Federal Court  Cour fédérale

Date: 20231026

Docket: T-853-23

Citation: 2023 FC 1428

Ottawa, Ontario, October 26, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

9219-1568 QUEBEC INC and MG FREESITES LTD

Applicants

and

PRIVACY COMMISSIONER OF CANADA

Respondent

ORDER AND REASONS

[1] On this Motion, the Applicants, 9219-1568 Quebec Inc. and MG Freesites Ltd. seek the following relief:

(a) an order staying the publication of the Privacy Commissioner of Canada's final investigative report under s.13 of the *Personal Information Protection and Electronic Documents Act,* until the disposition of the applicants' judicial review;

(b) a continuation of the confidentiality order of June 19, 2023, sealing details of the Commissioner's investigation and

preliminary report until the disposition of the judicial review; and

(c) a continuation of the publication ban order of July 12, 2023, prohibiting publication of the details of the Commissioner's investigation and preliminary report until the disposition of the judicial review.

[2] The parties filed extensive records on this Motion.

[3] In support of the Motion, the Applicants rely upon the Affidavit evidence of Andreas Alkiviades Andreou affirmed on May 15, 2023 [Andreou Affidavit]. Mr. Andreou is the Director of Corporate Finance and Accounting of 9219-1568 Quebec Inc.

[4] The Respondent relies upon the Affidavit of Michael Maguire [Mr. Maguire] affirmed on May 29, 2023 [Maguire Affidavit]. Mr. Maguire is the Director of *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA] Compliance. As such, he was involved in the investigation into the Applicants' compliance with PIPEDA.

[5] This Motion was heard on August 24, 2023.

Background

[6] MindGeek S.à r.l. [MindGeek] is the parent company of a number of subsidiaries whose primary business is adult content video streaming services. MindGeek owns the two Applicant corporations, 9219-1568 Quebec Inc. and MG Freesites Ltd. MindGeek describes the website,

Pornhub, as its flagship brand. The corporate Applicant, 9219-1568 Quebec Inc., carries on business in Montreal with approximately 1,000 employees.

[7] The Respondent, Privacy Commissioner of Canada, has the statutory mandate to oversee compliance with the provisions of PIPEDA. The provisions of PIPEDA establish rules on the collection, use, and disclosure of personal information by private organizations. Section 3 of PIPEDA states:

The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.	La présente partie a pour objet de fixer, dans une ère où la technologie facilite de plus en plus la circulation et l'échange de renseignements, des règles régissant la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

[8] Section 4 of PIPEDA states that it applies to "every organization in respect of personal information that (a) the organization collects, uses or discloses in the course of commercial activities…".

[9] In April 2020, the Commissioner received a complaint from an Ontario resident alleging that MindGeek collected, used, and disclosed personal intimate images and videos as well as personal information without consent contrary to PIPEDA. The complainant requested an investigation of the personal information handling practices of the MindGeek companies.

[10] The Commissioner undertook an investigation and on December 19, 2022 delivered a preliminary report of investigation to the Applicants outlining the Commissioner's preliminary findings and recommendations. The preliminary report alleges the Applicants' operations contravene several provisions of PIPEDA and the report makes a number of recommendations for changes to bring the Applicants' operations into compliance with the provisions of PIPEDA.

[11] On March 29, 2023, the Commissioner advised the Applicants that a Final Report would be issued in May 2023.

[12] On April 21, 2023, the Applicants filed the underlying judicial review application. Among other relief, the Applicants seek an order "prohibiting the Commissioner from publishing a report in respect of his investigation of the applicants." The Applicants assert the Commissioner lacks the jurisdiction to regulate the Applicants' worldwide operations. They also argue that the Commissioner failed to comply with the timelines set out in section 13 of the PIPEDA for investigative reports. They argue that the decision to publish the final report is both unreasonable and procedurally unfair.

[13] On June 19, 2023, on the consent of the parties, Associate Judge Molgat issued a confidentiality order to protect the information defined in Schedule A to the order [Confidentiality Order].

[14] On July 12, 2023, Justice Furlanetto issued a publication ban prohibiting the publication of the names of the parties and prohibiting the publication of the confidential information identified in the Confidentiality Order [Publication Ban].

[15] On this motion, the Applicants seek an order to continue the terms of both the Confidentiality Order and the Publication Ban.

I. Issues

[16] The following are the issues on this Motion:

A. Should an interim injunction be issued?

B. Should the Confidentiality Order and Publication Ban be continued?

II. Analysis

A. *Should an interim injunction be issued?*

[17] To obtain an interim injunction, MindGeek must satisfy the three-part test from *RJR -- MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] and *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12 [*CBC*].

[18] Specifically, MindGeek must establish:

i. there is a serious issue to be tried;

ii. irreparable harm will be suffered if the injunction is not granted; and

iii. the balance of convenience favours granting the injunction.

[19] The *RJR-MacDonald* test is conjunctive, meaning all three parts of the test must be satisfied for injunctive relief to be granted.

(i) *Serious Issue*

[20] The parties disagree on the applicable threshold that applies to the consideration of the serious issue part of the test.

[21] MindGeek argues a lower threshold applies and they need only establish that the underlying judicial review is not frivolous or vexatious (*RJR-MacDonald; Singh v Canada (Public Safety and Emergency Preparedness*, 2023 FC 523 at para 29).

[22] The lower threshold was explained in *RJR-MacDonald* as follows at 337-338:

> The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. […] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[23] In contrast, the Respondent argues that the higher threshold applies to this case and therefore MindGeek must establish a strong *prima facie* case (*CBC* at paras 15 and 17). The Respondent says the higher threshold applies because an injunction, if granted, would provide MindGeek the relief they seek in the underlying judicial review. In support of this position the Respondent relies upon cases that arise in the immigration context including *Ledshumanan v Canada (Public Safety and Emergency Preparedness,* 2021 FC 1463 at para 19 and *Wang v Canada (Minister of Citizenship and Immigration*), 2001 FCT 148.

[24] The Supreme Court explains in *RJR-MacDonald* that a higher standard applies "when the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR-MacDonald* at 338). The Court outlines the approach to be taken in such circumstances as follows at 339:

> …a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

[25] Having considered the contrasting positions of the parties and the applicable tests, I have concluded that the lower threshold applies to the serious issue branch of the *RJR-MacDonald* test for the following reasons. MindGeek seeks an injunction to prevent the Commissioner from issuing a Final Report until such a time as they can argue the merits of their judicial review. As it now stands, a Final Report has not yet been issued. Therefore, an interim injunction would simply maintain the status quo. Additionally, I am satisfied that even if an interim injunction were to be issued, it would not amount to a determination of the underlying judicial review as the merits of the judicial review application would still have to be determined.

[26] Thus, on the lower threshold, MindGeek need only show that the issues they raise in their judicial review application are not frivolous or vexatious. This requires only a preliminary assessment of the merits of those issues. On this Motion it is not my role to assess if the arguments made by MindGeek will ultimately succeed.

[27] MindGeek says the judicial review raises three serious issues. First, they argue that the Commissioner failed to publish his report within 12 months as required by subsection 13(1) of PIPEDA and therefore lost jurisdiction. Second, they submit the Commissioner ought to have declined to investigate the complaint pursuant to paragraph 12(1)(c) of PIPEDA, as the complaint was not filed within a reasonable time. Third, they assert the Commissioner exceeded his statutory power and jurisdiction by purporting to regulate alleged conduct that occurs entirely outside of Canada.

[28] I will briefly consider the merits of the above issues against the "frivolous or vexatious" threshold.

[29] On the issue of the failure of the Commissioner to issue a report within 12 months, section 13 of PIPEDA states:

13 (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains	13 (1) Dans l'année suivant, selon le cas, la date du dépôt de la plainte ou celle où il en a pris l'initiative, le commissaire dresse un rapport où :
(a) the Commissioner's findings and recommendations;	a) il présente ses conclusions et recommandations;

(b) any settlement that was reached by the parties;	b) il fait état de tout règlement intervenu entre les parties;
(c) if appropriate, a request that the organization give the Commissioner, within a specified time, notice of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken; and	c) il demande, s'il y a lieu, à l'organisation de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite;
(d) the recourse, if any, that is available under section 14.	d) mentionne, s'il y a lieu, l'existence du recours prévu à l'article 14.

[30] The Respondent argues that the decision in *Facebook, Inc v Canada (Privacy Commissioner),* 2023 FC 534 [*Facebook*] is a full response to this issue. In *Facebook* the Court considered the subsection 13(1) deadline in PIPEDA and concluded as follows at para 62:

> A more sensible approach, as the Court of Appeal has held in certain contexts, is that for a tribunal to lose jurisdiction over the lapse of a statutory deadline requires "clear language to that effect" …The lapse of the deadline would entitle Facebook – or the Complainant – to demand a report in the shortest possible time, not cause the Commissioner to lose jurisdiction or render the Report a nullity.

[31] Here the delay by the Commissioner is significantly longer than the one month delay in *Facebook*. It took the Commissioner 31 months to prepare the preliminary report provided to MindGeek. Currently, the Commissioner is well outside the statutory mandate of 12 months to issue a report. The Maguire Affidavit explains that the delay is the result of the unique

circumstances of this case, including its complexity, volume of information, a broad complaint, and novel issues not previously investigated by the Commissioner (Maguire Affidavit at paras 22, 23, and 44).

[32] In my view, even if the delay is justified because of the unique nature of this investigation, I cannot conclude that the position advanced by MindGeek on this point is frivolous or vexatious.

[33] The second issue raised by MindGeek is that the Commissioner should have declined to investigate, based upon subsection 12(1) of PIPEDA which states:

12 (1) The Commissioner shall conduct an investigation in respect of a complaint, unless the Commissioner is of the opinion that	12 (1) Le commissaire procède à l'examen de toute plainte dont il est saisi à moins qu'il estime celle-ci irrecevable pour un des motifs suivants :
…	[…]
(c) the complaint was not filed within a reasonable period after the day on which the subject matter of the complaint arose.	c) la plainte n'a pas été déposée dans un délai raisonnable après que son objet a pris naissance.

[34] The allegations in the complaint relate to events in April 2015; however, as noted by the Respondent, the complaint was not restricted to historic issues of non-compliance. The Commissioner's decision to investigate is an exercise of discretion under subsection 12(1) of PIPEDA. In my view, MindGeek's argument on the refusal to investigate does not meet the serious issue test even on the lower standard.

[35] The third serious issue advanced by MindGeek is the jurisdiction of the Commissioner over MindGeek's business operations outside of Canada. They argue that because of the unique nature and structure of their business operations, the "real and substantial connection" test does not apply (*Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 [*SOCAN*])

[36] Notwithstanding the case law that appears to suggest that even if the Applicants' operations are partly conducted outside Canada, they would be caught on the "real and substantial connection" test (*SOCAN* at paras 61 and 63; *AT v Globe24h.com*, 2017 FC 114 at para 52-54; *Facebook* at para 83), I also accept that the application of the "real and substantial connection" test involves a number of considerations that require a further inquiry on the merits. MindGeek also claims they will be making novel arguments on application of the "real and substantial connection" test in relation to their business operations.

[37] The PIPEDA is silent on the issue of extraterritoriality. Accordingly, on a preliminary assessment of the merits of this issue, the issue of the Commissioner's jurisdiction on matters of extraterritoriality is not frivolous or vexatious.

[38] The final matter I will address on this part of the test is the Respondent's position that the judicial review application has been brought prematurely and therefore no serious issue can arise.

[39] The issue of prematurity was addressed in *Newbould v Canada (Attorney General)*, 2017 FCA 106 [*Newbould*] as follows at para 22:

> The insertion of a decision on the merits of the underlying application before consideration of the tri-partite test for granting a stay or an injunction pre-empts the question of whether there is a serious issue, as the Supreme Court has conceived it. It forces applicants who need only meet a low threshold under the serious issue branch of the tri-partite test to satisfy the more demanding test of showing extraordinary circumstances as a condition of being heard on their application for a stay. Prematurity /extraordinary circumstances is a feature of the law of judicial review, and not of the law of injunction. The creation of a requirement that prematurity be negatived before the tri-partite test can be considered is a conflation of the law governing two distinct remedies, for which no justification has been offered other than a repetition of the rationale underlying the doctrine of prematurity.

[40] Based upon *Newbould*, the issue of the prematurity of the underlying judicial review is a matter to be considered when the merits of the application are considered, and not in the context of this Motion for an interim injunction.

[41] Overall, I am satisfied that the Applicants have met the serious issue branch of the *RJR-MacDonald* test.

(ii) *Irreparable Harm*

[42] I now turn to consider the irreparable harm part of the *RJR-MacDonald* test.

[43] This refers to the nature of the harm suffered rather than its magnitude. It is harm that cannot be quantified in monetary terms or which cannot be cured. Irrevocable damage to a business reputation can be irreparable harm (RJR-MacDonald at 341). As explained in *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31- 32 [*Glooscap*]:

> [31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.
>
> [32] The reason behind this was explained in Stoney First Nation as follows (paragraph 48):
>
> > It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[44] MindGeek advances two arguments on irreparable harm. Their first argument is that there will be widespread media coverage if the Commissioner's Report is published and that will harm their reputation and goodwill. They say that the allegations in the Report will be serious and will harm their goodwill. They submit that despite the nature of their business, they are entitled to the dignity and respect afforded to any mainstream business.

[45] In support of the reputational harm they will face, they rely upon the Andreou Affidavit at para 51 as follows:

> 51. The MindGeek Group has been the subject of extensive public scrutiny. The above-mentioned harms will be compounded by the media attention facing the MindGeek Group. This coverage includes:
>
> (a) A Toronto star report of January 18, 2021, indicating that the Commissioner was considering

> this investigation. Attached as Exhibit "O" is a copy of that report [titled "Canada's privacy commissioner considering complaint about Pornhub's parent company"].
>
> (b) Public comments by the Commissioner about this investigation made on May 10, 2021. Then-Commissioner Daniel Therrien appeared before the House of Common's Standing Committee on Access to Information, Privacy and Ethics to speak about facial recognition technologies. Although not on topic, the Commissioner responded to questions about his investigation of the MindGeek Group. Attached as Exhibit "P" is a copy of the transcript of the then Commissioner's appearance. Canadian media covered Mr. Therrien's comments about his investigation and the circumstances around it. Attached as Exhibit "Q" is a copy of a story published by CTV News on May 10, 2021 [titled "Canada's privacy watchdog investigating Pornhub over alleged non-consensual content." Attached as Exhibit "R" is a copy of a story published by The Globe and Mail on May 10, 2021 [titled "Privacy Commissioner calls for bill to include tougher regulation of facial-recognition technology"].

[46] Beyond the claims in the Andreou Affidavit, MindGeek does not offer any specific or particular evidence as to how further negative media attention will cause them irreparable harm. As noted in *Glooscap,* evidence in support of irreparable harm must be at a convincing level of particularity. No such evidence has been provided.

[47] The fact that MindGeek has already been the subject of negative media attention, weighs against their irreparable harm argument (*Shoan v Canada (Attorney General),* 2016 FC 1031 at para 40). The Court of Appeal in *Newbould* considered if reputational harm could amount to irreparable harm, and noted that the appellant had "already been exposed to a certain amount of public exposure resulting from the contemporary coverage of his involvement in the events

giving rise to these proceedings as well as in the coverage of the proceedings themselves to date" (*Newbould* at para 32). The Court further noted that for reputational harm from investigative proceedings to amount to irreparable harm, "there must be some factor, some element in the surrounding circumstances that takes the case out of the normal run of such proceedings" (*Newbould* at para 33).

[48] In my view, MindGeek has not led any evidence to demonstrate that harm to their reputation or goodwill is something beyond the normal consequences of the process of the Commissioner undertaking an investigation under PIPEDA. Additionally, MindGeek itself admits to having already faced public exposure through the coverage of the Commissioner's investigation in Canadian media. However, MindGeek did not offer any evidence to establish that such public exposure had an impact on their business in a manner that would take it outside the normal impact of the Commissioner's proceedings. Furthermore, I would note that there is evidence of negative publicity directed at MindGeek unrelated to the Commissioner's investigation.

[49] MindGeek's second irreparable harm argument is that if the Commissioner publishes the final report, their right to a meaningful judicial review will be rendered moot as one of the issues raised is whether the Commissioner has the jurisdiction to act. They argue that even if they were successful on their judicial review, it is impossible to "un-publish" the report.

[50] This argument needs to be considered in the context of the relief sought in the underlying judicial review application. In their judicial review MindGeek seeks review only of "the

Commissioner's decision to investigate and publish the Final Report." They do not seek review of the contents of the Final Report as the report has not yet been published. Thus the issue of irreparable harm in the context of the Final Report is, at this time, purely hypothetical and would have to be inferred.

[51] On the issue of a jurisdictional challenge supporting an irreparable harm claim, the Court in *Newbould* noted as follows at para 35:

> Does an allegation of lack of jurisdiction permit an inference of irreparable harm? It could but I do not believe that it gives rise to that inference in every case. The threat of damage to reputation inherent in Inquiry Committee proceedings does not flow from the Committee's jurisdiction but from the evidence it hears. To the extent that the possibility of vindication at the end of the proceedings exists, any harm suffered in the course of proceedings could be remedied in whole or in part.

[52] Similarly, while I acknowledge that MindGeek is challenging the very jurisdiction of the Commissioner to issue a Final Report, as noted in *Newbould*, this argument does not, without more, support the drawing of an inference of irreparable harm (*Newbould* at para 35).

[53] Further in the context of MindGeek's rights vis-a-vis the Commissioner in the context of a PIPEDA investigation, I note the following by Justice Manson in *Facebook* at paras 91 and 92:

> [91] Considering these factors, I find that the Commissioner owed a minimal degree of procedural fairness. A *PIPEDA* investigation does not resemble a judicial process, rather it is a fact-finding exercise in which the role of the Commissioner is required to follow "an approach that distinguishes [him] from a court" and "resolve tension in an informal manner" (*Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras 37-38; *Kniss v Canada (Privacy Commissioner)*, 2013 FC 31 at para 24 [*Kniss*]; Facebook 2021 at para 58).

> [92] An investigation culminates in a report that in and of itself is non-binding and of little legal consequence (*Kniss* at paras 23, 28). Under *PIPEDA*, the Commissioner must apply to this Court to seek any remedy and a subject organization is free to contest that application, just as Facebook is doing here. The commencement and conclusion of the investigative process is provided for under *PIPEDA*; however, the OPC retains significant freedom over the course of the investigation.

[54] Considering the context of a PIPEDA investigation, if MindGeek is successful in their judicial review application, the Court has broad declaratory powers to fashion an appropriate remedy (*Desjardins v Canada (Attorney General)*, 2017 FC 847 at para 12). I am satisfied that the remedies available to MindGeek are not compromised if an interim injuction is not granted.

[55] In conclusion, for the reasons outlined above, MindGeek has not established with clear and convincing evidence that they will suffer irreparable harm if an injunction is not issued prior to the consideration of their judicial review application. MindGeek has not satisfied the second branch of the *RJR-MacDonald* test.

(iii) *Balance of Convenience*

[56] On balance of convenience, MindGeek argues that granting an interim injunction will not cause any harm or prejudice to the Commissioner.

[57] In *RJR-MacDonald* (at 315) the Supreme Court notes that when the nature and declared purpose of legislation is to protect the public interest, a motions court must assume the legislation does so. Here the Commissioner is a public official obligated to carry out statutory duties under PIPEDA in the public interest. As noted at subsection 20(2) of PIPEDA:

The Commissioner may, if the Commissioner considers that it is in the public interest to do so, make public any information that comes to his or her knowledge in the performance or exercise of any of his or her duties or powers under this Part.	Le commissaire peut rendre publique toute information dont il prend connaissance par suite de l'exercice des attributions que la présente partie lui confère, s'il estime que cela est dans l'intérêt public.

[58] Further, as noted in *Glooscap* at para 52:

> Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc., supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paragraph 9; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 12.

[59] Here, MindGeek seeks to prevent the Commissioner, a statutory actor, from carrying out statutory duties. In these circumstances, the public interest weighs heavily in favour of the Commissioner.

(iv) *Conclusion*

[60] For the reasons outlined above, MindGeek has not met the *RJR-MacDonald* three-part test to obtain an interim injunction.

B. *Should the Confidentiality Order and Publication Ban be continued?*

[61] On June 19, 2023, on the consent of the parties, Associate Judge Molgat issued the Confidentiality Order to protect the information outlined in Schedule A to the order.

[62] On July 12, 2023, at the request of the Applicants, and upon the Respondent agreeing to the form of the Order, Justice Furlanetto issued a Publication Ban Order.

[63] On this Motion, MindGeek seeks an Order to continue the terms of both the Confidentiality Order and the Publication Ban as follows:

> An order under Rule 151 of the *Federal Courts Rules* permitting the parties to file certain documents confidentially in this motion, in any subsequent motion, and in the judicial review application, including the following documents:
>
> (i) The applicants' submissions to the Commissioner during his investigation;
>
> (ii) The Commissioner's preliminary report of investigation, (the "PRI") dated December 19, 2022;
>
> (iii) The applicants' response to the PRI dated February 2, 2023;
>
> (iv) The Commissioner's letter to the applicants dated March 29, 2023; and
>
> (v) The Final Report, if available (together, the "Investigation Documents");
>
> An order requiring the parties to file confidentially any information that would tend to identify all or part of the contents of the Investigation Documents.

[64] As a starting point, I note that the parties are in agreement that any documents listed in Schedule A of the Confidentiality Order that might may identify the complainant are and shall remain Confidential.

[65] Otherwise, the Respondent takes the position that it is not necessary to maintain the confidentiality of the balance of the documents listed in Schedule A to the Confidentiality Order. The Respondent also argues that a Publication Ban is not necessary.

[66] Both the Confidentiality Order and the Publication Ban are discretionary orders that restrict the presumptive open court principle. Thus, the continuation of these Orders must be considered against the test outlined in *Sherman Estates v Donovan*, 2021 SCC 25 at para 38 [*Sherman*] as follows:

> … In order to succeed, 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 (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[67] MindGeek submits that having access to effective judicial review is a public interest that is best protected by the continuation of the Confidentiality Order. They argue that disclosure of the materials before the judicial review is heard on the merits would render the application moot. They also argue that they provided confidential information to the Commissioner with the expectation that it would not be disclosed.

[68] As outlined in the analysis above, I did not accept that the Applicants would be denied a meaningful judicial review if there was no interim injunction. Likewise I do not accept that the lifting of the Confidentiality Order will impact the hearing of the underlying judicial review on the merits. I therefore do not find this to be a sufficient public interest requiring the continued confidentiality of materials provided to the Commissioner.

[69] The only potential basis upon which MindGeek could seek to shield their documents from disclosure is if the documents can be characterized as confidential information of a "commercial interest" that is recognized as a public interest.

[70] MindGeek says it provided information to the Commissioner voluntarily on the understanding that the information would remain confidential. The Andreou Affidavit at para 56 states as follows:

> Public disclosure of the parties' correspondence, including the MindGeek Group's various responses to the Commissioner, would harm the applicants because it contains extensive confidential commercial information about the applicants provided voluntarily to the Commissioner under the assumption of privacy and confidentiality. A substantial portion of this information includes technical detail about the MindGeek Group's trust and safety technologies, policies and strategies which is highly sensitive

> propriety information that if made public could undermine the MindGeek Group's efforts to subvert unlawful actors from abusing its platforms. The MindGeek Group engaged in the voluntary disclosures it made to the Commissioner on the understanding that these communications would remain confidential.

[71] The correspondence from MindGeek to the Commissioner, however, does not support the claim that the information provided was done so on the understanding that it would be kept confidential. The letters of November 11, 2021 and August 31, 2021 from legal counsel for MindGeek to the Commissioner both state that they are providing information to the Commissioner with the following stipulation:

> …voluntarily and in good faith without waiving our clients' rights to any claim or defence…our clients do not consent to the release of this or any future information provided to the OPC for any purposes other than those directly related to the OPC's own investigation.

[72] I read this as MindGeek saying that the information is being provided for the purposes of the Commissioner's investigation only and that MindGeek is maintaining its rights to raise any claim or defence. However, I do not read this as MindGeek stating that the information is confidential or commercially sensitive.

[73] MindGeek relies upon *Shell Canada Limited v the Queen*, 2022 TCC 39 at para 17 [*Shell*], to argue that there is a public interest in the commercial or business context to treat documents as confidential. They rely upon the Andreou Affidavit to argue that there is a public interest in protecting the technical detail about MindGeek's trust and safety technologies, policies, and strategies which are highly sensitive proprietary information. They argue that if

this information is made public, it could undermine their efforts to subvert unlawful actors from abusing its platforms.

[74] However, MindGeek has provided none of the supporting evidence that was tendered in *Shell* to justify their claim that the information provided to the Commissioner is commercially sensitive or that there is a serious threat to their commercial interest if it is disclosed. In *Shell,* the Court had a highly particularized affidavit with a detailed review of the documents including the degree of confidentiality associated with the documents as well as details of the proprietary nature of the documents and the risk of harm.

[75] Here, MindGeek has not provided such evidence. Rather, MindGeek relies upon the broad claims at para 56 of the Andreou Affidavit. MindGeek has not identified how the "trust and safety technologies, policies, and strategies" that are alleged to be proprietary, constitute a public interest. They had not provided any details of the proprietary nature of the technologies, policies, and strategies. They have not provided any evidence on how disclosure "could undermine their efforts to subvert unlawful actors from abusing its platforms." Nor is it clear who the "unlawful actors" are and how they might abuse their platforms. In sum, the statements in the Andreou Affidavit do not provide a clear description of the "commercial interest" at stake that justifies, in the public interest, treating the information as confidential.

[76] While I appreciate that MindGeek seeks to protect their commercial information, to do so they need to establish a serious risk to an important public interest as defined in *Sherman* at

para 42. Here the evidence is lacking. Relatedly, there is no evidence on the record that the Commissioner agreed to treat the information provided by MindGeek as confidential.

[77] The mere fact that there is media interest in the Commissioner's investigative proceedings does not justify a Confidentiality Order or a Publication Ban. Further, there is a lack of evidence that media attention will cause harm to MindGeek.

[78] Overall, MindGeek has not demonstrated that the benefits of the Confidentiality Order and Publication Ban would outweigh the negative effects, namely the intrusion into the open court principle. There is a lack of evidence to satisfy the *Sherman* test to allow the Court to continue the Publication Ban and the full breadth of the Confidentiality Order. As agreed, however, the terms of the Confidentiality Order shall be continued with respect to any documents that might identify the complainant.

III. Conclusion

[79] The Applicant's motion for an interlocutory injunction is dismissed with costs.

[80] Within ten (10) days of the date of this Order, the parties shall provide the Court with a revised Confidentiality Order protecting only those documents that might identify the complainant. In the meantime, and to avoid any unintentional disclosure, the June 19, 2023 Confidentiality Order shall remain in force.

[81] The Publication Ban that has been in place is hereby discontinued as of the issuance of this judgment.

IV. Costs

[82] The parties agreed that the costs on this Motion would be awarded to the successful party. Accordingly, the Respondent is entitled to costs in the all inclusive sum of $30,000.00.

ORDER in T-853-23

THIS COURT ORDERS that:

1. The Applicants' motion for an interlocutory injunction is dismissed;

2. Within ten (10) days of the date of this Order, the parties shall provide the Court with a revised Confidentiality Order protecting only those documents that might identify the complainant. In the meantime, and to avoid any unintentional disclosure, the June 19, 2023 Confidentiality Order shall remain in force.

3. The Publication Ban is hereby discontinued as of the issuance of this judgment; and

4. The Respondent shall have costs in the all inclusive sum of $30,000.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-853-23
STYLE OF CAUSE:	9219-1568 QUEBEC INC and MG FREESITES LTD v PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	AUGUST 24, 2023
ORDER AND REASONS:	MCDONALD J.
DATED:	OCTOBER 26, 2023

APPEARANCES:

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Nadia Effendi Christine Muir Kelly Stephens	FOR THE RESPONDENT

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