Federal Court  Cour fédérale

Date: 20201217

Docket: T-1606-18

Citation: 2020 FC 1161

Ottawa, Ontario, December 17, 2020

PRESENT: Madam Justice Walker

BETWEEN:

RICHARDS PACKAGING INC.

Plaintiff/
Defendant by Counterclaim

and

DISTRIMEDIC INC.

Defendant/
Plaintiff by Counterclaim

ORDER AND REASONS
(Plaintiff's Motion and Defendant's Cross-Motion appealing in part the Confidential Order of Madam Prothonotary Steele dated February 10, 2020)

[1] Richards Packaging Inc. (Richards) appeals, in part, an order of Prothonotary Alexandra Steele, the Case Management Judge, dated February 10, 2020 (Confidential Order). Prothonotary Steele validated the designation as "Confidential – Counsel's Eyes Only" (C-CEO) of twenty-eight (28) of the thirty-three (33) documents at issue before her. The designations were made by Richards under a Confidentiality Agreement between the parties governing the exchange of

confidential documents in the course of this patent litigation. The documents in question (Documents) were listed in Schedule 1 to Richards' Affidavit of Documents sworn on April 3, 2019. In paragraphs 5 and 7 of the formal Order contained in the Confidential Order, Prothonotary Steele invalidated the C-CEO designations of Documents 23.3, 23.4, 23.5 and 91, and permitted them to be re-designated as "Confidential Information" (CI). Richards appeals paragraphs 5 and 7 of the Order and requests that the Court validate the C-CEO designations of Documents 23.3, 23.4, 23.5 and 91.

[2] In response, Distrimedic Inc. (Distrimedic) brings a motion cross-appealing the Confidential Order. If the Court allows Richards' appeal, Distrimedic requests that the Court order a reconsideration *de novo* of Richards' original validation motion before Prothonotary Steele.

[3] The appeal and cross-appeal were each brought by motion pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 (Rules). I address the appeal and cross-appeal in this Order and Reasons.

[4] For the reasons that follow, Richards' appeal will be allowed and Documents 23.3, 23.4, 23.5 and 91 validated as C-CEO under the Confidentiality Agreement. In addition, Distrimedic's cross-appeal will be dismissed.

I. Background

[5] Richards and Distrimedic are direct competitors in the field of medical products used to facilitate the distribution of medication to patients, including pill receptacles and cover sheets for those pill receptacles. Richards carries on this business through its Dispill division. The two parties are essentially the only major competitors in the niche market for these products.

[6] Richards filed an action against Distrimedic for infringement of three of its Canadian patents on September 4, 2018. Distrimedic filed its Statement of Defence and Counterclaim on December 21, 2018 denying infringement and asserting that one of the three patents is invalid.

[7] On April 1, 2019, the parties entered into the Confidentiality Agreement. The Confidentiality Agreement is two-tiered, meaning it contains provisions for the designation of documents as: (1) CI, which restricts disclosure of documents to the Court, the parties, and their counsel and experts; and (2) C-CEO, which restricts disclosure of documents to only the Court and the parties' outside counsel and experts, to the exclusion of the receiving party. The Confidentiality Agreement contains a challenge provision pursuant to which a receiving party may object to a producing party's confidentiality designation of one or more documents. In response, the producing party may bring a motion before the Court to validate the challenged confidentiality designation(s).

[8] In its Affidavit of Documents, Richards initially designated fifty-eight (58) of its Documents as C-CEO. Distrimedic objected to the C-CEO designations and Richards agreed to re-designate twenty-five (25) Documents as CI. Richards maintained thirty-three (33) C-CEO

designations and brought a motion before Prothonotary Steele pursuant to section 22 of the Confidentiality Agreement to validate the remaining C-CEO designations.

II. Confidential Order

[9] Prothonotary Steele validated the C-CEO designations of the majority of documents at issue in Richards' validation motion. Her refusal to validate the C-CEO designation of four Documents is at issue in this appeal.

[10] Prothonotary Steele described the common, two-tier system (CI and C-CEO) for protective measures contained in the Confidentiality Agreement and set out the legal principles applicable to her analysis:

A. C-CEO serves "to prevent the disclosure of highly sensitive and confidential information to officers, executives, employees or anyone else involved in the receiving party's day-to-day operations from consciously or unconsciously grounding their business decisions on the confidential information to the competitive disadvantage of the producing party" (*Angelcare Development Inc. v Munchkin, Inc*., 2018 FC 447 at para 20 (*Angelcare*)). The disclosure of C-CEO information must present a "serious threat" that is "real, substantial and grounded in the evidence" (*Bard Peripheral Vascular Inc. v W.L. Gore & Associates, Inc.*, 2017 FC 585 at paras 15, 16; *Pliteq, Inc. v Wilrep Ltd.*, 2019 FC 158 at paras 6, 9 (*Pliteq*)).

B. The party asserting confidentiality must establish objectively on a balance of probabilities that (1) it has treated the information as confidential at all times; and (2) its proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information (*AB Hassle v Canada (Minister of National Health and Welfare*), 1998 CanLII 8942 (FC) at paras 29-30 (*AB Hassle*)).

C. A C-CEO designation will not be made lightly and will not be ordered on the basis of bald allegations (*Glaxo Group Limited v Novopharm Ltd.*, 1998 CanLII 7667 (FCA) at paras 2-3; *Rivard Instruments, Inc. v Ideal Instruments Inc.*, 2006 FC 1338 at para 2 (*Rivard*)).

D. A C-CEO designation may be justified if, for example (a) the parties are direct competitors and the information in issue would allow the receiving party to injure the producing party's interests whether intentionally or unintentionally (*Lundbeck*

> *Canada Inc. v Canada (Health)*, 2007 FC 412 at paras 16, 19 (*Lundbeck*)); and/or (b) the receiving party has a single representative who may use the information in issue consciously or unconsciously to further their business interests (*Arkipelago Architecture Inc. v Enghouse Systems Limited*, 2018 FC 37 at paras 7, 20, affirmed 2018 FCA 192 at para 16 (*Arkipelago Architecture*)).

[11] Prothonotary Steele addressed paragraph 21 of the Confidentiality Agreement which states:

> 21. A rebuttable presumption will exist with respect to the designation as **Confidential Information or Confidential Information - Counsel's Eyes Only** of documents containing (a) trade secrets or other confidential research, development, business, commercial or technical information entitled to protection under applicable law, (b) non-public financial, business or technical information of the Party or a person or entity directly or indirectly affiliated with the Party, or (c) information protected or restricted by statute or governmental regulation.

[12] Prothonotary Steele cautioned that, although the designation of documents that fall within the definitions described in paragraph 21 may be presumptively valid, Richards nonetheless bore the burden of establishing the propriety of its C-CEO designation pursuant to paragraph 22 of the Confidentiality Agreement. Once Richards did so, Distrimedic bore the burden of rebutting the presumption in paragraph 21.

[13] Prothonotary Steele considered the affidavit of Mr. Alain Proulx, Richards' director of national sales, sworn on August 1, 2019 (Proulx Affidavit). The Proulx Affidavit was Richards' sole evidence in support of its motion. Prothonotary Steele also reviewed the transcript of Distrimedic's cross-examination of Mr. Proulx (Transcript) and Distrimedic's argument that no weight should be given to the Proulx Affidavit because it was based on hearsay and did not meet the high threshold required to support a C-CEO designation. Prothonotary Steele was not

persuaded that Mr. Proulx's evidence should be accorded no weight. She stated that any weakness in Richards' evidence would factor into her determination of whether Richards had met its burden of validating its C-CEO designations.

[14] Prothonotary Steele noted that Distrimedic filed no evidence in response to the validation motion.

[15] Prothonotary Steele concluded that the Documents Richards described as highly confidential technical information (technical drawings or prototypes, inventors' notes) were presumptively CI as they contained confidential research, development or technical information or otherwise non-public technical information of Richards or its suppliers (paragraphs 1c), 1d) and 21b) of the Confidentiality Agreement). She found that Richards had a reasonable expectation the Documents would remain confidential even though they were not marked as such.

[16] Richards premised its C-CEO designation substantially on the basis that the evidence in question revealed precise measurements and specifications that are not readily ascertainable from its products and go directly to the quality of those products. Richards' evidence was that, if such information were disclosed, Distrimedic could improve the quality of its allegedly inferior products and gain a competitive advantage. Prothonotary Steele stated that the Court had no evidence that Distrimedic's products were of inferior quality or that Distrimedic or its sole director, Mr. Claude Filiatrault, would intentionally misuse the information. She then considered whether Mr. Filiatrault, as the person receiving the information on behalf of Distrimedic for the

purpose of instructing counsel, might voluntarily or unwittingly be influenced by this knowledge in his business decisions for Distrimedic. Prothonotary Steele stated:

> [49] Distrimedic argues that it is impossible for it to be "influenced" by specific measurements, specifications and test results. While this may seem an attractive argument on its face given the minutiae of the technical information, the Court is not in a position to infer that no such influence is impossible absent any evidence from Distrimedic or Mr. Filiatrault refuting the assertions of Mr. Proulx. The evidence shows that Mr. Filiatrault is an experienced businessman with a long history in this particular industry, who is currently the sole director, shareholder and employee of Distrimedic (Exhibit AP-3), who appears to also have interests in related companies that share with Distrimedic the process of putting identical products on the market to those of Richards (*Distrimedic Inc. v Dispill Inc.* 2013 FC 1043, at para 13) and marketed as "The Alternative" (Exhibit AP-4), his company Distrimedic is the most important competitor to Richards on the Canadian market and he is the sole instructing principal to counsel for the purpose of this litigation. Given these facts and the absence of evidence to the contrary, it is not unreasonable to conclude that the knowledge acquired by Mr. Filiatr[ault] in this litigation may influence certain future decisions regarding its own products. Again, there is no evidence that Mr. Filiatrault would voluntarily use or disclose this information to Richards' detriment, but the Court cannot discard the possibility that he would not be influenced by this additional knowledge which would not otherwise be accessible to Distrimedic but for the litigation.

[17] Prothonotary Steele also stated that the Court had received no evidence or explanation as to why Mr. Filiatrault required Richards' technical information to instruct counsel. She could not conclude that the harm that would occur to Distrimedic as a result of maintaining the C-CEO designations would be greater than the harm to Richards were the designations not maintained.

[18] Prothonotary Steele validated Richards' C-CEO for all of the Documents containing technical information with the exception of Documents 23.3, 23.4 and 23.5 (Technical Documents). Prothonotary Steele noted that the Technical Documents each bear a disclaimer that

the information they contain is the property of Tilton, one of Richards' suppliers. She stated that paragraph 1d) of the Confidentiality Agreement provides that only the information of a producing party can be designated as C-CEO and concluded that "the Court has no alternative but to conclude that these documents are third-party documents and that the C-CEO designation is invalid and should be removed".

[19] Prothonotary Steele then turned to the one remaining Document in issue in this appeal, Document 91. Document 91 contains Richards' sales volumes over a number of years by type of product, whether the product was sold at regular price or with a rebate, and some geographic information. Richards' concern was that Document 91 would allow Distrimedic to compare its sales with those of Richards to determine the size of the Canadian market for the various products and Richards' market share, and to estimate Richards' revenues and profits for each product. Distrimedic argued that Document 91 does not contain dollar figures, model or client names, or discounts and there was no justification for a C-CEO designation.

[20] Prothonotary Steele was satisfied that the information in Document 91 is presumptively confidential but was not prepared to validate the C-CEO designation. She drew a number of conclusions from the information in the Document, including the fact that it only contains information from past years, and characterized the conclusions drawn by Mr. Proulx in his Affidavit as "unsupported". Prothonotary Steele also found that Mr. Proulx's evidence in support of a C-CEO designation for Document 91 had been discredited on cross-examination.

III. Standard of review and issue on appeal

[21] The applicable standard of review for appeals of prothonotaries' discretionary orders is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraphs 66 and 79. Such orders are to be reviewed on the civil appellate standard (*Housen v Nikolaisen*, 2002 SCC 33) as follows: (1) the correctness standard for questions of law and questions of mixed fact and law if there is an extricable legal principle at issue; and (2) palpable and overriding error for factual conclusions and questions of mixed fact and law.

[22] At issue in this appeal is Prothonotary Steele's refusal to validate the C-CEO designation made by Richards under the terms of the Confidentiality Agreement in respect of four Documents. The determination of the appeal rests on my analysis of Prothonotary Steele's application of the law to the facts and the terms of the Confidentiality Agreement and involves no pure or extricable question of law. Therefore, her conclusions are owed deference by this Court, absent palpable and overriding error.

IV. Analysis

[23] There are two factual aspects of the parties' business relationship that were recognized by Prothonotary Steele in the Confidential Order and that are central to this appeal:

1. Mr. Filiatrault is the founder and current sole shareholder, director and employee of Distrimedic. He is an individual with enormous experience and past history in this industry who appears to have interests in related companies that, with Distrimedic, sell identical products to those of Richards (citing *Distrimedic Inc. v Dispill Inc., 2013 FC 1043* at para 13);

2. Distrimedic is the most important competitor to Richards in the Canadian market and Mr. Filiatrault is the sole instructing principal to counsel for the purposes of this litigation.

[24] Prothonotary Steele stated that there was no evidence either that Distrimedic's products are inferior to those of Richards or that Mr. Filiatrault or Distrimedic would intentionally misuse any confidential information disclosed in the litigation for competitive advantage. Nevertheless, she considered whether Mr. Filiatrault might unknowingly use such information to Richards' detriment (*Pliteq* at para 27). Based on the facts of this case, Prothonotary Steele determined in paragraph 49 of the Confidential Order that "it is not unreasonable to conclude that the knowledge acquired by Mr. Filiatr[ault] in this litigation may influence certain future decisions regarding its own products".

[25] Mr. Proulx explained Mr. Filiatrault's history with the Richards' Dispill division in the Proulx Affidavit. His evidence is not challenged by Distrimedic. In fact, Distrimedic filed no evidence in support of its contention that Mr. Filiatrault should have access to the Documents at issue (see, *Rivard* at para 38). Mr. Filiatrault was one of three co-owners of Dispill Inc. from 1998 to 2002. In 2002, following a dispute, the founder of Dispill purchased the shares of Mr. Filiatrault and the third co-owner. Mr. Filiatrault and the third individual then entered the same line of business, incorporating Distrimedic to compete with Dispill. In 2005, Richards purchased Dispill Inc., including certain Canadian patents and know-how. Dispill now operates as a division of Richards.

[26] The 'empty head' principle described by Prothonotary Steele is recognized in this Court's jurisprudence and underlines the importance of the factual and competitive context in determining the validity of a proposed C-CEO designation (*Rivard* at para 39; *Angelcare* at para 20). The Technical Documents and Document 91 are of the type where the principle is

directly on point. They each contain detailed information that Richards has maintained in strict confidence. The competitive landscape in which the two litigants operate as major competitors is not in dispute. While there is no suggestion that Mr. Filiatrault will intentionally or maliciously use the information, his position in Distrimedic and his history in the industry generally and with Dispill are also not in dispute (*Arkipelago Architecture* at para 20; *Lundbeck* at para 9).

Documents 23.3, 23.4, 23.5 – Technical information and drawings re pill receptacles

[27] Richards submits that Prothonotary Steele made a palpable and overriding error in concluding that the Confidentiality Agreement precludes a C-CEO designation for information developed on its behalf by a third party but marked as proprietary to the third party. Richards argues that the combination of paragraphs 1d), 3 and 26 of the Confidentiality Agreement permits a party to designate as C-CEO third-party information produced by the party (and not the third party) if the information is shown to be (1) highly confidential to the disclosing party; and (2) its disclosure to employees of the receiving party will cause serious prejudice to the proprietary, commercial or scientific interests of the disclosing party (*AB Hassle* at paras 29-30; *Canadian National Railway Company v BNSF Railway Company*, 2020 FCA 45 at paras 14, 23-24 (*CN Railway*)).

[28] Distrimedic disagrees with Richards' interpretation of the Confidentiality Agreement and argues that, because the Technical Documents were produced by Richards and not Tilton, paragraph 3 does not permit their designation as C-CEO. Distrimedic also argues that the information in the documents is proprietary to Tilton and Tilton has filed no evidence that it will

suffer prejudice if the Technical Documents are disclosed to Mr. Filiatrault, a fatal flaw in Richards' Motion.

[29] Prothonotary Steele concluded that the Technical Documents were not validly designated as C-CEO because they were not Richards' documents. Rather, they had been prepared by Tilton and contained the following legend (Legend):

> THE INFORMATION CONTAINED IN THIS DRAWING IS THE SOLE PROPERTY OF TILTON PLASTIC. ANY REPRODUCTION IN PART OR AS A WHOLE WITHOUT THE WRITTEN PERMISSION OF TILTON PLASTIC IS PROHIBITED.

[30] Prothonotary Steele stated:

> [51] The only exception to this [C-CEO] finding concerns documents # 23.3, 23.4 and 23.5 (forming part of Exhibit AP-6). These technical drawings contain a specific mention or disclaimer that the information they contain is the property of Tilton and cannot be reproduced without its permission. (Documents bearing a RotoMetrics logo contain no […] such disclaimer). Paragraph 1d) of the Agreement provides that only the information of a producing party can be designated as C-CEO. Since Richards has not produced any agreements or documents supporting the fact that Tilton documents should be treated as highly confidential C-CEO (as opposed to confidential CI), the Court has no alternative but to conclude that these documents are third-party documents and that the C-CEO designation is invalid and should be removed.
>
> (Emphasis in original)

[31] Paragraphs 1d) and 3 of the Confidentiality Agreement provide that:

> 1. For the purposes of this Agreement:
>
> d) "Confidential Information – Counsel's Eyes Only" within the context of this Agreement means information that a producing Party claims in good faith to be its highly sensitive commercial or technical information;

> 3. A producing Party shall have the right and reasonable opportunity to designate as **Confidential Information** or **Confidential Information – Counsel's Eyes Only** such documents, physical exhibits and information, including documents produced by an affiliate of the producing Party or a non-party, which it determines constitutes **Confidential Information** or **Confidential Information – Counsel's Eyes Only**.

[32] The substance of the Technical Documents is virtually identical to the information contained in certain other technical Documents produced in the litigation by Richards but developed for Richards by its suppliers. Prothonotary Steele validated the C-CEO designations of those other similar technical documents which, for ease of reference, I will refer to as the "C-CEO Technical Documents". The distinguishing element of the Technical Documents is the Legend which led Prothonotary Steele to conclude that she had no alternative but to invalidate the C-CEO designation of the Technical Documents.

[33] The Technical and C-CEO Technical Documents contain precise configurations, designs and measurements used or to be used in products under development for Richards. In simple terms, these Documents provide a roadmap to Richards' research and development (R&D) processes. The cover emails that accompanied the various iterations of the Technical and C-CEO Technical Documents establish that the suppliers were engaged by Richards to develop product design proposals for Richards. The designations of the C-CEO Technical Documents were validated by Prothonotary Steele on the basis of Mr. Proulx's evidence. She found that the disclosure of the C-CEO Technical Documents to Mr. Filiatrault would result in serious prejudice to Richards' commercial interests. Having reviewed Mr. Proulx's evidence explaining

the nature of the documents and their use by Richards, I find no error in Prothonotary Steele's analysis (*Rivard* at para 38).

[34] Prothonotary Steele focussed her analysis of the Technical Documents on paragraph 1d) of the Confidentiality Agreement. I find that she did not err in doing so. However, I also find that Prothonotary Steele made a palpable and overriding error in concluding that she had no alternative but to invalidate the C-CEO designations of the Technical Documents because paragraph 1d) "provides that only the information of a producing party can be designated as C-CEO" to the exclusion of the Technical Documents.

[35] The critical question in Richards' appeal is the impact of the Legend and whether Tilton's claim to a proprietary interest in the information in the Technical Documents necessarily defeats a C-CEO designation based on the definition of the term in paragraph 1d). I find that it does not.

[36] There is a distinction in purpose and result between the reservation by a third party of a proprietary interest in information and a C-CEO designation of that information under the Confidentiality Agreement. The purpose of the Legend is to prevent Richards from using the information in the Technical Documents other than in its own manufacturing process. Richards is not permitted to distribute or sell that information to third parties. The manufacturing know-how reflected in the Technical Documents remains that of Tilton. The Legend protects Tilton's ability to market its proprietary production know-how, its stock in trade, to other customers. The result or consequence of the proprietary reservation is to prevent Richards from using the information beyond the scope of its contractual arrangements with Tilton.

[37] The purpose of a C-CEO designation under the Confidentiality Agreement is to protect Richards' technical and commercial interests by preventing disclosure of highly sensitive R&D information to Distrimedic, a direct competitor. The consequence of the designation is to limit the use of the C-CEO information to and during the litigation.

[38] The fact the information in the Technical Documents is stated to be proprietary to Tilton does not preclude Richards from establishing that the information in the Technical Documents is *its* highly sensitive information within the paragraph 1d) definition of C-CEO information. A proprietary interest is not inevitably a confidential interest. While the information in the Technical Documents may be proprietary to Tilton, it is not necessarily confidential or commercially sensitive to Tilton. If it is, it may nonetheless be confidential and commercially sensitive to Richards. Paragraph 1d) of the Confidentiality Agreement contemplates the designation as C-CEO by a disclosing party of confidential and sensitive technical information, whether its own or that prepared by a third party on its behalf, provided the disclosing party satisfies the test set out in *AB Hassle* (*AB Hassle* at para 11; *CN Railway* at paras 23-24). A contrary interpretation would result in a gap in the intended protections of the Confidentiality Agreement.

[39] The Technical Documents were developed by, under the direction of and for the benefit of Richards relying on Tilton's manufacturing know-how. There is no reason the documents would or should have been produced in the litigation by Tilton. The Technical Documents contain information specific to Richards' product development and commercial interests sufficient to render that information Richards' (*its*) highly sensitive technical information.

[40] The right to make a C-CEO designation is reserved to Richards and Distrimedic pursuant to paragraph 3 of the Confidentiality Agreement. To successfully defend a designation, Richards or Distrimedic must establish that the disclosure of the documents or information in question would prejudice its own commercial interests. With respect to the Technical Documents, the issue before Prothonotary Steele and now the Court is the effect of disclosure on Richards' interests. The fact that Tilton provided no evidence of the confidential and sensitive nature (to it) of the information it claims as proprietary is not determinative.

[41] The information in the Technical Documents has been consistently treated by Richards as confidential and is commercially and technically sensitive to Richards. Distrimedic filed no proof contesting Mr. Proulx's evidence in this regard, nor has Distrimedic established the necessity of disclosure to it of the Technical Documents in furtherance of this litigation.

[42] As stated above, Prothonotary Steele found that: (1) the information in all of the technical Documents disclosed by Richards was objectively confidential; and (2) disclosure of the information in the C-CEO Technical Documents to Distrimedic and Mr. Filiatrault would cause serious prejudice to Richards. I conclude that the configuration and prototype information contained in the Technical Documents is no different. The invalidation of their C-CEO designation and disclosure of the Technical Documents to Mr. Filiatrault would seriously prejudice Richards and would, in fact, undermine the utility of the C-CEO designations of the C-CEO Technical Documents. As Richards' counsel stated in argument, disclosure of the Technical Documents to Mr. Filiatrault would enable him to gain knowledge of Richards' future products before Richards has the opportunity to bring them to market.

[43] I find that the Technical Documents can properly be considered Richards' confidential information within the meaning of paragraph 1d) of the Confidentiality Agreement. Prothonotary Steele erred in concluding that she was constrained to find that the Technical Documents could not be designated C-CEO. The error was clear and was determinative of Prothonotary Steele's refusal to validate Richards' C-CEO designation of the Technical Documents.

[44] Paragraph 3 of the Confidentiality Agreement is poorly drafted and resulted in considerable argument in these Motions. The constituent elements of the paragraph can be paraphrased as:

A. A producing Party (here, Richards) has the right to designate as C-CEO;

B. Certain documents "including documents produced by an affiliate of the producing Party or a third-party";

C. Which "it" determines constitute C-CEO.

[45] The first element is straightforward. Richards has the right to make the C-CEO designation. The third element must be read in conjunction with paragraph 1d) and the definition of C-CEO. I find that the word "it" in the third element refers to the producing Party (Richards) and not the affiliate or third party (Tilton). Richards must determine that the Technical Documents are "information that [Richards] claims in good faith to be its highly sensitive commercial or technical information" (paragraph 1d)).

[46] Richards and Distrimedic disagree on the meaning of the second element of paragraph 3 and the phrase "including documents produced by an affiliate of the producing Party or a non-party". Richards argues that the paragraph extends to documents prepared by or proprietary to a third party but produced in the litigation by a party. Distrimedic relies on the words "produced

by" in paragraph 3 to argue that the documents in question must have been produced by the affiliate or third party. Distrimedic states that the paragraph does not permit Richards to assert a C-CEO designation because the Technical Documents were produced by Richards, not Tilton.

[47] I agree with Richards that paragraph 3 contemplates the production of documents by a party to the litigation and by an affiliate or third party. The use of the wording "including" is not exhaustive. Rather, it broadens the scope of documents that may fall within the ambit of the Confidentiality Agreement. Paragraph 3 is the operative paragraph of the Agreement, providing the right to each party to make CI and C-CEO designations. Paragraph 1d) is solely definitional. Distrimedic's restrictive interpretation of paragraph 3 would result in only documents produced by an affiliate or third party being capable of a CI or C-CEO designation under the Confidentiality Agreement.

Document 91 – Commercial and business information

[48] Document 91 consists of a series of detailed tables setting out Richards' unit sales by product from 2005 to 2019. The various tables report those sales on a monthly basis and distinguish between sales in Québec and sales in other provinces. The tables indicate numbers of products sold at regular price, with rebate, and with special promotion.

[49] Mr. Proulx described the nature of the information in Document 91 and its use by Richards. He gave his opinion as to the commercially damaging information Mr. Filiatrault

would be able to derive from Richards' detailed sales data. The evidence in the Proulx Affidavit regarding Document 91 was:

- because Richards and Distrimedic are direct competitors in a largely two-player market in Canada, the information would allow Distrimedic to compare its sales with those of Richards to determine the overall size of the Canadian market and Richards' market share. Distrimedic would also be able to estimate Richards' revenues and profits for each product it has developed over the years;
- Richards relies on its sales figure, volumes, market penetration and market share information to operate its business and Mr. Proulx assumed Distrimedic does the same;
- the information in Document 91 is highly sensitive and would allow Distrimedic to make business decisions on the basis of Richards' proprietary information and provide Distrimedic with valuable insight into the health of Richards' business in Canada.

[50] Richards submits that Prothonotary Steele made two palpable and overriding errors in invalidating the C-CEO designation of Document 91. Richards states that Prothonotary Steele erred in concluding that (1) the proof before her in support of the confidential and sensitive content of Document 91 was limited to two paragraphs of the Proulx Affidavit; and (2) Mr. Proulx's affidavit evidence was discredited on cross-examination. Richards argues that Prothonotary Steele's first conclusion ignores the granular content of Document 91 itself and Mr. Proulx's description of the strategic commercial information that can be derived from that content. Richards also argues that Mr. Proulx's analysis and opinions regarding Document 91 and Distrimedic's ability to extrapolate from the information it discloses were not contradicted on cross-examination.

[51] In response, Distrimedic maintains that Mr. Proulx's evidence was discredited on cross-examination and that Document 91 would not permit Mr. Filiatrault to derive the strategic information outlined by Mr. Proulx. Distrimedic emphasizes that neither Richards' pricing nor its market share for its Dispill products were set out in Document 91. Finally, Distrimedic submits

that the Court must defer to Prothonotary Steele's credibility findings and that the conclusions she drew in the Confidential Order were not clearly wrong.

[52] Prothonotary Steele's conclusion regarding Document 91 was:

> [55] The Court is prepared to accept that the document is CI. However, Mr. Proulx's evidence does not support a C-CEO designation. The entire evidence of Richards rests on paragraphs 67 and 68 of the Proulx Affidavit, which have been discredited on cross-examination. The Court fails to find any support for Richards' assertion that knowledge of the information contained in Exhibit AP-8 might affect the future business decisions of Mr. Filiatrault or Distrimedic. Much of the information contained in Exhibit AP-8 concerns past years. How this information could serve to ground, even unwittingly, Distrimedic's maketing [sic] or sales strategies is not explained. There is also no explanation as to how Richards might be prejudiced if the information was disclosed to Distrimedic or Mr. Filiatrault (*Pliteq*, at para 10). The Court cannot grant the relief sought by Richards based on the unsupported allegations of the Proulx Affidavit, especially given the fact that it is not apparent from the document itself that the information it contains would permit Distrimedic or Mr. Filiatrault to do what Richards suggests they could do, i.e. compare Distrimedic's sales with those of the Richards, determine the size of the Canadian market for cover sheets and pill receptacles and Richards market shares and estimate Richards revenues and profits for each product it has developed over the years.

[53] I find that Prothonotary Steele erred in her conclusion that Mr. Proulx's evidence had been discredited on cross-examination. I find that this error was clear based on the Transcript and was determinative of her refusal to uphold the C-CEO designation of Document 91.

[54] I have reviewed the relevant portion of the Transcript. Distrimedic's counsel posed a series of questions to Mr. Proulx that focussed on information that Document 91 does not contain (model numbers, sales figures (and rebate figures), market share). Mr. Proulx answered the

questions truthfully but did not contradict the evidence in his Affidavit. His admissions regarding the absence of information from the Affidavit do not undermine his evidence regarding the uses Mr. Filiatrault could make of the information that is set out in Document 91. This evidence, coupled with Mr. Proulx's explanation of the importance of the content of the Document, remains unchallenged.

[55] Document 91 contains detailed unit sales information over an appreciable period of time, by product, in Canada. It also contains regional sales information and forms a matrix for a review of the Dispill business by unit sales, geography and rebate strategy. Mr. Proulx stated in his Affidavit that, because the parties are direct competitors who share the majority of the total industry market in Canada, the information would allow Distrimedic to add its unit sales to those of Richards to determine the size of the Canadian market and Richards' market shares not only in general terms but on a product-by-product basis. Richards' sales information would also, in Mr. Proulx's opinion, allow Distrimedic to estimate Richards' revenues and profits for each product developed over the years given Mr. Filiatrault's knowledge of the market and its economic drivers.

[56] Distrimedic argues, for example, that the geographic breakdown in Document 91 is limited to Québec and the other provinces. However, Distrimedic led no evidence to suggest that the breakdown in Document 91 is not the critical breakdown for the Canadian market, nor did it provide evidence regarding the difficulties of estimating market share once in possession of Richards' sales information. On cross-examination, Mr. Proulx admitted that he did not know Distrimedic's Canadian market share(s). Distrimedic argues that this admission undermines the

utility of Document 91 but I agree with Richards that the admission highlights the importance to each party of maintaining the confidentiality of its own segmented sales information. Neither party can reasonably estimate total market for their products without the other's information.

[57] Prothonotary Steele was concerned that Document 91 contained historic financial information but the fact that it pertains to Richards' prior operating years is not sufficient to preclude its use as a predictor of Richards' future business endeavours. The support for Mr. Proulx's assertion that knowledge of the Document 91 information might affect Mr. Filiatrault's future business decisions is found in the detailed nature of the Document itself and in the opinions and explanations provided by Mr. Proulx in his Affidavit.

[58] I find that the granular information contained in Document 91 and Mr. Proulx's explanation of how the information could ground Distrimedic's marketing and sales strategies support Richards' position that disclosure of Document 91 to Distrimedic and Mr. Filiatrault would result in serious competitive prejudice. I find that Prothonotary Steele erred in her assessment of the content of the Document and her conclusion that it is not apparent that the information it contains would be capable of the extrapolations explained by Mr. Proulx.

[59] Prothonotary Steele accepted that the information contained in Document 91 had been accumulated by Richards with the reasonable expectation that it would remain confidential. I find that Richards has satisfied the criteria necessary to designate Document 91 as C-CEO and that Prothonotary Steele's contrary conclusion was a palpable and determinative error.

V. Conclusion regarding Richards' appeal, in part, of the Confidential Order

[60] In summary, I have concluded that the C-CEO designations of Documents 23.3, 23.4, 23.5 and 91 are valid pursuant to paragraphs 1d), 3, 8 and 22 of the Confidentiality Agreement. Richards' appeal of paragraphs 5 and 7 of the formal Order contained in the Confidential Order will be allowed.

VI. Distrimedic's cross-appeal – Request for hearing *de novo*

[61] By way of cross-appeal, Distrimedic requests that, if I grant Richards' appeal of paragraphs 5 and 7 of the Confidential Order, the matter be returned to Prothonotary Steele for a reconsideration *de novo*. Distrimedic argues that, if Prothonotary Steele made palpable and overriding errors in her analysis of Documents 23.3, 23.4, 23.5 and 91, the entire basis of her analysis is called into question and must be undertaken anew.

[62] Richards submits that (1) Distrimedic's appeal of the Confidential Order was out of time under the Rules; and (2) the Rules make no provision for a 'cross-appeal' of a section 51 appeal of a prothonotary's order. Substantively, and in any event, Richards submits that a consideration *de novo* of its C-CEO designations is both unthinkable and unnecessary as the errors in question were discrete and do not place in doubt Prothonotary Steele's analysis as a whole.

[63] Whether or not a cross-appeal is permitted by the Rules, I agree with Richards and will dismiss Distrimedic's cross-motion. I find no basis for a reconsideration *de novo* by the Court of Prothonotary Steele's Confidential Order or Richards' C-CEO designations. I do not agree with Distrimedic's submission that there is a contradiction in finding specific and determinative errors

in Prothonotary Steele's analysis of the Technical Documents and Document 91 but maintaining her analysis and application of the *AB Hassle* test to the remaining Documents. The errors I have found in Prothonotary Steele's analysis are discrete and in no way affect her analysis of the other Documents. The parties agree that Prothonotary Steele correctly summarized the law in the Confidential Order. Her analysis of the principles applicable to C-CEO designations is unchallenged. Prothonotary Steele's application of those principles to the evidence before her, except as identified in this Order and Reasons, are without error.

VII. Public version of Confidential Order

[64] At the hearing of the appeal and cross-appeal, Richards and Distrimedic asked that I address the question of whether the redactions made to the public version of the Confidential Order (Public Order dated March 2, 2020) should be maintained as C-CEO. The result of that designation is that Distrimedic's counsel is prevented from providing the unredacted Confidential Order to Distrimedic and Mr. Filiatrault. The redacted information consists solely of Mr. Proulx's estimates during cross-examination of the parties' respective percentage market shares on an industry basis.

[65] The percentage numbers were redacted by Richards from the Transcript and designated C-CEO because they are derived from Richards' sales information set forth in Document 91 and Mr. Proulx's experience in the industry. Richards argues that, if I find that Document 91 is properly designated as C-CEO, then Mr. Proulx's estimates are also C-CEO. Distrimedic submits that the percentages are not based on data or market research; they are simply a reflection of

Mr. Proulx's belief and intuition. As a result, their disclosure to Distrimedic would not be seriously prejudicial to Richards.

[66] I have reviewed the redactions in the Public Order and the Transcript and considered my conclusion that Richards' C-CEO designation of Document 91 is valid. One of Richards' submissions in support of the C-CEO designation was that disclosure of Document 91 to Mr. Filiatrault would permit him to extrapolate Richards' market shares for its products because he would then be in possession of the relevant information of the two major industry players. However, the information set out in Document 91 is materially different from Mr. Proulx's estimates of the total market share of each company.

[67] Document 91 contains Richards' monthly sales, product, rebate and geographic information. The detailed nature of that information was Richards' focus in defending the C-CEO designation and in my conclusion that disclosure of Document 91 to Distrimedic would result in serious prejudice to Richards. The estimates given by Mr. Proulx in answer to questions regarding the size of the Canadian market for the Dispill and Distrimedic products is markedly different. Mr. Proulx's answers disclose no Richards financial, product, rebate or geographic data. At most, Mr. Proulx's estimate of Richards' industry market share would permit Mr. Filiatrault to better estimate Distrimedic's market share, the collective share of the remaining industry participants and, perhaps, size of the overall market.

[68] The jurisprudence regarding C-CEO designations speaks to serious commercial prejudice based on more than bald assertions. I cannot conclude that disclosure of Mr. Proulx's estimates to Distrimedic would result in significant adverse commercial consequences for Richards.

[69] I find that Richards' C-CEO designation of the percentage estimates provided by Mr. Proulx during cross-examination is invalid but that the percentage estimates are CI. A copy of the Confidential Order may be provided to Distrimedic as CI within the meaning of the Confidentiality Agreement.

VIII. Costs

[70] Richards requests costs in these motions, and in the motion brought by Distrimedic in this Court file appealing the order of Prothonotary Steele regarding privilege, also dated February 10, 2020 (Privilege Order), of $6,000 all-inclusive, payable forthwith. The privilege motion and two motions I have addressed in this Order and Reasons were heard by me in the course of one hearing.

[71] The quantum of Richards' costs request is reasonable in light of the complexity of the three motions but an order that the costs awarded be paid forthwith is not warranted.

[72] Costs in the aggregate lump sum of $6,000.00, including taxes and disbursements, will be awarded to Richards in respect of (A) this motion and cross-motion; and (2) the motion by Distrimedic appealing the Privilege Order, which I have dismissed by separate Order and Reasons of even date herewith.

ORDER IN T-1606-18

THIS COURT:

1. Orders that the appeal by Richards Packaging Inc., the Plaintiff, is allowed and paragraphs 5 and 7 of the Order of Prothonotary Alexandra Steele, the Case Management Judge, dated February 10, 2020 (Confidential Order) are set aside.

2. Orders that the motion regarding a cross-appeal of the Confidential Order by Distrimedic Inc., the Defendant, is dismissed.

3. Declares that the "Confidential – Counsel's Eyes Only" (C-CEO) designations of documents 23.3, 23.4, 23.5 and 91 are valid pursuant to paragraphs 1d), 3, 8 and 22 of the Confidentiality Agreement dated April 1, 2019.

4. Declares that the C-CEO designation of the percentage estimates provided by Mr. Proulx during cross-examination by Distrimedic and reflected in the transcript of his cross-examination is not valid and permits the designation of those percentage estimates as "Confidential Information" pursuant to the Confidentiality Agreement.

5. Orders that costs in the aggregate lump sum of $6,000.00, including taxes and disbursements, are awarded to the Plaintiff in respect of (A) this motion and cross-motion; and (2) the motion by the Defendant appealing a separate order of Prothonotary Alexandra Steele regarding privilege also

dated February 10, 2020, dismissed by Order of Justice Walker of even date herewith.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1606-18
STYLE OF CAUSE:	RICHARDS PACKAGING INC. v DISTRIMEDIC INC.
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN MONTRÉAL, QUÉBEC AND OTTAWA, ONTARIO
DATE OF HEARING:	JULY 22, 2020
ORDER AND REASONS:	WALKER J.
DATED:	DECEMBER 17, 2020

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