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SEALING ORDERS

sealing orders since *Sierra Club*

Eleven years ago, the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* helped clarify when confidential business information may be sealed from the public record. As Shawn Irving and Victoria Creighton explain, a review of the case law since *Sierra Club* provides further insights into the current law surrounding sealing orders. In particular, recent jurisprudence helps to clarify the elements of the *Sierra Club* test, the standing required to obtain a sealing order, and what it means to have a public component to one's private commercial interests – a necessary condition to obtain a sealing order. With respect to the latter point, the courts have become increasingly adamant that it is not enough that one's own commercial information be sensitive and confidential. Private economic harm is not an important commercial interest sufficient to override the open court principle. A sealing order will generally only be granted if the moving party ties his or her private commercial interest to a broader public component such as, for example, upholding confidentiality agreements, ensuring the right to a fair trial or protecting the integrity of judicial proceedings. The authors provide some helpful tips, distilled from the case law and through practice, to improve the chances of obtaining expansive confidentiality protections.

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ARBITRATION AGREEMENTS

enforceability of arbitration agreements

In the decision *Kerry Murphy v. Amway Canada Corporation and Amway Global*, the Federal Court of Appeal examined when arbitration clauses apply to private actions and class proceedings involving claims of anti-competitive conduct under the *Competition Act*. As Chris Naudie, Mary Paterson and Stephanie Fujarczuk explain, *Murphy* reaffirms Canada's status as an arbitration-friendly jurisdiction. As a result, defendants may now have the ability to stay future private actions or class proceedings involving claims under the *Competition Act* by relying on mandatory arbitration provisions. The authors note that the decision also highlights how difficult it is to predict when arbitration clauses and class action waivers will apply, and their vulnerability to factors outside the drafter's control, including the interpretation of statutes that were not necessarily drafted with the potential existence of arbitration agreements or class action waivers in mind.

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SEALING ORDERS

Sealing Orders Since *Sierra Club*: Effective Ways to Obtain Expansive Confidentiality Protections

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It has been over ten years since the Supreme Court of Canada delivered its reasons in *Sierra Club*, a decision which gave much needed clarity on when confidential or sensitive business information may be sealed from the public record. Since that time, commerce has continued to expand, businesses have become increasingly competitive and commercial actors increasingly litigious. All the while, the sheer volume of information and documentation produced by commercial actors – and potentially subject to discovery – has increased exponentially. It is therefore not surprising that the number of commercial litigants seeking confidentiality protections from the courts has increased. Commercial litigants are looking for new and effective ways to keep their valuable business information from becoming public through the court process. Canadian courts, in turn, have attempted to keep pace with these developments while at the same time staying true to the words, if not the spirit, of *Sierra Club* by ensuring a proper balance between the protection of confidential information, on the one hand, and ensuring an open and transparent court process, on the other.

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This article will examine the evolution of the Canadian courts' application of the *Sierra Club* test, with a focus on arguments that have proven effective in obtaining expansive confidentiality protections. We conclude by providing some practical tips to improve the chances of obtaining a sealing order.

The *Sierra Club* Test

In Ontario, the *Courts of Justice Act*¹ is the starting point for determining whether a sealing order is available. Section 135(1) of the CJA sets out the general principle that “all court hearings shall be open to the public.” In the context of sealing a document, section 137(2) provides that “a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.”

The principles as to when public access to a court file may be restricted are set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*.² A sealing order should only be granted when:

- (a) such an order is necessary in order 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
- (b) the salutary effects of the confidentiality order, including the effects on the rights 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.³

The test is stringent. It sets the open court principle against commercial interests. The Supreme Court of Canada has held that “the open court principle is not to be lightly interfered with.”⁴

In practice, the test is administered in two steps. First, the person seeking the order must establish that the sealing order is necessary. Second, the court will weigh the salutary

¹ R.S.O. 1990, c. 43 [the “CJA”].

² [2002] 2 S.C.R. 522 [“*Sierra Club*”].

³ *Ibid.* at paragraph 53.

⁴ *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 26.

effects of the order against any deleterious effects.

Necessity

This is a threshold requirement. The moving party seeking the order must satisfy three elements:

1. The risk must be “real and substantial.” That is, it must be “well grounded in the evidence, and pose a serious threat to the commercial interest in question.”⁵
2. The “important commercial interest” must be capable of being expressed in terms of a public interest in confidentiality. If there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test.⁶
3. There must be no other reasonable alternatives to the order and the order must be restricted as much as reasonably possible while preserving the commercial interest in question.

In assessing the necessity branch of the test, the court must decide only whether the moving party has established these three elements. The court should not generally consider any of the potential benefits of the order at this stage.⁷

Real and Substantial Risk

The moving party must establish in evidence that the risk posed by disclosure of the information is a real and substantial risk to an identified commercial interest. It is not enough, for example, simply to assert that the confidential information will harm the person’s financial interests or permit its competitors to gain an advantage. Affidavit evidence from an affiant “in-the-know” should be led which sets out in reasonable detail why disclosure of the confidential information would be damaging to the business or other interest.

Disclosure of information can only risk harming a commercial interest if that information is confidential. To establish the confidential nature of the information, the moving

party must prove, on a balance of probabilities, that its proprietary, commercial and scientific interests could be reasonably harmed by the disclosure of information. The moving party must also show that it was accumulated with a “reasonable expectation of it being kept confidential” and has at all times been treated as confidential.⁸ The moving party must also show how the information could be used against it to its detriment and establish the degree of risk associated with the information’s disclosure.⁹ To do this a moving party might show, for example, that the information (i) would be of interest to its competitors and that its competitors could actually use the information;¹⁰ or (ii) contains details unknown to a competitor and that those details would permit the competitor to gain an unfair competitive advantage.¹¹

Important Commercial Interest

The moving party must identify an important commercial interest that would be at risk by virtue of public disclosure. This aspect of the test has seen the most judicial consideration since the *Sierra Club* decision.

Justice Iacobucci explained the meaning of “important commercial interest” in *Sierra Club*. He noted that the important commercial interest cannot be one specific to the moving party but rather must be grounded in a broader public interest:

... 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, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information.

⁸ *Sierra Club*, supra note 2 at paragraph 60.

⁹ *Pattison Outdoor Advertising LP v. Toronto (City)*, 2012 ONCA 212 at paragraph 58 [“*Pattison*”].

¹⁰ *Sierra Club*, supra note 2 at paragraph 61; *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789 at paragraph 65 [“*Fairview Donut*”]; *Peter v. Medtronic Inc.*, Unreported (05-CV-295910-PD2) [“*Medtronic Inc.*”], cited in *Fairview Donut* at paragraph 55.

¹¹ *Fairview Donut*, ibid. at paragraph 66.

⁵ *Sierra Club*, supra note 2 at paragraph 54.

⁶ Ibid. at paragraph 55.

⁷ *M.E.H. v. Williams*, 2012 ONCA 35 at paragraphs 31-32 [“*MEH*”].

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Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test.¹²

To qualify as an important commercial interest, courts across Canada have become increasingly adamant that it must be capable of being expressed in terms of a broader public interest. This is described in greater detail below.

Reasonable Alternatives

The court must consider whether there are reasonable alternatives to the requested order and whether the order is restricted as much as is reasonably possible while still preserving the commercial interest in question. A court need not accept any other alternative; it must only consider reasonable alternatives. Similarly, the method of protecting the information need not be the absolutely least restrictive option.¹³

The alternative to a blanket sealing order most commonly considered is to redact the confidential information. Other alternatives include (i) providing summaries of the confidential information;¹⁴ (ii) permitting third parties to examine the information but only upon signing a confidentiality agreement;¹⁵ and (iii) banning publication of the information for a limited time or permanently.¹⁶

It should be noted that the process of redacting confidential information can often be extremely time consuming and cost prohibitive – particularly where there are a large number of documents that are subject to production. In certain circumstances, a blanket sealing order may be more appropriate than redaction. To be best positioned to obtain a blanket sealing order, the moving party should

tender evidence that redacting the information will be cost prohibitive, relating to the amounts in dispute or the financial means of the parties, and may not sufficiently protect its interests or permit the other side to appreciate the information fully. This argument will be made easier if it can be shown that the information is the very subject matter of the dispute.

Proportionality

The second part of the *Sierra Club* test requires the moving party to establish that the benefits gained from protecting the identified commercial interest outweigh the costs associated with issuing the order, including the public interest in open and accessible court proceedings.

In *Sierra Club*, the Supreme Court of Canada highlighted the importance of the open court principle but went on to analyze the impact that the sealing order would have on the core values underlying the constitutionally protected right to freedom of expression. This included the search for truth and the common good, promoting self-fulfillment of individuals, and ensuring that participating in the political process is open to all persons.¹⁷

The court held that any restriction on the public’s ability to access documents will impair its search for truth at least to some extent. However, the detriment to the search for truth may be negligible where the information is “highly technical” such that “the general public would be unlikely to understand their contents.”¹⁸ Conversely, where there is a risk that the public may not comprehend the proceedings without the contested information, a sealing order will be seen to be highly detrimental to the search for truth.¹⁹ Moreover, where the nature of the case engages the public interest, it will be harder to justify a sealing order. The public nature of the case strengthens the open court principle.²⁰

¹² *Sierra Club*, supra note 2 at paragraph 55.

¹³ *Ibid.* at paragraph 66.

¹⁴ This was suggested in *Sierra Club*. Though ultimately rejected, had the information not been directly relevant to the dispute this likely would have been an acceptable alternative.

¹⁵ *117560 Ontario Ltd. v. Great Atlantic Pacific Co. of Canada*, [2003] O.J. No. 1016 (Master) at paragraph 7 [“*Great Atlantic*”].

¹⁶ *In Ottawa Citizen Group Inc. et al. v. R.*, [2005] 75 O.R. (3d) 590 (C.A.), the Court of Appeal permitted the newspaper access to information contained within the search warrants for which the sealing order was sought but prohibited the publication of that information.

¹⁷ *Sierra Club*, supra note 2 at paragraphs 74-75.

¹⁸ *Ibid.* at 78; *Andersen v. St. Jude Medical Inc.*, 2010 ONSC 5191 [“*St. Jude*”] at paragraph 22.

¹⁹ *Fairview Donut*, supra note 10 at paragraph 69.

²⁰ *Sierra Club*, supra note 2 at paragraph 82. Sealing orders requested in the context of class actions will be harder to justify given that “a class action serves public purposes that go beyond the immediate interests of the

Standing to Obtain a Sealing Order

Every party to a civil proceeding has standing to request a sealing order. What is somewhat less clear is when and under what circumstances a non-party will be granted standing to request a sealing order.

A non-party is likely to be granted standing to bring a sealing order if its “proprietary or economic interests” are “affected by” the disclosure of the information. This follows from the Ontario Court of Appeal’s analysis in *Ivandaeva Total Image Salon Inc. v. Hlembizky (c.o.b. Dermocare)*.²¹ There, the Court held that if a party’s proprietary or economic interests are affected by the sealing order, it will have standing under Rule 37.14 of the *Rules of Civil Procedure*.²² It should follow that where a party has standing to move to vary or set aside an order, it should also have standing to bring a motion to preserve its proprietary or economic rights in the first place.²³ This is also in keeping with the rationale underlying our general understanding of standing: that a person must have legal interests that are affected by the outcome of the dispute.²⁴

It is also likely that non-parties will face little judicial opposition to a request for standing because courts routinely consider the special impact that granting or not granting the order would have on the non-party. It follows that they will likely be permitted (perhaps even encouraged) to present their position.

parties.” (*Fairview Donut*, supra note 10 at paragraph 51.) The rights of unnamed class members may be infringed if the members do not have full access to material information. However, there are examples of class action sealing orders (see, e.g., *Great Atlantic*, supra note 15; *Medtronic Inc.*, supra note 10).

²¹ (2003), 63 O.R. (3d) 769 (C.A.) [*Ivandaeva*].

²² *Ivandaeva*, ibid. at paragraph 27. Rule 37.14 provides that a party or other person who is affected by an Order obtained on motion without notice may move to set aside or vary the Order forthwith after the Order comes to the person’s attention

²³ The courts in *Himel v. Greenberg*, 2010 ONSC 2325 [*Himel*] at paragraph 2 and *Great Atlantic*, supra note 15 at paragraphs 5 and 11 granted standing to non-parties whose economic interests were affected by the disclosure to make submissions.

²⁴ *Morden & Perell, The Law of Civil Procedure in Ontario*, (LexisNexis: Markham, 2010) at 297.

Recent Developments: Does the Interest in Confidentiality Engage a Public Component?

A review of the case law since *Sierra Club* was released, and particularly recent case law, reveals that courts have become increasingly adamant that in order to satisfy the first part of the *Sierra Club* test, the commercial interest that is at risk must be capable of being expressed in terms of a broader public interest. It is not enough that one’s commercial information be sensitive and confidential. Private economic harm specific to the moving party is not an important commercial interest sufficient to override the open court principle.²⁵

As the Ontario Court of Appeal recently held, “... the focus must be on how the motion is framed. Where the interest in confidentiality engages no public component, the inquiry is at an end. There is no basis upon which to proceed to the second branch of the test where factors such as the nature of the order’s impact on public access and other societal interests become valid considerations.”²⁶

A review of the case law reveals that courts have recognized that commercial interests framed in the following ways are capable of being expressed in terms of a broader public interest:

- upholding confidentiality agreements but only if they are negotiated before litigation begins;
- ensuring a right to a fair trial/access to court;
- protecting sensitive personal information;
- protecting the subject matter of the litigation itself; and
- protecting settlement privilege.

Enforcement of Confidentiality Agreements

Protecting confidentiality agreements was found to be an important commercial interest in *Sierra Club*. Since that time, Canadian courts have generally followed this principle, however, several judges have drawn a distinction between confidentiality agreements executed in the normal course – absent litigation – and those that are entered in the midst of

²⁵ *Himel*, supra note 23 at paragraph 52

²⁶ *Pattison*, supra note 9 at paragraph 55.

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litigation. The latter will not be sufficient to afford confidentiality protection.

For example, in *Himel*, the plaintiff signed a confidentiality agreement in the midst of litigation as a precondition for receiving financial disclosure. The Ontario Superior Court of Justice held that there were substantial public policy considerations militating against finding that protecting this confidentiality agreement was an important commercial interest. The Court cautioned that if this type of confidentiality agreement was accepted as an important commercial interest, it could significantly narrow the open court principle by effectively allowing litigants to contract out of the constitutionally protected right to freedom of expression through the use of confidentiality agreements as a precondition to disclosure.²⁷

However, in the same decision, the Court held that that a sealing order should be granted to protect the confidentiality provisions in a shareholders' agreement. Unlike the confidentiality agreement between parties to litigation, this type of confidentiality agreement is capable of being framed as a broader public interest of super-ordinate importance. Society as a whole has an interest in the enforcement of these confidentiality agreements, and there are no alternative measures that could achieve the same end.²⁸

Access to Courts/Right to a Fair Trial

The right to a fair trial for all litigants is a fundamental principle of justice and there is a general public interest in protecting this right. As a general proposition, all disputes in the courts should be decided under a fair trial standard and the legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.²⁹

If a litigant's right to fair trial will be compromised without confidentiality protections, the court will be more inclined to grant a sealing order. Evidence of actual prejudice to the litigant's fair trial right will be necessary.

In *Moore v. Bertuzzi*, the Ontario Superior Court of Justice examined the impact of the disclosure of certain transcripts to the defendant's right to a fair trial.³⁰ The Court ultimately declined to not grant the requested order, finding that any minimal risk to a fair trial did not outweigh the deleterious effect on the rights and interests of the public to open court proceedings.

The Court found that the "evidence herein does not demonstrate the "clearest of circumstances" for abrogating freedom of expression."³¹ Master Dash held:

Public access to the courts is the method by which the judicial process is scrutinized and criticized. When a case has as much public interest as the current action, given the interest of the public in a perceived rise and apparent sanctioning of violence in hockey, the courts should be ever more vigilant to ensure that the court process is transparent for inspection by the public and scrutiny by the press, unless there is real and substantial evidence that a fair trial will be jeopardized. Such evidence of prejudice is missing in this case. The right of the public to information respecting court proceedings depends upon the freedom of the press to transmit the information. It can only transmit information if it has access to it. There is no societal value on the facts herein that are of superordinate importance to the right of the public to open access to the courts.³²

While the fair trial right is of great importance, this is always weighed against the right of the public to information respecting the courts proceedings.

The Ontario Court of Appeal recently held that access to the courts – i.e., a person's right to seek and obtain appropriate relief in a court proceeding – is a matter of significant public interest impacting on the proper administration of justice which may, in the proper circumstances, justify the issuance of a sealing order. Essentially, if insisting on the openness usually demanded of court proceedings will effectively close the courtroom door to a litigant, the first component of the *Sierra Club*

²⁷ *Himel*, supra note 23 at paragraph 53.

²⁸ *Ibid.* at paragraph 56.

²⁹ *Sierra Club*, supra note 2 at paragraph 50.

³⁰ (2007), 88 O.R. (3d) 499.

³¹ *Ibid.* at paragraph 44.

³² *Ibid.* at paragraph 46.

test will be made out, provided there is no reasonable alternative to some limit on the openness of the courts.³³

Protecting Sensitive Personal Information

Protecting sensitive third-party personal information – specifically, names, addresses, telephone numbers, e-mail addresses, personal financial data, medical information, etc. – has been found to be an important commercial interest with a public interest component and thereby appropriate for confidentiality protections.

Several of the cases in this regard arise in the insolvency context. For example, in its request for an initial order granting creditor protection under the *Companies' Creditors Arrangement Act*,³⁴ Canwest Global sought to seal from the public record certain personal and financial information contained in key employee retention plans (“KERP”) that it had entered into with several of its senior executives.³⁵ The Court held that the protection of sensitive personal and compensation information is an important commercial interest that should be protected and that the KERP participants had a reasonable expectation that their personal information would be kept confidential.³⁶ Similar orders were granted in *Re Nortel* and *Re Canwest Publishing Inc.*³⁷

A recent decision of the British Columbia Supreme Court – outside of the insolvency context – also addressed the issue of protecting sensitive personal information. In *Southpaw Master Credit Fund LP et al. v. Asian Coast Development (Canada) Ltd., et al.*,³⁸ Madam Justice Ross issued an order

sealing from the public record, *inter alia*, all references to the names of shareholders and potential investors of the respondent. The respondent had tendered evidence that those shareholders had a reasonable expectation that their privacy, and their interest in a privately-held company, would be protected. With respect to potential investors who had expressed an interest in making an equity investment, the respondent tendered evidence that disclosure would pose a serious harm to its relations with those investors. Each had signed non-disclosure agreements prior to conducting their due diligence and therefore had a reasonable expectation that their privacy would be protected. Moreover, it was argued that disclosure of the identity of the potential investors could discourage those investors from considering a future investment in the company.

Protecting the Integrity of Judicial Proceedings

Absent exceptional circumstances, a party is entitled to its day in court. That is trite. Where there is evidence that a sealing order is the only means to maintain the litigation – and thereby ensure that the parties have their day in court – courts have held that the public interest component of the Sierra Club test has been satisfied.

For example, in *Towers, Perrin, Forster & Crosby Inc. v. Cantin*,³⁹ the Ontario Superior Court of Justice heard a motion for an interlocutory injunction to restrain the defendants from soliciting business or from performing services for a list of clients. Before the hearing of the motion, the parties agreed to a consent order that would see certain of the plaintiffs' documents subject to a confidentiality order. The injunction was granted and the plaintiffs thereafter moved for an order that the confidentiality order be maintained with respect to a smaller collection of documents. The documents contained information regarding the plaintiffs' business plans, principal and employee compensation and benefits, and the provision or proposed provision of services to the plaintiffs' clients or former clients. It was argued that if the information

³³ *M.E.H. v. Williams*, 2012 ONCA 35 at paragraphs 25-30.

³⁴ R.S.C. 1985, c. C-36.

³⁵ *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 at paragraphs 49-51 [“*Canwest Global*”].

³⁶ *Ibid.* at paragraph 52.

³⁷ *Re Nortel Networks*, [2009] O.J. No. 4487 at paragraph 39. *Re Canwest Publishing Inc.*, [2010] O.J. No. 188 at paragraph 65.

³⁸ *Southpaw Credit Opportunity Master Fund LP, Southpaw Asset Management LP, Wilshire Institutional Master Fund SPC-Wilshire Southpaw Opportunity Seg Port, GPC 76, LLC, and Old Westbury Funds, Inc. v. Harbinger Capital Investments S.a.r.l., and Harbinger Capital Partners Master Fund I, Ltd.* Oral reasons

provided in Chambers by the Honourable Madam Justice Ross, dated January 30, 2013.

³⁹ (2000), 50 O.R. (3d) 476.

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were to become a matter of public record and available to plaintiff's competitors, it would cause incalculable financial loss to the plaintiffs and possibly to their affiliated companies and clients.⁴⁰

The Court held that the plaintiffs would risk serious financial harm if the confidential materials were to be made public. Further, the Court found that unsealing the information would undermine the plaintiffs' efforts to protect the confidential information by seeking an injunction in the first place, and therefore the remedy obtained from the court would be rendered ineffective. In other words, the Court was persuaded that unsealing the material would destroy the subject-matter of the litigation itself.⁴¹

Protecting Settlement Privilege

Protecting litigation settlement privilege is an important commercial interest, which has the requisite public interest component. In *Re Hollinger Inc.*, the Ontario Court of Appeal heard an appeal from a order redacting the amounts to be paid by a law firm and an accounting firm to Hollinger Inc. pursuant to two proposed settlement agreements.⁴² The Court was unequivocal that there is a public policy favouring settlement and held that the sealing order should be upheld. In this case, the sealing order protected the privilege and thereby fostered the strong public interest in the settlement of disputes and the avoidance of litigation.⁴³

Tips for Practitioners

The preceding review of the post-Sierra Club case law provides an interesting and informative reveal of the types of arguments that have proven effective when seeking to obtain a sealing and/or confidentiality order. We conclude by providing some helpful tips, distilled from the case law and through practice:

- Tender actual evidence that the risk posed by disclosure is real and substantial. Avoid supposition or speculation. Numerous appellate level courts have stressed the need

for a solid evidentiary basis to support any sealing order.

- Pay particular attention to the public interest principles when arguing that there is an important commercial interest that must be protected. Where possible, establish in evidence that the moving party's right to a fair trial will be hindered if the order is not granted.
- Canvass all reasonable alternatives to a blanket sealing order. Consider redaction of confidential terms (subject to the cautions noted above). If redaction would be overly cumbersome and costly, lead evidence to establish the level of effort and cost that would be involved in the redaction of the court file.
- Be circumspect in terms of the proposed order. Seek to seal only that information which poses a real and serious risk to the moving party's business.
- Establish that the benefits gained from protecting the identified commercial interest outweigh the costs associated with issuing the order. Extra care should be taken if the matter engages participation of public institutions or the subject matter engages environmental issues, the democratic process or public funds.
- Seek to obtain the consent of all parties to the litigation. In many cases, all parties will have the same interest in maintaining confidentiality. In other cases, the opposite party may not have the same interest, but will not be opposed. It is important to keep in mind, however, that the consent of all parties may not be enough to obtain a sealing order. The right to open courts does not reside with the litigants: it belongs to the entire public. All restrictions of this principle will be carefully scrutinized by the court.
- Add safeguards to the proposed order. Consider including a provision that would give interested third parties a right to apply to court, on notice, to vary the order.

⁴⁰ Ibid. at paragraph 8.

⁴¹ Ibid. at paragraph 11.

⁴² *Re Hollinger Inc.*, 2011 ONCA 579.

⁴³ Ibid. at paragraphs 17-20.

 ARBITRATION AGREEMENTS

Arbitration Agreements Can Preclude Competition Claims and Class Actions

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In the decision *Kerry Murphy v. Amway Canada Corporation and Amway Global*,¹ the Federal Court of Appeal examined when arbitration clauses apply to private actions and class proceedings involving claims of anti-competitive conduct under the *Competition Act*.² *Murphy* reaffirms Canada's status as an arbitration friendly jurisdiction while highlighting how difficult it is to predict when arbitration clauses and class action waivers will apply, and their vulnerability to factors outside the drafter's control.

Relying on recent guidance from the Supreme Court of Canada, in this case the Federal Court of Appeal granted a stay of a class proceeding on the basis that:

- i. arbitration agreements should generally be enforced absent legislative language to the contrary; and
- ii. the Act does not contain language expressly precluding the enforcement of arbitration clauses in commercial agreements.

As a result of this ruling, defendants may now be able to stay private actions and class proceedings that allege anti-competitive conduct where the parties have a commercial

contract containing a mandatory arbitration provision.

Factual Background

The appellant, Kerry Murphy, was a registered Independent Business Owner ("IBO") under the umbrella of the respondent, Amway. Amway is a wholesaler of home and personal care products that it supplies to its IBOs throughout Canada. Amway encourages IBOs to recruit distributors for further sales, which results in the creation of multiple levels of distribution. To become an IBO, Murphy had to execute a Registration Agreement with Amway. The Registration Agreement included an Arbitration Agreement which stated that disputes must proceed to binding arbitration and that the *Ontario Arbitration Act, 1991*³ would govern any Canadian court proceedings. The Registration Agreement also incorporated by reference the Amway Rules of Conduct, which barred class action proceedings for claims exceeding \$1,000.

In October 2009, Murphy brought a claim to the Federal Court under section 36 of the Act alleging that Amway provided false or misleading information to distributors contrary to section 52 of the Act, and that Amway operated an illegal multi-level marketing scheme contrary to section 55 of the Act. Murphy sought damages of \$15,000 and filed a motion for the certification of a proposed class action. In response, Amway filed a motion for an order dismissing or permanently staying Murphy's action and to compel arbitration on the ground that the Federal Court had no jurisdiction to hear the appeal as the matters raised in the Statement of Claim were subject to mandatory arbitration under the terms of the Arbitration Agreement.

The Federal Court held that the Arbitration Agreement and class action waiver were applicable, enforceable, and effectively precluded a class proceeding for any amount exceeding \$1,000. Murphy appealed to the Federal Court of Appeal.

Jurisdiction of the Federal Court of Appeal

The first issue before the Federal Court of Appeal was which arbitration legislation

¹ 2013 FCA 38.

² R.S.C. 1985, c. C-34, hereinafter referred to as the "Act."

³ S.O. 1991, c. 17, hereinafter referred to as the "Ontario Act."

applied. The Arbitration Agreement stated that the Ontario Act applied while the incorporated Amway Rules of Conduct stated that the United States Arbitration Act applied. The Court held that the Ontario Act applied to the Agreement, but without much explanation.

Holding that the Ontario Act applied raised a second issue: subsection 7(6) of the Ontario Act states that if a court stays a proceeding in favour of arbitration – as the Federal Court did – then “[t]here is no appeal from the court’s decision.” Amway argued that the Federal Court of Appeal therefore did not have jurisdiction to hear the appeal.

The Court disagreed, holding that although the parties were bound by the Ontario Act, the Court was not; in other words, the parties’ agreement could not oust the Federal Court of Appeal’s appeals jurisdiction in competition claims. Although the Ontario Act would be binding upon an Ontario Court by force of law, it was before the Federal Court of Appeal only through the parties’ contract. Instead, the Federal Court of Appeal was bound by subsection 27(2) of the *Federal Courts Act*, which provides that final decisions of the Federal Court may be appealed to the Federal Court of Appeal. The parties could not circumscribe the Court of Appeal’s statutory jurisdiction by attempting to contract out of it.

The Court distinguished the case at bar from the earlier Federal Court of Appeal decision of *Halterm Ltd. v. National Harbours Board*,⁴ where the Court of Appeal gave effect to a contract which prohibited an appeal from a decision of the Federal Court. In this case, Halterm leased a container terminal facility from the National Harbours Board (the “Board”). The lease agreement between the two parties stated that Halterm could apply to the Federal Court to determine the appropriate rental rate for the facility, but that there could be no appeal from that Federal Court decision. However, when the Federal Court ruled to reduce the rent increases earlier set by the Board, the Board appealed the decision. The Federal Court of Appeal held that it lacked jurisdiction to hear the appeal because the parties had effectively appointed the Federal Court as their arbitrator and agreed that the Federal Court decision would be final. The appeal to the Federal Court of Appeal was

barred by contract. In contrast to *Halterm*, the issue in *Murphy* was whether the claims raised in Murphy’s Statement of Claim were subject to compulsory arbitration under the terms found in the Registration Agreement.

Murphy raises the question of whether certain restraints – jurisdictional or other – contracted for by the parties will bind the Court. It seems clear that the Federal Court will not be bound by any jurisdictional fetters enshrined in provincial arbitration acts; however, whether parties can contract to limit the Court’s jurisdiction seems to depend on the role the Federal Court plays in the dispute resolution process. As demonstrated by *Murphy*, this uncertainty may effectively restrict parties’ ability to structure their disputes in a mutually agreed upon way, which often includes limiting court involvement.

Claims Under the Competition Act Are Arbitrable in Light of Seidel

The Federal Court of Appeal then addressed the issue of whether a private claim for damages under section 36 of the Act is arbitrable and held that it is. The Court was guided by the Supreme Court of Canada’s decision in *Seidel v. Telus Communications Inc.*⁵ In *Seidel*, the Supreme Court found that only where a statute can be interpreted as excluding arbitration will the Courts refuse to give effect to the terms of an arbitration agreement. This is the same principle that the Supreme Court had previously articulated in *Dell Computer Corp. v. Union des consommateurs et al.*⁶

In *Seidel*, Ms. Seidel commenced a class action against a telecommunications company under sections 171 and 172 of the *Business Practices and Consumer Protection Act*⁷ notwithstanding an arbitration agreement and class action waiver between the parties. In determining the applicability of the arbitration agreement, the Supreme Court examined the extent to which the arbitration agreement waived any “rights, benefits or protections” under the BPCPA, which is expressly prohibited by section 3 of this consumer protection statute. In its analysis, the Supreme Court

⁵ 2011 SCC 15.

⁶ 2007 SCC 34.

⁷ S.B.C. 2004, c. 2, hereinafter referred to as the “BPCPA.”

⁴ (1984), 55 NR 118 (F.C.A.).

noted the difference between sections 171 and 172 of the BPCPA: section 171 confers a private cause of action, whereas section 172 is a public interest remedy and a claim under this section can be brought by “virtually anyone.” The Supreme Court found that arbitration would be incompatible with achieving the public interest objective found in section 172 and that the right to pursue this public interest remedy could not be waived. Therefore, the arbitration agreement did not preclude litigation of claims under section 172.

The Federal Court of Appeal in *Murphy* considered the *Seidel* decision and noted two key differences between the legislative schemes in *Seidel* and *Murphy*:

- i. The Act contains no provision limiting a person’s ability to waive his or her rights under the Act, unlike section 3 of the BPCPA.
- ii. In contrast to section 172 of the BPCPA, section 36 of the Act permits parties a private right to seek compensation for damages they suffered. Such claims, like those under section 171 of the BPCPA, can be resolved by private arbitration.

The Federal Court of Appeal held that these differences indicated that the legislature did not intend to exempt section 36 of the Act from arbitration agreements.

The appellant argued that despite these differences between the statutes, competition law, by its very nature, should never be arbitrated because of the public interest objectives driving the Act. Further, the appellant cited *Seidel* for the proposition that public interest concerns can displace an arbitration agreement.

The Court of Appeal rejected this argument, finding there was no basis to conclude that claims under the Act cannot be resolved by arbitration. Rather, the public interest nature of a statute is not enough, on its own, to displace an arbitration agreement. The courts will likely focus on the specific nature of the claim under the statute at issue. It seems that private rights of action, even when found within a public interest statute, will be decided by arbitration if an arbitration agreement applies.

The Enforceability of Class Action Waivers

The Federal Court of Appeal did not comment on the enforceability of class action waivers as distinct from arbitration clauses, though it ultimately upheld the Federal Court’s ruling which gave effect to the class action waiver found in the Amway Rules of Conduct. When this issue was examined, the Federal Court had looked to *Seidel* for guidance. In *Seidel*, the Supreme Court of Canada held that the class action waiver agreed to by the parties was not severable from the arbitration agreement. Since the arbitration was void with respect to claims under section 172, so was the class action waiver. Therefore, Ms. Seidel was not barred from pursuing certification of her class action under section 172 of the BPCPA.

The Federal Court in *Murphy* considered *Seidel* to stand for the proposition that class actions waivers – and not just arbitration agreements – should be enforced unless expressly prohibited by the legislature. It applied the same test to class action waivers as is used to determine when an arbitration agreement should be enforced. The Federal Court of Appeal provided no additional guidance on the issue of class action waivers.

The Federal Court’s approach to class action waivers – enforcing them unless there is clear legislative language prohibiting such waivers – has been rejected by other courts. In July 2013, the Alberta Court of Appeal in *Young v. Dollar Financial Group Inc.*⁸ upheld a decision made by the Alberta Court of Queen’s Bench⁹ rendering a class action waiver unenforceable based on public policy reasons. In *Young*, the parties had agreed not to pursue or participate in any class action; nevertheless, the plaintiffs proceeded with the intention of certifying two consolidated actions. The Alberta Court of Queen’s Bench held that it would not be just to allow the defendants to avoid certification based on the class action waiver. Despite the fact that the governing legislation was silent on the issue of class action waivers, the Court found that based on public policy considerations the class action waiver should not operate to prevent an application for certification being made. The Alberta Court of Appeal agreed.

⁸ 2013 ABCA 264.

⁹ 2012 ABQB 601.

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While some courts have broadly interpreted the validity of class action waivers, others have tempered the scope of their enforcement. The inconsistency between these approaches to class action waivers remains to be resolved in future cases.

Implications

The Federal Court of Appeal's decision in *Murphy* confirms that Canadian courts are prepared to enforce mandatory arbitration agreements in connection with proposed private actions or class proceedings under the Act. As a result, defendants may now have the ability to stay future private actions or class proceedings involving claims under the Act by relying on mandatory arbitration provisions.

Murphy reinforces the notion that the enforceability of arbitration agreements may turn on the interpretation of statutes that were not necessarily drafted with the potential existence of arbitration agreements in mind,

rendering the outcome potentially uncertain. *Murphy* highlights the difficulty of drafting arbitration clauses that create certainty for the parties. The enforceability of an arbitration clause may turn on factors beyond the drafters' control; therefore, arbitration clauses must be drafted with care, and parties should be cognizant of the risks involved when entering into an arbitration agreement.

The enforceability of class action waivers – which are often seen coupled with or incorporated into arbitration agreements – is less certain. This issue has received uneven treatment across Canadian jurisdictions as Courts have not yet settled on a uniform principle to determine when class action waivers should be enforced. Nevertheless, it appears as though Canadian courts are increasingly loathe to intervene when parties have contracted for specific methods of dispute resolution.

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