S.C.C. FILE NUMBER: 36602

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

BETWEEN:

GOOGLE INC.

APPELLANT
(Appellant)

and

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

RESPONDENTS
(Respondents)

and

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PART I: OVERVIEW AND FACTS

A. Overview

1. This case provides an opportunity for this Honourable Court to map the limits of Canadian judicial authority over Internet content. Defining the proper limits of the exercise of Canadian judicial authority requires adherence to guiding principles, including comity; the Court will effectively also be addressing the scope of foreign courts' jurisdiction over global Internet content that will be recognized and enforced inside Canada. As such, the Canadian Civil Liberties Association ("CCLA") urges this Court to adopt a restrained approach to the granting of orders with extraterritorial constraints on global Internet content lest Canadian courts be bound to enforce orders from other nations' courts that unreasonably restrict freedom of expression in Canada.

2. The CCLA submits that *Charter* values require that:

(a) an order against a third party for the removal of search results should only be made where a domestic court has already determined that the underlying web content is unlawful;

(b) orders affecting freedom of expression on the Internet should be narrowly tailored to such material that is *prima facie* directed at or sought out from Canada;

(c) orders restricting the availability of Internet content should only be made where reasonable alternative measures will not suffice; and

(d) the salutary effects of such an order must outweigh the deleterious effects on freedom of expression in Canada and around the world.

B. The present appeal

3. The underlying action involved an intellectual property dispute in B.C. The plaintiffs manufactured computer networking devices. They claimed that the defendants stole their trade secrets to sell and distribute a competing product on the Internet.

4. Google was not a party to the underlying action. The defendants' websites, however, were listed on its search engine. Google initially complied with the plaintiffs' request to remove

specific web pages from its Google.ca search results (i.e. from searches originating in Canada), but was unwilling to categorically block the defendants' websites from appearing in any search results, conducted on any Google website, from any location anywhere in the world (e.g. on www.google.com or www.google.fr).

5. The plaintiffs sought an injunction against Google to stop it from including the defendants' websites in worldwide search results. The B.C. Supreme Court concluded it had territorial jurisdiction to grant an injunction against Google and ordered the results be removed from all Google search results worldwide.

6. On appeal, the B.C. Court of Appeal found that the court at first instance had territorial jurisdiction over the underlying subject of the dispute—the plaintiffs' intellectual property dispute—and that it therefore had territorial jurisdiction over the injunction application regarding the non-parties (Google and Google Canada). It rejected Google's argument articulating limits on the B.C. Supreme Court's authority to grant an injunction with worldwide, extraterritorial effect.

7. While the B.C. Court of Appeal noted that there is no firm rule against making an order with extraterritorial effect, it observed that a court should be mindful of the principle of comity, which requires courts to respect the jurisdiction and norms of other courts and nations. In making orders with worldwide effect, it held—relying in part on CCLA's submission—that courts must be very cautious about imposing limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values on freedom of expression, the order should not be made. However, the Court of Appeal found that on the facts before the court, there was nothing impacting foreign freedom of speech or violating principles of comity as the defendants were not using the websites for any legitimate or lawful activity. The Court of Appeal upheld the order and it now comes before this Court.

PART II: ISSUES

8. A core issue for CCLA in this appeal is the scope of the superior courts' jurisdiction to restrain expression on the Internet and their discretionary authority with respect to free expression and access to information by foreign nationals. Further, these issues are simultaneously affected by the constraints imposed upon Canadian courts by the principles of judicial comity and reciprocity.

9. In adjudging orders targeting the Internet, the Court's decision must be informed by respect for the rights of self-determination and freedom of expression of other nations and their citizens. The CCLA therefore urges the Court to adopt a restrained view of the superior courts' jurisdiction which respects, protects and promotes freedom of expression at home and abroad, while providing a means of redress for those who seek the assistance of our courts.

PART III: ARGUMENT

A. Freedom of expression is a core constitutional value and courts should tread carefully where other nations' self-determination is implicated

10. The manner in which a nation treats freedom of expression is a core part of its self-determination, rooted in a nation's historical and social context, and the ways in which its constitutional values (written or unwritten), norms and legal system have evolved. As articulated by Professor Fiss, speech is worthy of protection "because it is essential for collective self-determination".[1] This Court has held that the "marketplace of ideas" enabled by free expression "is, itself, central to a strong democracy".[2]

11. Freedom of expression is tied to self-determination in that the exercise of the right determines how democratic rights are expressed, how governments are formed, and how laws and constitutions are made and justified. This formative capacity makes freedom of expression different from other constitutional rights, as is recognised in various international agreements and statements of principle,[3] including the United Nations *Universal Declaration of Human Rights*. Article 19 of the *Declaration* explicitly acknowledges that free expression crosses borders and must not be subject to interference:

> 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.]

12. Similarly, the *International Covenant on Civil and Political Rights* provides:

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[1] O.M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 3.
[2] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 140. See also: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 952, 966.
[3] See the preamble to United Nations, *Resolution No. 59(I)*, 1st General Assembly, 14 December 1946 and *Final Act – United Nations Conference on Freedom of Information* (U.N. Publications, 1948 XIV); and *Taylor*, *supra*.

> 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.[4]

13. Canada's protection of that right is enshrined in s. 2(b) of the *Charter*. The central place of freedom of expression within Canada's borders is reflected in the *Charter's* restraints on the courts' exercise of discretionary authority where freedom of expression is concerned.[5] Where rights of expression in foreign states are concerned, the CCLA submits that similar restraints are necessarily imposed by the doctrines of comity and reciprocity.

B. Comity requires courts to respect foreign freedom of expression

14. In *Morguard Investments Ltd. v. De Savoye*, this Court identified comity as the "informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory."[6]

15. Where core constitutional matters are at stake, comity requires that courts avoid the appearance of or actual interference beyond their territorial limits. While such interference may be justified in cases involving the violation of international law or *jus cogens* obligations, the principle of sovereign equality under international law requires that states and their judicial institutions respect each other's authority to regulate internal affairs.[7] The United Nations, for example, is founded upon "respect for the principle of equal rights and self-determination of peoples".[8] Similarly, the United States Supreme Court, in 1897, observed that:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[9]
>
> (Emphasis added.)

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[4] *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 19.
[5] *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 839.
[6] [1990] 3 S.C.R. 1077 at p. 1095; see also *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 74.
[7] *R. v. Hape*, 2007 SCC 26 at para. 40; see *Charter of the United Nations*, Ch. 1, art. 1 and 2; and, for example, *Underhill v. Hernandez*, 168 U.S. 250 at 252 (1897).
[8] *Charter of the United Nations*, *supra*, article 2.
[9] *Underhill v. Hernandez*, *supra*.

16. Countries may reasonably differ on what is acceptable expression, and the consequences of one court determining what content is accessible to the citizens of another nation have serious ramifications for freedom of expression. Moreover, orders or decisions of a domestic court that purport to limit free speech for persons located abroad pose a serious challenge to comity, because they do not respect the integrity and self-determination of other nations.

17. Decisions from other jurisdictions that have already engaged with similar challenges demonstrate the inherent difficulties in attempting to regulate expressive activities outside the forum, and the negative consequences for judicial comity occasioned by attempts to do so. In particular, the competing decisions of the French and American courts in *Yahoo! Inc. v. La Ligue contre le racisme et l'antisémitisme* are instructive, and the CCLA urges this Court to review them with an eye to avoiding the problems they exemplify.[10]

18. The precedent set by worldwide orders that restrict freedom of expression may also give rise to concerns about forum shopping. Parties may seek out those courts most willing to grant a remedy with worldwide impact even where jurisdictional ties are tenuous. When coupled with the vastly different protections for freedom of expression worldwide, the potential for using a court order from a highly-restrictive regime to attempt to limit expression around the globe is of significant concern to the CCLA, and something our domestic courts must guard against.

C. The Internet does not respect borders and cannot be governed by any one court

19. The Internet's capacity to disseminate information is "one of the great innovations of the information age" whose "use should be facilitated rather than discouraged".[11] The Internet cannot meaningfully function without freedom of expression;[12] it has no national borders. These considerations should guide this Court's approach to the issues, particularly to the provision of search results by providers like Google, which both communicate what information is accessible

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[10] *La Ligue contre le racisme et l'antisémitisme c. La Société YAHOO ! Inc.*, Tribunal de Grande Instance de Paris (May 22, 2000 and November 20, 2000), Court File No. 00/05308; *YAHOO! INC. v. La Ligue contre le racisme et l'antisémitisme* (2001), 169F. Supp. 2d 1181 (N. Dist. Cal.) rev'd (2004) 379 F.3d 1120 (9th Cir.) and (2006) 433 F.3d 1199 (9th Cir. *en banc*).

[11] *SOCAN v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 40.

[12] *Crookes v. Newton*, 2011 SCC 47 at para. 36.

on the Internet and provide access to underlying expressive content through hyperlinks, which, this Court has held, are content neutral.[13]

20. The flexible and borderless nature of the Internet is central to its value as an engine of free speech, yet it presents challenges to the territorial reach of laws, states and courts. The issue raised for consideration in this case is, to what extent should Canadian courts purport to restrict access to content on the Internet beyond Canadian borders?

21. While the Internet is inherently 'transnational', courts have cautioned against subjecting persons to the jurisdiction of any court anywhere simply by having used the Internet to communicate, because of the potentially "crippling effect on freedom of expression" of such extraterritorial exercise of jurisdiction.[14] Accordingly, where an entity makes available information over the Internet in nearly every country on the planet (as Google does), letting individual courts determine allowable content for the world is equally threatening to freedom of expression.

22. Canadian courts should strive not to make orders that affect the expressive acts of foreigners beyond those which relate specifically to this jurisdiction and its residents, to avoid trenching on foreigners' entitlement to self-determination. In particular, our courts should be wary of asserting authority over expressive activity beyond the borders of the country, lest other courts, from places with different approaches to freedom of expression, consider them unenforceable. Similarly, the courts of Canada should consider the spectre of orders from jurisdictions with less permissive views of freedom of expression that purport to limit what content can be accessed by citizens here. The requirement for reciprocity means courts should be conservative in the exercise of their jurisdiction, so that other courts observe the same respect. There is a real risk to the strong reputation of Canadian courts if worldwide orders are made in Canada and then regularly ignored by other countries.[15] The issues of enforceability and reciprocity must be a paramount consideration when orders of this type are contemplated.

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[13] *Ibid.*, at para. 30.
[14] *Braintech Inc. v. Kostiuk*, 1999 BCCA 169 at paras. 63-64.
[15] See *United Services Funds (Trustee of) v. Richardson Greenshields of Canada Ltd.* (1987), 18 B.C.L.R. (2d) 360 (S.C.) at 366 aff'd (1988), 23 B.C.L.R. (2d) 1 (C.A.).

D. The nature of the speech at issue and the Court's role in characterizing that speech

23. This Court has recognised that expressive rights cover a broad spectrum of material, ranging from commercial speech[16] to the most fundamental, personal views, however different from the mainstream.[17] All of it is protected by s. 2(b) of the *Charter*. Although this case does not engage state action, and is not therefore directly subject to the *Charter*, the approach adopted by the Court in establishing appropriate limitations on a court's discretionary powers must still be informed by *Charter* values. Thus, in deciding whether to make an order affecting the accessibility of expressive content over the Internet, one of the factors that the court should consider is the nature (not the value) of the underlying speech that will be affected (i.e. the underlying web content linked to by a search provider such as Google, as opposed to the search results or URL index generated by Google).

24. The need for commercial expression "derives from the very nature of our economic system ... The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information".[18] The B.C. Court of Appeal's ultimate determination to issue the worldwide order in this case is implicitly premised on a view that core freedom of expression values are not implicated in cases involving commercial expression. CCLA recognizes that Canadian jurisprudence allows for limits on expression to be more readily accepted as reasonable and constitutional where an important public need or benefit conflicts with primarily commercial expression. However, the characterization of certain expression as commercial is an exercise that requires significant care. There are many examples of expressive activity that incorporates both commercial elements and elements that touch the very core of the s. 2(b) protection. For example, a consumer boycott of a retail store is expression linked directly to commerce but might also be a comment on the store's social or environmental practices, or raise social or political concerns.

25. The need for courts to be mindful of the nature (or category) of the expression at issue does not mean that courts should assess the relative "value" of particular speech. Comity may be

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[16] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

[17] *R. v. Sharpe*, 2001 SCC 2 at para. 21.

[18] *R. v. Guignard*, 2002 SCC 14 at para. 21.

less imperilled by an order that limits access to online content where the underlying speech is not core democratic or political speech. Conversely, judges should proceed with due caution when the underlying speech implicates the rights of self-determination of foreigners, even where the expression at issue may be controversial, unpopular, or express a dissenting view.

E. This Court should impose structural safeguards in crafting these types of orders

26. The CCLA submits that, in light of the obligations imposed by respect for comity and reciprocity, this Court should adopt an approach to orders that potentially impact foreign expressive activities that is minimally impairing of freedom of expression, with limited exceptions. As a preliminary matter, standard protections must be included in the form of the order, including a limited time during which the order remains operative, procedures to vary or rescind the order and provisions that allow interested third or fourth parties leave to apply to amend or set aside the order. The substance of the order must also be limited, in accordance with the guidelines described below.

27. First, when faced with an application for an order against a third party for the removal of search results, such orders should be made exceptionally, where a court has already determined that the underlying web content is unlawful (as in this case).

28. Second, the court should narrowly tailor any order affecting freedom of expression to expressive material that is *prima facie* directed at or sought out from Canada. In practice, this means limiting orders to search results displayed on national websites. By way of example, here, any order ought to be limited to results displayed on www.google.ca.[19] Exceptions to this rule should be subject to a stringent standard of justification in order to avoid undermining the core concerns of self-determination bound up with each nation's approach to freedom of expression.

29. Third, in any case where a court is asked to exercise its discretionary authority in a manner that restricts Canadian *Charter* rights to freedom of expression, the case law dictates that an order should only be given when:

(a) such an order is necessary to give effect to common law or statutory rights of the

[19] This was essentially the procedure adopted by the French court in *Max Mosely v. Google France SARL and Google Inc.* (Tribunal de Grande Instance de Paris (6 November 2013)) and the effect that the same tribunal appears to have tried to achieve in *La Ligue contre le racisme* (Fr.), *supra*; and see the discussion in *Yahoo!* (U.S.), *supra* (2006) at 69 and 139.

parties because reasonably alternative measures will not protect those common law or statutory rights; and

(b) the salutary effects of the order outweigh the deleterious effects on the right to free expression.[20]

30. Where such an order is to be made against a non-resident, non-party Internet provider or search engine, this test should be applied to take into account principles of comity and the freedom of each state to develop its own approach to free speech. This Court has acknowledged that the factors to be considered in the application of this test may vary depending on the context.[21]

31. The CCLA's approach recognises that the Internet is too fluid and borderless for any court to ever fully prevent or limit access from a particular physical place to particular digital content, but—by focusing on the means by which such content is usually accessed—permits the court to exert and preserve its authority and maintain the integrity of the administration of justice, while respecting that all states develop their own approach to freedom of expression. To the extent that territorially-limited and narrowly-tailored orders may be ineffective in protecting those seeking the court's assistance, this is a problem for legislatures, Parliament, and the international community to address. CCLA submits that it is a not a problem that can be solved on an *ad hoc* basis in a series of domestic judicial decisions.

PART IV: SUBMISSIONS REGARDING COSTS

32. The CCLA seeks no order as to costs, and asks that no award of costs be made against it.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

33. CCLA respectfully requests leave to present oral argument during the hearing of the appeal, not to exceed ten minutes.

34. The CCLA was granted leave to intervene in the court below.[22] Its counsel filed a factum and made oral argument. In the reasons for judgment, the B.C. Court of Appeal noted the

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[20] *Dagenais, supra*, at 839; see also *R. v Mentuck*, 2001 SCC 76 at paras. 22-23; and *Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 36-48.

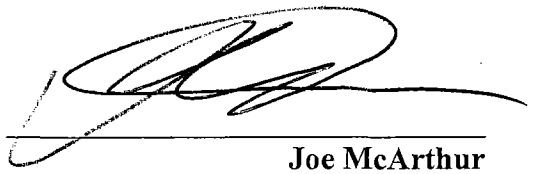
[21] See, for example, see *Globe and Mail v. Canada*, 2010 SCC 41; *R. v. N.S.*, 2012 SCC 72; and *A.B. v Bragg Communications Inc.*, 2012 SCC 46.

[22] *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 (in Chambers, Groberman J.A.).

particular assistance of the CCLA, "which dealt with international aspects of freedom of speech."[23] Mr. Justice Groberman quoted and agreed with the submissions of the CCLA on the need for Canadian courts to refuse to exercise their discretion to make extraterritorial orders where such orders may impact on core constitutional values outside of Canada.[24]

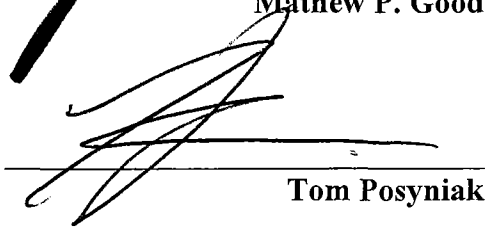
35. It can be fairly said that CCLA's participation was important in moving the focus of this appeal towards the key underlying issue, namely freedom of expression. CCLA seeks the opportunity to continue that dialogue with this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28th day of September, 2016.



Joe McArthur

Mathew P. Good



Tom Posyniak

[23] *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265 at para. 4.
[24] *Ibid.*, at paras. 91, 108.

PART VI: TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Cited
Cases	--
A.B. v. Bragg Communications Inc., 2012 SCC 46	30
Braintech Inc. v. Kostiuk, 1999 BCCA 169	21
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PART VII: LEGISLATION AT ISSUE

Charter of the United Nations

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; ...

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members. ...

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. ...

United Nations

Resolution No. 59(I)
1st General Assembly, 14 December 1946

The General Assembly,
Whereas
Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated;

Freedom of information implies the right to gather, transmit and public news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world;

Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent;

Understanding and co-operation among nations are impossible without an alert and sound world opinion, which, in turn, is wholly dependent upon freedom of information …

United Nations

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

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. ...