File Number: 36602

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

GOOGLE INC.

Appellant
(Appellant)

-and-

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

Respondents
(Respondents)

FACTUM OF THE INTERVENER
THE WIKIMEDIA FOUNDATION
Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW AND STATEMENTS OF FACTS

1. The Wikimedia Foundation ("Wikimedia") is a public-serving not-for-profit that operates twelve free-knowledge projects, exclusively on the internet. The most well-known project is Wikipedia, which is one of the most visited websites in the world and is one of the largest collections of shared knowledge in human history. Wikipedia is an online free encyclopedia written and edited by a global community of volunteers, who devote their time and knowledge to disseminating information. In fact, it is the global dissemination of information that is at the heart of the Wikimedia Foundation's mission. [Affidavit of Michelle Paulson of July 10, 2016 ("Paulson Affidavit") at paragraph 10]. Orders such as that issued by the Court in British Columbia and affirmed by the Court of Appeal cause Wikimedia grave concern because of the potential impact on the global dissemination and receipt of knowledge and because organizations such as Wikimedia will be at the receiving end of future orders intended to thwart such dissemination.

2. While this case may be characterized as a private dispute into which Google, a disinterested third party, has been drawn; its outcome has much broader implications both in Canada and in the rest of the world. The Wikimedia Foundation does not take any position regarding the underlying dispute between the plaintiffs and the defendants. The Wikimedia Foundation requests that this Court delineate a coherent, workable, principled, and pragmatic test for the removal of content that (i) fully takes into account the effects that such an order has on the rights of third parties to receive information and (ii) recognizes that an order in Canada that purports to have global effect will embolden other countries' courts to do likewise, with a significant impact upon the rights of all to receive information.

PART II – QUESTIONS IN ISSUE

3. The present case engages rights of freedom of expression and comity. Wikimedia will argue that the appropriate framework for Canadian courts asked to suppress information must take into account the rights under section 2(b) of the *Charter* to disseminate and to receive information both within Canada and globally.

PART III – ARGUMENT

A. Section 2(b) of the Charter incorporates the right of access to expressive content

4. The right to freedom of expression in s. 2(b) of the *Charter* is not a one-way street. Not only do Canadians have a right to express themselves, they have a concurrent right to receive information: *Edmonton Journal v. Alberta (Attorney General)*, [1989] CanLII 20 (SCC); [1989] 2 SCR 1326. Any order that purports to limit anyone's expression not only affects the speaker, but also affects the listener. In some cases, the effect on the listener may be greater than the effect on the speaker, but the listener is seldom represented before the Court. For this reason, the Wikimedia Foundation respectfully requests that this Court ensure these important interests are protected.

5. While this Court adjudicates the rights of Canadians, this case implicates the rights of individuals throughout the world. Article 19 of the *Universal Declaration of Human Rights* (the "*Declaration*") (1948), contains the following universal human right:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference **and to seek, receive and impart information and ideas through any media and regardless of frontiers**. [emphasis added]

The wording of this right is important. First, it refers to a right to <u>seek and receive</u> information. Secondly, it recognises that information may be imparted "through any media" and, thirdly, it says this right exists regardless of frontiers. This right has been expanded upon in Article 19 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966) ("ICCPR"), adopted by the United Nations in 1966 and ratified by Canada in 1976.

B. The tests used by the Court of Appeal did not adequately take freedom of expression and the right to receive expression into account.

6. The test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, used by the courts below does not sufficiently take into account the fact that freedom of expression is deeply implicated in any order that prohibits anyone (litigant or otherwise) from expressing something. Though one might import such a consideration into the balance of convenience portion of the test (as it appears the Court of Appeal below did at paragraph 100 *et seq*), the Court of

Appeal did not not address the *Charter*-protected rights of third parties to receive information. The *RJR-MacDonald* test is a blunt instrument that does little or nothing to address the deeply important and nuanced considerations related to a *Charter*-protected right. Nor does it sufficiently take into account the rights of individuals around the world to receive information. "Balance of convenience" does not sufficiently consider *Charter*-protected rights, when the resulting order is an unequivocal ban on *Charter*-protected expression. Justice Bastarache's decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626 at para. 49 is clear that the test from *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 and its offspring from *RJR-MacDonald* are not the appropriate tool for questions of freedom of expression:

> These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply...

7. Justice Bastarache at para. 46 was clear that *Cyanamid* (and *RJR-MacDonald*, by extension) does not adequately take freedom of expression into account and is flawed as far as protected expression is concerned. In employing this test, the British Columbia court below inadequately considered freedom of expression rights. This Honourable Court should determine a decision-making framework that fully considers the rights of all persons implicated, speakers and listeners, and it should do so mindful of the fact that those affected by the order are not merely the litigants, but strangers to the dispute.

C. Factors to be considered for an appropriate test for the removal of content in this case

8. In determining the appropriate test, we note that common law discretionary publication bans are usually considered through the lens of the "Dagenais-Mentuck Test". In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR. 835, this Honourable Court definitively determined that there is a compelling need to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Constitution*" (p. 878), which of course includes the *Charter*. The circumstances in which the Dagenais-Mentuck test most often arise relate to publication bans over court proceedings. All such orders, of course, implicate freedom to receive information under s. 2(b). When applied to court proceedings, the rights to be counterbalanced are generally individual rights related to trial fairness or rooted in the administration of justice generally. In *Dagenais*, the media's freedom of expression had to be reconciled with accused

persons' rights to fair trials, so the Court derived a test that "clearly reflects the substance of the Oakes test" (p. 878).

9. In the present case, there is no countervailing *Charter* right or other Constitutional right in the balance. In this case, the Court has before it Google Inc.'s *Charter* right to freedom of expression and everyone's right to receive information (under the *Charter* for residents of Canada and under the *Declaration* elsewhere). The Respondents do not have any *Charter* rights that are implicated. As the Ontario Court of Appeal summarized, one can only obtain a publication ban if there is a public interest at stake (such as a *Charter* right or a real threat to the proper administration of justice):

> [25] Mentuck describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the Dagenais/Mentuck test: *Sierra Club of Canada*, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test.

10. This Honourable Court is not adjudicating on the question of whether the original plaintiff should be able to obtain an order against the defendants, but is rather considering the rights of uninvolved third parties, when the original plaintiff was simply unsuccessful in its attempts to enforce an injunction against the original defendant. On one side of the balance are the *Charter* and human rights of strangers to the dispute. No rights appear on the other side of the scale beyond an economic interest in a private dispute.

D. Considerations from other discretionary, equitable orders that have an effect on unrelated third parties.

11. Wikimedia draws the Court's attention to the body of case law developing in Canada related to "Norwich Orders", which are equitable orders requiring a third party to provide information to a putative litigant. The orders originate from *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 and have been described by the Ontario Court of Appeal in *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 (CanLII), 96 OR (3d) 481:

> [41] The remedy of pre-action discovery derives from the ancient bill of discovery in equity. Contemporary consideration of this type of equitable relief began with the 1974 decision of the House of Lords in Norwich Pharmacal, a case of suspected patent infringement. Norwich Pharmacal holds that, in certain circumstances, an action for discovery may be allowed against an "involved" third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so…

12. Importantly, the third party can only be dragged into the dispute if they are "caught up" in the underlying dispute and they will be made whole for their involvement, meaning their costs will be covered by the applicant. While they are not direct parallels, Norwich cases do indicate a strong -- and prudent -- hesitation in putting a burden on a relatively uninvolved party, even where the burden is simply to provide information. In this case, however, the burden on the third party is suppression of speech for which one can never be made whole. At the same time, these non-litigants are obliged to appear in court and are then compelled to assist the litigants in the suppression of content. For a not-for-profit like Wikimedia, the cost alone of addressing these applications and motions for amendments to orders, with hearings around the world, would be a significant burden. However, in the face of such a burden, the only other alternative is to not oppose them and acquiesce, all at the cost of freedom of expression and access to information.

13. Contrary to the Court of Appeal's characterization at para. 86ff, the order granted in this case is not the same as a Mareva injunction, whether that injunction is worldwide or otherwise. By its nature, a Mareva injunction only impacts the litigant or the potential litigant's access to assets. The order granted in this case affects the whole world's access to information and free expression, all within an action to which these people will never be a party.

14. The Court of Appeal below erred in applying the wrong test and in not giving sufficient consideration to freedom of expression rights in its decision-making framework. Discretionary orders that affect the rights of individuals to receive information -- both in Canada and abroad -- should be the result of a coherent, principled, and pragmatic test.

E. The proliferation of global orders will have a negative effect on the rights of Canadians and non-Canadians to receive information.

15. This Honourable Court is being called upon to craft a decision-making framework that properly takes the above interests of third parties into account. Where the order would propose to have worldwide effect, the Wikimedia Foundation respectfully submits a number of important factors must be taken into account.

16. First of all, worldwide orders of foreign courts will have effects in Canada, and many of them will interfere with our own *Charter*-protected rights. The Court of Appeal at paragraphs 95-96 of its decision refers to a range of cases where non-Canadian courts have granted orders with a purported global reach and concluded that problems with comity have not been apparent. What the Court of Appeal failed to consider, however, is the effect of such orders on freedom of expression of Canadians and the risk that foreign courts will follow the Court of Appeal's lead, further infringing Canadians' right to receive information.

17. While it would appear that comity was not a top consideration when these global orders were made by non-Canadian courts, it should be a consideration by this Court. All of the foreign orders referred to by the Court of Appeal have an effect on the rights of Canadians. To use the most recent and high-profile example, the "right to be forgotten" case from Spain, the European order effectively orders Google to not provide information (which is lawful under Canadian law) to Canadians. The factual foundations for this case are found at paragraph 14 of the decision [Case C-131/12, ELI:EU:C:2014:317]:

> [14] On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

18. Mr. Gonzalez sought to suppress the presence of information on the internet regarding an auction of his assets for the recovery of a debt. He complained about the newspaper and about Google. The Spanish authorities could not order the newspaper to remove the content, so the focus

shifted to Google. In the result, Google has been ordered to remove the article about the auction from its search results not only in Spain, or in Europe - but worldwide. The result is that Google has been ordered to **not** provide this information to Canadians, though there can be little doubt that such an order would not be available from a Canadian court.

19. A Canadian worldwide order for the removal of expressive content has the effect of imposing Canadian principles related to freedom of expression (assuming such principles are fully canvassed) on citizens of other countries. Perhaps more problematic is that the increasing use of such orders by other countries -- perhaps emboldened by the example of this case -- will have the effect of imposing non-Canadian principles related to access to information on Canadians. Canadians are rightly proud of this country's democratic principles. Some countries have higher bars for the protection of expression while others -- including some advanced democracies -- have lower ones. And, of course, there are countries that do not share the values expressed in our *Charter* or the Declaration. If global orders proliferate, it will logically be the tendency for the internet to descend to the lowest common denominator. This would be directly at the expense of content platforms like Wikipedia, search engines such as Google, and the global public.

20. While this case relates to commercial speech, the Court should be mindful of the fact that expression that is creative, educational, and informative will also come before courts around the world. The Paulson Affidavit describes many circumstances where the Wikimedia Foundation and its supporters have been engaged in litigation related to expression. In the future, if global orders become the norm, cases such as those described in paragraph 12 of the Paulson Affidavit will have a global scope. As an example, Ms. Paulson refers at paragraph 15 to a suit in Sweden where Wikimedia Sverige is defending the right to include photographs of public art installations in an online encyclopedia. It is alleged that this violates Swedish copyright. One does not need a vivid imagination to foresee orders for removal with a global scope, affecting Canadians where such copyright protection does not exist. Canadians have a right to take and publish such photographs under the *Copyright Act* (Canada), but can be precluded from doing so because of differences between our copyright laws and those of another jurisdiction.

21. Takedown demands are far from isolated and this question is far from academic. Many organizations -- the Wikimedia Foundation included -- publish "Transparency Reports" to provide

a fuller understanding of the "takedown requests" they receive, along with demands for information about users. The Google Transparency Report details more than 31,462 takedown demands since 2009. Of these, 13,517 are said to be court orders from around the world. Facebook's report lists 55,827 "Government Requests to Restrict Access to Content" in just one half year (July - December 2015). Twitter's similar report includes 761 court orders and 4,434 other government demands to remove information from its platform between January and June of 2016. In Turkey in particular, Twitter's report states that it has filed "346 legal objections with Turkish courts in response to 712 of the Turkish court orders we received."

22. Just as the British Columbia Court of Appeal took notice of the European decisions referred to above, courts around the world will be looking to the well-respected Supreme Court of Canada for reasoned guidance on whether global orders should ever be issued at all, and if they are to exist, what criteria should be applied to meaningfully give effect to the free speech rights of speakers and listeners, both in Canada and in the rest of the world.

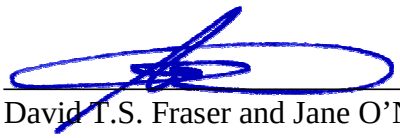
PART IV – SUBMISSION AS TO COSTS

23. Wikimedia does not seek costs and asks that costs not be awarded against it.

PART V – ORDER REQUESTED

24. Wikimedia takes no position on the disposition of the appeal, but respectfully requests that the constitutional issues addressed in this Factum be determined in accordance with these submissions. Wikimedia respectfully requests leave to present oral argument.

Dated at Halifax, October 4, 2016



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PART VI – TABLE OF AUTHORITIES

PART VII – STATUTORY PROVISIONS

Universal Declaration of Human Rights (1948), Article 19

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> Tout individu a droit à la liberté d'opinion et d'expression, ce qui implique le droit de ne pas être inquiété pour ses opinions et celui de chercher, de recevoir et de répandre, sans considérations de frontières, les informations et les idées par quelque moyen d'expression que ce soit.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), Article 19

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.