Fast Track

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1803 0076AC
COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated March 20, 2018
Filed the 2nd day of May, 2018

BOOK OF AUTHORITIES OF THE RESPONDENT, SAWRIDGE FIRST NATION

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1803 0076AC
COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated March 20, 2018
Filed the 2nd day of May, 2018

BOOK OF AUTHORITIES OF THE RESPONDENT, SAWRIDGE FIRST NATION

FOR THE APPELLANT,
Priscilla Kennedy

Field LLP
2500 Enbridge Centre
10175 – 101 Street NW
Edmonton, AB T5J 0H3
Attn: P. Jonathan Faulds, Q.C.
Phone: (780) 423-7625
Fax: (780) 429-9329
Email: jfaulds@fieldlaw.com
File No.: 65063-1

FOR THE RESPONDENT,
Sawridge First Nation

Parlee McLaws LLP
1700 Enbridge Centre
10175 – 101 Street NW
Edmonton, AB T5J 0H3
Attn: Edward Molstad, Q.C.
Phone: (780) 423-8500
Fax: (780) 423-2870
Email: emolstad@parlee.com
File No.: 64203-23/EHM

FOR THE RESPONDENTS,
Sawridge Trustees

Dentons LLP
2900 Manulife Place
10180 – 101 Street NW
Edmonton, AB T5J 3V5
Attn: Doris Bonora & Anna Loparco
Phone: (780) 423-7188
Fax: (780) 423-7276
Email: doris.bonora@dentons.com

INTERESTED PARTY

Maurice Felix Stoney
500 4th Street NW
Slave Lake, AB T0G 2A1
Phone: (780) 516-1143

TABLE OF CONTENTS

TAB 1

In the Court of Appeal of Alberta

Citation: Secure 2013 Group Inc v Tiger Calcium Services Inc, 2017 ABCA 316

Date: 20171018
Docket: 1703-0001-AC;
1703-0003-AC;
1703-0004-AC;
1703-0005-AC
Registry: Edmonton

Between:

Appeal No. 1703-0001-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

- and -

Respondents
(Plaintiffs)

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure Developments Inc., Secure Resources Inc., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants)

- and -

Secure 2013 Group Inc., Secure Rentals Inc., Scott Weinrich and Weinrich Holdings Ltd.

Appellants
(Defendants)

And Between:

Appeal No. 1703-0003-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs)

- and -

Secure Developments Inc.

Appellant
(Defendant)

- and -

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

And Between:

Appeal No. 1703-0004-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V) by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs/ Applicants)

- and -

Lianguang Hu, Also Known As, Stephen Hu

Appellant
(Defendant/ Respondent)

- and -

Clark Sazwan, Shilo Sazwan, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants/ Respondents)

And Between:

Appeal No. 1703-0005-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V) Inc., by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

Respondents
(Plaintiffs)

- and -

Shilo Sazwan, Andrea Sazwan, 1793068 Alberta Ltd., Secure Resources Inc.

Appellants
(Defendants)

- and -

Clark Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Denise Sazwan, Smokey Creek Ranch Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of The Honourable Madam Justice Strekaf
Concurred in by The Honourable Mr. Justice Berger
Concurred in by The Honourable Mr. Justice McDonald

Appeal from the Orders by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 30th day of November, 2016
Filed on the 1st day of December, 2016
(Docket: 1601 16191; 1603 22128)

Reasons for Judgment Reserved of
the Honourable Madam Justice Strekaf

I. Introduction

[1] These four appeals are from a combined *ex parte Mareva* injunction and attachment order ("*Mareva*/attachment Order") against four individuals[1] and seven corporations[2], and six *ex parte Anton Piller* orders, ("*Anton Piller* Orders") against some of the same parties[3] and three third-party service providers.[4]

[2] A chambers judge granted the orders on November 30, 2016 (collectively, "Orders"). The Orders impose severe remedies on fourteen parties.

[3] The appeals raise questions about when *ex parte Mareva* injunctions, attachment orders and *Anton Piller* orders should be granted, the duties on applicants and their counsel when making such applications, the orders' scope and the process to review them.

[4] The appeals are allowed and the Orders are set aside, except for the *Mareva*/attachment Order against Clark Sazwan and Smokey Creek Ranch Ltd, which was not appealed (but a set aside application is pending in the Court of Queen's Bench).

II. Background

[5] The plaintiffs commenced an action against six individuals and seven corporations arising from the acquisition of a 67% interest in the plaintiff Tiger Calcium Services Inc ("Tiger"), a family-owned business operating since 1964. The plaintiff Tiger Tanklines (2011) Ltd ("Tiger Tanklines") is a wholly owned subsidiary of Tiger. The remaining plaintiffs (collectively, "P49 Group") acquired their interest in Tiger in August 2014 from the defendant Smokey Creek Ranch Ltd ("Smokey Creek").

[6] Smokey Creek, owned by the defendants Clark Sazwan ("Clark") and Denise Sazwan, continues to own the remaining 33% of Tiger. At the time of the acquisition, Clark Sazwan was Tiger's President and CEO, the defendant Shilo Sazwan (Clark's son) was Vice-President of Operations ("Shilo") and the defendant Lianguang (aka Stephen) Hu ("Hu") was the Engineering Manager. The defendant Andrea Sazwan is Shilo's wife, both of whom are equal shareholders in the defendant 1793068 Alberta Ltd ("179").

---

[1] Shilo Sazwan, Clark Sazwan, Lianguang Hu (aka Stephen Hu), Scott Weinrich

[2] 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Secure Resources Inc., Weinrich Holdings Ltd., and Smokey Creek Ranch Ltd.

[3] Shilo Sazwan, Clark Sazwan, Lianguang Hu (aka Stephen Hu), Scott Weinrich, Secure Rentals Inc., Secure Resources Inc.,

[4] RMLO LLP, All-Type Office Services Ltd, SVS Group LLP

[7] The defendant Scott Weinrich ("Weinrich") is a friend of Shilo. Weinrich owns the defendant Weinrich Holdings Ltd ("Weinrich Holdings"), which owns the defendant Secure 2013 Group Inc ("Secure 2013"), which in turn owns the defendant Secure Rentals Inc ("Secure Rentals") (collectively, "Weinrich Defendants").

[8] The defendant Secure Developments Ltd ("Secure Developments") is owned equally by Weinrich and Shilo. The defendant Secure Resources Inc ("Secure Resources") is owned equally by Weinrich Holdings and Sazwan Holdings Ltd ("Sazwan Holdings").

[9] A chart showing the defendants' relationships is attached as Schedule A.

[10] The 86-page statement of claim advances multiple causes of action against numerous defendants including broad allegations of conspiracy. Among the principal claims are the following:

a. P49 Group was induced to invest $102 million to acquire a 67% interest in Tiger from Smokey Creek pursuant to a Share Purchase Agreement dated August 14, 2014. As a result of material misrepresentations by Clark, Shilo and Hu the P49 Group overpaid for the Tiger shares by $44.3 million.

b. The misrepresentations were that Tiger had designed, constructed and operated a successful Pilot Project and needed equity financing to construct a large industrial-scale plant using the Pilot Project technology at an initial estimated cost of $12 million ("Pastille Plant"). Problems emerged following the commencement of construction of the Pastille Plant in September 2014. It is alleged that the Pastille Plant was poorly designed, and construction was mismanaged, over budget and behind schedule. It is contended that the process used in the Pastille Plant damaged the equipment and the ultimate product would not meet market specifications and may not be saleable. This information, known only by Clark, Shilo and Hu, was concealed from Tiger's board of directors.

c. Tiger and Tiger Tanklines claim damages not less than $87.6 million for misrepresentations and concealment of information about the Pastille Plant detailed above; breach of the defendants' employment contracts, fiduciary duties, non-compete/non-solicitation obligations, confidentiality obligations, and restrictive covenants; intentional interference with Tiger's contractual relations; misuse of confidential information to enable Secure Resources to compete with Tiger; and theft of proprietary records, among other wrongs.

d. Both before and after the P49 Group acquisition, Shilo misappropriated Tiger labour and resources for his personal benefit, which Clark condoned, at an estimated cost of at least $2.5 million.

e. In late 2014, after Tiger's new owners advised Shilo that Tiger would be leasing equipment and not purchasing, Shilo and Weinrich colluded to have Tiger lease equipment from

Secure Rentals at unconscionably high rates and concealed Shilo's involvement in Secure Rentals, at an estimated cost to Tiger of at least $2 million.

A. Procedural History

a. Timing

[11] On September 9, 2016, the plaintiffs' counsel sought to have set down on the Calgary commercial list on October 6, 2016 an urgent hearing of an *ex parte* application for a *Mareva* injunction against (at least) Shilo and *Anton Piller* orders against (at least) Shilo, Hu, Secure Rentals and associated corporate entities. Five affidavits were sworn in September 2016 in support of the application.

[12] Plaintiffs' counsel cancelled the October 6 date and rescheduled it to November 30, 2016. On that day, an expanded application was brought against additional parties. On November 25, 2016, the plaintiffs had delivered unfiled copies of their application, eleven affidavits consisting of almost 2000 pages and a 54-page bench brief ("Brief") to the chambers judge assigned to hear the application.

[13] Parties are frequently under significant time constraints when applying for an *ex parte* attachment order, *Mareva* injunction or *Anton Piller* order. They are often dealing with information that has just come to their attention and are moving quickly to get into court on short notice to obtain temporary relief so as to maintain the *status quo* or preserve documents pending an application on notice to the opposing party. This context is important when examining the materials put forward in support of such an application as it may explain why some information is missing or the relief claimed is not as clearly thought out as it might otherwise be.

[14] This case is not like that. The delays and timing of the application raise concern. By September 9, 2016, the plaintiffs had a clear understanding of the relief they were seeking as demonstrated by the letter to the court to schedule their application. While they characterize the matter as urgent, the original court date of October 6 was cancelled and the application was not heard until November 30, 2016, about eight weeks later.

[15] It is not clear why, if the plaintiffs were sufficiently concerned on September 9, 2016 that they needed this urgent relief to prevent the destruction of documents or dissipation of assets, they waited almost twelve weeks until November 30, 2016 to have their application heard. While it can be difficult to schedule matters, the Court of Queen's Bench can usually accommodate truly urgent matters on reasonably short notice. This delay is discussed in more detail later in these reasons.

b. Orders Granted

[16] On November 30, 2016, the chambers judge, who had reviewed the affidavits and Brief in advance, heard submissions and granted the Orders largely in the form presented.

[17] He was satisfied that the plaintiffs had met the requirements for the *Anton Piller* Orders. He outlined the four factors from *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36 at para 36, [2006] 2 SCR 189 and acknowledged that it is "almost impossible for an applicant to produce direct proof that a defendant will destroy the material", citing *Capitanescu v Universal Weld Overlays Inc* (1996), 192 AR 85 at para 22, 46 Alta LR (3d) 203 (QB). He was satisfied with respect to the individuals (other than Denise Sazwan and Andrea Sazwan) that "because of their actions in the past as outlined in the affidavit, there is from my perspective a risk of destruction of the materials" and that the Orders "are certainly within line with the manner of proceeding and the structure of the orders as outlined in the *Celanese Canada* case".

[18] With respect to the *Mareva*/attachment Order, he was satisfied that the plaintiffs had shown "that there is not only a reasonable likelihood of success, but they've also shown that there is a strong *prima facie* case" and that the safeguards outlined in the *Mareva* injunction cases and the *Civil Enforcement Act*, RSA 2000, c C-15 have been met, including undertakings as to damages.

[19] He granted the following orders:

a. One combined *Mareva* injunction and attachment order against Clark, Shilo, Weinrich, Hu, 179, Secure 2013, Secure Developments, Secure Rentals, Secure Resources, Weinrich Holdings, and Smokey Creek Ranch;

b. *Anton Piller* Orders against each of Clark, Shilo, Weinrich, Hu, Secure Rentals and Secure Resources;

c. *Anton Piller* Orders against RMLO LLP (a law firm), SVS Group LLP (an accounting firm) and All-Type Office Services Ltd (a bookkeeping firm) (collectively the "Third Party *Anton Piller* Orders"); and

d. a Restricted Court Access Award that kept the orders and all supporting materials sealed until the day following the earlier of execution of the *Anton Piller* Orders or determination of the plaintiffs' petition to have the orders recognized and enforced in British Columbia.

[20] The *Anton Piller* Orders were executed on December 6, 2016.

c. Application to Change Venue and Set Aside the Orders

[21] The plaintiffs' selection of the judicial district of Calgary proved to be problematic. Of the seven plaintiffs, the Tiger-related enterprise is headquartered in Nisku and the Pastille Plant is in Slave Lake. The remaining five plaintiffs are located in British Columbia and the United States. Eight of the six *Anton Piller* Orders were executed in Edmonton, the ninth in Wetaskiwin. The defendants' residences and places of business as well as the third-party service providers are

located in Edmonton. Of the plaintiffs' affiants, seven are located in Edmonton or northern Alberta, two are in Calgary and one is in Vancouver. For all these reasons, the action was subsequently transferred to the judicial district of Edmonton by order on December 12, 2016, despite the plaintiffs' objection.

[22] On December 12, 2016, the Weinrich Defendants applied to set aside the part of the *Mareva*/attachment Order that applied to them pursuant to, among other things, rule 9.15(1)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 ("Rules").

[23] The difficulty the plaintiffs' choice of judicial district created was that it made it inconvenient for the chambers judge who granted the Orders to hear the set aside applications when the action was transferred to Edmonton. That application was brought on December 16, 2016 in the Court of Queen's Bench before another chambers judge. He advised them that if they wished to revisit the Orders based on the record before the chambers judge who granted them, they should appeal them. The set aside application was not heard at that time.

[24] However, some aspects of *Mareva*/attachment Order were varied by consent. In particular, the *Mareva*/attachment Order was set aside against Weinrich, Weinrich Holdings and Secure Resources by consent. Subsequently other consent orders were granted permitting individual defendants to spend greater amounts than initially specified.

[25] A subsequent order by the chambers judge dated December 22, 2016 stated that the defendants were permitted to apply to have the Orders set aside or further varied.

[26] On January 20, 2017 the same chambers judge was advised of the now extant appeals and the forthcoming set aside applications. He noted that in "the end, I have no doubt that you're going to go to the Court of Appeal" but in the meantime, he said the set aside applications should be heard.

[27] Set aside applications were filed February 24, 2017 by Clark Sazwan, Denise Sazwan and Smokey Creek Ranch pursuant to rule 9.15(1)(a). They were also granted permission to file a factum as a respondent in these proceedings: *Tiger Calcium Services Inc v Sazwan*, 2017 ABCA 172, [2017] AJ No 562 (QL).

[28] Consequently, some defendants have appealed and not brought set aside applications; other defendants brought set aside applications and did not appeal but were permitted to participate in the appeal as respondents; and some defendants have both appealed and pursued set aside applications. These simultaneous proceedings are duplicative, costly and inefficient.

[29] Following preliminary submissions, we agreed to hear these appeals in the particular circumstances; however, direction is provided later in these reasons regarding the better procedure for the review of orders granted without notice (formerly known as *ex parte* orders) in future cases.

III. The Appeals

[30] Notices of Appeal were filed on January 3, 2017 as follows:

a. Appeal No 1703-0001AC by Secure 2013, Secure Rentals, Scott Weinrich and Weinrich Holdings;

b. Appeal No. 1703-0003AC by Secure Developments;

c. Appeal No. 1703-0004AC by Hu; and

d. Appeal No 1703-0005AC by Shilo Sazwan, Andrea Sazwan, 179, and Secure Resources.

[31] Clark Sazwan, Denise Sazwan and Smokey Creek are not appellants, nor are the three parties enjoined by the Third Party *Anton Piller* Orders.

[32] The appeals raise numerous issues that can be classified into two broad categories: (i) issues arising from the process used to review the Orders, and (ii) those arising from the granting of the Orders. In the first category is the correct process for the review of a without notice order granted in the Court of Queen's Bench.

[33] In the second category are:

a. the expectations on a party seeking the extraordinary relief of a *Mareva* injunction, a *Civil Enforcement Act* attachment order or an *Anton Piller* order without notice;

b. the legal requirements to obtain a *Mareva* injunction, an attachment order, or an *Anton Piller* order;

c. whether the applicants satisfied their disclosure obligations;

d. whether the Third Party *Anton Piller* Orders were justified;

e. whether the terms of the other *Anton Piller* Orders overreached;

f. whether the terms of the *Mareva*/attachment Order overreached; and

g. whether the record justified the Orders against each party enjoined.

IV. Standard of Review

[34] Granting a *Mareva* injunction, an attachment order or an *Anton Piller* order involves the exercise of judicial discretion. The standard of review is deferential unless the judge proceeded

arbitrarily, on a wrong principle or failed to consider or properly apply the applicable test in which case the standard is correctness: *Peters & Co v Ward*, 2015 ABCA 6 at para 10, 588 AR 365; *Drew Energy Services v Wenzel*, 2008 ABCA 290 at para 10, 440 AR 273.

[35] In the ordinary course there ought to have been a full hearing in the Court of Queen's Bench on whether or not to continue or vary the Orders prior to this appeal. However, these appeals are not "ordinary course" appeals. As the procedural history above demonstrates, the parties have not yet been heard *inter partes*.

V. Positions of the Parties

[36] In brief, all the appellants challenge whether the plaintiffs satisfied the duties of candour and full disclosure on the without notice applications. They also submit that the Orders were overbroad and overreaching, and the chambers judge erred in granting them without due consideration or balancing their interests, and by failing to adequately consider and impose terms designed to mitigate harm caused by the Orders.

[37] The Weinrich Defendants, Secure Developments, Hu, Secure Resources and 179 deny that the record supports any relief against them.

[38] Shilo does not dispute, for the purposes of this appeal, that there was evidence capable of meeting the legal test for a *Mareva* injunction and an *Anton Piller* order as against him. However, he contends that no consideration was given to the strength of the claims against him, and submits that the nature and scope of the orders against him go well beyond what would have been necessary to preserve his records and assets sufficient to secure the claims against him.

[39] As noted, Clark Sazwan, Denise Sazwan and Smokey Creek did not appeal but filed materials supporting the position taken by the other appellants challenging the process and nature of the Orders.

[40] The respondents submit that the Orders were reasonable, granted after considered review and supported by the chambers judge's view that there was a risk of destruction of relevant materials and dissipation of assets. They say the Orders are discretionary and this Court should not reweigh the evidence or the chambers judge's conclusion that their claims against the defendants (conspiracy, collusion, fraud, misappropriation, misrepresentation, breach of contract, fiduciary breaches, etc.) satisfied the legal requirements for the Orders.

VI. Analysis

A. Legislation and Applicable Legal Principles

a. Without Notice Applications Generally

[41] Applications without notice (formerly, *ex parte* applications) are extraordinary since it is a fundamental principle that parties have a right to be heard before their rights are negatively affected:

> *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party .... The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard ...

Ruby v Canada (Solicitor General), 2002 SCC 75 at para 25, [2002] 4 SCR 3 (citations omitted)

[42] "Notice of an application is not required to be served on a party if an enactment so provides or permits or the Court is satisfied that ... serving notice of the application might cause undue prejudice to the applicant": r 6.4(b). *Anton Piller* orders and *Mareva* injunctions, by their nature, usually fall under rule 6.4(b).

[43] The *Civil Enforcement Act* permits applications for attachment orders to be brought *ex parte*: s 18(1).

[44] An applicant proceeding without notice to the opposing party is required to act with the utmost good faith and make full, fair and candid disclosure of the facts and this disclosure must include facts which would militate against the application: *Royal Bank v W. Got & Associates Electric Ltd* (1994), 150 AR 93 (QB), aff'd (1997), 196 AR 241 (CA), aff'd [1999] 3 SCR 408.

[45] "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld. ... Virtually all codes of professional conduct impose such an ethical obligation on lawyers ...": *Ruby* at para 26.

[46] This obligation applies to applicants and their counsel who have "an obligation to make full, fair and candid disclosure of all non-confidential, non-privileged material facts known to the lawyer, including those which are adverse to his position": *Hover v Metropolitan Life Insurance Co*, 1999 ABCA 123 at para 23, 237 AR 30. Said another way, "counsel in *ex parte* applications bear a heavy obligation to ensure that appropriate safeguards are in place to protect the integrity of

the legal system": *Alberta (Treasury Branches) v Ghermezian*, 2002 ABCA 101 at para 15, 303 AR 63.

[47] Failure to comply with these obligations may result in an *ex parte* order being set aside: *Duke Energy Corporation v Duke/Louis Dreyfus Canada Corp*, 1998 ABCA 196 at para 4, 219 AR 38, held:

> It is trite law that a party applying to the court *ex parte* has a duty of disclosure; it is sometimes said to be a duty of the utmost good faith. He or she must disclose to the court all facts material to the motion in question. It is also settled law in Alberta (and elsewhere) that the court is not always compelled to set aside an order for breach of that duty, but that the court will sometimes set it aside on that ground alone. We will not attempt to define the precise circumstances in which the order will or will not be set aside for non-disclosure. But obviously a very relevant factor is how important was the evidence not disclosed to the court on the *ex parte* application. ...

[48] The disclosure obligation also applies to defences. It was the failure to meet this obligation that led to an order for service *ex juris* being set aside in *Duke,* at para 8:

> Counsel for the respondent plaintiffs submitted very firmly that the matters not disclosed were matters of defence, not absence of a cause of action. We do not agree. ... In any event, we cannot see the significance of the distinction postulated. We repeat that we are here talking about setting aside an order got *ex parte* because of failure to make full disclosure. ... The duty to disclose material facts extends to obvious defences, or bars to the relief sought.

[49] The prospect of a review or set aside application is no justification for including overreaching terms that are not demonstrably necessary, or for a failure to take into consideration appropriate provisions to protect the reasonable interests of the party against whom an order is granted. Restraint is required and, without notice, orders should not be approached on the basis that unreasonable terms can always be modified after the fact on a review application.

[50] How the obligations on an applicant seeking an order without notice are discharged will depend on the circumstances. In a complex commercial case with substantial materials, a bench brief provided in advance (as was done in this case) is one mechanism to provide the chambers judge hearing the application with the opportunity to digest the material. The brief and oral submissions should outline the applicable legal tests, fairly highlight the relevant evidence, address possible defences, explain why the test is satisfied in respect of each of the parties against whom an order is sought and articulate why the relief claimed is necessary and appropriate against each party.

b. Process to Review Without Notice Applications

[51] By their nature, *Mareva* injunctions, attachment orders and *Anton Piller* orders impose severe remedies. It is recognized that the "harshness of the *Mareva* injunction, issued usually *ex parte*, is relieved against or justified in part by the Rules of [Court] which allow the defendant, faced by risk of loss, an opportunity to move against the injunction immediately": *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2, 15 DLR (4th) 161 at para 27 (emphasis added), r 9.15(1)(a).

[52] The opportunity to move against the Orders "immediately" was foreclosed owing to delay and the timing of the initial application and the action's subsequent transfer to another judicial district. It was further delayed by comments made by the chambers judge before whom the set-aside application by the Weinrich Defendants was brought on December 16, 2016. He suggested that a party who wished to challenge a without notice order on the basis of the record before the court when the order was granted was required to proceed by way of an appeal. That is not a correct interpretation of rule 9.15.

[53] Rule 9.15(1)(a) provides that the Court of Queen's Bench "may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made (a) without notice to one or more affected persons". Rule 9.16 states that such an application "must be decided by the judge or master who granted the original judgment or order unless the Court otherwise orders". That became inconvenient when the action was transferred from the judicial district of moved Calgary to Edmonton. As a result, a second Queen's Bench justice was asked to revisit the almost 2000 page record and review the decision.

[54] This Court has previously indicated that the appropriate forum to address concerns about without notice orders is a review application in the Court of Queen's Bench and not an appeal to this Court. "Normally this court will not entertain appeals from *ex parte* orders when they can be cured in the court below": *Dahlseide v Dahlseide*, 2011 ABCA 237 at para 2, [2011] AJ No 875 (QL). If the possibility of a review of an order granted without notice in the Court of Queen's Bench exists, that must be done before an appeal can be launched, absent exceptional circumstances: *Thompson v Procrane Inc (Sterling Crane)*, 2016 ABCA 71 at para 6, [2016] AJ No 237 (QL).

[55] There are good reasons why this practice should be followed, not the least of which is to avoid appeals by some parties and set aside applications by others, or both an appeal and a set aside application by some parties, all of which occurred here. These overlapping and duplicative proceedings caused confusion and additional expense for everyone and were not an efficient use of court resources.

c. Anton Piller Orders

[56] An *Anton Piller* order is a form of civil search warrant that "displaces the normal rules on discovery of records": *Catalyst Partners Inc v Meridian Packaging Ltd*, 2007 ABCA 201 at para 6, 417 AR 7. It enables the applicant "to attend at the premises of the defendant, without notice, and take possession of the records of the defendant. They are highly intrusive orders ... subject to a number of procedural limitations designed to protect the defendant": *ibid.*

[57] It is "an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss": *British Columbia (Attorney General) v Malik*, 2011 SCC 18 at para 5, [2011] 1 SCR 657.

[58] *Catalyst Partners* summarizes the requirements (set out in *Celanese Canada* at para 35) as follows at para 7:

> a) The plaintiff must demonstrate a strong *prima facie* case;
>
> b) The damage to the plaintiff of the defendant's alleged misconduct must be very serious;
>
> c) There must be convincing evidence that the defendant has in its possession incriminating documents or things; and
>
> d) It must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

Since the *raison d'etre* of an *Anton Piller* order is to preserve documents that might otherwise be destroyed, the fourth criterion is of central importance.

[59] While the legal test to obtain an *Anton Piller* order is well established, its application and the crafting of an appropriate order remains a challenge. There "has emerged a tendency on the part of some counsel to take too lightly the very serious responsibilities imposed by such a severe order. It should truly be exceptional for a court to authorize the passive intrusion, without advance notice, of a privately orchestrated search on the privacy of a business competitor or other target party": *Celanese Canada* at para 30. Their "terms should be carefully spelled out and limited to what the circumstances show to be necessary": *ibid* at para 32.

[60] *Celanese Canada* provides guidance on recommended basic protections that should be included in *Anton Piller* orders: para 40. Ontario and British Columbia have model orders[5] but Alberta does not.

[61] When an *Anton Piller* order is sought without notice, there is a duty of candour and full disclosure on the applicant which extends to its counsel and counsel carrying out the search. A motions judge "necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms": *Celanese Canada* at para 36. An *Anton Piller* order may be set aside if there is material non-disclosure, whether negligently or deliberately: *Peters* at para 11.

[62] The standard of disclosure is not met if the affiant's opinions are based on speculation instead of observation: *Celanese Canada* at para 37.

d. Attachment Orders Made Pursuant to the Civil Enforcement Act

[63] Part 3 of the *Civil Enforcement Act* provides a statutory mechanism for a party to obtain prejudgment relief in certain circumstances. The requirements for an attachment order are set out in sections 17(1) and 17(2). In the context of this matter, the respondents were required to establish that:

a. They had or were about to commence proceedings in Alberta to establish their claim;

b. There is a reasonable likelihood that their claim against the defendant would be established; and

c. There are reasonable grounds for believing that the defendant is dealing, or is likely to deal, with its exigible property other than for the purpose of meeting its reasonable and ordinary business and living expenses and in a manner than would likely seriously hinder the claimant in the enforcement of a judgment against the defendant.

[64] The *Civil Enforcement Act* imposes the following statutory requirements and limitations on an attachment order:

a. The applicant is required to undertake to pay any damages or indemnity required by the Court: s 17(4);

---

[5] www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc; http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/model_orders.aspx

b. The order must be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted: s 17(5);

c. The order must not attach property that exceeds an amount necessary to meet that claimant's claim (including interest, costs and related writs), unless such a limitation would make operation of the order unworkable: s 17(6); and

d. The order must specify an expiry date not more than 21 days from the date it is granted on which day the order will expire unless otherwise specified in accordance with sections 18 and 19.

Sections 18 and 19 provide:

18(1) An application for an attachment order may be made *ex parte*.

(2) Subject to subsection (3), an attachment order granted on an *ex parte* application must specify a date, not more than 21 days from the day that the order is granted, on which the order will expire unless the order is extended on an application on notice to the defendant.

(3) If the Court is satisfied that it would be inappropriate for an attachment order granted on an *ex parte* application to expire automatically after 21 days, the order may specify a later expiry date or specify that it remains in effect until it terminates in accordance with section 19.

(4) The Court, on application on notice to the defendant, may direct that an attachment order that was granted on an *ex parte* application remains in effect until the order terminates in accordance with section 19 or as otherwise directed by the Court.

(5) If an application under subsection (4) cannot reasonably be heard and determined before the expiry date of the relevant attachment order, the Court may on an *ex parte* application extend the period of time during which the order remains in force pending the determination of the application.

(6) When an application on notice to the defendant is made under subsection (4) the following applies:

(a) the onus is on the claimant to establish that the attachment order should be continued;

> (b) the Court shall not continue the attachment order unless the circumstances that exist at the time of hearing the application justify the continued existence of the order;
>
> (c) the Court may terminate the order if the Court is satisfied that the claimant failed to make full and fair disclosure of the material information that existed at the time that the claimant made the *ex parte* application for the attachment order.
>
> 19(1) Subject to section 18 and except as otherwise ordered by the Court, an attachment order terminates on whichever of the following occurs first:
>
> (a) on the dismissal or discontinuance of the claimant's proceedings;
>
> (b) on the 60th day from the day of the entry of a judgment in favour of the claimant.
>
> (2) The Court may extend the operation of an attachment order beyond the times set out in subsection (1) if it appears just and equitable to do so.

e. Mareva Injunctions

[65] A *Mareva* injunction provides similar relief to an attachment order under the *Civil Enforcement Act*, but is granted pursuant to the court's equitable jurisdiction to grant injunctive relief: *Judicature Act*, RSA 2000, c J-2, s 13(2).

[66] While provincial legislation (and federal legislation in the case of the *Bankruptcy Act*) provides some overlapping remedies, the much broader equitable remedy of a *Mareva* injunction continues to be available: *Aetna*. To the extent remedies are sought within Alberta that are comparable to those available under the *Civil Enforcement Act*, similar protections for the interests of the defendants to those contemplated in the legislation should be considered by the court, absent exceptional circumstances. "[I]n granting a *Mareva* injunction or a preservation order a court should be guided by the principles in the [*Civil Enforcement*] *Act*": *Interclaim Holdings Ltd v Down*, 1999 ABCA 329 at para 83, 250 AR 94.

[67] The requirements for a *Mareva* injunction are outlined in *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para 5, 522 AR 154:

> There are a number of procedural requirements, and the usual tripartite test for ordinary injunctions probably also must be satisfied. On the merits, the plaintiff must show a strong *prima facie* case for his suit, and also that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid execution (enforcement) under a judgment.

[68] Ontario and British Columbia both have model *Mareva* injunction orders[6], but Alberta does not.

B. The Orders

a. The Third Party Anton Piller Orders

[69] There are significant concerns about the nature of the disclosure provided with respect to the Third Party *Anton Piller* Orders and the justification for those orders.

[70] Searching the registered office of a defendant (often a law firm) or its accountant is generally "unwarranted": *Ontario Realty Corp v P Gabriele & Sons Ltd*, [2000] OTC 797, [2000] OJ No 4341 (QL) at para 37 (Sup Ct J) *per* Farley J:

> It should have been more than sufficient to merely notify those firms and ask that they hold any [of the defendants' documents] in suspension and ask that their appropriate clients give an undertaking not to request "originals" back from the law firm and have the law firm confirm that arrangement. ... That is the way in which any documents which are (or were but for the seizure) at the law firms should and therefore are to be handled now. The same goes for the accounting firms.

[71] The fourth requirement for an Anton Piller order is that "it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work": *Celanese Canada* at para 35 (with emphasis). Granting the Third Party *Anton Piller* Orders suggests that these third parties would, merely at the request of their clients, destroy material in their possession despite the statement in paragraph 39 of the Third Party *Anton Piller* Orders that: "[n]othing in the granting or execution of this Order implied or suggested any wrongdoing being alleged as against the [third parties]".

[72] No mention was made in the Brief that *Anton Piller* Orders were being sought against any third parties although the application did so. In oral submissions to the chambers judge, the plaintiffs' counsel described the category of *Anton Piller* Orders sought that dealt with these three non-parties as "trickier" stating:

> And you'll see one is All-Type Office Services, that's the company that does all of their – their accounting and bookkeeping for almost all of them. We have a law firm as well that does all of their corporate work. We have [SVS Group] that does, again, all of their accounting work. And all of the affidavits identified the common addresses for these common defendants.

---

[6] www.ontariocourts.ca/scj/files/forms/com/*Mareva*-order-EN.doc; www.courts.gov.bc.ca/supreme.../Model_Order_for_Preservation_of_Assets.docx

[73] These submissions are a material overstatement of the evidence.

[74] The only evidence with respect to All-Type was Patric Nagel's affidavit which indicated that All-Type had an office in the same office building listed as the registered office of 179, Secure Rentals and Secure Resources (none of which otherwise had an identified office in that building); that All-Type advertised that it provided bookkeeping services, packaged office rentals and office support services and that as a result Mr Nagel believed that the business and corporate records of each of 179, Secure Rentals and Secure Resources will likely be located at All-Type's offices; and that such records "will likely evidence Shilo's relationship, either direct or indirect, to these corporate entities and any payment made by these entities, either directly or indirectly, to Shilo, by way of dividends or otherwise". The submission by the plaintiffs' counsel that All-Type was doing "all of their accounting and bookkeeping for almost all of them" constituted a representation that All-Type was doing all of the accounting and bookkeeping for almost all of the defendants. This was not a reasonable inference when the only evidence in the record (other than Mr Nagel's speculation) was that three of the corporate defendants had a registered office in the same building where All-Type was located.

[75] The only evidence regarding RMLO was that its address was the registered office of Secure Developments, Weinrich Holdings, Secure 2013, Secure Rentals and Secure Resources. Mr Nagel stated that as a result he believed that corporate records, including minutes books, and files and correspondence would be located at RMLO that "will likely evidence Shilo's relationship, either direct or indirect, to these corporate entities and any payments made by these entities, either directly or indirectly, to Shilo, by way of dividends or otherwise." The submission by the plaintiffs' counsel that RMLO was a law firm "that does all of their corporate work" was not justified by the evidence on the record. Acting as the registered office for five of the corporate defendants is not the same as doing all of the corporate work for the 15 named defendants.

[76] The only evidence regarding SVS Group LLP ("SVS Group") are some emails between it and Shilo and Weinrich in relation to the 2013 year end of Secure Developments (of which they were both directors), including information about payments made to each of them. Mr Nagel states that he believes that Secure Developments is one of the corporate entities through which monies generated from entities such as Secure Rentals may be conveyed to Shilo, however, he acknowledges that he has been unable to determine what business Secure Developments is engaged in beyond noting that it has generated a fairly significant amount of money. He states that he believes that "records regarding Secure Developments' financial affairs, including its source of funds, the persons to whom funds are paid, the financial arrangement between [Shilo] and Weinrich, and the length of time for which this arrangement has been in place, will likely be found at the SVS Group LLP place of business.": Nagel Affidavit at para 80.

[77] The representation made by counsel for the plaintiffs to the chambers judge that SVS Group "does all of their accounting work" is not supported by the record. There was no evidence that SVS Group did accounting work for any defendant other than Secure Developments.

[78] Two additional paragraphs added to each of the Third Party *Anton Piller* Orders stated:

> 23. Without invitation by the Possessor, its solicitor, officers, directors, servants, agents, employees or anyone acting on its behalf to further or otherwise to enter the Premises, the Supervising Solicitor shall remain in the public reception area of the Premises while the Possessor, its officers, directors, servants, agents, employees or anyone acting on its behalf assembles the records for removal as required by this order.
>
> [...]
>
> 39. Nothing in the granting or execution of this Order implied or suggested any wrongdoing being alleged as against the Possessor.

[79] With the exception of those additional paragraphs, the Third Party *Anton Piller* Orders were essentially identical to those granted in respect of the defendants.

[80] In summary, the Third Party *Anton Piller* Orders are problematic in many respects, including:

a. The exceptional nature of obtaining an *Anton Piller* order against a third party, particularly a law firm or an accounting firm, should have been expressly drawn to the chambers judge's attention, which was not done.

b. The submissions of counsel in relation to these Third Party *Anton Piller* Orders contained material misstatements that went well beyond the affidavit evidence, as outlined above.

c. Other than Mr Nagel's speculation, the limited evidence on the record that RMLO and All-Type had the same address or were the registered office for certain of the corporate defendants and that SVS Group prepared the 2013 financial statements for Secure Developments does not satisfy the third requirement for an *Anton Piller* Order that there be "convincing evidence" that those parties had "incriminating records in their possession": *Celanse Canada* at para 35.

d. There was no evidence on the record that addressed the fourth requirement for an *Anton Piller* Order; that is, that there was a real possibility that any incriminating records in the third parties' possession would be destroyed.

e. Assuming that it could have been established that the third parties had incriminating documents in their possession, less severe alternatives could have been used such as obtaining an undertaking or a court order prohibiting the third parties from dealing with such records or releasing them to the defendants pending

further court order. No explanation was provided to the chambers judge or this Court why such remedies would not have been adequate and why any seizure of any records from these third parties was required.

f. The *Anton Piller* Order provided for privilege claims by the third parties without any provision for privilege claims over documents in the third parties' possession by the defendants who possessed the privilege. The *Anton Piller* Orders did not provide for any notice to be given to the defendants whose documents were subject to seizure from the third parties. In *Canada (Attorney General) v Chambre des notaires du Quebec*, 2016 SCC 20, [2016] 1 SCR 336 provisions in the *Income Tax Act* that did not require notice to be provided to a party when their records were sought from a notary or lawyer and which placed an inappropriate burden on the lawyer or notary to protect the client's right to professional secrecy were declared unconstitutional. The Supreme Court pointed out that "the right to claim professional secrecy does not belong to the legal adviser. The constitutionality of a seizure cannot rest on the unverifiable expectation that a legal advisor will always act diligently and solely in the client's interest when faced with a seizure by the state": para 48. Similar concerns apply with respect to seizure of the defendants' potentially privileged material from a third party by way of an *Anton Piller* Order.

g. The orders in respect of the third parties were in essentially the same form as those directed at the defendants. As a result, these third parties (against whom no wrongdoing was alleged) were subjected, without notice or rational justification, to intrusive searches that could potentially damage their reputation and affect their business. For example, the Third Party *Anton Piller* Orders contained the following provisions:

    i. "the Supervising Solicitors and a Bailiff for MNP shall be entitled to be present in reception area of the Premises to ensure that there is no destruction of records" during the 90 minute window provided to seek legal advice (para 10). No one was permitted to enter the third party's premises following service of the *Anton Piller* Order until the conclusion of the Search unless the Supervising Solicitors were present or the parties agreed otherwise in writing (para 31). These provisions could cause significant disruption to the business of these third parties without any explanation why such provisions were warranted.

    ii. a police enforcement clause (para 20).

    iii. MNP was authorized to seize the third party's computers and conduct forensic searches (para 26).

iv. The third party was required to unlock any locked door, cabinet, safe or safety deposit box and provide the Supervising Solicitor on request with all user identification and passwords for the computers, software application and any web based or other email accounts (para 29).

v. The third party and its employees were restrained until further order of this court or until written agreement "from deleting, erasing, or altering the following property or records situated at the Premises ... computers, personal digital assistants (PDAs), smart phones, cellular telephones, servers, external and internal drives and external storage media" (para 34). On its face, this provision appears broad enough to prohibit an employee of one of the third parties from deleting any personal emails from their personal cell phone pending further court order if the cell phone was in the office at the time of the search.

h. There was no provision for compensation to these third parties for any costs they incurred as a result of the *Anton Piller* Orders. This is a typical provision in a Norwich Order imposed for pre-action discovery of a party against whom the applicant has no cause of action and is not a party to the contemplated litigation but is in some way connected to or involved in the misconduct: see generally *Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575 at para 106, aff'd 2002 ABCA 101, leave to appeal to SCC refused [2002] SCCA No 235.

[81] The Third Party *Anton Piller* Orders are set aside in their entirety.

b. The Plaintiffs' Disclosure

[82] These appeals also raise concerns about the nature and extent of disclosure made by the plaintiffs on their without notice application.

i. The Share Purchase Agreement

[83] P49 Group's claim for $44 million is based upon alleged misrepresentations that led to its 67% acquisition of Tiger. While the plaintiffs provided almost 2000 pages of evidence to the chambers judge, the plaintiffs did not include the complete Share Purchase Agreement dated August 2014. Only fourteen highly redacted pages of the 63-page agreement, which were characterized as "the relevant provisions", were produced. While the clause dealing with the vendor's representations was at least 30 pages long and contained at least 49 representations, the excerpt provided from that clause disclosed only four of the representations made by the vendor. This limited disclosure in the context of a claim for misrepresentation is inexcusable.

[84] The indemnification provision in Article 7 of the Share Purchase Agreement provided that the "representations and warranties contained in this Agreement and any Ancillary Agreement will

survive Closing and continue in full force and effect for a period of eighteen (18) months after the Closing Date". As the Share Purchase Agreement was dated August 14, 2014, the representations and warranties would have expired on February 14, 2016, subject to certain specified exceptions including "(e) there is no limitation as to time for claims involving fraud or fraudulent misrepresentation". Accordingly it is at least arguable that misrepresentations not rising to the level of fraud or fraudulent misrepresentation are no longer actionable.

[85] There is no indication whether or not the Share Purchase Agreement contained an "entire agreement" clause, which would not be unusual. The failure to disclose the entire Share Purchase Agreement or, at the very least, the complete clause containing the representations and whether there was an "entire agreement clause" constitutes material non-disclosure in respect of P49 Group's claim for alleged misrepresentations that induced it to enter into that agreement.

ii. Other Relevant Information Not Disclosed to the Chambers Judge

[86] Other relevant matters were not disclosed to the chambers judge. Two examples illustrate this.

a. Prior to August 1, 2014, Tiger was owned by Clark Sazwan, Denise Sazwan and the Sazwan Family Trust. The Brief suggests that Shilo was using corporate resources for his own benefit during that period and Clark condoned or turned a blind eye to that. To the extent that the Brief relies on misappropriation of Tiger property prior to P49 Group's acquisition, it was not drawn to the chamber judge's attention that if Shilo was using Tiger resources for personal benefit during that period with the knowledge of his father, that may well have been an issue for taxing authorities but it may not be an actionable wrong vis-à-vis Tiger or the P49 Group. Further, such claims may be statute-barred if Clark was aware and chose not to have Tiger take action against Shilo. *Duke* indicates that there is an obligation to raise potential defences when seeking relief without notice.

b. There is affidavit evidence that Shilo had Tiger carry out maintenance and repairs on Secure Rentals equipment at no charge. The chambers judge was not told that the Equipment Rental Agreements provide that the lessee (Tiger) is responsible for repairs and maintenance.

iii. Unsubstantiated Speculation

[87] The affidavits filed in support of the applications include numerous unsubstantiated speculations. Shortcomings specific to each defendant follow later in these reasons but a few general examples illustrate the point and are similar to the type of speculation criticized in *Celanese Canada* at para 37.

a. When discussing security video footage showing Hu (while still employed but on medical leave) exiting Tiger's office with a box the deponent states (with emphasis added): "The

contents of the box cannot be determined from the security footage. I believe the box may have contained Tiger's proprietary and confidential information, including information regarding the Pastille Plant Project, the plant design and construction materials, or both."

b. The Nagel Affidavit includes a statement that Secure Developments is believed to be "one of the corporate entities through which monies generated from other entities, such as Secure Rentals, may be conveyed to Shilo Sazwan". The support for this claim is a bank statement that shows that the entity generated a "fairly significant amount of money". The deponent concedes that he has no idea what the business of Secure Developments is. The affidavit of Nagel regarding Secure Developments was based in part on emails relating to the 2013 year-end which refer to Weinrich, Shilo and SVS Group. It should have been made very clear to the chambers judge that this information related to a period before the P49 Group acquired its interest in Tiger.

iv. Overstatements in the Brief

[88] In addition to the overstatements made by the plaintiffs' counsel in his submissions on the application about the Third Party *Anton Piller* Orders on the application, the Brief also contained overstatements of the evidence. A few examples are:

a. The Brief suggests that Hu may have misappropriated corporate assets when it states "legitimate questions arise about the provenance of the funds that enabled Hu to enter into these transactions, including whether the funds were diverted from Tiger". This claim is based on highly speculative and circumstantial evidence, including an unexecuted 2005 loan agreement found on Hu's laptop between a Tiger supplier and Hu personally for $675,000 and his purchase of three properties between 2012 to 2014 for a total acquisition cost of $452,250 while his income from Tiger between 2010 to 2013 was $579,145. It requires a substantial amount of speculation to infer that Hu may have misappropriated Tiger assets for the purchase of these properties. All of the properties were purchased with another party and there is no indication whether Hu had other assets or what the assets and income of the other party. Moreover, the Brief states that Hu "obtained a loan in the approximate amount of $675,000" when the only evidence is a ten-year old unexecuted loan agreement found on his laptop and there is no information that the agreement was ever executed or the loan ever advanced.

b. The Brief makes the repeated assertion that Secure Resources entered into a business that competes with Tiger. This contradicts evidence that Secure Resources plans to produce sulphur-based fertilizer, not the calcium chloride products produced by Tiger. The production of sulphur-based fertilizer is not included under the definition of Tiger's business in the Non-Competition Agreement signed by Clark.

c. Overreaching Terms in the Anton Piller Orders

[89] The *Anton Piller* Orders are very broad and contain essentially the same provisions against each defendant despite there being significant differences in the nature of the claims advanced against, and circumstances of, the various defendants. Many of *Anton Piller* Orders' terms are overreaching and go well beyond what would be reasonably required in the circumstances.

i. Scope of the Documents Covered by the Anton Piller Orders

[90] The scope of records to be seized under an *Anton Piller* order must be clearly identified and be "no wider than necessary": *Celanese Canada* at para 40(1)(iii). "The evidence sought should be specifically defined to ensure that the AP Order is not overbroad": Footnote 8 of the Ontario Model Order.

[91] The scope of records covered by the *Anton Piller* Orders is very broad and the wording is ambiguous and open to interpretation. Paragraph 23 identified the documents that the Possessor was required to deliver up to the Supervising Solicitors as follows (emphasis added):

> The Possessor and any other person or person having notice of this Order are hereby ordered and directed to surrender up and deliver to the Supervising Solicitors all files, correspondence, minute books, share certificates, billing account, permit application, document, agreements, business plans, accounting records, bank statements, credit card records, asset purchase records, net worth documents, tax returns, financial reporting, invoices, payment records and any other records in their possession, whether located at the Premises or stored off site and whether stored in paper or electronic data form if such records related to the Defendants , or any of them, and the assets and financial records of Shilo Sazwan ("Shilo"), Lianguag Hu, also known as Stephen Hu ("Hu"), or any of 1793068 Alberta Ltd ("179") Secure 2013 Group Inc (Secure 2013"), Secure Resources Inc ('Secure Resources"), and Secure Rentals Ince, including but not limiting the generality of the foregoing, any record, in any form, taken at any time, by anyone, from the Plaintiffs.

[92] This language appears to require production of all records which relate to any of the defendants' financial information. Production of such records goes beyond the allegations in the Statement of Claim and constitutes a form of prejudgment examination-in-aid-of-execution.

[93] Paragraph 24 identified the records that the Authorized Persons were entitled to search and seize from files, computers, smart phones and other electric media as follows (emphasis added):

> The Possessor, his servants, agents, employees or anyone acting on his behalf, shall disclose the location of and permit the Authorized Persons to carry out a search and seizure of the Possessors' files, documents, books, records, computers, computer

fifes, computer equipment, hard disk drives, cell phones, smart phones, personal digital assistants (PDA), digital storage devices, electronic media and any other storage medium, including electronic and paper copies, and all other records that relate to, or may relate to:

(a) any of the Plaintiffs:

(b) any matter pertaining, relating or dealing with the facility constructed by Tiger at Slave Lake, Alberta for the purposes of manufacturing three forms of dry calcium chloride (the "Pastille Plant"), including, but not limited to:

(i) the decisions and activities of Clark, Shilo, Hu, or any of them with respect to all aspects of the Pastille Plant project, including the plans, specifications, procurement of equipment for, drawings, and construction of the Pastille Plant project; and

(ii) the market and demand for the pastille form of calcium chloride; the expenditures on the Pastille Plant project and any underlying records; the timeline for achieving production from the Pastille Plant; and the ability and expertise of Shilo and Hu to oversee and direct the Pastille Plant project;

(c) Clark, Shilo, and Hu's obligations of confidentiality to Tiger Calcium Services Inc. and Tiger Tanklines (2011) Ltd. (collectively, "Tiger") and the disclosure, retention, withholding, or any other use of Tiger's confidential information, including, but not limited to:

(i) engineering information regarding Tiger's manufacture of liquid and dry calcium chloride;

(ii) information regarding the inputs and feedstock and costs of the Inputs for the manufacturing processes, the rate of production, the quality of the manufactured product, and the margins on the manufactured product;

(iii) information regarding the location of the Tiger's wells near Slave Lake, Alberta; the stratigraphic formation from which Tiger's wells produce; and the nature and extent of the brine reserve from which Tiger's walls produce; and

(iv) all aspects of Tiger's business, Including information regarding their financial position, customers and competitors, and business plans (collectively, the "Confidential Information").

(d) Clark, Shilo, and Hu's fiduciary obligations to Tiger, including, but not limited to, that relate to the misappropriation of corporate resources; knowledge of and failure to investigate wrongdoings of management employees; and obtaining personal benefits to the detriment of Tiger, including, but not limited to;

(i) Shilo's purchase, ownership, and/or sale of various personal vehicles, including, but not limited to, a Porsche, a red Dodge Viper; a two-door Bentley, a Ford F-250 truck, a Lincoln Navigator, a fifth-wheel holiday trailer, and a black Freightliner on which Tiger resources were expended or otherwise;

(ii) the services and materials provided by Tiger and Tiger employees to Shilo in relation to Shilo's previous personal residences located in Slave Lake and Sherwood Park, Alberta and Mission Hill, Kelowna, British Columbia, and his current personal residences in Beaumont, Alberta and located at [...] Road, Kelowna. British Columbia or otherwise;

(iii) the services and materials provided by S&K Ready Mix Ltd., Direct Current, D'Lanne Electro Controls Ltd., and any other third party service provider at Shilo's personal residences or otherwise;

(iv) personal financial records that reflect Shilo's misappropriation of the Tiger's resources or otherwise;

(v) communications with Weinrich, Hu, and others using Shilo's personal email account of [...] and the email account with Secure Rentals with the address of [...]; Hu's personal email account of [...] and Weinrich's Secure Rentals' email account of [...]:

(e) Clark, Shilo, and Hu's obligations to not compete with Tiger, including their involvement, relationship or any other connection or dealings with Secure Resources, and Brimstone Sulphur Inc., and their use of the Confidential Information:

(f) the performance by Clark, Shilo and Hu of their employment duties;

(g) Shilo's Involvement, direct or indirect, in any of 179 Alberta, Weinrich Holdings Ltd. ("Weinrich Holdings"), Secure 2013, Secure Developments (previously called 1690307 Alberta Ltd.), and Secure Rentals;

(h) any payments or financial benefits received by Clark, Shilo, or any of the Defendants directly or indirectly from one or more of 1793068, Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, Secure Rentals, or Weinrich;

(i) the financial status or affairs of any of Clark, Shilo, Hu, 1793068, Weinrich, Weinrich Holdings, Secure 2013, Secure Developments. Secure Resources, and Secure Rentals; and

(j) records or items that are the property of or relate to the business of any of 179 Alberta, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals

(collectively, the "Search").

[94] This clause is very broad. It authorizes the seizure of all records that relate to the listed categories, and also records that *may* relate to those categories. This greatly expands the potential scope of the *Anton Piller* Orders and it is uncertain how this provision would be applied or why it is necessary or reasonable.

[95] It is not clear why many of the documents referred to in paragraph 24 would be relevant to the litigation. For example:

a. Paragraph 24(a) refers to records that relate to "any of the Plaintiffs". Clark Sazwan was the principal of Tiger prior to the sale and continues to have a 33% interest through Smokey Creek. He likely has numerous records which relate to Tiger that are unrelated to any of the issues in the litigation.

b. Paragraph 24(h) refers to records that relate to "any payments or financial benefits received by... any of the Defendants directly or indirectly from ... Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, Secure Rentals or Weinrich". There is no temporal limit in this clause and it would seem to require unlimited production of all financial payments made within the group of Weinrich Defendants, even if they relate to other businesses that have no relationship with Tiger or any of the other defendants.

c. Paragraph 24(i) refers to records that relate to "the financial status or affairs of any of Clark, Shilo, Hu, 1793068, Weinrich, Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals", which appears to constitute a form of prejudgment examination-in-and-of-execution.

d. Paragraph 24(j) refers to "records or items that are the property of or relate to business of any of 179 Alberta, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals". This is broad enough to include all business records of these companies, some of

which may contain commercially sensitive information, even if they predate the P49 Group acquisition or otherwise have no relevance to the litigation.

ii. Unlimited Scope of Persons Required to Produce Records

[96] The opening language of paragraph 23 expands the scope of the obligation to produce records pursuant to the *Anton Piller* Orders in an unlimited fashion to "any other person or person having notice of this Order". Nothing in the affidavits suggests that such breadth is warranted. It potentially broadens the *Anton Piller* Orders to require an unidentified and unlimited number of individuals upon whom the *Anton Piller* Orders could be served to produce financial information regarding the defendants.

iii. Forensic Search

[97] Paragraph 26 to 28 set out a process for a forensic search to be conducted by MNP of the computers and any other relevant digital storage devices at the premises (emphasis added):

> 26. For the purposes of the Search, MNP may:
>
> (a) seize the Possessor's computers, and any other relevant digital storage devices (collectively, the "Electronic Media"), situate at the Premises;
>
> (b) perform Bit Stream Imaging (the "Imaging") of the Possessor's Electronic Media situate at the Premises to preserve the evidentiary integrity of any data they contain and provide information for further investigation; and
>
> (c) forensically search all levels of the relevant hard disk drives, <u>including for occurrences of key words determined to be relevant by the Plaintiffs</u> or evidence of any confidential or proprietary information of Tiger (the "Key Word Search")
>
> (collectively, the "Forensic Search").
>
> 27. MNP shall undertake the Forensic Search at the Premises. Alternatively, with the Supervising Solicitors' agreement, MNP may take the Electronic Media into its possession and remove it from the Premises to MNP's business premises for the purposes of the Imaging and conducting the Key Word Search. The Electronic Media may be removed into the possession of MNP for a period of up to 14 days, or such further period agreed to by the parties or ordered by the Court.
>
> 28. Upon completion of the Forensic Search, if practicable, MNP shall make a detailed list of all documents and data, including the Imaging, located through the Forensic Search and provide that list to the Supervising Solicitors. Following the Forensic Search, the results of the Forensic Search, including the Imaging, shall be remanded into the custody of the Supervising Solicitors, until counsel for the

> Possessor have been given a reasonable opportunity to review them to advance legal privilege claims, after which the Supervising Solicitors shall release to the Plaintiffs copies of those records that are relevant and not privileged.

[98] The forensic search included performing bit stream imaging "to preserve the integrity of any data that they contain", to forensically search for "occurrences of key words determined to be relevant by the Plaintiffs", to provide a detailed listing of all documents and data and the imaging to the Supervising Solicitors. After counsel for the Possessor reviewed them "to advance legal privilege claims", the Supervising Solicitors would release to the plaintiffs copies of those records that are relevant and not privileged.

[99] Aside from the concerns raised elsewhere, this seems to be a significant intrusion on the privacy interests of individual defendants whose computers and other electronic storage devices would be imaged in their entirety and the contents listed. The rationale for permitting the plaintiffs to unilaterally determine the key words to be searched on all of the defendant's hard disk drives is not apparent.

iv. Access to Seized Documents

[100] The *Anton Piller* Orders are ambiguous about when and how access to the non-privileged seized records was to be provided by the Supervising Solicitors to the plaintiffs' solicitors.

[101] Paragraphs 16, 19 and 28 suggest that this would occur automatically without further court order:

> 16. The Supervising Solicitors shall, within 10 business days after the implementation of this Order, report to this Honourable Court and to each party served with this Order in writing as to:
>
> ....
>
> (d) what disclosure, if any, of the contents of any of the Records seized in the Search has been made to the Plaintiffs or to their solicitors or agents, and provide particulars of any such communications, including any correspondence of memoranda evidencing any such communications;
>
> [...]
>
> 19. The Supervising Solicitors will deliver to the Plaintiffs' solicitors, copies of the non-privileged records which are seized, retained, and/or copied. The Plaintiffs' solicitors shall ensure a list is made of all of the records delivered up pursuant to this Order and shall serve a copy of that list upon the Possessor. The Plaintiffs

> solicitors shall ensure that all of the records delivered up to it are kept in safe custody.
>
> 28. ...Following completion of the Forensic Search, the results of the Forensic Search, including the imaging, shall be remanded into the custody of the Supervising Solicitors, until counsel for the Possessor have been given a reasonable opportunity to review them to advance legal privilege claims, after which the Supervising Solicitors shall release to the Plaintiffs copies of those records that are relevant and not privileged.

[102] The respondents submit that the *Anton Piller* Orders do not permit the release of the materials to them without further order of the Court as paragraph 36 stated:

> The Plaintiffs may schedule a return date for a hearing date for the review and release of the materials seized, copied and/or removed from the Premises pursuant to the terms of the Order that are in custody or control of the Supervising Solicitors.

[103] Even if that were the intention, the *Anton Piller* Orders would not necessarily be read in that fashion. Paragraphs 19 and 28 contain mandatory language requiring delivery of records to the plaintiffs' solicitors and paragraph 16(b) suggests that seized documents may have been turned over to the plaintiffs or their solicitors within 10 days after the seizure. Paragraph 36 merely permits the plaintiffs to bring an application for release of materials in the custody of the Supervising Solicitors and it could be read as applying to documents other than those required to be turned over to the plaintiffs' solicitors.

[104] If it was intended that no documents would be released by the Supervising Solicitors pending further court order, the *Anton Piller* Order should have been drafted accordingly. This is the approach adopted in paragraph 21 of the British Columbia Model Order which states:

> The plaintiff and its representatives are not, after completion of the search, entitled to inspect the Evidence for Seizure seized and held in the custody of the Independent Supervising Solicitor pursuant to this Order, unless the defendant consents or the Court otherwise Orders.

[105] Paragraph 29 of the Ontario sample order provides that the Plaintiff is not "permitted to access the Evidence seized [on an *Anton Piller* Order] prior to the delivery of the Defendants' affidavit of documents, unless the Defendant consents or this Court orders otherwise." The associated footnote explains "[t]he primary purpose of an AP Order is preservation: *Celanese Canada, supra* at para. 52. Accordingly, the Plaintiff will usually not have access to the Evidence seized until discovery."

v. Failure to Provide a Mechanism to Address the Appellants' Confidential or Commercially Sensitive Non-privileged Information

[106] The *Anton Piller* Orders do not prescribe a mechanism to protect the appellants' non-privileged confidential information or commercially sensitive information.

[107] One of the basic protections is that a "term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included [in the *Anton Piller* Order] with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise": *Celanese Canada* at para 40 (emphasis added).

vi. No Confidentiality Requirements Imposed on the Authorized Person

[108] While the *Anton Piller* Orders designate the Supervising Solicitor as an officer of the court, they do not expressly impose an obligation on Authorized Persons who may have access to the seized documents (the Supervising Solicitor, MNP and the bailiffs) to maintain the confidentiality of information obtained as a result of the order. This is an expressly contemplated provision in the BC Model Order, section 23(b).

vii. Length of the Anton Piller Orders

[109] The *Anton Piller* Orders provided that they would remain in force for a period of 60 days (para 37) but the plaintiffs could apply to extend that time period and upon filing such an application the order would remain in effect until the hearing of the application (para 38).

[110] This time period is lengthy compared to that contemplated in *Celanese Canada* where the Court noted that such *Anton Piller* Orders "are generally time-limited (e.g., 10 days in Ontario under Rule 40.02 (*Rules of Civil Procedure*, RRO 1990, Reg 194) and 14 days in the Federal Court, under Rule 374(1) (*Federal Courts Rules*, SOR/98-106))": para 40.

viii. Limits on the Use of the Seized Records

[111] Paragraph 33 of the *Anton Piller* Orders limit the use of the records seized "for the purposes of the civil proceeding related hereto or for the purpose of instructing counsel and pursuing or preserving assets of the Defendants in the Action, any related Action, or Any Action or proceeding by the within Plaintiffs in any jurisdiction, including in British Columbia" (emphasis added). The highlighted language would appear to permit seized records to be used to pursue assets of the defendants in unrelated actions in any jurisdiction. This goes well beyond the implied undertaking that limits the permitted use of documents obtained through discovery to the subject litigation, unless a court orders otherwise.

[112] This language is a significant expansion of the recommended limited use clause contemplated in *Celanese Canada* that "items seized may only be used for the purposes of the pending litigation": para 40 at 1(v). It is also much broader than the standard limited use provision in paragraph 21 of the Ontario Precedent Order that evidence seized "shall be used by the Plaintiff only for purposes of this action, unless the Court orders otherwise." The BC Model Order also provides that the evidence seized "shall be used by the plaintiff only for the purposes of this action, unless the parties agree otherwise in writing or the Court orders otherwise" (para 28) while recognizing that such a clause may not be appropriate in every case (footnote 11).

[113] When broader use of documents seized on an *Anton Piller* Order is sought that goes beyond the subject litigation and the usual implied undertaking rule, one would have expected that the justification for doing so would have been specifically addressed in the affidavit materials and submissions. That was not done.

ix. Prohibitions on Dealing with Records

[114] Paragraph 35 stated that despite the contemplated imaging, the Possessor and its employees were "restrained, until further order of the court or until written agreement from deleting, erasing, or altering ... computers, personal digital assistants (PDAs), smart phones, cellular telephones, servers, external and internal drives and external storage media".

[115] On its face, this provision appears broad enough to prohibit an employee of one of the third parties or defendants from deleting any personal emails and text messages from their personal cell phone pending further court order if the cell phone was in the office at the time of the search.

d. Overreaching Terms in the Mareva/attachment Orders

[116] The chambers judge conflated the attachment order and the *Mareva* injunction and granted a combined order. This combination is discouraged because it makes it difficult to determine whether the provisions of the *Civil Enforcement Act* are intended to govern or whether principles of the law of equity apply.

i. No Financial Cap

[117] The *Mareva*/attachment Order contemplated unlimited attachment of the assets of four individuals and seven companies, without any financial caps in respect of any of the parties. A *Mareva*/attachment Order granted against multiple parties against whom different causes of action are alleged should have contained different financial caps depending upon the claims advanced and evidence furnished against each defendant.

[118] An unlimited *Mareva* injunction or attachment order will be granted only if justified by compelling evidence. Section 17(6) of the *Civil Enforcement Act* requires that an attachment order "not attach property that exceeds an amount or a value that appears to the Court to be necessary to

meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective."

[119] This provision and the unlimited nature of the *Mareva*/attachment Order sought was not brought to the chambers judge's attention, nor was any evidence provided or submissions made to demonstrate why a financial cap would make the operation of the order "unworkable or ineffective."

[120] The lack of financial caps is particularly problematic where, as here, the quantum of the claims against the various defendants are significantly different. At the hearing of the appeal, respondents' counsel estimated the following damage claims:

a. P49 Group's claims against Clark, Shilo and Hu for misrepresentations in relation to the share acquisition were $26 million;

b. Tiger's claims against Clark, Shilo and Hu for wasted expenditures in relation to the Pastille Plant were $26.5 million;

c. Tiger's claim against Clark, Shilo and Hu for loss of profits relating to other aspects of the business was $6 million;

d. Tiger's claims against Shilo for wrongful expenditures were between $2 million to $3 million;

e. Tiger's claims for the overcharges against Weinrich, Secure 2013, Secure Rentals and Shilo relating to the equipment leasing scheme were estimated at $1.2 million; and

f. Tiger's claims against Secure Resources were not quantified.

[121] The *Mareva* injunction which the plaintiffs obtained in British Columbia against Clark and Shilo had a cap of $87 million.

ii. Failure to Specify an Expiry Date

[122] The *Mareva*/attachment Order failed to address the statutory requirements in sections 18 and 19 of the *Civil Enforcement Act*. An attachment order must have a specified expiry date (usually not more than 21 days from the date the order is granted) unless the court is satisfied that it would be inappropriate, in which case "the order may specify a later expiry date or specify that it remains in effect until it terminates in accordance with section 19": s 18(3). This order failed to do any of these three things, which is mandatory for any attachment order granted under the *Civil Enforcement Act*.

[123] While sections 18(4) through (6) provide a mechanism for review of an attachment order upon application, the existence of a review mechanism is no excuse for failing to comply with the statutory requirement in section 18(3) that an *ex parte* order address one of the three specified options as to its expiry.

iii. Spending Limits

[124] The limits on spending by the individuals covered by the order of $5000 per month for living expenses and $10,000 per month for legal expenses, were unrealistically low in the context of this action.

e. Delay and its Consequences

[125] As mentioned at the outset, there was an eight-week delay after the October 6 application date was cancelled and rescheduled to November 30, 2016. No explanation for this delay was provided. Moreover, five of the affidavits filed in support of the application were sworn in September 2016, ten weeks before the application was heard.

[126] An applicant otherwise entitled to an injunction may lose that right on account of delay: Robert J Sharpe, *Injunctions and Specific Performance*, (Aurora, Ont: Canada Law Book, 1998) (loose-leaf 2015 supplement, release 24) at ¶1.830. "The very fact of delay by the plaintiff, quite apart from any question of prejudice to the defendant, may often serve as evidence that the risk is not significant to warrant interlocutory relief": ¶1.990. "To justify an *ex parte* injunction, there must be such urgency that the delay necessary to give notice might entail serious and irreparable harm to the plaintiff": ¶2.30.

[127] One consequence of the delay to November 30, 2016 was that the searches were not executed until December 6, 2016 so that, by the time the defendants became aware of the Orders, there was only a short window before the Christmas break to have the set aside applications brought in the Court of Queen's Bench.

f. Applying the Substantive Tests for the Anton Piller Orders and Mareva/attachment Order

[128] To obtain an *Anton Piller* order, *Mareva* injunction or attachment order the applicant must establish that it has met each of the requirements with respect to each party.

[129] As already indicated, Shilo conceded that these tests were met with respect to him for the purposes of this appeal. The other appellants deny that these tests were satisfied based upon the record.

[130] While the chambers judge concluded that the tests were met with respect to all the parties against whom the Orders were sought, this conclusion was not reasonable with respect to some of the parties having regard to the record and the concerns outlined above.

i. Weinrich Defendants

[131] The claims against Weinrich Defendants arise out of alleged collusion between Weinrich, Shilo and their companies. They do not relate to the misrepresentation claims or claims that unnecessary expenses were incurred in relation to the Pastille Plant, which represent the bulk of the damages claimed.

[132] The *Mareva*/attachment Order against Weinrich and Weinrich Holdings was set aside by consent, but remains against Secure 2013 and Secure Rentals. There are also *Anton Piller* Orders against Secure Rentals and Weinrich personally.

[133] Weinrich and Shilo are friends. It is alleged that in late 2014, after Tiger's new owners advised Shilo that Tiger would be leasing and not purchasing equipment, they founded Secure Rentals and used it to enter into a series of inflated equipment rental contracts, estimated to be 15 to 20% above market rates. Secure Rentals is owned by Secure 2013, which is owned by Weinrich Holdings, which is owned by Scott Weinrich.

[134] The only claims against Secure 2013 in the Statement of Claim are general claims of conspiracy. No substantive submissions were made in respect of Secure 2013 in the Brief or in oral submissions. While the corporate searches do not disclose any connection between Shilo and Secure Rentals, there is affidavit evidence that Tiger rents all of its equipment from Secure Rentals, including equipment which Shilo advised Jody Penton he had personally purchased but which Penton stated was apparently purchased by Secure Rentals. Penton stated that Shilo told him in May 2016 that "nobody can trace Secure Rentals back to me", and "they can search and search and they wouldn't be able to find a paper trail" because he billed Secure Rentals for his services using his numbered company. There is affidavit evidence that Shilo had Tiger provide improvements to a Secure Rentals campsite and instructed Tiger employees to carry out maintenance and repairs on Secure Rentals equipment at no charge. As already mentioned, the chambers judge was not told that the Equipment Rental Agreements provide that the lessee (Tiger) is responsible for repairs and maintenance.

[135] The conspiracy allegations against the Weinrich Defendants are largely speculative, based upon suspicion and statements by Shilo. Even if Tiger paid more than the market rate for equipment rentals (estimated at $2 to 3 million) there is no evidence of a real risk of dissipation and removal of assets by Secure 2013 and Secure Rentals sufficient to justify an unlimited *Mareva*/attachment Order. Moreover, Tiger is in possession of the equipment it leases from Secure Rentals and there is no suggestion that the equipment is encumbered.

[136] With respect to the *Anton Piller* Order against Scott Weinrich and Secure Rentals, the plaintiffs submit that they believe that Scott Weinrich may direct the destruction or concealment of corporate records based upon his alleged involvement in the Secure Rentals scheme. As this Court noted in *Catalyst Partners* at paras 34–35, when setting aside an *Anton Piller* order:

> In the circumstances, it is not sufficient that an inference of dishonesty can be drawn from the evidence. The inference of dishonesty, and that there is a 'real possibility' that evidence will be destroyed, must be compelling before the court should presume prospectively that the defendant will do so... The analysis must also lead to the conclusion that an inference of dishonesty, and an inference that the appellants are the type of persons who would destroy evidence, can be drawn from that evidence. Further, given the extraordinary and intrusive nature of the *Anton Piller* remedy, the inference that the appellants would destroy evidence must be strong.

The record with respect to Weinrich Defendants is insufficient to justify the inference that they would destroy documents.

[137] The *Mareva*/attachment Order and *Anton Piller* Orders against the remaining Weinrich Defendants are set aside.

ii. Secure Resources - Anton Piller Order

[138] The *Mareva*/attachment Order against Secure Resources was set aside by a consent order but the *Anton Piller* Order remains.

[139] Shilo and Weinrich are the directors of Secure Resources and each owns 50% of the shares through their respective companies, Sazwan Holdings and Weinrich Holdings. The Statement of Claim alleges that Shilo breached his fiduciary obligations to Tiger by providing to other defendants, including Secure Resources, confidential information regarding mineral leases, which they used to apply for permits on lands adjoining Tiger's mineral leases. Those permits were never granted. It is also alleged that Secure Resources' interests are being furthered in an unspecified manner by confidential information provided to a competitor. No specific loss is alleged to have been suffered by Tiger (or other plaintiffs) as a result of the allegations against Secure Resources.

[140] The evidence with respect to the claims against Secure Resources was limited and the submissions made to the chambers judge with respect to Secure Resources contained some misstatements and overstatements. These include:

a. Paragraph 77 of the Brief states that following the termination of Shilo's employment with Tiger, Shilo and Clark "appear to have become involved in a new company in the Secure Group of Companies – Secure Resources Inc – which appears to be entering a business that will compete with the Companies." However, the related footnote refers to paragraph 87 of

the Nagel Affidavit, which discusses the rental contracts and contains no information regarding Secure Resources.

b. Paragraph 106(b) of the Brief states that Shilo "established a business in direct competition with Tiger, being Secure Resources Inc..."

c. Paragraph 107 of the Brief alleges that Clark breached various non-competition clauses by "advising Shilo with respect to Shilo's involvement in Secure Resources Inc."

[141] While there is some evidence from which it could be inferred that Secure Resources may have received some of Tiger's confidential information (although there is no evidence other than speculation that Secure Resources was the entity that applied unsuccessfully for the permits on lands adjoining Tiger's mineral leases), there does not appear to be any basis for the submission that Secure Resources is competing with Tiger. Secure Resources manufactures sulphur fertilizer. There is no evidence that Tiger is in that business nor is that business included in the definition of the "Business" in Clark Sazwan's Non-Competition Agreement or Unanimous Shareholders' Agreement with which he undertook not to compete.

[142] One of the principal concerns expressed by Secure Resources with respect to the *Anton Piller* Order is that it contains no provisions to protect any of its confidential or commercially sensitive information, particularly in view of the breadth and scope of the searches contemplated in the *Anton Piller* Order. For example, paragraph 23 requires production of all records that "relate to the Defendants ... and the assets and financial records of ... Secure Resources". Paragraph 24 permits a search of "all records that relate to, or may relate to: ... (i) the financial status or affairs of ... Secure Resources ...:; and (j) records or items that are the property of or relate to the business of ...Secure Resources".

[143] The record does not demonstrate that the respondents have suffered any "serious" damage as a result of the alleged misconduct by Secure Resources, which is a requirement to obtain an *Anton Piller* order.

[144] The *Anton Piller* Order against Secure Resources is set aside.

iii. Secure Developments – Mareva/attachment Order

[145] Secure Developments is owned by Shilo (50%) and Weinrich Holdings (50%). Shilo and Weinrich were its directors from 2011 to 2015. The only specific reference in the Statement of Claim to Secure Developments (other than in the style of cause and description of the parties) is paragraph 327(d) where it is alleged to be a party to a conspiracy to carry out and conceal the diversion of secret profits received by Secure Rental, Shilo and Weinrich.

[146] The only substantive reference to Secure Developments in the evidence is the Nagel Affidavit. Nagel states that he believes that Secure Developments "is one of the corporate entities

through which monies generated from entities, such as Secure Rentals, may be conveyed to Shilo." He states that although he has been "unable to determine the business in which Secure Developments Ltd is engaged, based on the very limited records available to me, it appears that Secure Development Inc has generated a fairly significant amount of money in the past". He attached copies of emails relating to the 2013 year-end which are from or refer to Weinrich, Shilo and SVS Group. These statements are dated and the payments occurred before the P49 Group acquired its interest in Tiger.

[147] From the materials it appears that the order against Secure Developments is based on allegations of wrongdoing of various kinds against Shilo, and to a lesser degree Weinrich, and that because they own Secure Developments its assets should be frozen. This evidence does not meet the test for either an attachment order or a *Mareva* injunction and does not justify the freezing of Secure Developments' assets.

[148] Given the paucity of the evidence to support the *Mareva*/attachment order against Secure Developments, it is set aside.

iv. Hu Orders

[149] Hu was employed as an engineer at Tiger from 1997 until October 2016. When he left the company (it is in dispute whether he was terminated or resigned) he was its chief engineer. He was not a party to the Share Purchase Agreement. When the plaintiffs sought the first date for the without notice applications, Hu was still employed by Tiger.

[150] The claims against Hu are that he fraudulently misrepresented material facts about the cost and capability of the Pastille Plant; the availability and financial opportunity related to salt production at the Tiger plant; and breached various contractual and other duties he owed to Tiger with respect to equipment procurement and manufacturing processes.

[151] In addition to the substantive allegations against him, the plaintiffs submitted in their Brief that an *Anton Piller* Order and *Mareva*/attachment Order were justified because he had engaged in the following questionable conduct:

a. In 2010 Hu plead guilty to a strict liability environmental offence of providing false and misleading data for which Tiger was fined $100,000;

b. In March 2015 a lawsuit was commenced against Hu and others in relation to alleged misrepresentations made by Shilo and Andrea on the sale of a property. It was alleged that renovations were performed negligently and that Hu stamped the plans, which exceeded the scope of his expertise as a chemical engineer. The lawsuit was discontinued in early 2017 when an undisclosed settlement was reached between Shilo and the purchasers; and

c. Security footage shows Hu removing a box from Tiger's office on September 4, 2016 while the office was closed and his security clearance was deactivated because he was on medical leave. On the same day Tiger documents were scanned to his work email address. Hu was prevented from removing records from Tiger's office on September 6, 2016. He was employed by Tiger at this time and claimed he was gathering personal items and was taking the records to work from home. When Hu's employment ended on October 25, 2016, he was also prevented from removing materials from his office.

[152] Neither of the first two instances lead to a reasonable inference that Hu would destroy documents or dissipate or conceal assets. A guilty plea to a strict liability environmental offence for which Hu received an absolute discharge, without more, does not indicate that he would destroy documents or conceal assets. Nor does the settlement of a lawsuit, on undisclosed terms.

[153] While the third instance involves allegations that Hu was surreptitiously removing documents, his explanation at the time was that he was removing personal items or taking the records to work at home. Tom Hodson indicated that he believed Hu may have been working at home on occasion and there was no evidence Hu was prohibited from doing so. While the circumstances of Hu's attempts to remove records from Tiger while on medical leave and on the occasion of his termination/resignation are somewhat ambiguous, there is insufficient evidence that supports drawing the necessary "strong inference" that he would destroy evidence to justify the granting of the *Anton Piller* Order.

[154] To support the *Mareva*/attachment Order, the plaintiffs alleged that between 2012 and 2014 Hu and another party purchased properties cumulatively valued at $3 million with down payments of $453,250. At that time Hu was earning $140,000 per year. The plaintiffs submit that this evidence and the unexecuted loan agreement support the inference that Hu may have wrongfully and unlawfully directed funds from Tiger.

[155] All three properties were purchased with another individual. In the absence of any information about Hu's financial circumstances (beyond his salary) or those of the other individual, it is not reasonable to infer that these property transactions suggest that Hu was diverting Tiger resources.

[156] There is no evidence that Hu was dealing with his assets other than in the ordinary course or that he will dispose of, dissipate or conceal his assets. In some cases of alleged fraud, even in the absence of such evidence, courts have been prepared to draw an inference from all of the circumstance, including the circumstance of the fraud itself, that there is a serious risk that a defendant will attempt to dissipate assets or put them beyond the reach of the plaintiffs: *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at paras 81–83, [2015] AJ No 1463 (QL). The evidence regarding the misrepresentations alleged to have been made by Hu and his other conduct while a Tiger employee is not sufficient to justify drawing the inference in this case.

[157] The *Anton Piller* Order and *Mareva*/attachment Order against Hu are set aside.

v. 179 – Mareva/attachment Order

[158] 179 is a corporation owned equally by Shilo and Andrea, of which Shilo is the sole director. It is mentioned only twice in the Statement of Claim, once in the description of the parties (para 20) and again in paragraph 327 in which a general allegation of conspiracy in respect of which no specific particulars as against 179 were plead.

[159] The mention of 179 in the Brief was the description of the parties that identified Shilo as 179's director and 50% shareholder (para 15) and the statement that the plaintiffs believe that Shilo has possession and control of the records of 179 and may destroy or conceal 179's incriminating records. No mention was made of 179 in the submissions to the chambers judge.

[160] The evidence in respect of 179 included:

a. Penton deposed that Shilo told him he made up a phony bill of sale for Tiger to sell a bobcat and pickup truck to Shilo's numbered company, which he believes may be 179, which were leased to Secure Rentals which leased them back to Tiger, that there is no paper trail between him and Secure Rentals and that he billed Secure Rentals using his numbered company;

b. Nagel provided information regarding the 179 corporate search results which indicates that the registered office of 179 and business address of Secure Rentals and Secure Resources is a two-storey building located at a specified address in Edmonton and states that he believes that the business and corporate record of 179 would be located at the All-Type Office Services office located in the same building. He also stated that Penton told him that Shilo told him that his means of getting money out of Secure Rentals was by sending invoices for "services rendered from his numbered company to Secure Rentals"; and

c. Schwartz stated that he became aware when drafting a lease agreement for Shilo's personal vehicle from 179 that 179 had the same address as Secure Rentals.

[161] 179 was subject to the unlimited *Mareva*/attachment Order. No *Anton Piller* Order was granted in respect of any location in which 179 was identified as the Possessor, however, the *Anton Piller* Order granted in respect of the other defendants and the third parties required production of any records that relate to 179's "assets and financial records" (*Anton Piller* Order, para 23), "Shilo's involvement, direct or indirect" in 179 (*Anton Piller* Order, para 24(g)), "any payments or financial benefits received by Clark, Shilo, or any of the Defendants directly or indirectly" from 179 (*Anton Piller* Order, para24(h)), " the financial status or affairs" of 179 (*Anton Piller* Order, para 24(i)) and "records or items that are the property of or relate to the business of" 179 (*Anton Piller* Order, para 24(j)).

[162] The record before the chambers judge with respect to 179 was not sufficient to establish a strong *prima facie* case or reasonable likelihood that the claim of conspiracy against 179 would be established, without considering the evidence in respect of Shilo. To the extent that 179 was an entity controlled by Shilo who conceded for the purpose of this appeal that the evidence on the record was capable of meeting the test for a *Mareva* injunction against him, the *Mareva*/attachment Order against 179 and Shilo will be dealt with in the same fashion, as outlined below.

g. Shilo - Mareva/attachment Order and Anton Piller Order

[163] Shilo conceded for the purpose of this appeal that there was evidence capable of meeting the test for a *Mareva*/attachment order and *Anton Piller* order with respect to him. However, he sought to have the orders set aside because they were granted without due consideration or balancing of his interest and failed to adequately consider and impose terms to mitigate potential damage to him as a result.

[164] *Anton Piller* orders, attachment orders and *Mareva* injunctions granted without notice which are obtained without full candour and which overreach will not necessarily be set aside on review or appeal: *Peters* at para 11. However, that may be the appropriate remedy in some cases having regard to the overall circumstances. This is such a case as a result of the concerns outlined above regarding: the process followed by the plaintiffs; the delays; the disclosure issues; the overreaching aspects of the *Mareva*/attachment Order; the failure to comply with the statutory requirements in the *Civil Enforcement Act*; the unjustified Third Party *Anton Piller* Orders; the overbreadth of the *Anton Piller* Orders; the lack of differentiation amongst the defendants; and the failure to take appropriate account of the legitimate interests of the defendants on a without notice application.

[165] The *Anton Piller* Order and *Mareva*/attachment Order against Shilo and 179 are also set aside.

C. General Comments

[166] This appeal raises issues relating to the temporal scope of without notice *Mareva* injunctions and *Anton Piller* orders and the evidence that can be adduced on an application to continue an order granted without notice or on a review application made pursuant to rule 9.15(1)(a).

a. Temporal Scope of the Orders

[167] Sharpe states that injunctions granted without notice are "typically made for a strictly limited time" and cites appellate authority for the proposition that "in no case" should the order be for an unlimited period but rather should be "limited to the shortest possible time so that notice can be given to the parties affected by it" (emphasis added). Further, "the moving party is required to

notify the affected party and to bring a further motion to have the injunction continued ... [and] ... [t]he party affected ... is entitled to present its case after receiving notice of the order, either by way of motion to set aside the *ex parte* order, or on the hearing of the motion to continue" it: ¶2.25.

[168] Absent exceptional circumstances, the 21-day limit in the *Civil Enforcement Act* for a without notice application is also an appropriate temporal guideline for without notice *Mareva* injunctions. As to *Anton Piller* orders, the "shortest possible time" should be granted.

[169] The onus at the hearing to continue an order granted without notice is on the party who brought the original application to demonstrate that the injunction should continue; the without notice injunction does not create a *status quo* that shifts the onus to the party enjoined: *Catalyst Canada Services LP v Catalyst Changers Inc*, 2013 ABQB 73 at para 32, 560 AR 22.

b. Permissible Evidence on an Application to Maintain or Set Aside an Order Obtained Without Notice

[170] A party against whom an order without notice has been granted can bring an application to set aside or vary the order prior to its expiry pursuant to rule 9.15(1)(a).

[171] It is self-evident that the enjoined party (which had no opportunity to present evidence because it was not given notice) is at liberty to file evidence and cross-examine the original applicant's deponents. The question is whether the original applicant is entitled to supplement the record and adduce the fruits of the injunction to bolster its position to continue the order or defend against.

[172] As a starting point, a chambers judge's decision to admit new evidence from the original applicant is a matter of discretion: *Marcil v Ellefson*, 2014 ABCA 169 at para 8, 575 AR 189.

[173] The general rule is that these applications are heard *de novo*. In "most cases, it is appropriate to treat an application to set aside an *ex parte* order as a new application for the same order, without any restriction on the type of evidence the party with the benefit of the order may produce in its support": *Marcil* at para 23.

[174] The party moving to set the order aside is also entitled to give new evidence "which establishes some legal bar to granting the order. And the order can also be set aside if the original evidence failed to disclose material facts, given the duty of good faith lying upon anyone making an *ex parte* application": *Hansraj v Ao*, 2004 ABCA 223 at para 84, 354 AR 91.

[175] The appellants contended that an appeal has the advantage of being a review limited to the record before the court that granted the initial application, which enables the reviewing court to properly consider whether the order had been appropriately granted on the record. In our view a chambers judge hearing the variation application has the discretion to use this approach if circumstances warrant it.

[176] Attempts by the original applicant to bootstrap the record by putting in additional evidence that was available at the time of the initial without notice application should be treated with caution. As noted earlier in these reasons, the duty to present all evidence, including available defences, means that such evidence should have formed part of the original application. That said, the "fruits of the search" have been considered on applications to review an *Anton Piller* Order: *Peters* at para 8. Whether that approach is inappropriate in the circumstances of a particular case is a matter to be considered by the chambers judge on such an application.

VII. Conclusion

[177] Having regard to all of the circumstances, the Orders are unreasonable and are set aside (with two exceptions) for the following reasons:

a. the failure on the part of the respondents and their counsel to satisfy their duty of candour;

b. the overreaching nature of the *Mareva*/attachment Order, including its failure to address the statutory requirements in the *Civil Enforcement Act* without reason or justification;

c. the overreaching terms of the *Anton Piller* Orders which go well beyond what could be reasonably needed and authorize intrusive searches of third party premises without demonstrated need and the homes and businesses of the defendants without reasonable limitations or providing appropriate protection;

d. the respondents' failure to proceed in a timely fashion when seeking equitable relief without notice; and

e. the record does not demonstrate that there was justification to grant attachment orders, *Mareva* injunctions or *Anton Piller* orders against most of the defendants.

[178] Third parties enjoined by the *Anton Piller* Orders did not appeal, nor did Clark Sazwan, Denise Sazwan and Smokey Creek. In the case of the Third Party *Anton Piller* Orders, it was the defendants whose documents were subject to seizure and those orders can be set aside by virtue of their appeals.

[179] While Clark Sazwan, Denise Sazwan and Smokey Creek did not appeal and instead are proceeding with set aside applications in the Court of Queen's Bench, they were granted status to participate as respondents on this appeal. Because the broad scope of the *Anton Piller* Orders authorized seizure of documents which may relate to other defendants and to matters not covered by the litigation, it is appropriate to set aside the *Anton Piller* Order against Clark Sazwan as well.

[180] Clark Sazwan and Smokey Creek did not appeal the *Mareva*/attachment Order and, as a result, that order remains as against them, to be dealt with in their set aside application having regard to these reasons.

[181] The Supervising Solicitors are directed to return the documents seized to the parties from whom they were seized or their counsel. The appellants, Clark Sazwan and Smokey Creek, must discharge their obligation to produce an affidavit of records listing all relevant and material documents that were seized under the *Anton Piller* Orders: see generally *Catalyst Partners* at para 36.

[182] The parties are at liberty to submit written representations regarding costs, not to exceed ten pages, within 60 days.

Appeal heard on June 7, 2017

Reasons filed at Edmonton, Alberta
this 18th day of October, 2017

Strekaf J.A.

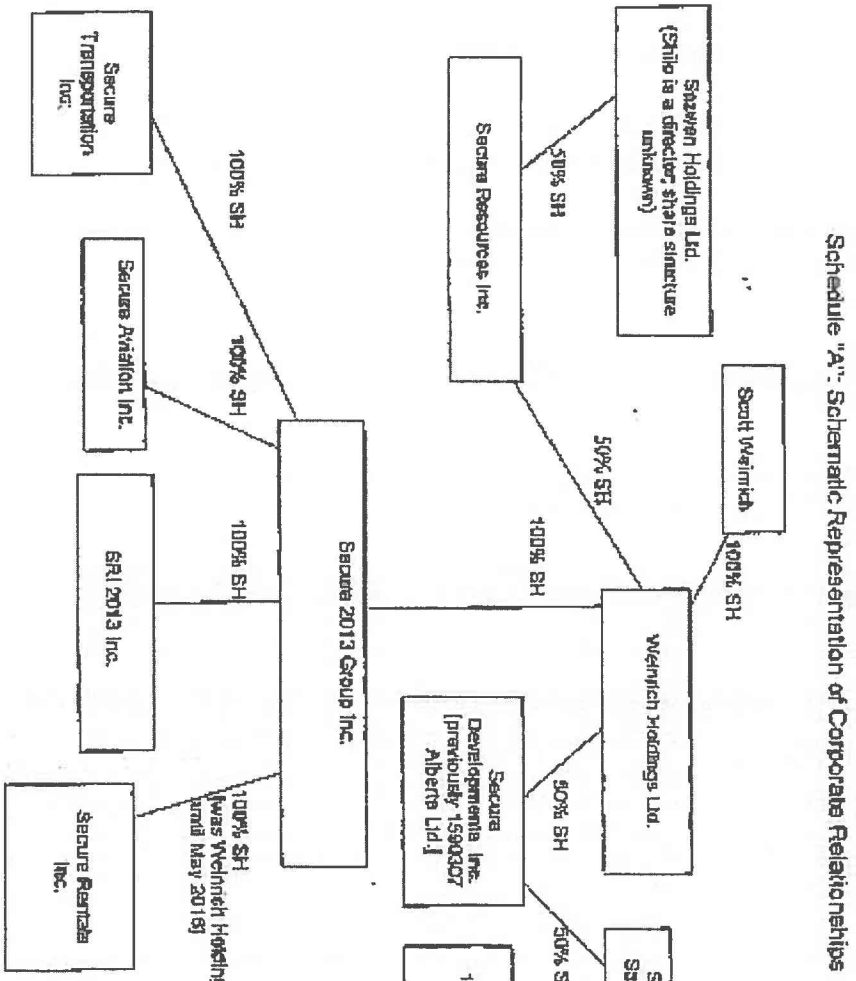
I concur:

Berger J.A.

I concur:

McDonald J.A.

SCHEDULE A



Appearances:

A.Z. Breitman and J.J. Bourchier
for the Respondents Tiger Calcium Services Inc. and others

M.J. Hewitt and K.A. Maw
for the Appellant/ Respondent Shilo Sazwan and others

M.A. Pruski and S.B. Bachelet
for the Appellant/ Respondent Lianguang Hu aka Stephen Hu

M.A. Wolowidnyk and M.A.A. Shepherd
for the Appellants/ Respondent Scott Weinrich and others

E.C. Duffy
for the Appellants/Respondents Secure 2013 Group Inc and Secure Development and others

W.E.B. Code, Q.C. and A.M. Cooper
for the Respondents Clark Sazwan and others

TAB 2

In the Court of Appeal of Alberta

Citation: Secure 2013 Group Inc v Tiger Calcium Services Inc, 2018 ABCA 110

Date: 20180323
Docket: 1703-0001-AC;
1703-0003-AC;
1703-0004-AC;
1703-0005-AC
Registry: Edmonton

Between:

Appeal No. 1703-0001-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

- and -

Respondents
(Plaintiffs)

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure Developments Inc., Secure Resources Inc., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants)

- and -

Secure 2013 Group Inc., Secure Rentals Inc., Scott Weinrich and Weinrich Holdings Ltd.

Appellants
(Defendants)

And Between:

Appeal No. 1703-0003-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs)

- and -

Secure Developments Inc.

Appellant
(Defendant)

- and -

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

And Between:

Appeal No. 1703-0004-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V) by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs/ Applicants)

- and -

Lianguang Hu, Also Known As, Stephen Hu

Appellant
(Defendant/ Respondent)

- and -

Clark Sazwan, Shilo Sazwan, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants/ Respondents)

And Between:

Appeal No. 1703-0005-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V) Inc., by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

Respondents
(Plaintiffs)

- and -

Shilo Sazwan, Andrea Sazwan, 1793068 Alberta Ltd., Secure Resources Inc.

Appellants
(Defendants)

- and -

Clark Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Denise Sazwan, Smokey Creek Ranch Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment Regarding Costs

Appeal from the Orders by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 30th day of November, 2016
Filed on the 1st day of December, 2016
(Docket: 1601 16191; 1603 22128)

Memorandum of Judgment Regarding Costs

I. Introduction

[1] This judgment deals with claims for costs arising from *Secure 2013 Group v Tiger Calcium Services*, 2017 ABCA 316, 58 Alta LR (6th) 209 ("*Tiger*"), which allowed the appeals and set aside a without notice combined *Mareva* injunction and attachment order against four individuals and seven corporations, and six without notice *Anton Piller* orders against some of the same parties and three third-party service providers (collectively, "Orders").

II. Positions of the Parties

[2] As a preliminary point, there has been no assessment of the claimed costs by a review officer.

[3] The appellants Scott Weinrich, Weinrich Holdings Inc and Secure Rentals Inc ("Weinrich Group") seek full indemnity solicitor-client costs for all the Court of Queen's Bench and Court of Appeal proceedings to date. They claim $204,280.65 from the plaintiffs/respondents ("Respondents") and the lawyers who acted for them in obtaining the Orders and on the appeal ("Former Counsel").

[4] The appellant Lianguang Hu, also known as Stephen Hu ("Hu"), seeks full indemnity solicitor-client costs for all proceedings in the amount of $182,913.94 from the Respondents and their Former Counsel.

[5] The appellants Secure Developments Inc and Secure 2013 Group Inc ("Secure Group") seek full indemnity solicitor-client costs from the Respondents in an indeterminate amount "covering all legal activity from the moment counsel were retained to respond to the Orders, up to and including the date of this Honourable Court's decision on costs being rendered".

[6] The appellants Shilo Sazwan, Andrea Sazwan, 1793068 Alberta Ltd and Secure Resources Ltd ("Shilo Group") seek full indemnity solicitor-client costs from the Respondents and their Former Counsel for all proceedings in an indeterminate amount or, alternatively a lump sum payment of $715,000 (a 3.5 multiple of the Weinrich Group's claim).

[7] The respondents Smokey Creek Ranch Ltd, Clark Sazwan and Denise Sazwan ("Smokey Group") claim elevated costs for participating in the appeals, including opposing the application to strike their factum, in a multiple of five or six times Column 5 of Schedule C in the amount of $123,000 to $147,600 from the Respondents and their Former Counsel.

[8] The respondents Tiger Calcium Services Inc and Tiger Tanklines (2011) Ltd ("Tiger") submit that costs should be limited to those incurred in connection with the appeal, costs for the

Shilo Group should be party and party costs payable at the conclusion of trial and all costs should be payable solely by Former Counsel, or alternatively by the Respondents and their Former Counsel on a joint and several basis.

[9] The respondents Parallel49 Equity (Fund V) BC, Limited Partnership by it General Partner, Parallel49 UGP (Fund V), Inc, and Parallel49 Equity (FundV), by its General Partner, Parallel49 Equity UGP (Fund V), Inc. ("Parallel49"), submit that costs should be limited to the appeal, assessed by a review officer and not be full indemnity costs. They recognize that substantial indemnity costs may be appropriate. They seek a deduction for the set aside motions brought in this Court.

[10] Former Counsel submit that costs should be limited to party and party costs for the appeal only and payable by the Respondents only.

III. Summary of Relief Granted

[11] We order that:

a. Costs are awarded on a solicitor-client basis to all the appellants for all reasonable steps taken to date for the purpose of varying, setting aside or appealing the Orders in this Court and in the Court of Queen's Bench. Such costs will be determined by a review officer if they cannot be resolved by agreement.

b. Smokey Group is awarded its taxable costs for successfully opposing the application to strike their factum and for participating in the appeal, but is not entitled to a fee for second counsel.

c. While there were significant concerns with some aspects of the approach by Former Counsel and the scope of the Orders, the conduct of Former Counsel was not sufficiently egregious to justify the exceptional award of costs payable by them personally. To the extent that the Respondents may wish to pursue such claims they will involve the consideration of privileged communications and are best addressed in another forum.

IV. Analysis

A. Types of Costs Awards Generally

[12] Courts have broad discretion when awarding costs: *Alberta Rules of Court*, AR 124/2010, r 10.29–10.31. While different and sometimes inconsistent nomenclature is used, four types of costs are typically awarded:

a. Party and party costs – determined in accordance with the tariff in Schedule C of the *Rules* and awarded in the majority of cases. They generally compensate the successful party for a portion of the legal fees incurred. The court may specify that the amount paid is a multiple, proportion or fraction of any of the amounts in the tariff: r 10.31(3). These costs are comparable to "ordinary costs" in British Columbia and to "partial indemnity costs" in Ontario: Mark M. Orkin, *The Law of Costs* (Aurora, Ont: Canada Law Book, 1987) (loose-leaf 2017 supplement), ch 1 at 3-4.

b. Lump sum costs – fixed at a set amount: r 10.31(1)(b)(ii).

c. Solicitor-client costs – provide full indemnity for all legal fees and disbursements reasonably incurred to the party to whom they are awarded. They are comparable to "special costs" in British Columbia and to "substantial indemnity" costs in Ontario: Orkin, ch 1 at 3-4. They are also called 'solicitor and client costs' or 'party and party costs payable on a solicitor and client basis'.

d. Solicitor and own client costs – allows a solicitor to recover from a client "frills or extras" authorized by the client which the client should reasonably pay its own solicitor, but which "should not fairly be passed on to third parties who become responsible for those expenses": *Lufi v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at paras 77–78. When they exceed solicitor-client costs because they include services requested by a client that go beyond the reasonable fees and disbursements incurred for all steps reasonably necessary within the four corners of the litigation, such an award is only justified in the most exceptional circumstances.

B. Solicitor and Own Client Costs are Not Appropriate

[13] Some of the appellants are seeking to be fully indemnified for all costs incurred by them, that is, costs on a solicitor and own client basis..

[14] There are few circumstances when it would ever be appropriate to require an opposing party to cover costs which go beyond the reasonable fees and disbursements required to defend or prosecute an action. There is no reason to do so in this case.

C. Solicitor-Client Costs Generally

[15] Solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct by a party: *Young v Young*, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193. They are only awarded in rare and exceptional circumstances, and may be available if misconduct occurs in the course of litigation: *FIC Real Estate Fund Ltd v Phoenix Land Venture Ltd*, 2016 ABCA 303 at para 4, 403 DLR (4th) 722. A careful analysis of the facts is required: para 5. *FIC Real Estate* at paragraph 4 endorsed circumstances that may justify such an award:

a. blameworthiness in the conduct of the litigation;

b. when justice can only be done by a complete indemnification for costs;

c. when there was evidence that the plaintiff hindered, delayed or confused the litigation, there was no serious issue of fact or law which required lengthy, expensive proceedings, when the misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;

d. when there has been an attempt to delay, deceive and defeat justice, imposed the requirement to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents and failing to produce material documents in a timely fashion;

e. positive misconduct, where others should be deterred from like conduct and the party should be penalized beyond the ordinary order of costs;

f. litigants found to be acting fraudulently and in breach of trust;

g. fraudulent conduct including inducing a breach of contract and presenting a deceptive statement of accounts to the court at trial; and

h. an attempt to delay or hinder proceedings, deceive or defeat justice, fraud or untrue or scandalous charges.

[16] The Orders were set aside in their entirety (with one exception) for reasons outlined in detail in *Tiger* at para 177. To summarize, the respondents failed to satisfy their duty of candour; parts of the Orders were overreaching and lacked reasonable limitations and appropriate protection; the Respondents did not proceed in a timely fashion when seeking equitable relief without notice; and the record did not justify granting the Orders against most of the defendants.

[17] The criteria for an award of solicitor-clients costs set out in *FIC Real Estate Fund Ltd* is met. The appellants are entitled to recover those solicitor-client costs which were reasonably and properly incurred as a direct result of the issuance of the Orders, both in this Court and in the Court of Queen's Bench.

D. Shilo Group

[18] While Shilo Sazwan acknowledged that there were grounds for an *Anton Piller* order and a *Mareva* injunction against him, the Orders against him were set aside: *Tiger* at para 164. In view of the overall circumstances, it is appropriate that the Shilo Group recover its costs on the same basis as the other appellants.

E. Costs Limited to Steps Taken to Vary, Set Aside or Appeal the Order

[19] Some of the Respondents have submitted that the costs awarded should be limited to the appeals and should not include costs incurred in the Court of Queen's Bench to vary, modify or set aside the Orders. Having regard to the extremely broad scope of the Orders, their timing, and the comments of the chambers judge who initially suggested that parties seeking to challenge a without notice order on the record were required to appeal, it is not surprising that overlapping proceedings were taken in this Court and in the Court of Queen's Bench. While these proceedings were somewhat duplicative, they would have not been undertaken in the absence of the Orders. The Orders have now been set aside on the basis that they should not have been granted. In these circumstances, it is appropriate that the appellants should be indemnified on a solicitor-client basis for all steps that were reasonably incurred to date for the purpose of varying, setting aside or appealing the Orders.

[20] Costs sought by some of the appellants go beyond those arising from the Orders and include steps taken in the Court of Queen's Bench which would have been required in any event; for example, costs relating to the application to change the judicial district; drafting Statements of Defence, Counterclaims and Notices to Admit and reviewing the plaintiffs' production. It is premature to determine costs unrelated to the Orders and they should be dealt with by the Court of Queen's Bench in due course.

[21] Some appellants have sought enhanced costs as a result of the manner in which the search was conducted. The Weinrich Group expressed concerns with respect to aspects of the search conducted by the Independent Supervising Solicitors, including the search of a business premises belonging to a corporation owned by Scott Weinrich that was not a party; the seizure and copying of that corporation's network server and cell phones of two of its employees; the seizure of financial records of Scott Weinrich's wife and son who are not parties to the action; the deletion of voicemail messages from his cellphone, including those from his deceased father (copies of which were later provided to him); and delays in discharging the order from the Personal Property Registry until September 2017 despite it having been set aside against two members of the Weinrich Group in December 2016. These concerns are better addressed in the Court of Queen's Bench as claims for damages sustained as a result of the Orders or the conduct of the searches. The letter of credit posted in support of the Undertaking in Damages was provided to cover such claims and should not be applied to costs awarded by this Court.

F. Costs Against Former Counsel

[22] Rule 10.50 contemplates that a lawyer who engages in serious misconduct may be ordered to pay costs personally. The threshold is high and the discretion to do so must be exercised cautiously: *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 25, [2017] 1 SCR 478. Guidance is provided at para 29:

> an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[23] While the circumstances justify the exceptional award of solicitor-client costs, the conduct of Former Counsel was not so egregious as to merit the highly unusual remedy of awarding costs against them personally. For example, there is no reason to believe that any of the overstatements of the evidence with respect to the third parties was done with the intention of misleading the chambers judge who granted the Orders, but simply without the care that should have been exercised whenever without notice relief is sought.

[24] Tiger submits that any costs awarded against them should be paid solely by their Former Counsel. As noted above, this is not justified. To the extent that any of the plaintiffs wish to pursue recovering such costs from their Former Counsel, such claims raise issues that involve privileged communications between them and their Former Counsel and are best be addressed in another forum.

G. Assessment by a Review Officer

[25] Rule 10.34 provides that the Court may order an assessment of costs by a review officer. This mechanism ensures that costs are properly calculated. Some of the appellants wish to by-pass this step. However, the costs claimed collectively exceed $1 million and it is appropriate that they be subject to the discipline of assessment by a review officer.

H. Smokey Group

[26] Smokey Group elected not to appeal the Orders. However, they successfully opposed the Respondents' application to strike their factum: *Tiger Calcium Services v Sazwan*, 2017 ABCA 172. Smokey Group participated with second counsel present at the hearing of the appeals as a respondent supporting the position advanced by the appellants.

[27] Smokey Group claims costs relating to its participation in the appeals and opposing the application to strike their factum. Their position is that all other aspects of costs arising from the Orders in relation to them fall within the jurisdiction of the Court of Queen's Bench. They seek an award of five or six times column 5, which according to their calculations (including second counsel) would be between $123,000 and $147,600, plus disbursements. As Smokey Group did

not provide information on its actual legal expenditures in relation to the appeals, it is not possible to assess what portion of their appeal costs their claim represents.

[28] Smokey Group submits that it should be entitled to the costs it is claiming, notwithstanding that it elected *not* to appeal, as they were essentially successful parties on the appeals and because the Respondents engaged in blameworthy conduct.

[29] Smokey Group also submits that it is entitled to enhanced costs because the Respondents did not accept an informal offer made on September 7, 2017 (withdrawn on September 20, 2017) to vacate the Orders (and various related orders in British Columbia) in exchange for their agreement not to seeks costs or damages. This offer has no impact on our assessment of Smokey Group's claim for costs.

[30] It is unusual for a party to elect not to appeal but nevertheless participate actively in the appeal, and then seek costs when the appellants are successful. *Donaldson v Moose Jaw Transportation Company*, [1945] 1 WWR 678, 1945 CanLII 188 (Sask CA), involved a motor vehicle accident where a corporate defendant and its employee, K, were found liable but another defendant, M, was found not liable. M did not appeal. The Court held that as M did not appeal, it was unnecessary for him to appear at the appeal hearing and he was not entitled to costs except for attending to accept service. In *Re Hammond*, [1935] 1 DLR 263, [1935] OJ No 281 (QL) (CA), the Court awarded costs against a respondent who adopted the appellant's position on the basis that he was really acting as an appellant.

[31] In this case, the parties were all represented by experienced counsel. Having elected not to participate in the appeal as an appellant, there is no good reason in this case for Smokey Group to be awarded costs from the Respondents for participating in the appeal as essentially a named respondent not as an interested party to the appeals. Their role was akin to an intervenor who, as a general rule, bear their own costs: *Stoney Tribal Council v Pancanadian Petroleum Ltd*, 2000 ABCA 164 at para 7, 266 AR 374.

[32] As Smokey Group was successful in opposing the Respondents' application to strike its factum, it is awarded its taxable costs calculated under column 5 for that application, in accordance with the usual practice of this Court.

V. Conclusion

[33] The appellants are awarded solicitor-client costs payable by the Respondents for fees and disbursements that were reasonably incurred to date for the purpose of setting aside, varying or appealing the Orders, both in this Court and in the Court of Queen's Bench. Failing agreement, such costs shall be determined by a review officer.

[34] Smokey Group is awarded its taxable costs under column 5 for opposing the Respondents' application to strike their factum, payable once from the Respondents in respect of the application on all of the appeals.

Written Submissions received on November 24, December 7, 8, 15, 18, 2017, & January 22, 2018

Memorandum filed at Edmonton, Alberta
this 23 day of March, 2018

REGISTRAR
FILED
MAR 23 2018
Court of Appeal of Alberta

Berger J.A.

Authorized to sign for: McDonald J.A.

Authorized to sign for: Strekaf J.A.

Appearances:

R.W. Block, Q.C. and D.T. Madsen, Q.C.
for the Respondents Tiger Calcium Services Inc. and others

K.R. Costin, P.J. Osborne and A. Parley

For the Respondents Paralell49 Equity (Fund V) BC, and others

M.C. Samuels and V.S.C. Rossos
for the Appellant/ Respondent Shilo Sazwan and others

M.A. Pruski and S.D. Bachelet
for the Appellant/ Respondent Lianguang Hu aka Stephen Hu

M.A. Wolowidnyk and M.A.A. Shepherd
for the Appellants/ Respondent Scott Weinrich and others

E.C. Duffy
for the Appellants/Respondents Secure 2013 Group Inc and Secure Development and others

W.E.B. Code, Q.C. and A.M. Cooper
for the Respondents Clark Sazwan and others

G. Solomon, QC
for Ariel Brietman and Jonathan Bourchier

TAB 3

COURT FILE NUMBER	1603 22128
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	TIGER CALCIUM SERVICES INC., TIGER TANKLINES (2011) LTD., PARALLEL49 EQUITY (FUND V) BC, LIMITED PARTNERSHIP, by its General Partner, PARALELL49 EQUITY GP (FUND V), LIMITED PARTNERSHIP, by its General Partner, PARALLEL49 EQUITY UGP (FUND V), INC., and PARALLEL49 EQUITY (FUND V), by its General Partner, PARALELL49 EQUITY UGP (FUND V), INC.
DEFENDANT(S)	CLARK SAZWAN, SHILO SAZWAN, LIANGUANG HU, also known as, STEPHEN HU, ANDREW SAZWAN, DENISE SAZWAN, SMOKEY CREEK RANCH LTD., 1793068 ALBERTA LTD., SECURE 2013 GROUP INC., SECURE DEVELOPMENTS INC., SECURE RENTALS INC., SECURE RESOURCES INC., SCOTT WEINRICH, WEINRICH HOLDINGS LTD., JANE DOE, JOHN DOE, and ABC CORP.
DOCUMENT	ORDER
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Michele A. Wolowidnyk Weir Bowen LLP 500 Revillon Building 10320 —102 Avenue Edmonton, AB T5J 4A1 Telephone: (780) 424-2030 Facsimile: (780) 424-2323 File: 21058 MAW

I hereby certify this to be a true copy of the original.

N. Harenac

for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: December 16, 2016

LOCATION OF HEARING OR TRIAL: Edmonton

NAME OF JUDGE WHO MADE THIS ORDER: Associate Chief Justice J.D. Rooke

ORDER

UPON the Application of the Defendants, Scott Weinrich, Weinrich Holdings Ltd., Secure 2013 Group Inc. and Secure Rentals Inc., and a non-party to the Action, Weinrich Contracting Ltd. (the **"Application"**); **AND UPON HAVING HEARD** submissions by counsel for the parties; **IT IS HEREBY ORDERED THAT:**

1. The November 30, 2016 Mareva Injunction/Attachment Order (the **"Prior Order"**), granted by the Honorable Justice K.D. Yamauchi, is hereby set aside as it relates to Weinrich Holdings Ltd. and Secure Resources Inc., and any reference to these Defendants, as contained within the Prior Order, shall be deleted, as follows:

   a. Paragraph 1(a)(v) of the Prior Order shall be deleted; and

   b. Paragraph 1(a)(vii) of the Prior Order shall be deleted.

2. This Order is without prejudice to the Plaintiffs' ability to bring an application for a Mareva Injunction/Attachment Order against Weinrich Holdings Ltd. or Secure Resources Inc., on proper notice.

3. Any matters raised in the Application that were not addressed are adjourned *sine die*.

4. The Plaintiffs shall provide an Undertaking in Damages, which shall apply to any individual or business who was searched, or whose premises was searched, pursuant to the Anton Piller Orders granted on November 30, 2016 by the Honourable Justice K.D. Yamauchi, whether they are a party to this Action or not.

5. The Plaintiffs shall fortify their Undertakings in Damages filed in the within action by depositing with the Clerk of the Court an Irrevocable Letter of Credit in the amount of $7,000,000.00 no later than Friday, December 23, 2016, failing which the Prior Order granted on November 30, 2016, will be vacated without further Order.

6. The signatures of counsel for Clark Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., Shilo Sazwan, Secure Resources Inc., and 1793068 Alberta Ltd. are not required for the purposes of entering this Order.

7. This Order may be executed in counterpart and by facsimile.

8. Costs of this Application are reserved.

Associate Chief Justice J.D. Rooke
A.C.J.C.Q.B.A.

Approved as the Order given this 23 day of December, 2016 by:

Weir Bowen LLP
Per:

Michele Wolowidnyk,
Counsel for Scott Weinrich, Secure 2013 Group Inc., Secure Rentals Inc., Weinrich Holdings Ltd., and Weinrich Contracting Ltd.

Approved as the Order given this 23 day of December, 2016 by:

Rackil Belzil LLP
Per:

Matt Pruski,
Counsel for Stephen Hu

Approved as the Order given this 23rd day of December, 2016 by:

MacPherson Leslie & Tyerman LLP
Per:

Ariel Breitman
Counsel for the Plaintiffs

COURT FILE NUMBER	1603-22128
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	TIGER CALCIUM SERVICES INC., TIGER TANKLINES (2011) LTD., PARALLEL49 EQUITY (FUND V) BC, LIMITED PARTNERSHIP, by its General Partner, PARALELL49 EQUITY GP (FUND V), LIMITED PARTNERSHIP, by its General Partner, PARALLEL49 EQUITY UGP (FUND V), INC., and PARALLEL49 EQUITY (FUND V), by its General Partner, PARALELL49 EQUITY UGP (FUND V), INC.
DEFENDANTS	CLARK SAZWAN, SHILO SAZWAN, LIANGUANG HU, also known as, STEPHEN HU, ANDREW SAZWAN, DENISE SAZWAN, SMOKEY CREEK RANCH LTD., 1793068 ALBERTA LTD., SECURE 2013 GROUP INC., SECURE DEVELOPMENTS INC., SECURE RENTALS INC., SECURE RESOURCES INC., SCOTT WEINRICH, WEINRICH HOLDINGS LTD., JANE DOE, JOHN DOE, and ABC CORP.
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Michele A. Wolowidnyk Weir Bowen LLP 500 Revillon Building 10320 – 102 Avenue Edmonton, AB T5J 4A1 Telephone: (780) 424-2030 Facsimile: (780) 424-2323 File: 21058 MAW

JUDICIAL CENTRE OF EDMONTON
Clerk's Stamp
FILED
DEC 23 2016
Clerk of the Court

I hereby certify this to be a true copy of the original.

N. Harvey

for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: December 22, 2016

LOCATION OF HEARING OR TRIAL: Edmonton

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Associate Chief Justice J. Rooke

UPON the Application of the Plaintiffs, provided December 19, 2016 (the "**Plaintiffs' Application**"); **AND UPON** hearing from counsel for the parties; **IT IS HEREBY ORDERED THAT:**

1. The Mareva Injunction/Attachment Order of the Honourable Justice K.D. Yamauchi, granted November 30, 2016 (the "**Prior Order**"), is hereby varied by deleting subparagraphs 1(b)(iv) and 2(b)(i)(8).

2. The Registrar of the North Alberta Land Titles Registry is hereby directed to forthwith discharge the registration of the Prior Order as against title to the personal residence of Scott Weinrich and Patricia Weinrich, such discharge shall occur notwithstanding the requirements of section 191(1) of the *Land Titles Act*, as it relates to lands legally described as:

   Plan 0524781
   Block 2
   Lot 1
   EXCEPTING THEREOUT ALL MINES AND MINERALS

3. Paragraph 5 of the Order of the Honourable Associate Chief Justice J. Rooke, granted December 16, 2016, is hereby deleted and replaced with the following:

   "The Plaintiffs shall fortify their Undertakings in Damages filed in the within Action by depositing with the Clerk of the Court an Irrevocable Letter of Credit in the amount of $2,000,000.00 no later than Friday, December 30, 2016, failing which the Mareva Injunction/Attachment Order granted on November 30, 2016 by Justice K.D. Yamauchi, will be vacated without further Order."

4. This Order is without prejudice to: (i) the parties' rights to apply to have the Prior Order set aside; (ii) the parties' rights to apply to further vary the Prior Order; and (iii) the parties' rights to apply to have this Order varied or set aside.

5. Counsel for the parties are directed to employ their best efforts to reduce the next steps in the within action to a procedural order.

6. The date of January 20, 2017, is hereby set-aside for potential Applications that the parties may wish to bring. Should any party wish to make an Application, such Application shall be filed and served no later than January 17, 2017, together with any Affidavit(s) sworn in support thereof, and accompanied by a brief no greater than 10 pages, double-spaced. These materials must also be delivered to the Court no later than January 17, 2017.

7. The signatures of counsel for Clark Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., Shilo Sazwan, Secure Resources Inc., and 1793068 Alberta Ltd. are not required for the purposes of entering this Order.

8. This Order may be executed in counterpart and by facsimile.

9. Costs of the Plaintiffs' Application are reserved.

Associate Chief Justice of the Court of
Queen's Bench of Alberta

for J. Rooke ACJ

476482

Approved as the Order given this 23 day of December, 2016 by:

Weir Bowen LLP
Per:

Michele Wolowidnyk, Counsel for Scott Weinrich, Secure 2013 Group Inc., Secure Rentals Inc., Weinrich Holdings Ltd., and Weinrich Contracting Ltd.

Approved as the Order given this 23 day of December, 2016 by:

Rackil Belzil LLP
Per:

Matt Pruski, Counsel for Stephen Hu

Approved as the Order given this 23 day of December, 2016 by:

MacPherson Leslie & Tyerman LLP
Per:

Ariel Breitman
Counsel for the Plaintiffs

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Ferreira v. St. Mary's General Hospital, 2018 ONCA 247
DATE: 20180314
DOCKET: C64204

Juriansz, Miller and Nordheimer JJ.A.

BETWEEN

Fernando Ferreira

Applicant (Appellant)

and

St. Mary's General Hospital and Dr. Christopher Hinkewich

Respondents

Jordan Palmer, for Georgiana Masgras, also acting in person

Daphne Jarvis, for the respondent, St. Mary's General Hospital

Sarit Batner, for the respondent, Dr. Christopher Hinkewich

Heard: March 1, 2018

On appeal from the order of Associate Chief Justice Frank Marrocco of the Superior Court of Justice dated July 9, 2017 and of the costs order of Regional Senior Justice Harrison Arrell of the Superior Court of Justice dated November 28, 2017.

Nordheimer J.A.:

[1] Ms. Masgras is a lawyer. She purports to bring this appeal on behalf of Mr. Ferreira. As the background to this matter demonstrates, this is an unusual case that arises out of an unfortunate factual situation. The case revolves around a lawyer's claim of authority to take steps on behalf of a client who is

incapacitated. Mr. Ferreira was the client and Ms. Masgras was his lawyer. Ms. Masgras purports to appeal the order of Marrocco A.C.J.S.C. (the "reviewing judge") as it relates to a decision to set aside an interim injunction that prohibited the removal of Mr. Ferreira from life support. She also appeals the costs order made against her personally by Arrell R.S.J. (the "application judge"). As I shall explain, while she has the right to do the latter, she does not have the right to do the former.

Background

[2] In December 2016, Mr. Ferreira was in a motor vehicle accident. He retained Ms. Masgras in respect of his claims for compensation for neck and lower back pain and related injuries.

[3] On July 3, 2017, Mr. Ferreira was quite unexpectedly found in cardiac arrest at his home. EMS personnel were able to restore his pulse, and brought him to St. Mary's General Hospital in Kitchener ("the Hospital"), where he was provided with life support in the Intensive Care Unit ("ICU").

[4] Over the following days, it became clear that Mr. Ferreira had suffered a very significant brain injury as a result of a lack of oxygen to his brain caused by the cardiac arrest. His condition continued to deteriorate in spite of the intensive care provided. There was no prospect of recovery.

[5] After consultations with the physicians involved and Mr. Ferreira's family, on July 6, Mr. Ferreira's wife made the decision to remove Mr. Ferreira from life support. No family member, of the over 15 in attendance, nor any of the medical professionals, thought that this was the wrong medical decision or inconsistent with Mr. Ferreira's wishes.

[6] As is legally required, the Trillium Gift of Life agency ("TGOL") was contacted and advised of Mr. Ferreira's imminent death. Further discussions between TGOL and the family on July 7 led to a decision to offer organ donation. In coordination with TGOL, the withdrawal of life support was scheduled to take place in the morning of Saturday, July 8 to allow the broader family to gather to support each other and to pay their respects.

[7] During this time, Ms. Masgras became aware of Mr. Ferreira's condition. Both she and her husband, a chiropractor who was treating Mr. Ferreira, contacted Mr. Ferreira's wife and urged her to reconsider the decision to remove Mr. Ferreira from life support. They also contacted members of Mr. Ferreira's family, through a friend of Mr. Ferreira's, to urge the same thing. Notwithstanding these entreaties from Ms. Masgras, the family did not change their minds.

[8] Convinced that the decision to remove Mr. Ferreira from life support needed to be given "further consideration", Ms. Masgras decided to bring an

application for an interim injunction restraining the Hospital from withdrawing Mr. Ferreira from life support.

[9] In furtherance of this application, at or around 7:00 p.m. on Friday, July 7, Ms. Masgras contacted the duty judge line for Central South Region. She was put in touch with a trial co-ordinator. When the trial co-ordinator learned of the relief being sought, she advised Ms. Masgras that the matter could be put in front of a judge immediately once the application materials were ready. She also told Ms. Masgras that she needed to serve the respondent with the application materials before it would be considered by a judge.

[10] Ms. Masgras spent the next number of hours preparing the application materials. Around 3:00 a.m., she arranged to have some application materials served on a nurse at the ICU in the Hospital. The materials were then sent by email to the court. Ms. Masgras did not serve Mr. Ferreira's wife with the materials or advise her of the proposed application.

[11] At approximately 9:00 a.m. on Saturday, July 8, Ms. Masgras re-attended at the ICU and advised the respondent, Dr. Christopher Hinkewich, the physician most responsible for Mr. Ferreira, that she had the application judge on the phone. She told Dr. Hinkewich that the application judge had made a verbal order not to remove Mr. Ferreira from life support.

[12] In light of the verbal order, Dr. Hinkewich retained counsel. The TGOL physicians, who were there to perform the organ donations, left. The family were told of this development. They were upset and confused. Later that day, Ms. Masgras served the formal injunction order, and later that evening she served copies of her application record.

[13] Mr. Ferreira's condition continued to deteriorate. Brain death seemed possible, and testing was initiated to determine whether it had occurred. If brain death had occurred, harm to Mr. Ferreira's organs preventing their donation was a real possibility. As a result, on Sunday, July 9, Dr. Hinkewich's counsel brought a motion to vary the injunction order.

[14] The motion was heard that day by the reviewing judge on an urgent basis by telephone. Ms. Masgras participated in the motion, as did counsel for the Hospital and for Dr. Hinkewich. During the hearing, the court was advised that Mr. Ferreira had been declared brain dead. The reviewing judge set aside the interim injunction and dismissed the application. He ordered that the costs of the application, including the costs of the motion to vary, be reserved to the application judge.

[15] The order of the reviewing judge was immediately communicated to the respondents. Mr. Ferreira was removed from life support and he passed away. The organ donation was accomplished.

[16] On August 18, 2017, Ms. Masgras filed a notice of appeal from the order of the reviewing judge with this court. The notice of appeal seeks to have the order of the reviewing judge set aside. The notice of appeal also seeks a series of orders that are best described as declarations, including an order that Ms. Masgras "had standing in the matter of whether Mr. Ferreira's life support system should be maintained or removed."

[17] In light of the appeal, Ms. Masgras sought to adjourn the costs hearing that was scheduled to be heard before the application judge on October 11, 2017. Ultimately, the costs hearing was held on October 27. At that hearing, all counsel agreed that further oral submissions were not necessary and that the costs could be determined on the basis of the written materials.

[18] The respondents sought their costs of the application on a substantial indemnity basis against Ms. Masgras personally. Dr. Hinkewich sought costs in the amount of $20,796.52. The Hospital sought costs in the amount of $20,048.46. On November 28, 2017, the application judge awarded costs of $7,500 to each of the respondents, payable by Ms. Masgras personally.

[19] In giving his reasons, the application judge said, at para. 29:

> I am satisfied that the Respondents incurred costs needlessly as set out in Rule 57.07(1) as a result of the inappropriate application brought by Ms. Masgras who had no instructions, submitted misleading material to the court, and was at the very least negligent or

> mistaken in her preparation of the material submitted to me.

The Main Appeal

[20] The main appeal, that is the appeal from the order of the reviewing judge, can be dealt with briefly. It cannot succeed for two fundamental reasons. First, Ms. Masgras had no instructions to bring this appeal. Indeed, she had no instructions to bring the underlying application. Further, the underlying application was stayed as a result of Mr. Ferreira's death by virtue of r. 11.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, unless and until an order to continue is granted under r. 11.02. No such order has ever been obtained. Once death occurred, the right to bring this appeal vested in the estate trustee. Consequently, this appeal is improperly constituted as it has not been brought by the estate trustee nor has it been assigned by the estate trustee to Ms. Masgras. As a result, the appeal must be quashed. Alternatively, the underlying application must be dismissed pursuant to r. 15.02(4) as it was commenced without Mr. Ferreira's authorization.

[21] Second, and in any event, as is apparent from the facts, the appeal is now moot. Even if Ms. Masgras could bring a successful appeal to set aside the reviewing judge's order (and it would not be successful), the result would be of no moment given that the Mr. Ferreira is deceased. Further, there is no basis for

this court to give the type of declaratory orders that are sought in the notice of appeal.

[22] The main appeal must therefore be dismissed.

The Costs Appeal

[23] I begin by noting that Ms. Masgras was given an indulgence by this court. She was allowed to wrap her costs appeal into her main appeal even though she did not seek leave to appeal the costs award as required by s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 61.03.1(17) of the *Rules of Civil Procedure*.

[24] The costs decision directly engages the propriety of Ms. Masgras' conduct throughout this entire proceeding. Ms. Masgras submits that she was entitled to take the steps that she did in obtaining the interim injunction, and then opposing the motion to set aside that order, and indeed then bringing an appeal, on the basis that she was obliged as Mr. Ferreira's personal injury lawyer in a separate matter, to protect his interests and further "his cause".

[25] In support of her position, Ms. Masgras relies on r. 3.2-9 of the *Rules of Professional Conduct* of the Law Society of Ontario, which reads:

> When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

[26] She also relies on commentary 3 to that Rule, but only on the final sentence that reads "In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned." To put that statement into context, the whole of the commentary needs to be considered. The entirety of commentary 3 reads:

> A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[27] Ms. Masgras did not take any steps to have an authorized representative appointed. Indeed, it is not apparent on the record that Ms. Masgras sought or obtained any form of instructions from any next of kin of Mr. Ferreira, most notably, his wife. I note, on this point, that under the *Health Care Consent Act, 1996,* S.O. 1996, c. 2, Sched. A, s. 20, if a person is incapable with respect to treatment, consent may be given by a person designated in the section, one of which is the incapable person's spouse.

[28] In fact, rather than attempting to obtain instructions from a next of kin, what is clear on the record is that Ms. Masgras acted in a manner that contravened the wishes of Mr. Ferreira's next of kin without ever advising Mr. Ferreira's wife, or

any other member of his family, of her intended actions. More specifically, Ms. Masgras never told any member of Mr. Ferreira's family, that she intended to go to court and obtain an injunction to restrain the family from doing what they had decided to do, that is, to remove Mr. Ferreira from life support.

[29] Ms. Masgras contends that her perceived obligation to protect Mr. Ferreira gave her the right to act in such a fashion. In addition to her reliance on the *Rules of Professional Conduct*, to which I have referred above, Ms. Masgras also relies on the decision in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401. In particular, Ms. Masgras relies on the various references in that decision to the "lawyer's duty of commitment to the client's cause".

[30] Ms. Masgras fundamentally misunderstands the principles enunciated in that case. That decision does not support Ms. Masgras' proposition that a lawyer is entitled to take whatever steps s/he wishes in furtherance of what the lawyer thinks is the client's "cause". What Ms. Masgras appears not to understand is the fundamental principle that lawyers must act in accordance with the instructions of their clients.[1] Lawyers do not have a *carte blanche* to take steps of their own volition under the guise of furthering the client's perceived cause. In particular,

---

[1] I recognize that there are certain exceptions to the rule that lawyers must follow the instructions of their clients but those exceptions are not engaged in this case.

lawyers do not have the right to institute proceedings without being armed with instructions from their clients to do so.

[31] Simply put, Ms. Masgras had no authority to take the steps that she did. In doing so, Ms. Masgras breached the basic principles that apply to the conduct of lawyers, particularly their duty to act honourably.

[32] In my view, that conclusion is sufficient to dispose of Ms. Masgras' costs appeal against the application judge's order requiring her to personally pay the costs of the injunction application. It is worth repeating that Ms. Masgras launched the application for an interim injunction without instructions. She did so without advising Mr. Ferreira's family of her intentions to do so. She also obtained the interim injunction without first giving any notice of her intentions to the Hospital or to the physician treating Mr. Ferreira, save and except for serving the application materials on a nurse in the ICU at 3:00 in the morning on the day that she obtained the *ex parte* injunction. Further, she obtained the extraordinary injunctive relief based on what the application judge found to be misleading material.

[33] Ms. Masgras submits that her actions were undertaken in good faith and thus do not rise to the level necessary to warrant a costs award against her personally. In support of her submission, she points to the decision in *Quebec*

(Director of Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26, [2017] 1 S.C.R. 478.

[34] It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:

> In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.

[35] In my view, the facts of this case amply establish that Ms. Masgras' actions "seriously interfered with the administration of justice." She acted without instructions. She acted in a manner that was directly contrary to the wishes of Mr. Ferreira's family. And she did so when one of the most difficult, emotional, and personal of decisions was being undertaken by them. Further, Ms. Masgras' actions potentially interfered with the ability of another individual to receive what might well have been a life-saving organ transplant. Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the

> public and other members of the profession honourably and with integrity.

[36] Ms. Masgras contends that she was just trying to protect her client and to ensure that all available information was considered and reviewed by an independent party, namely a judge, before the decision to remove Mr. Ferreira from life support was taken. Even if one could accept the *bona fides* of Ms. Masgras' intentions, that objective had been met once the matter was before the reviewing judge. Yet Ms. Masgras did not let the matter go. Rather, she opposed the motion to set aside the interim injunction and she then appealed the reviewing judge's decision. Indeed, she told the reviewing judge, right after he announced his decision, that she intended to appeal it. It is readily apparent from her conduct in this regard that Ms. Masgras was not interested in an independent review. Rather, she was intent on achieving her own personal objective.

[37] As a final defence, Ms. Masgras raises various procedural complaints with respect to the manner in which the costs hearing took place. Specifically, she says that she was not made fully aware that costs would be sought against her personally and she was not "present" when the costs issue was determined. On the first point, the record clearly establishes that Ms. Masgras knew that costs were being sought against her personally. Indeed, her own costs submissions directly address that prospect. On the second point, Ms. Masgras agreed with the other counsel, after the costs hearing had been adjourned at least twice, that the

application judge could proceed to determine the costs based on the written material. She cannot now complain about the process that she consented to.

[38] Finally, in making the costs award against Ms. Masgras, the application judge considered the appropriate principles. There is no foundation for any challenge to his conclusion that Ms. Masgras' conduct warranted a costs award against her personally. In fact, the application judge was more than generous towards Ms. Masgras, given her conduct, in fixing the costs in the amounts that he did. Ms. Masgras was entirely responsible for all of the costs incurred by Dr. Hinkewich and the Hospital. In my view, an order awarding them costs on a full indemnity basis would have been justified.

[39] Nevertheless, Ms. Masgras was not deterred. Rather than learning her lesson, she continued with the main appeal. As should be apparent from the above, there was no merit to the main appeal as there is no merit to the costs appeal. I would dismiss Ms. Masgras' appeal of the costs award.

[40] The respondents are entitled to their costs of the appeals on a substantial indemnity basis given the conduct of Ms. Masgras. Ms. Masgras will personally pay the costs of the Hospital and Dr. Hinkewich. I would fix the costs of the Hospital at $19,885.74 and the costs of Dr. Hinkewich at $11,642.00. Both amounts are inclusive of disbursements and HST.

Released: "RGJ" MAR 14 2018

"I.V.B. Nordheimer J.A."
"I agree. R.G. Juriansz J.A."
"I agree. B.W. Miller J.A."

TAB 5

Law Society of Alberta

Code of Conduct

April 26, 2018

Conflict with Lawyer's Own Interests

3.4-12 A lawyer must not act when there is a conflict of interest between lawyer and client, unless the client consents and it is in the client's best interests that the lawyer act.

Commentary

[1] If a lawyer's own loyalty, interest, or belief would impair the lawyer's ability to carry out a representation, the lawyer may not act. If the conflicting interest of the lawyer does not impair the lawyer's objectivity, the lawyer should nonetheless decline to act unless the representation is in the client's best interests. In making this judgment, the lawyer must evaluate all relevant factors. It is insufficient to rely on the client's assessment. The client must consent to the representation after disclosure by the lawyer of the nature of the conflicting interest and the advantages of independent representation. The lawyer has the onus to establish disclosure to and consent from the client. It is therefore advisable that these matters be confirmed in writing.

[2] In addition, a lawyer's professional objectivity in a matter may be threatened or destroyed by circumstances personal to the lawyer. A conflict may arise due to a family or other close relationship, an outside activity, or a strong belief or viewpoint. Another example is a mental state created or exacerbated by a particular representation, such as feelings of enmity towards a colleague acting for an opposing party. A lawyer's objectivity may also be affected when the lawyer unduly favours the client's position, since the result may be overly optimistic advice or an unrealistic recommendation.

[3] In all of these circumstances, a lawyer must recognize when it is not in the client's best interests to be represented by the lawyer.

Doing Business with a Client

3.4-13 A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction.

Commentary

[1] This rule applies to any transaction with a client, including:

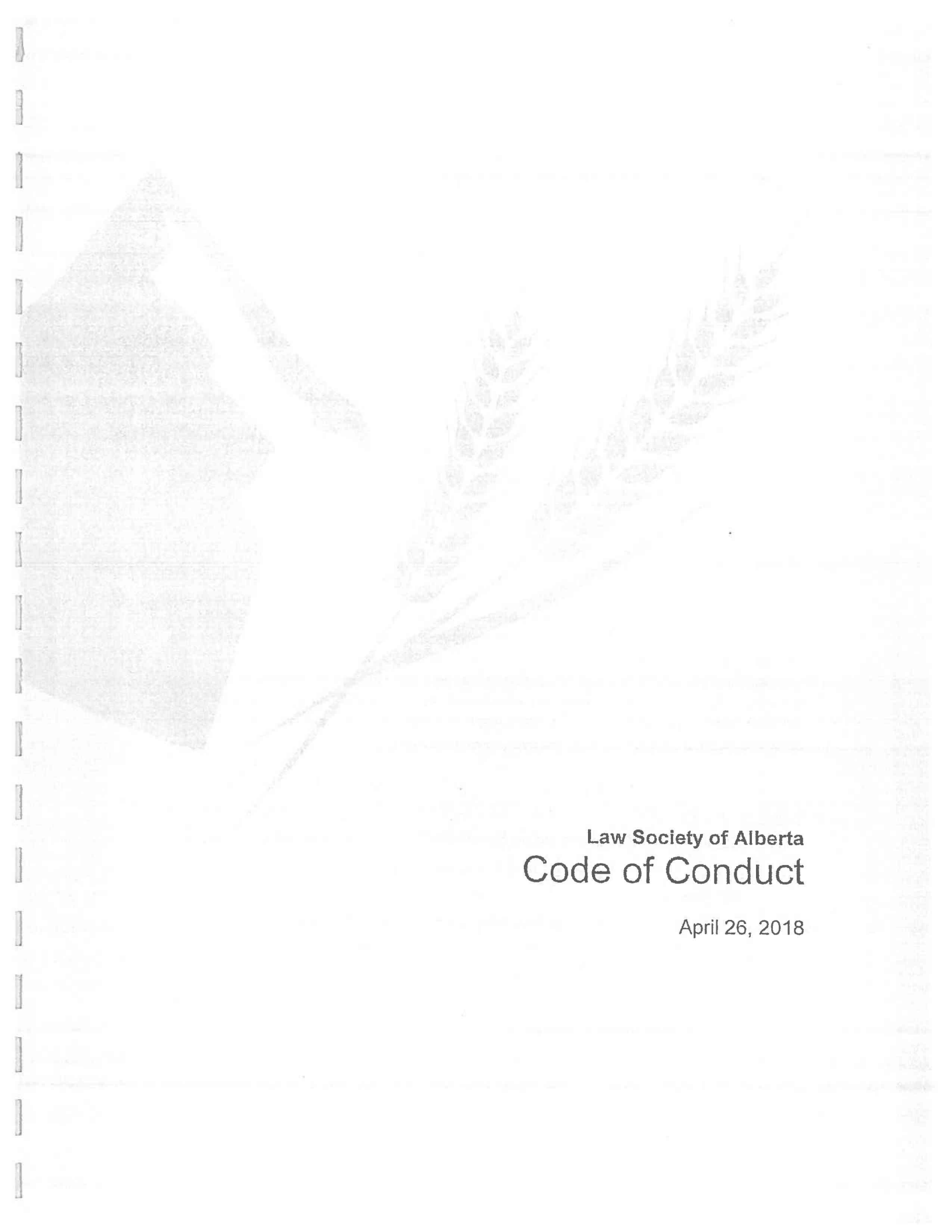
(a) lending or borrowing money (see related commentary below);

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift (see related commentary below);

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

TAB 6



Law Society of Alberta

Code of Conduct

April 26, 2018

Chapter 1 – Interpretation and Definitions

1.1 Definitions

1.1-1 In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary

[1] A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person;

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic operated by Legal Aid Alberta;

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

(f) from the same premises, while expressly or impliedly holding themselves out to be practising law together and indicating a commonality of practice through physical layout of office space, firm name, letterhead, signage and business cards, reception and telephone-answering services, or the sharing of office systems and support staff;

(g) from the same premises and indicating that their practices are independent.

"lawyer" means an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at-law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta. A reference to "lawyer" includes the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context;

"limited scope retainer" means an agreement for the provision of legal services for part, but not all, of a client's legal matter;

"Society" means the Law Society of Alberta;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

TAB 7

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 85/2016

VOLUME ONE

Published January, 2018

(2) If a self-represented litigant retains a lawyer for a particular purpose, the litigant must attend the application or proceeding for which the lawyer is retained unless the Court otherwise permits.

Change in lawyer of record or self-representation

2.28(1) A party may change the party's lawyer of record or may self-represent by

(a) serving a notice of the change in Form 3 on every other party and on the lawyer or former lawyer of record, and

(b) filing an affidavit of service of the notice.

(2) A self-represented litigant who retains a lawyer to act on the litigant's behalf must serve on every other party a notice to that effect naming the lawyer of record.

(3) The notice must include an address for service.

(4) The notice is not required to be served on

(a) a party noted in default, or

(b) a party against whom default judgment has been entered.

Withdrawal of lawyer of record

2.29(1) Subject to rule 2.31 *[Withdrawal after trial date scheduled]*, a lawyer or firm of lawyers may withdraw as lawyer of record by

(a) serving on the client and each of the other parties a notice of withdrawal in Form 4 that states

(i) the client's last known address, and

(ii) that on the expiry of 10 days after the date on which the affidavit of service of the notice is filed, the withdrawing lawyer will no longer be the lawyer of record,

and

(b) filing an affidavit of service of the notice.

(2) The withdrawal of the lawyer of record takes effect 10 days after the affidavit of service of the notice is filed.

(3) The address of the party stated in the notice of withdrawal is the party's address for service after the lawyer of record withdraws unless another address for service is provided or the Court otherwise orders.

(4) The Court may on application order that a lawyer need not disclose the last known address of a client and instead may provide an alternative address for service for the client in a notice of withdrawal served under this rule where the Court considers it necessary to protect the safety and well-being of the client.

(5) An application under subrule (4) may be made without notice.

TAB 8

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 85/2016

VOLUME ONE

Published January, 2018

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

(2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2
Recoverable Costs of Litigation

Subdivision 1
General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

Information note

Party is defined in the Appendix *[Definitions]* as a party to an action. There are other Court proceedings that are not "actions" and so the definition of *party* is expanded to allow a costs award against anyone participating in an application or proceeding that is not an action started by statement of claim or originating application.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31 *[Court-ordered costs award]*,

(b) the assessment officer's discretion under rule 10.41 *[Assessment officer's decision]*,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37 *[Appointment for assessment]*.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33 *[Court considerations in making a costs award]*, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)