
CANADA / JUDGMENT

McHenry Software Inc. v. ARAS 360 Incorporated

2014 BCSC 1485

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1485 McHenry Software Inc. v. ARAS 360 Incorporated

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McHenry Software Inc. v. ARAS 360 Incorporated,

2014 BCSC 1485

Date: 20140807

Docket: S144039

Registry: Vancouver

Between:

McHenry Software Inc.

Petitioner

And

ARAS 360 Incorporated also known as ARAS 360 Technologies Inc.

Respondent

- and -

Docket: S144050

Registry: Vancouver

Between:

ARAS 360 Incorporated also known as ARAS 360 Technologies Inc.

Petitioner

And

McHenry Software Inc.

Respondent

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2014

INTRODUCTION

- [1] In two related applications, McHenry Software Inc. ("McHenry") seeks sealing and confidentiality orders with respect to two Court files: No. S-144039 and No. S-144050. The parties are identical in the two proceedings, except that in the first, McHenry is the petitioner and ARAS 360 Incorporated ("ARAS") is the respondent, while in the second, ARAS is the petitioner and McHenry the respondent. Both files are appeals against the decision of J. Gary Fitzpatrick, Q.C. (the "Arbitrator") made March 26, 2014 (the "Arbitration Award").
- [2] ARAS opposes both of the applications for the sealing and confidentiality orders.
- [3] Pursuant to Practice Direction number PD-35 of this Court, McHenry has attached draft orders to each of its applications, setting out several documents that it wished to have sealed, including several portions of the transcript from the arbitration. However, on the hearing of these applications, counsel for McHenry stated that it was now seeking a more limited order, and the only document it wishes to have sealed is the Arbitration Award itself.

- [4] The material filed on these applications includes Affidavit #1 of Betty Chan sworn May 26, 2014; Affidavit #1 of Brian McHenry sworn June 5, 2014; and Affidavit #1 of Melanie Fisher sworn June 20, 2014.

BACKGROUND

- [5] McHenry is a software company. It has developed accident reconstruction software that it says is proprietary, subject to copyright, and highly confidential.
- [6] ARAS is a company that has developed graphical environment software.
- [7] On February 5, 2010 the two companies entered into an agreement (the "Agreement") with a five-year term for the integration of McHenry's accident simulation software with ARAS's graphical environment software.
- [8] The relationship between the two companies deteriorated in the fall of 2011, and in December 2011 McHenry purported to terminate the Agreement. In the Arbitration Award the Arbitrator found that this termination was wrongful.
- [9] After the termination of the Agreement, McHenry became aware that ARAS was still selling products involving the McHenry software.
- [10] On May 17, 2012, McHenry commenced proceedings against ARAS in the United States Federal Court in North Carolina (the "North Carolina Proceedings") seeking damages for copyright infringement and breach of contract, as well as injunctive relief. This was despite clause 14 of the Agreement that required McHenry to resolve any disputes with ARAS through arbitration in Vancouver, British Columbia.
- [11] The North Carolina Proceedings were commenced by McHenry filing a "Verified Complaint", the contents of which were sworn by McHenry's principal, Brian McHenry. Exhibited to the Verified Complaint were numerous documents containing potentially sensitive information, including email correspondence with ARAS personnel, correspondence between counsel, and a list of the names of various ARAS customers with details on how much each had paid for software.
- [12] In response to the North Carolina Proceedings, ARAS filed a motion to compel arbitration of the issues raised in that proceeding.
- [13] On October 31, 2012, United States District Judge Terrance W. Boyle made an order granting the preliminary injunction sought by McHenry, but also granting ARAS's motion to compel arbitration.
- [14] On November 15, 2012, McHenry commenced an arbitration with the British Columbia International Commercial Arbitration Centre (the "Arbitration").

- [15] McHenry filed its statement of claim in the Arbitration on December 7, 2012, and ARAS filed a counterclaim on January 28, 2013. The Arbitration concerned claims for breach of the Agreement by both parties, copyright claims advanced by McHenry, and tort claims advanced by ARAS.
- [16] On January 29, 2013, McHenry filed a motion for contempt in the North Carolina Proceedings, alleging that ARAS had violated the preliminary injunction granted by Judge Boyle.
- [17] In the North Carolina Proceedings, McHenry filed in the public record numerous documents containing potentially sensitive information, including its Arbitration Notice, its Statement of Claim in the Arbitration, and the Expert Report of Jacklyn Davies, which was identified as being for use in the Arbitration.
- [18] McHenry has never applied for a sealing order in the North Carolina Proceedings.
- [19] With respect to the Arbitration, it is governed by the British Columbia International Arbitration Centre's Domestic Commercial Arbitration Rules of Procedure. Rule 25 provides:

25. Confidentiality

Unless otherwise agreed by the parties or required by law, all hearings, meetings, and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.

- [20] At the request of ARAS, the Arbitrator ordered the parties to enter into a confidentiality agreement for the purposes of the Arbitration. The parties entered into a confidentiality agreement dated for reference June 7, 2013. By its terms, that confidentiality agreement affects only the Arbitration and does not affect the present appeal proceedings in this Court. Clause 6 of the confidentiality agreement states:
6. Notwithstanding the foregoing, nothing in this Agreement shall limit the disclosure of any documents, evidence or information whether electronic or otherwise, disclosed in this arbitration to the extent that such disclosure is required by law, or required to enforce an award in this arbitration or to challenge, by appeal in British Columbia, an award in this arbitration in legal proceedings before a court or other competent judicial authority.
- [21] The Arbitration hearing was held in November of 2013, and the Arbitrator handed down his Arbitration Award on March 26, 2014.
- [22] The next day, ARAS circulated the Arbitration Award to a number of third parties.

- [23] McHenry sought and obtained an order from the Arbitrator (the "Confidentiality Award") holding that ARAS had improperly distributed the Arbitration Award. In pursuing that application, McHenry sought costs of the entire proceeding based on the distribution of the Arbitration Award. In its response, ARAS noted that the Arbitration Award would become a matter of public record if either party chose to appeal, which both have now done. ARAS intends to amend its existing petition to challenge the Confidentiality Award.
- [24] The Arbitrator has not yet dealt with costs of the Arbitration, nor have the parties made their final submissions on that issue.

MCHENRY'S SUBMISSION ON WHY IT NEEDS A SEALING ORDER

- [25] At paragraphs 26-30 of its notice of application, McHenry sets out the basis for its application for a sealing order:
26. McHenry is a software company. Specifically, McHenry is the world's leading developer of accident reconstruction software.
 27. Considerable evidence was tendered by the parties in the Arbitration explaining McHenry's proprietary software information, and the commercial arrangement that McHenry entered into with ARAS for the integration of that software with another party's graphical environment.
 28. The marketplace which McHenry and ARAS operate in is highly competitive. The evidence tendered at the arbitration, and the Award, contain confidential and commercially sensitive information, which could harm McHenry's business if it were disclosed publicly and became known to competitors and other accident simulation software developers.
 29. Because McHenry's commercial relationship with ARAS did not succeed, McHenry is currently making efforts to find a new commercial arrangement for the commercialization of its software and wishes to limit, to the extent possible, the details of its previous failed relationship with ARAS. McHenry is particularly concerned with the following information that is contained in the Award:
 - (a) Paragraphs 25 through 33 of the Award detail the back-and-forth between McHenry and ARAS regarding payment under the Agreement, and include characterizations of positions that the parties took regarding decisions on pricing and discounting of the software that McHenry does not agree with.
 - (b) Paragraph 35 details what the arbitrator found to be a "variation of the agreement", which the arbitrator says McHenry "complained about" but "did not do anything about". McHenry is concerned that this paragraphs leaves the impression that McHenry is indifferent as to its commercial arrangements. This was not and is not the case.

- (c) Paragraph 37 suggests that McHenry was aware that the Agreement was "unclear", but that it never brought the issue to a head or attempted to rewrite the Agreement. McHenry is concerned that this paragraph leaves the impression that McHenry is indifferent as to its commercial arrangements. This was not and is not the case.
 - (d) Paragraph 45 suggests that McHenry had agreed with ARAS to receive payments upon request by McHenry and agreement by ARAS to pay the amount requested. McHenry never agreed to such an arrangement.
 - (e) Paragraph 49 of the Award suggests that it deferred to ARAS on changes in the agreed upon pricing of the products that it was going to sell incorporating McHenry's software. This suggests a commercial approach to the commercialization of McHenry's software that it would never take.
 - (f) McHenry is concerned about the content of paragraph 52, which suggests that McHenry accepted ARAS selling a \$9000 product incorporating McHenry's software for \$3000. McHenry never accepted such a drastic reduction, and is concerned about how such a finding may impact negotiations with future business partners regarding the commercialization of its software.
 - (g) McHenry is concerned about the contents of paragraphs 65 through 70 as they suggest that providing multiple licenses for single sales of a product was permissible under the contract and is an acceptable business practice. McHenry is concerned about how such a finding may impact negotiations with future potential business partners regarding the commercialization of its software.
 - (h) Paragraph 60 suggests that McHenry reneged on a commitment it had made to ARAS. McHenry disagrees with this finding, which unfairly casts McHenry in a bad light. McHenry did not provide the deliverable in question because ARAS, after promising a specific past due payment, then reneged on the payment and demanded the deliverable which is not something that is made clear in the Award.
 - (i) Paragraphs 93 thru 96 present portions of personal and private communications McHenry provided in the arbitration with the expectation that they would remain private and confidential.
30. These are just examples of the content of the Award that McHenry is concerned about. McHenry is concerned that its efforts to find a new commercial arrangement for the commercialization of its software will be frustrated by the availability of the Award if it is not sealed. McHenry is concerned that parties who are considering going forward with McHenry in a commercial arrangement may be deterred by the mischaracterization of events in the Award, which will cause McHenry significant harm.

LEGAL PRINCIPLES GOVERNING SEALING ORDERS

[26] Although this Court has a "supervisory and protecting power over its own records" and may deny access to records when required by the ends of justice, the presumption is in favour of public access, and the applicant for a sealing order therefore bears the burden of proof. As Dickson J. observed in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 189:

Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[27] The factors to be considered before granting a sealing order were discussed in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. After noting that a judge's discretion to grant such an order must be exercised in accordance with Charter principles and that any confidentiality order will have a negative effect on the right to freedom of expression under s. 2(b) of the Charter, the Court set out two preconditions for granting an order: the applicant must demonstrate both that a sealing order is necessary, and that it is proportional.

[28] More specifically, the Supreme Court of Canada held at para. 53 of *Sierra Club* that a sealing order should only be granted when:

- (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.

[29] The first, or necessity, branch of the test has three elements, as explained in paras. 54-57 of *Sierra Club*:

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as

in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally *Muldoon J. in Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[Emphasis added by Iacobucci J.]

NO REAL AND SUBSTANTIAL RISK TO IMPORTANT COMMERCIAL INTEREST

- [30] McHenry submits that there is a real and substantial risk to an important commercial interest if the sealing order is not granted. It says that the market for its product is very competitive. It says that following the failure of its relationship with ARAS, it is currently trying to make a new commercial arrangement to market its software. It claims that its efforts to negotiate a new arrangement with a new partner would be harmed if the details of its failed relationship with ARAS became known. For this reason, it says that the Arbitration Award should be sealed, because it would reveal the nature of the failed relationship between McHenry and ARAS.
- [31] It is important to note here that McHenry is not alleging that a sealing order is necessary to protect proprietary secrets such as the source code of its software. It is no longer seeking to seal the transcripts or evidence of the Arbitration. The only document over which it now seeks a sealing order is the Arbitration Award itself, and that document does not disclose any trade secrets.
- [32] I find that McHenry has not discharged its burden of demonstrating that a sealing order is necessary to prevent a real and substantial risk to an important commercial interest. The underlying facts of the dispute between McHenry and ARAS are already in the public realm because of the documents that McHenry filed in the North Carolina Proceedings. These documents include its Arbitration Notice and its Statement of Claim in the Arbitration. McHenry has neither sought nor obtained a sealing order in the North Carolina Proceedings, so those documents are open to public inspection. Therefore, the granting of a

sealing order in this Court would not achieve McHenry's stated objective of keeping confidential the nature of the failed relationship between McHenry and ARAS.

- [33] Moreover, the commercial interest that McHenry seeks to protect is its own, merely private, interest. In *Sierra Club*, the Supreme Court of Canada explained that the interest which the applicant for a sealing order seeks to protect must be "one which can be expressed in terms of a public interest in confidentiality."
- [34] McHenry's submission in the present case that it is seeking to protect the principle of the confidentiality of arbitration proceedings generally, rings hollow, because McHenry initially chose to commence its proceedings against ARAS in the United States Federal Court, where there was no confidentiality. McHenry did not initially choose arbitration. Rather, it only initiated the Arbitration in Canada when it was ordered to do so by the U.S. Court.
- [35] Moreover, there is no general principle that the confidentiality of arbitration proceedings carries over to court proceedings when the arbitration is appealed. On the contrary, such court proceedings are generally public. As Justice Cumming wrote in *GEA Group AG v. Ventra Group Co.*, 2009 CanLII 17992 (Ont. S.C.) at para. 18:
- [18] FNG and VGC argue, in effect, that given there is an obligation of confidentiality that adheres to an arbitration proceeding with its expectation of privacy, then the aspect of privacy automatically carries over to a court proceeding and continues with the determination by the court of the issues in that court proceeding. I disagree. Court decisions are normally publicly released for the reasons of public policy referred to above.

CONCLUSION

- [36] The onus on these applications for a sealing order is on the applicant. I find that McHenry has not satisfied its onus of showing that a sealing order is necessary or that the salutary effects of such an order would outweigh its deleterious effects, particularly its deleterious effect on the public interest in open and accessible court proceedings.

- [37] As Dickson J. observed in *A.G. (Nova Scotia)*, at p. 185:

As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

[38] Both of the applications brought by McHenry are dismissed, with costs to ARAS in any event of the cause.

The Honourable Mr. Justice W.F. Ehrcke

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