

To Seal or Not to Seal? That is the Question: Subway Decision Confirms That Courts are Willing to Grant a Sealing Order in the Face of Certain Commercial Harm

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On April 26, 2019, the Superior Court of Justice released its decision in *Subway Franchise Systems v. CBC*,¹ in which the Court granted a sealing order in favour of the plaintiff, Subway Franchise Systems. The order granted the request for a sealing order of six financial documents, which contained economically sensitive information about Subway's business, and further denied the request for a sealing order in respect of four private contracts that conveyed information about Subway's internal workings and corporate structure.

The defendant, Canadian Broadcasting Corporation, opposed the motion in the public interest on the basis that the 10 documents did not meet the test for a sealing order as set out by the Supreme Court of Canada,² which determined that a sealing order 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 rights 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.³

On the other hand, the request for a sealing order for the four private contracts was denied. The Court held that the salutary effect for Subway of sealing the four private contracts would be minimal, while the deleterious effect of maintaining confidentiality in the face of deeply ingrained principle of open courts would be substantial. In applying the test, the Court accepted the evidence from Subway's affiant that, if the six financial documents were widely disseminated, they would give Subway's competitors an unearned advantage in the market and that an order was necessary to provide protection against such a windfall. The six financial documents went to the quantification of damages and not to liability, unlike in *Fairview Donut Inc. v. TDL Group Corp*.⁴ In which the request for sealing of similar documents was denied. The Court granted this request, and in doing so commented that it was virtually certain that breaching the confidentiality of this data would bring considerable advantage to Subway's competitors and consequent harm to Subway.

Key Takeaway

A request for a sealing order bumps up against the principle of open courts which, as stated by the Supreme Court of Canada, is not to be lightly interfered with. The mixed results of this motion demonstrate that while courts will grant sealing orders where applicable, they will carefully scrutinize the facts of the particular case when applying the test of confidentiality for the purposes of obtaining such an order.

¹ 2019 ONSC 2584.

² *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

³ The Court further noted that benefit of the Order must also be of a magnitude that is proportionate to or that outweighs the detriment to the social interest in open court proceedings.

⁴ 2010 ONSC 789.