

**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.

Respondents

**FACTUM OF THE MOVING PARTY,
GARY WAYNE BODIMEADE**

JUNE 12, 2017

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Greg Azeff LSUC#: 45324C
Tel: 416.595.2660/Fax: 416.595.8695
Email: gazeff@millerthomson.com

Stephanie De Caria LSUC#: 68055L
Tel: 416.595.2652/Fax: 416.595.8695
Email: sdecaria@millerthomson.com

Lawyers for the Respondents and Gary
Bodimeade

TO: **MINDEN GROSS LLP**
Barristers and Solicitors
2200 – 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis LSUC#: 26900W
Tel: (416) 369-4137
Fax: (416) 864-9223
Email: francis@mindengross.com

Lawyers for the Receiver

AND TO: The Service List

**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.

Respondents

**FACTUM OF THE MOVING PARTY,
GARY WAYNE BODIMEADE**

PART I – OVERVIEW

1. The moving party, Mr. Gary Wayne Bodimeade (“**Mr. Bodimeade**”) is the director and officer of the debtors in the within proceeding, 1299746 Ontario Inc. o/a Compuquest2000 (“**129**”) and 2252709 Ontario Inc. (“**225**”) (collectively referred to as the “**Respondents**”), and is an interested party in the within proceeding.
2. Mr. Bodimeade brings this motion against Grant Thornton Limited (“**GTL**”), the court-appointed Receiver (as defined below) in the within proceeding, for an Order:
 - (a) Granting Mr. Bodimeade leave, *nunc pro tunc*, to bring the within motion against the Receiver;
 - (b) Requiring the Receiver to permanently expunge any materials filed with the Court and uploaded on the Receiver’s Website at the following URL: https://www.grantthornton.ca/services/reorg/bankruptcy_and_insolvency/compuquest2000 (the “**Receiver’s Website**”) that disclose any of the Guilty Plea, Probation Order or fact of the Discharge (as such terms are defined below) at its sole cost;

- (c) Awarding costs against the Receiver personally on a substantial indemnity basis; and
- (d) Sealing all documents and materials filed in connection with the within motion, together with the Order granted, pending further Order of this Court.

PART II – FACTS

- 3. Pursuant to the Order of the Honourable Mr. Justice Newbould of the Ontario Superior Court of Justice (Commercial List) dated May 17, 2016, GTL was appointed as receiver (in such capacity, the “**Corporate Receiver**”), without security, of all of the assets, undertakings and property (collectively, the “**Property**”) of the Respondents (the “**Appointment Order**”).
- 4. Pursuant to Order of the Honourable Madam Justice Conway of the Ontario Superior Court of Justice (Commercial List) dated January 25, 2017 (the “**Ashburn Appointment Order**”), GTL was appointed as equitable receiver (the “**Ashburn Receiver**”, and together with the Corporate Receiver, the “**Receiver**”), without security, of the real property known municipally as 7472 Ashburn Road, Whitby, Ontario (the “**Ashburn Property**”).
- 5. Minden Gross LLP acts as counsel to the Receiver in the within proceeding.

Reference: Affidavit of Gary Wayne Bodimeade, sworn June 7, 2017, Motion Record, Tab 2 (the “***Bodimeade Affidavit***”) at paras 2-4; Exhibits “A” and “B” of the *Bodimeade Affidavit*.

Guilty Plea, Probation Order and Discharge

- 6. In or around 2005, Mr. Bodimeade was charged with laundering the proceeds of crime and fraud over \$5,000.00 contrary to the Criminal Code, in relation to actions involving the Royal Bank of Canada (“**RBC**”).
- 7. Mr. Bodimeade pleaded guilty to the charge of laundering the proceeds of crime contrary to the Criminal Code (the “**Guilty Plea**”). Pursuant to the Probation Order of the Honourable Mr. Justice Sutherland dated September 12, 2006, he was given two (2)

years' probation on conditions (the "**Probation Order**"). The fraud over \$5,000 charge was withdrawn.

8. Mr. Bodimeade complied with the conditions of the two years' probation as set out in the Probation Order and was ultimately discharged. The Guilty Plea was expunged within three (3) years following the date of the sentence (the "**Discharge**"). By virtue of the Discharge, the Guilty Plea did not result in a criminal conviction or form part of Mr. Bodimeade's criminal record.

Reference: *Bodimeade Affidavit, supra*, at paras 5-8; Exhibit "C" to the *Bodimeade Affidavit*.

The Receiver's Disclosure of the Guilty Plea, Probation Order and Discharge

9. Ms. Catherine Francis of Minden Gross LLP acted as civil counsel for the RBC in connection with the above-noted criminal charge. As a result of said involvement, Ms. Francis was in possession of information and documentation related to the Guilty Plea, the Probation Order and the fact of the Discharge. Ms. Francis provided said information and documentation to the Receiver, as further described below.

Reference: *Bodimeade Affidavit, supra*, at para 9; Exhibit "G" to the *Bodimeade Affidavit*: Email dated April 24, 2017 from Ms. Catherine Francis to Ms. Stephanie De Caria.

A) Receiver's Second Report

10. On or about November 24, 2016, the Corporate Receiver filed its Second Report (the "**Second Report**"). The purpose of the Second Report was ostensibly to, among other things, support CIBC's motion to appoint the Ashburn Receiver over the Ashburn Property.
11. Paragraphs 58 to 60 of the Second Report reference the above-noted Guilty Plea and Probation Order, and improperly makes reference to a "record of conviction" and "criminal record". Specifically:

"58. Shortly after the Receiver's appointment, the Receiver learned from Minden Gross, its independent counsel, that on September 12, 2006, Bodimeade was found guilty of laundering proceeds of crime contrary to the Criminal Code, arising out of charges that Bodimeade and his brother defrauded Royal Bank of Canada. A copy of the record of conviction is attached as **Appendix "32"**.

59. Bodimeade was placed on probation for a period of two years and was therefore on probation at the time of the purchase of the Ashburn Property.

60. The Receiver understands that CIBC was unaware of Bodimeade's **criminal record** prior to the appointment of the Receiver." [emphasis added]

12. In addition to the above-noted paragraphs, Appendix 32 attached to the Second Report encloses a copy of the Probation Order and documents related to the Guilty Plea and fact of the Discharge.

Reference: *Bodimeade Affidavit, supra*, at paras 10-12; Exhibit "D" to the *Bodimeade Affidavit*.

B) Receiver's Motion for Directions

13. On or about February 21, 2017, the Receiver brought a motion for directions. In support of its motion, the Receiver filed its Motion Record dated February 15, 2017 (the "**Motion Record for Directions**") which contained the Receiver's Notice of Motion dated February 15, 2017 (the "**Notice of Motion**").
14. Paragraph 4 of the Notice of Motion (under the "Grounds for the Motion" section) references the Guilty Plea. Specifically, the Notice of Motion provides as follows:

"4. In 2006, Gary pleaded guilty to money laundering arising from charges that he defrauded Royal Bank of Canada and was placed on two-years' probation."

Reference: *Bodimeade Affidavit, supra*, at paras 13-14; Exhibit "E" to the *Bodimeade Affidavit*.

Requests to the Receiver to Rectify the Disclosure

15. By letter dated April 24, 2017 and in a subsequent email dated April 25, 2017, Mr. Bodimeade, through his counsel Ms. De Caria, advised the Receiver's counsel, Ms. Francis, that the Receiver's disclosure contravenes section 6.1 of the *Criminal Records Act*, R.S.C., 1985, c. C-47, as amended (the "**CRA**"), unless approval of the Minister of Public Safety and Emergency Preparedness had been obtained (the "**Minister**"). Therein, Ms. De Caria requested that the Receiver immediately take all steps available to have same sealed and removed from the public record.

16. As set out in the email correspondence dated April 24, 2017 and April 25, 2017, the Receiver, through its counsel, refused to expunge the disclosure, and specifically invited Mr. Bodimeade to bring the within motion.

Reference: *Bodimeade Affidavit, supra*, at paras 15-16; Exhibits “F” and “G” to the *Bodimeade Affidavit*.

17. In or around 2007, Mr. Bodimeade was granted a pardon from a criminal conviction in 1993. By virtue of the pardon being granted, the 1993 conviction no longer forms part of Mr. Bodimeade’s criminal record.
18. However, the Receiver, through its counsel, advised that it reserves the right to bring to the court’s attention the earlier fraud conviction and Mr. Bodimeade’s alleged failure to disclose information in applying for the pardon.

Reference: *Bodimeade Affidavit, supra*, at paras 16(b) and 18; Exhibit “G” to the *Bodimeade Affidavit*.

19. The Minister did not grant prior approval of the disclosure of the Guilty Plea, the Probation Order or the fact of the Discharge by Minden Gross LLP or by the Receiver.
20. The Receiver’s above-noted disclosure has had, and will continue to have, a prejudicial effect on Mr. Bodimeade’s personal and business relationships.

Reference: *Bodimeade Affidavit, supra*, at paras 19 - 20.

PART III – ISSUES

21. The within Motion raises the following issues:
- (a) Should this Court grant Mr. Bodimeade leave, *nunc pro tunc*, to bring the within motion against the Receiver?
 - (b) Should this Court grant an Order requiring the Receiver to permanently expunge any materials filed with the Court and uploaded on the Receiver’s Website that disclose any of the Guilty Plea, Probation Order or fact of the Discharge, at its sole cost?

- (c) Should this Court award costs against the Receiver personally, on a substantial indemnity basis?
- (d) Should this Court grant an Order sealing all documents and materials filed in connection with the within motion, pending further Order of this Court?

PART IV – LAW & LEGAL AUTHORITIES

- (a) **Should this Court grant Mr. Bodimeade leave, *nunc pro tunc*, to bring the within motion against the Receiver?**

22. In *Third Generation Realty Ltd. v. Twigg Holdings Ltd.*, Justice Farley held that leave to commence proceedings against a receiver appointed by the Court is to be granted unless it is clear there is no foundation for the claim or the action is frivolous. Leave should not be dealt with on a perfunctory basis or be given in a *carte blanche* matter. There should be very careful examination of both the factual and legal issues.

Reference: *Third Generation Realty Ltd. v Twigg Holdings Ltd.* [1992] OJ No 1472 at paras 9-11, 34 ACWS (3d) 842.

Moving Party's Book of Authorities, Tab 1.

23. In following Justice Farley's decision and having found that there is a basis for the claim, the Commercial List has granted leave to a party *nunc pro tunc* to commence and continue an action against a court-appointed receiver.

Reference: *3038081 Nova Scotia Ltd. v 3026255 Nova Scotia Ltd. (Receiver of)* [2003] OJ No 1087 at para 50, 121 ACWS (3d) 675.

Moving Party's Book of Authorities, Tab 2.

24. At this time, Mr. Bodimeade is not seeking leave to launch a claim or action against the Receiver. This motion is simply brought to require the Receiver to rectify its improper disclosure of the Guilty Plea, Probation Order and fact of Discharge in violation of the CRA.

25. There is nothing frivolous about the within motion, and the factual and legal issues raised herein warrant an Order granting leave. It is respectfully submitted that the within motion

is justified and necessary, and leave should be granted to Mr. Bodimeade *nunc pro tunc* to bring the within motion against the Receiver.

(b) **Should this Court grant an Order requiring the Receiver to permanently expunge any materials filed with the Court and uploaded on the Receiver's Website that disclose any of the Guilty Plea, Probation Order or fact of the Discharge, at its sole cost?**

26. Section 6.1 of the CRA prohibits disclosure of the existence of the record of a discharge under section 730 of the Criminal Code or the fact of the discharge to any person, without the prior approval of the Minister of Public Safety and Emergency Preparedness (the "**Minister**"), if more than three years have elapsed since an offender was discharged on the conditions prescribed in a probation order.

Reference: CRA, section 6.1(1)(b).

27. While ordinarily, the Commissioner of the Royal Canadian Mounted Police or a department or agency of the Government of Canada would have custody to a record of discharge, as contemplated by the CRA, this case presents an unusual circumstance wherein the Receiver has custody of the information as a result of its counsel's prior engagement in an unrelated matter. However, regardless of who is in possession of the information, the CRA prohibits the disclosure of the existence of a record or discharge or fact of the discharge without prior approval of the Minister.

28. The Supreme Court of Canada has made the following observations with respect to the purpose and application of the CRA:

- (a) In circumstances of a discharge under the CRA, a pardon is obtained through the passage of time, and the person in question receives no document attesting to his or her pardon;
- (b) In amending the CRA, Parliament recognized that the primary aim of a pardon is the removal, as completely as possible, of the negative consequences of conviction once the offender has fulfilled the sentence and enough time has elapsed to establish, with some degree of certainty, law abiding behaviour;

- (c) Under section 730(3) of the Criminal Code, a person found guilty of an offence who is discharged is deemed not to have been convicted of the offence;
- (d) The CRA was designed to further recognition of the distinction between a person who is found guilty and discharged and a person who is convicted and sentenced under the Criminal Code;
- (e) If more than three years have elapsed since a conditional discharge, no record of the discharge may be disclosed to any person, nor may the existence of the record be disclosed;
- (f) The pardon has the effect of requiring the judicial record of the discharge to be kept separate and apart from other criminal records;
- (g) The protection against the disclosure of information that the CRA affords a person granted a conditional discharge is effective only once three years have elapsed;
- (h) 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. The facts surrounding the offence did occur, but the pardon helps eliminate the stigma attached to the finding of guilt; and
- (i) Consequently, when the time period provided for in the CRA elapses or a pardon is granted, the opprobrium that results from prejudice and is attached solely to the finding of guilt must be resisted, and the finding of guilt should no longer reflect adversely on the pardoned person's character. It must be presumed that the person has completely recovered his or her moral integrity.

Reference: *Montréal (City) v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48 at paras 15-20, 2 SCR 698.

Moving Party's Book of Authorities, Tab 3.

29. Mr. Bodimeade was not convicted and sentenced under the Criminal Code. Rather, he entered the Guilty Plea, respected the conditions set out in the Probation Order, and as a result, obtained the Discharge. He is deemed not to have been convicted of an offence

and is therefore afforded the protection against disclosure of the Discharge provided by the CRA. Accordingly, no record of the discharge may be disclosed to any person, nor may the existence of the record be disclosed, without prior approval of the Minister.

30. In the criminal context, the Court has recognized that discharges should not be disclosed as Section 6.1 of the CRA clearly prohibits it. The Court has requested that references to a discharge be removed or that the author of the disclosure (specifically, the author of a pre-sentence report) be advised of the prohibition against disclosure.

Reference: *R v Corser*, 2004 AQBQ 861 at paras 8 & 21, AJ No 1335; *R v Khan*, 2016 ONCJ 282 at para 11, OJ No 2566.

Moving Party's Book of Authorities, Tabs 4 & 5, respectively.

31. The Receiver has violated and continues to violate section 6.1 of the CRA by disclosing the Guilty Plea, the Probation Order and the fact of the Discharge and refusing to expunge same.
32. In addition to its disclosure, the Receiver relies on and considers the underlying facts surrounding the finding of guilt, specifically Mr. Bodimeade's "prior involvement in fraud and money-laundering activities" as being relevant to the determination of issues within the receivership proceeding.
33. The Receiver's disclosure, reliance on and use of this information not only directly contravenes the CRA, but adversely impacts Mr. Bodimeade's reputation and character and results in the exact type of stigma and prejudice that the CRA serves to protect against.
34. While the above-noted disclosure should not have been disclosed at all, such disclosure improperly makes references to a "record of conviction" and "criminal record" and ultimately mischaracterizes the legal effect of Mr. Bodimeade's Discharge.
35. Simply put, the Receiver is not permitted to disclose any information related to the Discharge without the prior approval of the Minister, which it has not obtained.

36. For the reasons set out above, it is respectfully submitted that the Receiver be required to expunge any materials filed with the Court and uploaded on the Receiver's Website that disclose any of the Guilty Plea, Probation Order or fact of the Discharge, at its sole cost.

(c) **Should this Court award costs against the Receiver personally, on a substantial indemnity basis?**

37. Costs are only awarded personally against a receiver in the rarest of cases, and then, ordinarily, only if notice has been given to the receiver that such an order is being sought.

Reference: *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v Courtcliffe Parks Ltd.* (1995), CarswellOnt 3559 at paras 15-16, 58 ACWS (3d) 925.

Moving Party's Book of Authorities, Tab 6.

38. The Ontario Court of Appeal has held that elevated costs (*i.e.* substantial indemnity costs) should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made, and specifically, in cases where the court finds egregious behaviour deserving of sanction.

Reference: *Davies v Clarington (Municipality)*, 2009 ONCA 722 at para 40, OJ No 4236.

Moving Party's Book of Authorities, Tab 7.

39. It is respectfully submitted that these circumstances represent a rare case where costs ought to be awarded personally against the Receiver.

40. Mr. Bodimeade took reasonable steps to resolve this matter. He brought the relevant provisions of the CRA to the Receiver's attention and notified the Receiver that its disclosure was prohibited by the CRA unless the Minister granted approval. When he requested that the Receiver take steps to immediately remove the disclosure, the Receiver outright refused.

41. Through an additional request, Mr. Bodimeade provided the Receiver with an opportunity to reconsider the wisdom of refusing to remove the disclosure. Again, the Receiver refused.

42. Aside from its refusal to rectify the disclosure, the Receiver advised that it reserves its right to continue to disclose information related to Mr. Bodimeade's criminal past, in respect of which he has obtained a pardon.

43. As indicated above, the Receiver invited Mr. Bodimeade to bring the within motion, for which Mr. Bodimeade advised that it would be seeking its full costs.

Reference: *Bodimeade Affidavit, supra*, at para 16; Exhibit "G" to the *Bodimeade Affidavit*.

44. The Receiver was put on notice of the within motion and provided with a copy of the draft Order that Mr. Bodimeade is seeking prior to the motion return date.

45. The Receiver's refusal to remove the disclosure was ill-conceived. The Receiver was advised of the relevant provisions of the CRA and given more than one opportunity to rectify its disclosure.

46. The Receiver's deliberate conduct is egregious and merits sanction. The Receiver should not be permitted to wilfully violate the CRA, engage in conduct that occasions harm to Mr. Bodimeade, advise Mr. Bodimeade to bring the within motion himself and then walk away absolved from any responsibility for the costs.

47. It is respectfully submitted that the Receiver personally pay Mr. Bodimeade his costs for the within motion, on a substantial indemnity basis.

48. If this Court grants a cost award in favour of Mr. Bodimeade, it is respectfully submitted that such costs ought not be borne by the Respondents' estate and that the Receiver should be required to absorb and pay the cost award itself. To allow the Receiver to look to the assets of the receivership for the payment of a cost award would effectively make the creditors bear the financial burden of rectifying the Receiver's conduct, for which it was provided with ample opportunity to rectify itself.

(d) Should this Court grant an Order sealing all documents and materials filed in connection with the within motion, pending further Order of this Court?

49. Given the nature of the within motion and in an effort to protect against further disclosure of the Guilty Plea, Probation Order or fact of the Discharge, Mr. Bodimeade seeks a sealing order over all documents filed in connection with the within motion.

50. Section 137(2) of the *Courts of Justice Act* provides the Court with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record, notwithstanding the general principle that Court should be open and public.

Reference: *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, section 137(2).

51. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

- (a) the order is necessary to prevent risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk;
- (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

Reference: *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53, 2 SCR 522.

Moving Party's Book of Authorities, Tab 8.

52. It is respectfully submitted that in these circumstances, the granting of a sealing order would be consistent with provisions and purpose of the CRA, namely, that a discharged individual enjoys a statutory entitlement to the non-disclosure of prejudicial information.

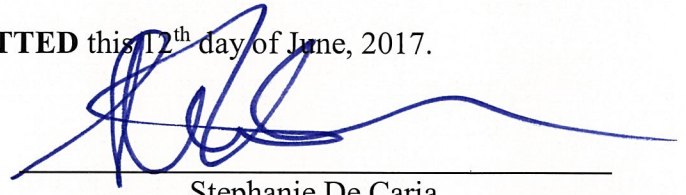
53. If granted, the sealing order will protect the personal interests of Mr. Bodimeade and will uphold a broader public interest that the protection afforded to discharged individuals by the CRA will be maintained and that wrongful disclosure of such information will be cautioned against.

54. The salutary effects greatly outweigh the deleterious effects of not granting the sealing order, namely the lack of immediate public access to all documents filed in connection with this motion.
55. It is respectfully submitted that the test for a sealing order has been met and the Court should make an order that all documents filed in connection with the within motion be treated as confidential, sealed, and not form part of public record, pending further Order of the Court.

PART V – RELIEF SOGUHT

56. In light of the foregoing, Mr. Bodimeade respectfully submits that this Court grant the relief sought in this motion, in the draft form of Order attached at Tab 3 of Mr. Bodimeade's Motion Record.

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



Stephanie De Caria

TAB

A

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Third Generation Realty Ltd. v Twigg Holdings Ltd.* [1992] OJ No 1472, 34 ACWS (3d) 842.
2. *3038081 Nova Scotia Ltd. v 3026255 Nova Scotia Ltd. (Receiver of)* [2003] OJ No 1087, 121 ACWS (3d) 675.
3. *Montréal (City) v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, 2 SCR 698.
4. *R v Corser*, 2004 AQBQ 861, AJ No 1335.
5. *R v Khan*, 2016 ONCJ 282, OJ No 2566.
6. *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v Courtcliffe Parks Ltd.* (1995), CarswellOnt 3559, 58 ACWS (3d) 925.
7. *Davies v Clarington (Municipality)*, 2009 ONCA 722, OJ No 4236.
8. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53, 2 SCR 522.

TAB
B

**SCHEDULE “B”
LIST OF AUTHORITIES**

1. **Criminal Records Act, R.S.C., 1985, c. C-47**

Custody of Records

Records to be delivered to Commissioner

6 (1) The Minister may, by order in writing addressed to a person having the custody or control of a judicial record of a conviction in respect of which a record suspension has been ordered, require that person to deliver that record into the Commissioner’s custody.

Records to be kept separate and not to be disclosed

(2) A record of a conviction in respect of which a record suspension has been ordered that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be kept separate and apart from other criminal records. No such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister.

Approval for disclosure

(3) The Minister shall, before granting the approval for disclosure referred to in subsection (2), satisfy himself that the disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or any state allied or associated with Canada.

Information in national DNA data bank

(4) For greater certainty, a judicial record of a conviction includes any information in relation to the conviction that is contained in the convicted offenders index of the national DNA data bank established under the DNA Identification Act.

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.

Purging C.P.I.C.

(2) The Commissioner shall remove all references to a discharge under section 730 of the Criminal Code from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1).

Disclosure to police forces

6.2 Despite sections 6 and 6.1, the name, date of birth and last known address of a person whose record is suspended under section 4.1 or who has received a discharge referred to in section 6.1 may be disclosed to a police force if a fingerprint, identified as that of the person, is found

(a) at the scene of a crime during an investigation of the crime; or

(b) during an attempt to identify a deceased person or a person suffering from amnesia.

Definition of *vulnerable person*

6.3 (1) In this section, ***vulnerable person*** means a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent,

(a) is in a position of dependency on others; or

(b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.

Notation of records

(2) The Commissioner shall make, in the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police, a notation enabling a member of a police force or other authorized body to determine whether there is a record of an individual's conviction for an offence listed in Schedule 2 in respect of which a record suspension has been ordered.

Verification

(3) At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant is the subject of a notation made in accordance with subsection (2) if

(a) the position is one of trust or authority towards that child or vulnerable person; and

(b) the applicant has consented in writing to the verification.

Unauthorized use

(4) Except as authorized by subsection (3), no person shall verify whether a person is the subject of a notation made in accordance with subsection (2).

Request to forward record to Minister

(5) A police force or other authorized body that identifies an applicant for a position referred to in paragraph (3)(a) as being a person who is the subject of a notation made in accordance with subsection (2) shall request the Commissioner to provide the Minister with any record of a conviction of that applicant, and the Commissioner shall transmit any such record to the Minister.

Disclosure by Minister

(6) The Minister may disclose to the police force or other authorized body all or part of the information contained in a record transmitted by the Commissioner pursuant to subsection (5).

Disclosure to person or organization

(7) A police force or other authorized body shall disclose the information referred to in subsection (6) to the person or organization that requested a verification if the applicant for a position has consented in writing to the disclosure.

Use of information

(8) A person or organization that acquires information under this section in relation to an application for a position shall not use it or communicate it except in relation to the assessment of the application.

Amendment of Schedule 2

(9) The Governor in Council may, by order, amend Schedule 2 by adding or deleting a reference to an offence.

Operation of section 6.3

6.4 Section 6.3 applies in respect of a record of a conviction for any offence in respect of which a record suspension has been ordered regardless of the date of the conviction.

Offences

Offence and punishment

10 Any person who contravenes any provision of this Act is guilty of an offence punishable on summary conviction.

2. **Criminal Code, R.S.C., 1985, c. C-46.**

Absolute and Conditional Discharges

Conditional and absolute discharge

730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

Period for which appearance notice, etc., continues in force

(2) Subject to Part XVI, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XVI pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under subsection (1) unless, at the time the accused pleads guilty or is found guilty, the court, judge or justice orders that the accused be taken into custody pending such a disposition.

Effect of discharge

(3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

(a) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;

(b) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and

(c) the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.

Where person bound by probation order convicted of offence

(4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation

order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

Probation

Making of probation order

731 (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or

(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

Idem

(2) A court may also make a probation order where it discharges an accused under subsection 730(1).

(3.1) [Repealed, 1997, c. 17, s. 1]

3. **Courts of Justice Act, R.S.O. 1990, c. C.43**

Public Access

Public hearings

135. (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information. R.S.O. 1990, c. C.43, s. 135.

Prohibition against photography, etc., at court hearing

136. (1) Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(a) (c) broadcast or reproduce an audio recording made as described in clause (2) (b). R.S.O. 1990, c. C.43, s. 136 (1).

Exceptions

(2) Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes. R.S.O. 1990, c. C.43, s. 136 (2); 1996, c. 25, s. 1 (22).

Exceptions

(3) Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

Offence

(4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.43, s. 136 (3, 4).

Section Amendments with date in force (d/m/y)

Documents public

137. (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) 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.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

CANADIAN IMPERIAL BANK OF
COMMERCE

and

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

Applicant

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

FACTUM OF THE MOVING PARTY,
GARY WAYNE BODIMEADE

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Greg Azeff LSUC#: 45324C

Tel: 416.595.2660/Fax: 416.595.8695
Email: gazeff@millerthomson.com

Stephanie De Caria LSUC#: 68055L

Tel: 416.595.2652/Fax: 416.595.8695
Email: sdecaria@millerthomson.com

Lawyers for the Respondents and Gary
Bodimeade