Federal Court  Cour fédérale

Date: 20230801

Docket: T-1551-21

Citation: 2023 FC 1038

Ottawa, Ontario, August 1, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION

Respondent

ORDER AND REASONS

[1] The respondent, Google Canada Corporation, seeks a confidentiality order under Rule 151 of the *Federal Courts Rules*, SOR/98-106 to seal certain information in the Court's file.

[2] For the following reasons, I conclude that the motion must be dismissed, without costs.

I. Events Leading to this Motion

[3] The backdrop for this motion includes investigations in the United States and Canada into potentially anti-competitive conduct by Google LLC and (in Canada) the respondent, and litigation against Google LLC in the United States.

[4] For ease in these Reasons, I will refer to the respondent and related Google entities as "Google".

A. The Commissioner's Section 11 Application and Google's Rule 151 Motion

[5] On December 18, 2020, the Commissioner of Competition (the "Commissioner") commenced an inquiry under subparagraph 10(1)(*b*)(ii) of the *Competition Act*, RSC 1985, c C-34, on the basis that he had reason to believe that grounds existed for the making of an order under Part VIII of the *Competition Act*. The inquiry concerned conduct by Google in relation to online display advertising and specifically, whether Google was "leveraging its market power in the supply of in-stream video advertising space into adjacent advertising technology markets."

[6] On October 12, 2021, the Commissioner of Competition filed an *ex parte* application under section 11 of the *Competition Act* for an order compelling Google to produce records and provide returns of information related to the inquiry under section 10.

[7] On October 15, 2021, Google filed a Notice of Motion seeking a confidentiality or "sealing" order under Rule 151 to seal specified portions of the Commissioner's section 11 application record. Google's motion record, filed on October 19, 2021, included an affidavit

from a senior litigation clerk at Google's Canadian counsel (which attached correspondence) and an affidavit from an American antitrust attorney providing evidence about US laws and practices related to antitrust investigations by the United States Department of Justice ("US DOJ"). That affidavit described confidentiality protections for parties subject to civil investigative demands, as issued by the US DOJ, under the US *Antitrust Civil Process Act*, 15 USC, §§ 1311 and following.

[8] In October 2021, Google's position on its motion was that the Commissioner had included confidential information in his section 11 application record. The information was said to be confidential because Google had provided it on a non-voluntary basis to US antitrust enforcement authorities, who had shared it with the Commissioner pursuant to a written waiver from Google's ultimate parent company through its US attorneys (the "Waiver"). According to Google at that time, the confidential information remained confidential and, without an order from this Court, the Commissioner's filing would "indirectly eviscerate" Google's confidentiality protections under US law.

[9] Google's motion was initially returnable on October 20, 2021, concurrent with the Commissioner's section 11 application.

B. Interim Confidentiality Order and Section 11 Order

[10] On October 20, 2021, following a hearing, the Court issued an Interim Confidentiality Order, on consent of the Commissioner, pending a hearing of Google's Rule 151 motion. At that same hearing, the Court heard *ex parte* submissions from the Commissioner on the section 11 application.

[11] The Interim Confidentiality Order sealed specific information in the Commissioner's application record filed on October 12, 2021 and required the filing of a public version of that record. The information sealed under the Interim Confidentiality Order included:

a) a letter from Google's Canadian counsel to the Commissioner's counsel dated April 23, 2021, which was an exhibit to the affidavit supporting the Commissioner's section 11 application;
b) the appendices to the Waiver, which included references to Google employees who had been deposed in response to US DOJ civil investigative demands and to Google employees who were document custodians;
c) Schedule VI to the Commissioner's proposed draft section 11 order, which contained a list of names of custodians of records for the purposes of one specification in the Commissioner's proposed section 11 order; and
d) a paragraph in the affidavit supporting the Commissioner's section 11 application, and the corresponding paragraph in the Commissioner's written representations, which advised that a law enforcement agency had provided a transcript of the deposition of four named individuals employed by Google.

[12] In accordance with the terms of the Interim Confidentiality Order, the Commissioner filed a public version of the application record with the specified information redacted. Substantially all of the application record remained public.

[13] I pause to note that the information now at issue in Google's motion, as updated in 2023, is contained on the same pages of the Commissioner's application record as were made

confidential by the Interim Confidentiality Order. However, the information Google seeks to be protected has since been narrowed to include only the names, positions and contact information of individuals who are non-senior executive employees of Google.

[14] On October 20, 2021, Google's Rule 151 motion was adjourned and a return date was to be set by the Registry in consultation with the parties, after giving the Commissioner an opportunity to file a responding motion record.

[15] On October 22, 2021, the Court issued the section 11 order requested by the Commissioner. The Court issued a public version of that order with the list of document custodians in Schedule VI redacted.

C. Events after October 2021

(i) Steps Taken in this Court

[16] By letter to the Registrar dated November 10, 2021, the Commissioner advised that the Waiver had been withdrawn. Compliance with the section 11 order contemplated the existence of the Waiver. However, the Commissioner advised that he was not seeking any relief from the Court at that time, while reserving his rights. The Commissioner's letter advised that he was still considering his position with respect to Google's application for a sealing order and that he would report back to the Court on that issue in due course following discussions with Google.

[17] On October 12, 2022, the Commissioner filed a responding motion record on Google's Rule 151 motion.

[18] In mid-March 2023, the Commissioner's motion record filed in October 2022 came to my attention. I issued a Direction to convene a case management conference to address the status of the matter and the scheduling of a hearing of Google's motion.

[19] The case conference occurred on March 27, 2023. Just beforehand, Google provided the Commissioner with an unfiled Amended Notice of Motion related to its Rule 151 motion.

[20] The unfiled Amended Notice of Motion updated and revised Google's position. Google now relied on several orders obtained from US courts as the basis for its Rule 151 motion. Those orders are summarized below.

[21] Following the case conference, the Court issued a Direction for the parties to confer and agree upon a schedule to file their materials towards a hearing during the week of June 12, 2023.

[22] On March 28, 2023, Google filed its Amended Notice of Motion (Sealing Order).

[23] The parties agreed on a schedule for additional filings and to a hearing on June 12, 2023. Google filed a supplementary motion record on April 24, 2023 (which included supplementary evidence), and the Commissioner filed supplementary written representations on May 23, 2023.

(ii) The US Courts' Orders

[24] As noted, since this motion was originally filed, Google obtained six sealing orders in legal proceedings in the United States, including several orders issued by the United States District Court for the Southern District of New York in proceedings commenced by various US States led by Texas against Google LLC (the "State of Texas Proceeding") and two orders issued by the United States District Court for the Eastern District of Virginia in proceedings commenced by the United States of America against Google LLC (the "DOJ Proceeding").

[25] In the State of Texas Proceeding, the plaintiff States filed their pleadings, or Complaint, with certain information redacted as requested by Google. Following the District Court's request to show cause why the pleading should not be publicly filed, Google sought to maintain redactions to the Second Amended Complaint as filed with the District Court.

[26] By order dated October 15, 2021, the District Court granted Google's motion to redact the names, job titles and email addresses of Google employees quoted in the Complaint. The District Court stated:

> Non-parties to an action may have "significant privacy interests" that favor redaction of identifying information [citation omitted]. The names and contact information of these employees have no apparent bearing on any issue in this dispute. The privacy interests of these Google employees outweighs the strong presumption of public access.

[27] On December 6, 2021, the District Court denied a request by Facebook, Inc. to redact the title of its chief executive from the Third Amended Complaint. The District Court's handwritten

order stated that the "intent in granting Google's application was to shield names, job titles and contact information of the employees of Google who are not senior executives."

[28] The District Court subsequently made four other orders:

- An order dated January 12, 2022, authorizing redactions in the Third Amended Complaint of the names, titles and email addresses of Google employees quoted in it;
- An order dated February 16, 2022, confirming redactions in an exhibit attached to an affidavit filed in support of a motion by Google, which was a copy of an agreement between Google entities and Facebook entities including negotiation provisions. Owing to third parties' privacy interests, the order redacted the names of four Google and Facebook "executive[s]" and the names and titles of the agreement's signatories on behalf of Google and Facebook;
- An order dated November 1, 2022, maintaining the seal on redacted contents of a privilege log; and
- An order dated November 18, 2022, maintaining the seal on redacted names and positions of Google employees making declarations in support of Google's pleadings.

[29] In the DOJ Proceeding, the District Court for the Eastern District of Virginia issued an order dated March 10, 2023, sealing the names of 41 current or former employees listed in an exhibit to a filed declaration. The District Court found that sealing the information was

"warranted to maintain the privacy of non-parties to this litigation." The same court issued a Protective Order on April 4, 2023, to cover information disclosed during discovery.

D. Google's Amended Motion

[30] Google's Amended Notice of Motion requested an order sealing materials filed or to be filed in respect of the section 11 application "to the extent that such materials or information have been sealed in the court record in litigation before US courts (the "Confidential Information"). The Amended Notice of Motion added:

> [T]he Commissioner's filing of Confidential Information in the public court record before this Court undermines and eviscerates the force and effect of sealing orders … that Google has obtained from courts in US proceedings involving the same or highly similar material, information and subject matter.

[31] Google's written representations filed on April 24, 2023, refined its request to seal the "Confidential Information" disclosed in the Commissioner's application record, which it described as "the names, titles, and contact information of *non-senior executive* employees of Google and employees of third parties" [original italics]. Google's position was that, without a confidentiality order from this Court that seals that information from public disclosure, the confidentiality protections it obtained in the US Courts' Orders would be lost or, in its words, "indirectly eviscerate[d]". Google advised that the names of senior executive employees were no longer the subject of its motion because their names were not sealed from disclosure in the US Courts' Orders. Google did not provide a definition or description of what it considered a "non-senior executive" employee.

[32] In particularizing its proposed remedy, Google referred to specific pages in the record in which the names of non-senior executives appeared, which reflected the pages covered by the Interim Confidentiality Order. Google did not provide its proposed redactions of these pages in the record, but proposed that its counsel would agree on the redactions with the Commissioner's counsel and send them to the Court.

[33] The pages identified in the record do not contain any employee contact information. There are names and a few references to the titles of some apparently "non-senior executive" employees.

E. The Commissioner's Position

[34] The Commissioner did not oppose Google's motion and formally took no position on the sufficiency of Google's evidence to support the requested sealing Order. The Commissioner's written representations sought to assist the Court by identifying additional relevant facts and commenting on the applicable case law.

[35] The Commissioner made observations about how Google's position had changed since October 2021. The Commissioner noted that the US District Court Orders had all been issued after the Commissioner filed his section 11 application materials. (The first one was issued on October 15, 2021.) The Commissioner made submissions on the terms of the District Court Orders and noted that there was no evidence before this Court that proved that the names, titles and contact information redacted under the District Court's Orders overlapped with the names, titles and contact information that Google requested to be sealed under Rule 151.

[36] The Commissioner observed that the standard against which the US courts adjudicated Google's request for sealing orders was a different standard than the one used by Canadian courts to determine whether a confidentiality order is appropriate. In addition, the Commissioner's submissions noted that the privacy interests advanced by Google in the US did not engage the types of personal information recognized as warranting a sealing order in the Canadian case law, including in *Sherman Estate v. Donovan*, 2021 SCC 25.

II. Analysis

A. The test under Rule 151 of the *Federal Courts Rules*

[37] The parties agreed that the test for a confidentiality order under Rule 151 was established in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, at paragraph 53:

> 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.

[38] In *Sierra Club*, the Supreme Court also held:

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 (at para 54);

b) an "important commercial interest" 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. The open court rule only yields where the public interest in confidentiality outweighs the public interest in openness (at para 55); and

c) "reasonably alternative measures" requires the Court 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 (at para 57).

[39] Importantly, the Supreme Court emphasized that the Court must be alive to the fundamental importance of the open court rule. The design of the applicable test reflected its links to constitutional principles and the role of the open courts principle in our democracy: *Sierra Club,* at paras 37-40, 44-45.

[40] In *Sherman Estate,* the Supreme Court affirmed the *Sierra Club* test as an appropriate guide (at para 43). The Court recast the test into three mandatory and cumulative prerequisites for an Order, without altering the essence of the test:

> The person asking a court to exercise discretion in a way that limits the open court presumption must establish 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.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments …
>
> (*Sherman Estate*, at para 38.)

[41] The Court in *Sherman Estate* emphasized that the open court principle is constitutionalized under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and referred to it as a foundation of a free press. The Court noted the importance of the principle to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and, ultimately, the legitimacy of the process. Thus there is a strong presumption in favour of court openness, albeit one that may be rebutted: *Sherman Estate*, at para 39.

[42] *Sherman Estate* also held that the requirement to demonstrate a "serious risk to an important interest" "… imposes a meaningful threshold necessary to maintain the presumption of openness" (at para 43). It is not merely a matter of weighing the benefits of the limit on court openness against its negative effects.

[43] Thus, on a Rule 151 motion, this Court must carefully consider and account for the public interest in maintaining open and accessible court proceedings, not least because it is a constitutional principle: *Sherman Estate,* at paras 3, 39; *Desjardins v. Canada (Attorney General),* 2020 FCA 123, at para 60. The public interest rests at the core of the required analytical approach to making confidentiality orders: see *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited,* 2021 Comp Trib 2, esp. at para 45.

[44] Therefore, the Court may only issue an order under Rule 151 in exceptional circumstances in which competing interests justify a restriction on the open court principles. In *Sherman Estate,* the Supreme Court observed that the burden on the moving party constitutes a "high bar" to meet on the specific facts and circumstances established in the evidence: *Sherman Estate,* at paras 3, 34, 62-63, 84; see also *Desjardins,* at paras 85, 89, 94.

[45] In addition, the moving party must provide a convincing evidentiary basis to justify issuing a Rule 151 Order, in particular to demonstrate a serious risk of harm; general allegations will not suffice. The risk in question must be substantiated and "well grounded in the evidence": *Sherman Estate,* at paras 35, 62, 102; *Sierra Club,* at paras 46, 54; *Desjardins*, at paras 82, 87-88, 94.

[46] With these principles in mind, I turn to the present motion.

B. Is there a serious risk to an important public interest?

(i) Important Public Interest

[47] Google submitted that the important public interest it seeks to protect is the integrity of the orders it obtained under US law from US courts. Google relied on the principle of international comity between the courts in Canada and the United States and the general public interest in the "administration of justice".

[48] To support its position, Google pointed to the public interest in preserving the confidentiality of information associated with cross-border law enforcement. It referred to the efficient sharing of information between competition enforcers. Google argued that there is a nexus between the matters investigated in the Commissioner's inquiry and the matters in dispute in the US proceedings in which it obtained the sealing orders. Google also noted that the Commissioner's inquiry was derived from the parallel investigations and litigation in the two countries. Google referred to statements about maintaining confidentiality in the Commissioner's publications: Competition Bureau, *Information Bulletin on the Communication of Confidential Information under the Competition Act* (Ottawa: Industry Canada, 2013); Competition Bureau, *Requests for information from private parties in proceedings under section 36 of the Competition Act* (Gatineau: Competition Bureau Canada, 2018).

[49] For the following reasons, I do not agree with Google's position.

[50] In this Court, unlike in the US District Court proceedings, Google did not characterize the interest at stake as being the privacy interest of its non-senior executive employees in seeking to protect their names, titles and contact information. The underlying confidentiality interest being protected in the US Courts' Orders was the personal privacy interests of Google employees who

were not parties to the litigation, but were mentioned in the proceedings. Here, the individual privacy interests of non-senior executive employees would not qualify as a serious risk to the public interest that would warrant a confidentiality order under Rule 151. There is no suggestion that any individual's sensitive personal information or information related to their "biographical core" is at issue: *Sherman Estate*, at paras 33-35, 63-65, 73-76, 85. Put another way, if those employees' information were the subject of a standalone Rule 151 motion, the motion would not succeed because their privacy interests would not meet the standard established in *Sherman Estate*.

[51] Neither Google's evidence nor its submissions attempted to characterize its commercial interest in its employees' names, titles and contact information as inherently confidential or as information to which some kind of confidentiality obligations attached. For example, Google did not identify any contractual or legislative provisions that made the information proprietary or otherwise confidential.

[52] In *Sierra Club*, the Court held that an "important commercial interest" cannot merely be specific to the party requesting the Order; the private commercial interest must be one which can be expressed in terms of a public interest in confidentiality. In that case, the Supreme Court identified the objective of preserving contractual obligations of confidentiality owed by Atomic Energy of Canada Ltd. to Chinese authorities and that party's right to a fair trial (including the public and judicial interests in seeking the truth and achieving a just result in civil proceedings): *Sierra Club*, at paras 49-51. In this case, Google argued that the important public interest in

confidentiality arose due to international comity, arising from US law and the US Courts' Orders.

[53] Google referred to a recent case, *Re Original Traders Energy Ltd.*, in which Osborne J. granted an sealing order over a confidential affidavit and its exhibits: *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.,* 2023 ONSC 753 (Comm. List), at para 56. Justice Osborne stated at paragraph 61:

> More fundamental, however, is the fact that the material over which the sealing order is sought is already the subject of a sealing order issued by a court in another jurisdiction. That order, which requires that the contents of the case in that jurisdiction remain sealed until further order of that court, was made in a proceeding commenced by a verified Complaint itself filed under seal. I am satisfied that an important public interest includes comity and cooperation between courts in different jurisdictions.

[54] I note in passing that the Ontario court's order may have been akin to an interim or temporary order, as it had effect until the earlier of the vacating of the foreign court's sealing order or further order of the Ontario Court: *Re Original Traders Energy Ltd.,* at para 66.

[55] Google also relied on the references to international comity or a foreign court's sealing order in *Paid Search Engine Tools, LLC v. Google Canada Corporation*, 2019 FC 559, at paras 59-61; *Subway Franchise Systems v CBC,* 2019 ONSC 2584, at para 7; *Bard Peripheral Vascular Inc. v. W.L. Gore & Associates, Inc.,* 2017 FC 585, at para 23; and to an endorsement by Farley J. in *Muscletech Research and Development Inc., Re,* 2006 CanLII 3282 (ON SC), at para 2.

[56] I agree that on Rule 151 motions, this Court should pay respectful attention to sealing orders granted by foreign courts and the reasons provided for granting them. I also accept the general proposition that international comity may, in some circumstances, demonstrate the public interest aspect of the test in *Sierra Club* and *Sherman Estate*. That is, a party may show that there is an identifiable public interest in respecting a foreign court order, and the reasons for it, that establishes that certain information is confidential. Doing so may support a party's argument that an identified confidentiality interest that has been recognized in the foreign court order has a public interest dimension in Canada in a particular case.

[57] However, in my view, international comity does not require this Court to issue a confidentiality order under Rule 151 simply because a foreign court – even a well-respected court in the United States – has issued a sealing order over information in its file: see *Subway Franchise Systems*, at para 7. To do so without examining the underlying confidentiality interest that is alleged to require protection would render an order automatic. To issue a Rule 151 order automatically would undermine the constitutional open courts principle, sidestep the application of the legal principles in *Sherman Estate* and *Sierra Club*, and deprive the Court of its discretion under Rule 151 to decide whether to make an order on the facts and evidence of each case: see *Desjardins*, at paras 88-90; *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52, [2006] 2 SCR 612, at para 31. The open court principle cannot be systematically sacrificed on the altar of international comity.

[58] Instead, given the constitutional importance of the open court principle, this Court is bound to apply the established legal tests to the evidence. International comity may provide the

public interest dimension to the argument, but it does not mean that any foreign sealing order will, of necessity, convert into a Rule 151 order regardless of the underlying confidentiality interest. That interest, and the evidence that supports it, must be examined to see whether a confidentiality order is justified.

[59] In this case, the evidence does not show that the information at issue – non-senior executive employees' names, titles and contact information – is confidential to Google. In my view, an important public interest in the confidentiality of that information does not arise merely from the existence of the US Courts' Orders that seal their records based on a balancing test that accounts for the employees' privacy as non-parties to the US litigation.

[60] I recognize that Google's initial position on this motion in October 2021 was that information provided to the US DOJ was confidential under US laws and practices related to antitrust investigations conducted by the US DOJ and exempt from disclosure under US freedom of information laws. However, in its latest submissions based on the US Courts' Orders, Google did not seek to rely on this argument, did not attempt to link the non-senior executive employees' names to any confidentiality obligations owed as a result of the US DOJ's investigation (such as confidential depositions they may have given), and did not argue the possible invasion of their personal privacy if these individuals were identified in a public court filing. From my review of the record, the evidence on US law and practices during antitrust investigations does not establish that Google's employee names are confidential *per se*. It is possible that the fact that an individual has given a deposition could, like the deposition itself, be treated as confidential under

US law and practice, but that was not directly addressed in the evidence and is not the issue as now defined in Google's updated motion.

[61] Google's written submissions concluded with the following argument:

> Absent compelling reasons, the confidentiality protections obtained by Google in the U.S. should not evaporate simply because the same information has been produced by Google to the Commissioner. Holding otherwise would have a chilling effect on cross-border enterprise and law enforcement. U.S.-based companies like Google would have to fundamentally reassess the manner in which they do business in Canada and liaise with regulators like the Commissioner if court orders obtained in the U.S. could be easily and indirectly nullified in parallel Canadian court proceedings.

[62] There are several issues with Google's position in this paragraph. For one, its argument erroneously reverses the onus on this Rule 151 motion, as discussed above. In addition, Google did not adduce or refer to any evidence to show any "chilling effect on cross-border enterprise" or refer to any evidence that Google – or any company – would have to "fundamentally reassess the manner in which it does business in Canada". Absent supporting evidence, there is no basis on which the Court can consider these assertions: see, similarly, *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] 3 FCR 633, at paras 84-85.

[63] I therefore conclude that Google has not established an important public interest for the purposes of the first element of the test in *Sherman Estate* and *Sierra Club*.

(ii) Real and Substantial Risk of Harm

[64] Google argued that the risk of harm to the public interest in international comity and the integrity of the US Courts' Orders is real and substantial as they would be rendered indirectly null and void.

[65] This argument was in part hyperbole, because no order of this Court could set aside or render another court's orders null and void. Google's point was that if the information is available from the Court's file in Canada, someone prevented from obtaining the information in the United States could obtain it here: see *Re Original Traders Energy Ltd.*, at para 62.

[66] However, as the Commissioner observed, the evidence filed on this motion does not fully support that argument. The US Courts' Orders established a category of persons whose names, positions and contact information are redacted from pleadings and filed documents available to the public. There is no direct evidence from Google that the information sealed in those US Courts' Orders actually overlaps with the names, positions and contact information of the persons mentioned in the Commissioner's application record filed in October 2021. Google also did not provide proposed redacted pages from the Commissioner's application record. Its affidavit evidence did, however, provide a list of individuals who are either senior executives or whose names have been made public in the US litigation proceedings.

[67] Google argued that the Court should infer that the category or the individual names overlap because of the connections between the subject matter of the US proceedings and the Commissioner's inquiry, and because there are hundreds of names listed in the Commissioner's application record as document custodians and the category of people covered by some of the US

Courts' Orders has resulted in the redaction of names from document logs. I agree that it is fair to infer some degree of overlap, but the extent of that overlap cannot be determined with confidence.

[68] However, even if I accept some overlap between the information protected in the US Courts' Orders and the information that is the subject of this motion, Google did not refer to any affidavit or other evidence to support a finding of a risk of any harm that would be caused to Google's commercial interests or to the employees whose names and positions appear in the Commissioner's application record (whether as a group or category, or individually). There is no direct evidence of a risk of harm or sufficient factual basis on which to draw any logical inference of harm from the disclosure of the non-senior executives' names, positions and contact information: *Sherman Estate,* at para 97; *Desjardins,* at paras 81-94.

[69] Thus, on this motion, Google has not discharged its heavy burden to establish a real and substantial risk of harm that is well grounded in the evidence.

[70] While these conclusions on the first stage of the analysis in *Sherman Estate* and *Sierra Club* are sufficient to determine the outcome of Google's motion, I will also address the other two elements of the test.

C. Is the order necessary because there are no reasonable alternatives?

[71] The parties agreed that there were no alternatives to a confidentiality order under Rule 151. This element does not require additional analysis in this case.

D. Proportionality: Do the benefits of the proposed order outweigh its negative effects?

[72] For this element of the *Sherman Estate* test, Google argued that the benefits of a Rule 151 order would significantly outweigh any negative effects. Google reiterated its position that the absence of a Rule 151 order would eviscerate the six US Courts' Orders in the "parallel" litigation in the United States, contrary to international comity. Google also argued that the intrusion upon freedom of expression would be minimal because the sealed information is highly targeted, and that, without a confidentiality order, entities being investigated concurrently in Canada and the United States might be hesitant to voluntarily provide relevant information to enforcement authorities. Google also referred to Canadian cases including *Subway Franchise Systems* and *Re Muscletech* to reiterate the importance of comity.

[73] Having concluded that Google has not identified a real and substantial public interest, there are no material salutary effects that would outweigh the public interest in protecting the openness of courts.

[74] I add three additional points.

[75] First, the evidence on this motion does not support the argument that entities being investigated concurrently in Canada and the United States would be hesitant to voluntarily

provide relevant information to enforcement authorities. Indeed, the Commissioner's written representations advised that his "considered view" on this motion was that the success or dismissal of Google's motion would not affect cross-border competition enforcement or his ability to carry out his mandate to administer and enforce the *Competition Act*.

[76] Second, I note the timing of this motion in Canada as it relates to the third stage of the *Sherman Estate* test. Unlike in the United States, this motion did not arise during litigation in Canada that seeks a remedy based on an alleged substantive violation of the *Competition Act*. Google filed its motion in response to an application for an order under section 11 of the *Competition Act*. The Commissioner made that application for an order requiring Google to provide certain information to advance the Commissioner's inquiry – whose aim under section 10 is to determine the facts and, in essence, to assist the Commissioner to decide whether or not to seek a remedy against a party to resolve concerns under the *Competition Act*.

[77] With respect to stage three of the *Sherman Estate* analysis, the parties on this motion did not specifically address how the objectives supporting the open court principle – free expression, access to information in judicial proceedings, and supporting truth-seeking and just outcomes in the courts – might be affected by the disclosure of information during the Commissioner's inquiry, when the Commissioner has not commenced an application to seek a remedy for a substantive breach of the *Competition Act*.

[78] Third, the non-senior executive Google employees who appear in the Commissioner's application record are not parties to a proceeding and are not identified as potential witnesses in a

proceeding in Canada. They are not accused of doing anything wrong. They are individuals who are mentioned in a court filing by virtue of their positions as employees of Google in October 2021, who may have records that are relevant to the Commissioner's inquiry or who have given a deposition to a law enforcer outside Canada.

[79] In that context, I refer to Canadian cases that show reluctance to issue confidentiality orders to protect the identities of individuals who are a party to litigation or who are potential or actual witnesses in a proceeding. In addition to the decisions in *Desjardins* and *Parrish & Heimbecker, Limited*, see: *Canadian Taxpayers Federation v Alberta (Election Commissioner),* 2023 ABKB 161; *Turner v. Death Investigation Council et al.,* 2021 ONSC 6625 (Div Ct), at paras 51-72, 73(b); *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 6688, at paras 31-40; *Adult Entertainment Association of Canada the Nuden v. Ottawa (City),* 2005 CanLII 16571 (ON SC); and *B.G. et al v. HMTQ,* 2002 BCSC 1417, at paras 55-60.

[80] Considering the constitutional open courts principle on one hand, and the factors mentioned above, I conclude that the benefits of a Rule 151 confidentiality order as requested do not outweigh its negative effects.

III. Conclusion

[81] Applying the relevant legal test under Rule 151 of the *Federal Courts Rules,* Google's motion must be dismissed.

[82] The Commissioner did not seek a costs order on this motion. No costs will be awarded.

[83] The parties agreed that the Interim Confidentiality Order could terminate with the Court's disposition of this motion.

[84] Google asked the Court to delay the effective date of its order on this motion for a short period of time, to enable counsel to obtain instructions on whether to appeal and presumably to seek interim relief from the Federal Court of Appeal. To that end, and considering that substantially all of the Commissioner's application record is available to the public in the Court's file, it is efficient to order that the Interim Confidentiality Order remain in place for 10 days following the Court's order on this motion.

[85] I would like to recognize the work of counsel for both parties in their written representations and Mr. Li's and Mr. Clarke's capable oral submissions on this motion.

ORDER in T-1551-21

1. The motion for an order under Rule 151 is dismissed.
2. The Interim Confidentiality Order dated October 20, 2021, shall terminate 10 days after the date of this Order.
3. The confidential version of the Court's order dated October 22, 2021, is no longer confidential, effective 10 days after the date of this Order.
4. There is no costs order.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1551-21
STYLE OF CAUSE:	COMMISSIONER OF COMPETITION v GOOGLE CANADA CORPORATION
PLACE OF HEARING:	OTTAWA, ONTARIO (VIDEOCONFERENCE)
DATE OF HEARING:	JUNE 12, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	AUGUST 1, 2023

APPEARANCES:

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Chenyang Li Elisa Kearney	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Davies Ward Phillips & Vineberg LLP Toronto, Ontario	FOR THE RESPONDENT