

Federal Court



Cour fédérale

**Date: 20190429**

**Docket: T-227-17**

**Citation: 2019 FC 539**

**BETWEEN:**

**DTECHS EPM LTD.**

**Plaintiff/  
Defendant by Counterclaim**

**and**

**BRITISH COLUMBIA HYDRO AND POWER  
AUTHORITY AND AWESENSE WIRELESS  
INC.**

**Defendants/  
Plaintiffs by Counterclaim**

**REASONS FOR ORDER**

**LAFRENIÈRE J.**

I. Overview

[1] This is a motion brought by the Defendant, British Columbia Hydro and Power Authority [BC Hydro], for a “protective order” providing for the protection and maintenance of claims of confidentiality in certain materials to be disclosed and exchanged between the parties in the context of a patent infringement action brought by the Plaintiff, dTechs EPM Ltd. [dTechs] against BC Hydro and Awesense Wireless Inc. [Awesense].

[2] The motion was originally brought in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [the FCR]; however, the case management judge, Prothonotary Mandy Ayles, directed that it be heard orally to allow the parties to consider and address the implications of a recent decision of this Court in *Canadian National Railway Company v BNSF Railway Company*, 2019 FC 281 [CNR].

[3] In *CNR*, both parties moved on consent for a protective order defining various restrictions on the handling of confidential documents that were to be disclosed to the other side. The motions judge dismissed the motion because he considered himself bound by the test set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] for a sealing order, or a “confidentiality order” as it is known in this Court. The said test includes the requirement that “such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk”. The motions judge concluded that the test was not met by the parties because the implied undertaking rule, supplemented by the terms agreed to by the parties as set out in their draft consent order, adequately addressed the risk to the parties’ confidential information. He therefore found that the protective order requested was not necessary.

[4] BC Hydro submits that the present case can be distinguished from the facts in *CNR* given that dTechs has refused to enter into a litigation confidentiality and non-disclosure agreement to protect their confidential information and documents [protective agreement]. It maintains that, in any event, it has satisfied the test in *Sierra Club*.

[5] Although I agree with BC Hydro that the issuance of a protective order is justified on the facts of this case, as explained further below, I disagree that a protective order is subject to the stringent criteria set in *Sierra Club* for a confidentiality order. In my view, this finding is based on an incorrect premise that discovery is intrinsically public, an assumption that was used to justify imposing open court considerations to matters that have little, if anything, to do with the public interest.

## II. Facts and Background

[6] In support of the motion, BC Hydro filed the affidavit of Mr. John Millard, Manager of Customer Analytics, Revenue and Risk Management for BC Hydro, the affidavit of Mr. Mischa Steiner-Jovic, the founder and chief executive officer of Awesense, and the affidavit of Ms. Susan Burkhardt, a law clerk employed by the law firm representing BC Hydro.

[7] BC Hydro ably sets out in its written representations a summary of the evidence of the deponents, which I repeat here only briefly.

### A. *Facts*

[8] By Statement of Claim dated February 16, 2017, dTechs brought the underlying action against BC Hydro and Awesense for infringement of Canadian Patent No. 2,549,087 [the 087 Patent], titled “Electrical Profile Monitoring System for Detection of Atypical Consumption”. The 087 Patent claims methods of detecting atypical electricity consumption, primarily for the identification of marijuana grow operations.

[9] BC Hydro is a British Columbia Crown corporation. Its mandate is to safely provide reliable, affordable and clean electricity throughout British Columbia. In connection with its mandate, BC Hydro uses multiple software and hardware solutions to monitor, visualize, and analyze the performance of its electricity grid, and to detect theft of electricity.

[10] Awesense is a British Columbia corporation that sells and licenses hardware and software for monitoring and analyzing electricity grid performance. Among the software and hardware solutions that BC Hydro uses to monitor, visualize, and analyze the performance of its electricity grid are Awesense's sensors and True Grid Intelligence [TGI] cloud-based software platform. TGI also utilizes data provided by BC Hydro.

[11] Mr. Millard states in his affidavit that BC Hydro has had, from the mid-1990s through to the present day, a theft detection program incorporating various techniques for detecting theft of electricity, including theft by marijuana grow operations. The corporation employs various systems in its approaches to theft detection and grid analytics. Its systems include multiple software and hardware components, including BC Hydro's own Energy Analytics Solution, along with those supplied by multiple third party vendors.

[12] According to Mr. Millard, while the fact that BC Hydro has a theft detection program is publicly known, the details of the program and BC Hydro's revenue assurance systems are highly confidential. BC Hydro is particularly concerned that public disclosure of this confidential information would enable criminals to avoid detection by BC Hydro's revenue assurance systems and perpetuate their theft of electricity and illegal activities.

[13] BC Hydro will be required to produce proprietary and sensitive technical and business documents and information as part of its discovery obligations in this action. Mr. Millard declares that these documents and information have at all times been maintained confidentially, and that BC Hydro's proprietary and commercial interests would be harmed by their disclosure.

[14] Mr. Mischa Steiner-Jovic affirms in his affidavit that Awesense will likewise be required to produce highly confidential documents and information as part of its discovery obligations, that the documents and information have at all times been maintained confidentially, and that Awesense's proprietary and commercial interests would also be harmed if disclosed.

[15] Ms. Burkhart simply attaches as exhibits to her affidavit copies of the pleadings and a series of letters and e-mails exchanged between counsel for BC Hydro and dTechs from June 2018 to February 2019.

B. *Background to the present motion*

[16] The proceeding is still at an early stage. The pleadings are closed, the liability and quantification issues were bifurcated by Order dated May 8, 2018, and the parties have yet to embark on examinations for discovery.

[17] In anticipation of the upcoming deadline for delivery of affidavits of documents and Schedule 1 productions, counsel for BC Hydro sought dTechs' consent to enter into a protective agreement. On June 26, 2018, counsel for BC Hydro sent a proposed draft "two-tier" protective agreement, containing a confidential category and a more restricted confidential category, to

dTechs' counsel and requested that dTechs provide its comments on the draft within two days. Counsel for BC Hydro also sought confirmation whether dTechs was in agreement that any disputes concerning any ultimate protective agreement could be brought before this Court for resolution or adjudication.

[18] After numerous exchanges between counsel, dTechs indicated that it would not consent, but that if BC Hydro sought a protective order or agreed to terms that did not prevent dTechs from seeing the Defendants' producible documents, an agreement could be possible. Counsel for BC Hydro subsequently sent a proposed draft "one-tier" protective agreement, containing a single confidential category, for dTechs' consideration; however, the parties were ultimately unable to reach an agreement.

[19] As an alternative to a protective agreement, the Defendants then jointly prepared and proposed to dTechs a draft "one-tier" protective order. Once again, dTech would not consent.

[20] In the circumstances, BC Hydro has turned to the Court for relief.

[21] Although dTechs refuses to consent to the draft protective order, or to enter into a protective agreement on terms equivalent to those sought in this motion, it does not oppose the relief requested.

[22] The issue to be determined on this motion is whether a protective order in the form set out in Schedule "A" to the Notice of Motion should be granted.

### III. Protective Orders in the Federal Court

[23] It has been the practice of this Court to grant requests for orders providing for the handling and protection of documents and information as between the parties during discovery. Such orders have been referred to interchangeably as “protective orders” or “confidentiality orders” in court decisions. Recent decisions by this Court highlight the tension—and possible confusion—between the standard applied for orders that govern the protection of materials exchanged between parties during discovery and those that allow for materials to be filed with the Court confidentially.

#### A. *Confidentiality Order*

[24] The open court principle is a hallmark of our judicial system. It not only means that members of the public have a right to attend court hearings, but also that the public can get access, within certain limits and under some conditions, to the files and records of the Court.

[25] A confidentiality order governs the filing of confidential documents and information on the court record, either in the context of an interlocutory motion or at the hearing of the proceeding on its merits. The open court principle is engaged when, if at all, a party seeks to file confidential information in support of a motion or, if the case goes to trial, the party’s documents or answers from the discovery transcripts are introduced as evidence.

[26] Unless otherwise required to be kept confidential by law, where documents are sought to be filed confidentially under seal with the Court, a party must bring a motion for a confidentiality order pursuant to Rule 151 of the FCR, which provides as follows:

**151 (1)** On motion, the Court may order that material to be filed shall be treated as confidential.

**151 (1)** La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

**(2)** Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

**(2)** Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[27] The effect of the plain words of Rule 151(2) is that material to be filed with the Court may not be made the subject of a confidentiality order until after the Court has satisfied itself that the claim for confidentiality outweighs the generally prevailing public interest in the openness of court proceedings.

[28] The Supreme Court of Canada set out the applicable two-part test for a confidentiality order at paragraphs 53 and following in *Sierra Club*. Speaking for the Court, Mr. Justice Iacobucci states that a confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its



deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[29] The Court added that three important elements are subsumed in the first branch of this test:

(a) the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question (para 54);

(b) The “important commercial interest” in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality (para 55); and

(c) The phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question (para 57).

[30] A party seeking an order to shield information from the public view must overcome the strong presumption in favor of access to court records by demonstrating compelling reasons supported by specific factual findings. When considering such a request, the Court must carefully balance the competing interests of the public's right of access and the party seeking to keep the records secret.

[31] The test for a confidentiality order is stringent, and reasonably so given the tension between confidentiality claimed by a party and the open court principle.

B. *Protective Order*

[32] A protective order is intended to govern the handling of documents and information that the parties have treated confidentially and may be disclosed or compelled during documentary or oral discovery. The designation of a document as confidential under a protective order does not permit the document to be filed confidentially with the Court.

[33] There is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court: *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases (The Sedona Conference: 2007)* <[www.thesedonaconference.org](http://www.thesedonaconference.org)>. This is because pre-trial discovery, as a general rule, does not take place in open court. Documents are inspected or exchanged by counsel at a place of their own choosing. In the vast majority of civil cases, materials exchanged between the parties during discovery rarely see the light of day as few matters go to trial.

[34] While Rule 151 provides that the Court may order that material to be filed shall be treated as confidential, there is no similar provision in the FCR addressing the treatment of documents or other materials to be disclosed during the course of discovery in an action. The Court has the necessary jurisdiction, however, under Rule 3 of the FCR, or Rule 385(1)(a) in case managed proceedings, to grant an order protecting documents claimed to be confidential in circumstances where a risk of harm arising from their disclosure has been established. So long as a protective order does not impinge on the Court's ability to keep its process open to the public, there is no public policy reason against granting one.

C. *Limits on Access to Protective Orders*

[35] Over the past few years, parties have increasingly experienced resistance from this Court to grant protective orders. A common mistake by parties was the inclusion of language in the proposed protective order allowing that if any designated material subject to the order was to be filed on the court record, it would automatically be treated as confidential and filed under seal. The Court began to disallow such hybrid orders permitting parties to file materials into court under seal without first obtaining an order made pursuant to Rule 151.

[36] Access to protective orders was further limited in *Live Face on Web, LLC v Soldan Fence and Metals (2009) Ltd*, 2017 FC 858 [*Live Face*]. Departing from the longstanding practice of the Court, a prothonotary concluded that motions on consent for protective orders should not be granted “absent highly unusual circumstances”. She stated that the implied undertaking rule provides sufficient safeguards to prevent misuse of confidential information produced in litigation. To the extent that restrictions needed to be placed on the number of recipients for certain materials, or certain materials must be filed in court, thus necessitating a Rule 151 order, the parties were expected to agree between themselves to the processes they would follow to address those issues and enter into a protective agreement. Where the parties could not agree, they could bring their disagreement to the case management judge for resolution.

[37] A few months later, the same prothonotary dismissed an unopposed motion for a protective order in *Seedlings v Pfizer*, 2018 FC 443 [*Seedlings I*]. She held that the implied undertaking rule constituted an undertaking to the Court that documents exchanged in the

context of a pre-trial discovery would not be used by the parties for purposes other than the litigation and that a breach of this undertaking was amenable to enforcement by this Court, including by way of contempt proceedings, without the need to be first acknowledged by the Court or enshrined in an order. She further added that given the protection afforded by the implied undertaking rule, the Court should not exercise its discretion to issue a protective order unless the parties can demonstrate the “necessity of an express order” or “other unusual circumstances.”

[38] On appeal, in *Seedlings Life Science Ventures, LLC v Pfizer Canada Inc*, 2018 FC 956 [Seedlings 2], a motions judge found that the prothonotary erred in concluding that the test for the issuance of protective orders was the same test to be applied for confidentiality orders and that the old test in *AB Hassle v Canada (Minister of National Health and Welfare)* (1998), 161 FTR 15, 83 CPR (3d) 428 (FCTD) [AB Hassle] and *Apotex Inc and Novopharm Ltd v Wellcome Foundation Ltd* (1993), 69 FTR 161 had been displaced by Rule 151 and the Supreme Court of Canada’s decision in *Sierra Club*. At paragraph 26 of his decision, the motions judge noted that the Supreme Court “stated the test concerning protective orders in the context of patent litigation by recalling the decision of this Court in AB Hassle (and modifying it slightly).”

[39] In *CNR*, the motions judge accepted that the legal test for the issuance of a protective order is found in *Sierra Club*, but determined that the judge in *Seedlings 2* did not apply the proper test by failing to consider whether the requested order was necessary or that reasonably alternative measures would not prevent the risk to the interests at issue. The decision in *CNR* has been appealed to the Federal Court of Appeal.

IV. Analysis

[40] As a result of the decisions of this Court described above, there is now great uncertainty regarding the proper test to be applied in determining whether a protective order should be granted. This is an unsatisfactory state of affairs, as the Court should strive for and promote procedural uniformity and consistency.

[41] A basic requirement for seeking relief from the Court is that the order sought must be of some practical value or effect. In most cases, concerns of parties regarding disclosure of confidential information during the discovery stage of a proceeding are adequately addressed by the implied undertaking or by entering into a protective agreement. However, intellectual property disputes involving trade secrets (for example, a formula, pattern, compilation, program, data, device, method, technique or process) or highly confidential competitive financial information are not like most cases. They are considered “cases of exceptional prejudice”: *Juman v Doucette*, 2008 SCC 8 at paragraph 23.

[42] The motions judge concluded in *CNR* that the test provided in *Sierra Club* is applicable to protective orders and binding on him. However, in *Sierra Club*, the Supreme Court of Canada was dealing with a confidentiality order to protect a litigant’s commercial interests in part on the basis that the litigant would not be willing or able to advance its case without such an order. As stated at paragraph 7, “In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.” The open court principle was clearly engaged in that case.

[43] In analyzing in what circumstances a confidentiality order could be granted, the Supreme Court of Canada cited with approval the test applied by this Court for a protective order. This test, at paragraph 60 of *Sierra Club*, focuses on the belief of the moving party as to the confidentiality of the information and the likelihood that its non-confidential release could cause harm to the party's interests.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 1998 CanLII 8942 (FC), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

[44] Although the criteria to be considered for granting a confidentiality order or a protective order clearly overlap, they are not the same. No mention is made at paragraph 60 of *Sierra Club* to the two-part test applicable to confidentiality orders, reproduced at paragraph 28 of these reasons.

[45] The motions judge imposed a burden on the moving parties in *CNR* to explain why a protective order was necessary and to establish that no other effective measure was available to prevent a serious risk to an important interest, a burden that, in my view, was not theirs to bear. The presumption that the parties had a higher burden appears to have permeated the motions

judge decision and coloured his view of valid concerns raised by the parties with reliance solely on the implied undertaking or a protective agreement.

A. *Implied Undertaking*

[46] As stated earlier, in most cases, concerns regarding disclosure of confidential information during the discovery stage of a proceeding are adequately addressed by the implied undertaking. However, the implied undertaking has its limitations, including the following.

[47] First, it does not prevent a party to litigation from filing another party's confidential information or documents in Court, including in motion records to compel, for other interlocutory relief filed in Court or within expert reports filed in advance of trial. Nor does it require that a party provide the other party with advance notice and the opportunity to apply for a confidentiality order pursuant to Rule 151 of the FCR.

[48] Second, except for providing that any disclosure must be made for the purpose of securing justice in the proceeding, the implied undertaking does not operate to specify who may receive or be shown the disclosing party's confidential information, or place restrictions on its dissemination. Although the implied undertaking rule prevents a party from disclosing another party's produced documents or information outside of the litigation, it does not prevent a party from disclosing the documents or information to other persons involved in the litigation, such as witnesses or potential witnesses.

[49] Third, if a party in possession of another party's confidential information is subpoenaed, the implied undertaking provides no obligation on that party to provide the disclosing party with notice of receipt of the subpoena, so that adequate steps may be taken by the disclosing party to protect the confidentiality of its information or documents at issue.

B. *Protective Agreements*

[50] As for protective agreements, parties may find it challenging to reach out-of-court agreements on the appropriate recipients of confidential information and the process for filing confidential information in Court. This can result in substantial delay in the proceeding, as occurred in this case.

[51] In some cases, parties may not agree by contract to the same provisions they otherwise would if done under the threat of a motion. In other cases, parties may refuse outright to enter into any form of out-of-court agreement. Actions should not be allowed to grind to a halt while the parties expend time trying to reach an agreement on the terms of a protective agreement.

[52] At paragraph 41 of *CNR*, the motions judge leaves open the possibility that if the parties are not able to agree on a protective agreement, "a Court order may indeed be justified". It is unclear however why an order would be justified when the parties cannot agree on the terms and yet, perversely, would be unjustified if an agreement is reached. This approach simply invites mischief.



C. *Benefits of Protective Orders*

[53] There are a number of reasons that favour granting a protective order. As stated by Mr. Justice Roger Hughes in *Merck & Co Inc v Brantford Chemicals Inc*, 2005 FC 1360 at paragraph 8, such orders “are much more specific as to how documents and other information is to be handled, who has access and so forth.”

[54] First and foremost, an order of the Court provides certainty and clarity. Court orders are meant to be complied with and have consequences when they are not. The importance of a court order and the way it is perceived by parties cannot be denied. The same cannot be said about a compromise or arrangement that has not been sanctioned by the Court.

[55] Second, certainty of an order should reduce the time needed to agree to issues relating to confidentiality. In other words, parties may quibble less about the language of an order than they would if it was in the form of an agreement.

[56] Third, a protective order provides added assurance to a party that any risk of harm from widespread dissemination of its confidential information is mitigated and that any breach may be remedied swiftly and effectively. The increased certainty enables a freer flow of information between the parties, lubricating the wheels for the process of discovery. The parties are free to tailor documentary and oral discovery as necessary with the comfort that documents and information designated as confidential will be protected against misuse and unauthorized

disclosure. It provides protection against the opposing party within the proceeding as well as protection against non-parties beyond the given proceeding, such as experts and witnesses.

[57] Because a protective order confers protections within the proceeding, it can also reduce the cost and time necessary to complete discovery by allowing parties to reduce the time taken to vet documents without fear of waiver of confidentiality.

[58] Protective orders benefit courts as well. Granting such orders avoids judicial resolution of confidentiality disputes arising from the inability to reach or enforce agreements, provides protections to the parties so that there is less incentive to litigate discovery disputes relating to confidential information, and potentially reduces the cost of litigation overall. Consequently, they reduce consumption of scarce judicial resources.

[59] Further, oversight by the Court ensures that protective orders are consistent, compliant in their terms and substance, and do not include abusive provisions. A standard form of order informed by jurisprudence and approved by the Court would certainly assist in that regard.

[60] Moreover, once entered, protective orders give notice to the Registry, the Court and the public of the nature of the documents deemed to be confidential and specific arrangements governing the handling of confidential documents between the parties, including how and when a Rule 151 order may be sought.

V. Conclusion

[61] The principles of comity between judges of cognate jurisdiction are to the effect that decisions by a judge of this Court should generally be followed by other judges of this Court. In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 341 at paragraph 52, Madam Justice Eleanor Dawson set out circumstances which would justify a refusal to follow a prior decision of the same court:

A judge of this Court, as a matter of judicial comity, should follow a prior decision made by another judge of this Court unless satisfied that: (a) subsequent decisions have affected the validity of the prior decision; (b) the prior decision failed to consider some binding precedent or relevant statute; or (c) the prior decision was unconsidered; that is, made without an opportunity to fully consult authority.

[62] The motions judge in *CNR* was correct in stating that the test provided by the Supreme Court of Canada in *Sierra Club* is applicable and binding on him. However, in my view, he applied the wrong test found at paragraphs 53 to 57 of the decision and failed to consider the separate and distinct binding jurisprudential test for granting a protective order at paragraph 60.

[63] Based on the uncontroverted evidence of the Defendants, I have no difficulty in finding that some of the documents that are going to be produced by the Defendants on discovery are likely to be confidential and commercially sensitive, that they were accumulated with a reasonable expectation of being kept confidential and that they have been treated at all relevant times as confidential. Further, I have no difficulty in finding that on a balance of probabilities, the Defendants' proprietary and commercial interests could reasonably be harmed by the disclosure of the documents. Finally, I am satisfied that a protective order would assist the

parties in the orderly and expeditious conduct of the litigation. The test set out at paragraph 60 of *Sierra Club* has clearly been met for the issuance of a protective order. An order shall go accordingly.

[64] Finally, I wish to add that given the fairly low test that a party has to satisfy to obtain a protective order, parties should be encouraged to apply informally to the Court, particularly in case managed proceedings, when such relief is sought on consent of the parties or is unopposed; see *Notice to the Parties and the Profession: Informal Requests for Interlocutory Relief*, August 25, 2017.

"Roger R. Lafrenière"

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Judge

Ottawa, Ontario  
April 29, 2019

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-227-17

**STYLE OF CAUSE:** DTECHS EPM LTD. v BRITISH COLUMBIA HYDRO  
AND POWER AUTHORITY AND AWESENSE  
WIRELESS INC.

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 5, 2019

**REASONS FOR ORDER:** LAFRENIÈRE J.

**DATED:** APRIL 29, 2019

**APPEARANCES:**

No appearance

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DEFENDANT BY COUNTERCLAIM

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