

## PRACTICE

Appeal from Case Management Judge's decision dismissing plaintiffs' motion for issuance of protective, confidentiality order pursuant to *Federal Courts Rules*, SOR/98-106, r. 151 — Motion arising in context of patent infringement proceedings commenced by plaintiffs against defendants — Plaintiffs, defendants principal competitors in Canadian, foreign market of baby care products — Parties agreeing that highly sensitive documents, information would be exchanged in course of proceedings, that protective order providing two tiers of confidentiality should be put in place, i.e. "Confidential", "Counsel's Eyes Only" (CEO) — However, parties not agreeing on who would have access to CEO documents, information — While defendants agreeing to limit disclosure to individuals proposed by plaintiffs, defendants wishing to include one in-house counsel for each party — In absence of agreement, plaintiffs bringing above-mentioned motion — In dismissing motion, Case Management Judge finding that in order to prevent disclosure to in-house counsel, Court must be presented with concrete evidence establishing on balance of probabilities actual prejudice if disclosure allowed — Rejecting plaintiffs' submission regarding risk that would occur if CEO documents, information disclosed to defendants' in-house counsel — Plaintiffs arguing that Case Management Judge disregarding factors established by case law governing issuance of CEO protective orders; failing to recognize irreversible prejudice resulting from disclosure of entirety of plaintiffs' CEO documents, information to defendants' in-house counsel — Whether Case Management Judge's decision reasonable — Purpose of CEO or "counsel and expert's eyes only" provisions is to prevent disclosure of highly sensitive, confidential information to officers, executives, employees or anyone else involved in receiving party's day-to-day operations from consciously or unconsciously grounding business decisions on confidential information to competitive disadvantage of producing party — Such orders preventing counsel from showing relevant evidence to clients; therefore should only be granted in unusual circumstances — Each case to be decided on its own merits — In case at bar, Case Management Judge not departing from earlier case law — Level of involvement of in-house counsel in party's day-to day operations, activities, threat posed by this involvement remaining determining factor for excluding in-house counsel from disclosure — Argument that where employee has had access to sensitive, proprietary information, he or she cannot be expected to have "empty head" as to such information when making future business decisions, remaining relevant consideration — Case Management Judge's decision consistent with foregoing principles — Not committing reviewable error in analysis, assessment of quality of evidence — Reasonably open to Case Management Judge to conclude that plaintiffs not meeting burden of demonstrating that order precluding disclosure to in-house counsel necessary at this point in proceedings — Motion dismissed.

ANGELCARE DEVELOPMENT INC. V. MUNCHKIN, INC. (T-151-16, 2018 FC 447, Roussel J., order dated April 24, 2018, 16 pp.)