# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Su v. Atom Holdings,*
2024 BCCA 386

Date: 20241113
Dockets: CA50108; CA50109

Docket: CA50108

Between:

**Weiyi Su also known as Victor Su**

Appellant
(Defendant)

And

**Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)**

Respondent
(Plaintiff)

- and -

Docket: CA50109

Between:

**Weiyi Su also known as Victor Su**

Appellant
(Respondent)

And

**Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)**

Respondent
(Respondent)

And

**George Kimberley Leck, in his capacity as joint liquidator of Atom Holdings**

Respondent
(Petitioner)

**FILES SEALED (IN PART)**

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 1, 2024 (*Atom Holdings (Re)*, 2024 BCSC 1397, Vancouver Dockets S242230; S242143).

## Oral Reasons for Judgment

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|---|---|
| Counsel for the Appellant: | D.R. McGowan<br>S.M. Gallagher |
| Counsel for the Respondent, Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision): | C.J. Ramsay<br>C.N. Fox |
| Place and Date of Hearing: | Vancouver, British Columbia<br>November 6, 2024 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>November 13, 2024 |

***Summary:***

*The appellant appeals orders made by the chambers judge in a civil action and a bankruptcy proceeding refusing to set aside a Mareva injunction and an order under s. 272 of the Bankruptcy and Insolvency Act. The orders were made ex parte. The appellant says the judge erred in failing to set the orders aside despite finding that the facts were not fully disclosed by the respondent. The appellant applies for various orders to facilitate the appeals. Held: The appellant's application for an extension of time and leave to appeal the s. 272 order is granted. The liquidators are enjoined and restrained from using information gathered in the execution of the s. 272 order in other proceedings pending the determination of the appeal. The two appeals are to be expedited. The appellant's application for a partial sealing order is granted.*



**HORSMAN J.A.**:

## Background

[1] These applications arise out of the collapse of the Atom Asset Exchange ("AAX"), a cryptocurrency exchange that was operated through the respondent Atom Holdings. Atom Holdings was based in the Cayman Islands. It controlled companies in various worldwide jurisdictions ("AAX Group").

[2] The appellant, Mr. Su, was a director of companies in the AAX Group. The respondents allege that he has diverted millions of dollars in cryptocurrencies invested in AAX for his personal use.

[3] Atom Holdings is now in liquidation proceedings before the Grand Court of the Cayman Islands (the "Cayman Proceeding"). On March 9, 2023, an order was made in the Cayman Proceeding appointing official liquidators of Atom Holdings with authority to recover assets of the AAX Group (the "Liquidators").

[4] The Liquidators commenced a petition proceeding in the Supreme Court of British Columbia under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] (the "Bankruptcy Proceeding"). On April 4, 2024, counsel for the Liquidators appeared *ex parte* before the chambers judge in the Bankruptcy Proceeding. The chambers judge granted the relief sought by the Liquidators, namely:

(a) a recognition order pursuant to Part XIII of the *BIA* recognizing the Cayman Proceeding as the foreign main proceeding in respect of the respondent; and

(b) an order pursuant to s. 272 of the *BIA* for the search of the appellant's residence and the seizure, examination, and preservation of evidence and digital assets suspected of being diverted from the respondent.



[5] In the court below, the chambers judge referred to the order issued under s. 272 of the *BIA* as the "*Anton Piller* Order". While the order is substantially similar to an *Anton Piller* order, it is important to be clear in this case about the jurisdictional basis for the order. I will, therefore, refer to it as the "Section 272 Order".

[6] On April 5, 2024, the Section 272 Order was carried out.

[7] On April 8, 2024, counsel for the Liquidators again appeared *ex parte* to obtain orders for leave to commence a civil action against the appellant (the "Civil Action"), and for a *Mareva* injunction to be issued in that action against his property (the "*Mareva* Injunction"). At this hearing, the respondents supplemented their case with evidence discovered during and after the execution of the Section 272 Order. The chambers judge also granted this application, and issued a *Mareva* Injunction.

[8] The appellant subsequently retained counsel to apply to set aside the Section 272 Order and the *Mareva* Injunction. The respondents applied to extend the *Mareva* Injunction. The applications were heard together on June 20–21, 2024.

## The chambers judgment: 2024 BCSC 1397 ("RFJ")

[9] Before the chambers judge, the appellant argued that the Liquidators failed in their obligation of full and frank disclosure at the two *ex parte* hearings by not disclosing the full transcript of an interview with Mr. Lin, the founder of the AAX Group, as well as the investigatory techniques the interviewer, Mr. Devost, used on Mr. Lin. The appellant argued that Mr. Devost used extortionate and dishonest

means to coerce Mr. Lin to attend the interview, and then tricked Mr. Lin during the interview into providing inaccurate information about the appellant. The Liquidators relied on Mr. Devost's interview with Mr. Lin to show the appellant's important role in the AAX Group.



[10] The judge found that it was "a close call", as "it would have been prudent and preferable" for the applicants to have provided the entire transcript of Mr. Lin's interview, and his communications with Mr. Devost, in the *ex parte* hearings, and counsel for the Liquidators should have obtained and reviewed the transcript of the Lin interview: RFJ at paras. 48–49. However, the judge noted that any imperfections in the Liquidator's presentation of Mr. Lin's evidence "were not material facts, in the sense of being necessary for consideration and the outcome" because the Court would have issued the orders even without Mr. Lin's evidence: RFJ at para. 47. He also found that counsel's failure to disclose the above facts "represent[ed] inadvertent rather than deliberate or bad faith non-disclosure": RFJ at para. 49.

[11] In relation to Mr. Devost's investigatory techniques, the judge cited statements from cases in the criminal law context recognizing that investigators may resort to "tricks, traps, and techniques that dip below beatific standards of honesty or fairness": RFJ at para. 52. He found that these statements apply with more force in a civil proceeding, particularly in the context of applications for freezing and *Anton Piller* orders. The judge reasoned that "[e]xcessive judicial pearl-clutching at how the sausage gets made and how evidence is gathered" would undermine the ability of parties to gather evidence in cases of suspected fraud. He found that while Mr. Devost's techniques "skate close to, and indeed, at times, may skate past, the lines of good sportsmanship and honesty" they do not justify setting aside the orders, "especially given the seriousness of the allegations and the strength of the evidence": RFJ at para. 55.

[12] The judge concluded that "in any case, the Court would confirm and issue afresh the orders on this *inter partes* return hearing": RFJ at para. 90. He noted that "[t]he strong *prima facie* case found on the evidence as it stood in April has been

strengthened considerably" by the post-order evidence gathered on the execution of the Section 272 Order. The judge found the case was also strengthened by the appellant's obfuscatory actions, non-compliance with court orders, and failure to provide significant evidence addressing the allegations against him: RFJ at paras. 91–95.

[13] On appeal, the appellant alleges the judge erred by making a number of inconsistent or inappropriate factual findings, as well as by applying the incorrect legal test regarding material non-disclosure at an *ex parte* proceeding.

## The issues

[14] The orders that are the subject of this appeal were pronounced on August 1, 2024. In relevant terms, the orders:

a) dismissed the appellant's application to set aside the Section 272 Order in the Bankruptcy Proceeding; and

b) dismissed the appellant's application to set aside the *Mareva* Injunction in the Civil Action, and granted the respondent's application to extend the *Mareva* Injunction.

(the "Set Aside Orders")

[15] On August 23, 2024, counsel for the appellant wrote to counsel for the respondent to advise of the appellant's intention to appeal the Set Aside Orders. Notices of appeal in the two proceedings were filed and served on August 30, 2024. This was within the 30-day time limit under Rule 6(2) of the *Court of Appeal Rules*, B.C. Reg. 120/2022. However, the respondent takes the position that the appeal of the order of the chambers judge in the Bankruptcy Proceeding is governed by the 10-day time limit for appeal in s. 31 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 [*Bankruptcy Rules*]. If the respondent is correct, then the appellant would require orders extending the time to appeal and granting leave to appeal the Section 272 Order.

[16] For clarity, the respondent does not argue that the *Mareva* Injunction was issued pursuant to the *BIA*, or that the orders made by the judge in the Civil Action are subject to the *Bankruptcy Rules*. The parties agree that the order dismissing the appellant's application to set aside the *Mareva* Injunction in the Civil Action is appealable as of right: *Pixhug Media Inc. v. Steeves*, 2016 BCCA 433 (Chambers) at paras. 38–43 [*Pixhug Media*]. It is further agreed that the appeal in the Civil Action is governed by the 30-day time limit in Rule 6(2) of the *Court of Appeal Rules*, and that the appeal was filed in time.

[17] The appellant contends that none of the orders under appeal are subject to the *Bankruptcy Rules*. Thus, he says, he does not need an extension of time or leave to appeal the judge's refusal to set aside the Section 272 Order. Alternatively, the appellant applies for an extension of time and leave to appeal. He also seeks a limited stay of the Section 272 Order pending the determination of the appeals in the form of an order enjoining the Liquidators from using the evidence they obtained in proceedings other than the Bankruptcy Proceeding. Finally, he seeks an order that the Court of Appeal file be sealed in part.

[18] Accordingly, these applications raise the following issues:

a) is the appeal in the Bankruptcy Proceeding subject to the appeal provisions in the *BIA* and the time limit for appeal in s. 31 of the *Bankruptcy Rules*?

b) if so, should the Court grant the appellant's applications for orders extending the time to appeal and granting leave to appeal?

c) if leave to appeal is granted, should an order staying the Section 272 Order be granted pending the determination of the appeal, and if so what form should the order take?

d) should a sealing order be issued?

## Analysis

### The first issue: is the appeal in the Bankruptcy Proceeding subject to the *BIA* and Bankruptcy Rules?

#### *Legal framework*

[19] Section 183(1) of the *BIA* vests in the BC Supreme Court "such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act". Section 183(2) of the *BIA* confers appellate jurisdiction on this Court to hear and determine appeals from the courts vested with original jurisdiction. In relevant part, s. 183(2) provides:

> …the courts of appeal throughout Canada, within their respective jurisdiction, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

[20] Section 193(a)–(d) of the *BIA* lists the orders that are appealable as of right. For any order not falling within the prescribed categories, leave to appeal is required. In the present case, the appellant acknowledges that if the *BIA* governs his appeal of the judge's dismissal of his application to set aside the Section 272 Order, then he requires leave to appeal.

[21] Procedure in a bankruptcy proceeding is governed by the *Bankruptcy Rules*. Rule 31(1) of the *Bankruptcy Rules* provides:

> An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

[22] The combined effect of s. 15 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 and Rule 6(2) of the *Court of Appeal Rules* is that a person must generally commence an appeal to this Court within 30 days. However, this is subject to the exception that where a time limit for appeal is specified in another enactment, that enactment governs. Where the order under appeal is granted by a judge in reliance on the

court's jurisdiction under the *BIA*, then the appeal falls within s. 183(2) of the *BIA* and is governed by the 10-day time limit for commencing an appeal under Rule 31(1) of the *Bankruptcy Rules*: *Podollan v. Trustee of Estate of David Podollan*, 2024 BCCA 173 (Chambers) at para. 39.



***Discussion***

[23] The appellant acknowledges that the Section 272 Order was granted under the *BIA*. However, he says that the jurisdiction to set aside the order is found in either the equitable jurisdiction of the court or Rule 8-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. The appellant relies on *Pixhug Media* in support of the distinction he draws between the jurisdictional basis for the issuance of the Section 272 Order, and the jurisdictional basis to set it aside.

[24] I am not persuaded that *Pixhug Media* is relevant to the issue of whether the 10-day time limit for appeal in the *Bankruptcy Rules* applies in this case. *Pixhug Media* did not involve a question of jurisdiction under the *BIA*. Rather, the issue was whether an appellant required leave to appeal an order setting aside an *ex parte* order granting a *Mareva* injunction. Justice Daphne Smith held that the jurisdiction to set aside an *ex parte* order was not found in Part 10 of the *SCCR*, but rather fell under either the equitable jurisdiction of the court or Part 8 of the *SCCR*, and specifically Rule 8-5(8). It was, therefore, not a limited appeal order.

[25] The parties agree, based on *Pixhug Media*, that the appellant does not require leave to appeal the judge's order refusing to set aside the *Mareva* Injunction in the Civil Action. However, *Pixhug Media* does not answer the question of whether the judge's refusal to set aside the Section 272 Order was authorized under the *BIA*. To the extent that the *SCCR* may provide what the appellant referred to as "overlapping jurisdiction", the provisions of the *BIA* would take precedence as a matter of federal paramountcy: *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2019 BCCA 368 (Chambers) at para. 26.

[26] In my view, there is no doubt that the *BIA* provided the court with jurisdiction to set aside the Section 272 Order. Section 273 of the *BIA* provides that an order

under Part XIII may be made on "any terms and conditions that the court considers appropriate". It was a term of the Section 272 Order that anyone affected by the order could apply to the court to vary or discharge it. If more authority was required, s. 187(5) of the *BIA* provides that every court "may review, rescind or vary any order made by it under its bankruptcy jurisdiction". The judge's order was made in a bankruptcy proceeding, in accordance with powers granted under the *BIA*.

[27] Accordingly, I conclude that the judge's order refusing to set aside the Section 272 Order was made pursuant to the *BIA*, and was subject to the 10-day time limit for appeal in Rule 31(1) of the *Bankruptcy Rules*.

**The second issue: The applications for an extension of time and leave to appeal the Section 272 Order**

***Extension of time***

[28] It is common ground that this Court has the jurisdiction to extend the time to appeal under Rule 31(1) of the *Bankruptcy Rules*, which states that the appeal must be commenced within 10 days "or within such further time as a judge of the court of appeal stipulates". It is also agreed that the question of whether an extension of time should be granted is governed by the well-known criteria set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256, 1987 CanLII 2608 (C.A.) at para. 20:

a) Was there a *bona fide* intention to appeal?

b) When were the respondents informed of this intention?

c) Would the respondents be unduly prejudiced by an extension?

d) Is their merit to the appeal?

e) Is it in the interests of justice that an extension be granted?

[29] The first three criteria clearly favour the granting of an extension of time to appeal. The orders were pronounced on August 1, 2024. The appellant advised the respondents of his intention to appeal on August 23, and the notices of appeal were filed on August 30. The delay has been explained as due to the inadvertent error of appellant's counsel in assuming that the 30-day time limit for appeal under the *Court*

*of Appeal Rules* would apply to both orders. Counsel moved expeditiously to apply for an extension of time once the error was identified. The short delay does not appear to have caused any significant prejudice to the respondents, particularly given that the appellant is not seeking to stay the operation of the Section 272 Order within the Bankruptcy Proceeding.

[30] The focus of the argument on these applications was on the criteria of the merits of the appeal and the interests of justice.

***The merits***

[31] Regarding the merits criterion, the question is whether the appeal is "doomed to fail" or "if it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 (Chambers) at para. 5, citing *Clock Holdings Ltd. v. Braich*, 2009 BCCA 269 (Chambers) at para. 31.

[32] The respondents emphasize that the judge's orders were discretionary, and the appellant does not identify any errors in his articulation of the applicable legal principles. They further emphasize the judge's conclusion that he would, in any event, confirm and issue afresh the orders based on the evidence "as originally presented and as expanded since the original hearings": RFJ at para. 90. Thus, they say, even if the appellant was successful in establishing the judge erred in his assessment of the significance of non-disclosure, this would not result in the Section 272 Order being set aside.

[33] The appellant identifies various errors that he says the judge committed in refusing to set aside the Section 272 Order. For the purpose of these applications, it is sufficient to outline three alleged errors that the appellant focused on at the hearing of the applications before this Court:

a) The judge applied the incorrect test in assessing the materiality of the non-disclosure by stating that the omitted facts must be "necessary for the consideration of and the outcome" or "critical to the decision" in order to be material: RFJ at paras. 47, 88. The appellant says this is too high a

standard. He cites *Evans v. Umbrella Capital LLC*, 2004 BCCA 149, at para. 33, for the proposition that a material fact is one that "may or might" affect the outcome.

b) In assessing the significance of the respondents' failure to disclose Mr. Devost's investigative techniques, the judge erred in treating the issue as solely a matter of relevance and admissibility. The question was not simply whether the techniques should result in the exclusion of evidence, but rather whether the trickery and pressure tactics employed by Mr. Devost, which were not disclosed on the *ex parte* application, might have affected the court's assessment of the reliability of the information he obtained from Mr. Lin and its weight.

c) In concluding that he would, in any event, issue the orders afresh based on evidence that was, at least in part, obtained through the execution of the Section 272 Order, the judge engaged in improper "bootstrapping". If the Section 272 Order should not have been issued due to material non-disclosure then, the appellant argues, it was not open to the judge to rely on evidence obtained through the execution of the order to issue it afresh.

[34] The respondents counter each of these points. They say that the judge cited and applied the correct test for materiality, and the appellant's real complaint is with the judge's factual finding that the undisclosed facts were not material. Similarly, the respondents say that the appellant's arguments about Mr. Devost's evidence concern the judge's assessment of the evidence, and the weight to be given to it, which was within the purview of the judge. As to the "bootstrapping" argument, the respondents say that it was open to the judge to consider the entire evidentiary record in determining whether he would issue the orders afresh, including evidence obtained through the execution of the Section 272 Order. The respondents rely on the decision of the English Court of Appeal in *WEA Records Ltd. v. Vision Channel 4 et al.*, [1983] 2 All E.R. 589, [1983] 1 W.L.R. 721.

[35] While it may be that the respondents have strong arguments against the appellant's proposed grounds of appeal, I cannot say that the appeal of the Section 272 Order is doomed to fail.

[36] The appellant's first argument raises a question of law about legal test for material non-disclosure. The proposition in *Evans* that a material fact is one that "may or might" affect the outcome has been applied in other decisions of this Court as the correct test for determining whether a fact is material for the purpose of disclosure in an *ex parte* application: *R. v. Montgomery*, 2016 BCCA 379 at para. 98; *Politeknik Metal San ve Tic A.Ş. v. AAE Holdings Ltd.*, 2015 BCCA 318 at para. 33. It is at least arguable that the judge's finding that the non-disclosed facts were not material "in the sense of being necessary" is inconsistent with the authorities: RFJ at para. 47.

[37] The appellant's second argument, as I understand it, does not take issue with the judge's weighing of the evidence, but rather with his alleged failure to consider and address how the weight of the evidence regarding Mr. Lin's implication of the appellant might have been affected by the disclosure of Mr. Devost's investigative techniques. In other words, the appellant alleges an error in principle by the judge in his treatment of the evidence.

[38] As to the appellant's third argument, I was not referred to any authority from the courts of this Province that directly addresses the question of whether a judge can consider the "fruits of the search" in deciding whether to issue an *Anton Piller*-like order afresh where there has been material non-disclosure on the original application. *WEA Records* does not appear to address this scenario: see the judgment of Dunn L.J. at 595.

[39] As the appellant's grounds of appeal are arguable, it cannot be said that the appeal is "doomed to fail". The appellant has met the low threshold that applies on this application of demonstrating there is some arguable merit to the appeal.

***Interests of justice***

[40] The “interests of justice” encompasses the other criteria and is the decisive one: *Podollan* at para. 67, citing *Davies*.

[41] In addition to the matters I have already reviewed, there is a further consideration at the interests of justice stage in the context of this appeal. The appellant has appealed the judge’s refusal to set aside the *Mareva* Injunction as of right. The *Mareva* Injunction and the Section 272 Order are intertwined. The judge did not distinguish between the two orders in his analysis, and the parties do not distinguish between them in their arguments on these applications. The same arguments regarding material non-disclosure and reliance on Mr. Devost’s evidence apply to both orders. The appellant further argues that the judge erred in relying on the “fruits of search” to justify his alternative conclusion that he would issue the orders afresh. It is difficult to see how the appellant’s arguments on why the *Mareva* Injunction should be set aside could fairly be adjudicated without the Court also considering the appellant’s various challenges to the Section 272 Order. This raises the prospect that, if the appellant succeeds on his appeal of the *Mareva* Injunction order, the legitimacy of the Section 272 Order would be undermined while the order remained in force. This, in turn, would undermine the integrity of the justice system.

[42] In summary, then, this is a case in which there was a short delay in commencing the appeal, no resulting prejudice to the respondents from the delay, meritorious grounds of appeal, and interests of justice considerations arising from the interconnected orders. In all the circumstances, I conclude that an extension of time to appeal should be granted.

***Leave to appeal***

[43] Particular considerations arise where an application for leave to appeal is made in association with an appeal brought as of right. In that event, the court should proceed by asking “whether the intended appeal is so intimately linked with the appeal that proceeds as of right that the interests of justice favour the two matters proceeding together”: *Hiebert v. Miller*, 2018 BCCA 216 at para. 30.

[44] In light of the interconnected nature of the legal and factual issues on the Section 272 Order appeal and the *Mareva* Injunction appeal, the respondents' sole argument in opposition to the granting of leave is that the appeal is frivolous. If I conclude otherwise, then the respondents acknowledge that leave should be granted.

[45] I have already explained my conclusion that the appellant's appeal raises arguable issues and is not doomed to fail. It follows that I reject the respondents' argument that the appeal is frivolous. I have also explained the connection between the Section 272 Order appeal, which requires leave, and the *Mareva* Injunction appeal, which is brought as of right. In these circumstances, I consider it in the interests of justice to grant leave to appeal.

[46] The respondents submit that in the event I grant the appellant's application for an extension of time and leave to appeal, the appeals of the Set Aside Orders should be expedited pursuant to Rule 31 of the *Court of Appeal Rules*. I agree, and will direct that the appeals be expedited.

**The third issue: the stay of the Section 272 Order**

[47] In light of the appellant's clarification at the hearing of these applications that he was not seeking to stay the *Mareva* Injunction pending the determination of the appeal, no controversy remains over the question of a stay. As counsel for the respondents points out, s. 195 of the *BIA* provides that on the filing of an appeal, all proceedings from an order or judgment are automatically stayed until the appeal is determined. There is a potentially difficult question as to how the automatic stay operates when the order under appeal is an order refusing to set aside a Section 272 Order. I am relieved of the need to explore this question by the parties' agreement on the appropriate term of the stay order in this case. The appellant seeks an order enjoining and restraining the Liquidators from using information obtained through the execution of the Section 272 Order in proceedings other than the Bankruptcy Proceeding pending the determination of the appeal. The respondents do not oppose this form of order.

[48] Accordingly, I will grant a stay on the terms sought.

**The fourth issue: the sealing order**

[49] The final order sought by the appellant is an order in both the Bankruptcy Proceeding and the Civil Action to seal certain portions of the appeal file. The appellant's concern, in particular, is with respect to material that discloses his personal information, and the personal information of his spouse, including their residential address, the layout of their house, their family circumstances, and daily routines. The appellant has provided evidence to demonstrate that he has been the target of threats of physical violence, including death threats, due to the events around the collapse of AAX. He says a sealing order is necessary to protect his physical safety, as well as the physical safety of his family.

[50] A sealing order was issued in the Supreme Court over the entire court file. In this Court, the Registrar issued a temporary sealing order over the Court of Appeal file pending the hearing of this application. At the hearing of this application, the appellant acknowledged that his concerns relate to a relatively small set of material within the court file, and that a partial sealing order would be sufficient to address the safety concerns.

[51] The respondents take no position on this application.

[52] A justice has jurisdiction to order that a file be sealed in whole or in part, pursuant to s. 30 of the *Court of Appeal Act*: *R. v. Klos*, 2022 BCCA 105 at para. 6, citing s. 10(2) of the former *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

[53] Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 37. The party seeking a sealing order must show that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

*Sherman Estate* at para. 38.

[54] I am persuaded on the material before me on this application that a partial sealing order is justified. The appellant's concerns are not simply about intrusion on his privacy, as in *Sherman Estate*, but rather about his personal safety, and the safety of his family, in light of the threats that he has received. Physical safety is an important public interest: *Sherman Estate* at para. 72. In addition, there are no reasonable alternatives to a partial sealing order to address the safety risk.

[55] The benefits of a partial sealing order outweigh its negative effects. Under the terms of the order I will make, a redacted appeal record will remain publicly accessible. As I have indicated, the portions of the record that the appellant seeks to have sealed involves a limited amount of material, consisting of personal information about the appellant and his family. During the course of the hearing, counsel for the appellant reviewed with me all of the redactions that were sought. The proposed redactions are limited, and targeted to the safety concerns that the appellant has demonstrated. The public does not have a strong interest in accessing this material. The limited redactions will not impede the public in understanding the proceedings and the issues on appeal.

[56] Therefore, I consider it appropriate to replace the Registrar's temporary sealing order with a partial sealing order on the terms sought by the appellant.

## Disposition

[57] In summary, I make the following orders:

1) The appellant's application for an extension of time to appeal the judge's set aside order in the Bankruptcy Proceeding is granted;

2) The appellant's application for leave to appeal the set aside order in the Bankruptcy Proceeding is granted;

3) The Liquidators are enjoined and restrained from using information obtained through the execution of the Section 272 Order in proceedings other than the Bankruptcy Proceeding pending the determination of the appeal;

4) The appeals of the Set Aside Orders in the Bankruptcy Proceeding and the Civil Action are to be expedited;

5) The parties shall arrange a case management conference before the Registrar to set timelines for the appeals;

6) The following portions of pleadings and evidence filed in both appeals will be permanently sealed:

    a) Paragraphs 8, 59(d) and 70–72 of the Petition filed in the Bankruptcy Proceeding;

    b) Paragraphs 9 and 21 of the notice of civil claim filed in the Civil Action;

    c) Paragraph 1 of Part 1 of the Notice of Application filed by the appellant on April 28, 2024 in the Bankruptcy Proceeding;

    d) Paragraph 2 of Part 1 of the Notice of Application filed by the appellant on May 14, 2024 in the Civil Action;

    e) Paragraph 4 of the Affidavit #1 of George Kimberley Leck, sworn March 28, 2024 in the Bankruptcy Proceeding;

    f) Paragraphs 10, 51, and 63–66, and Exhibits “L”, “M”, and “N” of the Affidavit #1 of Matthew Devost, sworn on April 3, 2024 in the Bankruptcy Proceeding;

g) Paragraphs 2, 5, and 7–9, and Exhibits “A” and “B” of the Affidavit #1 of the appellant, sworn on April 18, 2024 in the Bankruptcy Proceeding; and

h) Paragraphs 3–6 and 32, and Exhibit “A” of the Affidavit #1 of Lin Kong, sworn on April 18, 2024 in the Bankruptcy Proceeding.

(collectively the “Sealed Records”)

7) If either party files material with the Court in the appeals that contains copies of the Sealed Records, that party shall file:

a) unredacted copies of the material for the use of the Court and other parties; and

b) redacted copies of the material, with any portion of the Sealed Records redacted, for the use of the public.

8) The appellant’s application book on these applications shall remain permanently sealed (for the purpose of clarification, the appellant does not need to file a redacted version of the application book); and

9) Other than as set out in this order, the Registrar’s temporary sealing order over the Court file is lifted as of the date of this order.

“The Honourable Madam Justice Horsman”