S.C.C. File No.: 36602

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)

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, et al

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RESPONDENTS' REPLY 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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Injunctions and Extraterritoriality

1. There is no doubt that a provincial superior court has the power to issue an order with extraterritorial effects. In *Impulsora Turistica de Occidente v. Transat Tours*, the plaintiffs sued Mexican corporations which had no business establishment in Quebec, and sought an injunction against them in relation to hotel rooms in Mexico. The Superior Court concluded that only Mexican courts could issue such an injunction, but the Quebec Court of Appeal disagreed.[1] This Court unanimously approved of the judgment of the Court of Appeal:

> [TRANSLATION] I cannot accept the respondents' argument that a court of competent jurisdiction could lack the power to issue an injunction with purely extraterritorial effects.[2]

2. The Attorney General of Canada seeks to distinguish *Impulsora* by claiming that an injunction against a non-party involves "enforcement jurisdiction", while an injunction against a party involves "adjudicative jurisdiction".[3] This terminology is taken from *R. v. Hape,* where the question was whether the *Charter* applied to the actions of Canadian police outside of Canada. In this context, LeBel J. for the majority set out the following description:

- Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities….

- Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. "… *enforcement* or *executive* jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as *investigative jurisdiction*)".

- Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force.[4]

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[1] *Transat Tours Canada inc. c. Impulsora Turistica de Occidente, s.a. de c.v.*, 2006 QCCA 413 at para. 37 (not reproduced).

[2] *Impulsora Turistica de Occidente v. Transat Tours* [2007] 1 SCR 867 at para 6 (emphasis added) [Respondents' Book of Authorities ("RBA") Tab 27]. And see *Amchem Products Incorporated v. British Columbia* [1993] 1 SCR 897 [RBA Tab 3] and the other authorities cited in the Respondents' Factum at footnotes 130 and 131.

[3] Canada Factum, para 29. The Attorney General also never explains why, as a factual matter, the order is extraterritorial, given the Court's finding that it had territorial competence over Google and that Google never revealed *where* it needed to take the steps to fulfill the order – see paragraph 13 below.

[4] *R. v. Hape* [2007] 2 SCR 292 at page 325 (formatting added, citations omitted, emphasis in original) [Attorney General of Canada ("AGC") BA Tab 18]; see also *R. v. Cook* [1998] 2 SCR 597 at page 665 [Appellant's Book of Authorities ("ABA") Tab 32].

3. The Attorney General does not explain why making an order against a non-party is an instance of "enforcement" jurisdiction while issuing an injunction with extraterritorial effect against a party is only "adjudicative" jurisdiction. In either case, the court's authority to make orders against someone is established when the court has territorial competence (*in personam* jurisdiction) over that person and if so the court may order them to act or refrain from acting in a foreign jurisdiction.[5] It does not matter if the person is local or foreign, or is named as party or brought before the court in another manner. The court is exercising the same jurisdiction in both scenarios. The Attorney General provides no authority for the proposition that either of them are an exercise of enforcement jurisdiction.

4. The concept of enforcement – or executive – jurisdiction appears mostly concerned with the very limited ability of officials and other governmental agents – most obviously police – to act beyond Canada's borders.[6] It is self evident that Canadian police do not have the power to arrest people in the United States, just as American police cannot arrest people in Canada. This kind of jurisdiction is far removed from the power of a court to issue an order to a person over whom it has *in personam* jurisdiction.

5. However, the Attorney General's position is that before making any order which may have an extraterritorial effect, courts must ask whether they are exercising an adjudicative function (where extraterritorial effect is permissible) or enforcement function (where it is not). But courts only ever exercise an adjudicative function – this is their sole purpose. Judges do not enter the fray and actively enforce their orders. The fact that a court issues orders to give effect to earlier orders and uphold the integrity of its process does not mean that a judge becomes an actor, and is no longer an adjudicator. This is demonstrated by the Attorney General herself. She complains that

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[5] *Babanaft International Co SA v. Bassante*, [1990] Ch 13 at 37-38 [AGCBA Tab 2]: "There is abundant authority for the proposition that, where a defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad."

[6] *R. v. Hape*, *supra* at paras 42 ("a monopoly of legitimate physical coercion"), 85, 87, 103 ("As a threshold question, it must be asked whether there is a state actor in the sense of a government agent or official possessing statutory authority or exercising a public function [citation omitted]. Police officers are clearly government actors…."), and 105 [AGCBA Tab 18]. See also *R. v. Cook* [1998] 2 SCR 597 at para 131 [ABA Tab 32], and note that the quote from Professor Brownlie is followed by the quote from *The Case of the S.S. "Lotus"* (set out in footnote 10 below) which establishes that these rules have nothing to do with the private international law rules related to persons within the jurisdiction of the court.

the Order should not have been granted because it cannot be enforced, which obviously demonstrates that the Order is not an exercise of an "enforcement jurisdiction".[7]

6. Enforcement jurisdiction is a concept arising from public international law,[8] which is the body of customary international law and treaties by which states govern their relationship with one another. In contrast, private international law addresses the conflicts that may arise between legal systems where the private parties to a dispute are in more than one country.[9]

7. Public international law has long acknowledged the jurisdiction of the courts of one state to make orders that may have an extraterritorial effect on residents of other states.[10] Whether to exercise that jurisdiction is the subject to an extensive body of private international law, based on order and fairness, which this Court has developed, beginning with *Morguard*:

> Modern states cannot live in splendid isolation…. Modern times require that the flow of wealth, skills and people across boundaries be facilitated in a fair and orderly manner. Principles of order and fairness which ensure security of transactions with justice must underlie a modern system of private international law. The content of comity therefore must be adjusted in the light of a changing world order.[11]

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[7] See Canada Factum, para 24. Furthermore, this Court unanimously approved of the Quebec Court of Appeal's rejection of this argument in *Impulsora Turistica*, also at para 6 [RBA Tab 27]: "The possibility that the Superior Court would have difficulty sanctioning a failure to comply with its orders does not affect its power to issue an injunction…."

[8] *R. v. Hape*, *supra* at paragraphs 24, 35 – 36, 39, 46, in contrast to the domestic nature of private international law, in the footnote below [AGCBA Tab 18].

[9] *Club Resorts Ltd. v. Van Breda* [2012] 1 SCR 572 at para 15 [ABA Tab 16]: "Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province" (citations omitted; emphasis added).

[10] In its seminal decision *The Case of the S.S. "Lotus"* (1927), the Permanent Court of International Justice wrote, "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable," as quoted in *R. v. Cook* [1998] 2 SCR 597 at pp 665-667 [ABA Tab 32].

[11] *Morguard Investments Ltd. v. De Savoye* [1990] 3 SCR 1077 at 1078 (headnote); see also page 1097 [Attorney General of Ontario ("AGO") BA Tab 14]: "In a highly integrated world economy… the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate

8. In *Beals v. Saldanha*, Major J. wrote for the majority:

> The importance of comity was analysed at length in *Morguard*, *supra*. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner…. International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law.[12]

Major J. recognized that "where individuals carry on business in [a foreign] jurisdiction, it is reasonable that those individuals be required to defend themselves there…."[13] This observation applies directly to Google in this case. And in *SOCAN*, Binnie J. wrote:

> From the outset, the real and substantial connection test has been viewed as an appropriate way to "prevent overreaching . . . and [to restrict] the exercise of jurisdiction over extraterritorial and transnational transactions" (La Forest J. in *Tolofson*, at p. 1049). The test reflects the underlying reality of "the territorial limits of law under the international legal order" and respect for the legitimate actions of other states inherent in the principle of international comity (*Tolofson*, at p. 1047). A real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.[14]

9. In this case the courts below found that Google is carrying on business in British Columbia and is subject to the jurisdiction of the court based on the real and substantial connection test. Google does not challenge that finding. However, based on the description in *Hape*, the Attorney General of Canada says that the Order under appeal is an impermissible extraterritorial exercise of "enforcement jurisdiction". This is an attempt to roll back Canada's modern private international law and return to a strict view of territoriality, which this Court has rejected in cases such as *Libman*[15] and *Morguard*. The Court in *Hape* did not address, and did not intend to alter, the authority of superior courts to adjudicate matters with which they have a real and substantial connection.[16]

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and international commerce….". A shorter version of this passage was also cited with approval by LeBel J. in *Beals v. Saldanha* [2003] 3 SCR 416 at page 484 [BCCLA BA Tab 2].

[12] *Beals v. Saldanha* [2003] 3 SCR 416 at paras 27 – 28 [BCCLA BA Tab 2].

[13] *Beals v. Saldanha*, *supra*, at para 25 [BCCLA BA Tab 2]. The insertion of the word "foreign" is justified by Major J.'s sentence following the quote in his paragraph.

[14] *SOCAN v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 at para 60 [ABA Tab 43].

[15] *Libman v. The Queen* [1985] 2 SCR 178, at pages 207 – 210 [AGO BA Tab 11].

[16] Mr. Justice LeBel's analysis in *Hape* acknowledges the legitimacy of civil courts dealing with matters which may have extraterritorial effects, by referring to the same real and substantial connection test that is one of the foundations of private international law in Canada; see *Hape* at paras 59 – 60 [AGCBA Tab 18]: "competing claims for

10. Moreover, the implication of the Attorney General's argument is that – as against any non-resident litigant who is legitimately before the court – no order can be made that has an element of compulsion. Non-resident litigants would therefore be exempt from injunctions of any kind, all execution proceedings, and contempt proceedings.[17] This must be wrong, and indeed the Attorney General admits that it is – but she says that it is right when dealing with non-parties.[18] As noted, there is no logic in this distinction.

11. The Attorney General argues that a foreign state must consent to the exercise of jurisdiction that may have an effect in its territory and points to *Babanaft*,[19] but the rule in *Babanaft* was substantially changed in *Derby v. Weldon*, where the Court of Appeal determined that, where the court has territorial competence over a foreign party, an injunction operates without any application to enforce it in a foreign court.[20] A "*Babanaft* proviso" may be an appropriate term in a *Mareva* order where third parties not before the court are given notice of the order after it has been granted. But as Fenlon J. noted, Google was given notice and appeared to make submissions – so *Babanaft* has nothing to do with this case.[21]

Finding the borderless internet

12. Some interveners say that the internet has no national borders,[22] and that Canadian courts should not restrict content beyond Canada's borders.[23] These two ideas cannot be reconciled. If

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jurisdiction can arise on grounds other than territoriality, which are, of course, extraterritorial in nature" and 62: "…states may have valid concurrent claims to jurisdiction. Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question. Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event. As La Forest J. noted in *Libman*, what constitutes a 'real and substantial link' justifying jurisdiction may be 'coterminous with the requirements of international comity'" [AGOBA Tab 11].

[17] And, unless the relevant servers are located in Canada, no Canadian court would ever have the jurisdiction to make orders related to internet content accessible in Canada.

[18] Canada Factum, para 29. This foreshadows the error in AGC's analysis of *Babanaft*, below.

[19] Canada Factum, para 28

[20] *Derby & Company v. Weldon (Nos. 3 and 4)*, [1990] Ch 65 (online version at page 15) [Respondents' Reply ("RR") BA Tab 4]: "unless that person is . . . a person to whom the order is addressed" (emphasis added). The *Derby v. Weldon* approach has been further altered in the BC Supreme Court's *Model Order For Preservation of Assets*, at para 16.

[21] BCSC Reasons, paras 128 – 130 and 160. And, more generally, see paras 125 – 133. And private international law in Canada does not depend on the "international reciprocity" thesis of *Babanaft* – which AGC also relies on – it depends on order and fairness in the context of modern commercial realities, as exemplified in the real and substantial connection test: *Morguard*, page 1104 [AGOBA Tab 14]. This Court referred to reciprocity in *Beals* (para 29) but, not in the *Babanaft* sense of 'would another court grant the kind of order we are being asked to grant', but in the "jurisdictional equivalence sense" of 'would we have taken jurisdiction in the same circumstances as the foreign court' – see *Beals* paras 200ff, per LeBel J [BCCLA BA Tab 2].

[22] CCLA Factum paras 19, 20

[23] CCLA Factum, paras 20, 22

the internet is borderless, then courts making orders in relation to internet content are not making orders with effect beyond Canada's borders. Other interveners say that the ordinary rules of private international law should not apply to orders that may have an "extraterritorial" effect on the "borderless" internet – they say that such matters can only be dealt with by Parliament or by international treaty. There is no principled reason why this should be so.

13. And in this case, we do not know where Google's servers are located, or where Google takes the action required to put the Order under appeal into affect (on any of Google's websites, including google.com and google.ca). Google claimed that its servers were not in Canada,[24] but Fenlon J. does not appear to have accepted this evidence, finding only that:

> While Google was vague about the location of the computers that operate the search engine program, it is certain that those computers are not located in British Columbia.[25]
>
> … Google objects to British Columbia retaining jurisdiction because the order sought would require Google to take steps in relation to its websites worldwide. That objection is not resolved by "going to California". If the order involves worldwide relief, a California court will be no more appropriate a forum than British Columbia to make such an order. Even if the order can be construed more narrowly as requiring Google to take steps at the site where the computers controlling the search programs are located, Google has not established that those computers are located in California, or that they can only be reprogrammed there.[26]

United States law

14. The EFF frames its submissions as if it is presenting American cases as comparative law to assist the court in arriving at the right policy conclusion, but this is only window-dressing. If American law was being presented as helpful comparative law, this intervener would have taken the court to cases where American courts struggled with the same policy dilemma as in this case – how to effectively protect private rights when unlawful conduct moves onto the borderless world of the internet. But the EFF mostly lectures the court on procedural and First Amendment law generally. The EFF's partisan purpose, like Google's, is to raise doubts in the Court that unproven American law[27] – which Google never put before Fenlon J. – should have been applied and that, if it had been, the Order could not have been granted. This is wrong.

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[24] Affidavit of Steven Smith, para 16 [RR Vol. III, tab L]
[25] BCSC Reasons, para 25
[26] BCSC Reasons, para 104
[27] See Respondents' Factum, paras 74 and 79

15. The EFF's First Amendment cases are focused on freedom of the press and state-sponsored censorship,[28] which have little to do with the facts of this case. The EFF does not address important decisions from the US Supreme Court which recognize that enjoining *conduct* does not infringe speech merely because the conduct involved the use of words.[29]

16. The US doctrine of prior restraint would not prevent a court from granting an injunction in a case like this. The heart of the First Amendment's protection is speech on matters of public concern – speech on matters of purely private concern is of less importance.[30] And only content-based injunctions are subject to the prior restraint analysis. An injunction to restrain trade secret misappropriation is considered a content-neutral matter of private concern.[31] Furthermore, the doctrine is one of *prior* restraint so it would not apply here, *after* the wrongful conduct has occurred, and after a finding in a preliminary injunction proceeding.[32]

17. The EFF claims that orders restricting speech with extra-territorial effects offend the principle of comity, but the EFF does not address the power of United States courts to issue injunctions with extra-territorial effects in relation to intellectual property claims, or the global delisting and other orders made against service providers by US courts in intellectual property cases.[33]

18. Just like Canadian courts, if US courts have personal jurisdiction over a person they may use equitable powers to order the person to act outside their territorial jurisdiction.[34] US courts grant worldwide injunctions, as the Chambers Judge did here, to protect trade secrets from misappropriation or to enforce trade secret obligations in contracts.[35] Under the *Defend Trade Secrets Act of 2016,* injunctions for the misappropriation of trade secrets are available to restrain

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[28] *Bantam Books* dealt with a private "Commission to Encourage Morality in Youth" to halt distribution of "'objectionable' publications"*; CBS v. Davis* an attempt to suppress a news organization's investigation into unsanitary practices in the meat industry; *Procter & Gamble* an attempt to enjoin disclosure of court proceedings relating to racketeering and fraud by a trust company.

[29] Or was carried out, initiated or evidenced, by means of language, whether spoken, written, or printed. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) [RRBA Tab 11], and *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 at 2664-65 (2011) (approving *Rumsfeld*) [RRBA Tab 12].

[30] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 759 (1985) [RRBA Tab 6].

[31] *DVD Copy Control Ass'n, Inc. v. Bunner*, 75 P. 3d 1 (Cal. Sup. Ct. 2003) 81 – 87 [RBA Tab 19].

[32] *DVD, supra* 88 – 90 [RBA Tab 19]; *Aguilar v. Avis Rent a Car System Inc.* 980 P. 2d 846 (Cal. Sup. Ct. 1999) [RRBA Tab 1]; *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal 4th 1141 [RRBA Tab 2].

[33] These orders are referred to in the IFPI factum at para 12 and the FIAPF factum at para 29.

[34] *Steele v. Bulova Watch Co* 344 US 280, 289 (1952) (not reproduced).

[35] *Netlist Inc. v. Diablo Technologies Inc*. No. 13-cv-05962-YGR (N.D.Cal. 2015) [RRBA Tab 10], *Lamb-Weston Inc. v. McCain Foods Ltd* 941 F.2d 970 (9th Cir. 1991) [RRBA Tab 8].

foreign acts of misappropriation.[36] Passing off is prohibited by the *Lanham Act*,[37] which protects against unfair competition, including international norms to prevent passing off, and applies even if some of the acts are done outside the United States.[38]

19. The EFF claims a de-listing order could not be enforced against Google in the United States because of s. 230 of the *Communications Decency Act* ("*CDA*"). This is wrong because s. 230 does not apply to intellectual property claims.[39] The EFF refers to *Stevo* to suggest that the *CDA* gives a website immunity from state law trade secret claims,[40] but *Stevo* was rendered prior to the enactment of the Federal *Defend Trade Secrets Act of 2016* (which protects trade secrets as a *federal* form of intellectual property) and the EFF fails to bring contrary authorities,[41] to the attention of this Court. And, in this type of case, the *CDA* would not apply because Google is being ordered to remove the content based on an underlying injunction – no liability is imposed.[42]

Expression

20. Google only made a very limited censorship argument before Fenlon J., which their witness admitted had no application to the facts of this case.[43] Before the Court of Appeal, the CCLA argued that the approach to freedom of expression rights is part of the core of the self-determination of nations. The Court of Appeal accepted this submission,[44] but concluded that no such rights were engaged because the impugned websites do not contain any true expression – their only purpose is to sell illegal products in violation of multiple court orders.[45]

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[36] *Defend Trade Secrets Act of 2016*, sections 1832(a), 1836(4), 1837 (applying the law to "conduct occurring outside the United States if… an act in furtherance of the offense was committed in the United States") [RRBA Tab 17].
[37] 15 USC s. 1051 [RRBA Tab 22]
[38] *Steele*, 283-287; *Trader Joe's v Hallatt*, 14-35035 (9th Cir. August 26, 2016) [RRBA Tab 14]. The international requirement to prevent and provide effective redress against passing off is mandated by the *International Convention for the Protection of Industrial Property* (Paris Union); Art. 10bis, Art. 10ter [RRBA Tab 19]. Member counties to the *WTO TRIPS* agreement must also comply with these obligations.
[39] 47 U.S.C. s. 230(e)(2) [RRBA Tab 16].
[40] EFF factum at para. 21.
[41] *Doe v. Friendfinder Network, Inc*., 540 F. Supp. 2d 288 (D.N.Hamp.2008) [RRBA Tab 5] regarding IP claims generally; *UMG RECS v. Escape Media Group, Inc*., 37 Misc. 3d 208 (N.Y.S.C. 2012) regarding copyright claims [RRBA Tab 15].
[42] *Hassell v. Bird*, No. A143233 (Cal. C.A.) (July 6, 2016) at pages 26 – 31 [RRBA Tab 7]; Respondents' Factum para 77.
[43] Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [RR Vol. III, tab P]
[44] Court of Appeal Judgment, paras 91 – 92
[45] Paragraph 16 of the Statement of Facts in the Respondents' Factum; Court of Appeal Judgment, para 110. And see para 93: "…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

21. In this Court, none of the expression-focussed interveners[46] have attempted to address this simple fact. All of them treat everything as expression, and all expression as equally worthy of protection. This is an absurdly simple treatment of a complex field and is obviously wrong. The CCLA makes submissions about the value of commercial speech, but falls into the same analytical trap by treating all commercial speech as equal. Following the CCLA's logic, advertising illegal wares – prohibited narcotics or outlaw Datalink products – is commercial expression just as worthy of protection as advertising a lawful business. This is nonsensical.

22. Human Rights Watch makes similar arguments based on international human rights conventions,[47] but these do not add much to the analysis because, just as we would expect, these conventions contemplate a balance between competing rights,[48] and permit freedom of expression to be tempered by intellectual property rights.[49] For example, in *Laserdisken v. Kulturministeriet* the European Court of Justice ruled that restrictions on the freedom to receive information are justified where there is a need to protect intellectual property rights.[50]

23. Open Media and Wikimedia[51] go further by arguing that everything on the internet is expression, and that all of it is entitled to protection under *Charter* s. 2(b) because internet users have a right to all "information" on the internet.[52] Lined up against such rarefied rights, no

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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."

[46] CCLA, Open Media, EFF, the Media Coalition, Wikimedia, Human Rights Watch

[47] HRW factum paras 19 and 22. *ICCPR* and *UDHR* address *human* rights that do not extend to corporations like Google or to Datalink.

[48] The right to freedom of expression under the *ICCPR* provides for restrictions, *inter alia*, based on respect *of the rights* of others, as does the *ECHR*, which recognizes that expression may be restricted to "prevent the disclosure of information received in confidence" or "maintain[] the authority…of the judiciary": *ICCPR* Art. 19(3), *ECHR* Art. 10(2). The *UDHR* confers the right "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author:" Art. 27(2), *UDHR*. The right is also mandated by Art. 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights* to which Canada is a party [RRBA Tab 20].

[49] Art 1, *Protocol*; *Cartier CA* para 126; *Delfi v Estonia*, Chamber Judgment [2013] ECHR 941 at 81-82, 92-94 (liability for failure to remove defamatory content from portal not violating freedom of expression right) [RRBA Tab 3].

[50] *Laserdisken v. Kulturministeriet*, ECLI:EU:C:2006:549 at paras 60 – 65 [RRBA Tab 9]; See also the authorities in the FIAPF factum at paras 18 - 22 and IFPI factum at para 22, where delisting and blocking orders were granted

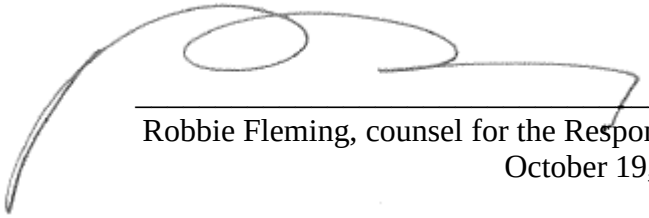
[51] Wikimedia improperly refers to the Affidavit sworn in support of its motion to intervene (Wikimedia Factum paras 17 – 18). And Wikimedia's authorities – at tabs 4, 7, and 9 – contain corporate "reports" of Facebook, Twitter, and Google, which are subsections of the interactive websites of these companies. None of this material is in evidence. It is obviously improper for this American intervener to attempt to change the record at this late stage by introducing this unproven and untested material.

[52] As if the internet were one giant electronic newspaper or courtroom, which it obviously is not. Not all internet activities deserve protection, as almost everyone acknowledges.

commercial litigant can ever have recourse in relation to internet content, even where the content provider commits crimes or civil wrongs.[53] Moving illegal conduct onto the internet elevates it to a social value worthy of constitutional protection without further enquiry. This dystopian reasoning would not stop with Google – a court would almost never be able to make an order that might alter any "information" available on the internet – no matter where the content providers or website hosts were located. The Website Order, which the plaintiffs obtained with Google and at Google's request, could never have been made.[54] A court could order a counterfeiter to stop using trademarks of a competitor, but not order the counterfeiter to stop using the marks on a website. No court could ever make an order to restrain illegal disclosure of confidential information on the internet.

24. Google supresses content from its search results every day, as part of its ordinary business; the Order under appeal is a very small step from Google's ordinary practice.[55] But Human Rights Watch says the Order requires Google to "… remove information that would otherwise be available to individuals accessing information on the Internet."[56] Of course, the information is only available because the Datalink defendants have ignored multiple orders (in particular the Website Order) of the court – if they had complied the impugned websites would not exist. Neither Google nor the public has any rights arising from the fact that the publishers of the impugned websites are outlaws – Google has admitted as much by agreeing that it should not advertise the websites.[57]

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Robbie Fleming, counsel for the Respondents
October 19, 2016

[53] Open Media Factum, para 37f, Wikimedia Factum, para 10: "No rights appear on the other side of the scale beyond an economic interest in a private dispute."
[54] See paras 29 – 30 of the Statement of Facts in the Respondents' Factum. Nor could the earlier orders that the Datalink defendants alter their websites to cease selling the plaintiffs' products, and post a notice for the plaintiffs' customers – see Reasons of Dickson J., paras 8 – 12 [RR Vol. 1, Part I, page 1].
[55] BCSC Reasons paras 137 and 139; Respondents' Factum para 22.
[56] Human Rights Watch Factum para 1.
[57] BCSC Reasons, para 50.

TABLE OF AUTHORITIES

STATUTORY PROVISIONS