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Confidentiality & Sealing Orders on the Commercial List

Litigation on the Commercial List often involves highly sensitive business information, such as trade secrets, proprietary data, or confidential financial records. While the Canadian justice system is predicated on the open court principle as a general rule, which ensures transparency and public access to proceedings, there are limited circumstances where courts may grant confidentiality or sealing orders to protect this type of information. These are exceptional remedies, available only where the need for confidentiality clearly outweighs the public interest in openness.

What Are Confidentiality & Sealing Orders?

- **Confidentiality (Protective) Orders:** These orders govern how information exchanged in the litigation process can be used and disclosed. Parties most often seek them during the discovery phase when they exchange documents that may contain commercially sensitive information. Common examples include internal financial data or forecasts, customer or supplier lists, and proprietary business strategies or technology.

  To balance the need for disclosure with the need for protection, confidentiality orders often create two tiers of protection: a general “confidential” designation where information may be shared among the parties and their representatives but not beyond, and a “counsel’s eyes only” designation, the highest level of protection, reserved for the most sensitive material, which may be viewed only by legal counsel (and sometimes experts).

- **Sealing Orders:** A sealing order goes further. It restricts public access to certain court-filed materials by physically sealing all or part of the court record. This means the sealed materials are not available for public inspection.

  Sealing orders are rare and narrowly tailored. Courts typically grant them to protect highly sensitive information, or in cases where disclosure would cause serious harm to a party’s legitimate interests. Importantly, sealing orders are not open-ended; courts limit them to

what is strictly necessary and for a defined period of time.

Legal Framework in Canada

The open court principle is a foundational aspect of the Canadian justice system, reflecting the idea that transparency enhances accountability and public confidence in the judiciary. As a result, courts begin with the presumption that proceedings and filings are open to the public.

To overcome that presumption, a party seeking a confidentiality or sealing order must meet a rigorous three-part test, established by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* and reaffirmed in *Sherman Estate v Donovan*.

The applicant must show:

1. Serious Risk to an Important Interest

The order is necessary to prevent serious risk to an important public interest, including a party's commercial interests such as the protection of trade secrets, confidential business information, or proprietary technology.

2. No Reasonable Alternative

There are no reasonable alternative measures, such as redaction or anonymization, that could adequately prevent the risk.

3. Proportionality

The benefits of granting the order outweigh its negative effects, particularly the harm it may cause to the public interest in open and transparent judicial proceedings.

The Court will consider granting the requested protection only if the applicant satisfies all three criteria.

Procedure & Practice on the Commercial List

On the Commercial List, specific procedural requirements apply when parties seek sealing or confidentiality orders.

Where parties seek such relief:

- They must still file and serve public, redacted materials in the usual way.
- They should provide the confidential materials directly to the presiding judge, either through the Commercial List Office or, if directed, via email.
- They should not upload these materials to Case Center or publicly file them unless and until the judge directs otherwise.

A judge will grant a sealing order only after being satisfied that

the *Sierra Club* test has been met and that the order is appropriate in the circumstances. Counsel must be ready to address the legal basis for the order and to confirm their request does not fall within the publication ban provisions of the Superior Court of Justice's *Consolidated Provincial Civil Practice Direction* (Part VI, section H).

Where the Court grants a sealing order, counsel must typically deliver a physical copy of the sealed materials to the Commercial List Office in an envelope marked, "Confidential and not to form part of the public record subject to further order of this Court."

Key Takeaways

- **Plan Early**: Identify potential confidentiality or sealing issues early in the litigation to avoid delays.
- **Be Precise**: Frame requests narrowly and use evidence to demonstrate the necessity of the order.
- **Respect Transparency**: Courts are vigilant in protecting the open court principle. Sealing orders are the exception, not the rule.
- **Follow Procedure**: Ensure compliance with Commercial List and Superior Court Practice Directions when seeking these orders.