

Federal Court



Cour fédérale

Date: 20200218

Docket: T-1636-18

Citation: 2020 FC 261

Ottawa, Ontario, February 18, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DEPURA PARTNERS LLC'S

Plaintiff

and

**DESJARDINS GENERAL INSURANCE INC
CERTAS DIRECT INSURANCE COMPANY
THE PERSONAL INSURANCE COMPANY**

Defendants

PUBLIC ORDER AND REASONS

(Confidential Order and Reasons issued February 18, 2020)

[1] The Defendants bring a motion [Motion] to validate the designation as “Confidential Information – Counsel’s Eyes Only” [C-CEO] of a number of documents they disclosed as part of the Affidavit of Documents they served to the Plaintiff pursuant to Rule 223 of the *Federal Courts Rules*, SOR/96-108 [Rules]. The C-CEO designation was made pursuant to a Confidentiality Agreement [Agreement] previously entered into by the parties aiming to govern

the exchange of documents during the discovery phase of the underlying litigation. The Agreement allows each party to designate highly sensitive documents either as Confidential or as C-CEO. It also provides a framework for resolving any disputes that could arise from such designations.

[2] According to the Agreement, a C-CEO designated document can only be consulted by the Court, the parties' counsel and their independent experts. Due to its highly sensitive nature, the receiving party cannot consult such a document. However, pursuant to paragraph 23 of the Agreement, that party may object to such a designation. If it does, then the producing party must bring a motion to the Court to validate the designation.

[3] The Defendants also seek an Order that their written representations and the affidavit of Mr. Fran Smith filed in the context of the Motion be kept under seal pursuant to Rule 151 of the Rules and be only accessible by the Court, the Plaintiff, the Defendants, the parties' counsel and the parties' independent experts, until further Order from the Court. They seek a similar type of Order in relation to four confidential designated documents listed in the Plaintiff's Affidavit of Documents (Documents No. 15b, 15c, 15d and 15e) which the Defendants also filed in the context of the Motion. The Plaintiff consents to both requests (Responding Motion Record, Vol. 2, Written Representations of Plaintiff, at para 106).

[4] This matter's underlying litigation is a claim, by the Plaintiff, that the Defendants have infringed on Canadian Patent No 2,777,931 "System for monitoring vehicle and operator behavior" [931 Patent] by their use of a system - called AJUSTO - that monitors vehicle and

driver behaviour for determining auto insurance premium. The Defendants, who offer home and auto insurance, deny infringement and attack the validity of every claim of the 931 Patent.

[5] The Agreement, which was entered into on July 7, 2019, binds a third party, Cambridge Mobile Telematics Inc. [CMT], as CMT licenced the Defendants' alleged infringing software. CMT was included in the Agreement to facilitate the disclosure of any documents it may hold that are relevant to the present matter.

[6] On July 22, 2019, the Defendants served their Affidavit of Documents, in which they listed 49 documents. Out of these 49 documents, 21 were designated as Confidential and 14 as C-CEO. The 14 C-CEO designated documents were regrouped by the Defendants under four categories of proprietary and technical information described as follows:

- A. "Documents that contain highly confidential information regarding the business relationship between the Defendants and CMT". These are Documents No. 7, 8 and 9 of the Defendants' Affidavit of Documents (Motion Record, Vol. II, Exhibits WGH-3 to WGH-5 to the Affidavit of Way-Gar Ho);
- B. "Documents containing highly confidential technical information of both the Defendants and CMT". These are Documents No. 10 and 11 of the Defendants' Affidavit of Documents (Motion Record, Vol. II, Exhibits WGH-6 and WGH-7 to the Affidavit of Way-Gar Ho);
- C. "Internal and highly confidential CMT documents that describe the implementation of its mobile and backend technology and procedures". These are Documents No. 20, 21 and 25 to 27 of the Defendants' Affidavit of Documents (Motion

Record, Vol. II, Exhibits WGH-8 and WGH-9 and WGH-13 to WGH-15 to the Affidavit of Way-Gar Ho);

- D. “Highly confidential sample data files which include examples of the information collected from the mobile devices and/or provided by CMT to its customers”.

These are Documents No. 22 to 24 and 28 of the Defendants’ Affidavit of

Documents (Motion Record, Vol. II, Exhibits WGH-10 to WGH-12 and WGH-16 to the Affidavit of Way-Gar Ho).

[7] On October 25, 2019, the Plaintiff objected to the designation of all 14 C-CEO designated documents. However, it eventually withdrew its objection for the documents that fall within categories A and B, above. Therefore, only the documents falling within categories C and D are at issue in the present instance.

[8] The parties agree that for the purpose of the underlying litigation and of the Motion, the Agreement is to be treated as equivalent to a Protective Order. As a result, they claim that the legal principles applicable to Protective Orders apply to the issues raised in the Motion. I agree (*Live Face on Web, LLC v Soldan Fence and Metals (2009) Ltd*, 2017 FC 858, at paras 13-15).

[9] In order for the C-CEO designation of these documents to be validated, the Defendants must establish, on the basis of these principles, that their commercial or scientific interests could be harmed without such designation (*Rivard Instruments Inc v Ideal Instruments Inc*, 2006 FC 1338 [*Rivard*] at para 2; *Bard Peripheral Vascular Inc v WL Gore & Associates Inc*, 2017 FC 585 [*Bard Peripheral*] at para 15). The risk of harm must be real and substantial (*Guest Tek*

Interactive Entertainment Ltd v Nomadix Inc, 2018 FC 818 [*Guest Tek*] at para 23) and there has to be no reasonable alternative measures to prevent the risk from materializing (*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53).

[10] Although a C-CEO designation should only be granted in “unusual circumstances”, and not as a matter of convenience (*Bard Peripheral* at para 15; *Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 [*Lundbeck*] at para 14), preventing disclosure to the opposing party has been held to be a perfectly legitimate purpose of a Protective Order in disputes involving direct competitors, especially in the area of intellectual property, provided that clear and non-speculative evidence shows that such a disclosure could injure the other party’s interests (*Lundbeck* at para 16; *Rivard* at para 40).

[11] The risk of harm can only materialize in one of two ways, that is deliberately or negligently, through the receiving party’s contravention of the common law’s implied undertaking rule, which prohibits the receiving party from using discovery information for any purpose other than the litigation in which it is produced; or, “unwittingly or unintentionally, in circumstances where an employee or officer of the receiving party who has obtained knowledge of confidential information could not help but be influenced by this knowledge in making business decisions for the receiving party as part of his or her regular duties, in a manner prejudicial to the disclosing party (see for example *Rivard Instruments Inc v Ideal Instruments Inc* 2006 FC 1338 at para 39)” (*Pliteq Inc v Wilrep Ltd*, 2019 FC 158 at para 7).

[12] In determining whether a C-CEO designation should be granted, the Court must ultimately balance the legitimate need for protection of a party's information against the equally legitimate need of the other party to properly instruct counsel (*Guest Tek* at para 23).

[13] The Defendants' evidence regarding the injury the disclosure to the Plaintiff of the C-CEO designated documents at issue could cause to their interests consists mainly of the affidavit of CMT's Chief Financial Officer, Mr. Fran Smith.

[14] In his affidavit, Mr. Smith, who describes CMT as the "world's leading mobile and analytics provider", discusses CMT's DriveWell program, which has been licenced to the Defendants and implemented in their branded mobile application. This application, he says, allows, through the AJUSTO function, for the collection and transmission to CMT of data relating to time-of-day travelled, location (GPS) and other sensor data. This data can later be used to evaluate a user's driving and calculate his insurance premium.

[15] Mr. Smith affirms that CMT has invested years of efforts and ████████ of dollars in capital to develop that technology, which is the company's core product and a closely guarded company secret. He says that the C-CEO designated documents at issue contain information that has always been- and is still - treated as highly confidential and proprietary by CMT. As a result, its disclosure to a potential competitor would allow that competitor to implement features of DriveWell in a competitive product, improve its position on the market and attempt to win customers from CMT. All of this, he opines, would cause permanent injury to CMT.

[16] According to Mr. Smith's affidavit, CMT has implemented measures to secure and protect the confidentiality of its proprietary information, including the confidential information contained in the C-CEO designated documents at issue. Such measures include requiring its employees to sign confidentiality agreements, securing confidential information on encrypted systems that require CMT access credentials and requiring clients or prospective clients to enter into non-disclosure agreements. Such an agreement, he asserts, was entered into by CMT and the Defendants.

[17] The five documents that fall within category C, above ("Internal and highly confidential CMT documents that describe the implementation of its mobile and backend technology and procedures" – Documents No. 20, 21 and 25 to 27 of the Defendants' Affidavit of Documents), describe, according to Mr. Smith's affidavit, CMT's server architecture, client architecture, algorithms, data processing procedures and related technical details. Mr. Smith is of the view that should the Plaintiff gain access to this detailed information, this would allow it to gain the knowledge necessary to develop a mobile application for vehicular telematics and the associated back-end server infrastructure similar to CMT's product offering. This could result, he asserts, in the Plaintiff gaining an unjust advantage in the marketplace.

[18] The same prejudice could occur, according to Mr. Smith, if the four documents falling within category D ("Highly confidential sample data files which include examples of the information collected from the mobile devices and/or provided by CMT to its customers" - Documents No. 22 to 24 and 28 of the Defendants' Affidavit of Documents) were made available to the Plaintiff. This could allow the Plaintiff to gain the knowledge necessary to

develop mobile applications for vehicular telematics and the associated back-end server infrastructure similar to those of the Defendants by knowing, for instance, which types of data are important, which types of data are transmitted to different parts of the system and how they are transformed at various stages of CMT's process.

[19] Mr. Smith concludes by saying that the highly confidential information contained in the documents falling within categories C and D, above, helps CMT maintain its leading position in a very competitive market. Therefore, both the Defendants and CMT's commercial interests would be directly and seriously prejudiced by the disclosure of this information to the Plaintiff.

[20] Mr. Smith's evidence has not been challenged by the Plaintiff.

[21] The evidence on record also shows that the Plaintiff is affiliated with DrivSafe LLC [DrivSafe], a US and Indian-based company that specializes in telematics and analytical solutions for the auto insurance industry. This company claims to offer a smartphone based telematics system that captures, compares and analyses comprehensive driving behavior data. According to the evidence, DrivSafe announced, in March 2017, the launch of its mobile telematics product in Canada. The evidence also indicates that at the same period, DrivSafe contacted one of the Defendants, Desjardins General Insurance Inc., to offer its product.

[22] I am therefore satisfied that there is sufficient evidence showing that the Plaintiff seeks to compete directly with CMT and that the C-CEO designated documents at issue, if disclosed to the Plaintiff, could allow the Plaintiff to improve its own product or advantageously adapt its

commercial strategies and to gain, therefore, a competitive advantage over the Defendants or CMT.

[23] I am also satisfied that there is a real and substantial risk that the Plaintiff will consciously - or unconsciously - use that information to the competitive disadvantage of the Defendants or CMT as I believe it would be difficult, if not “altogether artificial”, to expect the Plaintiff’s employee(s) or representative(s) who would gain access to said information to “divorce [their] mind” or “have an “empty head” as to such information as they make business decisions relating to their competing products” (*Rivard* at para 39; *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FCA 192 at para 16 [*Arkipelago Architecture*]).

[24] Contrary to the Plaintiff’s contention, the Defendants’ case for a C-CEO designation of the documents at issue is not based on bald or purely speculative allegations. The Defendants’ evidence is sufficient, in my view, to sustain a claim that the disclosure of these documents to the Plaintiff – which, again, seeks to be in direct competition with them with its DrivSafe product – could injure the Defendants or CMT’s commercial interests. This test does not require, in my view, certainty as to the occurrence of the apprehended injury. The use of the term “could” normally signals, in juridical terms and ordinary language, a less stringent onus than the use, for instance, of the word “would”, which connotes a higher likelihood that an event will occur (*R v Lees*, 2001 BCCA 94 at para 15; *Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114 at para 21).

[25] The Plaintiff also claims that there exists reasonable alternatives to a C-CEO designation, such as giving access to the designated documents, for a limited period to only one of its representatives at its counsel's offices. This alternative measure would permit that representative to inspect the documents, explain their content to counsel, and as a result, properly instruct counsel. No copy of the documents would be provided to the representative.

[26] At the hearing of the Motion, the Plaintiff's counsel contended that there was virtually no risk that its client's representative inspecting the C-CEO designated documents at issue for the purposes of instructing counsel could, in such a short period, assimilate any of the highly confidential information contained in said documents. I do not find this argument persuasive.

[27] First, I fail to see any basis for advancing such an argument, besides asking the Court to simply blindly accept counsel's word. Second, it is difficult, if not altogether artificial, as the Federal Court of Appeal stated in *Arkipelago Architecture*, to expect that this representative would completely divorce his or her mind from that information. This is a matter of common sense.

[28] But there is more. What makes this whole issue peculiar in this case is that the Plaintiff does intend to be assisted by experts in this case. According to the Agreement, these experts would have full access to the C-CEO designated documents at issue. However, having been ordered to post security for \$75,000.00 because none of its five principals reside in Canada, the Plaintiff says that retaining the services of its experts at this juncture in the proceeding would put it at a financial disadvantage. The difficulty with this assertion is that it is not supported by any

evidence. The Plaintiff describes itself as a “small family-run partnership entity” but there is no evidence as to the financial means of said entity. In particular, there is no evidence as to its capacity to support or not the extra financial burden that could result in hiring its experts now as opposed to at a later stage in the litigation.

[29] The Plaintiff also submits that the Defendants are amply protected by the implied undertaking rule and that, therefore, there is no need in this case for the additional protection of a C-CEO designation. As the case law shows, both protections can coexist in any given case, when the circumstances require it. Since each case must be assessed on its own merits (*Lundbeck* at para 14; *Arkipelago Architecture* at para 11), I am satisfied, as I have already indicated, that the circumstances of the present case justify the added protection of a C-CEO designation as far as the documents at issue are concerned.

[30] In addition, as the Defendants correctly point out, should I refuse to validate the C-CEO designation of one or any of these documents, the Court would have no meaningful way to control the use, or sanction the misuse, by any of the five individuals that make up the Plaintiff, of the information contained in said documents as these individuals all reside outside Canada and are, individually, not subject to the Court’s jurisdiction. Moreover, any prejudice suffered by the Defendants resulting from a misuse of the information by the Plaintiff could hardly be compensated by any remedy granted by the Court in sanctioning a violation of the implied undertaking rule.

[31] Finally, the Plaintiff contends that since the Defendants objected to the Plaintiff's own C-CEO designation and since the documents in question contain the same type of information than the C-CEO designated documents at issue, the Defendants have implicitly admitted that such designation is not justified. It is true that the Plaintiff's documents contain the same type of information than the C-CEO designated documents at issue, but they do so at a much smaller scale. None of the C-CEO designated documents at issue contain less than ■ types of data; one (Document 23), contain more than ■ types of data. In comparison, the Plaintiff's documents contain less than ■ types of data. These two sets of documents are simply not comparable.

[32] In sum, I am satisfied, when balancing in the particular circumstances of this case, the legitimate need for protection of the C-CEO designated documents at issue against the Plaintiff's legitimate need to properly instruct counsel that such designation ought to prevail.

[33] Each party asks, if it was to be successful, that it be awarded costs in the form of a lump sum of \$3,000.00. Cost will therefore be awarded to the Defendants at a fixed amount of \$3,000.00.

[34] A confidential draft of these Order and Reasons was sent to the parties on February 5, 2020, to enable them to propose redactions with a view to assist the Court in issuing both a public and a confidential version of these Order and Reasons. Both parties proposed a limited number of redactions which I found to be acceptable. As a result, there will be a confidential and a public version of these Order and Reasons.

ORDER in T-1636-18

THIS COURT ORDERS that:

1. The Motion is granted;
2. The C-CEO designation of the Defendants' Documents No. 20-28 to their Affidavit of Documents is validated pursuant to paragraph 23 of the Agreement;
3. The Defendants' Documents No. 20-28 of their Affidavit of Documents, corresponding to Exhibits WGH-8 to WGH-16 of the Affidavit of Way-Gar Ho filed in the context of the Motion, shall be kept under seal on the Court file and only be accessible by the Court, the Defendants, the parties' counsel and the parties' independent experts, until further Order from the Court, pursuant to Rule 151 of the Rules;
4. The Defendants' written representations and the Affidavit of Fran Smith filed in the context of the Motion, shall be kept under seal on the Court file and only be accessible by the Court, the Defendants, the parties' counsel and the parties' independent experts, until further Order from the Court, pursuant to Rule 151 of the Rules;
5. The Plaintiff's Documents No. 15b, 15c, 15d and 15e of its Affidavit of Documents corresponding to Exhibits WGH-23 to WGH-26 of the Affidavit of Way-Gar Ho filed in the context of the Motion, shall be kept under seal on the Court file, until further Order from the Court, pursuant to Rule 151 of the Rules;
6. Costs are awarded to the Defendants at a fixed amount of \$3,000.00.

“René LeBlanc”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1636-18

STYLE OF CAUSE: DEPURA PARTNERS LLC'S v DESJARDINS
GENERAL INSURANCE INC, CERTAS DIRECT
INSURANCE COMPANY, THE PERSONAL
INSURANCE COMPANY

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JANUARY 21, 2020

**PUBLIC ORDER AND
REASONS:** LEBLANC J.

DATED: FEBRUARY 18, 2020

APPEARANCES:

Bob H. Sotiriadis
Catherine Tall Dubé

FOR THE APPLICANT

Brian Daley
Renaud G. Gendron

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robic L.L.P
Barristers and Solicitors
Montréal, Québec

FOR THE APPLICANT

Norton Rose Fulbright
Barristers and Solicitors
Montréal, Québec

FOR THE RESPONDENT