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").

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[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);

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[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.

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[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.

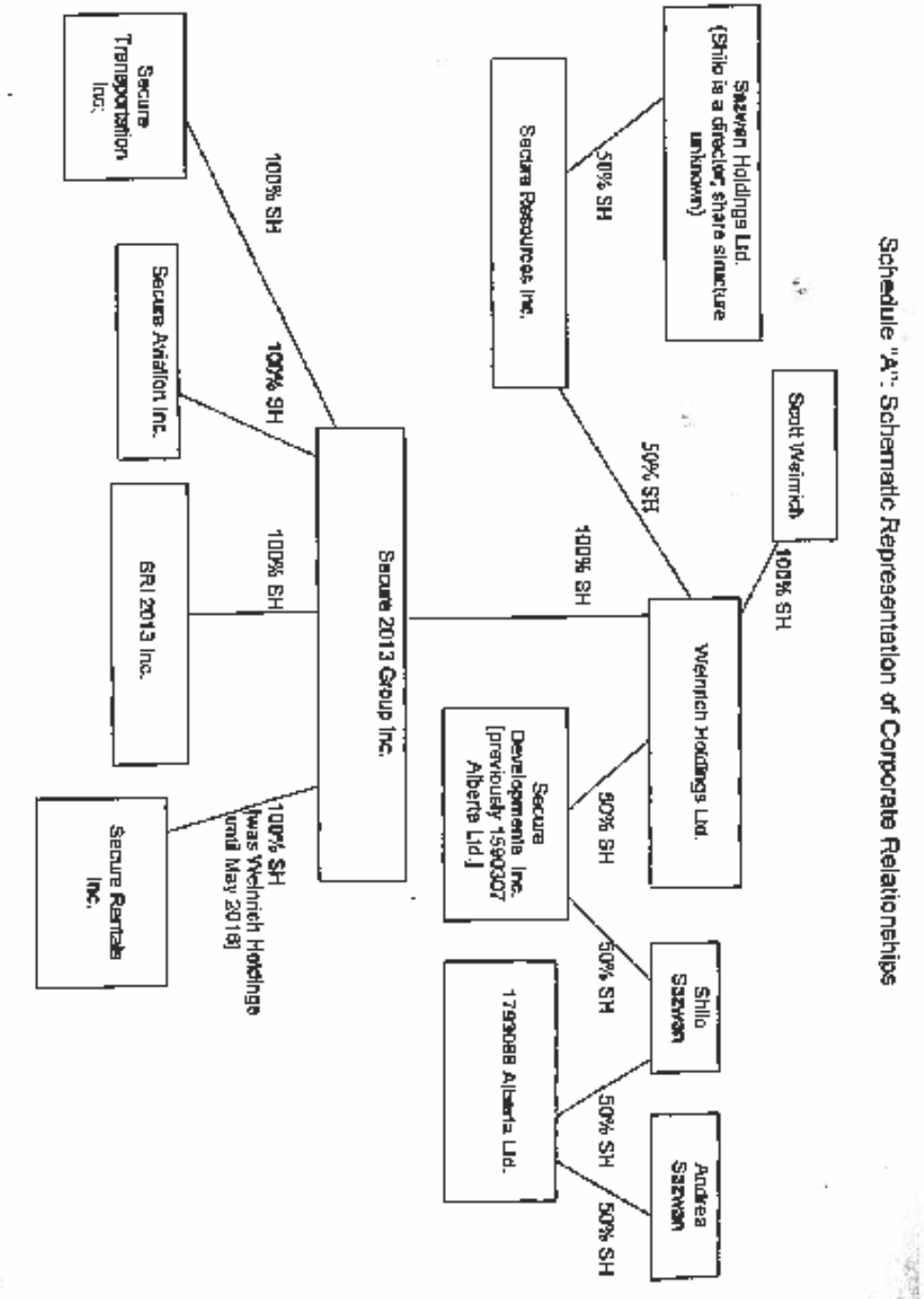
I concur:

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