

The Advocates' Quarterly

Volume 29, Number 4

March 2005

CONFIDENTIALITY IN CANADIAN CIVIL LITIGATION

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1. Introduction

In Canada all parties to a lawsuit must disclose to each other all documents and information that are relevant to the issue being litigated. The exception to this general rule is documents or information that are privileged. There are several well established categories of privilege in Canadian jurisprudence and they include solicitor-client privilege, litigation privilege and without-prejudice communications aimed at settling a dispute. Generally any document or information that fits into these categories will be protected from disclosure. All privileged documents by their very nature are confidential; however, not all confidential information is privileged. Confidentiality, unlike privilege, is not in and of itself a ground for refusing to disclose documents that are related to an issue being litigated. In this regard, Canadian courts have widely adopted the English approach, which rejects mere confidentiality as an excuse for the non-disclosure of relevant information. As Lord Diplock stated in *D. v. National Society for the Prevention of Cruelty to Children*:¹

The fact that information has been communicated by one person to another in confidence . . . is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating . . . The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the

* Of Blake, Cassels & Graydon, LLP. This article is based on a paper presented at a conference sponsored by the Section on Business Law of the International Bar Association. It has been edited for a Canadian audience, but some descriptions of the Canadian legal system have been retained for continuity. The authors would like to acknowledge, with thanks, the assistance of Courtney Harris in the preparation of this paper.

1. [1978] A.C. 171 at p. 218 (H.L.).

character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law.

Thus, when a party is in possession of relevant documents or has relevant information and is unable to make out a case for non-disclosure going beyond mere confidentiality, the documents or information will be subject to "discovery", *i.e.*, mandatory disclosure in the lawsuit. Trade secrets, proprietary formulae and processes and corporate strategies are all types of confidential information that do not fit into any of the above categories of privilege. As such, they will be subjected to the rules of disclosure. These rules create the potential that confidential business information that is disclosed in the discovery process may be disseminated to the public or used by an opposing party in competition with the disclosing party.

The potential for abuse is evident. Parties could use the litigation process as a tool for gathering industrial and commercial intelligence. In addition, the existence of confidential information can be used as a tactic to forestall or delay the litigation process. A party can demand the disclosure of sensitive information with a view to dissuading its opponent from pursuing a meritorious claim or from resisting a dubious one. Even if the information is not completely relevant to the matter being litigated, the threat or risk of having to release confidential information may be enough to soften an opposing party's litigation posture. It is clear that the pursuit of justice can be frustrated by the abuse of disclosure rules.

Generally there are several competing interests involved in a claim of confidentiality. Between the parties involved in the litigation there is a need for full disclosure of all relevant information so that the court can achieve a full understanding of the facts upon which its decision is to be based. It is also a well recognized principle of the Canadian litigation system that a defendant ought to know the case he or she has to meet. Balanced against this need is the legitimate commercial interest that a plaintiff may have in keeping confidential information out of the hands of competing parties or the general public. Without some assurances that the information given to the opposing party will not be disclosed to third parties outside the litigation, or be misused by the opposing party to compete with the disclosing party,² a party has less incentive to produce documents or give oral discovery of confidential information.

2. *Grant v. Monsanto Canada Ltd.* (1979), 101 D.L.R. (3d) 594, 10 Alta. L.R. (2d) 164, 30 A.R. 451 (Alta. S.C.) (hereafter *Monsanto*).

Generally in the business setting, specific measures can be taken to ensure confidentiality. The use and dissemination of confidential information can be controlled. Employees and co-ventures can be made to sign contracts that include confidentiality agreements as well as non-competition clauses. In the litigation setting, however, it is more difficult to protect confidential information from public dissemination. The concept that the public should be barred from hearings or from viewing information presented in a trial is foreign to our justice system. A basic tenet of our open court system is that the public should be able to view justice being done:³

The presence of the public, including representatives of the media, ensures the integrity of judicial proceedings. Openness of the courts is essential for the maintenance of public confidence in the administration of justice, and to further a proper understanding of the judicial system . . . There is necessarily implicit in the concept of an open court the concept of publicity; the right of the media to report what they have heard in the court-room so that the public can be informed about court proceedings and public criticism, if necessary, engendered should any impropriety occur . . . “[C]urtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance.”

The need to address a party’s legitimate interests in protecting confidential information from public dissemination while at the same time ensuring the maintenance of public confidence in the administration of justice is a challenge that is addressed by several rules of procedure that operate at different stages of a lawsuit.

For the purposes of this article the litigation process will be divided into three stages: pleadings, discovery and trial. At each stage there are various methods of protecting confidential information from public dissemination and from being used improperly by opposing parties.

2. Pleadings

Section 137(1) of the *Courts of Justice Act*⁴ in Ontario provides that anyone is entitled to see a document filed in a civil proceeding in a court unless an Act or an order of the court provides otherwise. Section 137(2) provides that a court may order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. Similar provisions exist in other Canadian provinces.⁵ Clearly, a party who is compelled to refer to or produce

3. *Canadian Newspapers Co. v. Canada (Attorney General)* (1985), 49 O.R. (2d) 557 at pp. 574-76, 16 D.L.R. (4th) 642, 17 C.C.C. (3d) 385 (C.A.), revd [1988] 2 S.C.R. 122, 52 D.L.R. (4th) 690, 43 C.C.C. (3d) 24.

4. R.S.O. 1990, c. C.43.

5. Most provinces have this rule: Alta. Rule 199; Man. Rule 30.11; N.B. Rule 31.12;

information that it considers to be confidential should address the possibility of seeking protective orders from the court, including an order under s. 137(2) ordering that any document filed with the court be sealed and not form part of the public record.

When deciding whether documents should be sealed pursuant to s. 137(2) the court must determine whether the principle of openness of court is outweighed by another principle of superordinate importance.⁶ The question then becomes whether protecting the proprietary or competitive interests of a party is a value of such importance as to grant a s. 137(2) motion. The Ontario High Court of Justice in *A. (J.) v. Canada Life Assurance Co.*⁷ identified several values that would outweigh the value of an open court, including the protection of trade secrets:⁸

“The third case — that of secret processes, inventions, documents or the like — depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court’s hands.”

The courts will generally grant a s. 137(2) motion only in the clearest of cases and on the clearest of material where the interests of justice would be subverted and/or a party’s rights would be prejudiced without any significant compensating public interest being served.

It should be noted that s. 137(2) by itself only provides for protection with respect to documents that are filed with the court. It offers no protection with respect to documents that are exchanged between the parties before they are filed with the court. Nor does this section of the *Courts of Justice Act* by itself grant the court power to restrict the use a party makes of a document or information it has received from another party to the litigation.⁹ The court, however, has inherent power to control and prevent abuse of its processes, and may make express non-disclosure orders that restrict a party and his or her solicitors from releasing such a document to other parties or using it for ulterior purposes.¹⁰ The courts have generally exercised this power so as to

Nfld. Rule 42.12; N.W.T. Rule 232; N.S. Rule 30.12; Ont. Rule 30.11; P.E.I. Rule 30.11; and Sask. Rule 286-88.

6. *Law Society of Upper Canada v. Telecollect Inc.* (2001), 56 O.R. (3d) 296 (S.C.), supp. reasons 108 A.C.W.S. (3d) 986.

7. *A. (J.) v. Canada Life Assurance Co.* (1989), 70 O.R. (2d) 27, 35 C.P.C. (2d) 6 (H.C.J.).

8. *Ibid.*, at p. 34, citing Lord Shaw in *Scott v. Scott*, [1913] A.C. 417 at p. 483 (H.L.).

9. *National Gypsum Co. v. Dorrell* (1989), 68 O.R. (2d) 689, 25 C.P.R. (3d) 15, 34 C.P.C. (2d) 1 (H.C.J.).

10. *Ibid.*, at p. 694.

prevent a particular use of documents produced for discovery.¹¹ This type of extended protective order can also be used to protect pleadings that contain confidential information.

Parties who wish to avoid the expense, inconvenience or uncertain outcome of applying for a protective order occasionally resort to delivering a pleading that is vague or that altogether omits to disclose confidential information that is essential to the claim or defence. In the United Kingdom, pleadings that omit confidential information have been allowed on occasion even when the confidential information is essential to the claim (*e.g.* in an action for breach of confidentiality).¹² There is very little case law in Canada on deliberate lack of specificity in a pleading as a means of protecting confidential information, but in the absence of explicit protective orders, most judicial decisions seem to favour specificity in a pleading over the protection of confidential information. The primary purpose of a pleading is to define the issues and to circumscribe the areas of factual inquiry. Full disclosure of material facts is necessary in a pleading so as to enable a party to properly formulate its position and to properly prepare for later discoveries. It has been held that a defendant should not have to wait until discoveries to learn what is the alleged confidential business information that it supposedly misused.¹³

The Alberta Court of Queen's Bench dealt with a case in which a pleading claiming the misuse of confidential information lacked specificity. In *Buddy L. Consultants v. Williams* the plaintiffs claimed that they were owners of proprietary information, including confidential business information and trade secrets. Pursuant to the *Income Tax Act*, ss. 37 and 127, the plaintiffs claimed for Income Tax Investment Tax Credits for Scientific Research and Experimental Development. In the course of that claim, the plaintiffs provided the trade secrets to the defendant, Williams, a lawyer for the Minister of National Revenue. The plaintiffs claimed that the confidential business information was

11. *Ibid.* See also *Anderson v. Anderson* (1979), 26 O.R. (2d) 769, 105 D.L.R. (3d) 341, 14 C.P.C. 87 (H.C.J.); *Reichmann v. Toronto Life Publishing Co.* (1988), 28 C.P.C. (2d) 11 (Ont. H.C.J.); *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260, 17 D.L.R. (4th) 745, 48 C.P.C. 199 (H.C.J.).

12. The plaintiffs successfully obtained an injunction without pleading or revealing full details of the alleged confidential information in evidence. *Lock International Plc v. Beswick*, [1989] 3 All E.R. 373 (Ch. D.); *Amber Size and Chemical Co. v. Menzel*, [1913] 2 Ch. 239; *Underwater Welders and Repairer Ltd. v. Street and Longthorne*, [1967] F.S.R. 194. *Underwater* was discredited in few cases, including *Suhner & Co. A.G. v. Transradio Limited*, [1967] R.P.C. 329.

13. *Buddy L. Consultants v. Williams*, [2000] 1 C.T.C. 40, [1999] A.J. 1232 (Q.L.) (Q.B.).

provided to the defendants in circumstances where these defendants should have known that the information was confidential. The plaintiff argued that certain provisions of the *Income Tax Act* reinforce the confidentiality of the business information supplied to the defendants. Contrary to the obligations of confidence and contrary to sections of the *Income Tax Act*, the defendant provided the plaintiffs' confidential business information to the other defendants, who were competitors of the plaintiffs. The plaintiffs believed that the defendant breached the confidence of the plaintiffs and breached the provisions of the *Income Tax Act*. The defendants made a demand for particulars that was rejected by the plaintiff on the ground that revealing the information in the pleadings would prejudice its rights with respect to the confidential information. The plaintiffs stated that their pleading contained enough information.¹⁴

The court rejected the plaintiffs' argument and enforced the demand for particulars. The court held that the particulars were necessary to understand the claim against the defendants. The court rejected the argument that the defendant was requesting "discovery or evidence" and should wait until discoveries to find out what confidential business information was alleged to have been improperly released. The court was of the view that this argument confused the allegation with its proof. An allegation is a matter of pleading while proof is a matter of evidence. In the case before the court the defendants sought a better pleading from the plaintiffs. They did not seek to learn how the plaintiffs would prove their complaint. The court decided that particulars were necessary to enable the defendants to formulate their defence properly and to prepare properly for later discoveries.¹⁵ The plaintiff did not appear to have sought any other relief from the court for the protection of their confidential information.

It is understandable that a plaintiff who believes that the defendant has stolen its confidential information may not wish to publish that information to the world in a pleading, thereby reducing or eliminating its value to both parties. A plaintiff in that situation should consider applying to the court for an order sealing the pleadings and providing other protections against publication of the confidential information before the action is formally commenced. In an emergency, such an order may be obtained without notice to the other party but with the other party being given the right to move to have the order varied or set aside once the other party has been served with a copy of the order. Another alternative is to plead without specifying the confidential

14. *Ibid.*, at para. 4.

15. *Ibid.*

information, stating that the information is within the knowledge of the opposite party and that the information will be provided once the appropriate protective orders have been obtained. If the opposing party then applies for particulars of the confidential information, the party seeking to protect the confidential information can indicate that it is willing to consent to an order requiring that such particulars be delivered conditional upon confidentiality protections being put in place by the court. Obviously, in all of these scenarios the final arbiter of what is fair and reasonable in the circumstances will be the court itself, if the parties cannot agree.

3. Discovery Stage

Issues relating to confidential information become most acute in the discovery stage of the action. Parties to an action are required to automatically produce to the other side all documents in their possession that relate to the matters in dispute, except for those documents for which they claim privilege. In most provinces, a party (or its representative) must swear an affidavit attesting to compliance with this requirement. Any exemption or protection with respect to confidential information must be sought by way of a special order from the court. Otherwise, a party risks serious sanctions for having failed to include non-privileged documents in the documents they produce.

Similarly, at the oral examination for discovery stage, each party is required to answer all questions that elicit information that is relevant to the action with the sole exception of privileged information. Again, there is no exemption for information merely on the grounds that it is confidential. As previously discussed, any confidential information that is produced is at risk of becoming public through the filing of that information at trial or at an earlier stage of the proceedings if the information is filed in connection with a procedural motion brought before the court. Therefore, where sensitive business information will necessarily be involved in the adjudication of the dispute, it would be highly advisable for the party concerned to apply to the court at an early stage for orders sealing the confidential information and restricting in other appropriate ways the use and publication of the information by other parties.

However, there is one rule of general application in Canadian litigation that protects a party against the use of information produced in the litigation by an opposing party for any other purpose outside of the litigation itself. This rule of general application is described as an "implied undertaking". The implied undertaking rule applies to prevent all documents and information revealed during oral or document discovery from being used for purposes other than the litigation itself.

(1) Implied Undertaking

The implied undertaking with respect to information produced in the course of civil litigation applies independently of any obligation existing under the general law of confidentiality.¹⁶ Generally, the implied undertaking rule enforces an obligation on the party to whom documents and information are produced in litigation to refrain from using the documents and information for a collateral or ulterior purpose. Any such ulterior use of the documents is a contempt of court.¹⁷ The undertaking will apply to counsel, their clients and any third person to whom the party must release the document; this includes experts retained by the parties or their counsel.¹⁸

The implied undertaking rule has been described as judge-made procedural law arising from the inherent jurisdiction of the court to control its own process.¹⁹ Unlike other undertakings in which a party explicitly provides the undertaking or the court orders that the undertaking be given, a party subjected to the implied undertaking does not have to consent to the undertaking or be ordered by the court not to disclose the information obtained on discovery. Because a party has been given access to and the use of the documents for a particular purpose there is a necessary implication that they are not to be used for any other purpose.²⁰

At one point, only the courts of British Columbia did not apply the implied undertaking rule. They have, however, recently reversed their position on the implied undertaking rule. As such, the courts in all provinces have now determined that the implied undertaking rule applies to civil litigation proceedings.²¹ In addition, all provinces have extended the implied undertaking rule to both documents disclosed during discovery and information revealed during oral discovery. Only

16. *Lubrizol Corp. v. Imperial Oil Ltd.*, [1991] 1 F.C. 325, 33 C.P.R. (3d) 49, 39 F.T.R. 43 (T.D.).

17. *National Gypsum*, *supra*, footnote 9, at p. 694.

18. *Winkler v. Lehndorff Management Ltd.* (1998), 28 C.P.C. (4th) 323, [1998] O.J. No. 4462 (QL) (Ont. Ct. (Gen. Div.)).

19. *National Gypsum*, *supra*, footnote 9, at p. 692.

20. *Lindsey v. Le Sueur* (1913), 29 O.L.R. 648 at p. 655, 15 D.L.R. 809 (Ont. S.C. (A.D.)).

21. *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649, 46 C.P.C. (2d) 157 (Gen. Div.); *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 (Gen. Div.); *Consolidated NBS Inc. v. Price Waterhouse* (1992), 94 D.L.R. (4th) 176, 10 C.P.C. (3d) 155 (Ont. Ct. (Gen. Div.)); *Reichmann*, *supra*, footnote 11 — recognized in New Brunswick in *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (Q.B.), in Alberta in *Wirth Ltd. v. Acadia Pipe & Supply Corp.*, [1991] A.J. No. 342 (QL), 50 C.P.C. (2d) 273, 79 Alta. L.R. (2d) 345 (Q.B.), in Manitoba in *Blake v. Hudson's Bay Co.*, [1988] 1 W.W.R. 176, 22 C.P.C. (2d) 95 *sub nom. Governor and Co. of*

Ontario, Prince Edward Island and Manitoba have expressly included the implied undertaking rule in their respective Rules of Civil Procedure.²²

Originally the British Columbia Court of Appeal in *Kyuquot Logging Ltd. v. B.C. Forest Products Ltd.*²³ held that the implied undertaking rule was not applicable in British Columbia. Madam Justice McLachlin began her judgment by observing that the issue in *Kyuquot* was whether there was an implied undertaking with respect to evidence given on an examination for discovery or on discovery of documents. After considering a number of authorities subsequent to 1858, McLachlin J.A. (as she then was) did not find support for the existence of an implied undertaking. Instead, she concluded that the cases established that documents produced on discovery “should” not be used for an unrelated purpose and that the court could impose restrictions “amounting to an injunction” against the use of documents produced pursuant to its order. She observed, however, that the onus was upon the party producing the documents to seek the court’s assistance where no specific undertaking had been given by opposing counsel.²⁴

The decision in *Kyuquot* was overturned in *Hunt v. T&N, plc.*²⁵ *Hunt* dealt with an appeal concerning the use of documents produced during litigation. The plaintiff in the action alleged that he was injured by deleterious asbestos materials many years earlier. He

Adventurers of England Trading into Hudson’s Bay v. Blake (Man. Q.B.), in Nova Scotia in *Sezerman v. Youle*, [1995] N.S.J. No. 525 (QL), 147 N.S.R. (2d) 71, 40 C.P.C. (3d) 1 (S.C.), affd 135 D.L.R. (4th) 266, 150 N.S.R. (2d) 161, 47 C.P.C. (3d) 137 (C.A.), in British Columbia in *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, [1997] B.C.J. No. 2614 (QL) (B.C.S.C.), leave to appeal refused [1998] B.C.J. No. 183 (QL) (B.C.C.A.), in Northwest Territories in *K. (M.) v. B.-K. (C.R.)*, [1995] N.W.T.J. No. 114 (QL), 130 D.L.R. (4th) 487, [1996] N.W.T.R. 168 *sub nom. K. (M.) v. B. (C.R.)* (N.W.T.S.C.); in Yukon in *Marko Trucking Ltd. v. Delta Western Fuel Canada Inc.*, [2000] Y.J. No. 98 (QL), 2000 YTSC 533 (Y.T.S.C.), in Saskatchewan in *Laxton Holdings Ltd. v. Lloyd’s Non-Marine Underwriters*, [1987] S.J. No. 131 (QL), [1987] 3 W.W.R. 570 *sub nom. Laxton Hld. Ltd. v. Madill*, 56 Sask. R. 152 *sub nom. Laxton Holdings Ltd. v. Non-Marine Underwriters* (C.A.); in Quebec in *Lac d’Amiante du Quebec Ltee v. 2858-0702 Quebec Inc.*, [1999] J.Q. No. 1043 (QL), [1999] R.J.Q. 970 (C.A.), affd 204 D.L.R. (4th) 331, [2001] 2 S.C.R. 743, 14 C.P.C. (5th) 189; in P.E.I. in *Ayangma v. NAV Canada*, [2001] P.E.I.J. No. 5 (QL), 203 D.L.R. (4th) 717, 197 Nfld. & P.E.I.R. 83 (P.E.I.C.A.), leave to appeal to S.C.C. refused 203 D.L.R. (4th) vi.

22. Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 30.1.01; P.E.I. Rules of Civil Procedure, rule 30.1.01; Manitoba, Court of Queen’s Bench Rules, rule 30.1. Ontario Rules of Civil Procedure are made under the *Courts of Justice Act*.

23. *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1, 30 D.L.R. (4th) 65, 12 C.P.R. (3d) 347 (C.A.).

24. *Ibid.*, at p. 8.

25. *Hunt v. T&N, plc.*, [1995] 5 W.W.R. 518, 96 W.A.C. 94, 4 B.C.L.R. (3d) 110 (C.A.).

brought the action on his behalf and on behalf of 56 other plaintiffs. Another 85 British Columbians had brought a similar action in Texas against other asbestos companies, including some of the defendants to the plaintiff's action. The defendants wanted to make a discovery of documents in the *Hunt* action subject to an undertaking that their documents would be used only for the purposes of that action. The plaintiff's counsel declined to give any such undertaking or assurance, and returned the documents. An application was brought by the defendants for an order restricting the use of their documents to "related actions". Relying on the *Kyuquot* decision, the court of first instance denied the request. This was appealed to the British Columbia Court of Appeal.

The British Columbia Court of Appeal ruled that there is a general obligation imposed on a party obtaining discovery of documents which requires that party, in appropriate cases, to obtain the owner's permission or the court's leave to use the documents other than in the proceedings in which they were produced.

In keeping with the importance attached to the implied undertaking, the courts have identified a number of remedies that may be available to a party seeking to enforce the undertaking. A breach of the undertaking can be a contempt of court.²⁶ Sanctions can be imposed when a party releases the information to another party or uses it against the disclosing party in another proceeding. A restraining order can be granted to bar disclosure of information or documents protected by the undertaking.²⁷ It is also possible that damages may be awarded where such can be proven to have resulted from a breach of the undertaking.²⁸ Further, where documents subject to the undertaking are used to found a new action, the second action may be struck out or stayed.²⁹

In cases dealing with the Crown, the court has enforced the deemed undertaking by ordering the Crown to return documents produced on discovery that were not made part of the public record. In this way, the implied undertaking would prevent the documents from being subjected to public disclosure through the *Access to Information Act*³⁰

26. *Reichmann, supra*, footnote 11; *Rivait v. Gaudry* (1993), 15 O.R. (3d) 159, 19 C.C.L.I. (2d) 239, 19 C.P.C. (3d) 289 (Gen. Div.), revd 18 O.R. (3d) 548 (Div. Ct.); *Orfus Realty v. D.G. Jewellery of Canada Ltd.* (1995), 24 O.R. (3d) 379, 83 O.A.C. 35, 41 C.P.C. (3d) 148 (C.A.).

27. *Reichmann, ibid.*

28. *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355 (Gen. Div.).

29. *Ibid.*

30. R.S.C. 1985, c. A-1.

or the *National Archives Act*,³¹ under either of which members of the public may access documents in the possession of the government.³²

A court clearly retains the discretion to relieve a party from the implied undertaking.³³ In Ontario, this discretion has been codified in rule 30.1.01(8).³⁴ Under the common law rule a court can grant relief from the undertaking rule when the interests of the discovered party sought to be protected by the rule will not be seriously affected, or affected at all, by a collateral use of discovered document, but those of the discovering party would be seriously affected if use could not be made of the document.³⁵ There is a great deal of case law dealing with when this discretion ought to be exercised. The most significant factors considered by the court are summarized below.

One reason for relieving a party of the implied undertaking is that the parties to the proceeding in which the document was disclosed are the same as those in the other proceeding in which the party wishes to use the document. This will occur in cases where a party alleges a common law tort in a court action and simultaneously commences a regulatory complaint under a statute that provides a remedy.³⁶ This was the situation in *Gleadow v. Nomura Canada Inc.*, where the plaintiff made an application for relief from an implied undertaking. The plaintiffs were employed as traders with the defendant. They commenced an action for wrongful dismissal. The defendant had produced certain trading notes that showed that the plaintiffs were working at certain material dates. Concerned that the action could take a long time, the plaintiffs subsequently filed a proceeding under the *Employment Standards Act* to determine their rights to vacation pay. Despite the defendant's objections, the plaintiffs submitted the defendant's trading notes in the employment standards proceeding and claimed relief from the implied undertaking. The court decided that there were several circumstances justifying relief. The parties in this action and in the employment standards proceeding were the same, the issue in both

31. R.S.C. 1985, c. 1 (3rd Supp.).

32. *R. v. Anderson Consulting*, 2001 CarswellNat 104 (F.C.T.D.), January 19, 2001, File No. Doc. T-1096-95.

33. *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613, 83 O.A.C. 38 (C.A.).

34. Rule 30.1.01(8) reads as follows: "If satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just."

35. *Goodman, supra*, footnote 33, at p. 362.

36. *Gleadow v. Nomura Canada Inc.* (1996), 44 C.P.C. (3d) 133, 18 C.C.E.L. (2d) 210 (Gen. Div.).

proceedings was the same, and the Employment Standards Officer was empowered to order production of the documents in any event. Therefore, the defendant could be compelled to produce the documents. There was no law prohibiting the plaintiffs from raising the issue of vacation pay in both proceedings.³⁷

In *Lubrizol*, the court had to consider the relationship between the implied undertaking and the explicit protection orders.³⁸ In particular the court had to decide whether to grant a motion to subject certain portions of the transcript of the trial to the protective order issued before trial and whether to expand the number of those entitled to see the documents subject to the protective order to include foreign lawyers who were counsel to the parties who were involved in foreign lawsuits involving similar subject-matter.

In deciding the first request the court held that documents subject to a protective order are the parties' confidential documents, which public policy requires that the party be entitled to keep confidential. The court held that these confidential documents would still have to be produced to the opposing party pursuant to the Federal Court Rules. The reason for the rule requiring production of confidential documents is that justice requires that all relevant evidence be before the court and also that an opposing party should not be surprised at trial. The court held that documents produced in accordance with the rules benefit from the implied undertaking that those documents produced can be used only for the purposes of the action. The court decided that the implied undertaking exists notwithstanding the existence of a protective order which may supplement or modify the implied undertaking. Accordingly, in the *Lubrizol* case the court refused to amend the confidentiality order or qualify the implied undertaking to allow the document to be shown to foreign lawyers in a foreign action.³⁹

In the *Lubrizol* case, the court also heard a motion to cause certain portions of the transcript of the trial proceedings to be made subject to the protective order. In deciding this motion, the court had to consider the principle of an open court. The court held that while an interested member of the public could have attended the trial and would have been aware of everything in the transcript, this would not relieve a party of the implied undertaking. In this case the confidential information was given in evidence at an open trial and thus potentially came to the attention of the public. To that extent, the confidential information that

37. See also *Leach v. Assaly* (1998), 28 C.P.C. (4th) 239 (Gen. Div.); *Brown v. McNeilly*, [2000] O.J. No. 1805 (QL), 99 A.C.W.S. (3d) 51 (C.A.).

38. *Lubrizol*, *supra*, footnote 16.

39. *Ibid.*, at p. 328.

came to the attention of the public had lost its confidentiality, but that did not relieve the parties of their implied undertakings. The court decided that the written transcripts of trial evidence were prepared for the benefit of the judge and the parties for the purposes of the trial and any appeals and were not, unless so ordered, made a part of the file. They were not prepared for public use. As such the court made the transcript record part of the protective order:⁴⁰

[E]vidence whether documentary or verbal produced under a protective order is in a similar position to discovery evidence produced subject to the undertaking. Therefore, if a party succeeds in having a document read in open court and having that reading recorded and transcribed, I do not see that the party should thus be able to relieve himself of the confidentiality order or the implied undertaking. This trial lasted several weeks and the transcript must be voluminous. Rather than leaf through it page by page I would have been prepared to consider an application for an order by which the transcript was sealed to be used only for the purposes of an appeal, but subject to the right of any person to apply for access to the transcript for the purpose of preparing a critical comment on the conduct of the case or any other proper purpose.

The decision in *Lubrizol* has been modified in Ontario by the enactment of rule 30.1.01(5) of the Rules of Civil Procedure, which provides that any documents that are filed or read in open court will no longer be subject to the implied undertaking no matter who has caused them to be filed or read in open court. Thus, a party may relieve itself of the undertaking if it has the document filed or read in open court. Once this is done the information may be used for any purpose⁴¹ unless a specific protective order is obtained (see discussion below regarding filed documents).

The potential for the abuse of this rule is obvious, as is the danger of relying on the implied undertaking rule for the protection of truly sensitive information. In the absence of explicit protective orders, a party could file a document with the court and use it in its pleadings or trial such that the confidentiality of the document is lost. This could be used as an effective (albeit abusive) tactic in the litigation process and, in appropriate cases, such tactics may well be sanctioned by the court as contempt of court or abuse of process. However, the fear of losing the implied undertaking as it relates to the confidential information

40. *Ibid.*, at pp. 329-30.

41. Rule 30.1.01(5) reads as follows:

Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b).

may be enough to deter a party from continuing with their claim or defence. In such cases, it may be necessary for the disclosing party to seek specific protective orders.

Only Manitoba, P.E.I. and Ontario have codified the deemed undertaking rule so it may be questionable as to whether the law as articulated in rule 30.1.01(5) is part of the common law rule. The *Lubrizol* decision suggests that it may not be.

The court is less likely to relieve a party of the implied undertaking when a third party is making the request. Generally the court will refuse a non-party's motion to obtain access to documents disclosed during discovery or the examination for discovery of a party who was involved in separate litigation with the non-party.⁴²

In *Livent Inc. v. Drabinsky*, the court decided not to relieve a party of the implied undertaking. In *Livent*, the Canadian Imperial Bank of Commerce (CIBC) was a party to proceedings in the United States in which it was alleged that it and certain former officers of Livent Inc. had misrepresented the financial condition of Livent Inc. to investors. Another investor in Livent Inc. threatened to sue CIBC with respect to his investment. He was also a party to related proceedings in Ontario against the officers. During negotiations to settle his threatened claim against CIBC, the investor's lawyer referred to the examinations of discovery of one of the officers of the company in the Ontario proceedings. His lawyer, however, refused to provide a copy of the transcript of the examination to CIBC and the officer in the action in Ontario refused to consent to the disclosure of his discovery evidence. Pursuant to rule 30.1.01(8) of the Rules of Civil Procedure, CIBC moved in the Ontario action, in which it was not a party, for relief from the deemed undertaking.

The court held that the motion should be dismissed. The court decided that under rule 30.1.01(8), relief from the deemed undertaking rule can only be given where the court is satisfied that the interests of justice outweigh any prejudice to the party who disclosed the evidence. Subrule (8) does not refer to non-parties seeking relief, but non-parties could seek relief at common law. In *Livent* the court determined that CIBC had not met their common law burden in requesting relief from the implied undertaking. The burden was not satisfied because: (1) the conduct of the investors' lawyer, which appeared to have been in breach of the implied undertaking, should not be condoned indirectly; (2) CIBC was able to settle a larger claim without the benefit of

42. *Livent Inc. v. Drabinsky*, 2001 CarswellOnt 717 (S.C.J.), March 15, 2001, File No. Doc. 98-CL-3157.

officers' evidence; and (3) there were as yet no related proceedings, only the threat of them. The court held that the integrity of the deemed undertaking rule is to be preserved unless the party seeking relief can demonstrate that the interests of justice will be fostered by disclosure.

Rule 30.1.01(6) and 30.1.01(8) of the Ontario Rules of Civil Procedure provide two further exceptions to the deemed undertaking rule. Rule 30.1.01(6) permits a party to use information or evidence obtained from one trial to impeach the testimony of a witness in another trial.⁴³ Lastly, rule 30.1.01(8) allows a party to seek an order that the undertaking rule does not apply. When considering whether to grant the order, the judge must be satisfied that the interests of justice outweigh any prejudice that would result to the party who disclosed evidence. While the deemed undertaking rule can provide some degree of protection, it clearly cannot provide the fullest protection necessary. Where the deemed undertaking rule leaves gaps in protection, it may be necessary to supplement the undertaking with a protective or confidentiality order.

(2) Protective Orders

The courts, exercising their inherent jurisdiction, have found methods of protecting confidential information. An Alberta superior court judge described the general approach of the courts in this way:⁴⁴

“the principles applicable are, in my view, as follows: 1. A party to litigation has a prima facie right of unrestricted inspection of the documents of which discovery has been made by the other party so far as may be necessary to dispose fairly of the case or for saving costs. 2. A party is not entitled to use his right of inspection for any collateral purpose. 3. If it is shown that there is a real risk of a party using his right for a collateral purpose, the Court has power to impose restrictions on such right in order to prevent or discourage him from doing so. I think that this power is derived from the inherent jurisdiction of the Court to prevent abuse of its process . . .”

The courts have often divided cases into three broad categories. The first level of cases is where the implied undertaking is sufficient. A majority of the cases that come before the courts need nothing more than the implied undertaking. The next level of cases is where the court may require a formal undertaking by the party or their counsel not to

43. *Antongiovanni v. Phung*, [2001] O.J. No. 4659 (QL), 20 C.P.C. (5th) 77 (Ont. S.C.).

44. *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.*, [1986] A.J. No 176 (QL) at para. 3, 43 Alta. L.R. (2d) 299, 14 C.P.R. (3d) 110 (Q.B.) (hereafter *Miller Sales*), quoting from *Church of Scientology of California v. Department of Health and Social Security*, [1979] 1 W.L.R. 723 at p. 743 (C.A.).

misuse the information. Finally, the extreme position is composed of a "small hard core of cases" where additional precautions are necessary to ensure no abuse of the discovery process occurs.⁴⁵ In cases where more than an implied undertaking is required, parties may make a motion for a protective or confidentiality order.

Cases in which a protective order is needed are quite common. For instance, if a plaintiff is claiming a trade secret infringement (*e.g.* the use of a secret production process) by one of its former employees, who is now employed with a competitor, the plaintiff may argue that the starting point for disclosure should be the disclosure of the defendant's production methods.⁴⁶

Obviously most defendants would object to such a proposal. Defendants would be fearful that if they disclosed first, the plaintiff would claim that such information was part of the plaintiff's own trade secrets. Even if the defendant's production reveals that none of the plaintiff's trade secrets were used, the defendant would not want to divulge information to the plaintiff that is not known to the plaintiff and that might be used to the advantage of the plaintiff as a competitor. The defendant would almost certainly not want to produce any information relating to the production methods used before the hiring of the new employee. In accommodating these legitimate concerns the courts have used their inherent jurisdiction to make protective orders to supplement the deemed undertaking rules.

In making a protective order the governing objective for the court is to resolve the conflicting interests of the parties by ordering a controlled measure of discovery to selected individuals upon terms that ensure there should neither be use nor further disclosure of the disclosed trade secrets to the prejudice of the party disclosing yet ensure that the party claiming infringement gains such disclosure as is necessary and consistent with adequate protection of any trade secrets of the disclosing party.⁴⁷ This mode of disclosure seems appropriate when weighing the need for disclosure and the fact that trade secrets only have value if they are not generally known. When determining whether full disclosure of trade secrets should be made the court should determine whether the probative value of such disclosure is clearly outweighed by the adverse effect disclosure could have.⁴⁸

45. *Ibid.*, at para. 4.

46. Facts are taken from *CPC International Inc. v. Seaforth Creamery Inc.* (1996), 49 C.P.C. (3d) 363, [1996] O.J. No. 1353 (QL) (Ont. Ct. (Gen. Div.)).

47. *Warner-Lambert Co. v. Glaxo Laboratories Ltd.*, [1975] R.P.C. 354 (C.A.).

48. *G.W.L. Properties Ltd. v. Les Industries Cafco Ltée/Industries Cafco Ltd.* (1992),

Protective orders have been granted that allow a solicitor and not his or her client to view the confidential information.⁴⁹ They have also been granted to ensure that confidential information be disclosed only to certain people who themselves agree to be bound by the order.⁵⁰ Obviously there are concerns with any protective order that denies counsel the ability to make full disclosure to a client. Indeed, the entire solicitor-client relationship can break down if the client is unable to give instructions to counsel because they lack the relevant information necessary. To combat this problem, most orders that restrict disclosure to counsel only often have provisions that allow counsel, if they deem it necessary for advice in connection with the action, to disclose the contents of individual documents to individuals who may have been involved with the matters described in the documents. This will be allowed only if the individual signs a written undertaking to the court not to use the information for any purpose other than the action and not to disclose in any manner any portion of the contents of the documents to any person other than legal counsel in the action. In addition, the protective order will usually include a provision that prohibits counsel from showing the individual the actual document or copies of documents that were discussed for advice.⁵¹ It should be noted that a “for counsel’s eyes only” protective order is very rarely given.⁵²

Often a court will order that discovery will be made only once the opposing side undertakes to abide by the protective order.⁵³ Court orders or required undertakings could also provide that all written material concerning confidential information should be destroyed immediately upon the conclusion of the litigation, including all transcripts of examinations.⁵⁴ These protective orders do not usurp the

70 B.C.L.R. (2d) 180 at pp. 184 and 185, 43 C.P.R. (3d) 491, [1992] 6 W.W.R. 584 (S.C.).

49. *Automated Tabulation Inc. v. Canadian Market Images Ltd.* (1995), 24 O.R. (3d) 292 (Gen. Div.) where disclosure was denied to an opposing party but allowed to that party’s solicitors and experts; *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.* (1989), 25 C.P.R. (3d) 12 (F.C.A.); *Harnischfeger Corp. of Canada Ltd. v. Kranco Inc.* (1991), 39 C.P.R. (3d) 81 (B.C.S.C.) at p. 85: “the authorities make it clear that all reasonable steps should be taken to minimize the extent of the disclosure of information which is alleged to be confidential, especially to a competitor”.

50. *E.R. Squibb & Sons Ltd. v. Apotex Inc.* (1993), 15 C.P.C. (3d) 169, [1993] O.J. No. 404 (QL), 47 C.P.R. (3d) 214 (Gen. Div.); *Miller Sales*, *supra*, footnote 44, at p. 2, where information was allowed to be disclosed to parties in litigation.

51. Example of such an order can be found in *Miller Sales*, *ibid.*, at p. 3.

52. *Glaxo Group Ltd v. Novopharm Ltd.* (1998), 81 C.P.R. (3d) 185, 227 N.R. 80 (F.C.A.).

53. *Monsanto*, *supra*, footnote 2.

54. *Ibid.* at p. 600.

implied undertaking. The implied undertaking exists notwithstanding the existence of a protective order that may supplement or modify the implied undertaking.⁵⁵ The protective order may be used to make up for the deficiencies of the implied undertaking rule. Unlike the implied undertaking rule, information that is under a protective order may not be disclosed by the party subjected to the order even if the information is filed with or read out in open court. As was stated by the Federal Court in *Lubrizol*:⁵⁶

In this case, however, there was in addition to the implied undertaking, a confidentiality order which by its terms, in my view, enables a party to claim confidentiality with regard to documents and evidence voluntarily produced. The order permits a party to designate evidence as confidential and the claim of the applicant in this motion must be considered such a designation. Because only certain pages of the transcript were the subject of the motion before me, I only ordered those pages to be subjected to the confidentiality order. As a practical matter, if no appeal is filed from the judgement at trial, applying the confidentiality order to parts only of the transcript may not cause any undue complication. If, however, an appeal is filed and there is a possibility of parts of the transcript being made part of the public file and part, because of the confidentiality order, having to be abstracted therefrom and filed in sealed envelopes I would suggest that counsel might move on consent for an amendment to my order to require that the whole transcript be sealed when filed for the purpose of the appeal.

Cases where more than the deemed undertaking is necessary usually occur in situations where there is a competitive business relationship between the parties or where there is evidence of a "real risk" for abuse of discovery information.⁵⁷ If the party who is subjected to the undertaking is part of a profession that already owes a professional duty of confidentiality, then a protective order may not be granted.⁵⁸ An example is the confidentiality owed by an accountant or a lawyer to his or her client. In the setting of a large accounting or law firm the court may, however, make an order requiring an express undertaking from secretarial or clerical staff within a professional firm:⁵⁹

While I accept that certain particulars concerning C.C.B.'s former and present customers may be confidential in nature, this fact alone is insufficient reason to require anything more explicit from the defendants

55. *Lubrizol*, *supra*, footnote 16.

56. *Ibid.*, at p. 330.

57. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1990), 68 D.L.R. (4th) 754, 106 A.R. 205 (Q.B.) (hereafter *Canadian Commercial*).

58. *Ibid.*, at p. 757.

59. *Ibid.*, at p. 760.

and their counsel than the undertakings which have already been implied at law. As well, the defendant's accountants also already owe a professional duty of confidentiality, as attested to by the affidavit of John Bathurst C.A. In the words of Anderson J., when presented with the same issue in the recent case of *Reichmann v. Toronto Life Publishing Co.* (1988), 28 C.P.C. (2d) 11 at p. 24, 10 A.C.W.S. (3d) 210 (Ont. H.C.J.):

I am satisfied that the implied undertaking is a sufficient safeguard for the plaintiffs against any risk reasonably to be anticipated on the material. The defendants will use any information or documents with knowledge of the implied undertaking, which will no doubt dictate a prudent course. If the defendants are in any doubt about any prospective use of any material, they have always open to them the remedy of a motion to exempt such material from the implied undertaking. In the event of any objectionable use, the plaintiffs always have open to them the remedy of injunction. In the existing circumstances, and at the present time, I see no need for the order sought.

I therefore conclude that the liquidator's first application regarding its continued control over C.C.B.'s pre- and post-liquidation documents be allowed. The plaintiff liquidator's second application for an order restricting access to and requiring confidentiality for their discovery documents is granted only to the extent that an express undertaking will be required from the clerical staff involved. The sheer number and complexity of documents involved has convinced me that considerations of confidentiality will justify obtaining such undertakings from what will necessarily be a large clerical network. The undertakings implied by law from the parties and professional people in this action otherwise provide sufficient protection for the plaintiffs.

The test of whether a protective order is necessary differs from jurisdiction to jurisdiction. In Alberta the courts have suggested that protective orders will be granted where either the information contained in the discovery is of such a nature as to require the order (patent processes, trade mark rights, sensitive or personal information, or in highly competitive industries) or where there is a "real risk" for the abuse of discovery. It is sufficient that there be one of the two aforementioned elements in a case in order that a protective order may be requested.⁶⁰ There are, however, at least two cases in Alberta that have decided that the test for a protective order is a "real risk" of abuse of discovery.⁶¹ In Nova Scotia the courts require that there be sensitive commercial information in a competitive industry as well as a "real

60. *Hamilton v. Alberta (Minister of Public Works, Supply and Services)*, [1991] 5 W.W.R. 232, 80 Alta. L.R. (2d) 169, 118 A.R. 267 (Q.B.).

61. *Wirth, supra*, footnote 21, *Canadian Commercial, supra*, footnote 57, at p. 765.

risk” for abuse. A protective order will be given only if both elements are met.⁶² In Ontario the courts are empowered by their inherent jurisdiction and Rule 30.11 to grant a protective order to limit disclosure. The courts have looked at all the factors mentioned above to determine whether a protective order should be granted. Master Beaudoin in the Ontario Superior Court has listed some of these factors, namely, that the information is confidential, that it is commercially sensitive and that a competitor could obtain an unfair advantage through its release. However, even if these facts are satisfied, showing that a protective order would unduly prejudice the party who wishes no protective order could still defeat the request.⁶³

Thus, in Ontario it has been held that there is a three-part test to obtain a protective order. The moving party must show that the document is confidential, that the information is commercially sensitive and that a competitor could obtain an unfair advantage if it were released. If the court is satisfied on all of those points then a protective order will be made unless the court is satisfied that the opposing party will be unduly prejudiced.⁶⁴ Noticeably missing from the Ontario test is any reference to the “real risk” of abuse test found in the Alberta and Nova Scotia tests.

(3) Confidentiality Orders for Filed Documents

Under the Federal Court Rules⁶⁵ the Federal Court may make an order treating documents filed with the court as confidential. This would restrict the ability of the public to view the filed documents. This rule is similar to s. 137(2) of the *Ontario Courts of Justice Act* mentioned above. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*⁶⁶ recently upheld the use of these confidentiality orders and spoke generally on the test to be met before a confidentiality order should be granted.

Sierra Club is an environmental organization that was seeking judicial review of the federal government’s decision to provide financial

62. *TransCanada Pipelines Ltd. v. Nova Scotia (Attorney General)* (1999), 179 N.S.R. (2d) 364, 40 C.P.C. (4th) 362, [1999] N.S.J. No. 369 (QL) (N.S.S.C.).

63. *BASF Canada Inc. v. Max Auto Supply (1986) Inc.* (1999), 30 C.P.C. (4th) 23, [1999] O.J. No. 515 (Gen. Div.).

64. *GasTOPS Ltd. v. Forsyth* (2000), 15 C.P.C. (5th) 116, [2000] O.J. No. 5614 (QL) (Gen. Div.).

65. Federal Court Rules, 1998, SOR/98-106: s. 151. (1) On motion, the Court may order that material to be filed shall be treated as confidential. (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

66. (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522, 18 C.P.R. (4th) 1.

assistance to AECL, a Crown corporation, for the construction and sale to China of two CANDU reactors. Sierra Club argued that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act* (CEAA), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compelled cancellation of the financial arrangements. AECL filed an affidavit in the proceedings that summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for the production of the confidential documents themselves on the ground that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities allowed disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court. The court had to determine whether a confidentiality order was an infringement of s. 2(b) of the *Canadian Charter of Rights and Freedoms*, which provides: "Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."⁶⁷ The Supreme Court of Canada decided that s. 2(b) of the Charter would not be violated by a confidentiality order if the courts believed that the two-prong test for making a confidentiality order was satisfied. In this case, the court decided to grant the confidentiality order.

In granting the confidentiality order the Supreme Court of Canada decided that the interests promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Taking into consideration the interests of both parties, the court determined that a confidentiality order pursuant to s. 151 of the Federal Court Rules should only be granted if a two-prong test is met. This test asks whether: (1) a confidentiality order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

67. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

In discussing the first prong of the test, the court quoted Binnie J. in *N. (F.) (Re)* and found that the principle of an open court rule only yields “where the *public* interest in confidentiality outweighs the public interest in openness”.⁶⁸ The court decided that in order for the confidentiality order to be necessary the applicant must demonstrate that the information in question had been treated at all relevant times 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. The court added to this the requirement that the information must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed”.⁶⁹ In addition, in order to satisfy the first prong of the test the applicant must show that there is a real and substantial risk, well-grounded in evidence, posing a serious threat to the commercial interest in question. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.⁷⁰

The court decided that the “important commercial interest” discussed in the first prong of the test cannot merely be specific to the party requesting the order. The interest must be one that 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, in the case before the court the AECL argued that exposure of information would cause a breach of a confidentiality agreement. After reviewing all the factors involved in the first prong of the test, the Supreme Court of Canada held that the AECL had satisfied it.

The proportionality prong of the test involves weighing the benefits of the order against the harms. In *Sierra Club*, one of the benefits of the confidentiality order was the maintenance of public security. The court held that public interest might be better served if information that pertained to the construction of nuclear reactors was subject to a confidentiality order. Another benefit of the confidentiality order was that if it was granted, the AECL would be able to use the information as part of their defence. If the order was not granted, then the AECL

68. [2000] 1 S.C.R. 880 at para. 10, 188 D.L.R. (4th) 1, 146 C.C.C. (3d) 1, 2000 SCC 35.

69. *Sierra Club*, *supra*, footnote 66, at p. 213.

70. *Ibid.*, at p. 212.

would not produce the documents. As such the primary interest that would be promoted by the confidentiality order was the public interest in the right of a civil litigant to present its case, or, more generally, the right to a fair trial. Because the fair trial right was being invoked in order to protect commercial, not liberty, interests of the AECL, the right to a fair trial was not a Charter right; however, a fair trial for all litigants was recognized by the Supreme Court of Canada as being a fundamental principle of justice.

In discussing the deleterious effects the court acknowledged that a confidentiality order was an attack on freedom of expression:⁷¹

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per Wilson J.*, at pp. 1357-58. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

The Supreme Court held that in weighing the deleterious effects, a court should examine how the confidentiality order would affect the three core values of freedom of expression. The core values underlying freedom of expression are: (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons. The more harm the order would cause to the core values, the more difficult it would be to justify the confidentiality order. Minor effects on the core values would make the order easier to justify.

In analyzing the effect that a confidentiality order would have on participation in the political process (*i.e.*, the third core value), the court held that the specific information sought to be subject to the order should be weighed against the specific limitations imposed by the confidentiality order:⁷²

Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, 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 . . .

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance

71. *Ibid.*, at p. 217.

72. *Ibid.*, at p. 220-21.

with the specific limitations on openness that the confidentiality order would have . . .

In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

The Supreme Court of Canada in *Sierra Club* weighed these deleterious effects against the salutary effects of the order in deciding that the order should be granted. It is important to note, however, that in *Sierra Club*, the Chinese agreement with the AECL did not include provisions requesting a closed trial process. The court in *Sierra Club* reaffirmed that public access to judicial proceedings should not be interfered with except where necessary and in a manner that is least restrictive of the public's right to access information.

(4) Varying and Setting Aside Protective Orders

In order to vary or set aside a protective or confidentiality order, a party must convince a judge that there has been a material change in circumstances that requires a second look at the order. Varying or setting aside a confidentiality order can become more complicated when an order affects a non-party to the proceeding in which the order was made. The Ontario Court of Appeal recently addressed this issue in *Ivandaeva Total Image Salon Inc. v. Hlembizky*.⁷³

In *Ivandaeva*, the defendants entered into three commercial agreements with the plaintiff (Mr. Ivandaeva) and his wife for the purchase of the defendants' business. Before the closing of the agreements, the marriage of the plaintiff and his wife failed. The plaintiff and his company brought three proceedings against the defendants claiming that they were entitled to terminate the agreements and asking for the return of all deposits paid under the agreements. Around the same time, the plaintiff commenced an application for divorce and obtained an order in that proceeding sealing the court files. Counsel for the defendants in the commercial litigation became aware of the sealing order, obtained access to the file, which had not been sealed due to an administrative oversight, and made copies of 15 documents. The defendants filed a supplementary affidavit of documents in the commercial litigation stating that they had come into possession of the documents, which their lawyer had copied. Counsel for the defendants ultimately returned the documents but took the position that the sealing order was

73. (2003), 63 O.R. (3d) 769, 225 D.L.R. (4th) 322, 169 O.A.C. 354 (C.A.).

not directed at himself or his clients and that they were not required to comply with it in the absence of an order of a Superior Court judge. The plaintiff moved for an order compelling compliance with the sealing order. The defendants brought a cross-motion to set aside the sealing order to the extent that it covered those documents listed in their supplementary affidavit of documents.

The defendants' argument was that the original sealing order was made without notice to them, a party whose interests were affected by the order. As such, the defendants argued that the order should be set aside or varied in a manner that would allow them to use the documents listed in their supplementary affidavit of documents. The Court of Appeal decided that the defendants did not have standing to vary or set aside the order as they had not established that they were a party affected by the order. The court held that a non-party who desires to set aside or vary an order must show that they have standing by establishing that they have a direct interest affected by the confidentiality order.

The defendants had argued that their financial interests were at stake because they could not properly defend the action without the documents. The court decided that the possibility that financial information about the plaintiff contained in the matrimonial court file might have assisted the defendants in their defence of the commercial litigation did not amount to the direct effect on their proprietary or financial interests necessary to establish standing. As such, the court denied the defendants motion to set aside or vary the confidentiality order.

(5) Confidentiality Order in Class Actions

The advent of class action legislation in various provinces has led to a unique body of case law on confidentiality. When dealing with class actions, the courts will often balance the purposes of class action legislation (*i.e.* a timely resolution to common issues) with the somewhat cumbersome rules of civil procedure. Confidentiality orders are no exception to this balancing act. The courts, when dealing with a confidentiality order in a class action, are left balancing the rights of representative plaintiffs and class members to be properly informed and instructed by their representative counsel against the potential for widespread dissemination of commercially sensitive information. With a large class the possibility of information leaking to the public becomes greater than in a normal civil case. More importantly, the larger the amount of people exposed to the commercially sensitive information, the less use and value it has to the party seeking the order. In deciding whether to grant confidentiality orders the courts have had to grapple with these unique concerns.

In *Prendiville v. 407 International Inc.*,⁷⁴ the defendant corporations sought a sealing order to preserve the confidentiality of their documents. The representative plaintiff had claimed damages from the defendants for their practice of charging late fees to users of the 407 highway. The court held that the defendants should be denied their request for a sealing order because "they did not establish that there is an important public interest in the confidentiality that is sought".⁷⁵ The court relied upon the Supreme Court's decision in *Sierra Club* for the proposition that a commercial interest cannot be an appropriate public interest if the interest affected applies only to the party requesting the order. The court went on to note that sealing orders in a class proceeding raise issues that are foreign to the normal litigation process.⁷⁶

[Sealing orders] raise a particular concern in the context of a class proceeding. Because this is a proposed class action, there is at least an argument (the plaintiff would put it higher than that) that all members of the proposed class ought to have access to all of the materials that are filed regarding the certification motion. The members of the proposed class, while not technically parties to the action, nonetheless have a direct interest in this action generally, and specifically in respect of the certification motion. During the hearing, I posed the question to counsel for the 407 defendants, if I should ultimately decide not to certify this action as a class proceeding based in part of the contents of the documents which it is proposed should be sealed, how is any member of the proposed class supposed to understand the reasons why the certification motion failed? The situation is equally problematic if the action is certified. There is no suggestion by the 407 defendants that, if certification is granted, the sealing order would automatically be lifted. Indeed, I assume that the 407 defendants would continue to wish to have the documents sealed. How then are the members of the class, who at that point clearly become parties to the action, to be denied access to material documents in the litigation?

I do not mean, by posing these somewhat rhetorical questions, to suggest that sealing orders could never be entertained in a proposed class action just because it is such, but as a way of demonstrating that there are additional complicating factors when such requests are considered in this context.

Because they were no longer "rhetorical questions", the Ontario Superior Court in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*⁷⁷ was forced to grapple with many of the issues raised by

74. [2002] O.J. No. 2548 (QL), 24 C.P.C. (5th) 184 (Ont. S.C.), aff'd [2002] O.J. No. 3913 (QL) (Ont. C.A.).

75. *Ibid.*, at para. 14.

76. *Ibid.*, at paras. 12-13.

77. [2003] O.J. No. 1016 (QL), 121 A.C.W.S. (3d) 426 (Ont. S.C.) (hereafter *Great Atlantic*).

the court in *Prendiville*. In *Great Atlantic*, the defendant brought a motion to obtain a permanent confidentiality order. The matter was a class action involving an alleged failure by Great Atlantic to properly pass on certain supplier discounts. The parties agreed to a detailed order and confidentiality undertaking regarding certain commercially sensitive information. The draft order contemplated three categories of persons: the representative plaintiffs, members of the class who were not named parties and the public at large. The draft order stipulated that sensitive information would be sealed and kept out of the public domain. Those officers of the representative plaintiffs who required access to the information to instruct counsel as well as the counsel, their staff and experts would have full access to the documents, but would be subject to a confidentiality order. Members of the class who were not named as parties would have access only to summaries of the sensitive information provided that they signed a confidentiality undertaking. Certain suppliers, non-parties to the motion, intervened contending that they would be affected by the order since it was their proprietary information that could become public.

One supplier was concerned that the restricted information the order contemplated passing to the class members who are not named parties could permit a knowledgeable person to calculate or estimate the detailed pricing, costing and contractual arrangements between the supplier and Great Atlantic. The court noted the difficulty in this situation:⁷⁸

There is no easy solution to this problem. Mr. Heintzman [counsel for the defendant] argues that he is obligated to advise the class members at various stages in the litigation and he can not advise them appropriately without at least the information agreed upon. This is fair. Once certification has been granted, the members of the class are clients of class counsel and class counsel has obligations to those clients.

Mr. Heintzman also argues that he needs to interview prospective witnesses; many of whom will be class members. He is of the view that he would be unreasonably restricted in these efforts if he can not disclose the information contemplated by the order or if he had to disclose persons he intended to interview. I note that the order does contemplate full access to information by experts and only limited information to the class members.

Ultimately, the court decided that while it was not appropriate for strangers to the litigation to be allowed to impose restrictions beyond what had been agreed to by the parties, the suppliers were granted the right to be informed concerning the release of information under the

78. *Ibid.*, at paras. 8-10.

confidentiality order and the right to enforce the order as fully as if they were parties to the litigation.

(6) The Effect of Foreign Confidentiality Law on Disclosure

The effect of foreign laws will generally be considered when it becomes necessary to impose sanctions on an individual who chooses to withhold information on the basis of foreign laws requiring non-disclosure. At that time, a party may adduce evidence of foreign laws that prohibits him or her from answering certain questions or producing relevant information.⁷⁹

The Ontario Court of Appeal in *Frischke v. Royal Bank of Canada*⁸⁰ decided that Panamanian secrecy laws could be used as an excuse to avoid a duty to disclose. In *Frischke*, the plaintiff sued his daughter, her husband and companies they controlled for a declaration that the plaintiff was the beneficial owner of funds that he had transferred to the defendants for investment on his behalf. The defendants converted the disputed assets to cash during the trial and left the country during an adjournment of the proceeding. These moneys were later declared to be the property of the plaintiff. The defendants had deposited the cheque at a branch of the Royal Bank of Canada in Toronto and immediately transferred the funds to a Royal Bank of Canada branch in Panama. The Royal Bank of Canada was made a party to the action for the purpose of an injunction and an order was made enjoining the bank from releasing or dealing with the money. What was not known at the time of the order was that the moneys had by then been transferred out of the Royal Bank of Canada branch in Panama to another bank in another place. The court directed the Royal Bank of Canada to secure from its employees in Panama all information and documents they had relating to the moneys in issue. The bank appealed the order. Its position was that it could not secure the information or documents ordered as it was against the bank secrecy laws of Panama that this information be divulged. The bank's Panamanian counsel advised that the employees of the bank in Panama would be subject to civil and criminal penalties if they gave the information that was required. The Ontario Court of Appeal decided that a court will not ordinarily make an order that would require someone to compel another person in a foreign jurisdiction to break the laws of that foreign state. Even though the information they wished to obtain was urgently required by the applicant to trace moneys that were the subject of the action, urgency alone

79. *Comaplex Resources International Ltd. v. Schaffhauser Kantonalbank* (1991), 5 C.P.C. (3d) 180, 84 D.L.R. (4th) 343 (Ont. Ct. (Gen. Div.)).

80. (1977), 4 C.P.C. 279, 80 D.L.R. (3d) 393, 17 O.R. (2d) 388 (C.A.).

did not justify departure from the established rule. The court reasoned that they should not assist in the breaking of laws of another state.

This case was distinguished in *Comaplex* and *Comexter Inc. v. Cassady*.⁸¹ In *Comaplex* the Ontario High Court had to decide whether to grant a motion by the plaintiff to compel the defendant to produce documents and answer questions that were refused on examination for discovery. The plaintiff alleged that the defendants violated provisions of the *Securities Act*. The defendant argued that the questions and documents were irrelevant and that it was bound by Swiss banking secrecy law. Issues for determination were whether the information and documents sought were relevant, whether Swiss law was applicable and, if so, whether it in fact prohibited disclosure. The plaintiff argued that a party to litigation before a Canadian court must disclose the information regardless of the consequences to it under the laws of the foreign jurisdiction in which it resides. The defendant was a party to litigation in Ontario and subject to the jurisdiction of the Ontario court. The court agreed and ordered the witness to answer the questions despite the fact that he would be violating Swiss law. Where the party requesting the application of foreign laws to avoid production is an actual party to the litigation, the decision in *Comaplex* will apply. The court distinguished *Frischke* on the grounds that the bank was only a limited party in that it had no interest in the actual result of the litigation. In *Comaplex* the party had a direct and substantial interest in the result. As such the bank could not use foreign confidentiality laws to insulate itself from disclosure. The court decided that foreign laws would only be considered when it became necessary to sanction an individual who chooses to withhold information. At that time, a party may adduce evidence of foreign laws that prohibit it from answering or producing relevant information.

A court will also disregard foreign confidentiality laws if a party can not be subject to prosecution under them. The Ontario Court of Appeal in *R. v. Spencer*⁸² dealt with whether a foreign confidentiality law could insulate a person from disclosing relevant information at trial. In *Spencer*, the accused was charged with an offence under the *Income Tax Act*. The Crown sought to call as a witness an employee of the Royal Bank of Canada who, while residing in Canada, was at the relevant time the bank manager for a branch in the Bahamas. The bank manager answered several questions but refused to answer any questions concerning transactions at the Bahamian branch of the bank

81. *Comaplex*, *supra*, footnote 79; *Comexter Inc. v. Rankin Estate* (1987), 7 A.C.W.S. (3d) 330 (B.C.C.A.), Taggart J.A.

82. (1985), 145 D.L.R. (3d) 344, 2 C.C.C. (3d) 526, 31 C.P.C. 162 (Ont. C.A.), *aff'd* 21 D.L.R. (4th) 756, [1985] 2 S.C.R. 278, 21 C.C.C. (3d) 385.

on the ground that disclosure of the information requested could expose him to a criminal prosecution in the Bahamas. Section 10(1) of the *Bank and Trust Companies Regulation Act, 1965* (Bahamas) provides that a bank employee shall not, without the express or implied consent of the customer concerned, disclose to any person any information relating to the identity, assets, liabilities, transactions or accounts of a customer. Contravention of any of the provisions of s. 10(1) constitutes a summary conviction offence.

The court decided that whether or not the witness would be exposed to liability in the Bahamas for his testimony in a Canadian court he was still required to testify concerning his knowledge of the transactions. The bank manager was a compellable witness in Ontario and was not being forced to give evidence in breach of any penal laws in Canada. The court held that in this case the witness would not be violating Bahamian law. The court decided that it is a part of the law of Bahamas that criminal law is territorial in nature and is not intended in the absence of explicit words to the contrary to cover conduct that takes place outside the territorial jurisdiction of the enacting body. The Bahamian legislation in *Spencer* did not state in any terms that it was to have extra-territorial effect. Because the Bahamas law would not apply to the witness, he was compelled to give the answers the Crown requested.

(7) Business Information and Blocking Statutes

There are a number of blocking statutes in Canada that prohibit the removal of documents from Canada to a point outside Canada for the purpose of complying with an order, direction or summons from a foreign court. Among these statutes are the Ontario *Business Records Protection Act*⁸³ and the *Foreign Extraterritorial Measures Act*.⁸⁴ Each of these Acts have numerous exceptions that would allow a foreign plaintiff or defendant to gain access to business records.

The Ontario *Business Records Protection Act*, while being a relatively inconspicuous piece of legislation, provides very clear language against removing business records from Ontario even when they are required by a foreign court order. The exceptions to the removal of business documents are limited to parent companies, securities regulation, and under the authority of other laws of Ontario and Canada:⁸⁵

Business records not to be taken from Ontario

1. No person shall, under or under the authority of or in a manner that would be consistent with compliance with any requirement, order, direction

83. R.S.O. 1990, c. B.19.

84. R.S.C. 1985, c. F-29.

85. R.S.O. 1990, c. B.19, s. 1.

or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario, unless such taking, sending or removal,

- (a) is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organization outside Ontario material relating to a branch or subsidiary company or organization carrying on business in Ontario;
- (b) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario and as to a jurisdiction outside Ontario in which the securities of the company or person have been qualified for sale with the consent of the company or person;
- (c) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario as a dealer or salesperson as defined in the *Securities Act*, and as to a jurisdiction outside Ontario in which the company or person has been registered or is otherwise qualified to carry on business as a dealer or salesperson, as the case may be; or
- (d) is provided for by or under any law of Ontario or of the Parliament of Canada.

The leading case dealing with s. 1 of the *Business Records Protection Act* is *France (Republic) v. De Havilland Aircraft of Canada Ltd.*⁸⁶ In this case a company that acted as agent for De Havilland in various transactions filed a complaint in France accusing Byron-Exarcos of misappropriating commissions payable from De Havilland to it for its personal use while Byron-Exarcos was managing its affairs. The French court issued letters rogatory requesting that the competent Canadian authorities assist with respect to preliminary investigations into the complaints. The Department of Justice, acting on behalf of the Republic of France, applied under s. 46 of the *Canada Evidence Act* for an order directing the taking of commission evidence.⁸⁷ At the court

86. (1991), 3 O.R. (3d) 705, 65 C.C.C. (3d) 449, 49 O.A.C. 283 (C.A.) (hereafter *Republic of France*).

87. Section 46 reads:

46. Where, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal of competent jurisdiction in the Commonwealth and Dependent Territories or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge

of first instance, the order was granted by Mr. Justice Eberle. De Havilland applied to have the order set aside by the Ontario High Court of Justice. Justice McRae of the Ontario High Court set aside the order on the grounds that s. 46 of the *Canada Evidence Act* requires that the evidence sought be in relation to a civil, commercial or criminal matter pending before the foreign court, that the proceedings in the French court were similar to a police investigation in Canada and that there was no criminal charge pending in France. The Republic of France appealed. The Ontario Court of Appeal decided that s. 46 did apply and that De Havilland was forced to provide oral evidence.

In coming to their decision, the Ontario Court of Appeal addressed the issue of whether s. 1 of the *Business Records Protection Act* applied:⁸⁸

The applicability of this section is doubtful. The order made by Eberle J. is not an order, direction or subpoena emanating from a jurisdiction outside of Ontario. I am also inclined to the view that s. 46 of the *Canada Evidence Act* triggers the exception set out in s. 1(d). It is not, however, necessary to determine, on this appeal, the applicability of s. 1 of the *Business Records Protection Act* to the documents requested, as I am satisfied the section is no bar to the order for commission evidence. Its application, if any, to any of the documents ordered produced is best determined by the Commissioner, should De Havilland contend that any of the documents are protected by the section. I am satisfied that the order requested will not compromise any federal or provincial statute.

The Ontario Court (General Division) had the opportunity to comment on this decision in *De Havilland in Germany (Federal Republic) v. Canadian Imperial Bank of Commerce*.⁸⁹ In so doing, the court discussed s. 1 as it related to business records. In *CIBC*, Germany through letters of request for judicial assistance sought an order for the production of documents by and the attendance for examination of CIBC. The evidence was sought to assist in the criminal investigation of another individual who was alleged to have engaged in a fraudulent scheme in Germany. The court decided that where letters rogatory relate to foreign criminal matters, they are exclusively governed by s. 46 of the *Canada Evidence Act*. The court determined

belongs or of the judge, the court or judge may, in its or his discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

88. *Republic of France, supra*, footnote 86, at p. 719.

89. (1997), 31 O.R. (3d) 684 (Gen. Div.), affd 80 A.C.W.S. (3d) 50, 38 W.C.B. (2d) 366 (C.A.) (hereafter *CIBC*).

that the prerequisites for s. 46 were met and thus CIBC would have to produce the documents requested. In discussing s. 1 of the *Business Records Protection Act*, the court adopted the statements made by the Ontario Court of Appeal in *Republic of France* as they related to s. 46 of the *Canada Evidence Act* meeting the exception set out in s. 1(d).

Thus, it is very clear that the provisions of the *Business Records Protection Act* are not contravened where an Ontario order facilitating production of documents in a foreign proceeding is made.

It is also doubtful that the Act would be applied to the voluntary compliance with a foreign order, direction or subpoena where only a copy of the record is provided as opposed to the original record.

Provincial blocking statutes have no inter-provincial application. As such, an Ontario litigant involved in an action commenced in another province cannot rely on the Business Records Protection Act to avoid the discovery obligations mandated by another province. The Supreme Court has found that any inter-provincial application of blocking statutes is unconstitutional.⁹⁰

(8) PIPEDA

The *Personal Information Protection and Electronic Documents Act*⁹¹ confers extensive rights on individuals to control the collection, use and disclosure of their personal information by organizations in the course of commercial activity. PIPEDA also has some implications for the collection, use and disclosure of personal information in the litigation process. Generally speaking, information that satisfies the definition of personal information cannot be collected, used or disclosed without consent⁹² There are, however, several exceptions to this general rule. Section 7 of the Act specifically provides for circumstances in which personal information may be collected, used or disclosed without consent.

Section 7(1) allows an organization to collect personal information without consent if it is reasonable to expect that the collection with the consent of the individual would compromise the availability or accuracy of the information *and* the collection is reasonable to investigate a breach of an agreement or contravention of the laws of Canada or the provinces. Clearly, the investigation of a contract breach would allow an organization to collect personal information without consent. However, what is not stated expressly is whether the “laws of Canada or the provinces” incorporates other common law actions (*e.g.* tort or negligence). It is submitted that the “laws of Canada or the provinces” includes both statutory and judge-made laws.

90. *Hunt v. T&N plc*, [1993] 4 S.C.R. 289.

91. S.C. 2000, c. 5 (hereafter PIPEDA).

92. Schedule 1, s. 4.3 of PIPEDA.

A further question is whether the statute requires an organization to consider and rule out the obtaining of the consent of the individual (for fear that requiring consent will affect accuracy) in every case.

Section 7(2) creates several exceptions to the need to obtain consent before using personal information. These exceptions include information that was collected pursuant to s. 7(1)(a) or (b). As such, any information collected for the purpose of investigating a breach of an agreement or contravention of law is automatically, by virtue of satisfying the requirements of s. 7(1)(b), available for use. In addition, s. 7(2)(a) provides an exception to the use of personal information without consent for the investigation of a contravention of law.

Lastly, s. 7(3) provides several exceptions to the general rule that disclosure of personal information is not permitted without consent. Some of the more relevant exceptions for litigation purposes are:

(a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(b) for the purpose of collecting a debt owed by the individual to the organization;

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

.....

(h.2) made by an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; or

(i) required by law

Arguably, s. 7(3) allows for the disclosure of personal information to a court or tribunal (as long as the tribunal has been given statutory power to compel production). An order from a court appears not to be necessary as s. 7(3) permits disclosure in accordance with the rules of court (*i.e.* Rules of Civil Procedure relating to document or oral discovery) or as required by law. However, read literally, this last exception appears only to apply to "records" and not to information in a broader sense.

On a review of PIPEDA there does not seem to be any provision that bars the production of relevant documents in a court action. The Ontario Superior Court of Justice has recently adopted this interpretation in *Lisozzi v. Bell Distribution Inc.*⁹³ In *Lisozzi* the plaintiff sought an order compelling production of an unedited copy of Bell Distribution's 2000 HCI Planning, Financial Ops (which was included in Schedule A of

93. [2001] O.J. No. 2378 (QL), 106 A.C.W.S. (3d) 42 (Ont. S.C.).

Bell's affidavit of documents, *i.e.* the document was relevant and in the possession of the defendant). The defendant's position was that the document need not be produced in unedited form as the edited material did not meet the test of relevance and that the defendant was precluded from producing the document by operation of PIPEDA.

In granting the order, the court held that s. 7(3)(c) permits disclosure made to comply with an order of the court or to comply with the rules of court relating to the production of records. The court held that the word "court" should be interpreted as having its ordinary meaning, which encompasses the Superior Court of Justice. The Rules of Civil Procedure of the Superior Court of Justice mandate discovery of documents relating to any matter in issue that are in the possession of the defendant. The court decided that the disclosure and provisions of the Rules of Civil Procedure fall within the exception set out in s. 7(3)(c):⁹⁴

Section 7(c) in no way precludes the inspection of document No. 24 but instead mandates that the document can be produced or ordered to be produced to comply with the rules of court relating to inspection of documents. Section 7(3)(a) complements that requirement by ensuring that disclosure can be made to the lawyer representing the party which then permits the solicitor to fulfil his or her duty vis-a-vis the necessity of full disclosure of all documents relating to any matter in issue in the action as required by rule 30.03(4).

4. Trials

As mentioned earlier, there is a very strong public policy in favour of ensuring that courts are open to the public. The courts have articulated the purpose of an open court: "The public interest in open trials is not for titillation or satisfaction of curiosity but is to enable a member of the public to see that justice was properly administered."⁹⁵ In order to limit public access the moving party must show that there is a policy reason favouring restricted access that is superordinate to the public policy in favour of openness. In the United Kingdom the courts have recognized that one of the exceptions to openness has been the maintenance of secrecy in trade secrets actions.⁹⁶ The Supreme Court of Canada has adopted the language in the U.K. cases that establish certain exceptions to the principle of openness of the court. Specifically the Supreme Court of Canada has recognized that courts can be closed to the public in order to protect secret processes.⁹⁷ In Ontario, the court is given the discretion, pursuant to s. 135(2) of the

94. *Ibid.*, at para. 11.

95. *Lubrizol*, *supra*, footnote 16, at p. 327.

96. *Scott v. Scott*, [1913] A.C. 417 at p. 422 (H.L.).

97. *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129.

Courts of Justice Act, to depart from the general principle that courts should be open. All of the analysis of s. 137(2) is applicable to s. 135(2) or general public bans of courtrooms.

The starting point in determining whether the court should be closed is that the courtroom is open and public access should only be denied to the extent necessary to ensure the protection of the secret information. If a hearing takes place in court where no part of the record contains secret formulas, then argument should take place in open court without concern.⁹⁸ When requesting that the courtroom doors be closed, the onus is upon the party who makes the request to satisfy the court that the closure of the courtroom to public access in whole or in part is justified as an exception to the general rule. To do this, it must be shown that the paramount object of securing justice will be subverted if the courtroom is left open. Where a party does request an *in camera* hearing, and it falls within a traditional exception to the rule of an open courtroom, the court should impose as few restrictions as possible on public access while still preserving the ability to do justice in the case before it. The courts will attempt to minimize, as much as possible, the exclusion of the public.⁹⁹

5. Conclusion

The litigation process creates many risks that confidential information will be released to the world. Documents filed with a court and courtroom proceedings are all subject to an open court principle which makes the litigation process as open as possible to ensure that the public will have confidence in the proper administration of justice. While this principle is of extreme importance, the legislatures and the courts have recognized the importance of ensuring the protection of confidential information in appropriate cases. Without the protections afforded in the legislation and common law, parties would be less likely to produce relevant documents or information for fear of improper use. On the other hand, the unrestrained granting of protective orders could seriously hamper the ability of an opposing party to craft their defence or claim and could undermine the confidence of the public in the administration of justice.

While a party who wishes to protect confidential information may rely on confidentiality orders, protective orders, closing of court proceedings, or even the implied undertaking rule, there are still many gaps in the protection that is afforded and the availability of relief cannot be guaranteed in advance.

98. *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1994] M.J. No. 357 (QL), [1994] 7 W.W.R. 420, 56 C.P.R. (3d) 20 (C.A.).

99. *Ibid.*, at para. 37.