CITATION: Toronto Star Newspapers Limited v. OpenAI Inc., 2025 ONSC 4685
COURT FILE NO.: CV-24-00732231-00CL
DATE: 20250814

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: TORONTO STAR NEWSPAPERS LIMITED, METROLAND MEDIA GROUP LTD., POSTMEDIA NETWORK INC., PNI MARITIMES LP, THE GLOBE AND MAIL INC./PUBLICATIONS GLOBE AND MAIL INC., CANADIAN PRESS ENTERPRISES INC./ENTREPRISES PRESSE CANADIENNE INC. and CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA

Plaintiffs

AND:

OPENAI, INC.; OPENAI GP, LLC; OPENAI, LLC; OPENAI STARTUP FUND I, LP; OPENAI STARTUP FUND GP I, LLC; OPENAI STARTUP FUND MANAGEMENT, LLC; OPENAI GLOBAL, LLC; OPENAI OPCO, LLC; OAI CORPORATION; and OPENAI HOLDINGS, LLC

Defendants

BEFORE: KIMMEL J.

COUNSEL: *Monique J. Jilesen & Niema Mohammad*, for the Plaintiffs/Responding Parties on Motion

Michael Crichton and Heather Fisher, for the Defendants/Moving Parties on Motion

Iain MacKinnon, for the Toronto Star Newspapers Limited and Canadian Broadcasting Corporation/Entreprises Presse Canadienne Inc. (Journalists, Non-Parties)

HEARD: July 30, 2025

ENDORSEMENT
(DEFENDANTS' PARTIAL SEALING ORDER MOTION)

The Action and Proximate Motions

[1] The plaintiffs are suing the defendants in this action for copyright infringement, breach of their standard "Terms of Use", and circumvention of technological protection measures. The

defendants are recognized leaders in artificial intelligence research and other activities related to artificial intelligence, or “AI”.

[2] Without attorning to the jurisdiction of this court, the defendants have brought a motion challenging this court’s jurisdiction (the "Jurisdiction Motion") and, specifically, to set aside service of the Statement of Claim on the defendants and to stay or dismiss the action. The Jurisdiction Motion is now scheduled to be heard on September 10, 2025.

[3] In the meantime, on May 6, 2025, the court granted an interim Order concerning confidential treatment of certain documents, information and transcripts to be produced and used in relation to the Jurisdiction Motion, which included a mechanism for the parties to designate confidential information (the "Protective Order"). That order was granted on consent and without prejudice to any parties’ position on this motion.

[4] The defendants have brought this motion seeking a partial sealing order in respect of their designated confidential information that they wish to rely upon for the Jurisdiction Motion (the “Partial Sealing Order”).

[5] The Protective Order does not authorize the sealing of Confidential Information filed in court, except in connection with this motion for the Partial Sealing Order. If the Partial Sealing Order is granted, that is what will govern what designated Confidential Information under the Protective Order will, or will not, be sealed.

The Confidential Information and the Business Interests It Relates To

[6] The designated Confidential Information over which the defendants seek the Partial Sealing Order is contained in the affidavits of three witnesses for the defendants, the transcripts of their cross-examinations (appended to a law clerk’s affidavit), and one exhibit (a detailed corporate organization chart) marked on the Wu cross-examination. The “Confidential Information” is comprised of:

1. In the affidavit of Robert Wu, dated April 15, 2025, portions of paragraphs 32 (third sentence), designated excerpts from his cross-examination and Exhibit 2 marked on his cross-examination (the "Wu Confidential Information");

2. In the affidavit of Colin Reid, dated April 16, 2025, paragraph 14, in the reply affidavit of Colin Reid, dated June 17, 2025, paragraphs 4 and 14 and designated excerpts from his cross-examination (the "Reid Confidential Information");

3. In the affidavit of Shantanu Jain, dated April 16, 2025, paragraphs 17, 18 and 19 and designated excerpts from his cross-examination (the "Jain Confidential Information"); and

4. In the reply affidavit of Mark Baker, affirmed June 17, 2025, paragraphs 15 (two bullet points) and paragraph 63 (fourth, eighth, and ninth sentences) (the "Baker Reply Confidential Information").

[7] The defendants explain that the Confidential Information relates to at least the following:

1. the corporate organization and structure of certain of the defendants;

2. web crawling and fetching processes, systems, resource allocations and updates/modifications/improvements; and

3. model training and inference processes, systems, resource allocations and/or cost structures.

[8] The proposed draft Partial Sealing Order is narrowly tailored to the specifically designated Confidential Information outlined above. These designations were based on a review and excision of only the excerpts that the defendants believe require exclusion from the public court record at this time to protect their commercial, competitively sensitive and valuable confidential information from disclosure to their competitors. These competitors are not party to this action but stand to gain an unearned competitive advantage through public disclosure of the Confidential Information.

[9] The defendants are leaders in the competitive and fast developing AI field. Their competitors range from large, established technology companies like Google and Amazon to smaller startups trying to establish a foothold in the industry.

[10] The defendants explain in two affidavits sworn on June 20 and July 16, 2025, respectively, by James Sherwood, a member of the Legal Staff at OpenAI OpCo. LLC (the "Sherwood Affidavits")[1], why the designated Confidential Information is both confidential and necessary for the Jurisdiction Motion. They say that:

1. The Wu Confidential Information is confidential non-public commercial information that describes the nature of each of the defendants' business, including:

    i. which particular defendants are operating entities, non-operating entities or startup fund entities, and including the corporate organization and structure of certain of the defendants;

    ii. specific disclosures regarding the contents of organizational charts;

[1] The defendants also submitted a law clerk's affidavit that attaches the relevant portions of the transcripts that they are requesting a sealing order over. All of the unredacted affidavits, exhibit and transcripts were provided to the court separately with the redactions removed and replaced by highlighting to enable the court to see all of the designated Confidential Information that they ask be sealed under the Partial Sealing Order. The Protective Order allows counsel and certain designated representatives of the plaintiffs to see the Confidential Information, under confidentiality restrictions.

iii. information concerning shared services agreements among certain defendants;

iv. details of the corporate structure used for investment in certain defendants;

v. information relating to the transfer of or holdings of intellectual property assets of certain defendants;

vi. provisions required of employees and investors in order to invest in certain defendants; and

vii. the licensing arrangement between certain defendants.

2. The Reid Confidential Information and Baker Reply Confidential Information are comprised of confidential non-public business and technical information related to or that describes:

i. the defendants' artificial intelligence systems, including web crawling and fetching processes, systems, resource allocations and updates/modifications/improvements;

ii. internal technical issues relating to system behavior under certain conditions;

iii. data retention and deletion practices;

iv. specific categories of data collected by certain defendant systems and the locations or systems where such data is stored; and

v. information regarding methods and infrastructure for accessing publicly available data, including the use of particular IP address ranges for retrieving certain web resources.

3. The Jain Confidential Information is confidential non-public business and technical information related to the defendants' AI systems, including:

i. model training and inference processes, systems, resource allocations and/or cost structures;

ii. the treatment of specific intellectual property rights;

iii. the geographic locations of computing clusters used for inference and research;

iv. the entities that possess or have access to AI models;

v. high-level differences in the training approaches used across various GPT models; and

vi. information relating to training data storage locations.

[11] The specific business and technical information identified in the Sherwood Affidavits that comprises the Confidential Information is relevant to the Jurisdiction Motion in that the defendants seek to demonstrate which aspects of their AI activities and business are, and are not, carried on in or connected to Ontario (or Canada).

[12] The defendants further explain that they have always maintained confidentiality over the Confidential Information. They preserve its confidentiality by securing it on access-controlled storage mediums and by limiting access to authorized individuals on a need-to-know basis. The Confidential Information is neither public knowledge nor in the public domain.

[13] None of the defendants' evidence about the Confidential Information or the business interests that it describes or relates to has been contradicted by any responding evidence from the plaintiffs, nor was the defendants' evidence in support of the Partial Sealing Order challenged on cross-examination.

The Test for Granting a Partial Sealing Order

[14] The test that the court must apply in considering whether to grant the requested Partial Sealing Order is based on well settled law that the parties agree on.

[15] To obtain a sealing order under s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C.43, the defendants 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: see *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 38; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53.

[16] The first two branches of this test make up the requirement of "necessity", while the third "proportionality" branch of the test is where the balancing of interests takes place.

[17] The burden is on the parties requesting the sealing order. It is a high burden that must be met with clear, non-speculative evidence: see *SSN v. Canada (Citizenship and Immigration)*, 2022 FC 1189, at para. 4.

Responses to this Motion for a Partial Sealing Order

[18] The plaintiffs do not forcefully oppose the Partial Sealing Order that the defendants seek. Rather, they ask the court to evaluate whether the evidence that the defendants have filed in support of their request (primarily the Sherwood Affidavits) is sufficient to meet the required legal test and, therefore, justifies granting the Partial Sealing Order.

[19] The defendants complied with the court's direction at an earlier case conference on April 17, 2025, requiring that: "If a sealing order is going to be sought of the nature currently contemplated, the Defendants will be required [to] comply with the Consolidated Civil Provincial Practice Direction requiring notice to the media in respect of any sealing order motion." Notably, many of these media outlets are, through other divisions within their same organizations, also plaintiffs in this action.

[20] Certain non-party journalists associated with two of the plaintiff media organizations (The Toronto Star and the CBC) retained counsel just prior to the hearing and instructed their counsel to appear and oppose the requested order. They argued that the public interest outweighs the private interest that the defendants seek to protect. The arguments made against granting the Partial Sealing Order were mostly focused on the first and third branches of the test for a sealing order.

[21] The defendants opposed the tag team approach of having two different lawyers representing some of the plaintiffs. They also questioned whether the court should grant leave for a new lawyer to be permitted to appear and make submissions at the hearing without even having filed a Notice of Appearance. Counsel appearing on behalf of media interests in response to a publication ban notice are typically granted permission to make submissions. This is a unique situation given that the media interests who wish to appear are affiliated with the plaintiffs.

[22] After hearing submissions from all counsel, the court granted leave to counsel for the non-party journalists opposed to the granting of the Partial Sealing Order to make submissions in their capacities as recipients of the CJA publication ban notice. Their interests and focus were expected to be specific to their interests as journalists.

[23] Leave was granted on the understanding and expectation that the lawyer for the non-party journalists would focus his submissions on different matters from plaintiffs' counsel, namely the public interest from the perspective of the journalists, and that some of the plaintiffs' hearing time allocation would be reserved for those submissions. Both of these conditions were adhered to and submissions were made by both sets of counsel.

Summary of Outcome

[24] For the reasons that follow, the requested Partial Sealing Order is granted.

Analysis

[25] I will deal with the three branches of the test for granting a sealing order in turn.

a) Serious Risk to Important Public Interest by Disclosure of Confidential Information

[26] In *Sierra Club*, at paras. 54-56, the Supreme Court specified three important elements that are subsumed in the question of whether disclosure of the identified Confidential Information poses a serious risk to an important public interest, namely that:

> [T]he risk in question must be real and substantial, in that the risk is well grounded in the evidence, and must pose a serious threat to the commercial interest in question.
>
> In order to qualify as an "important commercial interest", the 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…. [I]f there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).
>
> [C]ourts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the final branch of the test, courts must be alive to the fundamental importance of the open court rule.

[27] 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": see *Sierra Club*, at para. 60; see also *Mediatube Corp. v. Bell Canada*, 2022 ONSC 342, 191 C.P.R. (4th) 46, at para. 32. The party seeking the sealing order must 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.

[28] The *Sierra Club* test was recast by the Supreme Court of Canada in *Sherman Estate*, but it is widely accepted that the fundamental elements of the test and requirements for meeting it were not changed by this later decision.

[29] The defendants have established through the Sherwood Affidavits that their Confidential Information is comprised of valuable commercial and technical business information over which they have always maintained confidentiality. This safeguards the business strategies and methods that have given them their earned competitive advantages and prevent those advantages from being lost through disclosure to their competitors. They explain that maintaining this advantage is even more important in the current AI space, which is highly competitive and fast-paced. The defendants are concerned that their competitors will seize upon any litigation-related disclosure of

their otherwise confidential commercial and technical business information and exploit it to their advantage and the defendants' detriment.

[30] This concern is inherently speculative as it is partly based on predictions of the defendants' competitors' behaviour. However, it is also grounded in evidence from Sherwood, someone who is knowledgeable about the defendants' business and the AI industry in general, regarding the competitive nature of the business and about the specific aspects of the defendants' business that would be of interest to their competitors.

[31] On a balance of probabilities, I find that disclosure of the Confidential Information does pose a real and substantial threat, well-grounded in the evidence when considered as a whole, to the important commercial interest of encouraging fair competition (and not giving unearned advantages to competitors) in the highly competitive and fast-paced AI space. Further, I find that its disclosure *could* reasonably harm the defendants' proprietary, commercial and scientific interests: see *Sierra Club*, at para. 60.

[32] Courts have recognized that there is a public interest in the "general commercial interest of preserving confidential information": see *Sherman Estate*, at para. 41, citing *Sierra* Club, at para. 55. This is an important public interest worthy of the court's protection.

[33] Encouraging fair competition in a free and open market is an important and related public interest. Fair competition should not confer an unearned advantage to a litigant's competitors through the disclosure of confidential commercial and technical business information as a bi-product of that litigant's need to fully respond to litigation. There is some further authority that this concern should be heightened when a party has not chosen to litigate but is being forced to defend themselves: see *Sierra Club*, at para. 62; *Lewis v. Uber Canada Inc.*, 2023 ONSC 5134, at para. 11; *Mediatube Corp.*, at paras. 32-34.

[34] It is not in the public interest for party litigants to have to choose between fully advancing their litigation interests and protecting their confidential, commercial and technical business information from public disclosure to non-party competitors. It is in the public interest for the defendants to be able to fully defend themselves without compromising or sacrificing competitively and commercially sensitive Confidential Information. This is an important commercial interest that is not specific only to the defendants in this case but to any litigants involved in highly-competitive and fast-paced competitive markets.

[35] I am cognizant of the need to exercise caution in determining what constitutes an "important public interest". Not all of a commercial party litigant's self-designated confidential information will be worthy of this type of protection. Conversely, this protection should not be limited to formally patented or copyrighted information. What information qualifies will depend on the nature of the business and issues in each specific case.

[36] Here, the defendants have reviewed and excised only what they consider to be the essential confidential, technical and commercially sensitive business information contained in their affidavits and cross-examination transcripts that could give their competitors an unearned competitive advantage by enabling those competitors to exploit the defendants' vulnerabilities and

learn how the defendants access and use available resources to compete more effectively. The defendants have identified this specific information as the designated Confidential Information. No opposing evidence has been presented and Mr. Sherwood, the primary affiant on this point, was not cross-examined.

[37] The plaintiffs and non-party journalists have urged the court to review the evidence and ensure that the defendants have met their evidentiary burden of identifying commercially sensitive and confidential information (see: *Sierra Club*, at para 62; *Sherman Estate*, at para. 80). Some specific examples of the type of Confidential Information that the plaintiffs and non-party journalists have questioned or challenged include:

1. The detailed organizational chart of the defendant group of companies, including the location of certain companies and their investors/shareholders, that comprises the only document that the defendants seek to seal as part of the Wu Confidential Information. They contend that corporate organization charts are routinely filed in litigation and would not typically be regarded as confidential or proprietary.

2. The generalized, repeated statement in the Sherwood Affidavits is too vague and generally, namely that the Reid Confidential Information and the Jain Confidential Information comprise confidential business and technical information "access to which would enable competitors to modify, guide or shift focus for their own web crawling and fetching processes, systems, resource allocations and updates/modifications/improvements, model training and inference processes, systems, resource allocations and/or cost structures in ways that mimic and/or more effectively compete with the Defendants." They suggest that this evidence is analogous to what was before this court in *Crystallex International Corporation (Re)*, 2020 ONSC 3434, 81 C.B.R. (6th) 314, at paras. 8, 12-15, where the court was not satisfied with what it described as an insufficient paragraph of affidavit evidence to attempt to satisfy the *Sierra Club* test because "this evidence was highly speculative, not sufficiently detailed nor compelling".

3. The proposed confidential record on this motion does not include the defendants' code or models, which have not been produced in the proceedings. Nor have any handbooks or technical records describing or outlining training, crawling, inference, or fetching processes been produced. Similarly, no defendant intercompany, third-party licencing, shared service, or other agreements are in the record.

[38] I accept the responses of the defendants to these general criticisms, that:

1. Context is important. Organizational charts will not always be confidential or competitively sensitive. Exhibit 2 to the Wu cross-examination is confidential because of the location-specific and investor-specific information that it contains. Conversely, there is a higher level corporate organizational chart in the record that

is not part of the designated Confidential Information and no request is being made to seal it.

2. Unlike in *Crystallex*, the defendants have provided far more than a single paragraph of evidence to support their claim of confidentiality and commercial sensitivity in respect of the Confidential Information. The fact that the overarching concern is the same, and thus repeated, in connection with the Reid, Baker and Jain Confidential Information does not detract from the sufficiency of their unchallenged evidence. This is not a situation of a bare assertion of risk without any particulars, as was one of the concerns identified in *Sherman Estate* (at para. 102).

3. Context is similarly important when considering technical information. Not all technical information has to be formalized, patented, copyrighted or even memorialized in order to be proprietary and confidential, It is a false standard to say that this type of information must have been written down in a code or a handbook or spelled out in that level of detail in the evidence on the motion to qualify for a sealing order, especially where to do so would require an even deeper dive into the very same Confidential Information that the defendants are seeking to protect.

[39] What the plaintiffs and non-party journalists are essentially saying is that because the Confidential Information does not neatly fit into one of the previously recognized types of confidential information for sealing orders granted in commercial or technology cases (e.g. patented or copyrighted intellectual property such as source code or handbooks and manuals), it should not qualify for this designation without the defendants providing a detailed explanation outlining exactly how it could or would be used by a competitor. That level of specificity is not required in every case, and there is a satisfactory foundation in this case. There is a broader public interest in allowing corporate parties to litigate without having to expose all their private confidential inner workings. This also enhances the public interest in fair competition.

[40] I have reviewed and considered the evidence in the record and am satisfied that there is a risk, grounded in the evidence, that if competitors gain access to the defendants' Confidential Information, those competitors could gain an unearned advantage to the detriment of the defendants that could, in turn, reasonably harm the defendants' proprietary, commercial and scientific interests. This poses a real and substantial threat to the important commercial interest of encouraging fair competition (and not giving unearned advantages to competitors) in the highly competitive and fast-paced AI space.

b) Reasonable Alternative Measures will not Prevent the Risk from Disclosure

[41] The Supreme Court of Canada in *Sierra Club*, at para. 57, reiterated that "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."

[42] The defendants assert that the Confidential Information consists of narrow, discrete facts that are highly specific in nature. They maintain that this information cannot meaningfully be conveyed through non-confidential summaries, nor are there alternative, non-confidential substitutes.

[43] As discussed earlier in this endorsement, I am satisfied that the proposed Partial Sealing Order is restricted as much as is reasonably possible to preserve the commercial interest in question. The defendants have undertaken to excise only the Confidential Information that is commercially sensitive and that could give an unearned advantage to their competitors in the AI space.

[44] As the court found in *Sierra Club* (at para. 66), expungement of the Confidential Information would also be an unworkable and ineffective solution that is unreasonable in the circumstances. The Confidential Information has been demonstrated to be potentially relevant to the Jurisdiction Motion, which the defendants have the right to bring and for which the defendants should not be forced to compromise their arguments to preserve their Confidential Information. It has not been suggested that there is a more reasonable and less restrictive method than what the defendants have proposed.

[45] I am satisfied, based on the foregoing considerations under the first two branches of the test, that the proposed Partial Sealing Order is necessary to protect the public interest. This affords the litigants the ability to protect their competitively sensitive, confidential commercial and technical business information from public disclosure in the context of an interlocutory motion that could be dispositive of this proceeding in Ontario, such as the Jurisdiction Motion in this case.

c) Proportionality: the Benefits of the Order Outweigh the Negative Effects

[46] In *Sierra Club*, the Supreme Court of Canada emphasized at para. 69) that, at the proportionality stage:

> The salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

[47] There are circumstances such as these where, in the absence of an affected *Charter* right, the proper administration of justice still calls for a confidentiality order: see *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 31 and its companion case *R. v. O.N.E.*, 2001 SCC 77, [2001] 3 S.C.R. 478, at para. 14. Like in *Sierra Club* (at para. 70), in this case, the fair trial right being invoked to protect commercial, rather than liberty, interests is a recognized fundamental principle of justice. By facilitating access to relevant documents in a judicial proceeding through the proposed redactions and Partial Sealing Order, the order sought would assist in the search for truth, a core value underlying freedom of expression: see *Sierra Club*, at para. 72.

[48] The salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case and fairly participate in this litigation, as encompassed by the broader fair trial right.

[49] The Supreme Court of Canada describes in *Sierra Club*, at para. 74, the deleterious effects to be the negative effect that granting the Partial Sealing Order would have:

> …on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(*b*) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

[50] Considered in light of the core values underlying the open court principle and freedom of expression enumerated in *Sierra Club*, at para. 75, namely (1) seeking the truth and the common good, (2) promoting self-fulfillment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the proposed Partial Sealing Order in this case:

1. Arguably promotes rather than undermines the truth-seeking objective, if the alternative is that the litigant might have to make the hard business choice of withdrawing the Confidential Information and sacrifice or compromise on the evidence it puts forward on its Jurisdiction Motion.

2. Is arguably neutral to the self-fulfillment of the development of individual's thoughts and ideas, since there is no indication that the general public would have any interest in the Confidential Information, save for a small select subset of the public which stands to gain an unearned competitive advantage. The proposed Partial Sealing Order would restrict access to a relatively small number of specific evidentiary extracts and one document. Giving public access to these excerpts of evidence would contribute little to the public interest in the search for truth in this case whereas allowing the plaintiffs' designated representatives and their lawyers access would enhance the evidentiary foundation and arguments upon which the Jurisdiction Motion is to be decided.

3. Appears to have no bearing upon or relevance to protecting individual's rights to participating in an open political process.

[51] The Supreme Court of Canada cautions that "although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration": see *Sierra Club*, at para. 83. Here the plaintiffs are themselves media outlets and it is thus not surprising that there is

some media interest in the case; however, I do not consider that to be an influential factor in the balancing of competing public interests at this proportionality stage of the test.

[52] Under the terms of the order sought, the only restrictions relate to public accessibility and distribution. The Confidential Information would be available to the court and the parties (in the case of the plaintiffs, designated representatives), and public access to the proceedings would be generally unimpeded. As such, the order represents a minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle. In contrast, the older cases that the non-party journalists rely upon more directly engaged the importance of the open court principle and freedom of expression. *Canadian Broadcasting Corp. v. R*, 2010 ONCA 726, 102 O.R. (3d) 673 and *CBC v. New Brunswick*, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, were decided in context of absolute bans on media access to entire exhibits and portions of the hearing.

[53] In the context of this case, the Partial Sealing Order would only marginally impede, and in some respects would even promote, the pursuit of the fundamental values that the open court principle is intended to protect. As such, the order would not have significant deleterious effects on freedom of expression.

[54] The evidence establishes, on a balance of probabilities, that the defendants could suffer harm as a result of non-party competitors being able to access sensitive commercial and technical information about how and where the defendants conduct certain aspects of their business in the fast-paced world of generative AI. As in *Miller & Smith Foods Incorporated v. Citadelle, Coopérative de Producteurs de Sirop Dérable*, 2024 ONSC 6133, at para. 26, here there has been no indication that the public has a strong interest in the Confidential Information to be sealed, "apart from the general public interest in being fully informed of what transpires during the judicial process, which is only mildly impaired by the narrow order proposed." While there is no obvious corresponding benefit to the freedom of expression of the general public for that Confidential Information to be part of the public court file, it may be of great interest to competitors of the defendants; however, those (private interests of non-party competitors) are not interests that the court is concerned about protecting in this context: see *GasTOPS Ltd. v. Forsyth*, 2011 ONCA 186, 12 C.P.C. (7th) 116, at paras.17-22.

[55] Although not determinative, it is also a relevant consideration that this Partial Sealing Order is only being granted in connection with the Jurisdiction Motion. If the defendants are successful, then they will not be litigating in Ontario. In such circumstances, there is potentially heightened unfairness in the defendants having to expose their Confidential Information publicly when they have been specific about what needs to be sealed and provided supporting evidence for their request. If they are not successful in the Jurisdiction Motion, it is not to be presumed that there will be a sealing order that persists for the duration of this case.

[56] In the balance, I find that the salutary effects of the proposed Partial Sealing Order in the context of the Jurisdiction Motion outweigh its deleterious effects, and that the order should be granted.

Final Disposition and Costs

[57] The parties agreed to exchange costs outlines for this motion within a week of the hearing. I assume they have done so. They were directed to advise the court if they are able to reach any agreement on any aspect of costs. The court has not heard anything regarding the costs of this motion since the hearing concluded.

[58] The parties may incorporate any costs claimed of this motion into their costs outlines for the Jurisdiction Motion. The court may provide further directions regarding submissions as to costs of either this motion and/or the Jurisdiction Motion in conjunction with its decision on that upcoming motion. The court does note that, although the defendants were successful, it was their burden and obligation to bring this motion, which they would have had to fully brief and argue irrespective of whether there were any others opposing it: see *Aquino v. Aquino*, 2021 ONSC 7797, 96 C.B.R. (6th) 138, at para. 72.

[59] On this motion for a Partial Sealing Order, the cost dynamic is not one with a winner and a loser. I have not made any finding that any party took an unreasonable position on this motion. Although the parties opposite to the defendants made some submissions, they did eventually leave the determination in the court's hands. The court is grateful for the contributions of all counsel on this motion so that it could be decided with the benefit of all issues having been raised and considered.

[60] Neither the plaintiffs nor the non- party journalists offered any comments on the draft form of Partial Sealing Order that the defendants provided to the court at the hearing. I will sign that form of order once it has been updated to provide the missing information at the top (name of judge and date, which should be the date of this endorsement).

[61] The moving parties shall be responsible for submitting the materials to be sealed in an envelope to the court together with a copy of the order, once issued. Redacted versions of the materials for the Jurisdiction Motion shall be filed in the public court file and uploaded into Case Center. The same unredacted, highlighted versions of the sealed materials as were provided to the court for this motion shall be re-sent to the presiding judge by email through the Commercial List Office the week before the hearing is scheduled to proceed.

[62] The terms of the continuation of the sealing order after the Jurisdiction Motion shall be addressed at a case conference once the decision on that motion has been rendered.

KIMMEL J.

Date: August 14, 2025