Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.

Respondent

FACTUM OF
GRANT THORNTON LIMITED,
(in its capacity as Receiver and Trustee)
(Hearing June 13, 2017)

June 12, 2017

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PART I - OVERVIEW

1. Grant Thornton Limited ("GTL", the "Receiver" or the "Trustee") is the Court-Appointed Receiver of 1299746 Ontario Inc. o/a Compuquest2000 ("Compuquest") and 2252709 Ontario Inc. ("225"), the Receiver of a real property municipally known as 7472 Ashburn Road, Whitby, Ontario (the "Ashburn Property") and Trustee in Bankruptcy of Compuquest and Gary Bodimeade ("Gary") personally.

2. Gary has brought a motion for an order expunging all evidence of his past criminal conduct from reports and any other materials filed by the Receiver with the court. He also seeks costs against the Receiver personally.

3. Gary is an undischarged bankrupt. He brings this motion in reliance on the *Criminal Records Act,* R.S.C. 1985, c. C-47, as amended. Gary's position is that he has been discharged and pardoned for his past criminal conduct and therefore the Receiver is not permitted to disclose or rely on evidence of his past criminal conduct in relation to any matters arising in the receivership or bankruptcy proceedings.

4. The Receiver disputes Gary's interpretation of the *Criminal Records Act.* A discharge or pardon does not erase prior criminal convictions or findings of guilt. This has been repeatedly affirmed by courts and tribunals throughout Canada, including in at least two decisions of the Supreme Court of Canada.

5. The Receiver has uncovered evidence of very serious misconduct in relation to the operations of Compuquest and Gary's personal affairs, including irregular banking transactions, misuse of Compuquest's assets, the preparation of false or misleading financial information, inadequate record-keeping, fraudulent preferences and conveyances of assets and unjustifiable extravagance in Gary's personal lifestyle at the expense of Compuquest's and his own creditors.

6. The nature of Gary's criminal history (financial crimes, including fraud and money-laundering) is directly relevant to issues arising in the receivership of Compuquest and Gary's personal bankruptcy.

7. Gary cannot meet the tests for a sealing order.

PART II - SUMMARY OF FACTS

8. This summary of facts is largely based on material previously filed in these proceedings and is provided to give context to Gary's motion.

Canadian Imperial Bank of Commerce ("CIBC") Financing to Compuquest

9. Commencing in 2008, CIBC provided credit facilities to Compuquest and, later, 225. Gary on behalf of Compuquest executed a Security Agreement in favour of CIBC dated November 21, 2008.[1]

10. According to Compuquest's May 31, 2015 review engagement financial statements prepared by Alan Hogan ("Hogan") of Turner Moore LLP, Compuquest had $2,705,143 of accounts receivable and $2,397,177 of inventory as well as $432,618 of property, plant and equipment as of May 31, 2015.[2]

11. In February 2016, CIBC became concerned about the operation of Compuquest's account at CIBC. Among other things, CIBC's Fraud, Loss Prevention & Investigations department identified unusual activity in Compuquest's accounts, including circular transactions with an individual named Dean Salem ("Salem").[3]

12. On February 25, 2016, management of Compuquest's accounts was transferred to CIBC's Special Loans department.[4]

13. On March 24, 2016, CIBC, through counsel, issued formal demand letters to Compuquest and Gary.[5]

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[1] CIBC Application Record, including the Affidavit of Douglas MacLaine sworn April 28, 2016
[2] Receiver's Second Report dated November 24, 2016, Appendix 31
[3] CIBC Application Record
[4] CIBC Application Record

14. On April 12, 2016, Gary/Compuquest consented to the appointment of GTL as consultant.[6]

15. On April 15, 2016, GTL visited Compuquest's premises and discovered inventory on hand had a value of less than $50,000.[7]

16. On April 28, 2016, CIBC issued an Application Record to appoint GTL as Interim Receiver.[8]

17. CIBC initially sought to appoint the Interim Receiver without notice. The matter was adjourned to April 29, 2016 to provide notice to Gary. After receiving notice, Gary caused Compuquest to pay USD$16,000 to 2401484 Ontario Inc. ("240") and USD$75,000 to an individual named Jay Clausner ("Clausner").[9]

18. On April 29, 2016, by Order of Madam Justice Mesbur, GTL was appointed as Interim Receiver of Compuquest and 225.[10]

19. On May 3, 2016, CIBC issued bankruptcy applications against each of Compuquest and Gary.[11]

20. On May 13, 2016, GTL issued its First Report as Interim Receiver. GTL reported that there had been limited business for several months, limited inventory and minimal accounts receivable.[12]

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[5] CIBC Application Record
[6] CIBC Application Record
[7] CIBC Application Record
[8] CIBC Application Record
[9] Second Report at paras. 62-63
[10] Second Report, Appendix 2
[11] Second Report, Appendix 4

21. On May 17, 2016, by Order of Mr. Justice Newbould, GTL was appointed as Receiver of Compuquest and 225.[13]

22. On May 25, 2016, Bankruptcy Orders were issued against Compuquest and Gary.[14]

23. On June 1, 2016, GTL as Trustee registered Gary's Bankruptcy Order against the Ashburn Property, which was the matrimonial home of Gary and his wife, Aimee Bodimeade ("Aimee").[15]

24. On the Receiver's appointment, there was virtually no accounts receivable and no inventory. There has been no realization from accounts receivable. The Receiver has realized only $120,000.00 from an online auction that included all inventory, furniture and equipment of Compuquest.[16]

The Ashburn Property

25. On September 28, 2007, the Ashburn Property was purchased in Aimee's name for $638,000.[17] Gary and Aimee financed the purchase using approximately $230,000 from the proceeds of sale of their former home, the title to which property they held jointly.[18]

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[12] Second Report, Appendix 3
[13] Second Report, Appendix 1
[14] Second Report, Appendix 4
[15] Second Report, Appendix 15
[16] Second Report at paras. 56-57.
[17] Second Report at para. 20.
[18] Third Report of the Receiver dated January 11, 2017, Appendix 3.

26. In addition, they sought and received mortgage financing from Bank of Nova Scotia ("BNS").[19] Title to the Ashburn Property was registered in Aimee's name September 28, 2007.[20] Both Aimee and Gary were listed on the mortgage documentation with BNS.[21]

27. Since 2007, the Ashburn Property has been subject to significant improvements, including, without limitation, the construction of:

(a) an approximately 5,680 square foot two-storey detached residential dwelling, excluding the basement;

(b) an approximately 3,196 square foot finished basement with dance studio, family room, gym, bedroom and three piece bathroom;

(c) an outdoor pool with pool house;

(d) an approximately 800 square foot heated and insulated RV garage;

(e) an approximately 11,000 square foot equestrian barn complete with riding centre and stalls for 14 horses; and

(f) an approximately 2,400 square foot insulated hay/equipment barn.[22]

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[19] Affidavit of Aimee Bodimeade sworn January 6, 2017 ("Aimee Affidavit") at para. 3, Exhibits A and B.
[20] Second Report at para. 14.
[21] Aimee's Affidavit at Exhibit D; Exhibit 1 to Aimee's cross-examination; Gary's January 13, 2017 cross-examination at Q. 18.
[22] Second report at para 15.

The Receiver's Investigation

28. After its appointment, the Receiver identified a chain of emails dated April 6, 2016 between Gary, Aimee and Hogan (Compuquest's accountant), in which Gary admitted that "*everything*" was paid for with Compuquest funds. In the context of this email chain, "*everything*" appeared to refer to the construction of the new house, the barns, and eleven horses, among other things.[23]

29. The Receiver also found an email in Compuquest's records where Gary estimated the cost of the improvements to the Ashburn Property as follows:[24]

Home	$1,400,000
Finished Basement	$135,000
Pool	$65,000
Landscaping	$55,000
SUV Garage	$135,000
Equestrian Barn	$1,200,000
Hay/Equipment Barn	$75,000
Total	**$3,065,000.00**

30. As a result of these improvements, the estimated value of the Ashburn Property as at April 11, 2016 was $3,700,000.[25]

31. The Receiver conducted an investigation into the use of Compuquest funds during the period for which records were available from CIBC (after 2008). The

[23] Second Report at para. 32, Appendix 19.
[24] Third Report at 24, Appendix 4.
[25] Second Report at para 16, Appendix 9.

Receiver traced approximately $1 million of Compuquest's funds during this time period (i.e. after 2008) directly into the Ashburn Property.[26]

32. The Receiver also identified many other suspicious payments and transactions during this time period, including:

(a) $885,000 paid to Craig Pinfold and/or his company, Pinfold and Associates Inc. ("Pinfold");

(b) $80,000 in cheques made payable to Clausner and/or his company, "Virtual Technology", but which identified Pinfold in the memo box of the cheques;[27]

(c) $1,219,530.19 in payments to either Clausner, his wife Kara Clausner, 240, or Clausner's company Total Cart Solutions Inc.[28]

(d) $1,184,699.00 in payments to Virtual Technology, as well as $322,278.00 in further payments to Pinfold, $398,509.56 to Clausner and $5,000 to Kara Clausner;[29]

(e) Down payments and lease payments for leased vehicles (including many luxury vehicles) totalling $1,759,994.53;[30]

(f) Personal cheques to Aimee totalling $138,800 for the period 2009 to 2013;

(g) Personal cheques to Gary totalling $88,000 for 2013;

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[26] Second Report, ; Third Report, Appendix 5
[27] Second Report at paras. 42-43, Appendix 25.
[28] Second Report at para. 65, Appendix 34.
[29] Third Report at para. 61-63, Appendices 14,15.
[30] Third Report at para. 47, Appendix 8.

(h) Payments to "CASH" totalling $122,957.37 for the period 2009 to 2013;[31]

(i) Numerous additional payments by Compuquest in the nature of personal expenses, including retail purchases, insurance, utilities, telephone and cable, credit cards, and ATM cash withdrawals;[32]

(j) Preferential payments to Salem and his company, Norris Technologies LLC ("Norris") in the period leading up to the appointment of the Interim Receiver on April 29, 2016, including payment of net proceeds from the sale of a 2014 Kingaire Motorhome in the amount of USD$255,881.77, which Gary diverted to an account set up in Compuquest's name at The Toronto-Dominion Bank and then wired to Norris.[33]

33. The Receiver's investigation into these matters is ongoing.

GTL's Appointment as Receiver of the Ashburn Property

34. After learning of the diversion of Compuquest's funds into the Ashburn Property, CIBC brought a motion originally returnable on November 30, 2016 to appoint GTL as Receiver of the Ashburn Property. The Receiver filed its Second and Third Reports in support of this motion.[34]

35. On November 30, 2016, CIBC's motion was adjourned to January 25, 2017 pending delivery of responding material and cross-examinations. Aimee and Gary were given the opportunity to ask questions about the Second Report, after which they

[31] Third Report at paras. 50-52, Appendices 9-11.
[32] Third Report at para 45, Appendix 7.
[33] Second Report at para. 51.
[34] Second and Third Reports

both filed affidavits and were cross-examined on their affidavits. Gary's counsel refused to allow the Receiver to cross-examine Gary on his affidavit at that time.[35]

36. On January 25, 2017, Madam Justice Conway appointed GTL as Receiver of the Ashburn Property on terms negotiated between CIBC/GTL and Aimee. Gary did not oppose the appointment.

Issues with Salem and Norris

37. On December 31, 2015, Gary signed a Revolving Line of Credit Agreement (the "RLOC Agreement") with Salem/Norris.[36]

38. On February 4, 2016, Gary registered notice of his spousal interest on title to the Ashburn Property.[37] Gary's interest in the Ashburn Property has vested in the Trustee.[38]

39. On March 3, 2016, Aimee signed a modified form of RLOC Agreement with Salem/Norris, which was limited to "*Gary's share*" of the Ashburn Property.[39]

40. Aimee signed the RLOC because Gary told her that if she did not, he would no longer be able to support her.[40] When Gary later asked her to sign mortgage documentation relating to the Aimee/Norris RLOC, she refused because, in her view she had not agreed to mortgage the Ashburn Property.[41]

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[35] Transcript of Gary's January 13, 2017 examination
[36] Second Report at Appendix 27.
[37] Second Report at para. 13.
[38] Third Report at paras 15-16.
[39] Second Report, Appendix 28.
[40] Aimee's Transcript at Q. 253.
[41] Aimee's Transcript at Q.263-265.

41. After Gary's bankruptcy, Salem and Norris brought an Application against Aimee seeking declaratory relief for an interest in the Ashburn Property (the "Norris Application"). On June 30, 2016, Salem and Norris obtained and registered an *ex parte* certificate of pending litigation (the "CPL") on title to the Ashburn Property.[42]

42. GTL as Trustee was not served with the Norris Application or any other materials in advance of or after the registration of the CPL, despite having an interest registered on title to the Ashburn Property.[43]

43. On July 29, 2016, Salem and Norris filed unsecured proofs of claim in each of Gary's and Compuquest's bankruptcies. Salem claimed USD$106,200.00 and Norris claimed USD $697,385.49 pursuant to the RLOC Agreement.[44]

44. On August 12, 2016, Salem and Norris obtained and registered a court order dated August 9, 2016 on title to the Ashburn Property (the "Norris Order"). The Norris Order was again obtained without notice to the Trustee.[45]

45. By Order of Mr. Justice Hainey dated November 30, 2016 and issued after GTL was appointed as Receiver of the Ashburn Property, the Norris Application was transferred to the Commercial List.

46. The Receiver is bringing a motion for approval of the sale of the Ashburn Property and for an order dismissing the Norris Application and removing the CPL and Norris Order from title. The motion has been scheduled for July 17, 2017.

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[42] Second Report at para. 27, Appendix 16
[43] Second Report at para. 28, Appendix 17
[44] Second Report at para. 46, Appendix 26
[45] Second Report at paras. 29-30, Appendix 18

Gary's Criminal Past

47. On August 20, 1993, Gary was convicted of fraud. The Receiver learned of this fraud conviction from a package of documents found on Compuquest's premises. Prior to Gary's June 8, 2017 motion to expunge his criminal record, the Receiver had not disclosed the 1993 fraud conviction in its reports. However, Gary disclosed this himself in his June 7, 2017 affidavit.[46]

48. On or about September 12, 2005, Gary and his twin brother, Alan Bodimeade, were charged with defrauding Royal Bank of Canada between September 1, 2002 and April 30, 2004.[47]

49. On September 12, 2006, Gary pleaded guilty to laundering proceeds of crime contrary to the *Criminal Code of Canada* and received two years' probation.[48]

50. While he was on probation for the money-laundering charge, Gary applied for and obtained a pardon in respect of his 1993 fraud conviction, which was granted on December 19, 2007 (the "Pardon").[49]

51. Gary alleges in his June 7, 2017 affidavit that he disclosed the money-laundering charge on his application for the Pardon. He has not produced the application. However, the Pardon was premised on a finding that Gary had been of good conduct since his 1993 fraud conviction.[50]

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[46] Affidavit of Gary Bodimead sworn June 7, 2017
[47] Second Report, Appendix 32
[48] Second Report, Appendix 32
[49] Fourth Report of the Receiver dated June 9, 2107
[50] Affidavit of Gary Bodimeade sworn June 7, 2017

The Receiver's Examination of Gary

52. After GTL was appointed as Receiver of the Ashburn Property, the Receiver obtained an Order of Mr. Justice Hainey dated February 21, 2017 requiring Gary to attend for examination and answer questions related to the assets, operations and receivership of Compuquest and 225, the bankruptcies of Compuquest and Gary personally, the Ashburn Property and the Norris Application.[51]

53. The examination was held on February 22, 2017. Gary testified, among other things, that:

(a) He dropped out of high school in Grade 11;

(b) Clausner was a friend from high school;

(c) Over the years, both Clausner and Pinfold were loaning money to Compuquest because of Compuquest's "cash flow constraints";

(d) Gary has no records of any of the transactions with Clausner or Pinfold;

(e) When asked how he kept track of the transactions, Gary responded: "I probably had a spreadsheet. Again, I don't recall off the top of my head."

(f) Hogan was preparing Compuquest's review engagement financial statements and providing the monthly statements of inventory and accounts receivable to CIBC;

[51] Order of Mr. Justice Hainey dated February 21, 2017

(g) In 2013, Compuquest purportedly had a server crash and lost all of its records;

(h) Until 2013, Compuquest's main supplier (95%) was HP Financial Services ("HP"). Compuquest was getting virtually all of HP's off-lease desktop computers;

(i) In September 2013, Gary's contact at HP was let go: "There was accusations that he was being paid off to do certain business"; Gary admitted that he would "send him on a trip or send him a bottle of booze". When asked what kind of trip, Gary answered: "I don't recall.· I believe maybe Mexico. I'm not sure. It's a long time ago";

(j) In January 2014, HP cut off Compuquest. After Compuquest was cut off, Gary introduced HP to Salem/Norris, who began purchasing the product from HP and supplying it to Compuquest for a share of the profits;

(k) Up until 2014, Gary and Aimee did their personal banking at BNS. In 2014, BNS advised Gary they weren't interested in his business any more. Gary believed it was because of "having large amounts of money through PayPal transactions deposited into my personal account";

(l) In 2015, Compuquest's line of credit with CIBC was increased to $1.7 million; the line of credit was never repaid;

(m) In early 2016, Compuquest and Salem were writing cheques back and forth. Salem was providing pre-signed cheques to Gary, and Gary would fill in the dates and amounts of the cheques; In February 2016, Compuquest's accounts were flagged by CIBC for suspected cheque-kiting. CIBC told Gary they didn't want his business anymore;

(n) After this, both Gary and Dean retained Fogler Rubinoff to act for them: "At the time, it was considered that they would be acting together, yes.";

(o) Compuquest was leasing personal luxury vehicles for Gary and Aimee, as well as purchasing the horses, providing personal services through Compuquest staff and paying for their personal expenses;

(p) On the day of GTL's appointment as Interim Receiver, Gary told Pfaff Leasing of the receivership and arranged for them to pick up all vehicles leased by Compuquest, including turning over the keys to them;

(q) Since his bankruptcy, Gary has worked for Phase5 Solutions, which was purportedly started by his public school friend, Brad Fisher;

(r) All of Phase5 Solutions' employees (other than Brad Fisher) are former Compuquest employees;

(s) At the time of his examination, Gary was still driving the same BMW that Compuquest had been leasing for him before his bankruptcy – but which is now being leased by Phase5 Solutions;

(t) Phase5 Solutions purchases product from Norris.[52]

[52] Transcript of Gary's February 22, 2017 examination and exhibits thereto.

54. Gary was specifically asked on his examination about the 2015 fraud and money-laundering charges against him and his twin brother:

102 Q. You were charged sometime in the 2000s, criminally, related to a fraud involving Royal Bank?
A. Yes. I had a conditional discharge.
103 Q. Well, you were charged with an invoicing scheme?
A. I was charged with money laundering.
104 Q. Well, no, you were also charged with fraud related to the invoicing scheme, right --
A. Right.
105 Q. -- Mr. Bodimeade?
A. I -- okay. Go on, sorry.
106 Q. Okay. And this was an invoicing scheme involving your brother, Alan Bodimeade?
A. My brother, yes.
107 Q. And he was an employee of Royal Bank of Canada?
A. Yes.
108 Q. And he had set up some false invoices for services that were not rendered to the bank?
A. Yes.
109 Q. And the money was cycled through Compuquest?
A. Yes.
110 Q. And you ended up pleading guilty to money laundering?
A. Yes.
111 Q. And got two years --
A. Probation.
112 Q. -- probation? And the guilty plea was in 2006?
A. I believe it was in 2004 or 2005. I know my probation, I think, ended in 2006.
113 Q. You sure it didn't end in 2008?
A. No. I'm pretty sure it was finished in 2006.
MS. FRANCIS: Can we go off for a sec?
-- OFF THE RECORD DISCUSSION --

BY MS. FRANCIS:

114 Q. Okay. I have a second report of the receiver. I know you didn't bring it this afternoon, but I'm not going to mark it because it's already in the court record. But I'm going to show you Tab 32 of the report which seems to suggest that you were convicted of laundering the proceeds of crime on September 12, 2006?

A. Okay. Based on the information I read in the third report or whatever the latest update was led me to believe that I was discharged in 2006, so maybe I misread it.

115 Q. All right. So you don't remember?

A. I don't remember, no.

116 Q. Okay. And you were also sued by Royal Bank?

A. I don't know if you'd call it being sued. We settled, but that was all done through my lawyer, Benjamin Salsberg.

117 Q. Well, sorry, you were served with a Statement of Claim alleging fraud, correct?

A. Yes.

118 Q. That means being sued, correct?

A. Okay.

119 Q. And you settled?

A. Yes.

120 Q. And the settlement payment was made by your father-in-law?

A. Yes.

121 Q. Wayne MacDonald?

A. Wayne MacDonald.

122 Q. You told your father-in-law that you'd been sued for fraud and needed money to --

A. Oh, he was well aware of the situation. We were actually living with him at the time.

123 Q. And Aimee was aware as well?

A. Absolutely.

124 Q. And she was aware that you borrowed the money from your father-in-law to pay a settlement to Royal Bank?

A. Yes.

55. Gary did not raise any issues at that time of his examination about the disclosure of his prior fraud and money-laundering charges.

June 8, 2017 Motion

56. On April 24, 2017, more than two months after Gary's examination and five months after the Receiver's Second Report was delivered, Gary's lawyer wrote to the Receiver's lawyer alleging that disclosure of his 2006 guilty plea for money-laundering violated the *Criminal Records Act* and demanding that the Receiver obtain a court order to redact the information. The Receiver disagreed with Gary's interpretation of the *Criminal Records Act*.

57. On June 8, 2017, Gary served this motion on the Receiver, which has now been scheduled for hearing on June 13, 2017.

PART III - STATEMENT OF ISSUES, LAW & ARGUMENT

The *Criminal Records Act*

58. The preamble to the *Criminal Records Act* states: "An Act to provide for the suspension of the records of persons who have been convicted of offences and have subsequently rehabilitated themselves".

59. Part 6 of the *Criminal Records Act* is titled: "Custody of Records". Section 6.1(1) provides as follows.

> Discharges
>
> **6.1 (1)** No record of a discharge under section 730 of the *Criminal Code* **that is in the custody of the Commissioner or of any department or agency of the Government of Canada** shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if
> **(a)** more than one year has elapsed since the offender was discharged absolutely; or

> **(b)** more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order. [emphasis added]

60. On its face, this provision applies only to records that are in the custody of a department or agency of the Government of Canada. Indeed, the *Criminal Records Act* only applies to matters falling within the legislative authority of Parliament. The *Criminal Records Act* does not purport to apply to records or information in the control of the provinces or in the possession of third parties.[53]

61. In the present case, the records at issue consist of the original charges, a docket sheet and the probation order, obtained from the Ontario court file. There is no suggestion that these records were obtained from Government of Canada. There is no evidence of any impropriety in obtaining this information. Moreover, Gary has admitted the charges and his guilty plea in his cross-examination testimony.

62. Gary's wife, Aimee, was also aware of the charges, albeit not the details. The following is an extract from Aimee's January 13, 2017 cross-examination:

> 421. Q. Sure, yes, there are a couple. You know that he and his brother and CompuQuest have been sued for fraud?
> A. Yes, I know that...well, I knew when he was arrested.
> 422. Q. Did they...
> A. They arrested him. They arrested him at the office. I was notified. I was at home with the kids, so...
> 423. Q. Okay. So, you knew he was arrested for...
> A. Yes.
> 424. Q. ...fraud and money laundering?
> A. Yes.

[53] See, for example, section 8 of the *Criminal Records Act*, which prohibits the use of an application form that contains a question that by its terms requires the applicant to disclose a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect. This prohibition only applies to employment which falls within the legislative authority of Parliament.

> 425. Q. Okay. And eventually he pleaded guilty?
> A. I don't know the exact...what happened, what transpired, to be honest.
> 426. Q. Did he ever tell you what happened?
> A. He said that he cashed some cheques for Alan. Gary is a liar. I don't know what happened, to be honest. I have no idea.
> 427. Q. All right. So, he told you, but you don't know whether he was telling the truth?
> A. I have no idea.
> 428. Q. Okay. And he was...I think got two years of probation?
> A. He told me he was discharged. I don't know. I have no idea what...
> 429. Q. All right.

63. The scope of the *Criminal Records Act* was squarely addressed in *Kripp v. Standard Life Assurance Company et al*, 2004 MBQB 51 (CanLII), where the Court of Queen's Bench of Manitoba held:

> [66] … I agree with counsel for Standard Life that s. 5 does not purport to restrict disclosure of a criminal record by individuals or provincial departments, provincial government agencies or any other bodies, save and except for federal bodies and agencies. Section 6 of the *Act* requires that the record which is in the custody of the Commissioner or any department or agency of the Government of Canada shall be kept separate and apart from other criminal records and not disclosed without the prior approval of the Minister. **However, it does not purport to restrict disclosure where the information is in the custody or possession of a member of the public. It does not apply to information already in the public domain. Once information has been made public, it is not in the custody of a federal government department and is not subject to the controls specified in the *Criminal Records Act*.** [emphasis added]

64. There are many other cases confirming the scope of the *Criminal Records Act*. For example, in *R. v. Martin*, 2014 ABPC 283 (CanLII), the Provincial Court of Alberta stated:

> [18] A discharge is not a panacea. A foreign jurisdiction with access to CPIC such as Homeland Security in the U.S. is neither bound nor likely to draw a distinction between a 'discharge' and a 'conviction' when determining whether or not to grant entry into their country. A prospective employer or bonding agency may or may not be moved to draw a distinction. Further, the CRA governs the removal of records from CPIC and other federal agencies but it does not purport to govern the purging of records not in the hands of the federal government.

65. In *R. v. R.Z.*, 2016 ONCJ 438 (CanLII), the Ontario Court of Justice considered the effect of a pardon on a subsequent criminal finding of guilt, in the context of drunk driving offences. In the course of determining this issue, Justice Wakefield noted:

> Of course, whether "vacated" or "kept separate and apart", the restrictions on the use of a prior record are limited to federal matters and not provincial or municipal matters. (*R. v. Therrien*, para. 116). The Parole Board letter to the defendant confirming the granting of the pardon also states that the pardon only applies federally. That limitation is reflected in the Ontario Highway Traffic Act, s. 1(6), setting out that a pardoned federal record is still admissible against a defendant on sentencing pursuant to that provincial legislation.

66. Indeed, the end of this decision includes an excerpt from the parole board's letter granting the pardon in that case:

> A pardon does not ensure that either municipal or provincial agencies or private citizens will not disclose a criminal record, because the CRA applies only records kept at the federal level. However, many provincial and municipal agencies, when notified of the award of a pardon under the CRA, choose to cooperate by restricting the disclosure of their records even though they are not required by law to do so.

67. This interpretation of the *Criminal Records Act* not only accords with the plain wording of the *Criminal Records Act* and the legislative authority of Parliament, but is a necessary by-product of the “open court” principles that are of fundamental importance to the Canadian judicial system.

68. In *Re Application to Proceed in Camera,*[54] the Supreme Court of Canada provided the following commentary on "open court" principle:

> 1. Information is at the heart of any legal system. Police investigate crimes and act on the information they acquire; lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret.
> …
>
> B. The Open Court Principle
> 31 The "open court principle" is a "hallmark of a democratic society"… An open court is more likely to be an independent and impartial court. Justice seen to be done is in that way justice more likely to be done. The openness of our courts is a "principal component" of their legitimacy: Vancouver Sun, at para. 25. 17
>
> 33 In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(b) of the Charter. In the context of this appeal, it is important to note that s. 2(b) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents" (Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 (S.C.C.), at p. 1338, citing Nixon v. Warner Communications Inc., 435 U.S. 589 (U.S. S.C. 1978), at p. 597). La Forest J. adds at para. 24 of CBC: "[e]ssential to the freedom of the press to provide

[54] Re 2007 CarswellBC 2418 Supreme Court of Canada, 2007

> information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(b) also protects the ability of the press to have access to court proceedings (CBC, at para. 23; Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.), at para. 53).

69. The Ontario Court of Appeal also discussed the primacy of the "open court" principle in *Canadian Broadcasting Corp. v. R.*[55], which involved media access to evidence:

> 23 Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection.

70. In keeping with "open court" principles, members of the public and the press have free access to court files, except in the rare cases where there is a publication ban or a sealing order. In those cases, the interests of the public and the press must be weighed against countervailing interests, such as the protection of minors or the protection of sensitive commercial information.

71. In accordance with open court principle, and subject to publication bans, members of the press are free to write and publish articles about criminal charges and criminal proceedings. Anyone can publish a blog about a court case on the Internet. Court records are available for review. Court decisions are published on Canlii, without regard to the outcome of the case. These public records are not sealed when an accused person is acquitted, discharged or ultimately pardoned for the offence.

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[55] 2010 CarswellOnt 8225, 2010 ONCA 726, 102 O.R. (3d) 673, 262 C.C.C. (3d) 455, 327 D.L.R. (4th) 470, 271 O.A.C. 7, 221 C.R.R. (2d) 242

72. If Gary's position about the effect of the *Criminal Records Act* were correct, then any person who happened through any means (including from court files or legal databases or the Internet or personal involvement) to possess information about a criminal charge would be prohibited from disclosing or publishing that information, in the event the criminal charge resulted in an absolute or conditional discharge or subsequently resulted in a pardon (now, a record of suspension).

73. Ironically, no such prohibition would apply in the event of an acquittal or withdrawal or stay of the charges, since such matters are not addressed in the *Criminal Records Act*.

74. This is not the law, nor would such a law be consistent with open court principles.

What is the Legal Effect of a Discharge or Pardon?

75. This issue has been addressed many times by all levels of courts and tribunals in Canada, including the Supreme Court of Canada.

76. The seminal case is *Therrien (Re),* [2001] 2 SCR 3, 2001 SCC 35 (CanLII). In 1971, Therrien was convicted of harbouring four FLQ members and sentenced to prison. After serving his sentence, Therrien became a lawyer, obtained a pardon for his offence and had a distinguished legal career. He applied to become a judge four times. On the fourth time, he did not disclose his criminal conviction or pardon and was appointed a judge. When his background came to light, he was removed. The Supreme Court of Canada upheld this decision.

77. In discussing the legal effect of a pardon, the Supreme Court held:

> In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimize its future consequences. Section 5(*a*)(ii) *C.R.A.* provides that the pardon is evidence that "the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character" (emphasis added), implying that it still exists and could so reflect. **Second, the effects of the pardon are limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect.** Third, the information contained in the criminal record is not destroyed but is kept separate and apart, whence it may re-emerge should the pardoned person subsequently be no longer of good conduct. [emphasis added]

78. There was no suggestion in *Therrien* that the *Criminal Records Act* prohibited the use or disclosure of information about Therrien's criminal past – quite to the contrary, it was held that Therrien was obligated to disclose his criminal history in applying to become a judge and that the selection committee was permitted to refuse his application based on the offence, even though it had been pardoned.

79. In *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2008] 2 SCR 698, 2008 SCC 48 (CanLII), the majority of the Supreme Court of Canada came to a different conclusion where the appellant's application to become a police officer was rejected because of a shoplifting charge for which she had received a conditional discharge.

80. The case did not, however, turn on a different interpretation of the *Criminal Records Act*. Indeed, it was confirmed that: "A pardon does not have an absolute

effect and does not erase the past. Neither a discharge nor a pardon allows a person to deny that he or she was found guilty of an offence."[56]

81. Rather, the case turned on the interpretation of section 18.2 of the *Quebec Charter of human rights and freedoms*, R.S.Q., c. C-12:

> **18.2.** No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment <u>or if the person has obtained a pardon for the offence</u>. [emphasis in the original decision]

82. There is a similar provision in section 5(1) the Ontario *Human Rights Code*:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, <u>record of offences</u>, marital status, family status or disability. [emphasis added]

83. This prohibition is not absolute, however. Section 24(b) of the *Human Rights Code* states:

> 24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> (b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment;

[56] *Montréal (City) v. Quebec, p*ara. 20

84. In *Law Society of Upper Canada v. Tunney*, 2016 ONLSTA 20 (CanLII), the Law Society Tribunal (Appeal Division) noted that “record of offences” was specifically excluded from a separate section prohibiting discrimination in relation to “vocational associations” and held that the *Human Rights Code* does not preclude the Tribunal’s ability to rely upon pardoned or discharged criminal offences in considering whether a licensee applicant is of good character.

85. The Tribunal cited numerous decisions where criminal convictions (included pardoned convictions), criminal discharges, and withdrawn and outstanding criminal charges were considered.[57]

86. In the same vein, “record of offences” is not a prohibited ground of discrimination under the *Human Rights Code* with respect to the provision of “services, goods and facilities”, accommodation, harassment in accommodation or the right to contract on equal terms.[58]

87. In summary, the fact that a criminal charge has resulted in an absolute or conditional discharge, pardon or record suspension is relevant only to the extent that federal or provincial legislation specifically limits or precludes discrimination/taking into consideration a prior criminal offence which has been discharged or which is subject to a pardon or record suspension. In Ontario, the only such prohibition relates to employment applications, and even then the prohibition is limited.

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[57] *Tunney*, para. 49
[58] *Human Rights Code*, sections 1, 2 and 3

88. There is no law prohibiting a court-appointed receiver from filing evidence which is or may be relevant to a proceeding in a court report, including prior criminal proceedings. There is no law prohibiting the court in a civil or bankruptcy proceeding from considering evidence of a person's prior criminal conduct in making findings of credibility or determining issues that may arise in the proceeding.

Request for a Sealing Order

89. The two-part test for a sealing order is set out in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522[59] as follows:

(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 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.

90. This case does not meet either test.

91. In *M.E.H. v. Williams*, 2012 ONCA 35 (CanLII), the Ontario Court of Appeal set aside a publication ban imposed in relation to divorce proceedings brought

[59] Included in the Commercial List "Bench Book of Authorities"

by Colonel Russell Williams' former spouse. In doing so, the Court set out some of the criteria under the first test for a publication ban:

(a) There must be a public interest at stake;

(b) Purely personal interests cannot justify non-publication or sealing orders;

(c) "In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis";

(d) "Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards"":

92. The Court held that the evidence filed by Williams' wife fell short of establishing that the "orders were necessary to prevent a serious risk to the proper administration of justice". Accordingly, it was unnecessary to consider the second branch of the *Sierra* test.

93. In the present case, the sole evidence filed by Gary to meet the tests for a sealing order is a bald statement in his June 7, 2017 affidavit as follows:

> 19. The Receiver's disclosure of the Guilty Plea has had a prejudicial effect on my personal and business relationships. I verily believe that the Receiver's disclosure will continue to adversely affect me.

94. This evidence does not come remotely close to meeting the test for a publication ban on his criminal past, let alone justifying a sealing order over information that is already in the public domain. If this were the test for a sealing order, then "open court" principles would be gutted. It would be a rare case where public disclosure of

criminal charges did not have some potential adverse effect on the accused's personal or business relationships.

95. Moreover, Gary's 1993 fraud conviction, his 2006 guilty plea to money-laundering, the probation order and his 2007 pardon application are only part of a lengthy course of troubling conduct, of which the Receiver's investigation remains incomplete. The relevance and/or importance of Gary's criminal past, including the impact on Gary's credibility, are matters to be considered and weighed as appropriate during the course of these proceedings.

PART IV - ORDER REQUESTED

96. It is respectfully requested that Gary's motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June, 2017.

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B E T W E E N

CANADIAN IMPERIAL BANK OF COMMERCE	-and-	1299746 ONTARIO INC. o/a COMPUQUEST2000, et al.
Applicant		Respondents

Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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