IN THE MATTER OF
THE COMMERCIAL ARBITRATION ACT, R.S.B.C. 1996, c.55
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

McHENRY SOFTWARE INC.

CLAIMANT/ RESPONDENT BY COUNTER CLAIM

AND:

ARAS 360 INCORPORATED aka ARAS 360 TECHNOLOGIES INC.

RESPONDENT/ CLAIMANT BY COUNTER CLAIM

ORDER RE CONFIDENTIALITY (POST AWARD)

1. The Award in this Arbitration was made and delivered to the parties on March 26, 2014.

2. On April 17, 2014 the Claimant made a written Application regarding a claim of Breach of Confidentiality by the Respondent related to the alleged publication by the Respondent of the Award. On April 24, 2014 the Respondent filed a written Response to the Application together with the Affidavit of Melanie Fisher (Fisher Affidavit) stating the Application should be dismissed with costs. The parties made oral submissions regarding the Application before me on May 2, 2014. In attendance were myself as Arbitrator, David Lunny and David Cayley Counsel for the Respondent/Claimant by Counterclaim (Respondent), David Curtis and David Wotherspoon Counsel on behalf of the Claimant/Respondent by Counter Claim (Claimant).

History

3. Six months prior to the Arbitration hearing in this matter the Claimant made application for an order for the production of documents. In its response to the Application for production of documents the Respondent stated in part:

> **In subparagraphs (a), (b) and (c), the Claimant, which is now a direct competitor of Aras's, seeks the production of the copyrighted works of Aras. However, the parties have not executed a confidentiality agreement in this arbitration. Neither the *Arbitration Act*, R.S.B.C. 1996, c. 55 nor the *Domestic Commercial Arbitration Rules of Procedure* provide protection for documents disclosed during discovery. As such, in the event it is ordered that Aras produce any of these classes of documents, the Claimant and Aras must enter into a confidentiality agreement in terms agreeable to counsel to protect Aras's rights in its copyrighted work.**

4. On May 14, 2013 I heard the submissions of the counsel regarding the Application and made my Interim Order #3. In paragraph 5 I ordered, by consent, that the "…parties create and have their clients execute a consent Confidentiality Order as soon as possible." I also went on to make further orders relating to production of various categories of documents "subject to execution of the Confidentiality Order." During the exchange of draft Confidentiality documents, at the request of the Respondent, the document was changed to a Confidentiality Agreement. When a disagreement arose between the parties regarding the contents of the draft Confidentially Agreement I made two orders, Interim Order #6 and #7. The Confidentiality Agreement was completed and was executed by Mr. McHenry on behalf of the Claimant and Mr. Kennedy on behalf of ARAS, dated for reference June 7, 2013.

5. In Interim Order #7, after I provided the necessary Order settling the parties' disagreements regarding the content, I made an Order that the parties sign the document entitled Confidentiality Agreement. In this Application, relating to alleged breach of confidentiality, the Claimant takes the position the document entitled Confidentiality Agreement is an Order made in the Arbitration.

6. The Claimant's application regarding the claim of breach of confidentiality is based on the fact that on March 27, 2014, the day after the Arbitration Award was sent to the parties; Mr. Kennedy of Aras sent an email to 22 persons attaching the Award. In the covering email, among other comments revealing his feelings regarding the Award, he asked "If any of you are on INCR and would care to post something simple, please keep it simple. Although tempting—we do not wish to gloat."

Position of the Claimant

7. In support of its Application the Claimant relies on:

   A. The Arbitration Act, R.S.B.C. 1996 c 55 (the Act);

   B. the British Columbia International Commercial Arbitration Centre's Domestic Commercial Arbitration Rules of Procedure (the Rules);

   C. the Confidentiality Agreement/Order;

8. Rule 25 of the Rules states **"Unless otherwise agreed by the parties or required by law, all hearings, meetings, and communication shall be private and confidential as between the parties, the arbitration tribunal and the Centre."**

9. Provisions of the Confidentiality Agreement/Order are more specific. While this document is focused on documents, in paragraph 5, it provides the protection to "documents, evidence or information disclosed in the Arbitration. It provides that any of the aforesaid divulged in the Arbitration;

   A. are confidential,

   B. cannot directly or indirectly be used for any purpose other than for this Arbitration,

   C. the obligations in the document continues during the course of the proceedings and thereafter unless all parties otherwise agree.

10. The Claimant seeks two primary remedies, an injunction and costs.

Position of Respondent

11. In response the Respondent says:

   A. the Claimant put all of its claims against the Respondent in the public arena when it started an action in North Carolina (described in paragraph 75 of the Award) thereby renouncing any claims or expectations to confidentiality;

   B. the Claimant did not accept a confidentiality document which specifically included the award as confidential;

   C. the Confidentiality document supersedes Rule 25 because it is a separate agreement so the parties have "otherwise agreed";

D. the document entitled Confidentiality Agreement is not an Order and since it is the only remaining confidentiality provision I have no jurisdiction to resolve the Application;

Background

12. The Claimant first brought an action in North Carolina. It is important to note that the claims made in the North Carolina court are basically the same claims made in this Arbitration. The action in North Carolina was challenged by the Respondent on the bases the action was based on a contract between the parties and that contract contained a clause requiring Arbitration in British Columbia (BC). The Court then stayed the North Carolina action pending the completion of the BC Arbitration. At the same time the court granted an injunction to the Claimant to protect its copyrights.

13. In its submissions regarding this application the Respondent sets out a multitude of examples of the activities of the Claimant, before and during this Arbitration, publishing its claims made in the North Carolina court. The Claimant through emails and its website had detailed discussion of the progress of the claims, the results achieved in the North Carolina court as well as the possible meaning of these events. There was no evidence during the Arbitration process of any response to any of this by the Respondent.

14. In the email circulated by the Respondent it makes mention of posting on the INCR website. This website is devoted to news of interest to people in the same industry as the Claimant and Respondent. The Claimant had made some of its publication regarding the North Carolina action on that website. It was clear during the Arbitration that the Respondent was concerned the publication being done by the Claimant was damaging to the Respondent. In a counterclaim in the Arbitration the Respondent made a claim for defamation based on the publication regarding the North Carolina action. Hence the reference in the email publishing the Award "…we do not wish to gloat."

Discussion

15. The respondent says the Confidentiality document supersedes Rule 25 because the Rule says in part "Unless otherwise agreed by the parties…" The Respondent says there was a separate agreement. The Confidentiality document was initiated to create protection to the Respondent for its copyrights. When completed, by its terms it protected "documents, evidence or information" disclosed in this Arbitration. Nothing in the Confidentiality document directly or indirectly "supersedes" the provisions of Rule 25. It is clear that the Rule anticipates the parties would have to directly agree to remove all or part of the confidentiality protection granted in Rule 25. Whether the Confidentiality document is an Order or an Agreement it defines specific matters or items which the parties decided to spell out as being confidential.

16. Rule 25 and the Confidentiality document should be read together to obtain the full description of the confidential nature of the Arbitration. The Award gives a full description of the hearings, meetings and communications during the Arbitration which are, under Rule 25, confidential. The Award gives a full description of the documents, evidence or information disclosed in the Arbitration and that is confidential. Disclosure of the Award is disclosure of the very items which are stated to be confidential by Rule 25 and the Confidentiality document. I find that the Award is confidential.

17. The Respondent submits that the Claimant has failed to prove there has been any breach by publication of the Award. The Claimant points to the email of March 27, 2014 with the statement the Award is attached and states:

    A. Mr. Kennedy, nor any other representative of the Respondent, has denied Mr. Kennedy sent the email in any way in this application;

B. As part of the Application material there is a copy of the email which clearly shows the email is sent by Mr. Kennedy. Also attached is a copy of the web site with the comments requested in the email made by one of the listed recipients in the email.

C. the Act section 6 (2) b and the Rule 26 (3) provide as Arbitrator I can admit all evidence that would be admissible in court and all other relevant evidence and further, I am not required to apply the rules of evidence in determining relevance.

18. I have the email which on the face of it is sent by Mr. Kennedy of ARAS attaching the Award. It is sent to some 22 people with comments on the contents of the award. It requests the recipients post comments on the INCR website. Mr. McHenry filed an affidavit in support of the Application stating that one of the recipients designated on the email did make a posting on the INCR website summarizing the outcome of this Arbitration. None of this is denied by Mr. Kennedy. All of this evidence is relevant as well as admissible and I have no doubt the Award was published by Mr. Kennedy.

19. The Respondent submits the Confidentiality document is an Agreement and it does not have an Arbitration clause therefore I have no jurisdiction. That submission is based on the Respondents assumption that the document is an agreement which supersedes Rule 25. The document was created under a consent order made by me as Arbitrator during the Arbitration. When a disagreement arose between the parties, as Arbitrator, I made an order defining some of the terms of the document and ordered it be signed. It was not marked as an exhibit; however, it is a document created during the Arbitration process, for a specific purpose related only to the Arbitration, and it is therefore within my jurisdiction. Furthermore if I am wrong regarding this I find the Award is sufficiently covered by Rule 25 and therefore within my jurisdiction.

20. The Respondent suggests that Mr. McHenry's publications before and during the Arbitration process destroys any confidentiality that may have existed. This application is regarding the publication of the Award in this Arbitration. Mr. McHenry's publications are no excuse for publication of a confidential Award. At best Mr. McHenry's publications may go to the measure of penalty. Further, the Claimant submits that Mr. McHenry's publications were not related to evidence or documents in the Arbitration but rather related to the North Carolina court matter.

Findings

21. I find that in breach of the confidentiality provisions of Rule 25 and the Confidentiality document the Respondent published the Award made in this Arbitration. This was done by sending the email of March 27, 2014 with the Award attached to numerous parties. The evidence is clear that this was done deliberately by Mr. Kennedy a representative of the Respondent. I find I have jurisdiction to make these findings. In my Award I specifically reserved jurisdiction over costs. This matter is relevant to my dealing with the matter of costs. Further, I find that during this period of time before the order of costs, I have jurisdiction to deal with matters arising in the nature of controlling the Arbitration process more generally.

Relief Sought

22. The Claimant requests two forms of relief:

A. An Order for full costs of the Arbitration. The Claimant will receive full costs of this application. That is the costs of the Arbitrator and the Claimants own reasonable legal fees, as they may be related to this application. The parties will agree on these fees or, if there is a dispute, the fee dispute will be referred to the Master for the British Columbia Supreme Court. In so far as the costs of the whole Arbitration is concerned I will consider that when the application regarding costs in this matter is heard. That application is awaiting the completion of preliminary applications. On the final application of cost there are other matters such as several applications heard before the actual hearing where there was a split of success. The

outcome of this application will be given significant weight during the final application for costs.

B. An Injunction pursuant to Rule 29(1)(k). I am prepared to grant an injunction as requested in paragraph 86 of the Claimants submissions of May 2, 2014. The injunction may cover all or some of the requests. However, I want to be provided with a draft of the wording proposed since there is not sufficient detail in paragraph 86 for me to make an appropriate order. The Claimant will provide a draft to the Respondent at least 7 business days prior to the hearing regarding costs and I will hear submissions at that time.

This is my order

Dated: May 20, 2014

J. Gary Fitzpatrick, Q.C., Arbitrator