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(Donâ€™t) Keep It in the Family: Federal Court Grants Solicitorâ€™s Eyes Only Protection in Trademark Dispute Between Family Companies

In *Ma v Fivalco Industries Corporation*, the Federal Court granted a protective order that included a Solicitor's Eyes Only (SEO) designation over confidential financial documents. This case provides an example of where a moving party has met the evidentiary burden required for this exceptional remedy. Here, the Court was satisfied that there was a risk of harm if the documents were disclosed due to the significant degree of animosity and misconduct between the parties who were competitors in a small market.

What Is a SEO Designation and When Is It Granted?

A SEO Designation is a highly restrictive confidentiality designation under a protective order that permits disclosure only to legal counsel (and expert witnesses), preventing even the parties themselves from reviewing materials designated as SEO by the opposing party.

The foundational test for granting a protective order, including those with SEO designations, is set out in *Ab Hassle v Canada (Minister of National Health and Welfare)*, which requires the party seeking the protective order to establish:

- (1) the information must have been treated as confidential at all relevant times; and
- (2) there must be a real and substantial risk that proprietary, commercial, or scientific interests could be harmed by disclosure.

Canadian courts have consistently held that SEO designations in protective orders should only be granted in unusual circumstances. While the meaning of "unusual circumstance" remains context-dependent and fact-specific, the applicable legal standard is clear: the party seeking the SEO designation must show that the harm resulting from possible disclosure poses "a serious threat to the interest in question" that is "real, substantial, and grounded in evidence". A court must also balance the moving party's need to protect sensitive

information against the opposing party's right to meaningfully instruct and consult with counsel.

Background: From Family Business to IP Litigation

The dispute originated as a family business disagreement that evolved into an intellectual property battle.

Mr. William Euverman, the founder of both companies, Fivalco Industries Corporation (Fivalco) and Belven Controls Inc. (Belven), transferred ownership of Fivalco to his daughter and son-in-law (the Lufts) in 2020.

Mr. Euverman and his spouse, Ms. Ma, now operate Belven while the Lufts operate Fivalco. They are direct competitors, both involved in the sale and distribution of valves. Both companies make use of the "FIVALCO" trademarks.

Ms. Ma (Belvin) commenced proceedings against Fivalco for trademark infringement. Fivalco counterclaimed, seeking to invalidate the FIVALCO trademarks and alleging copyright infringement, passing off, and making false statements to third parties.

The parties agreed a protective order was warranted, but Belven disagreed that a SEO provision was needed to protect Fivalco's financial documents.

The Federal Court's Decision

Associate Judge Coughlan found that Fivalco met the elevated threshold for a SEO designation. In reaching this conclusion, the Court highlighted the following factors:

- The multiplicity of IP proceedings between the parties;
- Evidence demonstrating a significant degree of animosity between the parties, including inflammatory communications with suppliers and customers, and accusations of forgery;
- No evidence supporting Belven's argument that its principals were already privy to the information sought to be protected;
- The parties were direct competitors in a small market;
- No evidence of prejudice to Belven because both parties had experienced counsel who were capable of working within the constraints of the SEO designation; and
- The presence of a challenge mechanism within the protective order, mitigating any concerns that the SEO designation would be abused in an overbroad manner.

Key Takeaways

While the Federal Court's recent practice has frequently

exhibited increased scrutiny of routine protective orders, even those on consent of the parties, this decision confirms that protective orders with SEO designations remain an available and appropriate remedy where there is a substantial risk of commercial harm. In disputes between direct competitors, and especially where there's evidence of significant animosity and misconduct, courts are prepared to grant strong confidentiality protections to prevent the misuse of sensitive information.