



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-19-00616388-00CL DATE: 1 May 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: Pace Savings & Credit Union Limited v. Smith, et al.

BEFORE: JUSTICE STEELE

**PARTICIPANT INFORMATION**

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**ENDORSEMENT OF JUSTICE STEELE:**

1. This was a motion by KPMG, in its capacity as court appointed liquidator of Pace Savings & Credit Union Ltd. (“PCU”) for an order approving the final settlement agreement and sealing the confidential appendix to the liquidator’s second report pending completion of the settlement.
2. There was no opposition to the order sought.
3. In determining whether a settlement agreement entered into by the liquidator should be approved, the Court will consider:
  - a. Whether the settlement is fair and reasonable;
  - b. Whether it provides substantial benefits to other stakeholders; and
  - c. Whether it is consistent with the purpose and spirit of the legislation pursuant to which the court officer was appointed: *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078 [Commercial List], at para. 49.
4. Further, the Court may “also take into account the business judgment of a court officer involved in the negotiation of a settlement”: *Maple bank GmbH (Re)*, 2016 ONSC 7218, at para. 8.
5. In the Confidential Appendix A to the Liquidator’s Second Report, which was provided to the Court, the Liquidator includes a summary of relevant information leading to its decision to enter into the Final Settlement Agreement. The Liquidator is of the view that the terms of the Final Settlement Agreement are fair and reasonable. The Liquidator also states that the Final Settlement Agreement provides substantial benefit to PCU’s stakeholders, and the terms are consistent with the spirit and purpose of the *Credit Unions and Caisses Populaires Act, 2020*.
6. In deciding to enter into the Final Settlement Agreement, the Liquidator considered, among other things:
  - a) The likelihood of recovery or likelihood of success;
  - b) The future expense and likely duration of the litigation;
  - c) The proposed settlement terms and conditions;
  - d) The recommendations of counsel; and
  - e) The presence of good faith, arm’s-length negotiations.
7. The Liquidator recommends that the Court approve the Final Settlement Agreement.
8. The Court accepts the recommendation of the Liquidator. I find that the Final Settlement Agreement is fair and reasonable in the circumstances. The Court also takes comfort in the fact that there is no opposition to the approval of the Final Settlement Agreement. The Final Settlement Agreement is approved.

*Request for Temporary Sealing Order*

9. The Liquidator seeks an Order sealing the confidential appendix to its second report until completion of the settlement contemplated in the Final Settlement Agreement. The Liquidator states that it contains,

among other things, the quantum of the settlement funds for the Final Settlement Agreement and other commercially sensitive information.

10. Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.
11. The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, articulated the test applicable when determining whether a sealing order ought to be granted:

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

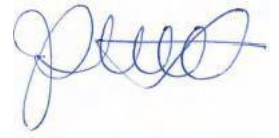
1. Court openness poses a serious risk to an important public interest;
2. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
3. As a matter of proportionality, the benefits of the order outweigh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

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

12. The Supreme Court in *Sherman* recognized, at para. 41, that “important interest” in the first part of the test may capture a broad array of public objectives, including commercial interests.
13. In *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*, 2022 ONSC 5878, at para. 19 this Court applied the *Sherman Estate* test. The Court concluded that disclosure of confidential appendices to a receiver’s report containing the terms of settlement posed a serious risk to important public interests, including the “overriding public interest in favour of the settlement of disputes and the avoidance of litigation.”
14. The information in Confidential Appendix A contains the settlement amounts under the Final Settlement Agreement. In addition, it contains information regarding the Liquidator’s decision to enter into the agreement. The Liquidator states that if this information were made public prior to completion of the settlement contemplated in the Final Settlement Agreement, it would be materially prejudicial to the interests of PCU and its stakeholders.
15. There are no alternative measures available to protect the information in Confidential Appendix A. Further, the Liquidator states that no party is materially prejudiced by the sealing of this information.
16. The Liquidator proposes that the sealing of the confidential appendix to the First Settlement Approval Order and Confidential Appendix “A” to the Second Report be lifted upon completion of the settlement under the Final Settlement Agreement.

17. I am satisfied that the requested sealing order is proportional. The benefits outweigh the potential negative effects.

18. Order to go in the form signed by me today, with immediate effect.

A handwritten signature in blue ink, appearing to be 'J. Hill', is located in the upper right quadrant of the page. The signature is written in a cursive style with a horizontal line extending to the right.