

Federal Court



Cour fédérale

Date: 20190501

Docket: T-40-18

Citation: 2019 FC 559

Ottawa, Ontario, May 1, 2019

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

PAID SEARCH ENGINE TOOLS, LLC

Plaintiff

and

**GOOGLE CANADA CORPORATION,
GOOGLE LLC, and ALPHABET INC.**

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion for a “Protective Order” on terms in a draft order and for an extension of time for the exchange of affidavits of documents. The motion is opposed by the Plaintiff as to a Protective Order but not with respect to an extension of time.

[2] Unlike some of the recent cases involving consensual protective orders, this is a contested motion which underscores the rationale for such protective orders.

[3] For the reasons to follow, this motion is granted in part. The basic requirement for the issuance of a Protective Order has been established but there remain some issues of the terms of the proposed Protective Order that must be addressed.

II. Background

[4] This underlying litigation is a patent infringement action in which the Plaintiff [PSET] alleges that the Defendants [Google] have infringed fifty-nine (59) of the eighty-nine (89) claims of the '167 Patent.

[5] The Defendants have denied infringement and asserted invalidity of the '167 Patent. Pleadings are closed.

[6] The litigation is at the stage where affidavits of documents are to be produced. The exchange of the affidavits and documents await the disposition of this motion.

[7] Over the course of several months there were numerous exchanges between the parties as to the method to disclose and control the use of what is highly confidential commercial information.

[8] It would appear at this stage that the bulk of the highly confidential and sensitive information belongs to Google.

[9] Google has essentially proposed a protective order [Protective Order] which is similar to a protective order consented to by the parties and issued by the U.S. Federal Court in respect of companion litigation related to the corresponding U.S. patent to the Canadian '167 Patent.

[10] Despite negotiation and small amendments, the parties have not reached agreement in the Canadian litigation. PSET is content to rely on the implied undertaking that documents exchanged in the course of litigation are to be used for that litigation's purposes. Alternatively, it has proposed a "modest" confidentiality regime.

[11] At the risk of oversimplification, what is at issue is the Google process of placing ads at the periphery of Google search page results and Google partners' pages. Through an electronic process, space for the ads are bid, accepted and placed in fractions of seconds and the ads appear on the Google search page.

[12] Google's concern is that PSET is a "patent assertion entity" – a more elegant description of a "patent troll". It is further concerned that some of the principals in PSET are engaged in advising and assisting others in "working around" (my description) the Google method of bidding and accepting ads to be placed on Google Search page results.

[13] In any event, if PSET is not a direct competitor of Google, Google sees it as an indirect competitor or a commercially adverse entity who directly or indirectly would benefit in having access to what Google claims is highly confidential sensitive commercial information which it has always treated as confidential.

[14] The *bona fide* concerns of Google are substantially laid out in the affidavit of Christopher Monkman [Monkman Affidavit], a Group Product Manager at Google LLC. The purpose of the affidavit is well laid out in paragraph 4 thereof:

I am providing this affidavit to describe the extraordinarily sensitive and valuable nature of information regarding Google's confidential business practices, and also how Google's search advertising systems generally work, including how the systems determine which advertisements to display, how Google computes costs to advertisers, and the potential risk of this type of information being shared with the public, including Google's advertisers and competitors.

[15] PSET has not provided any rebuttal evidence or otherwise seriously challenged by way of evidence the concerns expressed by Google. PSET says that the implied undertaking is sufficient protection for the exchange of any confidential information at this stage of the proceedings.

[16] The issues for the Court are: the bases for issuing a protective order; whether a protective order should be issued in this case; and whether the proposed Protective Order, or an amended version, should be issued.

III. Analysis

A. *Jurisdiction*

[17] The Court's authority to issue a protective order flows from Rules 3 and 4 of the *Federal Courts Rules*, SOR/96-106 [*Federal Courts Rules*], not Rule 151 (Confidentiality Orders) or from the analysis of confidential orders discussed in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*]. The Supreme Court of Canada referred to protective orders in that decision by way of *obiter*.

General Principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Matters not provided for

4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Cas non prévus

4 En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

[18] A protective order arises in the context of the disclosure between the parties and outside the open court process. Unless filed in Court, the public does not see, nor are they entitled to see, the documents produced nor the oral discoveries conducted.

[19] The term “protective order” refers to the way parties designate and treat confidential information that they exchange between themselves in the pre-trial phase of the action.

[20] A confidentiality order, on the other hand, arises when materials are to be filed in Court as the words of Rule 151(1) clearly provide:

Motion for order of confidentiality

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

Demonstrated need for confidentiality

(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.

Requête en confidentialité

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

Circonstances justifiant la confidentialité

(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.

[21] Despite the submissions of counsel who adopt *Sierra Club's* confidentiality order analysis as the appropriate test for a protective order and, with great respect to those in the Court who have expressed a similar view, there is significant distinction between protective orders and confidentiality orders.

[22] The test for a Rule 151 confidentiality order was set out at para 53 of *Sierra Club*:

... 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.

[23] Even where *Sierra Club* was relied upon in considering whether a protective order should be issued in *Canadian National Railway Company v BNSF Railway Company*, 2019 FC 281 at para 54, 303 ACWS (3d) 387, it was recognized that the “deleterious effects to the public” considered in the second part of the *Sierra Club* test, are not relevant to protective orders:

[54] Because of this conclusion, it is not necessary for me to consider the second part of the *Sierra Club* test which balances the salutary and deleterious effects of granting the requested order. However, I would expect that, in the context of a protective order (which does not address documents filed with the Court), this part of the test would typically not be a challenging obstacle since a protective order has no deleterious effects on the principle of open and public courts.

[24] As provided in the proposed Protective Order, when confidential documents are to be tendered in Court, such as on a motion, the parties must seek an additional order from the Court under Rule 151.

[25] It has been suggested that some recent Federal Court jurisprudence has made it more difficult to obtain protective orders by equating the test for protective orders with the test for confidentiality orders. This jurisprudence has generally assessed protective orders in the context of agreement between the parties as to how documents are to be handled, which is not the case here. There is significant disagreement in this case between the parties as to whether a protective order is needed and, if needed, what the terms of the order should include.

[26] In *Seedlings Life Science Ventures LLC v Pfizer Canada Inc*, 2018 FC 443 at para 8, 292 ACWS (3d) 391, rev'd 2018 FC 956, the learned prothonotary pointed out that the distinction between a protective order and a confidentiality order is relatively recent in Federal Court jurisprudence but that there is clearly a current recognized difference.

[27] The delineation between the two types of orders was blurred in earlier cases through the issuance of hybrid orders, which addressed elements of discovery process document control and elements of filing documents under seal in Court. However, courts still differentiated the considerations for pre-trial document disclosure from the filing of confidential information with the Court in these earlier cases.

[28] Particularly in *Apotex Inc v Wellcome Foundation Ltd* (1993), 51 CPR (3d) 305 at 311, [1993] FCJ No 1119 (FCTD) [*Apotex*], the Court recognized that at the pre-trial stage it was sufficient to demonstrate a belief that a party's proprietary, commercial and scientific interest would be seriously harmed by producing information upon which those interests would be based.

The Court went on to recognize that when matters went before the Court, the open court principles might alter the confidentiality regime.

[29] The Court favoured the issuance of an order based on three considerations also existing in the present motion:

1. The terms reflected the terms of a similar order in parallel litigation.
2. The terms of the order allowed for the other party to object to the classification of information as confidential, which allows for the Court to ultimately control the classification and disclosure between the parties.
3. The Court's practice was to issue protective orders where a party believed in good faith that its commercial, business or scientific interests may be seriously harmed by disclosure to the public, especially at the pre-trial stage.

[30] These three factors have been subsequently adopted by the Court when considering the granting of counsel's eyes only orders (see e.g. *Merck & Co v Apotex Inc*, 2004 FC 567 at para 8, 130 ACWS (3d) 487; *Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 at paras 14-16, 157 ACWS (3d) 161).

[31] The *Apotex* decision was followed by *AB Hassle v Canada (Minister of National Health & Welfare)* (1998), 83 CPR (3d) 428. 1998 CarswellNat 2520 (FCTD), aff'd [2000] 3 FC 360 (CA) [*AB Hassle*], where the Court was dealing with a challenge to the designation of confidential information under a hybrid order. The Court established a two-part test. The first part incorporated the good faith subjective belief discussed in *Apotex* and a second part where,

on a challenge to the classification, the party claiming confidentiality must show confidentiality on an objective basis – a harms test.

[32] In the Federal Court of Appeal’s decision upholding the trial decision in *AB Hassle*, the Court recognized the absence of the open court principle at this stage of the litigation. At paragraph 7, the Court held that “[t]here is little, if any, public interest in knowing the specific content of drug processes and no one can seriously argue that the issuance of protective orders of the type at issue in NOC proceedings imperils the principle of open justice.” The Court at paragraph 9 also stated that protective orders issued prior to the filing of evidence “are by necessity drafted in general terms.”

[33] In *Levi Strauss & Co v Era Clothing Inc / Vêtements Era Inc*, (1999), 1 CPR (4th) 513 at paras 17, 26-28, 172 FTR 248, (FCTD), dealing with a hybrid order under Rule 151, the Court emphasized that Rule 151 only applies to “material to be filed”. Rule 151 and the open court principle did not apply in respect of material not being filed in Court.

[34] The decision confirmed two different processes, one for protective orders and one for confidentiality orders, with the former being based on good faith belief in the harm from pre-trial outside Court disclosure.

[35] In the subsequent *Sierra Club* decision at trial (*Sierra Club of Canada v Canada (Minister of Finance)* (1999), [2000] 2 FC 400, 92 ACWS (3d) 758 (FCTD)), Justice Pelletier applied the *AB Hassle* test to a confidentiality order under Rule 151, stating that protective orders

are essentially confidentiality orders. It was significant that the party was seeking to voluntarily file its own confidential material rather than being forced to disclose confidential material through the mandatory process of production and discovery. In addition, he added the consideration of the harm to the public interest to the *AB Hassle* test because the case involved public law. Justice Pelletier declined to grant the confidentiality order.

[36] The Supreme Court of Canada in *Sierra Club* at para 53 granted the Rule 151 confidentiality order on the basis that:

(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.

[37] The *Sierra Club* test was based on common law principles for publication bans in the criminal context and on consideration of the right to freedom of expression. It was focused on the fundamental principle that court proceedings should be as open as possible.

[38] The Supreme Court recognized that there was a difference between protective orders and confidentiality orders. It accepted that the test in *AB Hassle* could be used for both protective orders and confidentiality orders for determining whether there was a risk to important commercial interests. However, for confidentiality orders, a party must also show that there are

no reasonable alternative measures and the confidentiality order is not disproportionately harmful to the public interest in open and accessible court proceedings.

[39] In *Sierra Club* at para 60, the Supreme Court addressed the test for protective orders:

60 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), 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).

[40] Rather than merging the principles governing confidentiality orders with those governing protective orders, the Supreme Court drew a distinction between protective orders per *AB Hassle* and confidentiality orders per *Sierra Club* in setting a higher test for confidentiality orders by 1) showing of no reasonable alternative measures; and 2) requiring that the salutary effects of the order outweigh the deleterious effects which include the public interest in open and accessible court proceedings.

[41] In recent decisions of this Court in respect of consensual protective orders, questions have been raised about the necessity of such orders, the cost, inconvenience to the Court, potential abuses and other potential problems with protective orders. Since the case before me is a contested matter, some of the above issues such as inconvenience are not pertinent. The

suggestion that there never was a test for protective orders has been clarified in the above discussion, particularly the *obiter* comment of the Supreme Court.

[42] In my view, the Court's jurisdiction to issue protective orders rests in Rules 3 and 4 and the decisions which followed it. *Sierra Club* gives guidance on the test for protective orders, but establishes a test in paragraph 53 meant solely for confidentiality orders.

[43] The test for protective orders can be summarized as follows:

- that the information at issue has been treated at the relevant times as confidential;
- that the information is confidential in nature; and
- that there is a reasonable probability that disclosure of the information could cause harm to proprietary, commercial and scientific interests.

[44] This test is essentially the test set out in *AB Hassle*, although the subjective and objective elements of the test are both required for the issuance of the protective order. This is both how the Supreme Court in *Sierra Club* described the test as well as how the test was applied in *Rivard Instruments v Ideal Instruments Inc*, 2006 FC 1338 at para 26, 153 ACWS (3d) 818.

[45] As with any motion for a Court order, the applicant must demonstrate that an order is needed. Courts are not in the business of rubber stamping requests, but consistent with a modern court process, courts should assist the parties in moving a case along in a reasonably expeditious and efficient manner taking into account what the parties see as the best way to accomplish those goals. So long as the legal test for a protective order is established, there is no reason not to issue

an order either on consent or opposed. It would be a curious circumstance that parties can benefit from an order if they disagree but cannot obtain an order if they do agree.

B. *Implied Undertaking v Protective Order*

[46] The Plaintiff takes the position that no protective order is needed because the implied undertaking is sufficient protection for Google's concerns. The matter is framed as an "either/or" proposition as if the implied undertaking and protective orders are mutually exclusive.

[47] To some extent recent jurisprudence may have fed this position, although in most of the recent cases the implied undertaking operates in conjunction with a protective agreement between the parties.

[48] There is no doubt that the implied undertaking, a common law principle in Canada, is part of the law of this Court, although it is not codified in the *Federal Courts Rules*. Prothonotary Tabib in *Live Face on Web, LLC v Soldan Fence and Metals (2009) Ltd*, 2017 FC 858 at para 12, 283 ACWS (3d) 821, confirmed that the implied undertaking is recognized and entrenched in the practice of the Court.

[49] Unlike more usual litigation involving past events, the type of litigation often seen in the Federal Court is "live", developing and indicative of present and future business conduct.

However, the implied undertaking, absent some other agreement, is not sufficient to completely protect the sensitive commercial information which has value currently and potentially into the future.

[50] There are some significant gaps with the implied undertaking particularly in cases like the current one. The basis of the implied undertaking, as a common law rule not codified in the *Federal Courts Rules*, creates some uncertainty as to its scope. It is also a principle that continues to develop and may differ across jurisdictions. The application of the implied undertaking to the parties does not address all the consequences that may flow from using the information for legitimate purposes. This is particularly important in respect of third parties (such as witnesses and experts who are not parties) and internally within the opposing organizations. Further, the matter of enforcement and the Court's ability to control behaviour is not settled unless the terms are encased in an order.

[51] Given those concerns, one wonders why prudent counsel would leave control of sensitive commercial information at risk of disclosure by solely relying on the implied undertaking.

[52] In my view, the implied undertaking is, in and of itself, insufficient for the purposes of this litigation.

C. *Role of Protective Order*

[53] A protective order is a complement to the implied undertaking. Properly structured, a protective order brings clarity, certainty, structure and enforceability in ways the implied undertaking cannot.

[54] A protective order can establish a regime for access, limiting access to those who absolutely need to see this type of information or even precluding information from those who

might normally have legitimate access to an opponent's information. The order also protects recipients from consequences of disclosure by regulating the nature, type and circumstances of disclosure. It helps prevent inadvertent disclosure. Courts recognize that even with the best faith, it can be impossible for a person to delete from their memory some particularly valuable competitive information (see e.g. *Arkipelago Architecture Inc v Enghouse Systems Limited*, 2018 FCA 192 at para 16, 297 ACWS (3d) 626 [*Arkipelago*]). Disclosure within an opposing party's organization raises difficult issues of sensitive commercial information being seen by those who deal with both daily and strategic corporate activities.

[55] A protective order is in the public interest by preventing or limiting access to competitive information (as is some of the information at issue here) and in maintaining a proper competitive environment. The protective order, and other orders like it, are frequently issued by the Competition Tribunal to preserve this public interest in proper competition.

[56] No prejudice is shown with respect to granting a protective order. The specific terms can be tailored to meet the needs of the particular case.

[57] A protective order can be adjusted as needs and circumstances dictate where agreement might be impossible. An order which allows for a challenge to the confidentiality claimed or the level of disclosure facilitates document disclosure and is a desirable feature recognized by the Supreme Court.

[58] In my view, a protective order is consistent with Rules 3 and 4 and with the development of modern, efficient, effective and proportional litigation. It is endorsed by the Supreme Court and it facilitates the orderly progress of litigation.

[59] This Court should not be seen to be an obstacle to properly litigating claims which may have parallel or related foreign aspects. Some aspects of comity also assist in the enforcement of Canadian protective orders which are not necessarily available to inter-party agreements.

[60] Absent a protective order, the exchange of sensitive information will be an arduous task. This is particularly the case where, as here, the defendant has the vast bulk of sensitive commercial information and has been sued and thus forced to disclose sensitive commercial information.

[61] As indicated earlier, the proposed Protective Order is similar to an order issued in companion litigation in the U.S. This Court should take cognizance that some types of claims are litigated in multiple and often foreign jurisdictions. To the extent that circumstances allow, a court should strive to find some concordance or comity with other litigation recognizing that there are different procedures and laws in these other jurisdictions.

[62] In the current circumstances, the U.S. order confirms that a protective order is a workable solution and that the parties are able and willing to comply with similar terms.

[63] There is no prejudice arising from such a protective order and its benefits outweigh any inconvenience arising from issuing a protective order.

[64] That said, there are some terms in the proposed Protective Order which are problematic and will be discussed below.

D. *Proposed Protective Order*

[65] Subject to the following comments, the Defendants have met the *AB Hassle* test for protective orders as described in *Sierra Club* at paragraph 60.

[66] I am satisfied, based on the Defendants' affidavit evidence, that much of the evidence to be disclosed has been treated as confidential, it is generally proprietary, commercial and/or scientific information, and its disclosure could reasonably result in harm. The information of concern to Google and referred to in the Monkman Affidavit is of a commercial nature accumulated in the reasonable expectation that it remain confidential.

[67] The "counsel's eyes only" [CEO] category in the protective order is a more restrictive type of protective order and therefore requires that Google establish the existence of "unusual circumstances" that would warrant it: *Bard Peripheral Vascular Inc v WL Gore & Associates, Inc*, 2017 FC 585 at para 15, 280 ACWS (3d) 524 [*Gore*]; *Arkipelago* at para 11. This requires that the disclosure of CEO-designated confidential information presents a "serious threat" that is "real, substantial and grounded in the evidence" (*Gore* at para 16). Although the consideration of

“unusual circumstances” is a contextual and flexible analysis, the Court has often considered the three *Apotex* factors in determining whether to grant a CEO order (*Gore* at para 15).

[68] The first *Apotex* factor favours granting a CEO order as the terms of the order reflect the protective order granted on consent in the companion U.S. litigation, in which both parties are involved regarding the same or similar issues. Given the evidence that the U.S. order has worked effectively, the Court’s concern for the potential breadth of CEO category is ameliorated.

[69] The second *Apotex* factor also favours granting a CEO order as the order provides the opportunity for challenging the classification of certain documents as confidential. Concerns about the impact of solicitor-client relations of CEO orders are mitigated by a challenge mechanism, where counsel can challenge designation of the information where they believe it necessary to disclose to their clients (*Arkipelago* at para 17).

[70] Third, I would find that Google has shown that there is a serious threat to Google’s commercial interests that is real and substantial.

[71] I find that the CEO designation in the Protective Order is justified.

[72] In addition, the proposed Protective Order contains a “Prosecution Bar” provision:

A. Any person reviewing any of another party’s materials designated as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – OUTSIDE COUNSEL’S EYES ONLY (all of which shall also be automatically designated as “Prosecution Bar Materials”) shall not, for a period commencing upon receipt of such information and ending three (3) years

following the conclusion of this case (including any appeals) engage in any Prosecution Activity (as defined below).

B. Prosecution Activity shall mean any activity related to the competitive business decisions involving: (i) the preparation or prosecution (for any person or entity) of patent applications relating to search engine keyword bid management or search engine advertising auctions; or (ii) advising or counseling clients regarding the same, including but not limited to providing any advice or counseling regarding, or participating in, the drafting of claims for any patent application, reissue application, re-examination, inter partes review, post grant review, covered business method review, or any other proceeding at the U.S. Patent and Trademark Office or Canadian Intellectual Property Office. Nothing in this paragraph shall prevent any attorney from sending non-confidential prior art to an attorney involved in patent prosecution for purposes of ensuring that such prior art is submitted to the U.S. Patent and Trademark Office, Canadian Intellectual Property Office, or any similar agency of a foreign government to assist a patent applicant in complying with its duty of candor. Nothing in this provision shall prohibit any attorney of record in this litigation from discussing any aspect of this case that is reasonably necessary for the prosecution or defense of any claim or counterclaim in this litigation with his/her client. The parties expressly agree that the Prosecution Bar set forth herein shall be personal to any attorney who review Prosecution Bar Materials and shall not be imputed to any other persons or attorneys at the attorneys' law firm. It is expressly agreed that attorneys who work on this matter without reviewing Prosecution Bar Materials shall not be restricted from engaging in Prosecution Activity on matters that fall within the Prosecution Bar.

[73] The Plaintiff has strenuously objected to this provision as an unreasonable restraint of trade for three years and affecting even outside counsel.

[74] In this regard, I adopt Justice Manson's reasoning in *Abbvie Corporation v Samsung Bioepis Co Ltd*, 2017 FC 675 at para 15, 282 ACWS (3d) 43:

[15] Although Bioepis also argues that their commercial business or scientific interests may be seriously harmed by conscious or unconscious misuse of their confidential information,

they have provided no evidence to support the conclusion that this is a reasonably held belief. All individuals included within the protective order have a serious obligation not to disclose or otherwise use confidential information originating from this action for purposes other than this litigation. Therefore, it is not reasonable for the Court to find that the Proposed Prosecution Bar should be granted, without concrete evidence to prove, on a balance of probabilities, that these individuals are at risk to misuse the confidential information disclosed to them.

[75] Google has not made out a case that this Prosecution Bar is reasonable nor necessary. The Court will not authorize such a provision.

[76] The Court cannot accept that the Protective Order would control the sealing of the courtroom during trial and provides no mechanism for objection.

The Court is not satisfied that it is necessary to identify to the opposing party the names of technical advisors. This intrudes too far into the disclosure of litigation strategy.

IV. Conclusion

[77] Therefore, the Court will grant a Protective Order which reflects the above reasons including, but not limited to, a regime for adjustment and amendment of its terms upon motion to this Court and the removal of the Prosecution Bar provisions.

[78] The Defendants shall have 30 days to serve and file an amended proposed Protective Order in the form of a Rule 369 motion.

ORDER in T-40-18

THIS COURT ORDERS that for the Reasons above, this motion is granted in part upon terms contained in the Reasons. The extension of time requested is granted to 10 days after the Protective Order is issued. Costs shall be in the cause.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-40-18

STYLE OF CAUSE: PAID SEARCH ENGINE TOOLS, LLC v GOOGLE CANADA CORPORATION, GOOGLE LLC, AND ALPHABET INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 15, 2019

ORDER AND REASONS: PHELAN J.

DATED: MAY 1, 2019

APPEARANCES:

Michael Crinson FOR THE PLAINTIFF
Devin Doyle

Christopher Van Barr FOR THE DEFENDANTS
Charlotte McDonald

SOLICITORS OF RECORD:

Aitken Klee LLP FOR THE PLAINTIFF
Barristers and Solicitors
Ottawa, Ontario

Gowling WLG FOR THE DEFENDANTS
Barristers and Solicitors
Ottawa, Ontario