Federal Court of Appeal Upholds Protective Orders Preventing Company President from Viewing Opposing Party's Confidential Business Information

October 22, 2018

***Arkipelago Architecture Inc. v. Enghouse Systems Limited,* 2018 FCA 192**

In relation to a copyright dispute, the Federal Court of Appeal (FCA) dismissed Arkipelago's appeal from a decision of the Federal Court, which dismissed Arkipelago's appeal from the Case Management Judge's (CMJ's) protective order. Under this protective order, Arkipelago's president and sole employee, Mr. O'Hara, was not allowed access to any information designated by the respondents as for "counsel's and expert's eyes only — highly confidential information" (CEEO).

In front of the CMJ, Arkipelago argued that access to the confidential information (CI), which included computer source code, and client and financial information, was necessary for Mr. O'Hara to instruct counsel. The CMJ was unpersuaded by these "bald assertions", finding that there was a real and substantial risk of Mr. O'Hara subconsciously or inadvertently using the CI in future business activities.

The FCA decided that the Federal Court and the CMJ did not adopt a lower standard of risk than is required to justify a CEEO order. The FCA stated that such orders should only be granted in unusual circumstances. In the context of harm to a commercial business interest, a CEEO is warranted where the disclosure of CI may result in a serious threat or risk that is real, substantial, and grounded in the evidence. This was no different than the standard adopted by the Federal Court and the CMJ.

The FCA then decided that there was no palpable and overriding error in the Federal Court's decision that the evidence supported the CMJ's finding that this legal test had been met. There was a well-founded concern that Mr. O'Hara, being the only employee of the corporation, would subconsciously use the CI. This use would have obvious and significant consequences for the respondent given the small and highly competitive field in which both parties work. Furthermore, the lack of particularity regarding why the respondent's CI was necessary for the appellant to instruct counsel supported the CMJ's finding. Therefore, the appeal was dismissed.

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