Ontario Superior Court of Justice: word of caution regarding sealing orders

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In the receivership proceedings of Distinct Infrastructure Group Inc. and its subsidiaries (collectively, DIG), the Ontario Superior Court of Justice (Commercial List) (the Court) granted the motion brought by the court-appointed receiver (the Receiver) for the approval of settlement agreements relating to multiple legal proceedings arising out of DIG's insolvency (the Settlement Agreements).

The Receiver also sought a sealing order to exclude the Settlement Agreements from being disclosed to the public as part of the documents filed with the Court. Notably, each of the Settlement Agreements contained confidentiality provisions that reflected the parties' agreement not to disclose its terms.

Although the sealing order was ultimately granted, the Court issued a word of caution against assuming that courts will seal a document solely on the basis that it contains a confidentiality clause or a provision that the parties will seek a sealing order.

The Court's decision also sheds further light on the recently refined legal test for the granting of sealing orders.

Background

Following the commencement of DIG's receivership proceedings in March 11, 2019, multiple proceedings were brought on DIG's behalf and by other claimants against former directors and officers of DIG. After a lengthy and complex mediation process, the parties entered into the Settlement Agreements to formalize the settlement of seven out of nine proceedings. Two proceedings against other defendants (the Non-Settling Defendants) remain ongoing.

In its motion for the Court's approval of the Settlement Agreements, the Receiver requested that the Settlement Agreements be sealed given that they contained financial settlement terms and commercially sensitive information. The Settlement Agreements also contained provisions requiring the parties to keep the terms confidential.

Sealing orders

In considering whether to grant a sealing order, courts must weigh the public interest of protecting confidential or sensitive information against the negative effects of restricting access to proceedings and files that would normally be available to the public. The principle of allowing public access to court proceedings (known as the open court principle) reflects the right to freedom of expression under the Canadian *Charter of Rights and Freedoms* and has long been recognized as an important public interest.

The legal test for the granting of a sealing order was established by the Supreme Court of Canada in its 2002 decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, which requires a party seeking a sealing order to demonstrate that:

1. a sealing order is necessary to prevent a serious risk to an important interest, including a commercial interest, because alternative measures would not prevent the risk; and
2. the positive effects of the sealing order outweigh the negative effects, including the public interest in open court proceedings.

The Supreme Court refined the *Sierra Club* test in its 2021 decision in *Sherman Estate v. Donovan*, finding that the test required the following three prerequisites:

1. court openness poses a serious risk to an important public interest;
2. the sealing order is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
3. as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

For a more fulsome discussion of *Sherman Estate*, please see our previous article.

The decision of the court

In its decision to grant the sealing order, the Court in DIG found that all three prerequisites set out in *Sherman Estate* were satisfied. It stated that there was a "clear and unassailable" public interest in promoting the settlement of disputes and the avoidance of litigation. There was also a public interest in preserving commercially sensitive information, particularly in light of the ongoing claims against the Non-Settling Defendants who were not entitled to the financial terms of the settlements.

The Court further held that the requested sealing order, which would seal the entirety of the Settlement Agreements, was proportionate given the complexity of the proceedings, the multitude of parties and the presence of commercially sensitive information throughout the agreements that made it impractical to redact only certain provisions. The Court acknowledged that the Settlement Agreements were the product of hard fought negotiations between multiple claimants defending different business interests and competing for settlement proceeds. The Court further noted that the sealing order was not absolute and could be modified or lifted by the Court in the future.

Finally, the Court determined that the public interest of promoting settlements, especially complex multi-party and multi-proceeding settlements involving parties seeking to protect their commercially sensitive and private information through

confidentiality clauses, outweighed the negative impact that the sealing order would have on the open court principle in this case.

However, although the Court recognized that the confidentiality provisions reflected the parties' intention and agreement not to disclose the settlement terms, it warned against assuming such confidentiality provisions would guarantee a sealing order.

In DIG, the lengthy negotiations and the multitude of parties and complex proceedings were key factors that supported a sealing order, as well as the commercial and financial sensitivities to which the Non-Settling Defendants should not be privy. In all cases, the granting of a sealing order must be based on a principled analysis guided by the legal test.

Key takeaways

Contracting parties should be aware that in circumstances where their agreement may be subject to public disclosure (such as in the context of insolvency proceedings), there is no guarantee that a court will grant a sealing order simply because the parties have contractually agreed to keep the terms confidential. Parties seeking to seal their agreement must be able to demonstrate legitimate concerns about disclosure of the contents that outweigh the public interest in open court proceedings.

Even then, parties will be expected to structure their agreements in a way that would allow for limited redactions, as opposed to a sweeping order that seals the entire agreement. This is especially the case where parties enter into negotiations with the knowledge or expectation that any agreement they reach will be subject to court proceedings – for instance, in the case where the agreement must be disclosed to the court in an insolvency proceeding or for purposes of enforcement.

Interestingly, in DIG, the Court took into account the fact that one of the Settlement Agreements contained personal information with respect to former executives of DIG and their spouses. This reflects the Court's recognition in *Sherman Estate* that the protection of an individual's privacy can be a sufficiently important public interest that justifies a sealing order.

In *Sherman Estate*, the Court set a high bar for granting a sealing order on this basis, holding that the protection of privacy would only outweigh the open court principle where an individual's dignity and core identity would be at risk if the information were to be publicly disseminated. In DIG, the Court only alluded to the presence of personal private information in the Settlement Agreements, and it is unclear whether this information met the high bar of having a bearing on the dignity and core aspects of an individual's life. The role of individual privacy in decisions regarding sealing orders following *Sherman Estate,* and now DIG, remains an issue of interest.

By

Roger Jaipargas, Charlotte Chien

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749