S.C.C. Court File No.

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

B E T W E E N:
(Court Seal)

GOOGLE INC.

Applicant

and

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

Respondents

and

MORGAN JACK, ANDREW CRAWFORD, DATALINK TECHNOLOGY GATEWAYS INC., DATALINK 5, DATALINK 6, JOHN DOE, DATALINK TECHNOLOGIES GATEWAYS LLC, AND LEE INGRAM

Non-Parties to the Appeal

APPLICATION RECORD OF THE APPLICANT, GOOGLE INC.

(Pursuant to Section 40(1) of the *Supreme Court Act* and Rule 25(1) of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT OF THE APPLICANT, GOOGLE INC.

(Pursuant to Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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PART I: OVERVIEW AND FACTS

OVERVIEW

1. Google seeks leave to appeal to this Court from the decision of the British Columbia Court of Appeal. The Court of Appeal affirmed an unprecedented worldwide order prohibiting Google's search engine from informing the public (including users both inside and outside Canada) about the existence and addresses of certain publicly available webpages when users search for them.

2. Google is not a party to the underlying action, nor is Google alleged to have done anything wrong. The action is brought by the designers of industrial equipment against parties that they say stole trade secrets and developed derivative products which they are selling online. Some of the defendants have fled the jurisdiction, and their pleadings have been struck.

3. Google was brought into this case because, when its system automatically indexed the billions of pages on the Internet, those pages included the defendants'. In the same way that Google makes it easier to find *all* publicly available content online, Google's search engine makes it easier to find the defendants' webpages by providing users who ask with a hyperlink.

4. The order against Google goes well beyond that necessary to protect the commercial interests of the plaintiffs, by ordering Google to globally and permanently remove the defendants' websites from users' search results.

5. This case raises questions of national and international importance that require the attention of this Court:

   (a) Under what circumstances may a court order a search engine to block search results, having regard to the interest in access to information and freedom of expression, and what limits (either geographic or temporal) must be imposed on those orders?;

(b) Do Canadian courts have the authority to block search results outside of Canada's borders?; and

(c) Under what circumstances, if any, is a litigant entitled to an interlocutory injunction against a non-party that is not alleged to have done anything wrong?

6. The order raises significant concerns for the freedom to access information on the Internet and freedom of speech, as guaranteed by the Canadian *Charter of Rights and Freedoms*:

(a) The object of the order is to restrict users' access to information on the Internet by creating gaps and weaknesses in their chosen search tool in ways that will not be immediately transparent to those users.

(b) This Court's guidance is required regarding what test should be applied when a litigant seeks to limit search results.

(c) The courts below have effectively created a new cause of action against search engines (or perhaps just Google) for indexing the Internet. The plaintiffs have no freestanding right against Google for the defendants to be more difficult to find online.

(d) Neither court below addressed this Court's relevant decisions in *Crookes v. Newton* and *SOCAN*, which both cautioned against rigidly applying legal doctrines to the Internet in ways that would threaten the flow of information online.

> ***Crookes v. Newton***: This Court held that Jon Newton is not liable in defamation for providing a hyperlink to defamatory material, and his right to provide that hyperlink engages his freedom of expression.
>
> ***SOCAN:*** This Court rejected the argument that Internet service providers breach copyright by hosting cached copies of material, stating that this

> conduct is "content neutral" and "ought not to have any legal bearing on the communication between the content provider and the end user."
>
> In both of these cases, this Court held and reaffirmed that the Internet is "one of the great innovations of the information age" whose "use should be facilitated rather than discouraged." The courts below made no mention of this Court's relevant authorities.
>
> **Reference:** *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers*, 2004 SCC 45 at para. 40, quoted in *Crookes v. Newton*, 2011 SCC 47 at para. 34

7. This Court should grant leave to determine under which circumstances such an order is justified, and to ensure that any such orders are informed by this Court's *Charter* jurisprudence.

8. This Court should also grant leave to determine whether Canadian courts have the authority to block search results outside of Canada's borders:

(a) The order legitimizes the practice of one country dictating what content the entire world can access. In an era when Canada is championing the cause of freedom of speech online, this decision will assist other countries that wish to limit their own citizens' and Canadians' access to online material.

(b) This Court should grant leave to provide guidance to lower courts on how to circumscribe the geographic scope of orders that limit access to information on the Internet, particularly in view of the principle of comity.

(c) This Court should also grant leave to determine if a Canadian court has the authority to grant coercive orders against non-residents when they are not alleged to have done anything wrong. In the case of subpoenas, it is settled law that one country's courts cannot coerce innocent foreign residents to provide evidence. The prohibition order against Google has far reaching implications for the Internet.

(d) The only connections identified by the courts below between Google and British Columbia are that Google sells advertising to British Columbia residents and Google automatically indexes webpages hosted in British Columbia. On these bases, virtually every jurisdiction in the world could make worldwide orders that limit access to information on the Internet.

9. The order is also unprecedented because it is an interlocutory injunctive order against a non-party that is not alleged to have done anything wrong:

(a) The order is styled as an "interlocutory order", even though it is not meaningfully related to any ongoing litigation, and is on its face intended to remain in force for perpetuity.

(b) Interlocutory injunctions are designed to preserve the *status quo* pending trial. To the contrary, the order granted against Google is wrongly styled as interlocutory as the pleadings of the key defendants have been struck. It provides the plaintiffs with permanent, new rights to which they were never entitled.

(c) The plaintiffs have no legal entitlement to a permanent injunction against Google.

10. Interlocutory injunctions allow any private litigant to direct the coercive power of the state against another private party based on attenuated grounds, often determined on a balance of convenience. This remedy was never intended to be used as a way to compel an innocent bystander to actively assist a litigant purely because it would be convenient to do so. Yet that is exactly what occurred in this case, without any court giving serious consideration to whether private civil interests should override the public interest in access to information, free expression and content neutrality on the Internet.

11. Leave ought to be granted.

STATEMENT OF FACTS

(a) The underlying action against the Datalink defendants

12. Equustek Solutions Inc. ("Equustek") designs and manufactures networking devices for industrial use. In April 2011, Equustek commenced an action against Morgan Jack, Andrew Crawford and the Datalink companies (the "Datalink Defendants") alleging that they conspired to steal trade secrets in order to develop and market a competing product.[1] Equustek alleged that the Datalink Defendants "passed-off" its product as an Equustek device through the use of Equustek trademarks on their websites.

Reference: Reasons for Judgment of the Honourable Justice Fenlon ("Motions Decision"), June 13, 2014, at para. 5

13. Equustek obtained interim orders against the Datalink Defendants, enjoining them from carrying on business over the Internet, from selling their product and from using Equustek's copyright materials on their websites (the "Defendants' websites"). The Datalink Defendants breached these orders and fled the jurisdiction, and accordingly their pleadings have been struck. There is also a warrant for the arrest of Morgan Jack.

Reference: Motions Decision at para. 6

(b) Google

14. Google Inc. ("Google") is a California-based search engine provider. Search engines are an important way that users find content on the Internet. Google operates a complex system that automatically indexes billions of web addresses (or "URLs") that are publicly available in order to generate lists of search results that respond to inquiries by users. Google does not host these billions of pages: it catalogues them in order to facilitate users' access to information.

Reference: Affidavit of John Blown sworn December 11, 2012, at paras. 6-9

15. When approached by the Plaintiffs, Google applied its internal policies, and of its own volition, removed over 300 URLs from search results on google.ca. However, Google is

[1] The plaintiffs also named other individual defendants, who are represented by counsel and are defending the claims.

opposed to blocking whole websites, and refused to do so when asked. Google considers the removal of an entire website from its search results to have a significant risk of over-blocking and thus requires identification of specific pages containing unlawful material. When the Plaintiffs asked Google to remove the entirety of the sites in question, worldwide, Google refused.

(c) Application Against Google

16. Equustek brought an application against Google seeking an order that Google suppress information regarding the existence of any of the Defendants' websites. Equustek did not initiate a new lawsuit against Google, but rather brought the application within the context of its action against the Defendants.

17. The Honourable Justice Fenlon (as she then was) granted the order, styled as an interlocutory injunction. She held that the court could grant this order against a non-party pursuant to the court's inherent jurisdiction, that the courts of British Columbia had jurisdiction to grant the order against Google because the court has jurisdiction over the underlying action between Equustek and the Defendants and that the plaintiffs' intellectual property was moveable property located in British Columbia. Justice Fenlon further held that Google carries on business in British Columbia because it sells advertising to British Columbia residents. She held that the order could apply to all of Google's services worldwide, regardless of whether they were directed to, or used by, anyone in Canada.

Reference: Motions Decision at paras. 26, 51 and 61

18. Justice Fenlon found that "[t]here is no evidence that Google acted in this case to deliberately flout this Court's order and assist the defendants." However, she held that the applicable test for granting an injunction against a non-party was the "balance of convenience" test. The Court asked whether the benefit to the Plaintiffs of obtaining the order outweighed the inconvenience to Google.

Reference: Motions Decision at para. 113

(d) Court of Appeal for British Columbia

19. The Court of Appeal dismissed Google's appeal, and affirmed Justice Fenlon's analysis. The Court held that:

(a) The Court has territorial competence over the injunction application because it has territorial competence over the underlying litigation between the plaintiffs and the defendants;

(b) Google carries on business in British Columbia because it sells advertising to British Columbia residents, and because it automatically indexes webpages hosted in British Columbia, thereby giving the courts of British Columbia personal jurisdiction over Google;

(c) "The granting of injunctive relief against third parties as an ancillary means of preserving the parties' rights is a well-established jurisdiction of the courts;" and

(d) The balance of convenience favours Equustek.

Reference: Decision of the Court of Appeal of British Columbia dated June 11, 2015 ("Court of Appeal Decision") at paras. 36, 54-55, 80 and 107

20. Both decisions below have been the subject of considerable discussion in the Canadian and American press, and within the legal profession.[2]

PART II: STATEMENT OF QUESTIONS IN ISSUE

21. The proposed appeal raises the following issues of public importance that warrant review by this Court:

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[2] Drew Hasselback, "Google gets ensnared in legal web" *The National Post* (June 24, 2015); Sunny Dhillon, "Google loses appeal on blocked site" *The Globe & Mail* (June 12, 2015); Jason Proctor, "Google Equustek BC court ruling raises fears of "censorship tourism" *CBC News* (July 25, 2015); Ian Austen, "Canadian judge says Google must remove links worldwide" *The New York Times* (June 19, 2014); Eriq Gardner, "In piracy fight, Google dealt huge defeat in Canadian Appeals Court" *The Hollywood Reporter* (June 12, 2015); Zachary Graves, "The dangerous proliferation of the 'Right to be Forgotten'" *The Huffington Post* (June 18, 2014); Justin Ling, "Where is Google?" *National Magazine: Canadian Bar Association* (June 2015); Emily Laidlaw, "Worldwide delisting from Google Search results: the significance of *Equustek Solutions Inc v Google Inc*" (June 25, 2015); Michael Geist, "Global deletion orders? BC court orders Google to remove websites from its worldwide index" (June 17, 2014) and "BC Court of Appeal upholds global deletion order against Google" (June 12, 2015)

(a) Under what circumstances may a court order a search engine to block search results, having regard to the interest in access to information and freedom of expression, and what limits (either geographic or temporal) must be imposed on those orders?;

(b) Do Canadian courts have the authority to block search results outside of Canada's borders?; and

(c) Under what circumstances, if any, is a litigant entitled to an interlocutory injunction against a non-party that is not alleged to have done anything wrong?

PART III: STATEMENT OF ARGUMENT

Issue 1: ***Under what circumstances may a court order a search engine to block search results, having regard to the interest in access to information and freedom of expression, and what limits (either geographic or temporal) must be imposed on those orders?***

22. The order against Google is without precedent in Canada.

23. No Canadian court has held that a litigant is entitled to prohibit Google (or any third party) from informing the public about the existence and location of their counter-party's website, which will continue to exist regardless of the suppression of Google, in the hopes that fewer people will visit that website.

24. The courts below relied on a controversial line of cases in Europe, in which courts have ordered Google to limit its search results.[3] These include circumstances in which individuals have invoked a "right to be forgotten" on the Internet. No such statutory powers of suppression exist in this country, and no legislative body has adopted the view that such suppression would be in the public interest in the case of private commercial disputes.

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[3] These include *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grand Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog https://inforrm.wordpress.com/2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/) and ECJ Google Spain SL, *Google Inc. v. Agencia Española de Protecciób de Datos, Mario Costeja González*, C-131/12 [2014], CURIA.

25. Google recognizes that in certain circumstances it is appropriate to remove material from search results, and will do so of its own volition. Where Google is advised of a court order made against a party to remove material, Google will often voluntarily facilitate the removal of a URL from its search results. The Court of Appeal underlined that Google chooses to remove certain search results.

26. However, leave ought to be granted in order to allow this Court to address when and under which circumstances Canadian courts may compel a search engine to block search results, having regard to the interest in freedom of expression, and to address the limits that should be placed on any such orders.

A. The public right to access information

27. This is a case about the public's right to access information, which is one of the central purposes underlying freedom of expression. Freedom of speech does not just protect the speaker, but also the listener. It is the right to both write and read materials.

Reference: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 at paras. 30 and 31; *International Fund for Animal Welfare, Inc. v. Canada*, [1989] 1 F.C. 335 (C.A.) at para. 16

28. While the order is against Google, the target of the order is the public. The order overtly seeks to make it harder for the public to find certain websites which remain online. The plaintiffs' objective was not to prevent Google itself from reading the defendants' websites, but to prevent Google's billions of users around the world from finding those websites.

29. In *Globe and Mail*, this Court drew a principled distinction between the liability of the tortfeasor and the rights of innocent readers of material.

Reference: *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 at para. 85 quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)

30. Ordinarily, the plaintiffs' private interest in limiting access to the defendants' websites does not impose any obligations on third parties. By analogy, confidentiality agreements only

bind the parties that sign them, and do not bar third parties from printing the materials in question. As held by this Court in *Globe and Mail*:

> [I]t would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.

Reference: *Globe and Mail, supra* at paras. 81 and 84

31. The decision below places Google in the impossible position of potentially being sanctioned for the contents of the billions of webpages it catalogues. The Court of Appeal has exposed all search engines to an indeterminate number of motions of this type, with an unpredictable cost and chilling effect.

32. Search engines like Google are an important conduit to allow users to make use of the Internet. In *Crookes v. Newton*, this Court underlined the crucial importance of the Internet, and held that an individual cannot be sued in defamation for merely providing a hyperlink to defamatory material. The Court in *Crookes* held that even though the defamatory content was not Mr. Newton's expression, his right to share it with a hyperlink engages his freedom of expression:

> The Internet's capacity to disseminate information has been described by this Court as "one of the great innovations of the information age" whose "use should be facilitated rather than discouraged" (SOCAN, at para. 40, per Binnie J.). Hyperlinks, in particular, are an indispensable part of its operation. As Matthew Collins explains, at para. 5.42:
>
> > Hyperlinks are the synapses connecting different parts of the world wide web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it.

Reference: *Crookes v. Newton, supra* at para. 34

33. Google's search engine does not provide the content of the Internet. Its role is simply to provide a catalogue of the publicly available Internet content that already exists. The plaintiffs targeted Google because of the important role of search engines in helping users find and access publicly available content on the Internet.

B. Interferes with the core values of speech

34. The order engages one of the underlying values of freedom of expression, notably, "the quest for truth, [...] and an embracing marketplace of ideas."

Reference: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 171

35. When a user searches on Google for a site or content, she or he is effectively asking the search engine which publicly available content on the Internet is most relevant to the user's search query.

36. The courts below focused primarily on the speech of the tortfeasors. However, that is not the relevant speech at issue when Google is prohibited from reporting to users which publicly available websites exist that may contain information relevant to the user's search query. By analogy, in *Crookes,* when Jon Newton shared a hyperlink to defamatory materials, his objective was to comment on the existence of the materials, and for that reason he could not be sanctioned for the contents of the defamatory webpage, nor compelled to remove his hyperlink.

C. Absence of a framework for evaluating the order

37. Since the order against Google is without precedent, the guidance of this Court is required regarding the proper test for whether and under what circumstances such an order should ever be granted.

38. The courts below applied the test for an interlocutory injunction in *RJR MacDonald*, which does not balance the private interest of a commercial litigant against the public interest in free speech. Moreover, it deals with an order against a party to the action, not a stranger. As such, its balance of convenience test creates an incomplete paradigm to resolve the clash of values that exist in this case.

39. This Court has historically applied the test from *Dagenais/Mentuck* to determine whether a limit on freedom of expression and access to information in the context of litigation is

warranted. According to this test, an order limiting the freedom of expression of third parties in the context of litigation may only be ordered where:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Reference: *R. v. Mentuck*, 2001 SCC 76 at para. 32

40. Unlike the test applied by the courts below, this Court's jurisprudence has infused the common law with the *Charter* value of freedom of expression.

41. While the *Dagenais/Mentuck* test was initially developed in the context of pure publication bans, this Court has applied the test in all cases where litigants seek to limit freedom of expression and access to information in the context of litigation. For instance, this Court applied *Mentuck* in *Sierra Club of Canada v. Canada (Minister of Finance)* when determining whether a confidentiality order could be imposed to seal court records from public access. The Court tied the confidentiality order to the applicant's right to a fair trial:

> [P]reventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial.
>
> **Reference**: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 50; see also *Vancouver Sun (Re)*, 2004 SCC 43 at para. 31

42. In *Sierra Club*, this Court underlined that confidentiality orders will only be granted to protect the public's interest in confidentiality, not the private interests of litigants.

> For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as

> in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".
>
> **Reference:** *Sierra Club*, *supra* at para. 55 quoting *F.N. (Re)*, [2000] 1 S.C.R. 880, at para. 10

43. Neither court below adverted to this Court's jurisprudence on limits for freedom of expression in the context of litigation.

44. This Court also evaluates confidentiality orders and publication bans by asking whether they are effective.

45. A publication ban against a single media outlet is not effective. The underlying content on the Internet exists independently of Google or any other search engine. The order against Google only prohibits Google from informing its users about the defendants' websites. Those same webpages are still publicly available and permitted to appear in search results on other search engines, such as Yahoo!, Bing or Baidu, and can still be accessed through other means, such as navigating to the site or by linking from shopping, social media or other sites. Therefore, even if search results are removed from Google's search engine, the content can still be accessed through other means.

46. Leave ought to be granted in order to allow this Court to address how courts should balance the threat to freedom of expression online against any salutary effects of such an order.

Issue 2: Do Canadian courts have the authority to block search results outside of Canada's borders?

47. Leave should also be granted so that this Court may address whether Canadian courts have the authority to block search results around the world.

A. Freedom of expression worldwide

48. The order below applies worldwide: it blocks the search results for Google's users around the world, not just in Canada.

49. A decision of this type will justify the universal assertion of jurisdiction by other countries to the detriment of Canadians' access. Injunctions of this type could seriously undermine the key value of the Internet. As held by this Court, courts should account for Canada's international commitments and obligations when balancing freedom of expression.

Reference: *Whatcott, supra* at para. 67

50. This issue was addressed by the U.S. District Court in *Yahoo Inc. v La Ligue Contre le Recisme et L'Antisemitisme*:

> The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press.

Reference: *Yahoo Inc. v La Ligue Contre le Recisme et L'Antisemitisme* (2001), 169 F Supp 2d 1181 at 1186-1187 (rev'd on other grounds (2006) 145 F Supp 2d 1168)

51. If Canadian courts assert the power to prohibit Google's search results worldwide on the basis of a private dispute by a British Columbia resident, on what principled basis can Canada object when other countries make similar worldwide orders?

B. No attempt to minimize the effect of the order

52. As stated by Justice Gonthier in *Dagenais*, "[a] ban must thus be carefully limited both in terms of temporal and geographic application."

Reference: *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 923 (dissenting, but not on this point)

53. In overturning a publication ban imposed in *Globe and Mail*, this Court underlined that it was "a blanket prohibition, and no indication was given as to when it would expire."

Reference: *Globe and Mail, supra* at para. 95

54. The courts below imposed the broadest possible ban - it applies everywhere in the world, seemingly for all time. The court rejected the suggestion that the order be limited to Canada on the basis that it would be more effective if the order was applied universally - expanding the effect of the order from 35 million Canadians to the entire globe - a 200-fold increase, with almost no consideration.

55. Nor is the temporal scope of the injunction aligned with the duration of the underlying intellectual property right. This is an unlimited order to protect a time-limited right, with the burden on Google to vary the scope and duration of the order.

56. Similarly the Court in *R. v. O.N.E.* limited the publication ban on the identity of undercover police officers to one year, stating:

> But I would still restrict the term of this ban to a period of one year from the date on which this judgment is released. The identity of police officers should not be, as a matter of general practice, shrouded in secrecy forever, absent serious and individualized dangers. A force of anonymous, undercover police is not the sort of institution the courts may legitimately, in effect, create; such would be the appearance of an order restraining publication of their identities in perpetuity.

Reference: *R. v. O.N.E.*, 2001 SCC 77 at para. 14

C. Coercive jurisdiction over non-residents

57. The order below was not an exercise of adjudicative jurisdiction against Google. Both courts stressed that Google was not alleged to have committed any legal wrong. Rather, the order is an exercise of the enforcement jurisdiction: it is an extraterritorial exercise of sovereign power insofar as it purports to directly command a person outside of Canada who has committed no civil wrong in Canada to do something, or risk being punished for contempt of the Canadian court.

58. This order is at odds with how Canadian courts treat coercive orders against non-parties. For instance, in the case of subpoenas, Canadian courts lack the authority to directly command residents of another country to provide evidence.

Reference: *Petro-Canada Products Inc. v. Dresser-Rand Canada Inc.* (2004), 348 A.R. 81, at 88 (C.A.); *Trustees of United Services Fund v. Richardson Greenshields of Canada Ltd.* (1988), 23 B.C.L.R. (2d) 1 at 7 (C.A.); *Vantel Broadcasting Co. v. Canada Labour Relations Board* (1962), 35 D.L.R. (2d) 620, at 631 (B.C. Sup. Ct.)

59. This principle has deep roots in the common law. In *Drummond v. Drummond* (1866), Lord Chelmsford L.C. states:

> The general principles laid down by Lord Westbury in *Cookney v. Anderson*, with regard to the exercise of extra territorial jurisdiction by the Courts of one country in another, apply rather to compulsory process than to the mere notification of proceedings. It may justly be considered to be an invasion of the jurisdiction of a country whenever an attempt is made to force one of its subjects, or any one under its protection and temporary allegiance, before a foreign tribunal.

Reference: *Drummond v. Drummond*, (1866) L.R. 2, Ch. App. 32, Lord Chelmsford L.C. states at p. 37; *Attorney General v. Prossor*, [1938] 2 K.B. 531, 537 & 541 (C.A.)

60. As international law scholar F.A. Mann observed:

> Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in the case of non-compliance. There is, it is true, no objection to a State, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of States in regard to the taking of evidence as it has developed over a long period of time.

Reference: F.A. Mann, "The Doctrine of Jurisdiction in International Law", (1964-I), 111 Recueil des Cours at p. 137

61. The fact that there is no cause of action pleaded against Google also compromises the analysis of jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act*. Section 3(e) of the *Act* requires the plaintiffs to establish a real and substantial connection between British Columbia and "the facts on which the proceeding against [Google] is based." On the test established below, nothing that Google does in Canada needs to be proven by the applicant, save that Google automatically indexes websites available to users in British Columbia.

Reference: *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 3(e)

62. This Court expressed concern about courts asserting universal jurisdiction over the Internet in *Van Breda*, stating that "the notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction."

Reference: *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 at para. 87

63. The courts below noted this passage, but proceeded to assert universal jurisdiction over Google since, as acknowledged by Justice LeBel, *Van Breda* did not concern e-trade.

Reference: The Court of Appeal Decision at para. 52; Motions Decision at para. 34

64. If the courts of British Columbia may assert jurisdiction over and grant orders against Google where it is not even alleged to have done anything wrong, presumably so could any other jurisdiction in the world.

Issue 3: Under what circumstance, if any, is a litigant entitled to an interlocutory injunction against a non-party that is not alleged to have done anything wrong?

65. The courts below granted an unprecedented interlocutory injunction against an innocent non-party to a dispute between others.

66. Quite apart from the effect on speech, whether and in which circumstances interlocutory injunctions may be issued against innocent non-parties is another question of national importance that requires the attention of this Court.

67. The courts below applied the test for interlocutory injunctions established by this Court in its 1994 decision *RJR MacDonald Inc. v Canada (Attorney General)*. In that case, this Court established the well-known three-part test, which requires the applicant to prove that:

(a) there is a serious question to be tried;

(b) the applicant will suffer irreparable harm if the injunction is not granted; and

(c) the balance of convenience favours the granting of the injunction.

Reference: *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

68. However, the test in *RJR MacDonald* was designed for interim and interlocutory orders that preserve remedies against parties to the litigation, not against non-parties. The test asks about the strength of the case against the defendants in order to justify granting relief before judgment. The test does not balance the private interest of a commercial litigant against the public interest in free speech, and is thus an incomplete paradigm to resolve the clash of values that exist in this case.

69. An interlocutory injunction is a serious and powerful remedy that allows a private litigant to request that the state's coercive powers be employed to assist purely private interests. It brings quasi-public law considerations - notably the risk of imprisonment for contempt - into private litigation.

70. If interlocutory injunctions may be ordered against non-parties, lower courts require this Court's guidance about how to adapt the test in *RJR MacDonald* to non-parties. The effect of the decisions below is that plaintiffs may obtain relief against innocent non-parties without ever establishing an entitlement to that relief. It creates remedies wherever "convenient" to the plaintiff.

71. While Google maintains that the *RJR MacDonald* test is inappropriate, it is also the case that the plaintiffs never established the elements of the *RJR MacDonald* test in any event. As to the first element, for example, the Court of Appeal asked only if there was a serious issue to be tried between the plaintiffs and the defendants, and not whether there was any serious issue to be tried against Google. In other words, the court granted relief against Google without establishing that the plaintiffs had any legal right to obtain the relief sought.

72. Moreover, an interlocutory order should – by definition – only remain in place until the end of a proceeding. As Justice Anderson held in *City of London v. Talbot Square Ltd.*, where relief is sought on an interlocutory basis, such relief is granted "only with a view to assuring that

the rights of the plaintiff asserted in the action may be effectually enforced by the Court in the event that the action ultimately succeeds." As recently held by Justice Corbett in *Pusateri's Yorkville Ltd. v. Toronto (City)*, the purpose of such an order is to "maintain a reasonable state of affairs so that the trial court may do justice at the end of the case."

Reference: *Pusateri's Yorkville Ltd. v. Toronto (City)*, 2013 ONSC 6860 at para. 9, quoting *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 1535 (SCJ) at paras. 29, 31-33; *City of London v. Talbot Square Ltd.* (1978), 22 O.R. (2d) 21 (Div. Ct.)

73. The court below acknowledged that the trial would never occur because the plaintiffs have effectively obtained everything they can expect to obtain as against the Datalink Defendants. Their pleadings were struck before the plaintiffs even sought the order against Google.

74. While styled as interlocutory, the type of order issued below is intended to remain in force permanently.

75. In the typical case of an interlocutory injunction, the party obtaining it comes under a duty to prosecute the action diligently, since the respondent to the injunction remains subject to a coercive order that was granted against it without a final adjudication of the merits of the case. In this case the order was granted against a non-party to the proceeding in circumstances where it is apparent that there will never be a final adjudication.

76. In the case of a final injunction, the applicant must establish a legal right to the relief sought. The courts below never explained how the plaintiffs had a legal right to compel an innocent non-party to assist them against the defendants. The courts below created a free-standing remedy against a search engine, without defining the scope of the remedy by reference to any recognized cause of action.

77. This Court should also grant leave in order to opine on the decision of the House of Lords in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133. This decision is relied upon heavily below to justify granting the order against a non-party. This Court has never considered whether this precedent applies in Canada.

78. With little analysis, the courts below found that an Internet search engine becomes "mixed up" in wrongdoing in the *Norwich* sense when it automatically archives and indexes webpages and then neutrally responds to queries as to the existence of such pages. The implication of this startling conclusion is that search engines are "mixed up" with all material online, and owe equitable duties predicated on being so "mixed up."

CONCLUSION

79. The decisions below have created out of whole cloth a new, powerful and invasive form of worldwide relief against innocent third parties on an interlocutory motion whose procedural context precludes any serious consideration of its substantive basis and systemic impact. If this form of relief is to be unleashed on the world, it should at least receive the careful consideration of Canada's highest court.

PART IV: SUBMISSIONS ON COSTS

80. The Applicant requests its costs of this application in any event of the cause.

PART V: ORDER REQUESTED

81. The Applicant respectfully requests leave to appeal the order of the Court of Appeal for British Columbia dated June 11, 2015, and that it be granted costs of this Application in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2015.

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PART VI: TABLE OF AUTHORITIES

SECONDARY LITERATURE

PART VII: STATUTORY PROVISIONS

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 3

3. A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.