



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-22-00685736-00CL
CV-19-00616388-00CL
CV-22-00677550-0000

DATE: 9 February 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: PACE SAVINGS & CREDIT UNION LIMITED
v
FINANCIAL SERVICES REGULATORY AUTHORITY et al

PRESIDING: MADAM JUSTICE STEELE

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
Phillip Underwood	Pace Savings & Credit Union Limited	punderwood@lolg.ca

For Defendants:

Name of Person Appearing	Name of Party	Contact Info
Deepshikha Dutt Douglas Stewart	Former Directors: Brent Bailey, Deborah Baker, Ian Goodfellow, Al Jones, Wendy Mitchell, George Pohle, Peter Rebellati, Jim Tindall, Pauline Wainwright, and Neil Williamson	Deepshikha.dutt@dentons.com Douglas.stewart@dentons.com
Anamika Gadia	KPMG Inc.	agadia@kpmg.ca
Laura Culleton	Court Appointed Liquidator	laurac@chaitons.com
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Victor Vandergust	Brian Hogan	vic@vandergustllaw.com
Janice Wright	Malek Smith &	janice@wrighttemelini.com

ENDORSEMENT OF MADAM JUSTICE STEELE:

1. This was a motion by KPMG, in its capacity as court appointed liquidator of Pace Savings & Credit Union Ltd. (“Pace”) for an order, among other things, approving the Former Directors’ Settlement Agreement, approving the CUMIS Settlement Agreement, and sealing confidential appendix A to the first report of the liquidator, dated January 27, 2023.
2. At the same time, the related motions by Pace were heard. Pace brings a motion for an order dismissing the action against CUMIS General Insurance (“CUMIS”) (court file No. CV-22-00677550) on a without costs basis. Pace also brings a motion in the Smith et al matter (court file No. CV-19-616388-00CL), seeking the dismissal of the action on without costs basis against certain of the defendants and seeking an order granting leave to the plaintiff to amend the plaintiff’s claim. These Court orders are a term of the settlements.
3. The two actions had been commenced prior to the liquidator’s appointment.
4. There was no opposition to any of the orders sought.
5. The settlement agreements in respect of the two claims resulted from mediation that took place on November 28 and 29 and December 1, 2022. The Smith et al matter will continue. There is another related matter that also is ongoing (court file No. CV-19-00628710)
6. 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.
7. 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.
8. In the Confidential Appendix A to the Liquidator’s First Report, which was provided to the Court, the Liquidator includes a summary of relevant information leading to its decision to enter into the two settlement agreements. The Liquidator is of the view that the terms of the two settlement agreements are fair and reasonable. The Liquidator states that the two settlement agreements provide substantial benefit to Pace’s stakeholders and the terms are consistent with the spirit and purpose of the *Credit Unions and Caisses Populaires Act, 2020* (“CUCPA”).
9. In deciding to enter into the settlement agreements, the Liquidator considered, among other things, in respect of each of the two settlements:
 - 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.

10. The Liquidator recommends that the Court approve the settlement agreements.

11. The Court accepts the recommendation of the Liquidator. I find that the settlement agreements are fair and reasonable in the circumstances. The Court also takes comfort in the fact that there is no opposition to the approval of the settlement agreements. The settlement agreements are approved.

Request for Sealing Order

12. The Liquidator seeks an Order sealing the confidential appendix to its report that summarizes and attaches the settlement agreement, pending further order of the court. The Liquidator states that it contains commercially sensitive information, public disclosure of which would be materially prejudicial to the interests of Pace and its stakeholders, which have an interest in maximizing recoveries from those defendants who have not settled. The Liquidator states that there is no alternative measure available to protect this information and no party is materially prejudiced by the sealing of the information.

13. 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.

14. 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:

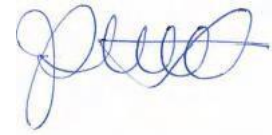
The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such 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).

15. 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."

16. The information in Confidential Appendix A contains the settlement amounts under the agreements. In addition, it contains information regarding the Liquidator's decision to enter into the agreements. The Liquidator states that if this information were made public prior to the conclusion of the Smith et al matter, the disclosure could impair the ability to maximize recovery from the other defendants.
17. There are no alternative measures available to protect the information in Confidential Appendix A. I note that rather than seeking to seal the full settlement agreements, the Liquidator has appended copies of the agreements to the First Report, with only the settlement amount redacted.
18. Further, I am satisfied that the requested sealing order is proportional. The benefits outweigh the potential negative effects.
19. Orders to go in the form signed by me today, with immediate effect.

A handwritten signature in blue ink, appearing to be "J. [unclear]", written in a cursive style.