

**Date: 20070330**

**Docket: T-1548-06**

**Citation: 2007 FC 344**

**Ottawa, Ontario, March 30, 2007**

**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**

**Costs on Injunction Motion**

[1] These reasons deal with the issue of costs that arise as a consequence of an application by the Plaintiffs (collectively referred to as Servier or the Plaintiffs) for an interlocutory injunction against the Defendants (collectively Apotex or the Defendants).

[2] The Plaintiffs have commenced an action against the Defendants for infringement of the Plaintiffs' Canadian patent no. 1,341,196 (the '196 Patent). On November 8, 2006, the Plaintiffs filed a Notice of Motion for an interlocutory injunction against the Defendants. On November 29, 2006, Justice Simon Noël granted an interim injunction to the Plaintiffs ([2006] F.C.J. No. 1887 (F.C.) (QL), 2006 FC 1443). In his decision, at para. 31, Justice Noël stated that the costs of the interim injunction would follow the decision on the motion for the interlocutory injunction. In a decision dated December 13, 2006 (2006 FC 1493, [2006] F.C.J. No. 1954 (F.C.) (QL)), this Court dismissed the motion for injunctive relief and directed the parties to make written submissions on the matter of costs.

[3] The Defendants, being the successful party in the motion, seek their costs for both the interim and interlocutory injunction motions. They request that costs be fixed in the lump sum amount of \$100,000, plus disbursements (\$214,716.71), payable in any event of the cause, for a total of \$314,716.71. A bill of costs is submitted by the Defendants in support of their request.

[4] The Plaintiffs submit that costs in the cause should be ordered, since this Court found that there is a serious issue to be tried and since there has been an admission of infringement by Dr. Sherman, the Chair of Apotex. In the alternative, the Plaintiffs submit that, if costs are awarded now, the quantum thereof should be left to the trial judge. The Plaintiffs submit that, in order to properly evaluate the quantum sought for fees and disbursements, more detailed information is required from the Defendants, including the supporting documentation underlying the bill of costs.

## Analysis

[5] Rule 400 of the *Federal Courts Rules*, SOR/98-106 provides the general framework for the awarding of costs between parties. This Rule gives full discretionary powers over the amount and allocation of costs to the Court and sets out certain factors that may be considered by the Court. Of further relevance is Rule 401 which states that:

401.(1) The Court may award costs of a motion in an amount fixed by the Court.

401.(1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[6] It is now clear that the motions judge has the discretion to award the costs of a motion to either party, regardless of the outcome of the main matter (*Enterprise Rent-A-Car Co. v. Singer*, 91 A.C.W.S. (3d) 716, [1999] F.C.J. No. 1687 at para. 6 (F.C.A.) (QL); *Lifescan, Inc. v. Novopharm Ltd.*, 2001 FCT 809, 107 A.C.W.S. (3d) 377, [2001] F.C.J. No. 1176 at paras. 8-10 (F.C.T.D.) (QL)). This is particularly applicable where the issue on the motion is discrete from the issues at trial (*AIC Ltd. v. Infinity Investment Counsel Ltd.* (1998), 148 F.T.R. 240 at para. 5 (F.C.T.D.), 80 A.C.W.S. (3d) 1150).

[7] In this case, I am of the view that the issues in the motion are discrete. Although the question of whether there is a serious issue to be tried was considered during the motion, there was certainly no determination of the merits of the action. At trial, there will be no need to revisit the determinations made by this Court on the interim injunction decision. Accordingly, it is appropriate to award costs on this motion separate from and in advance of the trial.

[8] With regards to Rule 401(2), the Plaintiffs' motion for an interlocutory injunction was reasonably brought. As I concluded in my decision dated December 13, 2006, there is a serious issue to be tried. It is apparent from the analysis contained in that decision that the question of irreparable harm required careful consideration. On this basis, it cannot be found that the Plaintiffs ought not to have brought the motion. As a result, an order for costs to be payable forthwith, pursuant to Rule 401(2), is not warranted.

[9] In exercising my discretion, I have had regard to all of the factors set out in Rule 400(3). Certain of those factors are of particular relevance; these factors are discussed below.

#### *Results of the Proceeding*

[10] Although the Plaintiffs were unsuccessful in their motion for an interlocutory injunction, they were successful on the motion for an interim injunction. However, in his Order dated November 29, 2006, Justice Noël ordered that costs would follow the decision on the motion for an interlocutory injunction. Consequently, this factor favours the Defendants.

*Importance and Complexity of Issues*

[11] The Defendants submit that the matter was of importance to the Plaintiffs and that the issues were complex.

[12] In my view, the legal issues arising on the motion were not complex since the test for an interlocutory injunction is very clear. It is the complexity of legal issues rather than the factual issues that the Court is to consider when dealing with this factor (*TRW Inc. v. Walbar of Canada Inc.* (1992), 43 C.P.R. (3d) 449 (F.C.A.)).

*Other Factors*

(a) Multiple Counsel

[13] The Defendants submit that the Plaintiffs' demand for an expedited schedule for the hearing of the interim and interlocutory motions placed extraordinary demands on them. Thus, it was necessary to involve eight lawyers on the file. The Defendants argue that, without the work of these lawyers, it could not have met the demands that the Plaintiffs placed upon them.

[14] In the Plaintiffs' submission, Tariff B only permits claims for multiple counsel in part E, "Trial or Hearing", and part F, "Appeals". Consequently, they argue that tariff fees for time spent by between two and five counsel in relation to the motions should not be allowed.

[15] In my view, it was reasonable for the Defendants to utilize multiple counsel on these motions. I agree with the Defendants that they would not have been able to respond adequately to

the motions without involving more than one lawyer on the file. I question, however, whether eight counsel were required at all stages of these motions described in the bill of costs.

(b) Expert Evidence

[16] The Plaintiffs take issue with the Defendants for requesting tariff fees for time spent by counsel and related disbursement (other than expert fees) to prepare the Klibanov, Gavras and McClelland Affidavits and attend at their cross-examinations since they believe that these opinions are relevant at trial, rather than on these motions. The Plaintiffs also question the expert fee for David Matthew (the UK expert).

[17] In my view, the Defendants may have gone beyond a reasonable level in retaining their experts for these motions. The Defendants should, therefore, bear some of the costs of those experts. The expert fee paid to David Matthew was \$97,907.58 CAD (converted from £46,232). I agree with the Plaintiffs that this expert fee is disproportionately high in comparison to the expert fee paid to Aidan Hollis, Stephen Cole, Philip Williams and Des Threlfall. The Plaintiffs should not have to pay for the Defendants' "Cadillac" expert (*Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (1999), 2 C.P.R. (4<sup>th</sup>) 368 at para. 20 (F.C.T.D.), 91 A.C.W.S. (3d) 722, 176 F.T.R. 142).

(c) Disbursements

[18] The Defendants are entitled to reasonable disbursements. However, I note that little supporting documentation was provided by which I could assess the reasonableness of some of the disbursements. In brief, I have the following concerns with respect to the disbursements:

- I agree with the Plaintiffs that the category “meetings” is quite vague.
- It is unusual that the travel and hotel accommodations costs are in round numbers.
- A review of the amount of the claimed travel items shows that the travel was luxurious.
- The photocopy expenses (at over \$25,000) are extremely high.

[19] Thus, while the Defendants are entitled to disbursements, I would cap the disbursements at \$100,000.

**Conclusion**

[20] I am satisfied that, on the facts of this case, it would be appropriate to fix costs as a lump sum. Exercising my discretion, I would fix the costs for the two motions at \$150,000 -- \$50,000 for counsel fees and \$100,000 for disbursements -- plus GST and PST, if applicable.

**ORDER**

**THIS COURT ORDERS** that:

1. The costs of the motions for the interim injunction and the interlocutory injunction are fixed at \$150,000 plus GST and PST, if applicable, payable by the Plaintiffs to the Defendants;  
and
2. The costs are payable at the final disposition after trial, to be set off at that time if appropriate.

“Judith A. Snider”

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Judge



**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1548-06

**STYLE OF CAUSE:** LES LABORATOIRES SERVIER ET AL  
v. APOTEX INC. ET AL

**PLACE OF HEARING:** Motion in writing

**REASONS FOR ORDER  
AND ORDER:** Snider J.

**DATED:** March 30, 2007

**SOLICITORS OF RECORD:**

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FOR THE PLAINTIFFS

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FOR THE DEFENDANTS