



PRACTICE

CONFIDENTIALITY ORDERS

Related subject: Competition

Motion by respondent (Google) seeking confidentiality order under *Federal Courts Rules*, SOR/98-106, r. 151 to seal certain information in the Court's file — Backdrop for this motion including investigations in U.S., Canada into potentially anti-competitive conduct by Google LLC, litigation against Google LLC in U.S. — Commissioner of Competition commenced inquiry under *Competition Act*, R.S.C., 1985, c. C-34 (Act), s. 10(1)(b)(ii) concerning conduct by Google in relation to online display advertising — Filed *ex parte* application under Act, s. 11 for order compelling Google to produce records, provide returns of information related to inquiry — Google's position on its motion was that Commissioner had included confidential information in its s. 11 application record — Interim confidentiality order issued pending hearing of Google's r. 151 motion — Information Google seeking to protect narrowed to include only names, positions, contact information of individuals who are non-senior executive employees of Google — Since motion originally filed, Google obtained six sealing orders in legal proceedings in U.S. — Google's amended notice of motion requested order sealing materials filed or to be filed in respect of s. 11 application to extent that such materials or information have been sealed in court record in litigation before U.S. courts — Commissioner noted that U.S. District Court orders issued after Commissioner filed s. 11 application materials — Also noted that there was no evidence herein proving that names, titles, contact information redacted under District Court's orders overlapping with names, titles, contact information that Google requested to be sealed under r. 151 — Google submitted that important public interest it seeks to protect is integrity of orders it obtained under U.S. law from U.S. courts — Argued that there is a nexus between matters investigated in Commissioner's inquiry, matters in dispute in U.S. proceedings in which it obtained sealing orders — Whether Google providing convincing evidentiary basis to justify issuing r. 151 order — Google not establishing important public interest for purposes of the first element of test in *Sherman Estate v. Donovan*, 2021 SCC 25, *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 — Unlike in U.S. District Court proceedings, Google not characterizing interest at stake as being privacy interest of its non-senior executive employees in seeking to protect their names, titles, contact information — Here, individual privacy interests of non-senior executive employees not qualifying as serious risk to public interest warranting confidentiality order under r. 151 — If those employees' information were the subject of standalone r. 151 motion, motion would not succeed because their privacy interests not meeting standard established in *Sherman Estate* — On r. 151 motions, Court should pay respectful attention to sealing orders granted by foreign courts, reasons provided for granting them — However, international comity not requiring Court to issue confidentiality order under r. 151 simply because foreign court has

issued sealing order over information in its file — To issue r. 151 order automatically would undermine constitutional open courts principle, sidestep application of legal principles in *Sherman Estate*, *Sierra Club*, and deprive Court of its discretion under r. 151 to decide whether to make an order on facts, evidence of each case — Given constitutional importance of open court principle, Court bound to apply the established legal tests to evidence — In this case, evidence not showing that information at issue confidential to Google — Evidence on U.S. law, practices during antitrust investigations not establishing that Google's employee names confidential *per se* — No direct evidence from Google that information sealed in U.S. District Courts' orders actually overlapping with names, positions, contact information of persons mentioned in Commissioner's application record — On this motion, Google not discharging its heavy burden to establish real, substantial risk of harm that is well grounded in evidence — Benefits of r. 151 confidentiality order as requested not outweighing its negative effects — Motion dismissed.

CANADA (COMMISSIONER OF COMPETITION) V. GOOGLE CANADA CORPORATION (T-1551-21, 2023 FC 1038, Little J., reasons for order dated August 1, 2023, 27 pp.)