

S-144039

No. \_\_\_\_\_  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

McHENRY SOFTWARE INC.

PETITIONER

AND:

ARAS 360 INCORPORATED aka ARAS 360 TECHNOLOGIES INC.

RESPONDENT

**PETITION TO THE COURT**

ON NOTICE TO:

Aras 360 Incorporated

This proceeding is brought for the relief set out in Part 1 below, by

- the person(s) named as petitioner in the style of proceedings above
- (the petitioner(s))

If you intend to respond to this Petition, you or your lawyer must

- (a) file a Response to Petition in Form 67 in the above-named registry of this Court within the time for Response to Petition described below, and
- (b) serve on the Petitioner
  - (i) 2 copies of the filed Response to Petition, and
  - (ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.**

**Time for Response to Petition**

A Response to Petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by Order of the Court, within that time.

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| (1) | The address of the registry is:<br><br>800 Smithe Street, Vancouver BC V6Z 2E1   |
| (2) | The ADDRESS FOR DELIVERY is:<br><br>Fasken Martineau DuMoulin LLP<br>2900 - 550 Burrard Street<br>Vancouver, B.C. V6C 0A3<br><br>Fax number for delivery is: n/a<br>E-mail address for service is: n/a                             |
| (3) | The name and office address of the Petitioner's Solicitor is:<br><br>Fasken Martineau DuMoulin LLP<br>2900 - 550 Burrard Street<br>Vancouver, B.C. V6C 0A3 Telephone: 604 631 3131.<br>(Reference: 294212.00001/David Wotherspoon) |

**CLAIM OF THE PETITIONER**

**Part 1: ORDERS SOUGHT**

1. An order pursuant to Section 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, granting leave to McHenry Software Inc. ("McHenry") to appeal the award of the arbitrator, J. Gary Fitzpatrick, Q.C. (the "Arbitrator"), pronounced March 26, 2014 (the "Award"), on the following issues:
  - (a) Ground 1 - Did the Arbitrator err in law by failing to apply the proper principles of contractual interpretation to the Agreement between the parties?

- (b) Ground 1A - In the alternative, did the Arbitrator err in law by failing to apply the terms of the modified Agreement, as found by the Arbitrator, to the facts as he had found them?
  - (c) Ground 2 - Did the Arbitrator err in law by failing to award McHenry damages for copyright infringement?
2. Further, and in the alternative, an order pursuant to Section 30 of the *Arbitration Act* remitting the Award for reconsideration on the following issue:
- (a) Ground 3 - Did the Arbitrator commit arbitral error by finding that the parties had modified the Agreement without giving the parties an opportunity to make submissions on the modification?
3. An interim or interlocutory order staying the Award pending the determination of the appeal.
4. An order giving directions for the procedure of the appeal in this matter.
5. An order giving directions for the protection of confidential information contained in the materials herein, including an order for the sealing of the Court file, or alternatively portions of the Court file.
6. An order allowing the appeal and amending the Award as follows:
- (a) when McHenry terminated the Agreement in December of 2011, \$152,000 of the 2011 annual prepayment under section 10.2 was due and owing to McHenry, and ARAS was in breach of the Agreement;
  - (b) McHenry was entitled to terminate the Award, as it did, in December of 2011;
  - (c) McHenry is entitled to damages in the amount of \$152,000, or alternatively in an amount to be assessed.
  - (d) McHenry is entitled to damages for copyright infringement in the amount of \$170,813;
  - (e) In the alternative, McHenry is entitled to damages for copyright infringement in the amount of \$71,263 if the Agreement did not come to an end until February 6, 2012;
  - (f) In the further alternative, McHenry is entitled to damages for copyright infringement in an amount to be assessed;
  - (g) McHenry is entitled to its costs of the arbitration.
7. In the alternative, an order allowing the appeal and remitting the Award back to the Arbitrator together with the Court's opinion on the questions of law and arbitral error raised in this petition.

8. Interest pursuant to the *Court Order Interest Act* on all amounts found due and owing.
9. Costs of these proceedings.

## **Part 2: FACTUAL BASIS**

### **The Parties**

1. McHenry is a company incorporated under the laws of North Carolina.
2. The Respondent, Aras 360 Incorporated (“ARAS”) is a company incorporated under the laws of British Columbia.

### **The Dispute that Led to the Arbitration**

3. The Arbitration arises out of a software integration contract between McHenry and ARAS dated February 5, 2010 (the “Agreement”).
4. The Agreement established the commercial arrangement for the integration of McHenry’s accident simulation software with ARAS’s graphic environment software.
5. The Agreement had a 5 year term.
6. Under the Agreement, ARAS was entitled to sell the integrated products at prices established in section 10.3 of the Agreement, and McHenry in turn would receive a royalty of 20% of ARAS’s sales.
7. Pursuant to section 10.2 of the Agreement, McHenry was to be provided with an annual prepayment of \$160,000 during the initial contract year, and the annual prepayment for the second contract year (commencing February 5, 2011) was to be \$192,000.
8. The integration of the software products was intended to commence shortly after the Agreement was executed in the winter of 2010.
9. The integration of the MS software into the ARAS suite was delayed until 2011 because the ARAS graphical environment was not ready for integration with McHenry’s software.
10. McHenry was paid by ARAS the \$160,000 due and owing under section 10.2 of the Agreement for the contract year 2010.
11. The integration work began in January of 2011, and a product was prepared for release to the public for sale in October of 2011.
12. ARAS failed to make the payment of \$192,000 to MS required under the Agreement at the beginning of the second contract year (2011), and instead promised to provide the payment in June of 2011.
13. ARAS paid McHenry \$40,000 in June of 2011.

14. McHenry demanded payment of the remainder of the annual prepayment due and owing under the Agreement, but ARAS refused to pay McHenry.
15. On November 1, 2011, ARAS told McHenry that it would pay it \$100,000, but shortly after on November 6 ARAS told McHenry that it had decided to hold its payment until it received validation papers.
16. ARAS's refusal to pay MS money due and owing under the Agreement was a fundamental breach of its obligations and as a result MS terminated the Agreement effective December 21, 2011.
17. Following termination of the Agreement by MS, ARAS continued to sell products that incorporated MS's proprietary software, which violated MS's copyright.
18. In a letter dated February 6, 2012, ARAS wrote to McHenry to acknowledge that the Agreement was now at an end and no further sales incorporating McHenry's software would be made.
19. In violation of McHenry's copyright, ARAS continued to sell products that integrated McHenry's software after February 6, 2012. In particular:
  - (a) ARAS made 13 sales that involved McHenry's software between December 21, 2011 and February 6, 2012; and
  - (b) ARAS made 14 sales that involved McHenry's software after February 6, 2012.

### **The Arbitration**

20. McHenry commenced an arbitration pursuant to the Agreement in December of 2012.
21. McHenry claimed for, *inter alia*:
  - (a) damages for breach of contract for outstanding license fees;
  - (b) damages for copyright infringement; and
  - (c) punitive damages.
22. The Arbitration hearing took place on November 12-15, 18-19, 21-22, 2013, and oral submissions took place on January 17, 2014.

### **The Award**

23. The Arbitrator handed down the Award on March 26, 2014.
24. All of McHenry's claims were dismissed, as were all of ARAS's counterclaims.

25. The Arbitrator found that by September of 2011, the Agreement had been modified by virtue of the conduct of the parties to allow for a process whereby payments would be made when requested by McHenry if they were agreed to by ARAS.
26. The Arbitrator went on to find that when McHenry terminated the Agreement in December of 2011, ARAS had not at that time agreed to pay McHenry any sum of money, and there was no basis for McHenry to terminate the Agreement.
27. As a result, in his Award the Arbitrator dismissed McHenry's claim for damages for breach of contract for outstanding license fees, and he found McHenry's termination of the Agreement to be wrongful.
28. The Arbitrator went on to find that the Agreement came to an end on February 6, 2012, when ARAS accepted the "repudiation" of the Agreement by McHenry.
29. With respect to McHenry's claim for copyright infringement for sales of McHenry's software after the Agreement to an end, the Arbitrator found, incorrectly, that no claim had been made for sales after the acceptance of the repudiation by ARAS.

### **Part 3:LEGAL BASIS**

#### **Leave to Appeal and Appeal of an Award**

1. Pursuant to Section 31(1) of the *Arbitration Act* a party to an arbitration may appeal to the court on any question of law arising out of the award if all the parties to the arbitration consent or the court grants leave to appeal.
2. Pursuant to Section 31(2) of the *Arbitration Act* the court may grant leave if it makes any of the following determinations:
  - (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
  - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
  - (c) the point of law is of general or public importance.
3. The questions of law are important and justify judicial intervention and determination of this court on appeal under paragraphs 31(2)(a), (b) and (c) of the *Arbitration Act*. In particular:
  - (a) the points of law concern central matters before the Arbitrator and fundamentally affect the result of the Award, and their determination may prevent a miscarriage of justice;
  - (b) the points of law are of general and public importance.

4. Pursuant to Section 31(4) of the *Arbitration Act*, on an appeal to the court, the court may:
  - (a) confirm, amend or set aside the award; or
  - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

**Ground 1 - The Arbitrator erred in law by failing to apply the proper principles of contractual interpretation to the Agreement between the parties**

**(a) *The error committed by the Arbitrator***

5. McHenry's position in the Arbitration was that pursuant to section 10.2 of the Agreement, as of February 5, 2011, it was entitled to an annual prepayment from ARAS of \$192,000, and that ARAS's refusal to pay this amount throughout 2011 permitted McHenry to terminate the Agreement and to claim damages for breach of contract.
6. In the Arbitration, the parties disagreed on the interpretation of section 10.2 of the Agreement and made extensive arguments on this issue.
7. The Arbitrator's conclusion on the meaning of section 10.2 is found at para. 37 of the Award, where he states in a single sentence that the meaning of the clause is "unclear".
8. An arbitrator must apply the proper principles of contractual interpretation, including consideration of the clause at issue in the context of the entirety of the contract and the factual, the post-contract conduct of the parties and business efficacy. An error of legal methodology or failure to use the proper principles is an error of law which is reviewable on appeal: see *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834, para. 72.
9. The law requires that every effort should be made by an arbitrator to find a meaning in a contractual clause, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to: see *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.).
10. The sentence referenced above from paragraph 37 of the Award is the only finding regarding the interpretation of section 10.2 of the Agreement that the Arbitrator provides in the Award.
11. The Arbitrator did not provide any analysis of section 10.2 of the Agreement, or say anything at all about its interpretation, other than that the clause is "unclear".
12. In arriving at his conclusion in paragraph 37 of the Award, the Arbitrator erred in law by failing to attempt to determine the intention of the parties when they entered into the Agreement through the application of the principles of contractual interpretation to section 10.2 of the Agreement.

13. Having found that section 10.2 of the Agreement is “unclear”, the Arbitrator went on at paragraphs 44 and 45 of the Award to find that the Agreement had been modified by the parties to allow a process of payments being made when requested by McHenry if they were agreed to by ARAS.
14. The modification to the Agreement described in paragraphs 44 and 45 of the Award is, on its face, a finding that the parties had modified the payment terms of the agreement into an “agreement to agree”.
15. An “agreement to agree” is not a contract and is not enforceable: *Bos v. Springmann*, 2012 BCSC 637, para. 47.
16. In arriving at his conclusion in paragraphs 44 and 45 of the Award, the Arbitrator erred in law by finding that the parties had modified the payment provisions of the Agreement to create an unenforceable agreement to agree. This finding is inconsistent with the Arbitrator’s view that the Agreement remained in force until February 6, 2012, and is inconsistent with any notion of business efficacy.

**(b) Relief Sought**

17. Section 10.2 of the Agreement is clear and yields only one interpretation.
18. Section 10.2 established the annual prepayment for the first contract year as being \$160,000, paid out on certain milestones.
19. The annual prepayment for the second contract year, which was payable by ARAS to MS on February 5, 2011, was \$192,000 (being \$160,000 increased by 20%).
20. In the Arbitration there was no dispute, and the Arbitrator found, that the \$160,000 annual prepayment for the first year was made by ARAS, and \$40,000 of the second year’s annual prepayment was made.
21. Accordingly, when McHenry terminated the Agreement in December of 2011, \$152,000 of the 2011 annual prepayment under section 10.2 was outstanding.
22. Pursuant to section 31(4)(a) of the *Arbitration Act*, McHenry seeks an order that the Court amend the Award as follows:
  - (a) when McHenry terminated the Agreement in December of 2011, \$152,000 of the 2011 annual prepayment under section 10.2 was outstanding;
  - (b) McHenry was entitled to terminate the Award, as it did, in December of 2011;
  - (c) McHenry is entitled to damages in the amount of \$152,000, or alternatively in an amount to be assessed.
23. In the alternative, pursuant to section 31(4)(b) of the *Arbitration Act*, McHenry seeks an order that the Award is remitted back to the Arbitrator together with the Court’s opinion on this question of law.



**Ground 1A - Did the Arbitrator err in law by failing to apply the terms of the modified Agreement to the facts as he had found them?**

**(a) *The error committed by the Arbitrator***

24. This ground is an alternative to Ground 1.
25. Having found that section 10.2 of the Agreement is “unclear”, the Arbitrator went on at paragraphs 44 and 45 of the Award to find that the Agreement had been modified by the parties to allow a process on payments being made when requested by McHenry if they were agreed to by ARAS.
26. At paragraphs 45 and 57 of the Award, the Arbitrator found that ARAS’s representative, Mr. Kennedy, had told McHenry in early November of 2011 that a payment of \$100,000 would be made to McHenry.
27. Accordingly, the Arbitrator found both that:
  - (a) the Agreement had been modified to allow a process on payments being made when requested by McHenry if they were agreed to by ARAS; and
  - (b) ARAS had agreed to pay McHenry \$100,000 in November of 2011.
28. However, the Arbitrator found at paragraph 45 of the Award that when McHenry terminated the Agreement in December of 2011, it was requesting money from time to time, but no money was owing.
29. In making this finding, the Arbitrator erred in law by inconsistently applying the “modified” version of the Agreement to the facts as he had found them.

**(b) *Relief Sought***

30. Pursuant to section 31(4)(a) of the *Arbitration Act*, McHenry seeks an order that the Court amend the Award as follows:
  - (a) when McHenry terminated the Agreement in December of 2011, \$100,000 was owing to McHenry;
  - (b) McHenry was entitled to terminate the Award, as it did, in December of 2011;
  - (c) McHenry is entitled to damages in the amount of \$100,000, or alternatively in an amount to be assessed.
31. In the alternative, pursuant to section 31(4)(b) of the *Arbitration Act*, McHenry seeks an order that the Award is remitted back to the Arbitrator together with the Court’s opinion on this question of law.

**Ground 2 - The Arbitrator erred in law by failing to award McHenry damages for copyright infringement**

**(a) *The error committed by the Arbitrator***

32. In the Arbitration McHenry claimed damages for copyright infringement relating to sales of the software that occurred after its termination of the Agreement on December 21, 2011.
33. With respect to this aspect of McHenry's claim, the Arbitrator found at paragraphs 71 and 72 of the Award that:
  - (a) McHenry had claimed damages for 27 sales that were made between the purported termination and the acceptance of the repudiation but nothing for sales made after the acceptance of the repudiation;
  - (b) that if there had been evidence of the number of sales and a specific claim for those sales he would have made an order for payment of the royalty on those sales;
  - (c) the royalty owing would have been calculated on the basis of the actual selling price of the product.
34. McHenry did not state that its claim for 27 sales was limited to the time period "between the purported termination and the acceptance of the repudiation", as suggested in para. 72 of the Award. McHenry's claim was for all sales after termination which comprised sales from December 21, 2011 to February 6, 2012 and 14 sales subsequent to February 6, 2012.
35. The evidence of the number of sales after February 6, 2012 was undisputed.
36. The evidence of post-termination sales by ARAS was either wholly misconstrued by the Arbitrator or entirely ignored.
37. It is an error of law to ignore or wholly misconstrue relevant evidence: see *Bal v. British Columbia (Agriculture)*, 2013 BCSC 1941, para. 79; *Canada v. Southam Inc.*, [1997] 1 S.C.R. 748, para. 41.
38. The Arbitrator erred in law by ignoring the evidence of 14 sales that occurred after February 6, 2012 and failing to award McHenry damages for copyright.

**(b) *Relief Sought***

39. Pursuant to section 31(4)(a) of the *Arbitration Act*, McHenry seeks an order that the Court amend the Award to grant McHenry damages for copyright infringement in an amount to be assessed.
40. In the alternative, pursuant to section 31(4)(b) of the *Arbitration Act*, McHenry seeks an order that the Award is remitted back to the Arbitrator together with the Court's opinion on this question of law.

**Ground 3 - The Arbitrator committed arbitral error by failing to give the parties an opportunity to make submissions on the modified contract as found by the Arbitrator.**

**(a) The error committed by the Arbitrator**

- 41. As set out in respect to Ground 1, McHenry advanced arguments regarding the proper construction of para. 10.2 of the Agreement.
- 42. Rather than addressing these submissions, the Arbitrator reached his own conclusion on a modified version of the Agreement at paragraphs 44 and 45 of the Award. Neither party advanced the modified version of the Agreement, and neither party had an opportunity to make submissions on the modified version of the Agreement.

**(b) Relief Sought**

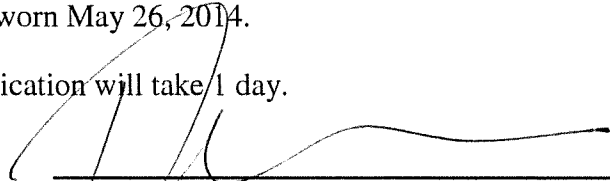
- 43. Further, and in the alternative to the submissions made above regarding Ground 1, the modified agreement as found by the Arbitrator is not a binding agreement.
- 44. With the opportunity to make submissions, McHenry could have demonstrated that:
  - (a) it had not waived its right to rely on the term of the Agreement requiring that all amendments be in writing; and
  - (b) that the Agreement as modified by the Arbitrator is untenable as it amounts to an unenforceable agreement to agree.
- 45. McHenry seeks an order that this issue be remitted back to the Arbitrator.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Betty Chan, sworn May 26, 2014.

The Petitioner estimates that the application will take 1 day.

Dated: 26-May-2014



Signature of  
 Petitioner  Lawyer for Petitioner

DAVID WUTHERSPOON

|   |   |
|---|---|
| <i>To be completed by the court only:</i> |   |
| Order made                                |   |
| <input type="checkbox"/>                  | in the terms requested in paragraphs ..... of Part 1 of this Petition |

|  |
|--|
| <input type="checkbox"/> with the following variations and additional terms:<br>.....<br>.....<br>.....<br>..... |
| Date:  |
| .....<br>Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master                             |