

Federal Court



Cour fédérale

Date: 20240529

Docket: T-1039-23

Citation: 2024 FC 820

Toronto, Ontario, May 29, 2024

PRESENT: Mr. Associate Judge Michael D. Crinson

BETWEEN:

**EMD SERONO, A DIVISION OF EMD INC.,
CANADA AND MERCK SERONO SA**

Plaintiffs

and

APOTEX INC.

Defendant

ORDER AND REASONS

[1] This is a motion by EMD Serono and Merck Serono SA (“Serono”), filed May 22, 2024, seeking among other relief a declaration that the information in the redacted version of the Acknowledgement and Certification of Information Received related to Apotex Inc.’s (“Apotex”) generic cladribine submission attached to the notice of motion as Schedule A (the “Redacted Acknowledgement”) is not confidential. In particular, Serono is seeking a conclusion

that the “Date Completed” information is not confidential, or to be granted permission to use that piece of information in another proceeding (Court File No. T-1369-23) between the same parties.

[2] The information at issue on this motion was previously designated confidential information subject to the protective order issued by this Court on August 23, 2023 (the “Protective Order”)

I. THE BACKGROUND

[3] The Protective Order permits parties to designate information it is disclosing as confidential information in two defined categories: “Confidential Information” or “Solicitor’s Eyes Only Information”. Paragraph 4 of the Protective Order permits the disclosing party to designate the information as confidential where that information falls into one of five defined classes and the disclosing party in good faith believes that:

- A. The information is maintained by the disclosing party as confidential; and
- B. The disclosing party could be harmed if the information were made available to the public.

[4] The Protective Order, in paragraph 28, also provides a mechanism for challenging designations of confidentiality. The parties agree that when there is such a challenge to a designation the burden on a balance of probabilities lies on the person asserting confidentiality. Paragraph 28 of the Protective Order provides:

... the burden on a balance of probabilities of establishing that the information is, in fact, Confidential Information or Solicitor's Eyes Only Information as the case may be.

[5] Apotex argues that this provision means its burden is to establish it believes in good faith that the information (i) is maintained by the disclosing party (Apotex) as confidential; and (ii) that Apotex could be harmed if the challenged information were made available to the public. Such an interpretation gives no meaning to the term "in fact" within paragraph 28 of the Protective Order. The proper interpretation of this provision means the burden is to establish that the information is as a fact, rather than good faith belief, information which falls into one of five defined classes and as a fact:

- A. is maintained by the disclosing party (Apotex) as confidential; and
- B. the disclosing party (Apotex) could be harmed if the challenged information were made available to the public.

[6] The above test, specifically the requirement to show the risk of harm if the information is disclosed is consistent with the test espoused by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 60.

[7] On the record before me, there is evidence of a general nature as to Apotex's practises regarding information of the type contained in an Acknowledgement and Certification. However, with respect to the specific information disclosed in the Redacted Acknowledgement and Certification at issue on this motion, Apotex has not established on a balance of probabilities that

its interests could be harmed if the challenged information were made available to the public by the release today of the specific information in the Redacted Acknowledgement and Certification.

[8] Accordingly, this Court concludes that the information in the Redacted Acknowledgement is not confidential.

ORDER

THIS COURT ORDERS that:

1. The redacted version of the Acknowledgement and Certification of Information Received related to Apotex Inc.'s generic cladribine submission attached to the notice as Schedule A is not confidential and shall not continue to be treated as designated Confidential Information pursuant to the August 23, 2023 Protective Order.
2. Costs in the amount of \$1,500 are payable by the Defendant to the Plaintiffs in the cause.

"Michael D. Crinson"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1039-23

STYLE OF CAUSE: EMD SERONO, A DIVISION OF EMD INC.,
CANADA AND MERCK SERONO SA v APOTEX
INC.

MATTER WAS HEARD VIA ZOOM VIDEOCONFERENCE

DATE OF HEARING: MAY 29, 2024

ORDER AND REASONS: CRINSON A.J.

DATED: MAY 29, 2024

SOLICITORS OF RECORD:

McCarthy Tétrault LLP
Toronto, ON

FOR THE PLAINTIFFS

GOODMANS LLP
Barristers and Solicitors
Toronto, ON

FOR THE DEFENDANT

ATTORNEY GENERAL OF
CANADA
Department of Justice
Ontario Regional Office

FOR THE RESPONDENT
IN COURT FILE NO. T-1369-23