

Date: 20080307

Docket: T-1548-06

Citation: 2008 FC 321

Montréal, Quebec, March 7, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**LES LABORATOIRES SERVIER,
ADIR, ORIL INDUSTRIES,
SERVIER CANADA INC.,
SERVIER LABORATORIES (AUSTRALIA) PTY LTD
and SERVIER LABORATORIES LIMITED**

Plaintiffs

and

**APOTEX INC.
and
APOTEX PHARMACHEM INC.**

Defendants

**REASONS FOR ORDER AND ORDER
(Motion to Quash Subpoenas)**

I. Introduction

[1] Three motions have been brought to this Court by:

- a) Andrew I. McIntosh, H. Roger Hart, and Sanofi-Aventis Deutschland GmbH;

- b) Anthony Creber and Jennifer Wilkie; and

- c) Les Laboratoires Servier, ADIR, ORIL Industries, Servier Canada Inc., Servier Laboratories (Australia) Pty. Ltd. and Servier Laboratories Limited (collectively referred to as Servier).

[2] The moving parties seek to quash seven subpoenas *duces tecum* issued at the request of Goodmans LLP, on behalf of Apotex Inc. and Apotex Pharmachem Inc. (collectively Apotex), requiring that five lawyers, one patent agent and one administrative assistant (described below) attend to testify and to produce certain materials at the trial of the action in Court File No. T-1548-06 (the Perindopril Action). All of the subpoenaed persons, in and around 2000, represented clients in matters that relate to issues raised in the Perindopril Action.

[3] For the reasons that follow, I am satisfied that all of the subpoenas but one should be quashed and that the remaining subpoena should stand on a limited basis.

II. Background

[4] The issues raised by these motions require an understanding of the background to the Perindopril Action and related proceedings.

A. *The Conflict Proceedings leading to the 196 Patent and the 206 Patent*

[5] On October 1, 1981, ADIR, one of the Plaintiffs in the Perindopril Action, filed Canadian Application Number 387,093 (the 093 Application). Around the same time, other claimants filed their own patent applications for the issuance of patents covering overlapping compounds, including Schering Corporation (Schering) in Canadian Application Number 388,336 (the 336 Application) and Hoechst Aktiengesellschaft (Hoechst AG - the corporate predecessor to Sanofi-Aventis Deutschland GmbH (Sanofi Germany)) with respect to Canadian Application Nos. 384,787 (the 787 Application) and 418,453 (the 453 Application). As provided for under the *Patent Act*, R.S.C. 1985, c. P-4, then in force, the Commissioner of Patents (the Commissioner) placed the various competing claims into conflict.

[6] In six decisions dated August 8, 1996, the Commissioner made determinations related to inventorship of the claims in conflict and awarded some claims to Schering, some to ADIR and some to Hoechst AG.

[7] Six proceedings were then commenced by way of actions in the Federal Court, in which proceedings the affected parties (including ADIR) challenged the determinations made by the Commissioner. All of the proceedings were consolidated by the Order of Justice Joyal, dated May 27, 1997, into Court File No. T-228-97.

[8] Subsequent to completion of discoveries in the consolidated actions, an Order on consent was issued by Justice Nadon on December 12, 2000. That Order provided for an allocation of the

claims of the competing applications and attached Minutes of Settlement specifying the claims to which the parties to the conflict were entitled. Ultimately, the result of the Order for ADIR was the issuance of the Canadian Patent No. 1,341,196 (the 196 Patent). The other results were the issuance of Canadian Patent No. 1,341,206 (the 206 Patent) to Schering and the issuance of Canadian Patent No. 1,341,296 (the 296 Patent) to Hoechst AG (Sanofi Germany).

[9] On each of April 3, 2001 and May 14, 2001, certificates of correction were issued with respect to claim 5 of the 196 Patent.

B. *T-1548-06: the Perindopril Action*

[10] By Statement of Claim dated August 25, 2006, Servier commenced the underlying action against Apotex in Court File No. T-1548-06 claiming that Apotex had infringed certain claims of the 196 Patent (the Perindopril Action). Apotex has defended the claim by Statement of Defence and Counterclaim wherein it denies infringing the 196 Patent, and challenges the validity of the patent on various grounds including: (i) the agreement which settled the conflict pleadings and resulted in the 196 Patent was contrary to the *Competition Act*, R.S.C. 1985, c. C-34; (ii) the certificates of correction issued in respect of the 196 Patent were issued contrary to s. 8 of the *Patent Act*; and, (iii) Schering, not Servier, was the first to invent the 196 Patent.

C. *T-161-07: the Ramipril Action*

[11] By Statement of Claim dated January 26, 2007, Schering, Sanofi-Aventis Canada (Sanofi Canada) and Sanofi Germany (collectively referred to with Sanofi Canada as Sanofi) commenced an action against Apotex Inc., alleging that Apotex Inc. infringed the 206 Patent (the Ramipril Action). Apotex Inc. has defended the claim by Statement of Defence and Counterclaim, in which it denies infringing the 206 Patent and challenges the validity of the patent on various grounds, including an allegation that the agreement which settled the conflict pleadings and resulted in the 206 Patent was contrary to the *Competition Act*.

D. *Procedural History in the Perindopril Action*

[12] The Perindopril Action continued through the summer of 2007. Affidavits of documents were served and examinations for discovery of the parties' representatives were conducted. During the examination of Servier's representatives, Apotex sought information and documents pertaining to the prosecution of the 093 Application, the conflict proceedings before the Commissioner and the Federal Court, and communications pertaining to the settlement of the conflict proceedings. Servier objected to answer questions on these topics on various grounds, including privilege and the existence of an implied undertaking, either of which would protect the documents from disclosure. Apotex moved to compel production of the information and documents. By Order of Prothonotary Aronovitch dated July 17, 2007, Apotex's motion was dismissed (the July 17 Order) and subsequently affirmed on appeal by Order of this Court dated September 11, 2007 (the September 11 Order).

[13] Of direct relevance to the subpoenas and the motions now before me, Prothonotary Aronovitch, in the July 17 Order, while maintaining the privileged and confidential nature of the sought-after information, required Servier to produce logs listing Ogilvy Renault's and Servier's files relating to the 093 Application prosecution and settlement.

E. *The Joinder Motions of Sanofi Germany and Schering*

[14] By Notice of Motion dated August 17, 2007, Sanofi Germany sought to be added as a Defendant by Counterclaim to the Perindopril Action. Schering filed a similar Notice of Motion on November 12, 2007. The motions were opposed by both Servier and Apotex. This Court dismissed both motions on November 19, 2007 (*Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210).

F. *The Subpoenas*

[15] On February 18, 2008, the subpoenas which are the subject of the motions before this Court were issued, pursuant to r. 41(1) of the *Federal Courts Rules*, S.O.R./98-106, to the following persons:

1. The Servier Witnesses, consisting of:
 - (a) Mr. J. Nelson Landry, who acted as legal advisor and as patent agent to ADIR in respect of the prosecution of the 093 Application, the conflict proceedings, the resulting settlement and issuance of the 196 Patent, and two

certificates of correction for claim 5 of the 196 Patent (Mr. Landry is now counsel with the Ogilvy Renault law firm and, while not counsel of record in the Perindopril Action, has participated in some legal matters related to this action);

(b) Ms. Liliane Benhamou, who was employed as Mr. Landry's assistant during the material times described above; and

(c) Ms. France Côté, who acted as a patent agent to Servier in respect of the 093 Application.

2. The Schering Witnesses, consisting of Mr. Anthony Creber and Ms. Jennifer Wilkie, both of whom are counsel of record to Schering in the Ramipril Action and acted as solicitors and patent agents for Schering in the conflict proceedings and resulting settlement; and

3. The Sanofi Witnesses, consisting of Mr. H. Roger Hart and Mr. Andrew I. McIntosh, who acted as solicitors and patent agents for the predecessors to Sanofi, the third party involved in the conflict proceedings and resulting settlement.

[16] In each subpoena, the proposed witness is required to bring with him or her documents that are described in very broad terms. Generally speaking, each of the Schering Witnesses and the Sanofi Witnesses is required to bring “all things normally understood to be documents” as may be relevant to the conflict proceedings and the settlement.

[17] Mr. Landry’s subpoena contains, in addition to the same general description of documents noted above, a requirement to bring two lists of documents set out in Schedule A and B to the subpoena. Schedules A and B are the logs of privileged documents provided by Servier to Apotex pursuant to the July 17 Order. Mr. Landry is also required to bring documents related to the translation of the claims of the 196 Patent and the corrections to claim 5 of the 196 Patent.

[18] Each of Ms. Benhamou and Ms. Côté are required to bring documents related to the translation and correction of the 196 Patent.

III. Analysis

A. *General Principles*

[19] The parties are in agreement that the general test that applies when quashing a subpoena was described by Justice Blais, in *Zundel (Re)*, 2004 FC 798 at paras. 5-7:

The case law on subpoenas shows that there are two main considerations which apply to a motion to quash a subpoena: 1) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?; (e.g. *Samson Indian Nation and Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] F.C.J. No. 1238); 2) Is the evidence from the

witnesses subpoenaed relevant and significant in regard to the issues the Court must decide? (e.g. *Jaballah (Re)*, [2001] F.C.J. No. 1748; *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294)

Privilege will apply for example in the case of Parliamentary immunity while Parliament is in session (*Samson Indian Band*, supra), or in the case of solicitor-client privilege, although an attorney acting in a managerial capacity may well be called upon to testify (*Zarzour v. Canada*, [2001] F.C.J. No. 123).

As to determining whether the evidence to be presented will be useful to the trial judge, courts will be reluctant to prevent parties from calling the evidence the parties feel they need, but courts generally will not allow fishing expeditions. Thus, if one party moves to quash the subpoena, it must show the lack of relevance or significance of the evidence the party that has issued the subpoena intends to produce. Obviously, the judge who decides whether or not to quash the subpoena is not deciding on the weight to be given to such evidence, which is to be determined by the trier of fact (*Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 98).

[20] Other jurisprudence reinforces the notion that a subpoena must not be a fishing expedition (see, for example, *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294 at paras. 12-13 (T.D.) (QL) [*Merck*]; *Jaballah (Re)*, 2001 FCT 1287 at para. 13).

[21] A subpoena may be quashed as being an abuse of process. I note Justice MacKay's holding in *Merck*, above at paras. 12-13, in this regard, wherein he indicated that the Court may be willing to quash a subpoena when it constitutes, or comes close to being, an abuse of process.

[22] The parties disagree on who bears the burden of proof on a motion to quash a subpoena. On the basis of the words of Justice Blais in *Zundel (Re)*, above, Apotex asserts that the moving parties must satisfy the Court that the sought-after information is not relevant or significant. The moving parties assert that the burden is on Apotex to demonstrate the relevance and significance of the

sought-after testimony and documents. On the facts of this case, where the subpoenas are being issued to lawyers and where the issue of privilege is prominent, I prefer the views of the moving parties.

[23] Particularly helpful on this question of burden is the Ontario Court of Appeal decision in *R. v. Harris* (1994), 93 C.C.C. (3d) 478 (Ont. C.A.). In that case, the accused sought to subpoena Crown counsel. In overturning the motions court judge's decision to permit the subpoena to stand, the Court adopted the words of Justice Craig in *R. v. Stupp* (1982), 70 C.C.C. (2d) 107 at 121 (H.C.J.), where he said:

In my opinion, when a subpoena or the right to call a witness is challenged as here, it is not sufficient for the party proposing to call the witness to merely allege that the witness can give material evidence; but rather the onus is on the accused in this case to establish that it is likely that Brian Johnston can give material evidence. That is particularly applicable where, as here, the accused takes the extraordinary step of seeking to call Crown counsel as a witness.

...

In my opinion, an accused person should not be permitted to call Crown counsel to conduct a fishing expedition or to examine in the hope that something might turn up that would assist him on the issue; but rather counsel must satisfy the judge that there is a real basis for believing that it is likely the witness can give material evidence.

[24] The Ontario Court of Appeal concluded by stating:

In our view it is not sufficient to sustain the subpoena that the witness "may have" evidence material to the case. The burden was on the respondent to establish that Murphy was likely, or to put it another way, would probably have evidence material to the issues raised (*Harris*, above at para. 5).

[25] Although *Harris* and *Stupp* were decided in a criminal context, the test established in those cases has been cited in the civil context (see *Zundel (Re)*, above) and, in particular, where lawyers were the subject of subpoenas (see *Wexler v. Bhullar*, 2006 BCSC 1466, aff'd 2007 BCCA 273).

[26] A review of the jurisprudence provided by counsel for purposes of these motions is instructive. In the five hefty volumes of authorities provided to the Court, there were relatively few cases involving subpoenas to lawyers (*Seagrove Capital Corp. v. Leader Mining International Inc.*, [2000] S.J. No. 315 (Q.B.) (QL); *Wexler*, above, *Williams v. Stephenson*, [2005] B.C.J. No. 665 (S.C.) (QL); *Harris*, above, *Zarzour v. Canada*, [2001] F.C.J. No. 123 (T.D.) (QL); *R.A.R.B. v. British Columbia* [2001] B.C.J. No. 908 (S.C.) (QL)). Apotex cited no jurisprudence where lawyers had been successfully made the subject of subpoenas. With one exception (*Zarzour*, discussed below), all of the subpoenas in those cases were quashed. This, of course, does not mean that lawyers can never be required to testify in respect of matters where they acted as legal advisors. However, in my view, it highlights the care that should be taken by the Court before a subpoena is issued that could profoundly affect the special relationship between a lawyer and client. Only in the clearest of cases should subpoenas be permitted that would require a lawyer to testify in respect of matters where he or she was providing advice to a client.

[27] What might satisfy the Court that the issuance of a subpoena is warranted? One case where the Court confirmed a subpoena was *Zarzour*, above. In that case, one of three subpoenas was issued to a lawyer, Ms. Collin, who was in-house counsel with Correction Service Canada. Justice Pelletier, in refusing to quash the subpoena, noted that:

...when legal counsel is involved in the management of an undertaking communication between counsel and the managers are not necessarily protected by professional secrecy. Such communications will not be privileged if counsel is consulted in her capacity as a manager rather than in her professional capacity – R. Campbell, [1999] 1 S.C.R., at para. 50:

...

The question of whether Ms. Collins was consulted in her capacity as a lawyer or as a manager is one of fact which the judge hearing the case will have to decide (*Zarzour*, above at paras. 8-9).

[28] Thus, if the party seeking the subpoena from a lawyer can provide some evidence that the lawyer undertook responsibilities or provided advice (such as, for example, as a patent agent) outside the solicitor-client relationship, the subpoena may be warranted. In particular, the courts have held, depending on the facts before them, that privilege might not arise where the lawyer who is also a patent agent acted in his or her capacity as a patent agent. (*Lumonics Research Ltd. v. Gould* (1983), 70 C.P.R. (2d) 11 at 15 (F.C.A.); *Montreal Fast Print (1975) Ltd. v. Polylok Corp.* (1983), 74 C.P.R. (2d) 34 (F.C.T.D.); *Whirlpool Corp. v. Camco Inc.* (1997), 72 C.P.R. (3d) 444 (F.C.T.D.)). In such situations, the trial judge will be in the best position to decide whether the lawyer was acting as a patent agent or as a solicitor.

[29] A further example where a subpoena may be warranted also relates to a situation where the relationship between lawyer and client falls outside the protection of solicitor-client privilege. Communications made to facilitate an offence are not covered by solicitor-client privilege (*Cadillac Fairview Corp. v. Canada (Commissioner of Competition)* (2003), 29 C.P.R. (4th) 33 at paras. 7-8, 10 (Ont. S.C.J.); *Dublin v. Montessori Jewish Day School of Toronto*, [2007] O.J. No. 1062 (S.C.J.) (QL)). The denial of privilege in such circumstances is based on the policy that the benefits of

maintaining the privilege are outweighed by the benefits to be derived from full disclosure of all circumstances relevant to resolving that issue, including those circumstances contained in documents which are usually protected from disclosure by reason of the solicitor-client privilege (see *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1987] 5 W.W.R. 252 at 261 (C.A.)).

B. *Application of Principles to the Motions before the Court*

[30] With these principles in mind, I turn to the facts before this Court in these motions.

(1) Is the potential testimony relevant?

[31] I begin with the issue of relevance, a question that affects all of the subpoenas. Based on my review of the jurisprudence, I am satisfied that the threshold to show relevance is not high. However, a party must do more than merely assert relevance (*Harris*, above at para. 4; *Zundel (Re)*, above, at para. 8).

[32] Turning now to the relevance of the subpoenaed witnesses before me, I find the moving parties' own affidavits confirm that most of the subpoenaed witnesses were involved in the settlement of the conflict proceedings leading up to the 196 Patent and the issuance of the subsequent certificates of correction:

1. Anthony Creber: paragraph 4 of the affidavit of John Norman confirms that Mr. Creber was counsel for Schering during the conflict proceedings.
2. J. Nelson Landry: paragraph 5 of the affidavit of Sylvie Jaguelin confirms that Mr. Landry was the patent agent for ADIR and Servier during 093 Application.
3. Liliane Benhamou and France Côté: paragraph 6 of the affidavit of Sylvie Jaguelin confirms Ms. Benhamou and Ms. Côté assisted Mr. Landry with the 093 Application.
4. Andrew I. McIntosh and H. Roger Hart: paragraph 9 of the written representations of Mr. McIntosh and Mr. Hart, as well as paragraph 5 of the affidavit of Mr. McIntosh, confirms these witnesses were counsel for Hoechst AG (later Sanofi Germany) during the conflict proceedings.

[33] Given that the issue of the conflict proceedings and certificates of correction are the subject of allegations in Apotex's Counterclaim, I am satisfied that the proposed witnesses might reasonably be supposed to have information which may directly or indirectly enable Apotex to advance its case or damage the case of Servier (*Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, [1988] F.C.J. No. 1025 (T.D.) (QL)).

[34] However, relevance is not the only factor to be taken into account.

(2) Is Apotex conducting a fishing expedition?

[35] As discussed above, this Court has repeatedly held that it will not allow subpoenas to be used as a fishing expedition (*Zundel (Re)*, above at para. 7; *Merck & Co. v. Apotex Inc.*, [1997] F.C.J. No. 1458 (T.D.) (QL); *Merck*, above at paras. 12-13). Apotex has cast a very broad net with its subpoenas. This is particularly so for the Sanofi Witnesses and the Schering Witnesses. For example, Mr. Creber is asked to bring with him and produce the following:

all things normally understood to be documents...as may be relevant to the prosecution of [the 336 Application] on behalf of Schering Corporation, and the settlement of certain conflict proceedings involving the [336 Application and the 093 Application and the 453 Application] which took place before the Commissioner of Patents (the “Commissioner”) and, subsequently, proceedings in the Federal Court, being consolidate[d] Court File No. T-228-97, between Schering Corporation, Hoechst Aktiengesellschaft, and the Plaintiff ADIR, each of whom had filed patent applications with the Commissioner.

[36] The subpoena to Mr. Landry relates to three issues in the proceeding – inventorship, the correction to claim 5 and the conspiracy allegations. With respect to the inventorship and conspiracy claims, the subpoena to Mr. Landry contains a list of documents but is, in effect, no less broad than the subpoenas to the Schering or Sanofi Witnesses. The only reason that Apotex is able to list the documents is because of the July 17 Order of Prothonotary Aronovitch that required Servier to provide a list of privileged documents related to the transactions. The existence of the logs in this case does not make the subpoena any less of a fishing exercise.

[37] I am persuaded that the subpoenas to the Schering Witnesses and the Sanofi Witnesses and to Mr. Landry, insofar as they purport to relate to the inventorship or conspiracy allegations, could be struck solely on the ground that they are overly broad and amount, in effect, to a fishing expedition.

[38] The situation with respect to the correction issue is different. Unlike the inventorship or conspiracy allegations, the certificate of correction issue relates to documents covering a limited number of discrete events (the translation of the Patent, the certificate of correction dated April 3, 2001, and the certificate of correction dated May 14, 2001) spanning a short and defined period of time. Further, the requirements set out in the subpoenas to Ms. Côté, Ms. Benhamou and Mr. Landry relating to these issues are clear and relatively well-delineated. Accordingly, I do not find these subpoenas, as they relate to the certificates of correction, to be overbroad.

(3) Is the information sought inadmissible due to privilege?

[39] The moving parties assert that the information sought through the subpoenas is subject to one or more of solicitor-client, litigation and settlement privilege. Further, they allege that the question of privilege has already been determined by the July 17 and September 11 Orders. In response, Apotex puts forward a number of arguments, which I summarize as follows:

- the question of privilege should only be determined at trial, even where (as here) a preliminary determination of admissibility has been made during the discovery

process (*William Allan Real Estate Co. v. Robichaud*, [1990] O.J. No. 41 (H.C.) (QL));

- privilege does not apply where the communications are made for the purpose of obtaining legal advice to facilitate the commission of an offence under the *Competition Act*; and
- privilege does not attach where the solicitor is acting in the capacity of patent agent.

[40] I agree with Apotex that the legal principle of *res judicata*, as set out by the Supreme Court in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25, may not be directly applicable. For example, none of the subpoenaed witnesses were parties to any earlier proceeding in the Perindopril Action. However, the findings of Prothonotary Aronovitch in the July 17 Order and the subsequent actions of the parties are, in my view, relevant in determining whether the subpoenas should be quashed.

[41] In finding that documents related to the earlier prosecution and settlement were privileged, Prothonotary Aronovitch (and this Court in the subsequent appeal) directed her mind to the same question of privilege that is before this Court on these motions. It would be inconsistent for this Court to now hold that, as a defined category, the documents in the possession of Servier are not privileged.

[42] More importantly, nothing has changed since the July 17 Order, beyond the fact that Servier has supplied detailed logs of the documents. The case of *William Allan Real Estate*, above is distinguishable on this basis. In that case, Justice Arbour, as she then was, found that a pre-trial ruling that a document ought not to be disclosed during discovery, on the basis of privilege, did not constitute a final decision on admissibility at trial. However, in *William Allan Real Estate*, the Court was dealing with one document in respect of which *viva voce* and more extensive evidence was presented at trial. Here, I have nothing before me to indicate that the facts upon which Prothonotary Aronovitch made her determination have changed. Privilege was found to apply on July 17, 2007; nothing has been presented by Apotex to persuade me that it might not apply now.

[43] There are three separate grounds of privilege that may be applicable to some or all of the information being pursued by the subpoenas: solicitor-client privilege; settlement privilege; and litigation privilege. At this point in time, based on the evidence before me, I am of the view that it is likely that all of the information sought (other than, possibly, some of the information related to the corrections of the 196 Patent) is caught by one or more of the grounds for asserting privilege and does not fall within any exception.

[44] In this action, Apotex is asserting that the parties entered into the settlement for the purpose of eliminating competition in the market for ACE inhibitors, contrary to the *Competition Act*. Thus, Apotex argues, the communications with their lawyers cannot be protected as privileged. On the evidence before me, I cannot reach that conclusion. While I would agree with Apotex that privilege may be denied in situations where there is evidence of the commission of an offence, in these motions, there is no evidence beyond the bald assertions in Apotex's pleadings that there has been

an offence. More that such assertions are required before privilege will be displaced. In this regard, I refer to the British Columbia Court of Appeal decision in *Pax*, above, where the Court adopted the test set out by Viscount Finlay in *O'Rourke v. Darbishire and Others* [1920], A.C. 581, at 604:

If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. [Emphasis added.]

[45] On the record before me, there is insufficient evidence to demonstrate that the allegations of conspiracy are made honestly and with sufficient probability of their truth to disallow the privilege.

[46] For these reasons, I will quash the subpoenas of the Schering Witnesses and the Sanofi Witnesses in their entirety. I will also quash the subpoena of Mr. Landry insofar as it relates to the prosecution of the 093 Application before the Patent Office and the Commissioner, the conflict proceedings and the settlement.

(4) Should the subpoenas issued to the Servier Witnesses stand, in part?

[47] The issue of privilege with respect to the subpoenas of the Servier Witnesses is not so clear.

[48] First, with respect to Mr. Landry, recent responses by Servier to questions raised in discovery conducted January 22, 2008, state unequivocally that Mr. Landry played some role in an alleged “clerical error” and in “handwriting” that appears on a produced document. Thus, as in *Zarzour*, above, there is evidence before me that suggests that Mr. Landry may have testimony and documents that are not subject to privilege because they arise in the context of his capacity as a patent agent. Accordingly, I am prepared to allow the subpoena of Mr. Landry to stand to a limited extent.

[49] I note that at this stage, we simply do not know, with any certainty, what will be asked of Mr. Landry concerning the corrections. I wish to be clear that my conclusion on Mr. Landry’s subpoena does not, of course, remove the right of Servier to object to the admissibility of certain evidence that may be provided by Mr. Landry.

[50] The situation with respect to Ms. Benhamou and Ms. Côté is different. Apotex provided me with no evidence of their individual roles in the translation and correction beyond a general statement of their duties at the relevant time. These subpoenas will be quashed.

IV. Conclusion

[51] In conclusion, the subpoenas of the Schering and Sanofi Witnesses will be quashed with costs to the moving parties. Although the Schering Witnesses requested an assessment of costs “at the highest scale”, I am not persuaded that higher costs are warranted.

[52] The subpoenas of Ms. Benhamou and Ms. Côté will be quashed. The subpoena of Mr. Landry will only be allowed insofar as it relates to the issues of the translation of and corrections to the 196 Patent. As Servier has been substantially but not entirely successful, costs will be awarded to Servier at 80% of the middle of column III of Tariff B.

ORDER

THIS COURT ORDERS that

1. The motions of: (a) Andrew I. McIntosh, H. Roger Hart, and Sanofi-Aventis Deutschland GmbH; and (b) Anthony Creber and Jennifer Wilkie are granted with costs and the motion of Servier is granted in part, with costs at 80% of the middle of column III of Tariff B;
2. The subpoenas issued to Andrew I. McIntosh, H. Roger Hart, Anthony Creber and Jennifer Wilkie are quashed without leave to amend;
3. The subpoenas of Liliane Benhamou and France Côté are quashed without leave to amend;
and
4. Requirements 1 (a) (i) and (v) and all of requirements 1(b) and (c) of the subpoena of J. Nelson Landry are struck from the subpoena and the balance allowed to stand.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1548-06

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v. APOTEX INC. ET AL

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REASONS FOR ORDER: SNIDER J.

DATED: March 7, 2008

APPEARANCES:

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Mr. Ben Hackett
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