

Docket: 2011-5(IT)G

BETWEEN:

ANDRÉ DROUIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application heard on September 6, 2011, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:

Guy Du Pont
Michael H. Lubetsky
Jack J. Fattal

Counsel for the Respondent:

Michel Lamarre
Alain Gareau
Sara Jahanbakhsh

ORDER

Upon motion by the appellant under section 16.1 of the *Tax Court of Canada Rules (General Procedure)* (the **Rules**) for a confidentiality order in respect of the documents identified in Schedule A of the motion (the **Confidential Documents**);

Upon reading the affidavit of Marc Bernier filed in support of the motion;

And upon hearing each party's allegations;

The motion is granted and a confidentiality order is issued, whose terms are as follows:

- (a) the Confidential Documents shall be kept sealed in the Court record and shall be accompanied by a copy of this order and shall not be made accessible to anyone other than the Court and its staff;
- (b) the Confidential Documents shall be shared with counsel for the respondent, who are not to share them or to use them outside of the scope of this appeal.
- (c) if counsel for the respondent refer to the Confidential Documents or present an excerpt from them to the Court or to a witness during the hearing of this appeal, any information that relates to rates for the services in question and/or is likely to identify third parties other than Prospector International Networks Inc., its affiliates, partners and subcontractors will be censored, viz.:
 - (i) Prospector International Networks Inc., PNMI Group Ltd., PIN Franchise Ltd., Réseau Prospector inc./Prospector Network Inc. (Quebec), Prospector Network Inc. (Wyoming), MIS International Inc. (collectively, the **Prospector Group**); and
 - (ii) Cash-On-Time Inc., Mail-It-Safe Inc. and Espeo Inc. (collectively, the **Prospector Partners**);

(d) counsel for the respondent shall destroy all copies of or excerpts from the Confidential Documents as soon as the appeal is disposed of.

Signed at Montreal, Quebec, this 14th day of September 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 22nd day of March 2013.

Erich Klein, Revisor

Citation: 2011 TCC 425

Date: 20110914

Docket: 2011-5(IT)G

BETWEEN:

ANDRÉ DROUIN,

Appellant,

and

HER MAJESTY THE QUEEN,

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REASONS FOR ORDER

Lamarre J.

[1] The grounds for the motion are as follows:

[TRANSLATION]

1. The Confidential Documents include (i) market studies and consultants' reports on the marketing strategy for the products and services of the Prospector Group and Prospector Partners (**Economic Studies**) [found at tabs 1 to 7 of the Book of Confidential Exhibits] and (ii) recent contracts with various clients (**Client Contracts**) [found at tabs 8 to 17 of the Book of Confidential Exhibits].
2. A confidentiality order is necessary to prevent a serious risk of prejudice to important interests, because
 - (a) the Confidential Documents are from Prospector International Inc., which has always considered and treated them as confidential and is not prepared to allow their use in this appeal without appropriate confidentiality measures;
 - (b) there are confidentiality obligations that have been agreed upon by the Prospector Group and some of its clients, and the fulfilment of those obligations would be irretrievably compromised if the Client Contracts were made public in their entirety;
 - (c) the disclosure of information related to the identity of new clients and the rates for the services offered to them would seriously prejudice the Prospector Group's and Prospector Partners' commercial interests;

- (d) there is a confidentiality obligation imposed by the authors of the Economic Studies the fulfilment of which would be irremediably compromised if the Economic Studies were made public and their authors publically identified; and
 - (e) the Economic Studies contain marketing strategies, market studies and profitability analyses for various products of the Prospector Group and Prospector Partners, which, if they were made public, could enable their competitors to gain a considerable, undue commercial advantage, which would undermine the competitive position of the Prospector Group and the Prospector Partners.
3. The salutary effects of a confidentiality order outweigh its deleterious effects in that
 - (a) the filing in evidence of the Confidential Documents is necessary to support the appellant's position;
 - (b) If the Court does not make the order sought, the appellant may have to withhold the Confidential Documents, thus compromising his right to a fair trial; and
 - (c) The prejudice to the public interest in open and accessible court proceedings is minimal since the Confidential Documents make up only a small portion of all the documents that will be filed in evidence, while the identity of new clients of the Prospector Group and Prospector Partners as well as information as to the exact rates for services offered to them are not per se directly relevant to the issues raised in this appeal.
 4. There is no reasonable alternative to the confidentiality order sought that would make it possible to prevent the serious risk of prejudice to the interests involved.
 5. The salutary effects of the order sought outweigh its deleterious effects.

[2] An affidavit of Marc Bernier, chairman of the board and chief executive officer of Prospector International Networks Inc. (**Prospector**), a corporation which he acquired in March 2009, was filed in support of the motion. The respondent accepted the filing of the affidavit without asking to cross-examine the deponent. M. Bernier stated in the affidavit that the Confidential Documents have always been treated by Prospector as highly confidential and that he authorized the appellant to use the documents on condition that they be protected by a confidentiality order (paragraphs 11 and 12 of the affidavit). With regard to the Economic Studies, Mr. Bernier stated that he had mandated ■ in 2009 to conduct marketing studies, and added at paragraphs 15, 16, 17 and 18:

[TRANSLATION]

15. The Mandate ■ contained the following provisions, among others:

The deliverables (market study, business plan and forecast) are for internal and management purposes only. All external uses or presentation of the deliverables must be preapproved in writing by an authorized delegate of ■.

16. During our discussions, ■ clearly indicated that the asking price for preparing the Economic Studies would increase significantly if they were to be published.
17. Therefore, I undertook to keep the Economic Studies strictly confidential in order to avoid breaching my obligations toward ■.
18. The Economic Studies were never prepared for the purpose of being disseminated to the public; they contain highly confidential information and business plans, including
 - (a) detailed technical comparisons between the Prospector software and that of its competitors, listing their compared advantages and disadvantages;
 - (b) the geographical regions and market segments targeted for priority marketing efforts; and
 - (c) potential partners of high-priority value-added resellers.

[3] With respect to Client Contracts, he stated, *inter alia*, the following at paragraph 23 of the affidavit:

[TRANSLATION]

23. Prospector and Canadian Partners verbally made a commitment to the New Clients not to identify them publicly as being clients of Cash-On-Time and Mail-It-Safe until further notice.

[4] The appellant relied on the Supreme Court of Canada decision in *Sierra Club v. Canada*, [2002] 2 S.C.R. 522, in support of his motion. In that case, a confidentiality order was sought with regard to documents belonging to the Chinese authorities, who had authorized the disclosure of the documents on the condition that they be protected by such an order. In essence, what was being sought was the prevention of the dissemination of confidential documents without, however, the imposition of any restriction on public access to the proceedings. The immediate purpose of the request for a confidentiality order was related to the applicant's commercial interests. If the documents in question were disclosed, the applicant would have been in breach of its contractual obligations and would have suffered a risk of harm to its competitive position. If the confidentiality order were denied, then, in order to protect its commercial interests, the applicant would have had to withhold

the documents, which would have impeded its ability to make full answer defence and violated its right to a fair trial.

[5] These are appreciably the same arguments as those put forward by the appellant before me. Section 16.1 of the Rules provides as follows with regard to confidentiality orders in this Court:

CONFIDENTIALITY ORDER

16.1 (1) On motion, the Court may order that a document or part of a document shall be treated as confidential at the time of filing of the document or part of the document and determines the conditions in relation to its reproduction, destruction and non-disclosure.

(2) Where the Court makes an order pursuant to subsection (1), a party or solicitor of record may have access to the confidential document or part of the confidential document only on conditions determined by the Court in relation to its reproduction, destruction and non-disclosure.

(3) The order remains in effect until the Court orders otherwise.

[6] Moreover, the Supreme Court of Canada, in *Sierra Club*, sets out a test for whether a confidentiality order ought to be granted in a case such as this one. Justice Iacobucci wrote as follows at paragraphs 54 and 55:

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" (emphasis added).

[7] The first step, therefore, consists in determining whether disclosing the Confidential Documents would impose a serious risk on an important commercial interest of the appellant and whether there are reasonable alternatives to the order itself (see *Sierra Club*, paragraph 58).

[8] As in *Sierra Club*, the commercial interest at stake in this case relates to the objective of preserving contractual obligations of confidentiality. The appellant must demonstrate that the information in question has always been treated as confidential and that, on a balance of probabilities, its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information. It must have been accumulated with a reasonable expectation of it being kept confidential (see *Sierra Club*, paragraphs 59 and 60).

[9] In the instant case, according to his affidavit, Mr. Bernier authorizes the use of the Confidential Documents by the appellant only if they are the subject of a confidentiality order. Mr. Bernier himself is bound to not disclose the Economic Studies in question without prior consent from ■ (see letter from ■ to Marc Bernier, page 19 of the motion record). In addition, Mr. Bernier has given a contractual undertaking to ■ not to disclose the studies' content.

[10] The respondent argued that the correspondence filed in the motion record was not countersigned by Mr. Bernier and that the agreement in question provided in the confidentiality clause that the documents could be disclosed in legal proceedings.

[11] As pointed out by counsel for the appellant, Mr. Bernier's affidavit was filed with the respondent's consent without any cross-examination being conducted by the respondent. From this I infer that the content of Mr. Bernier's affidavit was not disputed. He states specifically that he is bound by contract with ■ as well as with the clients at issue not to disclose the information. With regard to the Economic Studies, Mr. Bernier has given a contractual undertaking not to disclose their content in negotiating the rate required by ■. It is in this context that he agrees to voluntarily provide this documentation to the appellant as long as the appellant obtains a confidentiality order. It is therefore important to note here that, as regards Mr. Bernier and the appellant, the documents were collected by the latter with a reasonable expectation of them being kept confidential. Clearly, if the appellant does not obtain a confidentiality order, Mr. Bernier will not allow him to use the Confidential Documents to defend his case. The respondent does not seem to accept

that the Prospector Group intended to operate a business (see paragraphs 26(l) and (q) of the Reply to the Notice of Appeal, and excerpts from the out-of-court examination of Normand Desjardins, pages 160, 173, 174 and 180). In this regard, although I make no ruling on the matter, this evidence may be relevant for the appellant.

[12] It seems, therefore, that the appellant has shown, as a first step, the necessity of seeking a confidentiality order and the absence of reasonable alternatives to the order itself.

[13] In the second step of the analysis, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether a confidentiality order ought to be granted (see *Sierra Club*, paragraph 69).

[14] In this case, Mr. Bernier's affidavit indicates that the appellant will not be authorized to use the Confidential Documents without a confidentiality order. In this context, there is a very real a risk that, without such an order, the appellant's ability to prove part of his case would be limited, and that the Court would have to draw conclusions based on an incomplete evidentiary record. This could thus impede the search for truth in this case (see *Sierra Club*, paragraph 77).

[15] In addition, the fact that the appellant is not seeking to impede public access to the proceedings means that the confidentiality order represents a fairly minimal intrusion into the open court rule and thus would not have significant deleterious effects on this principle (see *Sierra Club*, paragraph 79).

[16] It is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. In this case, the substance of the proceedings was not public in nature but, rather, private since it is a matter of demonstrating the real operation of a business; the public interest is less engaged in this context (see *Sierra Club*, paragraphs 84 and 86).

[17] Finally, the appellant may not have to file the Confidential Documents (if the respondent were to concede certain points, for example), in which case those documents would be irrelevant to the proceedings, with the result that freedom of expression, which is inextricably tied to the principle of open courts, would be unaffected by the confidentiality order (see *Sierra Club*, paragraphs 74, 88 and 89).

[18] In conclusion, in weighing the various rights and interests involved in the very specific case before me, I am of the view that the salutary effects of the confidentiality order outweigh its deleterious effects and that the order should therefore be granted.

Signed at Montreal, Quebec, this 14th day of September 2011.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 22nd day of March 2013.

Erich Klein, Revisor

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REASONS FOR ORDER BY: The Honourable Justice Lucie Lamarre

DATE OF HEARING: September 14, 2011

APPEARANCES:

Counsel for the appellant: Guy Du Pont
Michael H. Lubetsky
Jack J. Fattal

Counsel for the respondent: Michel Lamarre
Alain Gareau
Sara Jahanbakhsh

COUNSEL OF RECORD:

For the appellant:

Name: Guy Du Pont
Michael H. Lubetsky
Jack J. Fattal

Firm: Davies Ward Phillips & Vineberg
Montreal, Quebec

For the respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada