CITATION: Toronto Star Newspapers Limited v. OpenAI Inc., 2025 ONSC 6217
COURT FILE NO.: CV-24-00732231-00CL
DATE: 20251107

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/SOCIETE RADIO-CANADA

Plaintiffs/Responding Parties

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/Moving Parties

BEFORE: KIMMEL J.

COUNSEL: *Monique J. Jilesen, Sana Halwani, Jim Lepore, Devon R Kapoor & Niema Mohammad*, for the Plaintiffs/Responding Parties

Michael Crichton, Marc Crandall & Heather Fisher, for the Defendants/Moving Parties

HEARD: September 10, 2025

ENDORSEMENT
(DEFENDANTS' JURISDICTION MOTION)

The Motion

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[1] The U.S.-based defendants[1] ("OpenAI Entities") are located and were served with the Statement of Claim outside of Ontario. They ask the court to set aside service of the Statement of Claim under r. 17.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and to stay or dismiss this proceeding against them, under s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[2] Rule 17.06 allows the defendants to move to set aside service or stay the proceeding on the ground that Ontario is not a convenient forum for the hearing of the proceeding. This question of *forum non conveniens* arises when the court has determined that it has jurisdiction over the parties or the claim but may decline to exercise its jurisdiction. Rule 17.06(4) provides a safe harbour for foreign defendants to bring a motion under this rule without having to attorn to the court's jurisdiction.

[3] Section 106 of the *Courts of Justice Act* gives this court a broad discretionary power to stay a proceeding on such terms as are considered just. In the context of a jurisdictional challenge, a stay may be granted if the court determines that it does not have jurisdiction over the subject matter of the dispute (subject matter jurisdiction), or that it does not have jurisdiction over the parties to the dispute (*in personam* jurisdiction or jurisdiction *simpliciter),* or if the court decides to decline to exercise jurisdiction over the dispute (for example, because Ontario is a *forum non conveniens*).

[4] The parties agree that the court must have both subject matter jurisdiction over the dispute and *in personam* jurisdiction over the parties for this claim to proceed in Ontario.

[5] The core claims in the Amended Statement of Claim are for copyright infringement, breach of contract and unjust enrichment arising from web or internet-based activities of the OpenAI Entities. These claims arise from the crawling and scraping of web content and data, the training of AI large language models ("LLMs") that power ChatGPT using that data (including the plaintiffs' copyrighted content), and the reproduction and use of that copyrighted content for the defendants' commercial purposes.

Summary of Outcome

[6] It is important to recognize that this is preliminary jurisdiction motion. It is not a determination of the merits of the plaintiffs' claims.

[7] For the reasons outlined in this endorsement and summarized at the end, the defendants' motion is:

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[1] As alleged in the Amended Statement of claim (para. 20): OpenAI consists of several related entities, including 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 (collectively, "OpenAI" or the "OpenAI Entities"). Each of the OpenAI Entities are registered in Delaware, with head offices in California.

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a. Granted with respect to the four defendants that have not been shown to have been involved in the business operations implicated in this action; and

b. Dismissed with respect to the other six defendants (the OpCo's involved in the business operations implicated in this action and their direct and indirect shareholders). The Ontario Superior Court of Justice has subject matter jurisdiction over the claims of the Ontario based News Media Companies and has assumed *in personam* jurisdiction over the OpCo's and their parent companies who stand to be unjustly enriched from the impugned actions of the OpCo's. The United States is not the more convenient forum in which to adjudicate the pleaded claims.

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The Positions of the Parties

The Defendants' Position

[8] The defendants argue that the court has neither subject matter nor *in personam* jurisdiction, without which the action cannot proceed. They further ask the court, even if there is both subject matter and *in personam* jurisdiction, to decline to exercise its jurisdiction on the basis that the United States is the preferred forum for this dispute to be adjudicated.

[9] The defendants maintain that Canadian copyright law establishes a territorially declared right that cannot be infringed by an extraterritorial act. They say their impugned conduct said to give rise to the plaintiffs' claims all occurred outside of Canada. They further maintain that the plaintiffs' breach of contract and unjust enrichment claims are duplicative of their copyright infringement allegations and are, thus, precluded by the *Copyright Act*, R.S.C. 1985, c. C-42, which provides an exhaustive statutory scheme setting out the rights and remedies relating to copyright.

[10] There are some factual links to Ontario that the defendants are prepared to recognize as having been asserted, such as: (i) the plaintiffs are located in Ontario and that is where they suffered their alleged harm, and (ii) users can access ChatGPT online in Ontario. As the record was developed on this motion, the defendants also were prepared to acknowledge that it is possible that the "Works" (the plaintiffs' original authored content) that are the subject of the plaintiffs' claims could have been accessed by or transmitted to the defendants through servers and data storage located in Ontario. However, the defendants maintain that these connections to Ontario do not establish a sufficient (real and substantial) connection to Ontario for the breach of copyright claim to come under the *Copyright Act*.[2]

[2] The Ontario Superior Court of Justice has concurrent jurisdiction with the Federal Court of Canada on the issues in the application: see s. 41.24 of *the Copyright Act*.

[11] Alternatively, the OpenAI Entities ask this court to decline to exercise its jurisdiction over them and over the plaintiffs' claims, suggesting that the United States is the proper and convenient forum in which to litigate them.

The Plaintiffs' Position

[12] The plaintiffs (sometimes also referred to as the "News Media Companies") counter that the defendants are taking a narrow and technical view of the pleaded claims for breach of copyright in Canada. They assert claims arising from the reproduction of data through scraping (accessing and copying), and the transmission of data from, to and through Canada in the development, training, augmentation and operation of the defendants' AI models used to power ChatGPT. It is also alleged that the defendants have leveraged their GPT models, all of which were developed using the unlawfully obtained Works, to offer a variety of GPT-based products and services to individual consumers and businesses in Canada (including in Toronto).

[13] When viewed holistically, the plaintiffs assert that even if the models themselves are not in Ontario, some of the infringing inputs are from, and outputs reach into, Ontario. The plaintiffs argue that the court has both subject matter and *in personam* jurisdiction. The plaintiffs further assert that the defendants have not met their onus to rebut the presumptive factors connecting their claims to Ontario, particularly given the alleged breaches of copyright in Ontario, alleged breaches in Ontario of the plaintiffs' Ontario law-based Terms of Use and the allegation that OpenAI Entities enter into contracts with Ontario based users of ChatGPT and otherwise carry on business in Ontario.

[14] The plaintiffs strongly oppose the suggestion that this court decline to exercise its jurisdiction over their claims where it has not been clearly demonstrated by the defendants that the United States is a preferable forum in which to adjudicate them.

Factual Context

[15] The Amended Statement of Claim is an important source of the factual context for this motion. The following extracts from the pleadings help to frame the issues.

[16] By way of background, it is alleged that:

> 5. To obtain the significant quantities of text data needed to develop their GPT models, OpenAI deliberately "scrapes" (*i.e.*, accesses and copies) content from the News Media Companies' websites, web-based applications, and/or the websites of their Third Party Partners (defined below). It then uses that proprietary content to develop its GPT models, without consent or authorization. OpenAI also augments its models on an ongoing basis by accessing, copying, and/or scraping the News Media Companies' content in response to user prompts.
>
> 6. OpenAI has taken large swaths of valuable work, indiscriminately and without regard for copyright protection or the contractual Terms of Use applicable to the misappropriated content. The misappropriated content includes works that the

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News Media Companies own or exclusively license (the "**Owned Works**") as well as works that they non-exclusively license from other third parties (the "**Licensed Works**") (together, the "**Works**"). Through its conduct, OpenAI has and continues to:

> (a) Infringe, authorize, and/or induce the infringement of the News Media Companies' copyright in its Owned Works;
>
> (b) Circumvent the technological protection measures employed by the News Media Companies and/or their Third Party Partners to protect the Works from unauthorized access; and,
>
> (c) Breach the Terms of Use of the News Media Companies' Websites.

…

21. Together, and pursuant to a common purpose, the OpenAI Entities function as a common enterprise to fund, develop, and commercialize OpenAI's proprietary GPT models—which are built, trained, and operated to infringe on the News Media Companies' copyright and contractually protected rights. Such common purpose is reflected in agreements between the OpenAI Entities that are known to those entities, but not the News Media Companies.

…

24. Each of the News Media Companies maintains, directly or indirectly, a website, series of websites, and/or web-based applications (the "**Websites**"), on which they publish original content (*e.g.*, beat reporting; in-depth investigations; reviews; guides; and commentary, editorial and opinion pieces), which constitute original works within the meaning of sections 2 and 5 of the *Copyright Act*. These original works take the form of text, videos, images, and audio files, which span a wide variety of topics ranging from global news, national politics, local issues, business news, sports, arts and culture, and entertainment. In this Claim, "**Works**" refers to such original content available online as of 2015 and onwards.…

39. OpenAI's GPT models work by predicting words that are likely to follow a given sequence of text using pattern recognition developed by copying, ingesting, and analyzing enormous quantities of data. To develop its GPT models, OpenAI generates a data set comprised of copious amounts of text data (the "Training Data"), which the model then analyzes to learn to generate coherent and natural-sounding text without the need for explicit supervision.

…

41. The Works, including both the Owned Works and Licensed Works, formed part of the Training Data used to train each of the GPT models, as the Works were

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among the data accessed, scraped, and/or copied one or more times by OpenAI into one or more datasets used to train each version of the ChatGPT models.

…

45. The Works were accessed, scraped, and/or copied, in their entirety (or in substantial part), one or more times by OpenAI from the News Media Companies' Websites and/or the websites of the Third Party Partners without the knowledge or consent of the News Media Companies. The Works may also have been accessed, scraped, and/or copied one or more times by OpenAI from the websites of other third parties (*i.e.*, websites other than those of the News Media Companies or their Third Party Partners), such as Common Crawl (commoncrawl.org), which provides a free, open repository of web crawl data, regularly collected since 2008. Common Crawl data is stored on academic cloud platforms around the world, including Canada.

…

48. Since the release of Chat GPT-3.5, OpenAI has leveraged its GPT models, all of which were developed using the unlawfully obtained Works, to offer a variety of GPT-based products and services to individual consumers and businesses in Canada (including in Toronto), including ChatGPT Plus, ChatGPT Team, and-ChatGPT Enterprise, and Azure OpenAI Service, OpenAI offers some of these GPT-based products and services (such as Azure OpenAI Service) to individual consumers and businesses in Canada (including in Toronto), through partnerships with third parties including Microsoft Corporation. Microsoft Corporation and OpenAI have revenue sharing agreements that flow both ways, ensuring that both companies benefit from increased use of new and existing models. These OpenAI products and services are sold in Canada, by Microsoft Corporation, through Microsoft Canada, which is headquartered in Toronto, Ontario, and are hosted on servers in Canada including at the Azure Canada Central data center in Toronto, Ontario.

[17] There was a significant amount of evidence tendered on this motion. The basic nature of the defendants' business and where certain activities are carried out have some bearing on the determination of the issues raised on this motion. To the extent it is relevant, that evidence is referred to in the aspects of the analysis to which it relates. Some of that evidence is subject to a Partial Sealing Order: see *Toronto Star Newspapers Limited v. OpenAI Inc.*, 2025 ONSC 4685.[3]

[3] Prior to the hearing of the sealing order motion, 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

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The court has considered the sealed evidence that the parties referenced in their written and oral submissions but has endeavoured not to refer to that evidence in this endorsement in light of that earlier order. If, through inadvertence, any such evidence has been referred to in this endorsement the parties are requested to identify such so that it can be removed before this decision is published.

Issues to be Decided

[18] The following issues are raised by this motion:

a. Does the court have subject matter jurisdiction over the asserted claims?

b. Have the defendants attorned to the jurisdiction of the Ontario Superior Court of Justice by the issues that they have asked the court to decide in their challenge to the court's subject matter jurisdiction?

c. If the defendants have not voluntarily attorned, does the court have *in personam* jurisdiction over the defendants?

    i. Is there at least one presumptive factor connecting each defendant to Ontario? and, if so,

    ii. Has each defendant rebutted any factors connecting them to Ontario?

d. Should the court exercise its discretion to decline jurisdiction over any defendant that is connected to Ontario in favour of the United States as a more appropriate forum in which to adjudicate the asserted claims?

Analysis

[19] The defendants asked the court to consider the question of the court's subject matter jurisdiction as a threshold issue. They contend that if the court does not have subject matter jurisdiction, then there is no need to consider *in personam* jurisdiction (or jurisdiction *simpliciter*) nor whether Ontario is the proper and convenient forum in which to adjudicate the plaintiffs' claims. For reasons that will be explained, I do not share the defendants' perspective on the proper scope of subject matter jurisdiction.

Does the Ontario Court Have Subject Matter Jurisdiction Over the Asserted Claims?

Order"). That order was granted on consent and without prejudice to any parties' position on this motion, but was superceded by the Partial Sealing Order granted on August 14, 2025.

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[20] The starting point of the analysis of subject matter jurisdiction requires a review of what it is. The defendants appear to be expanding what has traditionally been considered subject matter jurisdiction.

[21] Subject matter jurisdiction is distinguishable from *in personam* jurisdiction (or jurisdiction *simpliciter*), the latter of which is sometimes also referred to as territorial jurisdiction. Subject matter jurisdiction flows from the concept that the superior courts generally have jurisdiction to hear a claim in Canada, unless it has been displaced by legislation or an arbitral agreement: see generally Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 5th ed. (Markham: LexisNexis, 2024), at 2.219-2.242.

[22] On the other hand, *in personam* jurisdiction is "whether an Ontario court can properly assume jurisdiction over a matter, given the interrelationships among the matter, the parties and Ontario": Perell & Morden, at 2.564. This is the question to which the "real and substantial connection test" is applied: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 82.

[23] Typically, a subject matter jurisdiction motion is brought under r. 21.01(3)(a), which allows the defendants to seek an order staying or dismissing the action on the grounds that the court has "no jurisdiction over the subject matter of the action".

[24] The "real and substantial connection test" does not apply when considering subject matter jurisdiction. A court either has jurisdiction, "so long as the facts pleaded in the statement of claim raise a claim cognizable in the Superior Court", or it does not: see *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, 94 O.R. (3d) 19, at para. 109, aff'd 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 42-46.

[25] In *Telezone* the federal Crown had moved under r. 21.01(3) to have the action dismissed.[4] The Court of Appeal explained that:

> [92] I agree with Morawetz J. in *TeleZone* and Macdonald J. in *Fielding* that the proper approach is to determine whether the Superior Court has jurisdiction to adjudicate the plaintiff's claim. If it does, that ends the matter unless there is legislation, or there is an arbitral agreement, that clearly and unequivocally removes that jurisdiction. As a court of general jurisdiction, the Superior Court has jurisdiction over every conceivable claim, unless it is shown that it does not constitute a reasonable cause of action. Hence, jurisdiction lies in the Superior Court in each case unless removed by s. 18 of the *FCA*. As

[4] In the court of appeal, four cases were heard together, *Telezone*, *Fielding*, *G-Civil Inc.*, and *McArthur*. In the Supreme Court of Canada two cases were heard together, *Telezone*, and *Canada (Attorney General) v. McArthur* 2010 SCC 63, [2010] 3 S.C.R. 626.

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> I will explain, s. 18 does not remove the Superior Court's jurisdiction. Section 18 deals with remedies, not with jurisdiction. However, both Morawetz J. and MacDonald J. in *Fielding* were incorrect in applying the plain and obvious test, suitable for a rule 21.01(1)(b) motion dealing with whether a statement of claim discloses a reasonable cause of action. Either the Superior Court has jurisdiction, or it doesn't have jurisdiction. [Emphasis added.]

[26] The defendants have improperly attempted to expand what the court can and should consider when deciding the question of its subject matter jurisdiction. They ask the court to consider whether the Amended Statement of Claim in this case raises a reasonable cause of action, and assert that it does not because there is no real and substantial connection to Ontario on which to ground the causes of action under the *Copyright Act*. This argument is based upon an analysis of where the defendants' impugned conduct is alleged to have occurred, leading them to the assertion that even if it is possible that some websites or web-based applications were hosted in Ontario, and even if some data was transmitted from, to or through Ontario, the connection to Ontario is weak. On that basis, they ask the court to conclude that there is not enough to establish a real and substantial connection to Ontario to ground claims under the *Copyright Act*.

[27] The relative weight of connecting factors to Ontario is precisely what the court must consider when analyzing the question of *in personam* jurisdiction (jurisdiction *simpliciter*) and the real and substantial connection test that must be satisfied in that context. This is not what the court is concerned with when considering true subject matter jurisdiction. Subject matter jurisdiction is binary: it either exists, or it does not. It is not a discretionary exercise.

[28] The subject matter jurisdiction question in this case, properly framed, should be: does the Ontario Superior Court have jurisdiction to hear the plaintiffs' claims (under the *Copyrights Act*, for breach of contract, and for unjust enrichment), or has its jurisdiction been ousted by legislation or an arbitral agreement?

[29] Unlike an administrative tribunal or the Federal Court of Canada, this court always has inherent jurisdiction unless that jurisdiction is ousted. As the Court of Appeal stated in *Telezone*, at para. 109: "…so long as the facts pleaded in the statement of claim raise a claim cognizable in the Superior Court, that court has jurisdiction to decide the claim. This would occur in virtually all cases given that the Superior Court is a court of general jurisdiction."

[30] The defendants argue that the *Copyright Act* cannot apply because their alleged infringing activities did not occur within Canada, and the *Copyright Act* does not have a territorial reach over acts occurring outside of Canada. However, unlike the former *Labour Relations Act*, R.S.O. 1990, c. L.2, s. 45(1) (now the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A, s. 48), which displaces the provincial court's jurisdiction to arbitrators, as in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 9, or a contractual arbitration clause that a party is attempting to invoke, the *Copyright Act* does not "oust" the jurisdiction of the Ontario Superior Court of Justice.

[31] Section 3 (1) of the *Copyright Act* establishes that:

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> 3 (1) For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
>
> (a) to produce, reproduce, perform or publish any translation of the work,

[32] Section 27(1) proscribes that: "It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do". The allegation is that the defendants' use and reproduction of the plaintiffs' Works (e.g., in their model development, training and augmentation that they obtained by scraping (accessing and copying the plaintiffs' Works) and their leveraging of their model for the products and services that their customers then access and use) is copyright infringement.

[33] The defendants rely upon *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 ["*SOCAN*"], at para. 56, in support of their assertion that Canadian copyright law does not apply beyond Canada's borders: "[c]opyright law respects the territorial principle, reflecting the implementation a 'web of interlinking international treaties' based on the principle of national treatment". Further, the defendants invoke the comments of Lebel J., dissenting in part, at para. 148: "The only question is whether Parliament intended the Act to have effect beyond Canada. The principle of territoriality operates at the level of a rebuttable presumption that Parliament does not intend the Act to operate beyond Canada's borders."

[34] *SOCAN*, at para. 60, imported into the intellectual property realm the "real and substantial connection test" from *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the case that preceded *Van Breda* in the Supreme Court dealing with *in personam* jurisdiction. What is important is that this was linked to the analysis of where the tort was committed (one of the presumptive connecting factors for *in personam* jurisdiction (jurisdiction *simpliciter*), later confirmed in *Van Breda*). This is consistent with the more recent analogy drawn by this court between common law torts and the statutory tort of copyright infringement in *Pourshian v. Walt Disney*, 2021 ONSC 4840 (Div. Ct.), (decided under r. 17), in which the Divisional Court held, at para. 52, that:

> [i]t is a false dichotomy to say that *Van Breda* dealt with tort claims and *SOCAN* deals with claims for copyright infringement. Copyright infringement is essentially a statutory tort. One of the presumptive connecting factors established by *Van Breda* is whether the tort was committed in the jurisdiction where the action is brought. When dealing with a claim for copyright infringement, the analogous presumptive factor is whether the alleged copyright infringement occurred in the jurisdiction where the action was brought. In my view, *SOCAN* assists in this analysis.

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[35] The defendants also rely upon *Thumbnail Creative Group Inc. v. Blu*, 2009 BCSC 1833, at para. 23, for their assertion that "Canadian copyright law, which establishes a territorially declared right, cannot be infringed by an extraterritorial act"; however, that case was dealing with territorial competence under r.14(6) of the former *Supreme Court Rules*, B.C. Reg. 221/90,[5] rather than true subject matter jurisdiction. In that case, Dickson J. interpreted the statutory tests in ss. 3, 10-11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, which required a "real and substantial connection between British Columbia and the facts on which a proceeding is based": at para. 13. *Thumbnail* centered, therefore, on "territorial competence": at para. 11.

[36] Territorial competence/jurisdiction is part of jurisdiction *simpliciter*. Strathy J. (as he then was) analyzed in *Gould v. Western Coal Corporation*, 2012 ONSC 5184, 7 B.L.R. (5th) 19, at para. 326, the Ontario Superior Court's jurisdiction to apply British Columbia's oppression remedy, whose enabling legislation granted jurisdiction to the Supreme Court of British Columbia:

> [326] In my view, *Van Breda* is not on point. The issue in *Van Breda* was territorial jurisdiction or jurisdiction *simpliciter*. The issue here is jurisdiction over the subject matter. The distinction was noted by the British Columbia Court of Appeal in *Conor Pacific Group Inc. v. Canada (Attorney General)*, 2011 BCCA 403, 343 D.L.R. (4th) 324at para. 38:
>
> > It is important to appreciate the distinction between territorial jurisdiction and subject-matter jurisdiction. Territorial jurisdiction, known at common law as *jurisdiction simpliciter*, is concerned with the connection between the dispute and the court's territorial authority. A Canadian court may only assume territorial jurisdiction over a proceeding where there is a real and substantial connection between the action and the territory over which the court exercises jurisdiction: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*,

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[5] These rules have now been replaced, but read, in 2009:

Disputed jurisdiction

(6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,

(a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,

(b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or

(c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

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> [1993] 4 S.C.R. 289. In contrast, subject-matter jurisdiction is concerned with the court's legal authority to adjudicate the subject-matter of the dispute. For example, the Provincial Court does not have subject matter jurisdiction with respect to claims for libel, slander or malicious prosecution: *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3(2).

[37] In other words, territorial jurisdiction such as the defendants assert in respect of the *Copyright Act* claims is a question about whether there is a real and substantial connection, which is embedded in the *in personam* jurisdiction (jurisdiction *simpliciter*), *Van Breda* analysis. It is not a threshold subject matter jurisdiction question as the defendants contend. Accordingly, it will be addressed later in this endorsement in the section dealing with *in personam* jurisdiction (jurisdiction *simpliciter*).

[38] When considered in their proper context, the pleaded *Copyright Act* claims (infringement and circumvention of TPMs) do not oust this court's jurisdiction. In contrast, the broader arguments raised by the defendants in relation to these claims can only be properly considered with the full contextual and merit-based determinations that would be invoked under r. 21. Since the defendants have not moved under r. 21 (presumably intentionally, to avoid attorning), those arguments are not properly before the court except insofar as they are relevant to the real and substantial connection test that will be considered when the court turns to the question of *in personam* jurisdiction (jurisdiction *simpliciter*).

[39] The defendants also contend that the plaintiffs have not made legally tenable claims for breach of contract and unjust enrichment because the *Copyright Act* is a complete code. The defendants invoke s. 89, which provides that: "No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament". The defendants assert that this ousts any claims for breach of contract and unjust enrichment that are predicated on the same alleged conduct constituting infringement of the *Copyright Act*.

[40] Copyright in Canada is a creature of statute and the rights and remedies it provides are exhaustive: see *Théberge v. Galerie d'Art du Petit Champlain Inc*., 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5. The defendants essentially argue that to permit the plaintiffs to obtain equitable relief that it cannot obtain under the *Copyright Act* would defeat its purpose: see *Alberta v. Canadian Copyright Licensing Agency (Access Copyright)*, 2024 FC 292, 205 C.P.R. (4th) 324, at paras. 218-24. The defendants rely on these authorities in support of their assertion that the *Copyright Act* pre-empts the plaintiffs' asserted claims for breach of contract and unjust enrichment. These claims are said to be ousted by the mutual exclusivity of the *Copyright Act* over the alleged misconduct upon which those claims are grounded.

[41] These are not questions relevant to the court's determination of subject matter jurisdiction but are, rather, substantive arguments on the merits of the case and the legal feasibility of the asserted causes of action. The cases relied upon are dispositive decisions on the merits, not jurisdictional analyses.

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[42] The arguments raised in respect of these causes of action are properly raised as a r. 21.01(1)(b) motion, under which the defendants could have sought an order striking the statement of claim or dismissing the action on the grounds that it discloses no reasonable cause of action. Motions under r. 21 are dispositive motions that examine the legal viability of a plaintiff's claims and could give rise to arguments of *res judicata* or issue estoppel.

[43] If the defendants had moved under r. 21, they would have had to attorn to this court's jurisdiction (which would mean that the court, by the defendants' own actions, has *in personam* jurisdiction over them). They insist that their motion does not have this effect. To maintain their position, they have to walk a delicate line so as not to cross over from the narrow confines of true subject matter jurisdiction and into the arena of a r. 21 dispositive motion. The plaintiffs argue that the defendants have crossed that line and that they have attorned as a result (discussed in the next section of this endorsement).

[44] The determination of whether the court has subject matter jurisdiction does not require the court to delve into the legal merits or feasibility of the plaintiffs' claims. Doing so would require the defendants to attorn to this court's jurisdiction. However, they insist that they do not and did not intend to attorn to the jurisdiction of this court by the manner in which they have argued this motion. The only way the court can respect the defendants' insistence that they have not attorned is to hold that they cannot make their merit-based arguments as part of their challenge to the court's subject matter jurisdiction.

[45] Lastly, the defendants also argue that some of the alleged contracts, based on the plaintiffs' terms of use, oust the court's jurisdiction in favour of arbitration. Although the defendants deny that they are bound by any terms of use or contracts with the plaintiffs, they argue in the alternative that at least some of the alleged contracts contain arbitration clauses that expressly oust the jurisdiction of this court. On this basis, they contend that any alleged breaches of those contracts are not justiciable in this forum.

[46] This latter argument is the only one raised by the defendants that could theoretically have been properly considered under the question of subject matter jurisdiction. However, none of the parties seek to rely upon the arbitration clauses in the pleaded contracts to oust the court's jurisdiction. Since arbitration is not being pursued, the arbitration clauses have not been examined and no determination is being made on this motion regarding the validity, enforceability or applicability of those contracts or the arbitration clauses contained in them.

[47] Properly framed within the construct of true subject matter jurisdiction (not territorial jurisdiction, *in personam* jurisdiction or jurisdiction *simpliciter*), this court's inherent jurisdiction over the claims for copyright infringement, circumvention of TPMs, breach of contract or unjust enrichment have not been ousted by s. 89 or any other section of the *Copyright Act*, nor by any contractual arbitration provision that any party is seeking to rely upon to take these claims out of the court and into private arbitration.

[48] This court has subject matter jurisdiction over all of the asserted claims.

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Have the Defendants Attorned to the Jurisdiction of the Ontario Court (Submission-Based In Personam *Jurisdiction/Simpliciter)?*

[49] At common law, there were two bases for jurisdiction *in personam*: presence and submission. *Van Breda* confirmed a third, assumed jurisdiction. I will first deal briefly with the submission-based *in personam* jurisdiction that the plaintiffs contend has been engaged by the way the defendants have argued their case under subject matter jurisdiction. This "attornment" argument is alluded to in the previous section.

[50] The plaintiffs contend that by seeking what is a merits-based determination of the viability of the pleaded causes of action, the defendants have voluntarily submitted to this court's jurisdiction: see *Mid-Ohio Imported Car Co v. Tri-K Investments Ltd* (1995), 129 D.L.R. (4th) 181, 34 C.P.C. (3d) 369 (B.C. C.A.), at paras. 9, 15. On this basis, they should be regarded as appearing voluntarily, thus giving the court consent-based jurisdiction: see *Wolfe v. Pickar*, 2011 ONCA 347, 332 D.L.R. (4th) 157, at para. 44.

[51] I agree with the defendants that "[a]ttornment is not entrapment. It requires a deliberate voluntary act from which it can reasonably be inferred that the party was prepared to submit to the jurisdiction of the court": see *CNOOC Petroleum North America ULC v. 801 Seventh Inc*, 2020 ABCA 212, 62 C.P.C. (8th) 78, at para. 50.

[52] If the subject matter jurisdiction was as broad as the defendants contended, requiring the court to consider the legal tenability of the asserted causes of action as might be done under a r. 21 motion, then there would be some merit to the plaintiffs' assertion that the defendants had attorned to the jurisdiction of this court. If the court had been prepared to consider those arguments, they would have been made by the defendants without the safe harbour that r. 17.06(4) provides when jurisdictional challenges are made under that rule.

[53] However, the defendants clearly did not intend to attorn to this court's jurisdiction. They made their intention to challenge jurisdiction clear from the outset. They did raise arguments on subject matter jurisdiction that should have been brought as a r. 21 motion. However, rather than treating that as attornment, those arguments have been disregarded as they were not properly before the court on this motion.

[54] As noted in the previous section of this endorsement, the defendants cannot have it both ways. Their insistence that they have not attorned and that they are not seeking a final determination of the issues that they had raised as part of subject matter jurisdiction means that those issues are not being decided on this motion, except insofar as they are relevant to the real and substantial connection test, which will be considered in the next section of this endorsement dealing with *in personam* jurisdiction (jurisdiction *simpliciter*).

Does the Court Have Assumed In Personam Jurisdiction Simpliciter Over Each of the Defendants?

[55] *In personam* jurisdiction (jurisdiction *simpliciter*) looks at the connection of the defendants and the subject matter of the claims to the jurisdiction. There are three bases for asserting jurisdiction *in personam* over an out-of-province defendant: assumed jurisdiction (as per

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the *Van Breda* framework), and the two "traditional" grounds, which are presence-based and consent-based jurisdiction: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 82.

[56] The plaintiffs only identified one entity within the OpenAI group that was incorporated in Ontario, and it is not a defendant. It is a wholly-owned subsidiary of the operating company, OpenAI, LLC but its functions (processing invoices for OpenAI in Canada), are not implicated in the alleged misconduct, either directly or indirectly. There is no presence-based jurisdiction asserted over any of the defendants.

[57] Since all the named defendants were served *ex juris*, the court is being asked to assume jurisdiction, thus importing the framework of the real and substantial connection test developed in *Van Breda*.

[58] There are recognized presumptive connecting factors which, if established by the plaintiffs, may still be rebutted by the defendants. This involves a two-step analysis under *Van Breda*, as reiterated in *Sinclair v. Venezia Turismo*, 2025 SCC 27, 505 D.L.R. (4th) 451, at paras. 47-49:

> First, the plaintiffs must demonstrate that there is some connection between the jurisdiction and the dispute (this may arise by presumption); and
>
> Second, the defendants may rebut the presumption by demonstrating that the connection to Ontario "does not … point to a real relationship between the dispute and the forum" (in other words, it does not amount to a "real and substantial connection").

[59] In *Sinclair*, the Supreme Court of Canda explained, at para. 50, that:

> The assessment of whether a presumptive connecting factor has been established is concerned with the *existence* of a connection between the jurisdiction and the dispute, whereas the assessment of whether the presumption has been rebutted is concerned with the *strength* of that connection.

Have the Plaintiffs Established Presumptive Connecting Factors?

[60] There are four factors that presumptively allow a court to assume jurisdiction over a dispute in tort cases:

a. the defendant is domiciled or resident in the province;

b. the defendant carries on business in the province;

c. the tort was committed in the province; and

d. a contract connected with the dispute was made in the province.

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Sinclair, at para. 47, citing *Van Breda*, at para. 90.

[61] Property located in the province relating to the asserted claims can be a fifth connecting factor: see *Knowles v. Lindstrom*, 2014 ONCA 116, 118 O.R. (3d) 763, at para. 21.

[62] None of the defendants are domiciled in Ontario. The plaintiffs rely on the other presumptive factors to connect the defendants to Ontario.

[63] There must be a "good arguable" case supporting at least one presumptive factor for each defendant, "taking account of both the allegations in the statement of claim and the evidence tendered on the motion": see *Vahle v. Global Work& Travel Co Inc.*, 2020 ONCA 224, at para. 12; *Ontario (Attorney General) v. Rothmans Inc*., 2013 ONCA 353, 115 O.R. (3d) 561, at paras. 54, 106 and 118, leave to appeal refused, [2013] S.C.C.A. No. 327.

[64] In considering the standard of "good arguable case" in *Rothmans* (which involved a r. 17.02(g) challenge to service outside of Ontario based on an alleged tort committed in Ontario) the Ontario Court of Appeal emphasized that:

> [106] In our opinion, on a jurisdiction motion, the motion judge is not required to subject the pleadings to the scrutiny applicable on a Rule 21 motion. So long as a statement of claim advances the core elements of a cause of action known to law and appears capable of being amended to cure any pleadings deficiencies such that the claim will have at least some prospect of success, the issue for the motion judge is whether the claimant has established a good arguable case that the cause of action is sufficiently connected to Ontario to permit an Ontario court to assume jurisdiction. If an Ontario court can assume jurisdiction, the issue of the adequacy of the pleadings is properly dealt with on a motion brought under rule 21.01(1)(b).

[65] Each connecting factor should be analyzed under the "good arguable case" standard as against each defendant: see *Pourshian*, at paras. 64, 67-109.

[66] After observing, at para. 62, that standard for establishing a presumptive factor is low, the Supreme Court of Canada stated in *Sinclair*, at para. 63:

> The reason for examining jurisdiction from the perspective of each defendant is that, when a court takes jurisdiction over a claim, it assumes the authority not only to adjudicate the claim but also to make orders against each defendant. For this power to be exercised legitimately, the court must be satisfied that the requisite connection exists in respect of each defendant who may be subject to that power. An assumption of jurisdiction without the requisite connection amounts to judicial overreach. As such, there should be no "bootstrapping", where the legitimate establishment of jurisdiction over one defendant is taken uncritically to imply jurisdiction over all defendants.

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[67] Although the plaintiffs maintain that there is at least one presumptive factor connecting each defendant to Ontario, as a preliminary matter, they also assert that they are not required to meet even that low threshold for each defendant where the defendants are alleged to have acted in an interconnected way and under the direction of a single controlling mind (their ultimate parent company, OpenAI, Inc.) pursuant to a common Charter. They contend that because the defendants are bound to a common purpose and common Charter, and certain of them share common services and common leadership, jurisdiction may be found against all of them. They rely, in part, on *Sakab Saudi Holding Company v. Jabri*, 2022 ONCA 496, at para. 44, for this proposition.

[68] The *Sakab* case is distinguishable. In *Sakab*, at para. 44, "the motion judge found jurisdiction on the basis of a factual matrix proper to each defendant acting in concert with Saad", and that there was already a *prima facie* case made out against each defendant, so there was no need to run through the analysis for each defendant when the allegation was a conspiracy of acting in an interconnected way. Similarly, the joint liability for concerted action that the plaintiffs assert, citing to *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 74, requires "a conspiracy with all participants acting in furtherance of the wrong".

[69] Further, and as was noted by the defendants in their oral submissions, to justify piercing the corporate veil requires some impropriety or that the subsidiary was acting as the agent of its parent: see *Leon v. Volkswagen AG*, 2018 ONSC 4265, 78 C.P.C. (8th) 90, at para. 30. A helpful case cited in *Volkswagen AG* is *Yip v. HSBC Holdings plc*, 2017 ONSC 5332, aff'd 2018 ONCA 626, 141 O.R. (3d) 641, leave to appeal refused, [2018] S.C.C.A. No. 410. After reinforcing that the separate legal entities of a corporation are not to be lightly disregarded, at paras. 195-96, Perell J. articulated the following test, at para. 198:

> A foreign parent corporation does not carry on business in Ontario through a domestic subsidiary due only to its share ownership: *Lockwood Financial v. China Blue Chemical*, 2013 BCSC 839. For the activities of the subsidiary to be considered the acts of the parent corporation: (a) the subsidiary must be acting as the parent's agent for the purposes of the parent's business; (b) the parent corporation must completely control the subsidiary so that it has no autonomy; or (c) the parent incorporated the subsidiary for an improper purpose. [Emphasis added.][6]

[70] The common Charter that the defendants operate under does not automatically extend this court's jurisdiction to all of the OpenAI Entities. The Charter has a "moral" purpose that is not alleged to have a conspiratorial, improper or fraudulent objective. The Charter is not enough

[6] This view was recently confirmed in *Shirodkar v. Coinbase Global, Inc.*, 2025 ONCA 298, at paras. 58-63, leave to appeal to S.C.C. requested, 41875, although this case was not cited by either of the parties.

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to establish that there is a common purpose or concerted action with respect to the alleged infringing activities. Rather, the Charter adopts guiding principles that reflect:

> …the strategy we've refined over the past two years, including feedback from many people internal and external to OpenAI. The timeline to AGI remains uncertain, but our Charter will guide us in acting in the best interests of humanity throughout its development. OpenAI's mission is to ensure that artificial general intelligence (AGI)-by which we mean highly autonomous systems that outperform humans at most economically valuable work -benefits all of humanity. We will attempt to directly build safe and beneficial AGI, but will also consider our mission fulfilled if our work aids others to achieve this outcome.

[71] Where, as here, there is no allegation of agency, improper purpose, fraud or conspiracy under a single controlling mind, the *Van Breda* analysis needs to be undertaken and the presumptive connecting factors must be examined for each defendant.

a. Do any of the Defendants Carry on Business in Canada (or Ontario)?

[72] The question of whether there is a good arguable case that a defendant is carrying on business in Ontario is looked at in the context of the business in question: see *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, 374 D.L.R. (4th) 537 ("*Equustek (BCSC)*"), at para. 28, aff'd 2015 BCCA 265, 386 D.L.R. (4th) 224 ("*Equustek (BCCA)*"), aff'd 2017 SCC 34, [2017] 1 S.C.R. 824 ("*Equustek (SCC)*").

[73] Internet based businesses are ubiquitous.

[74] In *Equustek (BCCA)*, at paras. 52-55, the BC Supreme Court was found to have *in personam* jurisdiction over Google. Both levels of court in BC were satisfied that, while Google "does not have servers or offices in the Province and does not have resident staff [t]here", key parts of its business were carried out in B.C.: *Equustek (BCCA*), at para. 54. In *Equustek (BCSC)*, at para. 63, the trial judge found that Google's advertising services were linked to a user's activity. The Court of Appeal held, in *Equustek (BCCA)*, at para. 54, that:

> it can also be said that the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google's business.

[75] This was based on a finding at first instance that "Google's search and advertising services are inextricably linked": *Equustek (BCSC)*, at para. 63. Despite not being registered to carry on business in British Columbia, or having any physical offices or facilities there, or even having any servers in the province (see para. 29), Google Inc. was found to be carrying on business in British Columbia because key parts of its business were being carried out there, which included

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gathering user information, and then using that information to sell related services to users in British Columbia through contracts Google Inc. entered into with customers (see para. 51).

[76] Each case must be decided on its own facts. In this case, the period of the alleged wrongful conduct that is pleaded in the statement of claim is from 2015 to 2025. The three defendants that were operating entities and carried on active business during some part of the relevant period (the OpCo's) are:

a. **OpenAI OpCo, LLC**: Incorporated in Delaware. It is the main operating OpenAI Entity. It is responsible for the development and training of its GPT models. It owns most of the intellectual property for GPT models, and the code for web crawlers, training processes and search functions. Key aspects of OpenAI's business are conducted through OpCo in Canada:

    i. It operates the web crawler that collects (scrapes) data, including from at least some websites and web applications located in Canada, and uses that content to develop OpenAI models.

    ii. It makes some contractual arrangements in Ontario.[7]

    iii. Its models are developed and augmented by content (including that of the plaintiffs) by user prompts. The users can be located anywhere in the world, including in Ontario. While the majority of this activity overall, worldwide, may not occur in Canada, at least some of the user-generated training data comes from users in Ontario.

    iv. It holds trademarks for its products in Canada.

b. **OpenAI, Inc.:** This is the ultimate parent corporation, incorporated in Delaware. It was the operating entity and was engaged in activity in the core business (now carried on by OpCo, as described above) prior to transferring its assets (including intellectual property) to OpCo in 2019. While it is no longer an active operating company with a direct presence in Ontario, it carried on business in Ontario between 2015 and 2019, in the early part of the period of the impugned conduct, in the same manner as OpCo now does (described above): see *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862, 165 O.R. (3d) 189, at paras. 81-86, leave to appeal refused, [2023] S.C.C.A. No. 24.

c. **OpenAI, LLC**: A 100% owned subsidiary of OpenAI OpCo., LLC, incorporated in Delaware. It is the OpenAI Entity responsible for the procurement of goods and

[7] This description is vague to avoid referring to sealed confidential business information of the defendants that is protected by the partial sealing order.

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> services for OpenAI around the world, including in Ontario. It is the customer facing entity. It advertises to customers, including users in Ontario. It licenses OpenAI tools and services and offers OpenAI products and services to customers, including users in Ontario. It contracts and offers products to individuals and businesses around the world (including in Ontario) either directly or through partnerships with third parties such as Microsoft. Even if those contracts are downstream from the alleged breaches of copyright that is the subject matter of the dispute, they are *indicia* of an active business in Ontario that benefits in part from the unauthorized use of the defendants' Works.

[77] The business activities of these three entities, carried on variously in the relevant period from 2015 to 2025, when viewed in the context of their business as a whole, are enough to establish a presumptive connection of them carrying on business in Ontario. Although only one presumptive connecting factor is needed to establish *in personam* jurisdiction, other presumptive connecting factors, as they relate to these three entities, will be relevant to the strength of the connection that the defendants also challenge (discussed below when the court considers whether the presumptive connections to Ontario have been rebutted). Accordingly, the other presumptive connecting factors will still be analyzed for these three entities.

b. Did the Alleged Breach of Copyright Occur in Canada (or Ontario)?

[78] The defendants assert that the jurisdictional question that arises under the *Copyright Act* is concerned with whether there is a real and substantial connection between the alleged infringing conduct of each defendant and Canada (or, in this case, Ontario). The Supreme Court of Canada held in *Van Breda*, at para. 90, that a tort being committed in the province constitutes a presumptive connecting factor. The Divisional Court explained in *Pourshian*, at para. 51, that: "[w]hen dealing with a claim for copyright infringement, the analogous presumptive factor is whether the alleged copyright infringement occurred in the jurisdiction where the action was brought. In my view, *SOCAN* assists in this analysis".

[79] The defendants first attempt to minimize their connections to Ontario by illustrating that only some of the servers that host the plaintiffs' Works were/are located in Ontario (and Quebec) during the relevant period. The defendants acknowledge that there was a *small minority* of websites hosted in Canada, at least during the earlier years of the timeframe in issue (2015 to present) and acknowledge that it is *possible* (even if not likely) that the Cloudflare server is located in close proximity to a VPN in Toronto. However, the defendants maintain that what is relevant is not where the server is hosted. Rather, the defendants argue that where the request to queries was received and where the response transmitted from is what determines where the processes of data gathering (scraping and crawling) and model training take place.

[80] The Supreme Court of Canada confirmed in *SOCAN*, at para. 63: "[g]enerally speaking, this Court has recognized, as a sufficient "connection" for taking jurisdiction, situations where Canada is the country of transmission [(*Libman v. The Queen*, [1985] 2 S.C.R. 178)] *or* the country of reception [(*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626)]. This jurisdictional posture is consistent with international copyright practice."

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[81] Relying on *SOCAN*, the defendants maintain that their scraping and crawling activities are not enough to ground a claim for breaches of the *Copyright Act*, since those have predominantly taken place outside of Canada.

[82] The crux of the analysis under the territoriality of the *Copyright Act* is centered on what activities constitute the infringement and where that infringement occurred. As noted earlier in this endorsement, the defendants' own evidence does not go so far as to say that none of the defendants' impugned activities (conduct alleged to constitute the breaches) occurred in Ontario (or Canada, for purposes of the *Copyright Act*'s territorial reach). At its very highest, the defendants' evidence, including the evidence of their experts (for example, set out in the June 13, 2025 report of Phil Isaak), is that it is *unlikely* that the transmission of data over the internet in most of the scenarios postulated by the plaintiffs would travel through or terminate in Ontario (*except one scenario that admittedly clearly does*). Likewise, the defendants emphasize that the use of accessed content for training the AI models occurs on specialized servers often called a "computer cluster" or "cluster" that are located in jurisdictions outside of Ontario, although their witnesses have testified that the use of accessed content for other purposes *mostly* occurs outside Ontario.

[83] To the extent that the infringing conduct includes the use of copyrighted material that is sent (transmitted) from or through Canada (through scraping or training) or sending copyrighted material back into Canada (through either reproduction of copyrighted material or if the model itself constitutes a breach through its unauthorized reproduction of the copyrighted content), then Ontario does have a real and substantial connection to the alleged breaches of the *Copyright Act*. The existence of the connection of these impugned activities to Ontario is a presumptive connecting factor. The strength of the connection, and the relative extent to which the activities or related activities are occurring outside of Canada are part of the rebuttal and forum conveniens analysis.

[84] The defendants take a different tack here, and argue that even if these activities occurred in Ontario, they are not the infringing activities that are alleged in the Amended Statement of Claim. They focus on the allegation that the infringing activity is the unauthorized reproduction arising from crawling and training activities that are associated with the development and training of models that power ChatGPT. They say that the model development and training occurs entirely outside of Canada. They insist that the only alleged infringing conduct is the use of that accessed content for training or other purposes for the AI models, conduct which occurs outside Ontario. On this narrow reading of the Amended Statement of Claim, the defendants say there is no copyright infringement in Canada.

[85] The defendants further contend that the Amended Statement of Claim does not expressly plead that the resulting models are themselves infringing reproductions, or that the outputs from the models that are then accessed and used by Ontario-based users of the GPT model are part of the alleged breaches of copyright so this case is not analogous to the *Equustek* case and the connecting factors fall short.

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[86] The defendants' reading of the Amended Statement of Claim is too narrow. The allegations (reproduced earlier in this endorsement) involve the following activities alleged to have commenced as early as 2015:

a. Crawling and scraping content (including Works owned by the plaintiffs in Ontario) from the News Media Companies' websites and web-based applications and/or the websites of their Third Party Partners, some of which may be stored on servers in Canada.

b. Obtaining content from other websites, such as Common Crawl (commoncrawl.org), which provides a free, open repository of web crawl data, regularly collected since 2008. Common Crawl data is stored on academic cloud platforms around the world, including in Canada.

c. Using that proprietary content to build, train, augment and operate its GPT models, including in response to user prompts, without consent or authorization.

d. Leveraging its GPT models, that were developed using the unlawfully obtained Works, to offer a variety of GPT-based products and services to individual consumers and businesses in Canada (including in Toronto), including ChatGPT Plus, ChatGPT Team, and-ChatGPT Enterprise, and Azure OpenAI Service. OpenAI offers some of these GPT-based products and services (such as Azure OpenAI Service) to individual consumers and businesses in Canada (including in Toronto), through partnerships with third parties including Microsoft Corporation. These OpenAI products and services are sold in Canada, by Microsoft Corporation, through Microsoft Canada, which is headquartered in Toronto, Ontario, and are hosted on servers in Canada, including at the Azure Canada Central data center in Toronto, Ontario.

[87] These activities support the pleaded causes of action, that:

> IV. Copyright Infringement:
>
> 52. Without any licence or permission from the News Media Companies, OpenAI has reproduced and continues to reproduce and exploit each of the Owned Works (or a substantial part thereof), contrary to sections 3 and 27 of the *Copyright Act*.
>
> 53. By scraping and/or copying the Owned Works from the News Media Companies' Websites, the websites of their Third Party Partners, and/or the websites or data sets of other third parties for use as part of the Training Data and/or RAG Data [a process referred to as "Retrieval-Augmented Generation" or "RAG", through which its models are provided continuous access to an additional data set], OpenAI reproduced the Owned Works in their entirety (or in substantial part) and copied them into one or more datasets used to train and/or augment each version of the GPT model. The scraping and reproduction process engaged in by OpenAI commenced as early as 2015, and was for the ultimate purpose of developing for-

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> profit, commercial products and services. The precise timing and circumstances of the scraping and reproduction is information within the knowledge of OpenAI and not the News Media Companies.
>
> …
>
> 55. The scraping and reproduction process engaged in by OpenAI infringed, authorized, and/or induced the infringement of, the copyright of the News Media Companies in the Owned Works, including in the following ways:
>
> > (a) the resulting GPT models have been and continue to be reproduced and hosted in Canada, including at the Azure Canada Central data center in Toronto, Ontario by OpenAI and/or by third parties at the instruction of OpenAI; and
> >
> > (b) by offering its commercial products and services, including ChatGPT Plus, ChatGPT Team, ChatGPT Enterprise, and Azure OpenAI Service in Canada, OpenAI sanctions, encourages, and permits users in Canada (including in Toronto) to infringe the Owned Works.
>
> …
>
> V. OpenAI Circumvented and Continues to Circumvent the Technological Protection Measures ("TPMs") Employed by the News Media Companies
>
> …
>
> 59. By scraping or otherwise illicitly accessing and reproducing the Works, including the Owned Works, from the News Media Companies' Websites and/or those of their Third Party Partners for use as part of the Training Data and/or RAG Data, OpenAI circumvented the technological protection measures employed for the purpose of protecting the Works. The scraping and reproduction process engaged in by OpenAI was for the purpose of developing for-profit, commercial products and services.

[88] Read liberally, as it must be for the purposes of this motion, the Amended Statement of Claim does include as part of the alleged wrongdoing that the defendants are making the results of the web crawling, scraping and model training, including unauthorized reproductions of the plaintiffs' Works, available to AI users in Ontario through their customer contracts. Notably, they plead that the defendants have leveraged their model in their dealings with customers, including customers in Ontario.

[89] The court should not hold the plaintiffs strictly to the letter of their pleading, which they could simply amend if this needed to be clarified: *Rothmans*, at para. 106; see also *Vahle*, at paras. 12-13.Each case must be assessed on its own facts. The test is not as strict as the defendants

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suggest, nor should the Amended Statement of Claim be read as narrowly as the defendants suggest.

[90] Based on the more appropriate liberal reading of the plaintiffs' allegations in the Amended Statement of Claim and the factual record developed for this motion, a good arguable case has been made that the *Copyright Act* breaches are sufficiently connected to Ontario as a result of the activities of the three OpCo defendants that were previously identified to have been carrying on business in Ontario, namely: OpenAI OpCo, LLC, OpenAI, LLC, and OpenAI, Inc.

c. Did Any Other Alleged Wrongdoing Occur in Ontario??

[91] Other alleged wrongdoing includes breach of contract and unjust enrichment:

> VI. OpenAI Breached and Continues to Breach the News Media Companies' Terms of Use
>
> …
>
> 65. As described above, each of the Terms of Use expressly prohibit the use of the News Media Companies' Websites and Works for any use other than personal, non-commercial uses. The Terms of Use also generally prohibit users from reproducing, distributing, broadcasting, making derivative works from, retransmitting, distributing, publishing, communicating, or otherwise making available any of the Works. Any uses not expressly permitted by the Terms of Use require the News Media Companies' express consent—particularly commercial uses.
>
> 66. Since as early as 2015, OpenAI has breached and continues to breach the applicable Terms of Use for each of the Websites in various ways, including by accessing, scraping, and/or copying the Works for use as part of the Training Data to train its GPT models and/or as part of the RAG Data to augment its for-profit commercial products and services.
>
> …
>
> VII. OpenAI Has Been, and Continues to Be, Unjustly Enriched
>
> …
>
> 69. OpenAI has been, and continues to be, enriched at the expense of the News Media Companies, including by unlawfully obtaining and using the Works for free. The News Media Companies have been correspondingly deprived. There is no juristic reason for OpenAI's enrichment at the expense of the News Media Companies. OpenAI is accordingly liable for unjust enrichment.

[92] The breach of contract claim applies to the defendants identified as having engaged in the crawling and scraping activities that are in breach of the plaintiffs' Terms of Use. These Terms

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of Use originate from Ontario and prevent the use of the plaintiffs' Works for commercial gain. As detailed earlier, at various times, each of OpenAI OpCo, LLC and OpenAI, Inc. have engaged in these activities during the relevant period. The News Media Companies' website Terms of Use create a contract between those accessing the website and the respective News Media Company. The News Media Companies, who are the contractual counterparties to the Terms of Use, are each based in Ontario.

[93] In the context of a breach of contract claim related to website scraping, the Supreme Court of British Columbia found these kinds of "browse wrap" agreements enforceable as against the defendants who scraped the website for commercial purposes because the terms were available and those defendants made use of similar terms of use on their own website: see *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, 338 D.L.R. (4th) 32, at paras. 107-8.

[94] The defendants say they did not enter into any contracts or Terms of Use with the plaintiffs and that their webcrawlers are not entitles capable of entering into contracts or agreeing to Terms of Use. That is an unsustainable position for the purposes of this jurisdiction analysis. For this motion, it is sufficient that these defendants created and directed the activities of the activities said to give rise to the breaches of the plaintiffs' Terms of Use and that there is a good arguable case that they are responsible for that conduct: see *Century 21*, at para. 107-108.

[95] This establishes a third presumptive connecting factor for these two operating defendants, OpenAI OpCo, LLC and OpenAI, Inc., for breach of the plaintiffs' Ontario-based contract related to the dispute.

[96] The unjust enrichment claim is derivative of other claims. There is a good arguable case that the unjust enrichment claim extends beyond the defendants directly implicated in the wrongful conduct, to the for-profit entities that directly and indirectly own them, including the defendants that are the direct and indirect and indirect owners of OpenAI OpCo, LLC : **OpenAI Holdings, LLC, OAI Corporation and OpenAI Global, LLC.** As stated in the OpenAI Charter: "[T]he for-profit subsidiary is fully controlled by the Open AI Nonprofit. We enacted this by having the Nonprofit wholly own and control a manager entity (Open AI GP LLC) that has the power to control and govern the for-profit subsidiary".

[97] The jurisdiction over foreign entities in this context is derived from the jurisdiction that the court has assumed over their subsidiaries, where the parent companies would directly or indirectly profit from the business carried out and wrongful acts alleged to have been committed by their subsidiaries in Ontario (OpenAI OpCo, LLC and its wholly owned subsidiary, OpenAI, LLC). Where, as here, the plaintiffs may ultimately be entitled to restitution from the parent companies for the same causes of action that the court has assumed territorial competence over their subsidiaries, it is appropriate for this court assume territorial competence over the parent companies, OpenAI Holdings, LLC, OAI Corporation and OpenAI Global, LLC. The claims against the parent companies are that they were unjustly enriched by the alleged wrongful acts of their direct and indirect subsidiaries without juristic reason, which caused a corresponding detriment to the plaintiffs.

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[98] These are flow through claims that the court should have continuous jurisdiction over. Unjust enrichment does not require the piercing of the corporate veil nor require direct wrongdoing by the parent. It respects that separateness and seeks to hold the parent to account if it is unjustly enriched by the wrongdoing of its subsidiaries.

d. Is the Property at Issue Located in Ontario?

[99] The plaintiffs' Works were authored in Ontario or by employees of Ontario-based News Media Companies. A claim in respect of an authored Work created in Ontario is a claim in respect of property in Ontario: *Pourshian*, at para. 63.

[100] This is where the arguments advanced by the defendants concerning the territorial reach of the *Copyright Act* do have some traction. As discussed earlier in this endorsement, when dealing with a breach of copyright claim, it must be demonstrated that the *Copyright Act* infringement (or other breach of copyright) occurred in Ontario. The fact that the Works were created or existed in Ontario does not bring these claims into the territorial reach of Ontario. That is dependent on where the breach occurred: *Pourshian*, at paras. 52-58.

e. Recap of Presumptive Connecting Factors

[101] Based on the above analysis, presumptive connecting factors have been established for:

a. **OpenAI, Inc.:** Carrying on business in Ontario, committed wrongful acts in Ontario (in the period 2015-2019), and is party to the Ontario-based Terms of Use (contract)

b. **OpenAI OpCo, LLC**: Carrying on business in Ontario, committed wrongful acts in Ontario (in the period from incorporation in 2019 to present), and is party to the Ontario-based Terms of Use (contract)

c. **OpenAI, LLC**: Carrying on business in Ontario and committed wrongful acts in Ontario (in the period from incorporation in 2020 to present)

d. **OpenAI Holdings, LLC, OAI Corporation and OpenAI Global, LLC**: For-profit parent/holding companies unjustly enriched from profits of wrongful acts committed in Ontario by direct and indirect subsidiaries carrying on business in Ontario.

Have the Defendants Rebutted the Presumptive Connecting Factors?

[102] The defendants argue that, even if raised, the presumption is rebutted because the connection to Ontario through remote website access or limited research on third-party clusters located in Canada does not amount to a real and substantial connection for the purposes of a copyright infringement claim. I disagree.

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[103] Here, the plaintiffs have established that there is a good arguable case that the pleaded causes of action against the six defendants listed above are sufficiently connected to Ontario to permit Ontario to assume jurisdiction of the claims against them. As the Supreme Court stated in *SOCAN*, at para. 61: "[i]n terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute."

[104] When the presumptive connecting factors are considered together for the defendants to which they apply in this case, the overall connection is not weak and has not been rebutted. A real and substantial connection to Ontario has been established.

[105] The primary weakness that the defendants point to is that the preponderance of the impugned conduct underlying the claim for breach of copyright occurred outside of Canada. If they are right that the territorial reach of the *Copyright Act* does not extend to breaches that occurred outside of Canada, that may narrow or reduce the scope of the claims, but it does not rebut the presumptive connecting factor that gives this court jurisdiction over the claims that are shown to be within the territorial reach of the *Copyright Act*. The court does not need to determine the full scope of the territorial reach of the *Copyright Act* to the plaintiffs' claims on this motion.

[106] Insofar as there may be other claims that are more closely connected to another jurisdiction, they are not foreclosed by the Ontario court assuming jurisdiction over claims within its jurisdiction.

[107] The defendants further argue that a presumptive connecting factor involving business activities carried on in Ontario not connected to the alleged wrongful conduct would be weak and rebuttable. I agree that it could be, but the presumption in this case, detailed above, was not based on activities in Ontario unrelated to the alleged wrongful conduct.

[108] The defendants also argue that a presumptive connecting factor dependent upon a common Charter and "common business" enterprise that includes some entities engaged in the alleged wrongful conduct would be weak and rebuttable. I agree that it could be, but the presumption here was not based on the "common business" objectives of the defendants under their Charter.

Is Ontario a Forum Non Conveniens?

[109] The doctrine of *forum non conveniens* does not address whether a court has jurisdiction or should assume jurisdiction. Rather, it is a discretionary doctrine that applies only once jurisdiction is properly established. It recognizes that multiple forums may be capable of exercising jurisdiction and permits a court to decline to do so where another forum is clearly more appropriate for the adjudication of the dispute: see *Van Breda*, at paras 101-4; *Perfect 10, Inc. v. Google, Inc*., 2011 FC 348, 91 C.P.R. (4th) 444, at para. 37.

[110] The analysis is contextual and fact-specific and is guided by a non-exhaustive list of contextual factors aimed at determining the most appropriate forum. In *Van Breda*, at para. 105, the Supreme Court of Canada listed what courts have considered, among other things:

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a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

b) the law to be applied to issues in the proceeding;

c) the desirability of avoiding multiplicity of legal proceedings;

d) the desirability of avoiding conflicting decisions in different courts;

e) the enforcement of an eventual judgment; and

f) the fair and efficient working of the Canadian legal system as a whole.

[111] The defendants assert that the United States is a more appropriate, suitable and convenient forum than Ontario in which to litigate the pleaded claims for breach of copyright and related matters. The burden of demonstrating that the alternative forum of the United States is clearly a more appropriate, suitable and convenient forum is on the defendants: *Van Breda*, at para. 108. Turning to the contextual factors:

a. All of the defendants and their witnesses are in the United States and all of the plaintiffs and their witnesses are in Canada. The convenience to the parties and their witnesses is thus, at best, a neutral factor. Given the modernization of civil proceedings in Ontario and the ability for much of the pre-trial steps to be conducted virtually and for non-party witnesses to be examined through hybrid court proceedings, this factor is not as weighty as it might have been historically. Both sides are sophisticated, well-resourced corporate entities capable of litigating in both jurisdictions.

b. The laws to be applied to the issues as pleaded in the Amended Statement of Claim are the laws of Ontario and the applicable laws of Canada. OpenAI is alleged to have breached Canadian copyright law, Ontario contract law, and Ontario equitable principles in relation to conduct with a substantial connection to Canada. This factor favours Ontario. The defendants' assertion that their impugned conduct is more properly the subject of the laws of the United States has been considered. If there are aspects of the plaintiffs' claims that should be more properly pursued under the laws of the United States, the plaintiffs will have to determine whether to pursue them. In the context of this motion, this court has determined that there are claims that come within the laws that this court has jurisdiction, regardless of what other (as of yet unasserted) claims the plaintiffs may have elsewhere.

c. There is currently no multiplicity of proceedings involving the same parties and the same issues. OpenAI acknowledges that there are no directly overlapping actions currently initiated in the United States. The defendants point to a different proceeding commenced in the United States by one of the plaintiffs (the Toronto Star) against some of the defendants raising different issues under U.S. law. That is not a multiplicity of proceedings that supplants the jurisdiction of this court to

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deal with the claims properly asserted in this action under Ontario law. If these plaintiffs later assert other claims against the same defendants under the laws of the United States, and there are overlapping legal or factual considerations, then there is the ability of the courts in Ontario under r. 21 of our *Rules of Civil Procedure* to reconsider whether the avoidance of multiplicity of proceedings and overlapping conflicting decisions in different courts at a future time. The prospect of that is not a reason for this court to pre-emptively decline to exercise its jurisdiction over the pleaded claims.

d. The defendants assert that the permissibility of training AI models on copyright-protected works is an active issue before the U.S. courts and that, if American courts were to conclude that such conduct is lawful (for example, under the U.S. doctrine of fair use), it would be problematic for this court to reach a contrary conclusion under Canadian law. The existing proceeding that has been identified in the United States is not, as presently constituted, a proceeding that risks different outcomes in respect of the same issues involving the same parties. The consideration under this factor is whether different courts may reach conflicting decisions in respect of the particular facts of this case, not whether courts in the U.S. and Canada may apply their respective jurisprudence to reach different conclusions on novel legal issues. The fact that similar claims may arise and be pursued in two different jurisdictions that may have different laws is not a reason to block the claims in one jurisdiction from proceeding.

e. Challenges with enforcement are a risk that sophisticated commercial parties accept when they commence proceedings. There is a high degree of comity between Canada and the United States. If the laws are so different as to give rise to an unwillingness of a court in the United States to enforce a judgment rendered in Canada for breach of copyright and related claims, the News Media Companies are capable of assessing that risk and deciding whether it is worth taking. The fact that there was an internet-based case in British Columbia in which jurisdiction was challenged and it eventually could not be enforced in the United States due to its specific circumstances is not a reason for this court to decline to exercise its jurisdiction over the pleaded claims in this case. In *Equustek (SCC)*, the Supreme Court of Canada upheld a global injunction against Google to delist search results worldwide, at paras. 1, 54, that was not enforced by a U.S. District Court subsequently because it conflicted with applicable U.S. law: see *Google LLC v. Equustek Sols Inc.*, 2017 Comm. Reg. (P & F) 55 (ND Cal 2017), aff'd 2017 Comm. Reg. (P & F) 65 (ND Cal 2017). However, this is a different case. OpenAI has filed no evidence - expert or otherwise - establishing that a judgment in Canada finding copyright infringement would conflict with any existing U.S. laws. Further, and in any case, the allegations advanced against OpenAI in this case are broader than breach of copyright, and the defendants have not suggested any basis on which judgments for breach of contract or unjust enrichment would not be enforceable in the United States.

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f. On the whole, the fair and efficient working of the legal system in Canada favours allowing Canadian authors of Canadian-created Works with claims against foreign companies for breaches of Canadian copyright and other laws to pursue those claims here. This is the case if they are demonstrated to be claims against parties over which this court has jurisdiction, as they have been in this case.

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[112] The defendants have not met their burden of demonstrating that the United States is a clearly more appropriate, suitable and convenient forum than Ontario in which to litigate the pleaded claims for breach of copyright and related matters under Ontario law (and the laws of Canada applicable in this province). This is a discretionary assessment, having regard to the relevant contextual factors that have been identified in this case. When they are considered individually and collectively, they favour Ontario as the more appropriate, suitable and convenient forum for the adjudication of these claims.

[113] The normal state of affairs is that jurisdiction should be exercised once it is properly assumed. I agree with the plaintiffs that, to displace that presumption, the defendants must do more than show that this litigation could proceed in the U.S. – "[i]t is not a matter of flipping a coin." Rather, it must demonstrate that a court in the U.S. "is in a better position [than this Court] to dispose fairly and efficiently of the litigation": *Van Breda*, at para. 109. The defendants have not done so. This matter should proceed in Ontario.

Summary of Outcome, Costs and Final Disposition

[114] For the foregoing reasons, the defendants' motion is granted in favour of OpenAI GP, LLC, OpenAI Startup Fund Management, LLC, OpenAI Startup Fund 1 LP, and OpenAI Startup Fund GP 1, LLC. Service against these defendants of the Statement of Claim is set aside and the action is stayed as against these defendants. The motion is dismissed as it relates to the six other defendants.

[115] After the hearing of this jurisdiction motion, the parties advised the court by email that they had agreed upon an all-inclusive quantum for partial indemnity costs and reimbursement of reasonable disbursements: $435,000.00 to the winning party, subject to judicial discretion to adjust the quantum to reflect divided success (if any). There has been divided success in that the claims in the Amended Statement of Claim have been stayed against four of the ten defendants. The three core OpCo's and their three direct and indirect for-profit parent companies were not successful in having the claims against them stayed.

[116] Since 60% of the defendants were not successful, mathematically, the plaintiffs should be entitled to 60% of the agreed all-inclusive partial indemnity costs, which would be $261,000. My preliminary determination is that this is an appropriate award of costs in favour of the plaintiffs, having regard to the outcome and other relevant factors under r. 57 (the overall quantum and scale having been agreed, subject to adjustment for divided success).

[117] The plaintiffs might argue that the defendants that were successful did not bear a proportionate burden nor was the evidence proportionately weighted to their issues (much of it would have been the same whether they participated or not), and that the costs allocated to their

issues (and them) should therefore be less than 40% with a corresponding higher percentage allocation to the plaintiffs. The defendants only had one set of counsel and much of the evidence and argument applied to all defendants.

[118] The defendants may argue that the plaintiffs should have to pay costs to the defendants that were successful.

[119] The gross percentage allocations that the court has adopted are imperfect but that is often the manner in which costs must be dealt with in multi-party litigation. The 60% costs award in favour of the plaintiffs is rough justice. Costs are discretionary and I consider this to be fair and reasonable in the circumstances.

[120] If there is a material aspect of the costs analysis that has not been expressly accounted for in these reasons, a case conference may be scheduled for further directions regarding the possibility of further cost submissions, if I am persuaded that there is something that has been inadvertently overlooked.

[121] The costs of the earlier sealing order motion were reserved. Counsel advised the court that they agreed not to require costs outlines from each other and agreed that the defendants/moving parties' all-inclusive costs of that motion were $42,000.00 and the plaintiffs' all-inclusive costs of that motion were $15,000.00. The parties had asked to make submissions with respect to apportionment/entitlement to costs of the sealing order motion at the conclusion of the jurisdiction motion, however, there was not time for them to do so.

[122] Accordingly, it was agreed that submissions on apportionment/entitlement to costs of the sealing order motion could be made at a later date if the parties were unable to reach an agreement on those costs following the release of this decision. Before the parties exchange their written submissions as they have proposed to do, they shall arrange to attend a case conference before me for directions regarding any further submissions concerning the costs of both the sealing order motion and the jurisdiction motion, and regarding the continuation of the sealing order.

[123] At the end of the endorsement that granted the Partial Sealing Order on August 14, 2025, at para. 62, the court directed that: "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". With the court's decision in this endorsement, the parties should now confer and jointly request that case conference.

KIMMEL J.

Date: November 7, 2025

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