

Federal Court



Cour fédérale

Date: 20250630

Docket: T-2211-24

Citation: 2025 FC 1166

Edmonton, Alberta, June 30, 2025

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

LI MA

Plaintiff

and

**FIVALCO INDUSTRIES CORPORATION,
KIM LUFT, AND DARRYL LUFT**

Defendants

AND BETWEEN:

FIVALCO INDUSTRIES CORPORATION

Plaintiff by Counterclaim

and

LI MA, BELVEN CONTROLS CANADA INC., and WILLIAM (BILL) EUVERMAN

Defendants by Counterclaim

ORDER AND REASONS

I. Overview

[1] The Defendant/Plaintiff by Counterclaim, Fivalco Industries Corporation (Fivalco), and the Defendants, Kim Luft and Darryl Luft (collectively referred to as the Lufts), bring a motion for a Protective Order with a Solicitors Eyes Only (SEO) designation to protect the confidentiality of certain materials that will be disclosed during this proceeding.

[2] The Plaintiff/Defendant by Counterclaim, Li Ma, and the Defendants by Counterclaim, Belven Controls Inc. and William Euverman (collectively referred to as Belven), do not oppose the granting of a Protective Order but argue that a SEO designation should not be made. Belven asserts that the proposed Protective Order is neither appropriate nor necessary and may prejudice Belven by impairing its ability to instruct counsel.

[3] The parties acknowledge that, at its core, the underlying action is a family dispute manifesting as a trademark action. That context is important to the determination of this motion. Indeed, the antipathy the parties evince for one another is at the heart of the unusual or exceptional circumstances that grounds the requested relief.

[4] Here, I am satisfied that Fivalco and the Lufts have met their onus to show that the interests of justice support the granting of the Protective Order with a SEO designation. In granting the relief, I am satisfied that Belven will not suffer any prejudice.

II. Background and Procedural History

[5] Mr. Euverman founded both Fivalco and Belven. Those businesses are involved in the sales and distribution of valves. In June 2016, Fivalco filed applications for the trademarks which are the subject of the underlying action. On January 14, 2019, the FIVALCO Marks were registered to Fivalco.

[6] Around June 24, 2020, the registrations for the FIVALCO Marks were assigned to Mr. Euverman and then subsequently transferred to Ms. Ma, Mr. Euverman's wife. On July 31, 2020, Mr. Euverman sold his shares in Fivalco for a nominal sum to his daughter, the Defendant, Kim Luft and her husband, the Defendant, Darryl Luft.

[7] Mr. Euverman and Ms. Ma operate Belven while the Lufts operate Fivalco. They are direct competitors — offering the same goods to some of the same customers. Both use the FIVALCO Trademarks.

[8] In the underlying action, Ms. Ma alleges trademark infringement against Fivalco. In turn, Fivalco has counterclaimed against Belven alleging the registrations for the FIVALCO Trademarks are invalid. Fivalco also alleges copyright infringement, passing off contrary to section 7(b) of the *Trademarks Act* and making false statements to third parties contrary to section 7(a) of the *Trademarks Act*. The issues raised in the counterclaim were originally advanced by a Notice of Application which was converted into an action and consolidated with the within action on November 1, 2024.

[9] On this motion, the parties rely on several affidavits in support of their respective positions.

[10] Fivalco filed the affidavits of Tess Knight-Vornbrock and Kim Luft. Ms. Vornbrock is a legal administrative assistant with Gowling WLG (Canada) LLP, counsel for the Defendants. The affidavit is largely clerical and appends several documents as exhibits including correspondence between counsel attaching a proposed form of Protective Order. The correspondence discloses that counsel for Belven did not agree with the SEO designation and would not consent to the proposed Protective Order.

[11] Ms. Luft's affidavit, sworn April 22, 2025, provides background regarding her involvement with Fivalco. She also provides background with respect to Belven and the dispute over the FIVALCO Trademarks. At Exhibits "A" and "B" to her affidavit, Ms. Luft exhibits the Affidavits of Documents that the Lufts produced in the within action. She deposes that Document numbers 75, 76, 77 and 80 are Fivalco's financial records for the years 2021, 2022 and 2023, for which the SEO designation is sought. Ms. Luft asserts that those four documents contain sensitive financial information about Fivalco's revenues, expenses, and overall financial performance. She further deposes that Fivalco has always treated the financial documents as highly confidential.

[12] At paragraph 13 of her affidavit, Ms. Luft expresses concern that if Documents 75, 76, 77, and 80 are produced to Mr. Euverman and Ms. Ma, they could be used for purposes other than this litigation. She opines that since Fivalco and Belven are competitors, disclosure of Fivalco's confidential information could cause serious harm to Fivalco.

[13] At paragraph 16, Ms. Luft expresses particular concern that throughout the course of this proceeding, Mr. Euverman and Ms. Ma “have repeatedly communicated with third parties, including members of our family, our suppliers, and our customers, regarding the subject matter of this litigation and section 45 proceedings that were initiated by Gowling WLG (Canada) LLP with respect to the FIVALCO Trademarks.” Ms. Luft deposes that this conduct has continued even after the counterclaim was filed and after specifically asking Mr. Euverman and Ms. Ma to refrain from such conduct. Exhibits “C” through “H” attach copies of the various correspondence from Mr. Euverman and Ms. Ma to third parties.

[14] At the hearing of the motion, counsel for Fivalco advised of a further affidavit from Ms. Vornbrock affirmed June 3, 2025, which exhibits the four documents for which the SEO designation is sought. Counsel for Belven was provided with the affidavit the night before the hearing of the within motion. With leave, the affidavit was provided to the Court following the hearing of the motion.

[15] For its part, Belven relies on four affidavits. The first is the affidavit of Bill Euverman made April 15, 2024. The second is the affidavit of Li Ma also made April 15, 2024. The third is the affidavit of Kim Luft made March 1, 2024. All three affidavits were filed in Court File No. T-191-24, the application which was converted to an action and consolidated with the present action.

[16] The fourth affidavit is that of Kelsey Bittner made May 9, 2025. Ms. Bittner is a paralegal employed at Seastone IP LLP, counsel for Belven. Ms. Bittner’s affidavit is largely clerical and

appends as exhibits correspondence between counsel in respect of documents 75, 76, 77 and 80, and various email strings between the parties or between the parties and third parties.

III. Issue

[17] The only issue for the Court is whether a SEO designation should be included in the Protective Order.

A. *Legal Principles*

[18] The test for granting a Protective Order is set out in *AB Hassle v Canada (Minister of National Health and Welfare)*, 1998 CanLII 8942 (FC) [*AB Hassle*], and consists of two steps. First, the information sought to be protected must have been treated by the parties as confidential at all relevant times. Second, the requesting party must demonstrate that on a balance of probabilities, their proprietary, commercial, or scientific information could reasonably be harmed by the disclosure of the information: *AB Hassle* at paras 29-31.

[19] A SEO designation is considerably more restrictive than a confidentiality designation. It limits the disclosure of information obtained during the litigation process to external litigation counsel only. Because of its restrictive nature, a SEO designation is granted only in unusual circumstances and not as a matter of convenience: *Angelcare Development Inc v Munchkin, Inc*, 2018 FC 447 at para 21 [*Angelcare*]; *Depura Partners LLC's v Desjardins General Insurance Inc*, 2020 FC 261 at para 10 [*Depura*], citing *Bard Peripheral Vascular Inc v WL Gore & Associates, Inc*, 2017 FC 585 at para 15 [*Bard*]. What constitutes an “unusual circumstance” has not been

comprehensively defined, and each case must be decided on its own merits: *Angelcare* at para 22. In considering whether to grant a SEO designation, the Court must balance the need for protection of parties' information against the need for parties to instruct counsel: *Depura* at para 12.

[20] The party seeking the SEO designation must show that the harm caused by the possible disclosure of information poses “a serious threat to the interest in question” which is “real, substantial, and grounded in evidence”: *Bard* at para 16. The harm asserted cannot be “merely speculative” — “concrete evidence” is required: *Bard* at para 28. That said, the test does not require “certainty as to the occurrence of apprehended injury”: *Depura* at para 24. Rather, the evidence only needs to indicate some likelihood that the harmful event will occur. Neither bald assertions nor good faith belief that harm will occur are sufficiently persuasive to satisfy the test: *Bard* at para 30. The Court must be satisfied through “clear and non-speculative evidence that the harms [the moving party] seek to protect against could occur absent the more restrictive disclosure terms they seek to include in the Protective Order to be issued”: *Boehringer Ingelheim Canada Ltd v Jamp Pharma Corporation*, 2023 CanLII 125709 at para 31 (FC).

[21] Where the parties are competitors, preventing disclosure to the opposing party may justify the SEO designation: *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FC 37 at para 19. This is particularly the case in intellectual property matters, provided that “clear and non-speculative evidence shows that such a disclosure could injure the other party's interests”: *Depura* at para 10.

B. Fivalco's Position

[22] As a preliminary position, Fivalco argues that since Belven has not adduced any evidence on the substantive issue before the Court, Fivalco's evidence must be considered uncontroverted.

[23] With respect to the two-part test for a Protective Order, Fivalco asserts it has met its onus. First, it argues that Ms. Luft's evidence is dispositive that Fivalco's financial documents have always been treated as highly confidential. Moreover, the evidence details Fivalco's internal procedures that ensure the financial records remain confidential.

[24] Second, relying on this Court's decisions in *Rivard Instruments Inc v Ideal Instruments Inc*, 2006 FC 1338 and *Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412, Fivalco argues that the *AB Hassle* test has both an objective and a subjective component. The subjective component relates to the moving party's belief that its proprietary, commercial, and scientific interests would be seriously harmed by the disclosure of the information. Here, Fivalco argues that the Luft affidavit provides evidence of Ms. Luft's subjective belief that Fivalco could be harmed by the disclosure.

[25] With respect to the objective component of the test, Fivalco argues that the animosity between the parties, as disclosed by the evidentiary record, demonstrates that Belven does not have the best intentions in mind. Pointing to Exhibits "C" through "H" of Ms. Luft's affidavit, Fivalco submits that its concerns are not merely speculative. Rather, the evidence shows that throughout the course of the litigation, Mr. Euverman and Ms. Ma have communicated with third parties some

of whom are Fivalco's suppliers and customers. Some of those communications include inflammatory language suggesting that the Lufts have stolen or purloined the FIVALCO Trademarks from Mr. Euverman.

[26] Lastly, Fivalco argues that because they are direct competitors with Belven, without a SEO designation, Belven may be influenced to make business decisions in a manner prejudicial to Fivalco.

C. *Belven's Position*

[27] As noted earlier, at the hearing of the motion, counsel for Belven conceded that a Protective Order should be granted. However, he took issue with Fivalco's assertion that the *AB Hassle* test has a subjective component. Counsel argued that the test is entirely objective, and the harm alleged must be shown on the balance of probabilities: *Canadian National Railways Company v BNSF Railway Company*, 2020 FCA 45 at para 14 [*BNSF*].

[28] With respect to the SEO designation, Belven submits that the evidence does not support the assertion that Mr. Euverman or Ms. Ma would disclose confidential information. Rather, the evidence discloses the communications to suppliers and customers were made to enforce Ms. Ma's rights to the FIVALCO Trademarks or to share her success in the section 45 *Trademarks Act* proceedings. To the extent that the evidence discloses Mr. Euverman's anger toward Ms. Luft, that, Belven argues, does not support the inference that he will disclose confidential information; lesser measures will suffice.

[29] Belven also asserts that because the evidence discloses that Mr. Euverman and Ms. Ma had on-going involvement in Fivalco until 2022, they are already aware of Fivalco's business strategies. As a result of that prior knowledge, there is no basis to support a real or substantial risk of harm by disclosure of financial information to them. In short, they already have knowledge of the information sought to be protected from disclosure and a SEO designation would merely impede their ability to instruct counsel.

[30] Lastly, Belven argues that Fivalco's proposed form of Protective Order goes far beyond the four documents sought to be designated SEO and, to that extent, it is not supported by the evidence.

D. Discussion

[31] As Mr. Justice Boivin affirmed in *BNSF* at para 32, "Protective orders undoubtedly remain pertinent and useful for intellectual property litigants and there is no justification, legal or otherwise, for stifling this long-standing practice." Here, I see no compelling reason to refuse to grant a Protective Order. Regardless of Belven's concession at the hearing, I find that the *AB Hassle* test is met. As to whether the test has a subjective component is of little moment on this motion where Belven has already conceded that a Protective Order is warranted.

[32] With respect to the SEO designation, the jurisprudence of this Court is clear: a SEO designation will not be granted as a matter of convenience but only where "unusual circumstances" warrant it: *Depura* at para 10; *Lundbeck* at para 14; *Bard* at para 15. The Court must balance the

legitimate need for protection of a party's information against the equally legitimate need of the opposing party to properly instruct counsel: *Depura* at para 12.

[33] In the present matter, I am persuaded that the existence of unusual circumstances warrants the SEO designation for a number of reasons. First, while both parties agree that the underlying action is largely a family dispute rather than an intellectual property proceeding, that assertion is belied by the extent of the proceedings taken to date. Those include the section 45 expungement proceeding under the *Trademarks Act*, the Notice of Application and present consolidated action. While the genesis of the litigation may be rooted in family discord, the litigation engagement is real and substantial.

[34] Second, the record before me discloses a level of antipathy between the parties that is concerning and is sufficient to support a real and substantial risk of harm by disclosure of Fivalco's financial documents to Belven. The acrimony goes well beyond sending disparaging and derogatory correspondence of a personal nature. Rather, both parties have adduced evidence suggesting that the other has altered or forged documents for use in this proceeding. Fivalco's evidence also suggests that Belven has communicated with third parties including Fivalco's suppliers and customers asserting that Fivalco has infringed or stolen the FIVALCO Trademarks. In my view, the evidence adduced is sufficient to demonstrate, on a balance of probabilities, that Fivalco's proprietary interests could reasonably be harmed by disclosure of the financial information to Belven. Fivalco need not show actual harm to support the SEO designation.

[35] Third, I reject Belven's argument that Mr. Euverman and Ms. Ma are already privy to the information sought to be designated. Belven has adduced no evidence in support of that argument.

[36] Fourth, the parties are competitors in a small market. As this Court found in *Depura* at para 24, the test does not require certainty as to the occurrence of apprehended injury and the evidence need only support some likelihood that the harmful event will occur. Fivalco has met that requirement.

[37] Fifth, Belven has not presented any evidence or compelling argument regarding its assertion of prejudice. I agree with Fivalco that both counsel retained on this proceeding are experienced intellectual property counsel; they will have no difficulty working around the limited strictures of the SEO designated documents.

[38] Finally, with respect to the breadth of the Protective Order, I am satisfied that the terms of the Protective Order, which includes a challenge provision mitigates any concerns of overbreadth: *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FCA 192 at para 17. As this is a case managed proceeding, any issues concerning the SEO designated documents can be efficiently dealt with in the context of case management.

[39] In the result, Fivalco's and the Lufts' proposed Protective Order is granted.

IV. Costs

[40] The parties agreed the appropriate quantum of costs is \$2,500.00. As Fivalco and the Lufts were successful on this motion, they shall have costs fixed at \$2,500.00, inclusive of taxes and disbursements.

ORDER in T-2211-24

THIS COURT ORDERS that:

1. The motion is granted.
2. The Protective Order attached as Schedule "A" to the Notice of Motion, as amended by the Court, is granted.
3. Fivalco and the Lufts shall have costs fixed at \$2,500.00, inclusive of taxes and disbursements.
4. A copy of this Order shall be placed on Court File No. T-191-24.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2211-24

STYLE OF CAUSE: LI MA v FIVALCO INDUSTRIES CORPORATION,
KIM LUFT, AND DARRYL LUFT

PLACE OF HEARING: VIDEOCONFERENCE

DATE OF HEARING: JUNE 4, 2025

ORDER AND REASONS: COUGHLAN A.J.

DATED: JUNE 30, 2025

APPEARANCES:

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