

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GOOGLE INC.

APPELLANT
(Appellant)

-and-

**EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, and CLARMA
ENTERPRISES INC.**

RESPONDENTS
(Respondents)

RESPONDENTS' FACTUM
(EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, and CLARMA ENTERPRISES INC.,
RESPONDENTS)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Order made below is an important step in the development of the common law in response to a challenge that courts around the world face – how to deal with illegal conduct on the internet.

2. The plaintiffs operate a small Burnaby technology business. The Datalink defendants stole the plaintiffs' technology and conspired with others to manufacture a competing product and appropriate all of the plaintiffs' business and international goodwill for themselves.

3. The plaintiffs obtained multiple court orders against the Datalink defendants, including three separate orders prohibiting them from carrying on business anywhere in the world. The Datalink defendants evaded all of these orders by abandoning the litigation, fleeing the jurisdiction, and carrying on business on the internet, from an undisclosed location. There is a warrant for the arrest of their principal, Morgan Jack. Their defences have been struck and they are deemed to admit all of the plaintiffs' claims.

4. The plaintiffs do not know where the Datalink defendants are and cannot take any further steps directly against them. However, the Datalink defendants' online business cannot survive unless it can easily be found on Google so the plaintiffs asked Google to stop listing the impugned websites on search results. Google refused the plaintiffs' request even though Google de-lists websites every day as part of its ordinary business, and can do so without cost or inconvenience.

5. The defendants are not selling counterfeit handbags or watches on street corners – they are selling a sophisticated engineering product to sophisticated businesses around the world in the face of multiple court orders that they should stop. If the court is powerless to act in the face of this kind of conduct, then we no longer live in a world ruled by law.

6. There is nothing remarkable about the concept that the internet, like all other fields of human endeavour, is subject to law. Nor is there anything remarkable about an order being made *in personam* against a party within the jurisdiction of the court, to take certain steps outside the jurisdiction. English and Canadian courts have long exercised these powers.

7. The Order under appeal will not break the internet. The impugned websites do not engage any of the values underlying freedom of expression – their only purpose is to generate profit for the outlaw Datalink defendants and their collaborators by selling illegal products in violation of multiple court orders. The Order only affects a very specialized niche engineering market, and the only consequence of the Order is that, instead of finding the Datalink defendants’ outlaw websites, their customers will find the plaintiffs’ websites instead. The internet is one of the great innovations of our time, but it is also subject to abuse – as this case and others demonstrate. Google would have the internet remain a lawless zone, in which court orders are meaningless. This is a self-defeating and impossible conclusion for any court to accept.

8. British Columbia courts applying the rule of law are not a threat to internet freedom – the real threat is uncontrolled outlaw or criminal behaviour causing businesses and the public to lose confidence in the internet as a safe medium to engage in commerce and the free exchange of information and ideas.

“... the time has come for the Internet to grow up and for Congress and the businesses that rely on the Internet to accept a mature scheme of regulation that limits the social costs of illegal Internet conduct in the most cost-effective manner....”¹

Underlying Claim

9. The plaintiffs operate a small technology business in Burnaby, British Columbia. They manufacture networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.²

10. The plaintiffs claim that the “Datalink defendants,”³ while acting as a distributor of the plaintiffs’ products, conspired with one of the plaintiffs’ former engineering employees to design and manufacture a competing product, the GW1000. The plaintiffs say that the Datalink

¹ Mann and Belzey, *The Promise of Internet Intermediary Liability*, (2005) 47 William and Mary Law Review 239

² Reasons for Judgment of Fenlon J. (“BCSC Reasons”), at para. 3 [Appellant’s Record (“AR”) tab A]

³ Morgan Jack, Datalink Technology Gateways Inc. and Datalink Technologies Gateways LLC named in the Notice of Civil Claim at paras 4 – 10 [AR tab U]

defendants designed, manufactured, and sold their competing product using the plaintiffs' trade secrets.⁴

11. From the outset of the proceedings the Datalink defendants failed to comply with court orders. They abandoned the proceedings and fled the jurisdiction – without producing any documents – so their defences were struck in June 2012.⁵ With their defences struck, these defendants are deemed to have admitted all of the claims against them,⁶ including that the plaintiffs' products have a global market with a global reputation for quality.⁷ The Datalink defendants breached their contract with the plaintiffs⁸ and unlawfully appropriated the plaintiffs' goodwill by a conspiracy to steal the plaintiffs' trade secrets, which they used to design and manufacture the impugned products,⁹ which are sold on the defendants' websites¹⁰ through a complex network of companies in multiple jurisdictions around the world.¹¹ None of these claims are statute-based, although the plaintiffs have other claims which are.

12. Most of the Datalink defendants' sales occur outside Canada.¹²

13. After the Datalink defendants' defences were struck, Mr. Justice Punnett granted a *Mareva* injunction freezing the worldwide assets of the Datalink defendants, including their entire product inventory.¹³ In his reasons, Punnett J. wrote:

⁴ BCSC Reasons, paras 4 – 5 [AR tab A]

⁵ BCSC Reasons, para 6 [AR tab A] and see also Reasons for Judgment of Dickson J., June 20, 2012 [Respondents' Record ("RR") Vol I, Part I, tab A]. The defence of the third Datalink defendant, Datalink Technologies Gateways LLC (which was added to the proceedings), was not struck until the Order of Gropper J. on March 8, 2013 [RR Vol I, Part II tab F]

⁶ Reasons for Judgment of Fenlon J., August 3, 2012, paras 26, 31 [RR Vol I, Part I, tab B], citing *McIsaac v. Healthy Body Service Inc.*, 2009 BCSC 1716. And see Reasons for Judgment of Punnett J., October 10, 2012, paras 36 – 38 [RR Vol I, Part I, tab C].

⁷ Notice of Civil Claim, Part I: paras 22, 23, and 32 and Part III, paras 11 – 15 [AR tab U]; the references to "common law trademark" is shorthand for the tort of passing off. See *Petals, Inc. v. Winners Apparel Ltd.*, 1999 CanLII 14920 (ON SC) at para 12. And, with respect to the elements of the tort of passing off generally, see *Oxford Pendaflex v. Knorr*, [1982] 1 S.C.R. 494. The plaintiffs also have some late registered trademarks, but the focus of this aspect of their claim is the tort of passing off.

⁸ Notice of Civil Claim Part I: paras 28 – 32, 39 – 42, 50 – 54, 57, 61 [AR tab U]

⁹ Notice of Civil Claim Part I: paras 33 – 35, 47, 49 [AR tab U]

¹⁰ Notice of Civil Claim Part I: paras 29 – 32, 35, 50 – 52, 56, 59 – 61 [AR tab U]

¹¹ See Notice of Civil Claim Part I: para 36, and also Part I paras 6, 8A, and 41A [AR tab U]. And, the references in Part I, paras 32 and 51 to the "plaintiffs' customers" and "the public" are clearly (because of the way the plaintiffs' products are described in paras 22 and 23 as having a global reputation) references to a global customer base.

¹² BCSC Reasons, para 148 [AR tab A]

The evidence indicates as well that the Datalink Defendants have abandoned the litigation and show no intention of compliance with either the orders of the court or the rules of court. The defendants have established multiple corporate entities, including some outside Canada, and the defendant Morgan Jack appears to have taken up permanent residence outside the jurisdiction.

On the material filed it can be reasonably inferred that the Datalink Defendants have chosen to deal with the plaintiffs' claims by moving out of the jurisdiction, filing a notice of intention to act in person, incorporating a myriad of shell corporations in different jurisdictions and ignoring the court process.

...

In granting the injunction I have considered the significant impact it may have on the defendants' ability to carry on business. In practical terms it will prohibit them from doing so. Notwithstanding that result the balance of convenience lies with the granting of the injunction requested.¹⁴

14. In August 2012, Madam Justice Fenlon issued a "Confidentiality Order" including an injunction prohibiting the Datalink defendants from dealing with broad classes of intellectual property.¹⁵ In her reasons, Fenlon J. wrote:

The interim injunction sought by the plaintiffs is very broad, effectively prohibiting any use of whole categories of documents and information that lie at the heart of any business of a kind engaged in by both parties. I am mindful that the effect of this order is the suspension of the defendants' business activities and their ability to earn income.

...

The defendants have effectively disappeared. They have refused to provide any information about where they operate or manufacture the GW1000. The operating company has changed frequently. Morgan Jack at all times contracted in the name of Datalink Technologies Group Inc., a company that has not existed since 2007. Two other Datalink companies with almost identical names also no longer exist.... Further, the company appears to be a virtual one. At one time it carried on business at the defendant Morgan Jack's apartment in the West End of Vancouver, but that apartment has now been sold. It also purports to carry on business, according to its website, in Washington, Texas, and Arizona, although the addresses given are for rental mailboxes only.

...

The defendants have repeatedly failed to comply with court orders made in these proceedings and are now deemed to have admitted the use of the plaintiffs' trade secrets.¹⁶

¹³ Order of Punnett J., July 26, 2012 [RR Vol I, Part II, tab A], which was issued with reasons to follow.

¹⁴ Reasons for Judgment of Punnett J., October 10, 2012, paras 41- 42, 45 [RR Vol I, Part I, tab C]

¹⁵ Reasons for Judgment of Fenlon J., August 3, 2012 [RR Vol I, Part I, tab B]; Order of Fenlon J., August 3, 2012, paras 21, 24, 28 - 31 [RR Vol I, Part II, tab B]

¹⁶ Reasons for Judgment of Fenlon J., August 3, 2012 [RR Vol I, Part I, tab B]

15. Thus, both the Confidentiality Order (thou shalt not use intellectual property) and the *Mareva* injunction (thou shalt not sell inventory) prohibited the Datalink defendants from carrying on business.

16. However, the Datalink defendants did carry on – as an outlaw company selling the GW1000 on the impugned websites¹⁷ from an undisclosed location, to customers all over the world.¹⁸ The impugned websites do not address any matters of public concern – their only purpose is to generate profit for the outlaw Datalink defendants and their collaborators by selling their illegal product in violation of multiple court orders.¹⁹

17. In September 2012 the plaintiffs brought an application to have the Datalink defendants – and their principal Morgan Jack – found in contempt. None of the defendants appeared and the court issued a warrant for Morgan Jack’s arrest, which remains outstanding.²⁰

18. The plaintiffs did not know where the Datalink defendants were, so the plaintiffs could not take any further steps against them or their suppliers. The plaintiffs could not take steps against the parties hosting the impugned websites, because a hosting company can be changed in an hour.²¹ The plaintiffs’ only realistic remaining option was to engage the assistance of Google, the dominant search engine conduit through which the Datalink defendants’ websites were made accessible to the public.²²

¹⁷ BCSC Reasons, para 7 [AR tab A]. See also Reasons for Judgment of Fenlon J., August 3, 2012, para 29 [RR Vol I, Part I, tab B]. Groberman JA called them a “clandestine” company: Court of Appeal Judgment, para 18 [AR tab F]

¹⁸ BCSC Reasons, paras 76 and 148 [AR tab A]. See also Affidavit #2 of Robert Huth [RR Vol II, tab I], and Affidavit #3 of Dermot Devine [RR Vol II, tab D].

¹⁹ Affidavit #13 of Dermot Devine, pages 14 – 82 [RR Vol II, tab E]; Affidavit #18 of Dermot Devine, pages 7 – 78 [RR Vol II, tab G]; Affidavit #7 of Sarah Perkonig [RR Vol II, tab J], pages 71 – 81. The courts below have not made any express finding on this – since it was not directly in issue – but see the Court of Appeal Judgment, para 110 [AR tab F], noting that “there is no evidence that the websites in question have ever been used for lawful purposes, nor is there any reason to believe that the domain names are in any way uniquely suitable for any sort of expression other than the marketing of the illegal product.”

²⁰ Warrant, Groves J., September 26, 2012 [RR Vol I, Part II, tab C]

²¹ Affidavit #6 of John Zeljkovich, para 5 [RR Vol III, tab O]. And the websites are usually held by anonymous proxies around the world.

²² Court of Appeal Judgment, paras 18, 105 [AR tab F]; BCSC Reasons, paras 70 – 76 and 156 [AR tab A]

Google search

19. Google operates the world’s most popular search engine, and controls 70 – 75% of the global search engine market.²³ Because Google is the dominant search engine, no business conducted on the internet can succeed unless it can easily be found on Google.²⁴

20. Google provides a free service. In response to an internet user’s request, Google will provide the user with “search results” that Google identifies as relevant. Google’s search results include a “snippet” describing the content of each website listed, a link to those sites, and – usually – related advertising that is Google’s main source of its \$50 billion of annual revenue.²⁵

21. Google’s search results are determined by a computer algorithm designed by Google. However, Google keeps its algorithm and the process by which it delivers search results strictly secret.²⁶ Google advises that the algorithm takes over 200 factors into account, but has only disclosed one of these factors – the popularity of a website is a factor that makes it more likely to appear in search results.²⁷

22. And, whatever the “truth” may be of its algorithm-generated search results, Google alters them on a daily basis. For example,

- i. Google displays advertising above the search results generated by its algorithm. Google does indicate which results are ads, but the labelling may not be apparent to an ordinary user.²⁸
- ii. Google’s search results do not include websites whose owners do not wish to be included, no matter how relevant those websites might otherwise be.²⁹
- iii. Google alters its search results to avoid generating links to child pornography sites.³⁰

²³ BCSC Reasons, para 152 [AR tab A]

²⁴ BCSC Reasons, paras 32 and 152 [AR tab A]; Court of Appeal Judgment, paras 19 and 27 [AR tab F]; Affidavit #4 of John Blown, paras 6 – 10 [RR Vol II, tab B]; Cross Examination of Steven Smith, pages 7 – 8 [RR Vol III, tab P]

²⁵ BCSC Reasons, paras 33 and 83 [AR tab A]; Cross Examination of Steven Smith, page 4 [RR Vol III, tab P]

²⁶ BCSC Reasons, para 47 [AR tab A]; Affidavit #3 of John Blown (October 25, 2012), paras 4, 7 [RR Vol II, tab A]

²⁷ Affidavit of Steven Smith, Exhibit A [RR Vol III, tab L]; Google calls this “PageRank.”

²⁸ This topic is touched on in BCSC Reasons, para 55 [AR tab A], and see Cross-Examination of Steven Smith [RR Vol III, tab P], page 4 (line 17) to page 6 (line 36), and Exhibit 1. Sometime the ads are beside the “organic” search results instead of above them.

²⁹ Cross-Examination of Steven Smith, page 14, lines 30 – 35 [RR Vol III, tab P]

iv. Google alters its search results to avoid generating links to “hate speech” sites.³¹

v. Most website owners want to be found on Google, and an entire industry has sprung up (called “search engine optimization”, or “SEO”) to assist websites to get better rankings on Google. Effective SEO involves “gaming” the Google algorithm, but when this goes too far Google punishes the website.³²

vi. Google regularly alters its search results to comply with the law.³³ Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act* (DMCA), to remove content from search results.³⁴ There is good reason, from media reports, to believe that Google alters search results to comply with other countries’ laws as well. For example, Google has recently entered into a draft settlement with EU competition regulators by which it has accepted legal restrictions on the search results it generates.³⁵ The most infamous example is Google’s foray into China.³⁶ However, the only evidence in the record on these last two points are media reports that are not admissible for the truth of their contents, because Google’s witness – Mr. Smith – had no knowledge of them, or other similar examples.³⁷ Anticipating that this might be the case, the plaintiffs asked that Mr. Smith inform himself – before his cross examination – about the past practices of Google in the alteration of search results. Google refused.³⁸

23. Google did not disclose where the computers are located that control its search results,³⁹ except to claim that the process – of removing certain search results – occurs outside Canada.⁴⁰ However, Google has 54,000 employees around the world,⁴¹ including an in-house legal department of 700 people⁴² and at least three different “removals teams” to respond to requests to remove content from search results.

³⁰ Cross-Examination of Steven Smith, page 14, lines 47 to page 16, line 32, and Exhibits 3 and 4 [RR Vol III, tab P]

³¹ Cross-Examination of Steven Smith [RR Vol III, tab P], page 16, line 39 to the end of page 17, and then page 38, line 34 to page 39, line 3, and Exhibits 5 and 7, and see BCSC Reasons, para 139 [AR tab A]. Mr. Smith was not clear on whether this is achieved in part by filters in the algorithm.

³² Cross-Examination of Steven Smith, page 19, lines 27 to page 20, line 20 [RR Vol III, tab P]

³³ Cross-Examination of Steven Smith, page 14, lines 36 – 42 [RR Vol III, tab P]

³⁴ Cross-Examination of Steven Smith, page 12, lines 29 – 36, and page 20, lines 23 – 46 [RR Vol III, tab P]

³⁵ Affidavit #27 of Dermot Devine [RR Vol II, tab H], para 6 and pages 38 – 41

³⁶ Affidavit #27 of Dermot Devine [RR Vol II, tab H], para 5 and pages 34 – 37

³⁷ Cross-Examination of Steven Smith, page 8, lines 17 to page 9, line 44 [RR Vol III, tab P]

³⁸ Affidavit #11 of Sarah Perkonig, pages 27 – 29 [RR Vol II, tab K]

³⁹ BCSC Reasons, paras 25 and 104 [AR tab A]

⁴⁰ Affidavit of Steven Smith, para 16 [RR Vol III, tab L]

⁴¹ Cross-Examination of Steven Smith, page 4 [RR Vol III, tab P]

⁴² Cross-Examination of Steven Smith, pages 3 – 4 and 11 – 12 [RR Vol III, tab P]

24. One team, based in Ireland, deals with requests to remove content from Google's advertising.⁴³ A second team deals with removals where the purpose is to punish websites which have been overly aggressive with their SEO tactics.⁴⁴ A third team, called "legal removals", has staff members based around the world although the majority of them are in California.⁴⁵ This team alone receives over 1,000 content removal requests per week,⁴⁶ and deals with child pornography, hate speech, and legal requests such as those under the DMCA.⁴⁷ It was this third team that dealt with the plaintiffs' requests (below), although the record does not disclose where in the world the team member who dealt with the plaintiffs' request was based.⁴⁸

25. Google does not just provide search results. Google keeps a detailed record of the private search habits of each of its users, which it uses to deliver targeted advertising to them.⁴⁹ Google makes suggestions to complete a user's request before the user has finished typing it⁵⁰ and also suggests related searches based on the habits of other users – which in this case created more links to the impugned websites.⁵¹ And Google is integrated into certain web browsers (Firefox and Safari) so many members of the public use Google as a portal to the internet at large – to go to websites they already know the address for – not just for searches.⁵²

Google and the defendants

26. Before the Order under appeal was granted, Google provided direct links to the Datalink defendants' websites – on which the Datalink defendants continued to sell their GW1000 product

⁴³ Affidavit of Tugce Vulas, para 2 [RR Vol III, tab M]

⁴⁴ Cross-Examination of Steven Smith, pages 19 – 20 [RR Vol III, tab P]

⁴⁵ Cross-examination of Steven Smith, pages 2 – 3 [RR Vol III, tab P]

⁴⁶ Cross-examination of Steven Smith, page 12 [RR Vol III, tab P]

⁴⁷ Cross-Examination of Steven Smith, pages 11, 14 – 17 [RR Vol III, tab P]

⁴⁸ See Cross-examination of Steven Smith, pages 26 – 30 [RR Vol III, tab P]. The best Mr. Smith could say was that he thought the Google employee in question was Andrew Strait, but since he does not supervise Mr. Strait and had not spoken to him, he did not know. In any event, the evidence does not disclose where Mr. Strait was based.

⁴⁹ BCSC Reasons, paras 47 – 49 and 53 – 57 [AR tab A]. See also Affidavit #6 of John Zeljkovich, para 6 and page 34 [RR Vol III, tab O]

⁵⁰ BCSC Reasons, paras 48 – 49 (Google calls this function 'auto-complete') [AR tab A]

⁵¹ Affidavit #7 of Sarah Perkonig, pages 48, 61, 82, 94 – 103 [RR Vol II, tab J]; Affidavit #11 of Sarah Perkonig, pages 4 – 7 [RR Vol II, tab K]

⁵² Affidavit #4 of John Blown, paras 7 – 9 [RR Vol II, tab B]

in violation of multiple court orders – to any member of the public who conducted a Google search for it.⁵³

27. In September 2012 the plaintiffs wrote to Google to advise them of the matters set out above (in paras 9 – 18) and asked Google to cease indexing the websites of the Datalink defendants.⁵⁴ Google refused, and the plaintiffs issued the application below.

28. Google refused the plaintiffs’ request even though Google de-indexes websites every day as part of its ordinary business, and can do so without cost or inconvenience.⁵⁵ Google continued to provide links to the Datalink defendants’ websites – and to accept advertising money from the Datalink defendants – after being put on notice of the striking of the defendants’ defences, and the resulting *Mareva* and Confidentiality Orders.⁵⁶

29. Google operates what it calls a “voluntary compliance” program with respect to court orders. After Google was served with the application below, Google asked the plaintiffs to obtain yet another order, this time expressly prohibiting the Datalink defendants from carrying on business on the internet, which Google would “voluntarily” comply with.⁵⁷ However, Google refused to de-index entire websites – it would only de-index individual “urls” (subpages of those websites) provided to them by the plaintiffs.⁵⁸

30. The plaintiffs agreed to try Google’s approach.⁵⁹ The plaintiffs appeared – with Google – before Mr. Justice Tindale in December 2012, who granted the “Website Order” injunction ordering the Datalink defendants to:

“...cease operating or carrying on business through any website, including those contained in Schedule “A” and all associated pages, subpages and subdirectories, and that these Defendants immediately take down all such websites, until further order of this court.”⁶⁰

⁵³ BCSC Reasons, paras 113 and 152 [AR tab A]. Affidavit #16 of Dermot Devine [RR Vol II, tab F], pages 35 – 40; Affidavit #7 of Sarah Perkonig [RR Vol III, tab J].

⁵⁴ Affidavit #13 of Dermot Devine [RR Vol II, tab E], pages 5 – 9.

⁵⁵ BCSC Reasons, paras 139 and 153 [AR tab A]; Court of Appeal Judgment, paras 23 and 103 [AR tab F]

⁵⁶ Affidavit #13 of Dermot Devine [RR Vol II, tab E], pages 5 – 9

⁵⁷ Application Response (filed December 7, 2012), para 2 [AR tab N]; Transcript of Proceedings in Chambers, pages 2 – 3, 10, and 17 [RR Vol III, tab Q]

⁵⁸ BCSC Reasons, paras 9 [AR tab A]

⁵⁹ BCSC Reasons, para 71 [AR tab A]

⁶⁰ Order of Tindale J., December 13, 2012 [RR Vol I, Part II, tab D]

The Website Order operates *in personam* against the Datalink defendants, but its effect is global.⁶¹ This global order was proper because, *inter alia*, the Datalink defendants were deemed to admit all of the plaintiffs’ claims, including global misappropriation and unauthorized use of their trade secrets and breaches of contract, claims that apply *in personam* against those defendants.⁶² Google did not raise any objections to the Website Order.

31. The Datalink defendants still did not comply. They continued to operate in violation of the
- i. Mareva Order of Justice Punnett;
 - ii. Confidentiality Order of Justice Fenlon; and
 - iii. Website Order of Justice Tindale.

32. Between December 2012 and January 2013 Google advised the plaintiffs that it had de-indexed 345 specific urls from its websites.⁶³ The plaintiffs later discovered that Google had only de-indexed those urls on google.ca,⁶⁴ but the matter returned to court initially because for every url Google de-indexed at the plaintiffs’ request, another one rose up to take its place.⁶⁵

⁶¹ As is the *Mareva* Order and the Confidentiality Order – and see the Court of Appeal Judgment, para 109 [AR tab F]. But note the discussion in paragraphs 65 – 68 below about what “global” means in an internet context.

⁶² *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319 at paras 87-94

⁶³ Google did not specify that the removals were worldwide. However, the plaintiffs’ application was always for a de-indexing order on all of Google’s websites – which has been referred to as a “worldwide order”. None of the materials filed in response or the communications exchanged suggested that Google’s response was limited to google.ca, and so the plaintiffs reasonably assumed that the removals were worldwide. See Notice of Application (referring to “search engines” of Google Canada as well as Google Inc.), the correspondence between counsel in Affidavit #7 of Sarah Perkonig, pages 4 – 8, 16 – 113 [RR Vol II, tab J], and Google’s Amended Application Response, paras 2, 12, 14, 16, and 18 [AR tab O]. The plaintiffs were not aware that a google.ca limitation was even an issue until late June 2013 (Affidavit #27 of Dermot Devine [RR Vol II, tab H], paras 2 – 3 and pages 5 – 27), after the cross-examination of Steven Smith, and after the parties were already heading back to court because of the “whack-a-mole” problem. Madam Justice Fenlon refers to this fact at para 75 of her Reasons for Judgment [AR tab A].

⁶⁴ BCSC Reasons, para 75 [AR tab A]

⁶⁵ This was the “whack-a-mole” problem referred to by the courts below: BCSC Reasons, paras 70 – 76 [AR tab A]. The issue was not, as Google mistakenly suggests at para 20 of its factum, that new websites could be created automatically – the issue was the automatic creation of new urls on existing websites. Before Fenlon J., counsel for both sides used imprecise language which, in hindsight, appears to have created a problem of nomenclature – instead of only referring to “websites” made up of individual webpages, or “urls”, counsel referred to “mother [web]sites” (BCSC Reasons, para 9) and “subpages and subdirectories” of websites (as in the Order under appeal). This is clear by reading the rest of the paragraph from the BCSC Reasons which Google quotes: “The plaintiffs argue that any scheme that depends on the deletion of individual URLs is ineffective.” The source of this evidence is Affidavit #5 of John Zeljkovich, para 12 [RR Vol III, tab N], and Affidavit #5 of John Blown, paras 10 – 11 [RR Vol II, tab C], which refer to “subpages of websites”. The Court of Appeal clearly understood this distinction: Court of Appeal Judgment, para 25 [AR tab F].

33. Google did not just provide direct links to the Datalink defendants' websites as part of its search operations. Google's business is contextual advertising, meaning that Google posts ads that are relevant either to the search terms in question, or a user's private search history.⁶⁶ In this case, Google accepted money directly from the Datalink defendants to advertise the impugned websites. Google advised the plaintiffs at the outset that they had ceased doing so, but in the middle of the hearing before Fenlon J. the plaintiffs discovered that this was not true – Google had mistakenly continued to advertise the Datalink defendants' websites.⁶⁷

Proceedings below

34. The plaintiffs sought an order that Google stop displaying any part of the impugned websites, on all of Google's search results worldwide. The plaintiffs' evidence (in relation to Google) was limited because Google keeps the details of its operations secret.⁶⁸ And since the matter proceeded as an interlocutory motion against a non-party, Google was not obliged to give discovery of documents or be examined for discovery.

35. Google's evidence was provided in the Affidavit of Steven Smith. Google refused to allow the plaintiffs to cross-examine Mr. Smith, so the plaintiffs obtained an order. Mr. Smith swore that he had personal knowledge of the matters in his affidavit, but it became clear in cross-examination that this was almost completely untrue. He was not involved in any of Google's dealings with the plaintiffs or the defendants, and did not supervise those who were,⁶⁹ so he had no evidence to offer on Google's conduct in this case. Mr. Smith also had almost no evidence to offer on the policy issues at stake. He did not know anything about the Google algorithm,⁷⁰ had no role in policy analysis or development,⁷¹ and did not know anything about what other teams at Google do in respect of their power to change search results,⁷² or anything about what Google has

⁶⁶ BCSC Reasons, paras 54 – 56 [AR tab A]. This advertising is the main source of Google's \$50 billion in annual revenue: Cross-Examination of Steven Smith, page 4 [RR Vol III, tab P].

⁶⁷ BCSC Reasons, paras 50, 52, 115 [AR tab A]

⁶⁸ Affidavit #3 of John Blown (October 25, 2012), paras 4 and 7 [RR Vol II, tab A]

⁶⁹ Cross-Examination of Steven Smith [RR Vol III, tab P]: (i) page 24, lines 21 – 45, (ii) page 26 lines 33 to page 27, line 9, and (iii) pages 28 – 31, and in particular page 30, line 37 to page 31, line 7, (iv) page 36, line 31 to page 38, line 21

⁷⁰ Cross-Examination of Steven Smith [RR Vol III, tab P], (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20

⁷¹ Cross-Examination of Steven Smith [RR Vol III, tab P], page 28, lines 10 – 21

⁷² Cross-Examination of Steven Smith, (i) page 19, lines 22 – 26, and (ii) page 39, lines 9 – 27 [RR Vol III, tab P]

done historically in this regard.⁷³ Anticipating that this might be the case, the plaintiffs wrote, before the cross examination, to ask that Mr. Smith inform himself about the past practices of Google in the alteration of search results. Google refused.⁷⁴

36. The cross-examination of Mr. Smith was the plaintiffs' sole opportunity to obtain evidence from Google. But since Google chose to present a witness who knew nothing about the issues in the case (either as it was first conceived or as it has now been recast), the plaintiffs have been prevented from developing their case. And, since Mr. Smith has admitted to having no knowledge of most of what is in his affidavit, Google has presented almost no evidence at all.⁷⁵

37. The Chambers Judge made the following findings:

- i. the plaintiffs were suffering irreparable harm by the Datalink defendants' ongoing sales on the internet;⁷⁶
- ii. Google was inadvertently facilitating that harm through its search engines;⁷⁷
- iii. the plaintiffs had no alternative to the application brought against Google;⁷⁸
- iv. the relief sought against Google would not cause Google any expense or inconvenience,⁷⁹ and is only a slight expansion of what Google agreed to do voluntarily;⁸⁰
- v. for the orders against the Datalink defendants to be effective, even within Canada, Google must stop displaying the Datalink websites on Google's search results on all of Google's websites, not just google.ca.⁸¹

⁷³ Cross-Examination of Steven Smith, (i) page 8, line 23 to page 10, line 10, (ii) page 11, lines 19 – 47, (iii) page 18, line 47 to page 19, line 11 [RR Vol III, tab P]

⁷⁴ Affidavit #11 of Sarah Perkonig, pages 27 – 29 [RR Vol II, tab K]

⁷⁵ Google provided a second Affidavit, from Tugce Vulas [RR Vol II, tab M], of Google Ireland in Dublin, very late in the proceedings when the plaintiffs discovered that Google was still accepting advertising from the Datalink defendants. In view of the lateness and narrow focus of this Affidavit, the plaintiffs did not seek to cross-examine Ms. Vulas.

⁷⁶ BCSC Reasons, paras 152 [AR tab A]

⁷⁷ BCSC Reasons, paras 152, 156 and see also paras 113, 115 [AR tab A]

⁷⁸ BCSC Reasons, paras 70 – 76 and 156 [AR tab A]; see also Affidavit #6 of John Zeljkovich, para 5 [RR Vol III, tab O].

⁷⁹ BCSC Reasons, paras 83 and 153 [AR tab A]

⁸⁰ BCSC Reasons, paras 137 and 139 [AR tab A], and see Google's Affidavit of Steven Smith, para 16 [RR Vol III, tab L].

⁸¹ BCSC Reasons, para 148 [AR tab A]; Court of Appeal Judgment, paras 106 – 107 [AR tab F]. Google has a targeted website for almost every country in the world. For example, google.ca is targeted at Canada, google.com at the United States, google.fr at France, google.de at Germany, and so on. However, like every other website on the internet, Google's websites can be accessed from anywhere, so Canadian users can easily access google.com or any other site.

These findings of fact are entitled to a high degree of deference; none of these findings are challenged in this appeal.⁸² Based on her findings, Fenlon J. concluded that:

The Court must adapt to the reality of e-commerce with its potential for abuse by those who would take the property of others and sell it through the borderless electronic web of the internet. I conclude that an interim injunction should be granted compelling Google to block the defendants' websites from Google's search results worldwide. That order is necessary to preserve the Court's process and to ensure that the defendants cannot continue to flout the Court's orders.⁸³

38. The operative paragraph of the Order is as follows:

Within 14 days of the date of this order, Google Inc. is to cease indexing or referencing in search results on its internet search engines the websites listed in Schedule A, including all of the subpages and subdirectories of the listed websites, until the conclusion of the trial of this action or further order of this court . . .⁸⁴

Thus, the order only requires Google to de-index a specific list of websites.⁸⁵ The Order does not impose any obligation to "police" or supervise either the Order or the plaintiffs' claims. And the Order is clearly interlocutory.⁸⁶ In addition to the language quoted immediately above, the Order provides that:

The plaintiffs and Google Inc. have liberty to apply to vary any part of this order, including the Schedules;

The Court of Appeal emphasized the interlocutory nature of the order, and stated that "if the character of the websites changes, it is always open to the defendants or others to seek a variation of the injunction."⁸⁷ The Court of Appeal added:

The ability of parties and others with identifiable interests to apply to vary the terms of the injunction is an important safeguard to ensure that it is not more restrictive than necessary.⁸⁸

⁸² See Google's statement of issues at page 7 of its factum. Google alleges errors of law only.

⁸³ BCSC Reasons, para 159 [AR tab A]

⁸⁴ AR tab B (emphasis added).

⁸⁵ There were two further lists – with different deadlines for action – included in the subsequent paragraphs of the Order.

⁸⁶ Neither Fenlon J. nor the Court of Appeal ever suggested otherwise – contrary to the mistaken assertion in paragraph 61 of Google's factum – although Fenlon J. did acknowledge that her finding of jurisdiction over Google was in effect a final ruling – see BCSC Reasons, paras 17, 18, 21 [AR tab A]

⁸⁷ Court of Appeal Judgment, paras 94, 107, 111 [AR tab F]

⁸⁸ Court of Appeal Judgment, paras 110 – 111 [AR tab F]

39. While the Datalink defendants have had their defence struck and a warrant issued for the arrest of their principal, no judgment has been entered against them. Several trial dates have been adjourned as new defendants are discovered; the plaintiffs fully expect that the case will proceed to trial; Google's statement that the courts below suggested otherwise is wrong.⁸⁹

Amendments to Order

40. The original Notice of Application, and the list of websites associated with it, was filed in November 2012. Since the Court of Appeal hearing in October 2014, the Order has been amended to add additional websites seven times,⁹⁰ at a rate of about once every two months since April 2015. All of these were at the plaintiffs' request and were unopposed. The first one created a regime – by consent – for further variations to the website list to be made by desk order, and the subsequent variations all proceeded unopposed and without need for any appearance.

41. Google has not made any variation application. In particular, it has not suggested to the court that the Order offends the core values of any other nation, or that it requires Google to take steps that are in breach of Google's legal obligations in other countries. And it should be noted that Google has near-perfect knowledge of the operation of the internet, including the volume of traffic directed to the impugned websites, and where that traffic comes from. However, Google has not brought any evidence that the Order is ineffective, or that it has resulted in inappropriate or unintended consequences. No party has come forward claiming to be aggrieved by the Order.⁹¹

PART II – STATEMENT OF ISSUES

- I. Did the British Columbia Supreme Court have jurisdiction to make an order against a non-party against whom no cause of action is asserted?
- II. If so, did the court have jurisdiction to make an order against Google with worldwide effect?
- III. If the answers to questions I and II above are both yes, did the discretionary order made in this case offend principles of freedom of expression?

⁸⁹ See Google's factum, para 61.

⁹⁰ There was only one September 15, 2015 Order – the two orders of that date in Google's Record are identical.

⁹¹ As they would be entitled to: Court of Appeal Judgment, paras 110 – 111 [AR tab F]

- IV. If the order did not offend principles of freedom of expression, is there another basis to challenge the exercise of the Chambers Judge’s discretion?
- V. What should be the test for injunctions issued to search engines?

PART III – STATEMENT OF ARGUMENT

I. Did the British Columbia Supreme Court have jurisdiction to make an order against a non-party against whom no cause of action is asserted?

42. The logical starting point of the analysis is to ask whether a superior court has the power to issue an order against a non-party against whom no cause of action is asserted. Google’s answer is muddled. Google first argues that the courts below should not have granted an injunction against Google in the absence of a claim against it,⁹² but later suggests that such an order would be appropriate if the test it proposes is satisfied.⁹³ And much of Google’s argument is about a different issue – whether the *RJR MacDonald* injunction test should be applied to non-parties.⁹⁴ The questions of *whether* a court has this power and *how* it should exercise it are distinct.

43. On the first question, the Chambers Judge was clearly correct in holding that a superior court has the power to issue an order against a non-party.

44. Superior courts have long issued orders to non-parties where their assistance was required to do justice. The power of the court to command non-parties to serve on juries is very ancient,⁹⁵ while the power to issue subpoenas emerged in the 14th century, when it was invented by the Master of the Rolls.⁹⁶ Both powers existed in the inherent jurisdiction of superior courts hundreds of years before legislatures entered the field with statute-based rules of court.⁹⁷

⁹² Google’s factum, para 9(b)

⁹³ Google’s factum, paras 109-111

⁹⁴ Google’s factum, paras 56-58

⁹⁵ Patrick Wormald, “Neighbors, Courts, and Kings: Reflections on Michael Macnair’s *Vinci*” (1999) 17:3 Law & Hist. Rev. 597; Mike Macnair, “Vicinage and the Antecedents of the Jury” (1999) 17:3 Law & Hist. Rev. 537

⁹⁶ James Fitzjames Stephen, *A History of the Criminal Law in England, Vol. I*, (London: Macmillan & Co, 1883) at 175-6; Sir Francis Palgrave, *An Essay Upon the Original Authority of the King’s Council*, (London: The Commissioners on the Public Records of the Kingdom, 1834) at 40-42. Although it is worth noting that early juries may have acted as witnesses as well as adjudicators – see Wormald and Macnair, above.

⁹⁷ Which did not occur until the 19th century, before which the rules were entirely created by the courts: McEwan, Ken, “A Short History of Rule-Making for Courts” in *British Columbia Annual Practice*, 2016. And,

45. The foundation of all of these orders is the ancient rule that the court has inherent jurisdiction to maintain the rule of law and to control its own process. As this Court has stated:

It is accepted by all that the British Columbia Supreme Court, as a court of inherent jurisdiction, possesses the power required to maintain the rule of law. More specifically, the broad power of the Court to grant interlocutory injunctions is confirmed by the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 36, which provides for their grant “in all cases in which it appears to the court to be just or convenient that the order should be made ... on terms and conditions the court thinks just”.⁹⁸

46. Non-parties are also regularly made subject to injunctive orders issued against parties. In *MacMillan Bloedel v. Simpson*, this Court referred to *Bartel & Gibson v. Retail, Wholesale and Department Store Union*, [1971] 2 W.W.R. 449 (B.C.C.A.) in which Tysoe J.A. wrote:

I find it a little difficult to understand why, if it is true – and it is, of course, quite true that persons who, with knowledge of an order, take any steps to assist in contravening it, may be proceeded against for contempt of court – why the order should not provide that it covers somebody who, having knowledge of the order, disobeys it.⁹⁹

47. And this Court has held that anyone with notice of an injunction is bound not to violate it:

It may be confidently asserted, therefore, that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey.¹⁰⁰

48. Google is subject to the jurisdiction of the court¹⁰¹ and on notice of the *Mareva* (Punnett J.) and Confidentiality (Fenlon J.) Orders. The Chambers Judge found that Google’s actions did not amount to a deliberate flouting of those orders at the instigation of the defendants. However, it is clear that having notice of these orders Google is bound not to facilitate or assist anyone to violate them. In response to the plaintiffs’ application below, Google requested the Website Order

as the Chambers judge noted, the Rules contain many examples of orders made against non-parties who have no obligation to the plaintiffs, including subpoenas, and documentary and oral discoveries.

⁹⁸ *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048 at para 15; see also *R. v. Cunningham*, 2010 SCC 10 at para 18: “Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner.”

⁹⁹ As cited in *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048, para 30. See also *Greenpeace Canada v. MacMillan Bloedel*, [1994] B.C.J. No. 2148 (C.A.) where the Court stated: “If an order is to be made it is to be effective. It was clear in the circumstances here that the order would not be effective if it was restricted to named defendants.” See further *Attorney General v. Punch*, [2003] 1 AC 1046 (HL), in particular at paras 4 and 43.

¹⁰⁰ *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048, paras 31

¹⁰¹ Google no longer contests this issue – see para 60 below and the Statement of Issues in Google’s factum at page 7.

made by Tindale J., and appeared and made submissions in respect of that order, so there can be no doubt about Google's duty in respect of it.

49. A superior court also has the power to make whatever ancillary order is necessary to give effect to an existing order:

Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective. Similarly courts with jurisdiction to undertake a particular *lis* have had the authority to maintain the status quo in the interim pending disposition of all claims arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court.¹⁰²

The Chambers Judge was thus authorized to make an ancillary order to give effect to the previous three orders of which Google had notice.¹⁰³

50. The courts below referred to two well-known examples of orders made against non-parties in the absence of a cause of action against them: the *Mareva* injunction and the *Norwich Pharmacal* order. A *Mareva* injunction, which prohibits the dissipation of assets pending resolution of litigation, almost always operates against non-parties in some way: anyone with notice is prohibited from assisting with or permitting a breach; these orders specifically enjoin non-party banks and other financial institutions from dealing with the defendants' accounts.¹⁰⁴ *Mareva* injunctions can be issued to third parties against whom no cause of action exists, where it is "just and convenient" to do so.¹⁰⁵

¹⁰² *A.G. Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at 330. See also *First Choice Capital v. First Canadian Capital*, [1997] 9 W.W.R. 117 (Sask QB) at para 50 where Saskatchewan courts ordered discovery in aid of a *Mareva* injunction, and *Bayer AG v. Winger*, [1986] 1 WLR 497 (CA) where the English Court of Appeal upheld an order, ancillary to *Mareva* and *Anton Piller* orders, that the defendants surrender their passports and be prohibited from leaving the jurisdiction.

¹⁰³ Court of Appeal Judgment, para 109 [AR tab F]

¹⁰⁴ This is why these orders typically give non-parties a right to apply to have the order set aside – contrary to the suggestion in Google's factum at para 85. The two *Marevas* granted in this case were the Order of Punnett J., July 26, 2012 (see page 3) [RR Vol I, Part II, tab A] and Bauman CJSC's order regarding Andrew Crawford [RR Vol I, Part II, tab E]

¹⁰⁵ Including cases where there is no cause of action at all, e.g. *TSB Private Bank International v. Chabra*, [1991] 1 WLR 231 (Ch.), although in that case the non-cause of action party was still named as a defendant for procedural reasons, and those where there is only a cause of action in another jurisdiction, e.g. *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] 2 W.L.R. 262 (HL). And see Peter Devonshire, "Mareva Injunctions and Third Parties: Exposing the subtext" (1999) 62 *Modern Law Rev.* 539.

51. A *Norwich Pharmacal* order permits courts to make orders against third parties who unwittingly become mixed up in wrongdoing.¹⁰⁶ In *Norwich Pharmacal*, Lord Reid wrote:

... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.¹⁰⁷

52. The scope of the court's *Norwich* jurisdiction has expanded and continues to evolve.¹⁰⁸ For example, *Norwich* orders are now made against internet service and hosting providers whose only connection with the alleged wrongdoers is providing internet access or server space to post content online.¹⁰⁹ However, Google would confine *Norwich* to the narrowest scope possible, and not allow for any further development of the law.¹¹⁰ The Chambers Judge rejected this submission:

I do not accept Google's submission that the Court only has authority to make an order against a non-party in relation to contempt or to further fact finding necessary to effect justice. Lack of precedent should not be confused with lack of subject matter competence.

Lord Woolf M.R. described this distinction in *Broadmoor Hospital Authority & Anor v. R*, [1999] EWCA Civ 3039, [2000] QB 775 at para. 21:

¹⁰⁶ *Norwich Pharmacal Co v Customs and Excise Commissioners*, [1974] A.C. 133 at 175. For an example in the Canadian context see *Kenney v. Loewen*, [1999] BCJ No 363 (SC) at para 15 where the court noted that "all that is necessary to found the jurisdiction is that the third party should become mixed up in the transaction concerning which discovery is required and, of course, that the court should consider it 'just and convenient' to make an order."

¹⁰⁷ This was cited in *CEA Group v. Ventra Group* 2009 ONCA 619 at para 41. The obligation to cooperate has also been described as an "equitable protective duty" (see *Cartier International AG v. British Sky Broadcasting Limited*, [2016] EWCA Civ 658 at para. 51).

¹⁰⁸ "New situations are inevitably going to arise where it will be appropriate for the jurisdiction [to grant a *Norwich* order] to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy." *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All ER 193 (HL), as cited in *CEA Group AG v. Ventra Group Co.*, 2009 ONCA 619, at para 45.

¹⁰⁹ *BMG Canada Inc. v. Doe*, 2005 FCA 193; *York University v. Bell Canada Enterprises* (2009), 99 OR (3d) 695 (SCJ); *The Rugby Football Union v Consolidated Information Services Ltd*, [2012] UKSC 55 (21 November 2012)

¹¹⁰ The fact that the Court of Appeal in *Norwich Pharmacal* declined to order UK border officials to "police" the impugned imports – on the facts of that case – is of no significance. In our cases there is no policing required – only a software instruction given, as one among hundreds given every week, at no cost or inconvenience to Google.

The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.¹¹¹

53. The foregoing review clearly demonstrates that it is not necessary for there to be a cause of action against a non-party for an order to be made against it. The *RJR MacDonald* test for injunctive relief between parties requires an applicant to demonstrate a fair question (cause of action) to be tried and that the balance of convenience lies in its favour, but that test can be modified to deal with the situation where a non-party is involved (as the Chambers Judge did in this case):

...it is important to emphasize that the judge must not allow himself to become a prisoner of formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.”¹¹²

54. The internet, as the courts below found, does not change any of this. Courts in England have come to a similar conclusion. In *Cartier International v. British Sky Broadcasting*,¹¹³ the plaintiffs sought orders that retail broadband providers in England be required to block certain websites selling counterfeit goods in violation of the plaintiffs’ trademarks. The plaintiffs did not allege any cause of action against the ISPs. There was statutory authority for such orders in the case of copyright violations but not trademarks, so the ISPs argued that the court had no jurisdiction to make the orders sought, and advanced arguments that mirror those Google is making in this appeal.¹¹⁴

¹¹¹ BCSC Reasons, paras 119 – 120 [AR tab A]

¹¹² *Tracy v. Instaloans Financial Solutions* 2007 BCCA 481 at paras 30 – 33, 40, and 44, citing McLachlin J.A. as she then was, in *British Columbia v. Wales* (1986), 9 BCLR (2d) 333 (C.A.)

¹¹³ *Cartier International v. British Sky Broadcasting* [2014] EWHC 3354 (Ch) per Arnold J., aff’d [2016] EWCA Civ. 658

¹¹⁴ *Cartier*, per Arnold J., at para 104

55. Arnold J. rejected these arguments and granted the orders sought.¹¹⁵ He concluded that the court does have authority to issue the injunction on the basis of the “just and convenient” jurisdiction¹¹⁶ in s. 37(1) of the UK *Senior Courts Act 1981*:

The High Court may by order (whether interlocutory or final) grant an injunction... in all cases in which it appears to be just and convenient to do so.¹¹⁷

This jurisdiction is identical to that of the BC courts in the *Law and Equity Act*.¹¹⁸

56. On appeal, the ISPs, like Google in this Court, argued that it was necessary to show that a party to an action has invaded a legal right of the other party before an injunction could be issued,¹¹⁹ but the Court of Appeal rejected these arguments and dismissed the appeal.¹²⁰ While acknowledging that the ISPs were not liable to the plaintiffs,¹²¹ the Court of Appeal agreed with Arnold J. that the ISPs were under a duty to take reasonable measures to prevent or reduce the infringements of the plaintiffs’ rights:

Moreover, I think the judge was entitled to draw an analogy with the equitable protective duty described by Buckley LJ in the Court of Appeal in *Norwich Pharmacal*

“... If a man has in his possession or control goods the dissemination of ... will infringe another's patent or trade mark, he becomes, as soon as he is aware of this fact, subject to a duty, an equitable duty, not to allow those goods to pass out of his possession or control at any rate in circumstances in which the proprietor of the patent or mark might be injured by infringement ensuing.... This duty is one which will, if necessary, be enforced in equity by way of injunction: see *Upmann v. Elkan*, L.R. 12 Eq. 140; 7 Ch.App 130.”

As the judge observed, this principle is not directly applicable in the present case. Nevertheless, he continued, it was not a long step from this to conclude that, once an ISP

¹¹⁵ *Cartier*, per Arnold J., at para 266

¹¹⁶ *Cartier*, per Arnold J., at paras 92 – 111. Arnold J. came to this conclusion based on what he called a “purely domestic interpretation” – meaning traditional principles of English law (it was this analysis that drew the attention of the BCCA in this case: Court of Appeal Judgment, paras 69 – 75) [AR tab F]. Google is wrong when it implies at para 77 that the authority for the issuance of the injunction is EU law. Arnold J. considered the effect of various EU directives on the assumption he did not have power to grant a website blocking injunction based purely on a domestic interpretation of s. 37(1).

¹¹⁷ As quoted in *Cartier*, per Arnold J., at para 74

¹¹⁸ Court of Appeal Judgment, para 74 [AR tab F]

¹¹⁹ [2016] EWCA Civ 658 at para 45

¹²⁰ *Ibid.* at paras 46-56

¹²¹ *Ibid.* at para. 54. After upholding Arnold J’s reliance on s. 37 of the *Senior Courts Act* the Court of Appeal went on to consider whether EU law “provides a further basis for developing the practice of the court in connection with the grant of injunctions to include website blocking injunctions against ISPS in such cases” (para. 56) (emphasis added).

became aware that its services were being used by third parties to infringe an intellectual property right, it became subject to a duty to take proportionate measures to prevent or reduce such infringements even though it was not itself liable for them....¹²²

57. In the case at bar Google argues that it is not liable for the actions of the Datalink defendants or their websites. As the foregoing review demonstrates, this is not the test. The order under appeal was not based on any finding of liability against Google (just as the order in *Cartier* was not based on a finding of wrongdoing against the ISPs). Rather, the courts below founded the Order on the court’s jurisdiction to issue orders to uphold the integrity of their own process where it is “just and convenient” to do so.¹²³ This is the same jurisdiction that founded the orders against the ISPs in *Cartier*.¹²⁴

58. Google is on notice of the *Mareva* (Punnett J.), Confidentiality (Fenlon J.), and Website (Tindale J.) Orders, and as such it is bound not to assist anyone to violate them. As the Chambers Judge found, Google’s search engine facilitated the defendants’ breach of court orders.¹²⁵ And during the course of the application below Google accepted money from the Datalink defendants to actively advertise the impugned websites. Even if Google’s conduct was not aiding or abetting violations of the prior orders, Google is “mixed up in” the affairs of the Datalink defendants to a sufficient degree to justify an order being made against it.

59. Moreover, Google is a sophisticated global enterprise that generates substantial profits from advertising in connection with its search results. It cannot complain if called upon by a court to remove from its search results a website that is unlawfully selling pirated products. As this Court noted in a different context, such requests “are neither unanticipated nor aberrational.”¹²⁶ Indeed, Google has teams around the world specifically to deal with requests like the plaintiffs’ in this case.¹²⁷

¹²² *Ibid.* at paras 51 – 52, per Lord Kitchen, and see also Lord Briggs at paras 200 – 205

¹²³ BCSC Reasons, paras 150 – 159 [AR tab A], Court of Appeal Judgment, paras 100 – 110 [AR tab F]

¹²⁴ Court of Appeal Judgment, paras 69 – 75 [AR tab F]

¹²⁵ BCSC Reasons, paras 152, 156 and see also paras 113, 115 [AR tab A]

¹²⁶ *Tele-Mobile Co. v. Ontario*, 2008 SCC 12 at para 60

¹²⁷ In *Tele-Mobile*, at para 60, this Court found that costs associated with compliance with orders are “reasonably incident” to the operations of the telecommunications industry. Google now argues that the costs of complying with the injunction should be borne by the party seeking the injunction (Google factum, para. 112). This is contrary to *Tele-Mobile*. Furthermore, Google did not make this argument below, provided no evidence of any costs, and did not assert that it would incur any: see BCSC Reasons, at para. 153 [AR tab A]. The matter

II. Did the court have jurisdiction to make an order against Google with worldwide effect?

60. Before Fenlon J., Google argued that it was not subject to the jurisdiction of the court. The plaintiffs presented a considerable body of evidence on this question, while Google – as discussed in paragraphs 34 to 36 above – presented almost none. Based on the record before her, Fenlon J. found that the court had territorial competence over Google. Google’s summary of Fenlon J.’s finding of territorial competence is not accurate.¹²⁸ However, these errors are of little consequence because Google is no longer challenging territorial competence in this Court¹²⁹ so the only remaining jurisdictional issue is whether, in exercising its *in personam* jurisdiction over Google, the court below could make an order which has extra-territorial effect.

61. It has long been settled that the court can exercise its *in personam* jurisdiction in a way that has extra-territorial effect.¹³⁰ The Supreme Court of British Columbia regularly grants *in personam Mareva* injunctions to control worldwide assets, and there is no doubt that Canadian courts can exercise their *in personam* jurisdiction by granting injunctions against non-residents.¹³¹

is clearly not suitable for consideration by this Court on appeal *cf Cartier* where the matter was the subject of lengthy consideration based on the extensive evidentiary record regarding costs of compliance by the ISPs.

¹²⁸ See BCSC Reasons, paras 13 – 65 [AR tab A], Court of Appeal Judgment, paras 51 – 55 [AR tab F]. And there was other evidence which Fenlon J. did not refer to. For example, Google owns the trademark in Canada for ‘Google’ (Affidavit #6 of John Zeljkovich, pages 3 – 16 [RR Vol III, tab O], and *Perfect 10 Inc. v. Google* [2011] FCJ No. 48 (TD) at para 4) which, as a matter of law, means that Google carries on business in Canada. This is because Google is only entitled to register a trademark where they have used it in Canada, and “use in Canada” of a trademark in respect of services requires that the services be performed in Canada: *Porter v. Don the Beachcomber* [1966] Ex CR, 982, at para 17.

¹²⁹ See Statement of Issues in Google’s factum at page 7. Google refers to the jurisdiction dispute in its footnote 39, but does not pursue it and argues its appeal on the “assumption” the BC courts have territorial competence.

¹³⁰ *Minera Aquiline Argentina v. IMA Exploration* 2007 BCCA 319, at paras 88 – 93, aff’d 2006 BCSC 1102 at paras 163 to 170, 176 – 180 (requiring corporations subject to the jurisdiction of BC courts to transfer mineral claims situated in Argentina); *Amchem Products Incorporated v. British Columbia*, [1993] 1 S.C.R. 897 (holding that court can issue anti-suit injunction prohibiting plaintiff from suing in a foreign court); *Duke v. Andler* [1932] S.C.R. 734, at 737, 740 – 741 (summarizing case law holding that courts with *in personam* jurisdiction over defendants will enforce rights affecting real estate in foreign countries if rights based on contract, fraud or trust); *Catania v. Giannattasio* [1999] O.J. (CA) No. 1197 at para 12 (same). Fenlon J. dealt with this issue at paras 11, 104, 108, 119 – 120, 125 – 126, and 145 – 150 of her Reasons [AR tab A].

¹³¹ *Impulsoria Turistica v. Transat Tours Canada*, 2007 SCC 20 [*Transat Tours*] at paras 1, 2, 6 – 8 (upholding the Quebec Superior Court’s decision to assume jurisdiction in a case where an injunction was sought against a foreign defendant notwithstanding the possibility that there might be difficulty enforcing its orders); *Barrick Gold v. Lopehandia* [2004] OJ No. 2329 (CA)

62. The fact that an *in personam* order has extra-territorial effect does not mean that the court is exporting Canadian law to other countries, as Google argues.¹³² The governing law in any case with foreign elements is determined according to the applicable choice of law rules. Google did not argue that the propriety of an injunction concerning its search results should be decided under California law or the law of some other jurisdiction and it led no evidence “of the applicable law in California governing the granting of injunctions against non-parties.”¹³³ The law applied was therefore that of British Columbia as the law of the forum. This is standard conflict of laws fare.

63. Google also makes submissions about the undesirability of the enforcement of foreign court orders in relation to internet content,¹³⁴ but this case has nothing to do with the international enforcement of court orders – there are no foreign proceedings in play and the plaintiffs have not sought to enforce the Order outside of Canada. Google has complied with the order of the British Columbia courts and agreed to a mechanism for amending the order without the need for any further appearance.

64. Google raises the dramatic shibboleth of courts of some other countries – with less liberal views of morality and expression – using the decisions of the British Columbia courts as a precedent for imposing their moral and political views on the world. Courts of repressive regimes will do what they will do regardless of what Canadian courts say. But the decisions below have nothing to do with moral or political views in any event – here a court with clear jurisdiction over an international commercial dispute made an order with an international effect. The substance of the dispute is conspiracy and theft of intellectual property – which are subject to widely accepted international standards. The fact that the Datalink defendants have become fugitives from the law and moved their illegal business onto the internet does not change anything.

Internet and the rule of law

65. The Chambers Judge found that the Order obliges Google to act in the jurisdiction where the computers are located that control its search engine results:

I note again that on the record before me, the injunction would compel Google to take

¹³² Google factum, para 92

¹³³ BCSC Reasons, para 68 [AR tab A]

¹³⁴ Google factum, para 106

steps in California or the state in which its search engine is controlled, and would not therefore direct that steps be taken around the world. That the effect of the injunction could reach beyond one state is a separate issue. Even an order mandating or enjoining conduct entirely within British Columbia may have such extraterritorial, or even worldwide effect.¹³⁵

66. It is common to describe the internet as borderless, such that traditional concepts of territoriality are of limited use. However, the internet is only borderless in the sense that it can be accessed from anywhere. This means that any order in relation to internet content – on any website – will affect any users anywhere in the world who might visit the affected websites. The Website Order – if it were obeyed – has this effect. So does any private website owner choosing to change the content on any website, whether it is google.com or robertfleminglawyers.com or litigate.com.

67. The Order only requires Google to act in a single – undisclosed – jurisdiction where it effects the removals required by the Order. The Order is not, as Google suggests, “everywhere and for all time.”¹³⁶ The fact that the removals, in turn, change what the public sees when they use Google – wherever they may be – is an entirely separate issue. By analogy, an *in personam* British Columbia *Mareva* injunction might require a rogue BC defendant to close a manufacturing business in California. When that business shuts down it affects that business’ customers and suppliers, wherever they may be in the world.

68. Describing the order under appeal as global is therefore somewhat misleading. The Order only affects the very small number of business customers who may be interested in this very highly specialized niche market, and who may be searching for it on Google. And the only consequence of the Order is that, instead of finding the Datalink defendants’ outlaw websites, these businesses will find the plaintiffs’ websites instead.

69. If Google’s position is accepted it would require the plaintiffs to commence proceedings in every jurisdiction in the world in which the Datalink defendants might have customers. This would render the internet a lawless zone for all but the very few who have the resources to litigate in dozens of jurisdictions at once. The defendants are not selling fake watches or handbags on

¹³⁵ BCSC Reasons, para 146; see also paras 25, 104 [AR tab A]

¹³⁶ See Google factum, para 44. As for time, apart from the interlocutory nature of the order that the courts below stressed, and the ability to vary it, Google did not make any submission as to the temporal limits of the Order – see Court of Appeal Judgment, para 112 [AR tab F].

street corners – they are selling a sophisticated engineering product to sophisticated businesses around the world in the face of multiple court orders that they should stop. If the court is powerless to act in the face of this kind of conduct, then we no longer live in a world ruled by law.

70. This is a self-defeating and impossible conclusion for this Court to accept, and other courts around the world have rejected it. In *Dow Jones v. Gutnick*, two justices of the High Court of Australia wrote:

Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable.

...

The Court was much pressed with arguments about the ubiquity of the Internet. That ubiquity, it was said, distinguished the Internet from practically any other form of human endeavour. Implicit in the appellant's assertions was more than a suggestion that any attempt to control, regulate, or even inhibit its operation, no matter the irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so. I would reject these claims.¹³⁷

71. In *Yeung v. Google*, Ng J. of the High Court of Hong Kong stated:

I accept that the electronic technology revolution has brought new challenge to the orthodox legal framework for libel actions, but it is equally true that the success of the common law derives from the fact that it is responsive to change. As Sir James Munby P said in *Re J (A Child)* (albeit not in a libel context):

..... The law must develop and adapt, as it always has done down the years in response to other revolutionary technologies. We must not simply throw up our hands in despair and moan that the internet is uncontrollable. Nor can we simply abandon basic legal principles.¹³⁸

72. Google proposes, in the alternative, that the Order be limited to Canada. This would completely fail to achieve the Order's purpose – to protect the integrity of the court from rogues who flee the legal process entirely – because most of the Datalink defendants' sales occur outside Canada.¹³⁹ And even if there was a reason to do so, Google did not present any evidence that there is a technical ability to do this.¹⁴⁰ Google.ca is clearly not a solution because, as the

¹³⁷ *Dow Jones and Company Inc v Gutnick*, [2002] HCA 56 (10 December 2002) at paras 115, 186

¹³⁸ *Yeung v. Google* Hong Kong HCA 1383/2012 at para 54

¹³⁹ BCSC Reasons, para 148 [AR tab A]

¹⁴⁰ Google led no evidence of the geo-blocking referred at para 103 of Google's factum.

Chambers Judge found, Google users in Canada can choose to go to google.com, google.fr, or any other site, so to even be effective *even within* Canada, Google must block the impugned websites on all of its search platforms.¹⁴¹ The Chambers Judge made this finding of fact based on the limited record before her – there is no basis to disturb it in this Court.

Comity

73. Google’s position in this Court is that the Order “is legally impermissible and contrary to public policy” in the United States, so it should not have been made out of respect for international comity.¹⁴²

74. This Court should not entertain this argument on this appeal. Proof of foreign law is a question of fact to be proven “by evidence of experts in that law.”¹⁴³ Google could have, but failed to, lead expert evidence on the law of the United States or other countries. As for American law, which Google places the most emphasis on, there is little to no basis in the record to determine that US law should apply – even if Google had proven it and made submissions on it before Fenlon J. – because Google did not disclose where its servers are located or where it effects the removals required by the Order: see paragraphs 23 – 24 and 34 – 36 of the Statement of Facts.

75. And Google’s new comity argument is completely different from the argument it advanced before the Chambers Judge, where it raised a purely speculative concern that an order affecting searches worldwide might require Google to do something that could require it to contravene a law in another jurisdiction, while failing to even allege, let alone prove, any specific conflicts.¹⁴⁴

76. In any event, the plaintiffs do not accept Google’s submission that the Order below could not have been obtained in the United States.

77. In *Dawn Hassell v. Bird*, the California Court of Appeal upheld an injunction directing Yelp (a kind of online yellow pages) to delete certain defamatory reviews of a local law firm,

¹⁴¹ BCSC Reasons, para 148 [AR tab A]

¹⁴² Google factum, para. 91

¹⁴³ *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144 (C.A.) at para 39.

¹⁴⁴ BCSC Reasons, paras 140 and 144, and see also para 160 [AR tab A]

after the law firm obtained default judgment against the reviewer. When the trial court granted default judgment against the reviewer, it also ordered Yelp to delete the associated reviews, even though Yelp was not a party. Yelp appealed, making arguments similar to those that Google is making in this case.¹⁴⁵ The California Court of Appeal dismissed the appeal holding, *inter alia*:

i. Yelp’s due process rights were not violated when an order to remove content was made without notice to Yelp, a non-party, because injunctions “can run to classes of persons with or through whom the enjoined party may act.”¹⁴⁶

ii. Yelp’s First Amendment rights were not violated either – Yelp was not a publisher of the impugned speech, but only the administrator of a forum for it, so it did not have First Amendment Rights. And in any event the First Amendment does not protect speech that has been found to be defamatory.¹⁴⁷

iii. The *Communications Decency Act* provides immunity from tort liability to internet intermediaries like Yelp, but does not immunize internet intermediaries from injunctive relief in relation to internet content, because such orders do not involve any imposition of liability (and the court distinguished Yelp’s authorities – many of which related to search engines).¹⁴⁸

78. And in *Ashcroft v. Free Speech Coalition*, the US Supreme Court made it clear that there are limits to freedom of expression in the United States, just like everywhere else:

¹⁴⁵ Google’s factum, paras 96 – 102

¹⁴⁶ *Dawn Hassell v. Bird*, California Court of Appeal (file A143233), at pages 18 – 21 (July 6, 2016)

¹⁴⁷ *Dawn Hassell, supra*, at pages 21 – 24, citing in part *Balboa Island Village Inn v. Lemen*, 40 Cal.4th 1141 (2007):

“there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend, because they ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”

The Court in *Dawn Hassell* did conclude that it was an impermissible prior restraint to order Yelp not to allow the reviewer to make any other posts, because only certain posts had been found defamatory. But this is of no consequence in our case, which is not based on defamation and involves orders to not carry on business at all. Other cases demonstrate that the US doctrine of prior restraint does not apply in the case of “prior unlawful conduct” (*DVD Copy Control Ass’n v. Bunner* 31 Cal.4th 864 (2003): “...this is not a case of government censorship, but a private plaintiff’s attempt to assert its property rights...”), including copyright infringement (*Perfect 10 v. Google Inc.* 416 F.Supp.2d 828 (2006)).

¹⁴⁸ *Dawn Hassell, supra*, at pages 26 – 31

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.¹⁴⁹

In the United States, free speech will also give way to the courts' power to restrain intellectual property infringements. Protecting such rights does not inhibit the "free communication of facts" or prevent the defendant "from conveying its message".¹⁵⁰

79. Together, these cases demonstrate the danger of a party – as a last-ditch attempt on appeal – stringing together an incomplete account of foreign law when it has not pleaded or proven foreign law in the court below. Having chosen not to plead or prove US law, Google is not entitled to make the foreign law arguments it advances for the first time in this Court. If there is any real comity concern in this case, it is Google's suggestion that this Court should now make a ruling on disputed points of substantive US law that have not been tested to the satisfaction of the courts below through the evidence of qualified experts.

International Rights

80. Google also submits that the court made no express finding of fact that the plaintiffs had any international rights. Google did not make this submission to Fenlon J., but no such finding was necessary because the defendants – who have fled the jurisdiction and had their defences struck without producing any documents or otherwise complying with the legal process – are deemed to have admitted that the plaintiffs have an international business and trade secrets which they have stolen.¹⁵¹ If the defendants had stolen the plaintiffs' car in British Columbia and driven

¹⁴⁹ *Ashcroft v. Free Speech Coalition*, 535 US 234 at 245-46. See also *Cohen v. Google*, 25 Misc.3d 945 (2009) at 951-52: "In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights." (emphasis added)

¹⁵⁰ *Golan v. Holder*, 565 U.S. 1 at 23,132 S.Ct. 873 at 889-890 (2012): "some restriction on expression is the inherent and intended effect of every grant of copyright"; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 US 522 at 536-37 (1987): "The restrictions on expressive speech properly are characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities. The appropriate inquiry is thus whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest"

¹⁵¹ See Statement of Facts, paras 11 – 12

it across the border to Washington State there would be no suggestion that the plaintiffs needed to prove an international right to their car – and the same idea applies here. Fenlon J. was the case management judge and was familiar with all of this background.

81. Moreover, Google’s premise (no international right) does not lead to the conclusion they argue for (no extraterritoriality) because the Order was ancillary to multiple earlier orders of the court. From this perspective, Google’s argument is an impermissible collateral attack on the Website Order and other prior orders on the ground that *those* orders went too far.¹⁵² And this is not a case where the court has been led into error by unsophisticated local parties failing to bring the international implications of an order to its attention. Google is one of the largest and most sophisticated global corporations in the world, with an in-house legal department of 700 people around the world – often working on the cutting edge of emerging legal issues.¹⁵³ Google chose its arguments before Fenlon J. carefully – it made no choice of law or forum *non conveniens* arguments,¹⁵⁴ and made no argument that the plaintiffs did not have international rights.

82. Additionally, in the absence of proof, foreign law is assumed to be the same as British Columbia law¹⁵⁵ – this is a complete answer to Google’s complaint that the plaintiffs have not proven an international right. Notwithstanding this, both Fenlon J. and the Court of Appeal noted that the plaintiffs’ claims were of a nature that one would expect them to be upheld internationally:

In the present case, Google is before this Court and does not suggest that an order requiring it to block the defendants’ websites would offend California law, or indeed the law of any state or country from which a search could be conducted. Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong.¹⁵⁶

¹⁵² *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599 (“a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally”).

¹⁵³ BCSC Reasons, para 83 [AR tab A]

¹⁵⁴ But Fenlon J. addressed forum *non conveniens* anyway: BCSC Reasons, para 66 [AR tab A]

¹⁵⁵ *Old North State Brewing Co. v. Newlands Services* [1998] BCJ No. 2472 (SC) at para 39; *Guarantee Co. of North America v. Mercedes-Benz Canada* [2005] OJ No. 6149 (SCJ) at para 10

¹⁵⁶ BCSC Reasons, para 144 [AR tab A], and see the Court of Appeal Judgment at paras 91 – 93 [AR tab F]. Importantly, all signatories to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) are required, by reason of Article 39, to provide natural and legal persons “the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices”. TRIPs presently has 163 contracting parties, including Canada, the United States and all other members of the World Trade Organization.

III. If the answers to questions I and II above are both yes, did the discretionary order made in this case offend principles of freedom of expression?

83. Google's argument on expression is now in its third iteration. Before Fenlon J., Google only claimed that de-indexing the entirety of the Datalink defendants' websites would be censorship – of the Datalink defendants – because of the possibility that some of the content on those sites might not be unlawful.¹⁵⁷

84. Google's censorship thesis was not anchored in any legal framework, and in particular Google did not raise any *Charter* arguments, or any arguments that the public, either in Canada or elsewhere in the world, had a right to access the impugned websites. Google could not make these arguments because Google requested the Website Order, and de-indexed 345 urls in compliance with that order. Nor did Google argue that its own speech was in jeopardy – to the contrary Google argued that it was only a passive indexer of content, not a publisher or speaker of that content.¹⁵⁸

85. Mr. Smith, who was Google's witness, deposed that Google often removes websites from search results to facilitate court orders.¹⁵⁹ Google's censorship complaint was only that the process should be limited to individual urls. Mr. Smith deposed:

... URLs not specifically reviewed and identified may be used for any number of innocent purposes and a complete removal could result in possibly numerous URLs being blocked without Google having had the opportunity to review them and determine if a departure from its usual indexing process is necessary or warranted in the circumstances.¹⁶⁰

However, Mr. Smith admitted in cross-examination that Google's censorship thesis has no application to the facts of this case, because the Website Order prohibits the Datalink defendants from operating *any* website, regardless of its content.¹⁶¹ The Chambers Judge rejected Google's censorship argument:

¹⁵⁷ Affidavit of Steven Smith, para 18 [RR Vol III, tab L]

¹⁵⁸ Affidavit of Steven Smith, paras 13, 15 [RR Vol III, tab L]; Amended Application Response, paras 7, 20 [AR tab O]. And see Google's factum in this court at para 42, where these arguments are recast.

¹⁵⁹ Affidavit of Steven Smith, paragraph 16 [RR Vol III, tab L]

¹⁶⁰ Affidavit of Steven Smith, paragraph 18 [RR Vol III, tab L]

¹⁶¹ Because the Website Order is not about content – it prohibits the Datalink defendants from carrying on business on any website at all: Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [RR Vol III, tab P]

I do not find this argument persuasive. Google acknowledges that it alters search results to avoid generating links to child pornography and “hate speech” websites. It recognizes its corporate responsibility in this regard, employing 47 full-time employees worldwide who, like Mr. Smith, take down specific websites, including websites subject to court order. Excluding the defendant’s prohibited websites from search results is in keeping with Google’s approach to blocking websites subject to court order.¹⁶²

86. When the matter came before the Court of Appeal, Google’s censorship argument expanded to include the *Charter* right to freedom of expression, but it did not develop this argument and continued to focus on the expression of the defendants.¹⁶³ The Court of Appeal acknowledged the importance of freedom of expression but rejected Google’s arguments:

In the case before us, there is no realistic assertion that the judge’s order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs’ core rights are respected.

I note, as well, that the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.¹⁶⁴

87. In this Court, Google’s arguments have completely changed – now the focus is the public’s right to read the impugned websites, which is why Google now relies on the law related to publication bans. Google did not make these submissions below, so the courts below did not address them.

88. This Court has identified the three core values underlying freedom of expression as “individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy.”¹⁶⁵ There is no evidence that the impugned websites are a vehicle for conveying *any* expressive message beyond selling an illegal product in violation of multiple court orders. And, Google’s “speech”, if it can be said to have any, is purely commercial as well because Google’s search results in this case merely provide the public with an opportunity to buy an illegal product. No protection should be provided to such “speech” which does not

¹⁶² BCSC Reasons, para 139 [AR tab A] (emphasis added)

¹⁶³ See Google’s Court of Appeal factum, paras 103 – 104, and Court of Appeal Judgment, para 110 [AR tab F]

¹⁶⁴ Court of Appeal Judgment, paras 93 – 94 (emphasis added), and see also paras 104 and 107 – 111 [AR tab F]

¹⁶⁵ *R. v. Sharpe*, 2001 SCC 2 at para 23. See also Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Carswell, 2007 ff.) at 43.4.

engage any of the core values identified by this Court.¹⁶⁶ This is not expression analogous to the commercial speech in *Ford* or *Irwin Toy*, where this Court considered the right of businesses to promote lawful products through persuasive expression.¹⁶⁷

89. If the Datalink defendants had complied with the orders below, the impugned websites would not exist and nor would any freedom of expression arguments. Moving the defendants' misconduct onto the internet does not change anything. Neither Google nor the public can stand in a better position – with respect to freedom of expression claims – because the publishers of the impugned websites are now fugitives from the law.

90. But Google now argues it does stand in a better position than the Datalink defendants – with regards to those defendants' illegal websites – because the Order obliges Google to misrepresent the “truth” of the internet to its users. This argument does not bear serious analysis.

91. Google generates its search results by a computer algorithm that Google created,¹⁶⁸ which ranks websites based on secret criteria that Google determined.¹⁶⁹ Even assuming that this secret algorithm can be considered to produce the “truth” of the internet, Google interferes, on a daily basis, with its algorithm-generated search results,¹⁷⁰ whether by reason of (i) morality;¹⁷¹ (ii) statute,¹⁷² or what Google calls (iii) “voluntary compliance” with court orders,¹⁷³ and alters its

¹⁶⁶ See *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 247, noting that restrictions on speech are easier to justify where the motive for expression is primarily economic and the loss is one of profits “and not loss of opportunity to participate in the political process or the ‘marketplace of ideas’, or to realize one’s spiritual or artistic self-fulfillment.”

¹⁶⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712

¹⁶⁸ Steven Smith Affidavit, para 4 [RR Vol III, tab L]. Mr. Smith has no personal knowledge of the operation of Google's algorithm [Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20: RR Vol III, tab P]. See also Cross-Examination of Steven Smith, page 4, lines 44 – 47

¹⁶⁹ Cross-Examination of Steven Smith, page 13, line 23 to page 14, line 29 [RR Vol III, tab P]

¹⁷⁰ BCSC Reasons, para 8 [AR tab A]

¹⁷¹ BCSC Reasons, para 139 [AR tab A]

¹⁷² Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results: Cross-Examination of Steven Smith, page 12, lines 29 – 36, page 14, lines 36 – 42, and page 20, lines 23 – 46 [RR Vol III, tab P]

¹⁷³ BCSC Reasons, para 139 [AR tab A]

search results (iv) on behalf of clients who pay for the advertising on which its business depends.¹⁷⁴

92. Google submits that this Court drew a distinction, in *Globe and Mail*,¹⁷⁵ between the liability of wrongdoers and the rights of innocent parties who encounter related material.¹⁷⁶ In that case, the Court was dealing with a claim that a journalist had committed a civil fault in publishing confidential settlement negotiations. The Court noted that no illegal acts were attributed to the newspaper in acquiring the information and concluded that, for policy reasons, the law should not require a journalist to ensure that a source is not acting in breach of any legal obligations.¹⁷⁷

93. *Globe and Mail* is a great distance from the situation in the case at bar. Google’s reliance on *Globe and Mail* and the publication ban cases demonstrates a fundamental error in their analysis of this Court’s freedom of expression jurisprudence: the failure to account for the context of freedom of expression claims.¹⁷⁸ For example, the *Dagenais/Mentuck* test applies “to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings.” – in other words, preserving the open court principle.¹⁷⁹

94. This case is not about protecting journalist sources or the open court principle. It is not about the potential liability of journalists for publication of private communications. Nor is it about Google indexing news or political websites or making them available to its users. This case is about whether Google can continue to facilitate the defendants’ ongoing breach of court orders – relating to the defendant’s illegal commercial enterprise – in the name of freedom of expression.

¹⁷⁴ BCSC Reasons, para 55 [AR tab A]

¹⁷⁵ *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592 [*Globe and Mail*].

¹⁷⁶ Google factum, para 28

¹⁷⁷ *Ibid*, para. 84. Contrary to Google’s argument, the Court did not “adopt” the holding of the United States Supreme Court in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). The Court commented in *obiter* that its decision was “consistent” with the holding in *Smith* – “that if a newspaper obtains truthful information about a matter of public importance, and does so in a lawful manner, then, absent a higher order public interest, the state cannot punish the publication of that information” (at para. 85).

¹⁷⁸ This Court has stressed the need for a contextual analysis in freedom of expression cases. For example, in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 246-47 the Court said: “Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question.” See also *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras 65-66.

¹⁷⁹ *Vancouver Sun (Re)*, 2004 SCC 43 at para 31

95. It is obviously not appropriate to apply the *Dagenais/Mentuck* test to everything on Google’s search results because doing so would give an elevated status to all forms of expression (as found on Google, and by implication, the internet at large) including child pornography and other forms of expression which are properly criminalized notwithstanding the *Charter*.¹⁸⁰

96. The best claim that Google can make is that a court should consider the expression interests in play in a case such as this one before making a de-indexing order, as the courts below did on the basis of the arguments advanced before them.¹⁸¹

97. Apart from all this, there is something very unfair about allowing Google to advance a full-fledged *Charter* attack in this court for the first time. As noted above, the record in relation to Google’s activities is extremely limited. Google’s new expression arguments depend in part on the difference between Google’s ordinary practices and the Order. We know at least that Google regularly alters its search results to comply with the law,¹⁸² and that it processes almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results.¹⁸³ However, there is extensive related media coverage about Google’s global activities, which is not in evidence because Google was not making *Charter* arguments below, and because – once Mr. Smith admitted that Google’s only censorship thesis below had no application to this case – nothing further was required.

IV. If the order did not order offend principles of freedom of expression, is there another basis to challenge the exercise of the Chambers Judge’s discretion?

Time

98. Google complains that the Order applies “for all time.”¹⁸⁴ However, any reading of the order, which includes the language “until the trial of this action...” demonstrates that this is not true. And Google did not ask for any other temporal limitation below.¹⁸⁵

¹⁸⁰ *R. v. Sharpe*, 2001 SCC 2 at para 103 (recognizing that in its “main impact”, Parliament’s criminalization of child pornography was “proportionate and constitutional”).

¹⁸¹ As noted, in this case the courts below considered the specific “censorship” argument made by Google and rejected it on the facts of the case. No further inquiry was required.

¹⁸² Cross-Examination of Steven Smith, page 14, lines 36 – 42 [RR Vol III, tab P]

¹⁸³ Cross-Examination of Steven Smith, page 12, lines 29 – 36, and page 20, lines 23 – 46 [RR Vol III, tab P]

¹⁸⁴ Google factum, para 44

¹⁸⁵ Court of Appeal Judgment, para 112 [AR tab F]

Alternatives

99. The Chambers Judge made an express finding of fact that the plaintiffs had no alternative to the application brought against Google.¹⁸⁶ This is a higher standard than Arnold J. applied in *Cartier*, where the inquiry was only on whether “alternative measures are available which are less onerous.”¹⁸⁷

100. Google’s involvement was necessary in this case because the Datalink defendants are fugitives who carry on business on the impugned websites from an unknown location. This is a remarkable fact which meant that plaintiffs’ only realistic option was to seek the assistance of Google. The plaintiffs cannot bring applications against the various third party service providers suggested by Google (telephone companies, ISPs, etc.) because the plaintiffs do not know where the Datalink defendants are. This is not “every case involving access to a website,” as Google suggests.¹⁸⁸

101. Google argues that the plaintiffs did not pursue reasonable alternatives to the Order against Google, referring to “other websites linking to the defendants” and ISPs. However, there is no evidence of any other websites linking to the defendants. There is also no evidence about ISPs or their role in this case. However, *Cartier* was about an order against ISPs. If we assume that ISPs in Canada operate in the same way as those in England, an order against ISPs would not provide a better alternative. Each local ISP can only block websites for their own subscribers. Suggesting that the plaintiffs should have obtained an order against ISPs is the same as saying the plaintiffs must bring proceedings in every jurisdiction in the world.

Effectiveness

102. The order in question is clearly effective. The social media, shopping, and other search engines that Google refers to in its factum¹⁸⁹ are not in evidence and Google is not entitled to base any arguments on them in this court. However, if there was any substance to Google’s

¹⁸⁶ BCSC Reasons, paras 70 – 76, 153, 156 [AR tab A]; Court of Appeal Judgment, para 105 [AR tab F]

¹⁸⁷ *Cartier International v. British Sky Broadcasting* [2014] EWHC 3354 (Ch) per Arnold J. at para 162, aff’d [2016] EWCA Civ. 658 at paras 105 – 106

¹⁸⁸ Google factum, para 113

¹⁸⁹ Google factum, para 46 and note 27

claims that Order was not effective, it would be open to Google to bring that new evidence to the BC Supreme Court on an application to vary or vacate the Order.

103. Google says the Order is ineffective because it has not eliminated the impugned websites, but effectiveness is never measured this way – the *Criminal Code* cannot be dismissed as ineffective because it has not eliminated crimes.¹⁹⁰ The purpose of the Order was to suppress the defendants’ business by preventing them from being found on Google. In this the order has clearly succeeded¹⁹¹ – if it were not suppressing the Datalink defendants there would be no need for them to try to evade it by creating new websites. When this occurs, the plaintiffs and Google have agreed to a simple notice and take-down system that operates by desk order. But Google also claims that the amendments mean that Google is involved in ongoing supervision of the order. If this is so, its involvement is minimal. As the Chambers Judge noted:

Google acknowledges that it can do what is being asked of it. Google does not assert that it would be inconvenienced in any material way or that it would incur expense to do so.¹⁹²

Crookes

104. Google argues that it is not liable for providing links to other websites, and relies heavily on *Crookes v Newton*, where this Court’s concern was that imposing liability in defamation for merely providing a link to another website could have a chilling effect on the internet.¹⁹³ Google’s argument on *Crookes*, followed to its logical conclusion, is that Google is immune for anything it does on its webpages because everything Google does on its search engines involves providing links.¹⁹⁴ If *Crookes* stands for the proposition that Google asserts, it would suggest that courts could never control any unlawful activity conducted on the internet, which functions based on links.

¹⁹⁰ See also *Cartier*, per Arnold J. at para 173 pointing out that it is “inimical to the rule of law” to extend to the ISPs a defence based on the fact that there are other traders selling counterfeit goods who have not been sued. As Arnold J. explained, “the applicable criterion is whether the measures required by the injunction will at least seriously discourage users from accessing the target website (at para. 175).”

¹⁹¹ Court of Appeal Judgment, para 27 [AR tab F]. And see note 65 above regarding the problem of nomenclature with the term “websites”.

¹⁹² BCSC Reasons, para 153, and see also para 83 [AR tab A]

¹⁹³ *Crookes v. Newton*, 2011 SCC 47 at para 36

¹⁹⁴ If *Crookes* establishes that Google is not a “publisher”, then Google’s speech interests, such as they are, must be still more attenuated. However, courts in Australia have already determined that the search results that Google displays on its webpage are indeed publications for which Google may be found liable: *Trkulja v. Google (No. 5)* [2012] VSC 533 (at pages 11 – 12, 15 – 16, 18, and 24 of the copy in the respondents’ authorities).

105. The findings in *Crookes* relating to whether a provider of a link is liable as a “publisher” are only a distraction in this case, because the Order below is not based on any theory of liability against Google – the Order below was based on the court’s inherent jurisdiction to stop non-parties from “facilitating the defendants’ ongoing breaches of this Court’s orders.”¹⁹⁵ As the Chambers Judge said:¹⁹⁶

The Court must adapt to the reality of e-commerce with its potential for abuse by those who would take the property of others and sell it through the borderless electronic web of the internet. I conclude that an interim injunction should be granted compelling Google to block the defendants’ websites from Google’s search results worldwide. That order is necessary to preserve the Court’s process and to ensure that the defendants cannot continue to flout the Court’s orders.¹⁹⁷

V. What should be the test for injunctions issued to search engines?

106. Google argues that the *RJR MacDonald* test is not appropriate for “speech-limiting injunctions”, citing *Liberty Net*, where this Court confirmed a more stringent test for defamation cases where the defendant intends to justify his statements, and suggested that a similar test should apply to hate-speech cases.¹⁹⁸ Here, the Datalink defendants have admitted all of the plaintiffs’ allegations and fled the jurisdiction – obviously they do not intend to justify anything. *Liberty Net* has nothing to do with this case, and Google does not suggest otherwise – Google argues *Liberty Net* only to show that courts must proceed with restraint.¹⁹⁹

107. The courts below demonstrated restraint. Fenlon J. considered the particular freedom of expression argument advanced by Google and rejected it. But Google also submits that Fenlon J. should not have applied the “relaxed merits” *RJR MacDonald* injunction test because it depends on a cause of action against Google, and because the Order is permanent. Both of these points are wrong and have been addressed above.

¹⁹⁵ BCSC Reasons, para 156 [AR tab A]

¹⁹⁶ BCSC Reasons, paras 109 – 133, 150 – 160 [AR tab A]

¹⁹⁷ BCSC Reasons, para 159 [AR tab A]

¹⁹⁸ *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para 49

¹⁹⁹ Google factum, para 50

108. More fundamentally, the Chambers Judge did not apply the *RJR MacDonald* test. Fenlon J. created a modified test that incorporated elements of *RJR MacDonald*, *Mareva*, and *Norwich Pharmacal*, which can be summarized as follows:²⁰⁰

- i. The plaintiffs must demonstrate a strong *prima facie* / good arguable case, similar to a *Mareva* injunction, as against the defendants whose websites are in issue;²⁰¹
- ii. Then the court will balance the interest of the parties, including the third party search engine, to reach a just and convenient result.²⁰² Factors to be considered include:
 - a. whether the plaintiffs are suffering irreparable harm from the conduct of the defendants;²⁰³
 - b. whether the third party search engine has a relationship with the parties such that it is somehow involved in the acts of the defendants;²⁰⁴
 - c. whether the third party search engine is the only practical means to obtain the relief sought; this includes a consideration of the effectiveness of the order sought;²⁰⁵
 - d. whether the third party search engine can be indemnified for costs;²⁰⁶
 - e. whether the interests of justice favour granting the relief sought;²⁰⁷ and
 - f. the degree to which the interests of others, such as the public, might be effected.²⁰⁸
- iii. The judge must not become a prisoner of formula – the fundamental question is whether the injunction is just and equitable in all of the circumstances of the case.²⁰⁹

²⁰⁰ BCSC Reasons, paras 150 – 157 (“modified to take into account the direction to a non-party”; para 150); (“...Norwich.... modified to reflect the relief sought in this case....” at para 154) [AR tab A]

²⁰¹ BCSC Reasons, paras 150 – 151 [AR tab A]. The view in British Columbia is that the difference between the two *Mareva* threshold tests is not significant; *Tracey v. Instaloans* 2007 BCCA 481 at para 54.

²⁰² BCSC Reasons, paras 150, 152: “and then to balance the interests of the two parties”; “as for balancing the interests of the plaintiffs and the non-party Google....” [AR tab A]

²⁰³ BCSC Reasons, para 152 [AR tab A]

²⁰⁴ BCSC Reasons, paras 152, 154b [AR tab A]

²⁰⁵ BCSC Reasons, paras 154c, 153 (“Google acknowledges that it can do what is asked of it...”), 155, 156 (“there is no other practical way”), and see also paras 70 – 76 [AR tab A]

²⁰⁶ BCSC Reasons, paras 154d, 153 (“Google does not assert that it would be inconvenienced in any material way or that it would incur expense to do so”) [AR tab A]

²⁰⁷ BCSC Reasons, para 154e [AR tab A]

²⁰⁸ BCSC Reasons, para 155 [AR tab A]

²⁰⁹ BCSC Reasons, paras 157 [AR tab A]

109. It can be seen that there is no material difference between the test proposed by Google and the test applied by Fenlon J., except that Fenlon J.'s test makes a general reference to "the interests of others" while the test proposed by Google specifically mentions freedom of expression as one of those interests. As noted, Fenlon J. considered and rejected the freedom of expression argument advanced before her. Moreover, on the evidence before her, there was no need to delve any further into the issue because Google's witness admitted that there was no "censorship" issue.

110. The judge made findings of fact, none of which are challenged in this appeal, in support of all of these elements.²¹⁰ There is no need to further develop the scope of this remedial jurisdiction at this stage, particularly in view of the very limited record.

Conclusion

111. Google has never given a coherent explanation for why it opposed the Order sought. It agrees that the conduct of the Datalink defendants is reprehensible. It acknowledges the plaintiffs' rights and also acknowledges corporate responsibility to amend its search results in response to crimes (child pornography), social ills (hate speech), and court orders.²¹¹ It requested the Website Order to facilitate the first tranche of websites being taken down. Why has Google ever objected to the Order sought to address the balance of sites? The only explanation ever given was Mr. Smith's, and he admitted in cross-examination that it was not an explanation at all.²¹² The real concern appears to be – as it was in the stay application in the Court of Appeal – that Google's global reputation will suffer if it is seen to be subject to court orders.²¹³ In other words, Google's concern is that its reputation will be damaged if it is seen to be subject to the rule of law.

112. Google's concern seems less absurd if it is recast as 'being subject to the law of Russia, or Turkey', but whether Google is subject to the law of those countries will be determined by where Google chooses to conduct its business, how it chooses to organize its corporate structure, and the laws of those countries – none of these things are the concerns of this Court. Google is attempting

²¹⁰ See para 37 in the Statement of Facts above.

²¹¹ BCSC Reasons, para 139 [AR tab A]

²¹² See paragraph 85 above.

²¹³ Reasons for Judgment of Wilcock JA, paras 31, 34, 36 [AR tab P]

to impose a Hobson's choice on the court – arguing in essence that Google should not be subject to the rule of law in Canada, lest it may be subject to the rule of law elsewhere. This is an impossible contention for this Court to accept.

113. Google says that the Order is a dangerous precedent. There is a great irony in this. Google and some of its intervenor allies hold themselves out as defenders of the internet and the unlimited flow of information and ideas. However, their core argument is that the *idea* that the Order under appeal represents – that the court can make an order against a search engine limiting access to outlaw websites whose only purpose is to generate further illegal profits – that *idea* is too dangerous to be upheld and further disseminated. This submission is anathema to the spirit of the common law.

... a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court... [I]n this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.²¹⁴

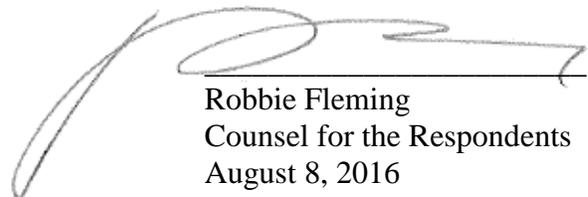
PART IV – SUBMISSIONS ON COSTS

114. The successful party should be awarded costs in this Court and the British Columbia Court of Appeal. No costs should be awarded in relation to the British Columbia Supreme Court because the Chambers Judge already awarded special costs to the respondents against the Datalink defendants (Google did not seek its costs of that proceeding).²¹⁵

PART V – ORDER SOUGHT

115. The respondents seek an order that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Robbie Fleming
Counsel for the Respondents
August 8, 2016

²¹⁴ *Mooney v. Orr (No. 1)* [1994] BCJ No. 2322 (SC) at paras 10 – 11

²¹⁵ Amended Application Response [AR tab O]

PART VI – TABLE OF AUTHORITIES

TAB	AUTHORITY	Referenced in Paragraphs
Cases		
1.	<i>A.G. Canada v. Law Society of B.C.</i> , [1982] 2 SCR 307	49
2.	<i>Aftergood v. Alberta</i> , 2006 ABCA 154	/
3.	<i>Amchem v. British Columbia</i> , [1993] 1 S.C.R. 897	61
4.	<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234	78
5.	<i>Attorney General v. Punch</i> , [2003] 1 AC 1046 (HL)	46
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8.	<i>BMG Canada Inc. v. Doe</i> , 2005 FCA 193	52
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10.	<i>Cartier International v. British Sky Broadcasting</i> , [2014] EWHC 3354 (Ch)	54, 55, 100, 104
11.	<i>Cartier International v. British Sky Broadcasting</i> , [2016] EWCA Civ 658	54, 56, 100
12.	<i>Catania v. Giannattasio</i> , [1999] O.J. No. 1197 (C.A)	61
13.	<i>Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.</i> , [1993] 2 W.L.R 262 (HL)	50
14.	<i>Cohen v. Google</i> , 25 Misc.3d 945 (2009)	78
15.	<i>Crookes v. Newton</i> , 2011 SCC 47	105, 106
16.	<i>Dawn Hassell v. Bird</i> , California Court of Appeal (file A143233), (July 6, 2016)	77
17.	<i>Dow Jones and Company Inc v Gutnick</i> , [2002] HCA 56 (10 December 2002)	70
18.	<i>Duke v. Andler</i> , [1932] S.C.R. 734	61
19.	<i>DVD Copy Control Ass'n v. Bunner</i> , 31 Cal.4 th 864 (2003)	77
20.	<i>First Choice Capital v. First Canadian Capital</i> , [1997] 9 WWR 117 (Sask QB)	49
21.	<i>Ford v. Quebec (Attorney General)</i> , [1988] 2 S.C.R. 712	89
22.	<i>GEA Group v. Ventra Group</i> , 2009 ONCA 619	51, 52

23.	<i>Globe and Mail v. Canada (Attorney General)</i> , [2010] 2 S.C.R. 592	93
24.	<i>Golan v. Holder</i> , 565 U.S. 1 (2012)	78
25.	<i>Greenpeace Canada v. MacMillan Bloedel</i> , [1994] BCJ No. 2148 (BCCA)	46
26.	<i>Guarantee Co. of North America v. Mercedes-Benz Canada</i> , [2005] OJ No. 6149 (SCJ)	82
27.	<i>Impulsoria Turistica v. Transat Tours Canada</i> , 2007 SCC 20	61
28.	<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	89
29.	<i>Kenney v. Loewen</i> , [1999] BCJ No. 363 (SC)	51
30.	<i>MacMillan Bloedel v. Simpson</i> , [1996] 2 S.C.R. 1048	45, 46, 47
31.	<i>Minera Aquiline Argentina v. IMA Exploration</i> , 2006 BCSC 1102	61
32.	<i>Minera Aquiline Argentina v. IMA Exploration</i> , 2007 BCCA 319	30, 61
	<i>Mooney v. Orr (No. 1)</i> [1994] BCJ No. 2322 (SC)	113
33.	<i>Norwich Pharmacal Co v Customs and Excise Commissioners</i> , [1974] A.C. 133	51, 52
34.	<i>Old North State Brewing Co. v. Newlands Services</i> , [1998] BCJ No. 2474 (CA)	74, 82
35.	<i>Oxford Pendaflex v. Knorr</i> , [1982] 1 S.C.R. 494	11
36.	<i>Perfect 10 Inc. v. Google</i> , [2011] FCJ No. 48 (TD)	60
37.	<i>Perfect 10 v. Google Inc.</i> , 416 F.Supp.2d 828 (2006)	77
38.	<i>Petals, Inc. v. Winners Apparel Ltd.</i> , 1999 CanLII 14920 (ON SC)	11
39.	<i>Porter v. Don the Beachcomber</i> , [1966] Ex CR, 982	60
40.	<i>R. v. Booker</i> , 2007 BCSC 456	/
41.	<i>R. v. Cunningham</i> , 2010 SCC 10	45
42.	<i>R. v. Sharpe</i> , 2001 SCC 2	88, 96
43.	<i>Rocket v. Royal College of Dental Surgeons of Ontario</i> , [1990] 2 S.C.R. 232	89, 94
44.	<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.</i> , 483 U.S. 522 (1987)	78
45.	<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11	94
46.	<i>Tele-Mobile Co. v. Ontario</i> , 2008 SCC 12	59
47.	<i>The Rugby Football Union v Consolidated Information Services Ltd</i> , [2012] UKSC 55	52
48.	<i>Tracy v. Instalogs Financial Solutions</i> , 2007 BCCA 481	53, 109

49.	<i>Trkulja v. Google (No. 5)</i> , [2012] VSC 533	105
50.	<i>TSB Private Bank International v. Chabra</i> , [1991] 1 WLR 231 (Ch.)	50
51.	<i>Vancouver Sun (Re)</i> , 2004 SCC 43	94
52.	<i>Wilson v. The Queen</i> , [1983] 2 S.C.R. 594	85
53.	<i>Yeung and Shing v. Google</i> , HCA 1381/2012, High Court of the Hong Kong Administrative Region Court of First Instance	71
54.	<i>York University v. Bell Canada Enterprises (2009)</i> , 99 OR (3d) 695 (SCJ)	52

Secondary Sources

55.	Devonshire, Peter “Mareva Injunctions and Third Parties: Exposing the subtext” (1999) 62 <i>Modern Law Rev.</i> 539	50
56.	Hogg, Peter W., <i>Constitutional Law of Canada</i> , 5 th ed. Supplemented (Toronto: Carswell, 2007 ff.)	88
57.	Macnair, Mike, “Vicinage and the Antecedents of the Jury” (1999) 17:3 <i>Law & Hist. Rev.</i> 537	44
58.	Mann, Ronald J. and Belzey, Seth R. <i>The Promise of Internet Intermediary Liability</i> (2005) 47 <i>William and Mary Law Review</i> 239	8
59.	McEwan, Ken, “A Short History of Rule-Making for Courts” in <i>British Columbia Annual Practice, 2016</i>	44
60.	Palgrave, Sir Francis <i>An Essay Upon the Original Authority of the King’s Council</i> , (London: The Commissioners on the Public Records of the Kingdom, 1834)	44
61.	Stephen, James Fitzjames, <i>A History of the Criminal Law in England, Vol. I</i> , (London: Macmillan & Co, 1883)	44
62.	Wormald, Patrick, “Neighbors, Courts, and Kings: Reflections on Michael Macnair’s <i>Vinci</i> ” (1999) 17:3 <i>Law & Hist. Rev.</i> 597	44

PART VII – STATUTORY PROVISIONS

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 39

UK Senior Courts Act 1981, s .37

World Trade Organization Agreement Implementation Act, S.C. 1994 c. 47, ss. 2, 8

Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, Section 7, Article 39

Law and Equity Act, R.S.B.C. 1996, c. 253

Injunction or mandamus may be granted or receiver appointed by interlocutory order

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

(3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

UK Senior Courts Act 1981

37 Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—

(a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the M1Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and

(b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6 of the M2Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

World Trade Organization Agreement Implementation Act, S.C. 1994 c. 47

Definitions

2 (1) In this Act,

Agreement means the Agreement Establishing the World Trade Organization, including

(a) the agreements set out in Annexes 1A, 1B, 1C, 2 and 3 to that Agreement, and

(b) the agreements set out in Annex 4 to that Agreement that have been accepted by Canada,

all forming an integral part of the Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations, signed at Marrakesh on April 15, 1994; (Accord)

Agreement approved

8 The Agreement is hereby approved.

Annex 1C
Agreement on Trade-Related Aspects of Intellectual Property Rights

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices²¹⁶ so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

²¹⁶ For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.