

Federal Court



Cour fédérale

Date: 20220812

Docket: T-1050-20

Citation: 2022 FC 1190

Toronto, Ontario, August 12, 2022

PRESENT: Madam Justice Go

BETWEEN:

**SUREWERX USA INC. and
JET EQUIPMENT & TOOLS LTD.**

**Plaintiffs/
Defendants by Counterclaim**

and

DENTEC SAFETY SPECIALISTS INC.

**Defendant/
Plaintiff by Counterclaim**

ORDER AND REASONS

I. Overview

[1] This is an appeal from an order of Case Management Judge [CMJ] Tabib, dated June 17, 2022 in which she granted a motion brought by Surewerx USA Inc. and Jet Equipment & Tools Ltd. [Surewerx] to challenge the designation of the identity of the manufacturer of Dentec Safety Specialists Inc. [Dentec] as “Solicitor’s Eyes Only” [SEO] information [Order]. The designation

was made pursuant to a Protective Order previously issued, on consent, by the same CMJ [Protective Order].

[2] The Protective Order provides, among other things, that information may be designated as Confidential information or SEO information, as the case may be, if the designating party in good faith, believes that the information is maintained as confidential and, in the case of SEO information, that the designating party could be harmed if the information were made available to the other party. The Protective Order further stipulates that, on challenge to a designation, the party asserting confidentiality shall have the burden on a balance of probabilities of establishing that the information is, in fact, Confidential information or SEO information, as the case may be.

[3] The SEO designation for Dentec's manufacturer covers those parts of any document that mention the name of the manufacturer as well as portions of the examinations for discovery from which the identity of the manufacturer could be deduced or inferred.

[4] Surewerx sought an order compelling Dentec to remove the SEO designation with regard to the manufacturer and to replace it instead with a Confidential Information designation, so that counsel for Surewerx may share the information with their client.

[5] In granting the Order, CMJ Tabib reviewed the relevant provisions in the Protective Order, including the definition of SEO information and the challenge provision; she also reviewed the relevant case law and the parties' submission with respect to the appropriate test to apply. CMJ Tabib concluded that, on challenge to a designation, the designating party must

establish that the party in fact maintains the information as confidential and that it could in fact be harmed if the information were made available to its opponent. CMJ Tabib went on to find that Dentec has not discharged its burden of demonstrating harm from the disclosure of the information in question.

[6] Dentec submits that CMJ Tabib erred by allowing Surewerx to “resile from their agreement and circumvent the Protection Order” by:

- (a) re-evaluating the evidence submitted in the Original Motion [for a Protective Order] to retroactively find that it supported only a prima facie case for issuance, and
- (b) applying the wrong test on a motion to challenge a SEO designation.

[7] For the reasons set out below, I find that CMJ Tabib did not err by applying the wrong test on a motion to challenge a SEO designation. I also find that the CMJ did not err in removing the SEO designation in question.

II. Issues and Standard of Review

[8] Dentec submits that the CMJ erred by: (a) articulating the wrong test to obtain a SEO protective order at first instance; (b) holding that a higher standard is merited because the Original Motion was brought on consent; (c) requiring the designating party meet a higher standard on a challenge motion than to support the grant of an SEO Protective Order; and (d) requiring Dentec to prove that Surewerx “would” breach the Protective Order or the implied undertaking rule in order to maintain an SEO designation.

[9] Surewerx submits the issues are: (a) What is the appropriate standard of review?; (b) Did CMJ Tabib apply the correct test to determine a challenge to an SEO designation under a Protective Order?; and (c) Did CMJ Tabib err in removing the SEO designation from the SEO Designated Information?

[10] In my view, the issues I need to decide are:

- a) What is the standard of review?
- b) Did the CMJ err in law by applying the wrong test to determine a challenge to an SEO designation?
- c) Did the CMJ err in finding that Dentec failed to meet its burden of establishing, on a balance of probabilities, that the information is in fact SEO information?

[11] I will address the parties' arguments as they relate to each of these issues.

[12] The parties agree that the applicable standard of review on a Rule 51 motion is that set out by the Federal Court of Appeal [FCA] in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*]. Questions of law and questions of mixed fact and law where there is a legal principle at issue are reviewed on a standard of correctness, while questions of fact and mixed fact and law where there is no extricable legal principle at issue are reviewed on a standard of palpable and overriding error: *Hospira*, paras 66 and 79.

[13] As Justice Strickland further explained in *Del Ridge Homes Inc v Ledgemark Homes Inc*, 2022 FC 566 [*Del Ridge Homes*]:

[26] The standard of review applicable to the appeal of a discretionary decision of a prothonotary is the appellate standard of

“palpable and overriding error”, as identified in *Housen v Nikolaisen*, 2002 SCC 33 for questions of fact, or mixed fact and law. Questions of law, and mixed questions where there is an extricable question of law, are to be reviewed on the standard of correctness (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79; *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48; *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 244 at para 33).

[27] Legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and, mixed questions are questions about whether the facts satisfy the legal tests, or, put otherwise, whether they involve applying a legal standard to a set of facts (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 [*Teal Cedar*] at para 43). The application of a legal test to a set of facts is a mixed question. However, if in the course of that application the underlying legal test may have been altered - for example by failing to consider a required element of the test - then a legal question arises. This is an extricable question of law (*Teal Cedar* at para 44). However, “[c]ourts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva [Sattva Capital Corp. v Creston Moly Corp]* 2014 SCC 53] at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question)” (*Teal Cedar* at para 45).

[28] The palpable and overriding error standard of review is highly deferential. “Palpable” means an obvious error. However even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding. An overriding error is one that goes to the very core of the outcome of the case (*South Yukon Forest Corp v R*, 2012 FCA 165 at para 46; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at paras 61-64; *Imperial Manufacturing Group Inc. v Décor Grates Inc.*, 2015 FCA 100 at paras 40-41; see also *NCS Multistage Inc. v Kobold Corporation*, 2021 FC 1395 at paras 32-33).

[14] I will adopt the approach as set out by Justice Strickland in this appeal.

III. Analysis

- A. *Did the CMJ err in law by applying the wrong test to determine a challenge to an SEO designation?*

Jurisdiction of this Court over Protective Orders

[15] To set the stage, I will begin with a few comments about the Protective Order and the role of this Court in supervising these types of orders.

[16] The underlying matter is an action for infringement of certain patents and of an industrial design registration. As noted above, the parties in this case obtained a Protective Order on consent, in order to provide for the maintenance of confidentiality in certain documents and information to be produced by the parties in the proceeding.

[17] As noted in the CMJ's Reasons for the Order, the consent motion for the Protective Order "was supported by evidence from each party attesting to its belief that the information to be disclosed has always been treated confidentially and that its interests could be harmed by the disclosure of that information", consistent with the FCA's teachings in *Canadian National Railway Company v BNSF Railway Company*, 2020 FCA 45 [BNSF].

[18] Of note, both parties identified "supplier and manufacturer information" as information to be protected.

[19] In their joint submissions for the Protective Order, citing *BNSF*, the parties agreed that the test for when a protective order on consent ought to be granted was set out in *AB Hassle v*

Canada (Minister of National Health and Welfare) (1998), 83 CPR (3d) 428 (FCTD) [*AB Hassle FC*] at paras 15, 29, and 30, affirmed in *AB Hassle v Canada (Minister of National Health and Welfare)* [2000], 5 CPR (4th) 149 (FCA) [*AB Hassle FCA*]. Namely, the Court must be satisfied that:

- (a) the information subject to the protective order has been treated by the disclosing party as confidential at all relevant times; and
- (b) on a balance of probabilities, the disclosing party believes that its propriety, commercial and scientific interests could reasonably be harmed by the disclosure of the information.

[20] Until *BNSF*, the question as to whether the test applied to confidentiality orders in the context of publication bans as laid down by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*] would also apply to protective orders pertaining to the pre-trial exchange of information between parties involved in intellectual property dispute was unsettled. In *BNSF*, the FCA answered the question in the negative. Instead, as noted above, the FCA adopted the *AB Hassle FC* test.

[21] This was confirmed by the FCA recently in *Fibrogen Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 [*Fibrogen*]:

[8] I note ... this Court settled the question whether the *Sierra Club* standard ... applied to protective orders (essentially court imposed confidentiality agreements), and confidentiality agreements such as the one under consideration. In February 2020, in [*BNSF*], this Court held that the *Sierra Club* standard did not apply to protective orders.

[22] As the FCA continued in *Fibrogen*:

[10] Protective orders and confidentiality agreements are integral to how litigation proceeds in the Federal Court. These agreements, often reached with little or no intervention of the Court, ensure that pre-trial proceedings are conducted in an efficient manner and on a common understanding between the parties as to how documents will be exchanged in a manner that does not put legitimate business interests at risk. They ensure that discoveries are timely and progress in a predictable manner, which is particularly critical given the mandatory time frames within which lengthy and complicated intellectual property trials must be completed in the Federal Court. Protective orders and confidentiality agreements remain subject to the supervision of the Court, particularly by case management judges who may be called on from time to time to resolve differences of opinion as to their terms or to adjust the time frames

[Emphasis added]

[23] The FCA in *Fibrogen* further reiterated the implicit jurisdiction of the FCA and this Court to supervise the implementation of confidentiality agreements:

[11] The jurisdiction of the Court to deal with confidentiality agreements as well as any post-trial issues with respect to documents does not depend on the agreement of the parties. This Court, as well as the Federal Court, has an implicit jurisdiction to deal with all documents that are engaged in the proceedings before it both during and after the conclusion of litigation (*Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, 461 D.L.R. (4th) 635 at paras. 36, 62 [CBC]).

[12] The provisions in the Agreement whereby the parties attorn to the jurisdiction of the Federal Court to supervise its implementation, while understandably inserted out of an abundance of caution, were unnecessary. The Court will, if necessary, intervene and impose orders as required as part of its implied jurisdiction to supervise proceedings before it and after the litigation ends (CBC; *Dugré v. Canada (Attorney General)*, 2021 FCA 8, [2021] F.C.J. No. 50 (QL), *Herskovitz v. Canada (Attorney General)*, 2021 FCA 38, 2021 CarswellNat 443).

[24] With that, I will now turn to determining the test to be applied on a challenge to a SEO designation arising from a protective order.

The Applicable Test on a Challenge to a SEO Designation

[25] The parties disagree on the applicable test that should apply on Surewerx's challenge to the SEO designation for Dentec's manufacturer information.

[26] Dentec makes extensive submissions on the applicable test, but their bottom line can be summarized as follows: Because the definition of SEO in the Protective Order specifically points to the "good faith belief" requirements of designation, without any requirement for an objective component, when a challenge is brought to a SEO designation, the correct test to apply is that of "good faith belief."

[27] Dentec argues this interpretation of the challenge provision is consistent with the policy articulated by the FCA in *BNSF* and *AB Hassle FCA* which holds that "it is only in the clearest of cases, where it is obvious that the impugned document does not fall within the terms of the Protective Order, that a motion challenging the confidential nature of the document should be granted": *AB Hassle FCA*, at para 11. Dentec submits that this policy is applicable regardless of whether the protective order was sought on consent or not, especially in light of the evidentiary burden required to obtain the said order, and in light of the fact that the Court is not a rubber stamp when it comes to issuing a protective order.

[28] In short, Dentec argues the party seeking to maintain the SEO designation needs only put forward evidence that a document falls, on a balance of probabilities, within the class of documents contemplated by the order and has been treated by the party as confidential. Putting it

in another way, Dentec submits the designating party has the burden of proving only that the information is properly designated, as the definition of the SEO in the Protective Order requires only a good faith belief.

[29] Surewerx, on the other hand, asserts that Dentec's motion is "predicated on a fundamental misstatement of the correct legal test to apply" when a SEO designation is challenged. Rather, Surewerx submits that both the subjective and objective arms of the *AB Hassle FC* test are necessary to action the different steps of a protective order's issuance and operation, including the order's initial issuance, the parties' respective designations of documents into the "Confidential" and "SEO" baskets, and any subsequent challenges to those classifications.

[30] I agree with Surewerx and I reject Dentec's submission, for several reasons.

[31] First, I find *AB Hassle FCA* can be distinguished, as the Court has done in other cases, including *Fluid Energy v Mud Master Drilling Fluid Services Ltd*, 2020 FC 229 [*Fluid Energy*]. At para 43, Justice Zinn noted that the FCA was "considering a situation where the protective order that issued did not issue on consent but following a contested motion", and in such circumstances "placing the burden on the party seeking to maintain the designation amounts, in effect, to requiring that it relitigate the matter." While the fact situation in *Fluid Energy* might differ from the case at hand, Justice Zinn's reasons for not applying *AB Hassle FCA* can be aptly applied here.

[32] Second, this Court has consistently adopted the subjective-objective test set out in *AB Hassle FC* notwithstanding the *AB Hassle FCA* decision: see *BNSF*, at para 14; *Paid Search Engine Tools, LLC v Google Canada Corporation*, 2019 FC 559 [*Paid Search Engine*], at para 44. A more recent example of this Court adopting the *AB Hassle FC* test is *Del Ridge Homes*, which dealt with an appeal from a CMJ's order dismissing a motion by the plaintiff seeking a protective order containing "counsel's eyes only" designation for certain financial production. At para 35, citing *Paid Search Engine*, the Court reiterated the two-part test in *AB Hassle FC*: the first part incorporated the good faith subjective belief discussed in *Apotex Inc v Wellcome Foundation Ltd* (1993), 51 CPR (3d) 305 at 311 (FCTD), and "a second part where, on a challenge to the classification, the party claiming confidentiality must show confidentiality on an objective basis - a harms test" [emphasis added]. *Del Ridge Homes* thus confirms, in my view, that the *AB Hassle FC* test applies on a challenge to a Confidential or SEO designation.

[33] Third, by focusing only on one provision of the Protective Order stipulating that the parties, may, in good faith, designate information as Confidential or SEO, Dentec's proposed interpretation ignores the challenge provision of the same Protective Order which requires the party asserting confidentiality to show the information is, in fact, Confidential or SEO information.

[34] I also reject Dentec's submission that asking them to face a "similar or more onerous burden" on a challenge than they had already overcome would render seeking and obtaining a protective order a futile exercise. The parties agreed on the *AB Hassle FC* test when it sought the

Protective Order, and not the “good faith belief” test. Having agreed to that test, there is no basis for suggesting it will be more onerous a burden on a challenge to rely on the same test.

[35] Dentec also advances a policy argument by suggesting that the benefit of a protective order will be defeated by requiring a “higher, objective standard” to defend challenged information. Rather than working towards a protective order, Dentec surmises, parties may choose to “vigorously contest producing confidential information knowing that this information is vulnerable to attack and may be disclosed to their competitors.” I find no merit for this claim. I note, first of all, the parties are not being asked to subject to a “higher” test; it is the same test that they have applied to the issuance of the Protective Order. Second, with or without a protective order, parties can and often will, vigorously contest producing confidential information that they do not want disclosed, as Dentec has done in this case.

[36] In my view, by ensuring that the same test applies throughout the life of a protective order, be it at the initial issuance stage, or on a challenge to a designation, parties will have the certainty of knowing what rule will govern them, and will be better able to organize their affairs, or mount their defence, as the case maybe. The benefit of having a protective order will remain, if the same test is to be applied, knowing that ultimately the Court will resolve any differences in opinion that may arise: *Fibrogen*, at para 10.

[37] For all of the above reasons, I find the *AB Hassle Test FC* applies on a challenge to the confidentiality provisions under the Protective Order.

[38] Determining that the *AB Hassle FC* test applies is only one-half of my assessment. The second half is to determine whether the heightened requirements and considerations that this Court applies to the granting of a SEO order should also apply on a challenge to a SEO designation. The answer, in my view, is yes.

[39] The jurisprudence of this Court confirms that to obtain an SEO protective order, the parties must demonstrate the existence of “unusual circumstances”: *Del Ridges Homes*, at paras 37 and 38 citing *Bard v Gore*, 2017 FC 585 [*Bard*] and *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FC 192 [*Arkipelago*]. The parties in this case agree that this is the test to be applied to a SEO designation, although they disagree on whether the same test should apply when a challenge to a SEO designation should arise.

[40] As Justice Phelan explained in *Paid Search Engine*:

[67] The “counsel's eyes only” [CEO] category in the protective order is a more restrictive type of protective order and therefore requires that Google establish the existence of “unusual circumstances” that would warrant it: *Bard Peripheral Vascular Inc v WL Gore & Associates, Inc*, 2017 FC 585 at para 15, 280 ACWS (3d) 524 [*Gore*]; *Arkipelago* at para 11. This requires that the disclosure of CEO-designated confidential information presents a “serious threat” that is “real, substantial and grounded in the evidence” (*Gore* at para 16). Although the consideration of “unusual circumstances” is a contextual and flexible analysis, the Court has often considered the three *Apotex* factors in determining whether to grant a CEO order (*Gore* at para 15).

[41] The *Apotex* factors, as referred to above, came from *Apotex Inc v Wellcome Foundation Ltd* (1993), 51 CPR (3d) 305 at 311 (FCTD) [*Apotex*]. As the Court explained in *Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 [*Lundbeck*]:

[15] In *Wellcome Foundation*, above, at page 311, Justice Andrew MacKay took into account three considerations: the existence of a similar order granted upon consent in parallel litigation elsewhere; the possibility for a party to object to a designation of confidentiality and the Court's power to control the “declassification” process; and a party's belief that its commercial business or scientific interest associated with trade secrets might be seriously harmed by disclosure. These considerations were also applied in other decisions of this Court also dealing with requests for “counsel's eyes only” provisions (see *Pfizer*, above, at 180-181; *Merck & Co. v. Apotex Inc.* (2004), 32 C.P.R. (4th) 203 at paras. 8-10).

[16] However, Justice MacKay did not purport to set out a series of criteria to be examined and followed in every instance (*Pharmascience*, above, at para. 5) and the Court may see fit to consider and apply other relevant factors in addition or in substitution to the considerations mentioned in the *Wellcome Foundation* case. Indeed, where the parties themselves are competitors, preventing disclosure to the opposing party is a perfectly legitimate purpose of a protective order, particularly where the evidence shows that the disclosure to the opposing party could injure the interests of the other party (*Rivard Instruments*, above, at para. 40). That being said, these considerations apply in this case which also involves the particular or special features addressed below.

[42] For the same reasons why I find the *AB Hassle FC* test should apply on a challenge to the protective designation, I also find that when the challenge is to a SEO designation, the party seeking the designation must meet the heightened test of demonstrating unusual circumstances.

[43] This case, in many ways, is similar to *Del Ridge Homes* in which Justice Strickland confirmed the CMJ's order rejecting a party's motion to treat certain documents as subject to SEO until the disposition of any and all appeals. In that case, Justice Strickland was faced with a similar argument from a party that the CMJ erred by requiring more than a good faith belief of harm on a challenge to their SEO designation. Justice Strickland dismissed that argument:

[55] In my view, there is no doubt that one of the “unusual circumstances” factors that will often have to be established to obtain a counsel’s eyes only designation within a protective order is whether the party requesting the counsel’s eyes only order believes in good faith that its commercial or business interests may be seriously harmed by disclosure. However, establishing this factor alone will not meet the test for a protective order containing that designation. Rather, the harm caused by the disclosure must also be a real threat to the interest in question and must be real, substantial and grounded in the evidence (*Bard*, at para 16; *Lundbeck* at para 16; *Sierra Club* at para 54; *Archipelago* at para 11; *Paid Search Engine* at paras 31, 67). The test requires not only a good faith subjective belief that harm will result, but also “confidentiality on an objective basis – a harms test” (*Paid Search Engine* at paras 31, 44; *AB Hassle* at para 9).

[44] The same rationale applies, in my view, to this case. I conclude therefore the correct legal test to apply in this case, is the two-part test in *AB Hassle FC*. In addition, a party defending a SEO designation must demonstrate that the harm caused by the disclosure be “a real threat to the interest in question and must be real, substantial and grounded in the evidence”: *Del Ridge Homes* at para 55.

The Test Applied by the CMJ

[45] In her Reasons for the Order, CMJ Tabib adopted Justice Zinn’s analysis in *Fluid Energy* and found that *AB Hassle FCA* does not have application on a challenge to designations made pursuant to a consent protective order. She also followed Justice Zinn’s conclusion in *Fluid Energy* and found that “the test in such circumstances must be that to which the parties agreed and which is expressly set out in the challenge mechanism of protective order at issue.”

[46] After reviewing the relevant portions of the Protective Order and addressing the parties' submissions, the CMJ rejected the good faith belief test as proposed by the Dentec. As the CMJ explained, at para 30 of her Reasons:

In order to constitute an effective challenge provision, paragraph 32 [the challenge provision in the Protective Order] must be read as requiring the designating party to establish, on a balance of probability, that the information it has designated as SEO in fact possesses the attributes enumerated in sub-paragraph 4(b). In other words, it must establish that it in fact maintains the information as confidential, that it could in fact be harmed if the information were made available to its opponent or that the information is in fact of commercial value to its opponent, and that it in fact contains technical, sales, customer, marketing, financial, business strategy or other commercially sensitive information or proprietary information not otherwise known or available to the public.

[47] While the CMJ did not specifically refer to the *AB Hassle FC* test in her formulation of the applicable test for the challenge to the SEO designation in this case, I agree with Surewerx that the CMJ's articulation of the test aligns with the two-part test established by *AB Hassle FC*, and accords with the explicit language of the Protective Order.

[48] Dentec raises several arguments to sustain its position that the CMJ erred by adopting a wrong test. I have already addressed some of these arguments and do not see the need to repeat my reasoning.

[49] Dentec also takes issue with the CMJ holding that the good faith test applies on the point of designation, and a different "higher" test applies on a challenge, and that she erred by retroactively holding that the evidence adduced in the motion for the Protective Order only supported a "*prima facie* case for issuance."

[50] I note that the CMJ stated at para 31: “[t]he balance struck by the Protective Order is that it allows designation of certain information on a relatively low standard of good faith, but on challenge, requires the designating party to establish that the document objectively meets the criteria for the designation.”

[51] However, in my view, Dentec’s argument takes the CMJ’s reasoning out of context. Far from stating that the parties need only assert good faith to support the SEO designation, the CMJ stated to the contrary at para 30:

Sub-paragraph 4(b) specifies that “Information may be designated as” SEO, “where” the producing party believes in good faith that it meets certain criteria. The criteria enumerated (confidentiality, the potential to cause harm, and the type of information it contains) are attributes of the information. The designating party’s good faith belief that the information possesses those attributes is what allows it to make the designation.

[Emphasis in original]

[52] In other words, CMJ Tabib made it clear that information that a party wishes to designate as SEO must have the following attributes: confidentiality, the potential to cause harm, and be of a certain type of information. The party’s good faith belief comes in, as it should, since without it the party will not be making the designation. This formulation is also consistent with the Court’s finding at *Del Ridge Homes* at para 55.

[53] I also agree with Surewerx that the CMJ’s analysis recognizes the “general/generic language of the “standard” protective order is usually issued when the parties cannot yet identify specific documents, but only broader categories of information”, as noted in *Del Ridge Homes* at para 49.

[54] Dentec further argues that once the Protective Order is issued, the CMJ is *functus officio* in relation to the issue of the parties' entitlement to an SEO Protective Order, citing *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 [*CBC v Manitoba*], paras 32 to 33, and *Federal Court Rules [Rules]*, Rule 392. Dentec submits that the SEO order is presumed to have been met based on the evidence submitted and the CMJ cannot return to her original decision and change what it stands for.

[55] I reject Dentec's argument. The doctrine of *functus officio* serves the goal of finality and is narrow in scope: *CBC v Manitoba* at paras 34 to 35. Without deciding whether this rule applies in the current context, I find Dentec's argument ignores the supervisory role that a CMJ must play with respect to parties' disputes over a protective order once it is issued. Further, as Surewerx submits and I agree, the granting of the Protective Order does not insulate any designated information from challenge.

[56] Dentec further submits the CMJ erred by holding that they needed to meet a higher standard by providing that Surewerx "would likely" breach the Protective Order or the implied undertaking rule in order to maintain a SEO designation, while the legal test at paragraph 4(b) of the Protective Order sets the standard whether harm "could" be caused by the disclosure. While the argument is framed as a legal error, I find it to be a challenge to the CMJ's application of the test to the facts in question. I will thus address this argument in the section below.

Conclusion on the Applicable Test

[57] In conclusion, I find CMJ Tabib did not err by adopting an incorrect test for the challenge of the SEO designation. The test she adopted is consistent with the teachings of this Court as well as the provisions of the Protective Order.

B. *Did the CMJ err in finding that Dentec failed to meet its burden of establishing, on a balance of probabilities, that the information is in fact SEO information?*

[58] As a starting point, I should note that Dentec has framed all of its arguments as legal errors on the part of the CMJ. Dentec does not make any argument as to whether the CMJ made palpable and overriding errors in applying the test to the case at hand. But as I have noted, whether the CMJ erred in requiring Dentec to prove Surewerx “would likely” breach the protective order is a question of mixed fact and law where there is no extricable legal principle at issue: *Hospira*, paras 66 and 79.

[59] I say this for two reasons. First, I find Dentec selectively excerpts portions of the CMJ’s reasons to support their position, as Surewerx submits. Second, I find the CMJ appropriately sets the standard of proof that Dentec must meet “is not a certainty, but a reasonable likelihood that harm could result” before explaining why this standard does not help Dentec. At para 30 of her Reasons, the CMJ states:

What the Protective Order requires is that the Defendant establish, on a balance of probability, that it could be harmed if the information were made available to the Plaintiffs. The nature of the information is such that it must be put to use in order to cause harm to the Defendant. Its mere availability to the Plaintiffs can cause no harm to the Defendant, because it is not the kind of information that, once it is known, cannot be prevented from influencing the business decisions the party makes in the normal course of its operations, or that could unwittingly or mistakenly be used in a manner prejudicial to the Defendant. In order to cause harm to the Defendant, the

information at issue here must be used by the Plaintiffs in circumstances that require a wilful and deliberate act.

[Emphasis in original]

[60] Thus, the CMJ's comment about the requirement of a "wilful and deliberate act" does not pertain to the standard of proof, but rather the use of the information in question, namely, the identity of the manufacturer, in order to satisfy the requirement of "serious threat" that is real, substantial and grounded in the evidence, to sustain the SEO designation.

[61] Having determined the legal test to apply, CMJ Tabib went on to apply the test to the evidence before her. She accepted that Dentec would indeed be harmed if Surewerx were to get an idea of Dentec's costs, obtain the material composition of its product, or copy its mould design. However, she found there is a lack of evidence that Surewerx could obtain any of the information merely from knowing the identity of Dentec's supplier. CMJ Tabib noted that the evidence shows Dentec has an agreement with its supplier whereby the manufacturer agreed to keep all of that information confidential, and that there is no evidence on record to entertain any doubt that the manufacturer might breach that agreement. Before this Court, Dentec offers no argument to suggest any palpable and overriding error with respect to these findings.

[62] The CMJ also dealt with Dentec's argument that as a large company, Surewerx might have the commercial influence required to price that information from its manufacturer. The CMJ rejected the argument because of a lack of evidence. I see no error with that conclusion. Her comment that "[t]he mere act of making such a request entails a deliberate and intentional use of the information for purposes other than the litigation and would constitute a breach of the

Protective Order and of the implied undertaking rule” does not amount to setting a higher test for Dentec. Rather, it illustrates the speculative nature of Dentec’s assertion in this regard. Further, in light of the testimony of Dentec’s witness in support of the issuance of the Protective Order that they expect Surewerx “will likewise obey the terms of any Protective Order issued by the Court”, I conclude CMJ Tabib committed no error in this aspect of her reasons.

[63] The CMJ also examined the harm that Dentec alleged could be caused from Surewerx’s interference with the business relationship between Dentec and its manufacturer. She found that the kind of interference cited by Dentec would require a deliberate act that would constitute a breach of the Protective Order. She also considered Surewerx’s suggestion that they might use the information to determine whether to add Dentec’s supplier as a party to this proceeding as arguably constituting a breach of the Protective Order. However, she noted that before impleading the manufacturer, Surewerx would require leave of the Court, creating an opportunity for Dentec to challenge the use of the information for that purpose. Again, Dentec did not explain why this finding constitutes a “palpable and overriding error.”

[64] As I find that CMJ Tabib did not commit any error in applying the applicable test to the facts before her, I need not address Surewerx’ argument that even if Dentec did establish the requisite risk of harm, there exists the further assessment of whether the information should be disclosed to Surewerx as necessary to instruct counsel.

IV. Conclusion

[65] In conclusion, CMJ Tabib did not err in law. She identified the correct legal test to be applied on a challenge to a SEO designation under a protective order. She committed no palpable and overriding error when she found that Dentec has failed to meet its burden of establishing, on a balance of probabilities, that the information is in fact SEO information.

V. Costs

[66] The parties will provide submissions on costs within one month of this judgment.

VI. Further Relief Sought by Dentec

[67] Dentec requests, in the alternative, for an order staying the effect of CMJ's order pending the resolution of any appeal, or until the expiration of the time to appeal, if no appeal is brought.

[68] Surewerx did not make any submission in response to Dentec's request.

[69] I note the CMJ granted a similar stay of her order during any appeal to a Judge of this Court to avoid an appeal becoming moot. The CMJ also reasoned that, provided that Dentec proceeded with the appeal in an expeditious fashion, the delay would not be prejudicial to Surewerx.

[70] For the same reason as set out by the CMJ, I am satisfied that a stay of the CMJ's order during a further appeal to the FCA is necessary.

ORDER in T-1050-20

THIS COURT ORDERS that:

1. The appeal is dismissed.
2. The order of the Case Management Judge Tabib is stayed pending the resolution of any appeal, or until the expiration of the time to appeal, if no appeal is brought.
3. The parties are to provide submissions on costs on or before September 9, 2022.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1050-20

STYLE OF CAUSE: SUREWERX USA INC. AND, JET EQUIPMENT & TOOLS LTD. v DENTEC SAFETY SPECIALISTS INC.

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: JULY 12, 2022

ORDER AND REASONS GO J.

DATED: AUGUST 12, 2022

APPEARANCES:

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