Federal Court Cour fédérale

Date: 20170613

Docket: T-2105-13

Citation: 2017 FC 585

Ottawa, Ontario, June 13, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BARD PERIPHERAL VASCULAR, INC.
and
BARD CANADA INC.

Plaintiffs
(Defendants by Counterclaim)

and

W.L. GORE & ASSOCIATES, INC.
and
W.L. GORE & ASSOCIATES CANADA INC.

Defendants
(Plaintiffs by Counterclaim)

JUDGMENT AND REASONS

I. Introduction

[1] This is an appeal of the Order of Prothonotary Morneau, dated April 11, 2017 (the "CEO Order"), granting Bard's motion to amend provisions in an existing protective order to the designation of "Counsels' Eyes Only" ("CEO"), preventing Gore's trial counsel from showing a US order quashing a subpoena, dated August 21, 2015 (the "Subpoena Order") and Dr. David

Goldfarb's medical information (the "Medical Records"), which was filed in the United States District Court for Arizona (the "District Court"), to Gore's in-house counsel and outside experts.

II. Background

[2] The Appellants are W.L. Gore & Associates, Inc and W.L. Gore & Associates Canada Inc (collectively, "Gore" or the "Appellants"). The Respondents are Bard Peripheral Vascular, Inc and Bard Canada Inc (collectively, "Bard" or the "Respondents").

[3] Bard alleges that Gore has infringed Canadian Patent No. 1,341,519 (the "'519 Patent"), entitled Prosthetic Vascular Graft. Gore counterclaims that the '519 Patent is invalid.

[4] Dr. Goldfarb is the inventor of the '519 Patent, and the Parties agree that his testimony is relevant to the issues of validity. He has testified before the Federal Court in a related Canadian litigation matter pertaining to the '519 Patent, and before courts in the United States in related litigation matters.

[5] In June 2015, Gore brought a motion before the District Court to examine Dr. Goldfarb on the basis of Letters Rogatory issued from this Court in this action. The motion was granted, on July 27, 2015, and the District Court issued a subpoena, requiring Dr. Goldfarb to attend at an examination for discovery. On appeal of the motion, the District Court quashed the subpoena on the basis that Dr. Goldfarb was medically unfit to be examined. Subsequently, the Medical Records and the Subpoena Order were designated as "Confidential Attorneys' Eyes Only" by the District Court (the "US Order").

[6] Under the US Order only the following individuals may access the Subpoena Order and the Medical Information:

a) the Court and its staff and any jury empanelled by this Court in this action;

b) court reporters and their staff in the performance of their duties in connection with this action;

c) legal counsel for the Parties and such legal counsel's staff;

d) outside expert consultants and witnesses;

e) any deponent who authored or previously received the document; or

f) as may otherwise be required by law, order of the Court, or mutual agreement.

[7] In contrast, the CEO Order in this proceeding precludes Gore, Gore's in-house counsel, and outside experts from seeing and evaluating the Subpoena Order and the Medical Records. Gore asserts that this level of confidentiality is disproportionate to the type of information being protected and argues that the Prothonotary erred in fact and law in granting the CEO Order.

III. Issues

[8] In its written representations, Bard agrees that the CEO Order is more restrictive than the US Order, and consents to amending the CEO Order to allow outside experts access to the Subpoena Order and the Medical Records for the purposes of this litigation (the "Amended CEO Order").

[9] At the hearing Gore narrowed its argument to the issue of access to the Subpoena Order and the Medical Records by two specifically named in-house counsel, Cathy Testa and Allan

Wheatgrass. Therefore, the only remaining issue to be determined is whether it is appropriate to grant the Amended CEO Order, or to amend the CEO Order so that it allows the following persons access to the Subpoena Order and the Medical Records (the "New CEO Order"):

1) Gore's outside legal counsel;
2) Allan Wheatcraft;
3) Cathy Testa;
4) Bard's outside legal counsel;
5) outside expert consultants and witnesses;
6) Dr. Goldfarb and counsel for Dr. Goldfarb;
7) court reporters and their staff in the performance of their duties in connection with this action; and
8) the Court and its staff.

IV. Analysis

A. *Standard of Review*

[10] The Parties agree that the standard of review for reviewing the Prothonotary's decision to grant the CEO Order is the *Housen* standard: correctness for questions of law and those of mixed fact and law, where there is an extricable legal principle at issue, and palpable and overriding error for questions of fact (*Housen v Nikolaison*, 2002 SCC 33). This is a deferential standard that recognizes that "prothonotaries are, for all intents and purposes, performing the same task as Federal Court Judges" (*Hospira Healthcare Corporation v The Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 63).

[11] However, given Bard's agreement to amend the CEO Order to allow for access to the Subpoena Order and the Medical Records by outside experts. I have limited my analysis to the Prothonotary's decision to grant a CEO order excluding Gore and Gore's in-house counsel (i.e., the Amended CEO Order). This is a question of mixed fact and law. Therefore, the question on

review is whether the Prothonotary was correct in deciding to exclude Gore and Gore's in-house counsel from access to the Subpoena Order and the Medical Records.

B. *Is the Amended CEO Order Appropriate?*

[12] Rule 151 of the *Federal Courts Rules*, SOR/98-106, allows for the issuance of an order to allow material to be filed in a confidential manner. Rule 4, which allows the Court to provide for any procedural matter not provided for in the *Federal Courts Rules*, permits the Court to grant an order of confidentiality beyond the scope of Rule 151, which states:

151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	151 (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[13] The Supreme Court of Canada has held that there is a link between openness in judicial proceedings and freedom of expression (*Sierra Club of Canada v Canada v Canada (Minister of Finance)*, 2001 SCC 41 at paras 36 and 52 [*Sierra Club*]). However, the Supreme Court noted that the approach to confidentiality must be flexible, taking into account the preservation of commercial and contractual relations, the right of civil litigants to a fair trial, and the public and judicial interests in seeking the truth and achieving a just result in civil proceedings (*Sierra Club* at para 51). The Supreme Court also commented that "to some extent the search for truth may actually be promoted by the confidentiality order", since some documents, which may be

relevant to the proceeding in question, may not be submitted, unless protected by a confidentiality order (*Sierra Club* at para 77).

[14] The Supreme Court has also held that a confidentiality order under Rule 151 should only be granted when (*Sierra Club* at para 53):

> a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[15] CEO orders are a more restrictive form of confidentiality order, which the Court has held should only be granted in "unusual circumstances" (*Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 at para 14 [*Lundbeck*]). What constitutes an "unusual circumstance" is not defined; however, the Court generally considers three factors which may favour granting a CEO order (*Apotex Inc v Wellcome Foundation Ltd*, [1993] FCJ No 1117 at paras 14 to 16 [*Wellcome*]):

1) the terms reflect the terms of protective orders granted upon consent in parallel litigation in the US, in which the parties are directly or indirectly involved;
2) the terms of the order provide opportunity to a receiving party to object to the classification of certain documents as confidential; and
3) the party requesting the CEO order believes in good faith that its commercial business or scientific interests may be seriously harmed by disclosure.

[16] These three *Wellcome*-factors form a non-exhaustive list of criteria, and the Court may see fit to consider and apply other relevant factors (*Lundbeck*, at para 16). However, the harm

caused by the disclosure of the CEO information must be a serious threat to the interest in question and must be real, substantial, and grounded in the evidence (*Sierra Club* at para 54).

[17] Gore argues that there are no "unusual circumstances" at play in this proceeding, and suggests that it was an error of law for the Prothonotary to grant the CEO Order. Gore states that almost all of the cases in which a CEO order has been granted were cases involving commercial competitors, where there was a demonstrable risk that sensitive information would be disclosed and used against the disclosing party. Gore submits that, in the circumstances of this case, it would be appropriate to grant a confidentiality order that prevented the disclosure of the Medical Records and the Subpoena Order to the public, but not to the Parties. It asserts that the case *Foss v Foss*, 2013 ONSC 1345 [*Foss*]—where a CEO order was not granted with respect to medical information—is instructive on the appropriate balance between confidentiality and ensuring that the Parties have access to documents relevant to the proceeding.

[18] Bard contends that *Foss* is neither helpful nor instructive, because the medical information in question was the personal medical information of one of the parties, which was directly tied to the issue in play (*Foss* at para 28):

> The adjudication of the guardianship application will require disclosure of documents and personal and private information about Mr. Foss's health and financial situation, and it will require disclosure of commercially sensitive business records of the various business (*sic*) with which Mr. Foss has interests.

[19] Bard also asserts that, in this case, what makes the situation leading to the request for the Amended CEO Order "unusual" is that the Medical Records and the Subpoena Order are not information belonging to either Party and, further, the information is not directly relevant to any

of the pleadings in this action. Bard states that there is little, if any, public interest that would be negatively affected by protecting the confidentiality of the Subpoena Order and the Medical Records.

[20] I agree with Bard that *Foss* is not helpful to my determination of whether it is appropriate to grant either the Amended CEO Order or the New CEO Order. Moreover, in my opinion, this case is distinct from cases dealing with the commercially sensitive information of the parties to litigation. Therefore, this situation is one where I must consider whether there is an "unusual circumstance" that would warrant granting a CEO order.

(1) The *Wellcome*-factors

[21] Gore asserts that the Prothonotary erred in law in his application of the *Wellcome*-factors. Gore submits that the US proceedings, which resulted in the US Order, are not parallel proceedings, since Bard was not a party. Further, it states that going forward there will be no opportunity to appeal the confidentiality of the Medical Records or the Subpoena Order, because the Amended CEO Order would define those documents as being CEO. Finally, Gore argues that there are no commercial or scientific business interests that need to be protected, and that the dissemination of the Subpoena Order and the Medical Records to Gore's in-house counsel would not cause any harm to Bard.

[22] As Bard points out in its submission, the US proceedings and the US Order occurred in the context of this action. The subpoena was sought on the basis of Letters Rogatory issued by this Court, and the US Order was granted based upon determination of the issues of whether Dr.

Goldfarb's medical condition precluded him from testifying in this action and to whom the Subpoena Order and Medical Records could be disseminated.

[23] The District Court found that there was reason to seal the Medical Records and the Subpoena Order. While this is not a CEO order on consent, as outlined in *Wellcome*, the District Court judge would have balanced Dr. Goldfarb's privacy interests with Gore's litigation interests. As such, the principle of judicial comity encourages this Court's recognition of the US Order.

[24] Further, in my opinion, Gore's assertion that the Prothonotary erred, because there is no mechanism for it to challenge the classification of the Subpoena Order and the Medical Records as CEO, misunderstands the context in which the *Wellcome*-factors were articulated. In *Wellcome* at paragraph 15, Justice MacKay stated "while the terms of the order are broad in their application to information of all kinds, and in leaving the initiative to the producing party to designate what is confidential, by its terms the Order also provides opportunity to a receiving party to object to the classification as confidential". This is distinguishable from the situation here, where the terms of the Amended CEO Order are very narrow, encompassing only the US Order and the Medical Records. Moreover, as Bard notes, should it designate anything beyond the US Order and the Medical Records CEO there is a "challenge provision" in the Amended CEO Order.

[25] Finally, Bard agrees that its interests would not be harmed, but asserts that the interests needing protection are Dr. Goldfarb's privacy interests. I agree that disclosure of the information

in the Subpoena Order and the Medical Records may not harm Bard's commercial or scientific interests; however, these documents contain information that is highly private to Dr. Goldfarb. In *McInerney v MacDonald*, [1992] 2 SCR 138 at 148, the Supreme Court stated:

> Thus, at least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient… In *R v Dyment*, I noted that such information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit… In sum, an individual may decide to make personal information available to others to obtain certain benefits such as medical advice and treatment.
>
> [citations omitted]

[26] As stated above, the District Court judge found that Dr. Goldfarb had shown "good cause" to protect the Medical Records and held that it was appropriate to grant the US Order. As Dr. Goldfarb is not a party in this action, his privacy interests are important interests in the context of this litigation and an important factor for the Court to consider.

[27] However, it is important to note that the standard against which the District Court judge adjudicated the appropriateness of sealing the Subpoena Order and the Medical Records is a very different standard than used by Canadian courts to determine whether a confidentiality order is deserved. The test applied by the District Court judge was whether or not Dr. Goldfarb had shown that "good cause", as defined by the Ninth Circuit in *Kamakana v City and County of Honolulu*, 447 F3d 1172 (9th Cir 2006), exists to overcome the presumption of public access and to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. This is a different standard than is applied by this Court in deciding whether to grant a confidentiality

order, particularly a CEO order. While embarrassment, annoyance, and undue expense are harms to Dr. Goldfarb, they are not serious harms of the sort contemplated in *Sierra Club*.

[28] Further, although Bard argues that Dr. Goldfarb's privacy interests will be harmed, it does not provide any concrete evidence of the harm: at the time of this hearing, the harm was merely speculative. Although this Court is sympathetic to Dr. Goldfarb's privacy concerns, there is no explanation as to why in inclusion of two additional people, Ms. Testa and Mr. Wheatcraft (Gore's in-house counsel), would cause serious harm to Dr. Goldfarb's privacy interests. Both Ms. Testa and Mr. Wheatcraft are officers of this Court. As such, they have a serious obligation not to disclose or otherwise use confidential information originating from this action for purposes other than this litigation.

[29] The onus is on Bard to show the need for the Amended CEO Order (*Pfizer Canada Inc v Novopharm Ltd*, 1996 FCJ No 1369 at para 15):

> The onus is on the party requesting the more restrictive order to establish the need for such a restriction on the ordinary disclosure of materials which may be relevant to the issues in the case. The burden on the requesting party is a heavy one, as the request is for a deviation from the normal procedures which ensure the efficiency and integrity of the legal justice system.

[30] In this case, Bard has only speculated that there could be an enhanced risk to Dr. Goldfarb's privacy rights if Ms. Testa and Mr. Wheatcraft have access to the Subpoena Order and the Medical Records. Therefore, while Bard may believe in good faith that it is protecting Dr. Goldfarb's privacy interests from serious harm, there is no evidence to support an order as restrictive as the Amended CEO Order.

(2) Is the Amended CEO Order necessary and do the salutary effects of the confidentiality order outweigh its deleterious effects?

[31] Gore submits that the Prothonotary erred in fact and law in finding that Gore will not be seriously harmed if its in-house counsel does not have access to the Subpoena Order and Medical Records. Gore argues that it is deprived of its fundamental right to know the case and evidence against it, and prevented from properly instructing outside legal counsel.

[32] Bard argues that, although the Amended CEO Order will be inconvenient for Gore, it does not prevent Gore from instructing outside counsel and preparing its case. Bard states that the sole use for the Subpoena Order and the Medical Records is as evidence supporting an argument for why Dr. Goldfarb's prior testimony should or should not be admissible as evidence, which would otherwise be inadmissible as hearsay. Bard asserts that these arguments can be made by outside counsel, with the help of outside experts as necessary, without Gore's in-house counsel being privy to the details in the Subpoena Order and the Medical Records.

[33] Outside counsel for Gore, having seen the Subpoena Order and the Medical Records during the US Proceeding, states that they absolutely will need to seek instruction from Gore's in-house counsel, Ms. Testa and Mr. Wheatcraft, before proceeding with this action. While this is not a determinative factor, it highlights the sacrosanct relationship between client and counsel in our legal system. The Supreme Court has made many pronouncements on the importance of the solicitor-client relationship, mainly in the context of communications privilege. Recently, in

Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53 at paragraph 26, the Supreme Court held that:

> The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In *R. v. Gruenke*, Chief Justice Lamer described its rationale as follows:
>
> > The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication . . . .
>
> [citations omitted, emphasis original]

[34] Similarly, in *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paragraph 26, the Supreme Court stated:

> The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence.

[35] Although this is not a case about solicitor-client privilege, these statements from the Supreme Court emphasize the seriousness of the deleterious effects created by precluding Gore's in-house counsel, Ms. Testa and Mr. Wheatcraft, from consulting with Gore's outside counsel in a fully informed manner.

[36] It is clear that the main salutary effect of granting the Amended CEO Order would be upholding Dr. Goldfarb's wish for privacy. As I alluded to above, this Court takes these privacy interests seriously and recognizes that they are interests that impact Dr. Goldfarb's right to bodily integrity and autonomy. However, there is no evidence of a realizable harm to Dr. Goldfarb's privacy interests, caused by granting Ms. Testa and Mr. Wheatcraft access to the Subpoena Order and the Medical Records. At this point, the allegations of harm are just "bald" statements that "may well support the need for a protective order, but they in no way justify interference with the normal solicitor-client relationship" (*Merck & Co v Apotex Inc*, 2004 FC 567 at para 14). This situation can be contrasted to that of *Rivard Instruments Inc v Ideal Instruments Inc*, 2006 FC 1338, where Justice Michel Shore upheld CEO provisions in a protective order granted by Prothonotary Tabib, based upon evidence of potential harm.

[37] Moreover, at the hearing, Bard admitted that it was requesting an exact "mirror" of the US Order primarily because Dr. Goldfarb has represented that he would agree to grant Bard access to the Subpoena Order and the Medical Records, if the equivalent of the US confidentiality provisions were in place in Canada. It may be true that, should the Amended CEO Order not be granted, Bard will have to subpoena Dr. Goldfarb to testify, which may result in further US litigation. However, the spectre of this occurrence is not sufficient evidence to overcome the deleterious effects to Gore's right to instruct counsel. CEO orders are a serious deviation from the normal solicitor-client relationship and are not granted for the purpose of convenience.

[38] Therefore, I find that the Amended CEO Order is neither necessary, nor do the salutary effects of the Amended CEO Order outweigh its deleterious effects.

C. *Conclusion*

[39] In my opinion, the Prothonotary did err, in fact and law, in holding that the CEO Order would not prejudice Gore. Gore has stated that it plans to use the Medical Records to challenge the admissibility of the hearsay evidence of Dr. Goldfarb, after outside counsel is able to receive necessary and proper instructions from their in-house counsel. Precluding outside experts or Gore's two in-house counsels, Ms. Testa and Mr. Wheatcraft, from seeing the Subpoena Order and Medical Records would have prevented Gore from challenging the admissibility of the hearsay evidence.

[40] As explained above, the Amended CEO Order is inappropriate because of its significant interference with the solicitor-client relationship. However, I find that it is appropriate to grant the New CEO Order, which grants Gore's in-house counsel Ms. Testa and Mr. Wheatcraft access to the Subpoena Order and the Medical Records.

V. Costs

[41] Costs will be paid by Bard to Gore, in any event of the cause, assessed at Column III of Tariff B.

JUDGMENT in T-2105-13

THIS COURT'S JUDGMENT is that:

1) The CEO Order will be amended to the New CEO Order, allowing the following persons access to the Subpoena Order and the Medical Records:

   a. Gore's outside legal counsel;

   b. Allan Wheatcraft;

   c. Cathy Testa;

   d. Bard's outside legal counsel;

   e. outside expert consultants and witnesses;

   f. Dr. Goldfarb and counsel for Dr. Goldfarb;

   g. court reporters and their staff in the performance of their duties in connection with this action; and

   h. the Court and its staff.

2) Costs will be paid by Bard to Gore, in any event of the cause, assessed at Column III of Tariff B.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2105-13
STYLE OF CAUSE:	BARD PERIPHERAL VASCULAR INC. ET AL v W.L. GORE & ASSOCIATES, INC. ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 2017
JUDGMENT AND REASONS:	MANSON J.
DATED:	JUNE 13, 2017

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