

Federal Court



Cour fédérale

**Date: 20221021**

**Docket: T-1662-17**

**Citation: 2022 FC 1445**

**Ottawa, Ontario, October 21, 2022**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**CROCS CANADA, INC. AND CROCS INC.**

**Plaintiffs  
(Defendants by Counterclaim)**

**and**

**DOUBLE DIAMOND DISTRIBUTION LTD.**

**Defendant  
(Plaintiff by Counterclaim)**

**ORDER AND REASONS**

I. Overview

[1] The Defendant, Double Diamond Distribution Ltd [Double Diamond or Defendant] makes a request in writing for a confidentiality order pursuant to Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106 [FCR].

[2] The Plaintiffs, Crocs Canada, Inc. and Crocs Inc. [collectively, Crocs or Plaintiffs] succeeded in their action for industrial design infringement against Double Diamond. The Court awarded Crocs an accounting of Double Diamond's profits that they elected to receive instead of damages. This Order is being issued contemporaneously with the Judgment in the action.

[3] Toward the end of the trial held March 14-21, 2022, Double Diamond indicated the possibility of a confidentiality order in respect of several of Double Diamond's financial statements that were produced. Having admitted its gross profits in advance of trial, Double Diamond's CEO and fact witness, Steven Mann was cross-examined on the financial statements regarding asserted expenses that Double Diamond argued should be deducted from gross profits in calculating the profits award.

[4] As permitted, the parties subsequently filed their material regarding Double Diamond's request in accordance with the schedule set at trial. The relevant financial statements were sealed in the meantime to preserve their asserted confidentiality.

[5] Having considered the parties' material, including their submissions, I am not persuaded that Double Diamond's request should be granted. For the reasons and on the terms below, I thus dismiss Double Diamond's motion.

## II. Background

[6] In preparation for trial, Crocs requested Double Diamond's financial statements during the examination for discovery of Mr. Mann. Double Diamond objected to this request and did

not produce its financial statements. As a result, Crocs brought a motion to compel. On April 30, 2019, Case Management Judge [CMJ] Tabib ordered the financial statements need not be produced. This outcome was based on Double Diamond's undertaking to waive the strictures of the United States [US] protective order which prevented Crocs from accessing or using, for the purpose of this action, information provided in parallel litigation in the US. Notwithstanding the April 30, 2019 order, Double Diamond did not comply with its undertaking to put the waiver in place.

[7] At a separate point during Mr. Mann's examination for discovery, Crocs also requested supporting documents and answers to written discovery questions regarding Double Diamond's production 76 [Document 76], a spreadsheet of Double Diamond's sales of Fleece Dawgs, cost of goods, and operating expenses that was prepared for this action. In response, Double Diamond simply directed Crocs back to Document 76. Absent a meaningful response, Crocs successfully brought a motion to compel Double Diamond's compliance with these written discovery questions and other outstanding Court orders. On July 21, 2021, CMJ Tabib ordered that Double Diamond provide all supporting documentation and its financial statements from 2012 to 2018. Double Diamond then served Crocs with a revised Document 76 [Revised Document 76] and its financial statements that are now the subject of this motion.

[8] Mr. Mann was examined and cross-examined at trial on the Revised Document 76 and the financial statements that were produced. Double Diamond did not indicate any intention to move for a confidentiality order until the fifth day of trial, March 18, 2022, after Crocs' counsel raised the issue. Until this point, Double Diamond had not sought either a protective order for the

discovery phase of the action or a confidentiality order, even though the documents are marked as highly confidential.

### III. Issues

[9] The issue for determination on this motion is whether the Defendant's financial statements should be treated as confidential and withheld from the public, notwithstanding the public interest in open and accessible court proceedings, as stated in subsection 151(2) of the *FCR*.

### IV. Analysis

[10] I find that Double Diamond has not met the applicable test described below for having its financial statements treated as confidential.

[11] Court proceedings are presumptively open to the public: *Sherman Estate v Donovan*, 2021 SCC 25 at para 37 [*Sherman Estate*]. As recently noted by my colleague Justice Zinn, sealing a court file is an extraordinary measure which involves "a high burden on the moving party to support the request with clear, non-speculative evidence": *SSN v Canada (Citizenship and Immigration)*, 2022 FC 1189 [*SSN*] at para 4.

[12] To persuade the Court that a confidentiality order is warranted, the moving party must establish the following conjunctive elements: (1) that openness in the circumstances poses a serious risk to an important public interest; (2) the order sought is necessary because reasonably

alternative measures will not prevent this risk; and (3) the benefits of the order outweigh its negative effects [*Sierra Club* Test]: *Sherman Estate*, above at para 38, citing *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*]; *SSN*, above at para 5, citing *Garcia Puebla v Canada (The Minister of Citizenship and Immigration)*, 2022 FC 879 at para 9.

[13] Double Diamond submits that in the past, corporate financial statements have been considered confidential. None of the cases on which Double Diamond relies, however, applies the *Sierra Club* Test, and further, they are distinguishable, in my view.

[14] For example, in *Montana Band of Indians v Canada (Minister of Indian and Northern Affairs)*, 1988 CanLII 9357 (FC), [1989] 1 FC 143, the sealed records contained sensitive financial information that was released to a third party by the Canadian government through an Access to Information request, rather than through trial disclosure.

[15] As a further example, in *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430, 1993 CanLII 73 (SCC), the public interest at issue was maintaining the privacy of taxpayers' personal information to encourage voluntary tax reporting. That interest was (and continues to be) the subject of a legislative confidentiality provision.

[16] I find that Double Diamond has conflated an expectation of privacy with the *Sierra Club* Test for sealing records. Double Diamond asserts that it always has treated its financial information as highly confidential and that it has maintained this position with Crocs in the

context of litigation taking place in the US between the parties. The question, however, is not whether Double Diamond has treated the information as confidential in the past, but rather, whether it meets the *Sierra Club* Test.

[17] Double Diamond has not provided any evidence in this motion, except impermissibly in its written submissions. Nor has Double Diamond outlined any harm or serious risk that would occur were its financial statements to remain open, other than stating Double Diamond competes in a competitive market for clog-style footwear products in Canada. The evidence at trial established that the parties are competitors, and while this may be a good reason justifying a protective order, the time for seeking such an order is long past in this matter.

[18] I agree with the Plaintiffs that the Defendant is operating on the presumption that it is entitled to have the financial statements treated as confidential because it asserts that they are. Further, Double Diamond points to the protective order in the US litigation in support and relies on Crocs' statements that they do not take a position on the motion. Double Diamond's presumption is misplaced, in my view.

[19] Under Canadian law, a protective order typically is sought to protect the information exchanged during the pre-trial discovery phase of an intellectual property dispute: *Canadian National Railway Company v BNSF Railway Company*, 2020 FCA 45 [*Canadian National*] at para 2. Double Diamond has not provided any evidence to support that US law and practice regarding protective orders is any different or applies more broadly. As the Federal Court of Appeal held in *Canadian National* (at paras 24-25), protective orders do not impact the open

court principle because they are used in situations such as pre-trial discovery where the principle is not engaged. In other words, the fact of a protective order in US litigation involving these parties or that Crocs take no position on the motion, does not absolve Double Diamond from satisfying the Court that it has met the *Sierra Club* Test.

[20] Regarding the first prong of the *Sierra Club* Test, I am not persuaded that the interest Double Diamond describes, of competing in a competitive market for clog-style footwear, is anything other than an interest specific to Double Diamond, as opposed to a broader public interest in confidentiality warranting the exercise of the Court's discretion to grant Double Diamond's motion: *Sierra Club*, above at para 55.

[21] I further find that Double Diamond has not met the second prong of the *Sierra Club* Test because it has not shown how sealing its financial statements is necessary to prevent a serious risk or detrimental effect.

[22] I also am not satisfied that in this case the benefits of the order Double Diamond seeks outweigh its negative effects. Double Diamond has not evidenced, for example, a confidentiality agreement between the parties that applies to Canada such that disclosure of the information contained in the financial statements in this action would involve necessarily a breach of that agreement. A situation like that could be "characterized more broadly as a general commercial interest of preserving confidential information" and constitute a public interest that would outweigh the open court principle: *Sierra Club* at para 55, citing *FN (Re)*, [2000] 1 SCR 880, 2000 SCC 35 (CanLII) at para 10.

[23] I further agree with the Plaintiffs that the Defendant repeatedly and inappropriately attempts to shift the burden of the *Sierra Club* Test onto the Plaintiffs, by pointing out that Crocs offered no submissions at trial regarding why Double Diamond's financial statements should be made part of the trial record for the public to view them. In my view, however, this simply is not Crocs' burden to meet.

V. Conclusion

[24] For the above reasons, I conclude that the Defendant has not met the *Sierra Club* Test, and I therefore decline to grant the Defendant's motion.

[25] That said, I am prepared to suspend the operation of this Order, and to extend the sealing order granted at the end of trial for Double Diamond's financial statements, excluding any relevant information contained in the Statement of Admitted Facts, until the time for an appeal of the outcome of the trial has expired and no appeal has been taken, or until the appeal is disposed of, if an appeal has been taken, for two reasons. First, Crocs take no position on this motion. Second, Crocs expressly do not advocate that Double Diamond's financial statements be maintained as public. I also observe that, once the time for taking an appeal has expired or any appeal taken has been disposed of, the financial statements, or any other trial exhibits for that matter, can be returned to the parties or their solicitors pursuant to Rule 26.1 of the *FCR*.



VI. Costs

[26] Double Diamond makes no submissions regarding the costs of this motion, while Crocs submit that no costs should be payable. In the circumstances, no costs are awarded. I add, however, that Double Diamond's dilatoriness in seeking a confidentiality order at the end rather than in advance of trial (for example, when Double Diamond produced its financial statements further to CMJ Tabib's July 21, 2021 Order but in the absence of any protective or confidentiality order of this Court), has resulted in a significant waste of Court resources.

**ORDER in T-1662-17**

**THIS COURT ORDERS that:**

1. The Defendant's motion for a confidentiality order is dismissed.
2. The operation of this Order is suspended, and the sealing order granted at trial regarding the Defendant's financial statements produced on March 18, 2022 is extended, until the time for an appeal of the outcome of the trial has expired and no appeal has been taken, or until the appeal is disposed of, if an appeal has been taken.
3. No costs of this motion are awarded.

"Janet M. Fuhrer"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1662-17

**STYLE OF CAUSE:** CROCS CANADA INC. AND CROCS INC. v DOUBLE  
DIAMOND DISTRIBUTION LTD

**ORDER AND REASONS:** FUHRER J.

**DATED:** OCTOBER 21, 2022

**APPEARANCES:**

Alexander Gloor  
Erin Creber  
Jenny Thistle

FOR THE PLAINTIFFS  
(DEFENDANTS BY COUNTERCLAIM)

Tom C. Stepper

FOR THE DEFENDANT  
(PLAINTIFF BY COUNTERCLAIM)

**SOLICITORS OF RECORD:**

Alexander Gloor  
Erin Creber  
Jenny Thistle  
Gowling WLG (Canada) LLP  
Ottawa, Ontario

FOR THE PLAINTIFFS  
(DEFENDANTS BY COUNTERCLAIM)

Tom C. Stepper  
Professional Corporation  
Calgary, Alberta

FOR THE DEFENDANT  
(PLAINTIFF BY COUNTERCLAIM)