

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.

APPLICANT

-and-

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

RESPONDENTS

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
VOLUME I (Tabs 1-2M, Pages 1-192)
(EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, and CLARMA
ENTERPRISES INC., RESPONDENTS)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

<u>TAB</u>	<u>PAGE</u>
VOLUME I (Tabs 1-2M)	
1. Response Memorandum	
PART I – STATEMENT OF FACTS.....	1
Overview.....	1
Errors in Application.....	3
Facts of the underlying dispute.....	7
Involvement of Google.....	8
Google’s censorship claims.....	10
PART II – STATEMENT OF ISSUES.....	11
PART III – STATEMENT OF ARGUMENT.....	11
Can a court order a search engine to block search results?.....	11
New Arguments.....	12
Inadequate Record.....	13
Mind the Gap.....	13
Freedom of Expression.....	16
Extra-territoriality.....	17
Comity.....	19
Injunctions against non-parties.....	19
Conclusion.....	19
PART IV – SUBMISSION ON COSTS.....	20
PART V – ORDER SOUGHT.....	20
PART VI – TABLE OF AUTHORITIES.....	21
PART VII – STATUTORY PROVISIONS.....	22
2. Documents Relied Upon	
A. Oral Reasons for Judgment of Justice Dickson, Supreme Court of British Columbia, June 20, 2012.....	26
B. Oral Reasons for Judgment of Justice Fenlon, Supreme Court of British Columbia, August 3, 2012.....	32
C. Order of Justice Fenlon, Supreme Court of British Columbia, August 3, 2012.....	41

D. Warrant – Contempt, Supreme Court of British Columbia, dated Sept 26, 2012.....	45
E. Reasons for Judgment of Justice Punnett, Supreme Court of British Columbia, Oct 10, 2012.....	46
F. Order Made After Application, Supreme Court of British Columbia, December 13, 2012.....	66
G. Order Made After Application, Supreme Court of British Columbia, March 8, 2013.....	69
H. Cross Examination of Steven Smith, Supreme Court of British Columbia, May 21, 2013.....	71
I. Appellant’s Factum, Court of Appeal, dated August 29, 2014.....	119
J. Affidavit #1 (CA) of John Blown, dated September 26, 2014.....	165
K. Affidavit #3 of John Blown, dated October 25, 2012.....	175
L. Affidavit #4 of John Blown, dated December 11, 2012.....	177
M. Affidavit #3 of Dermot Devine, dated March 10, 2012.....	182

VOLUME II (Tabs 2N-2Q)

N. Affidavit #13 of Dermot Devine, dated November 13, 2012.....	1
O. Affidavit #16 of Dermot Devine, dated December 6, 2012.....	83
P. Affidavit #18 of Dermot Devine, dated December 11, 2012.....	126
Q. Affidavit #27 of Dermot Devine, dated July 11, 2013.....	222

VOLUME III (Tabs 2R-2T)

R. Affidavit #2 of Robert Huth, dated February 7, 2012.....	1
S. Affidavit #7 of Sarah Perkonig, dated March 14, 2013.....	77
T. Affidavit #11 of Sarah Perkonig, dated July 11, 2013.....	190

VOLUME IV (Tabs 2U-2X)

U. Affidavit of Steven Smith, dated April 17, 2013.....	1
V. Affidavit #1 of Tugce Vulas, dated February 5, 2014.....	16
W. Affidavit #1 (CA) of John Zeljkovich, dated September 26, 2014.....	22
X. Affidavit #6 of John Zeljkovich, dated July 12, 2013.....	72

Book of Authorities filed separately.

PART I – STATEMENT OF FACTS

Overview

1. This case is about the rule of law in the face of illegal conduct on the internet.
2. The plaintiffs (respondents here) obtained multiple court orders against the Datalink defendants,¹ including three separate orders that prohibited them from carrying on business anywhere in the world. The Datalink defendants, whose customers are mostly outside of Canada, evaded all of these orders by carrying on business on the internet, from an undisclosed location.
3. The plaintiffs advised Google (the applicant here) of this state of affairs and asked Google to stop listing the illegal Datalink websites on search results, because if these websites cannot be found on Google, no online business can survive.
4. Google refused the plaintiffs' request even though Google de-lists websites every day as part of its ordinary business, and can do so without cost or inconvenience.²
5. The Chambers Judge found that by displaying the Datalink defendants' websites on its search results, Google is facilitating the ongoing breach of court orders.³ She found that the plaintiffs had no reasonable alternative, and that directing Google to stop displaying the Datalink websites was the only way for the court orders to be made effective.
6. Google has a website for almost every country in the world. For example, Google.ca is targeted at Canada, Google.com at the United States, Google.fr at France, Google.de at Germany, and so on. However, like every other website on the internet, Google's websites can be accessed from anywhere, so Canadian users can easily access Google.com or any other site.

¹ Morgan Jack and the various companies named Datalink. There are now six other defendants who are not included: engineers Andrew Crawford (the former plaintiffs former employee who is alleged to be the source of the trade secret theft), Lee Ingraham, and Frank Geiger, the website SEO consultant Mike Bunker, and Igor and Alexander Cheifot, who were the subjects of an *Anton Piller* search in March of 2015 and who have since fled and had their defences struck.

² Reasons for Judgment of Fenlon J., paras 139 and 153 [Application for Leave to Appeal (“LTA”) Tab 4]; Court of Appeal Judgment, paras 23 and 103 [LTA Tab 6].

³ Reasons for Judgment of Fenlon J, paras 113, 152, 156 [LTA Tab 4].

7. The Chambers Judge further found that, in order for the orders to be made effective, even within Canada, Google must stop displaying the Datalink websites on Google's search results on all of Google's websites, not just Google.ca.⁴

8. There is nothing remarkable about the concept that the internet, like all other fields of human endeavour, is subject to law. Nor is there anything remarkable about an order being made *in personam* against a party within the jurisdiction of the court, to take certain steps outside the jurisdiction. English, and then Canadian, courts have been exercising this jurisdiction for 250 years.

9. If the court cannot act effectively in the face of websites whose purpose is to evade the orders of this court, then we no longer live in a world ruled by law. Google would have the internet remain a lawless zone, in which court orders are meaningless (or at least, for everyone but the very few who have the resources to litigate in many jurisdictions at once).

10. The respondents agree that some of the issues proposed by Google are of national, and indeed international, importance which this court will one day wish to address. However, leave should be denied for three reasons:

- i. The Court of Appeal made detailed findings and gave clear and strong Reasons for Judgment:
 - a. Google has extensive contacts with British Columbia and is within the jurisdiction of the court;⁵
 - b. Google is facilitating the breach of multiple court orders by the Datalink defendants, whose illegal business cannot survive if it cannot be found on Google;⁶
 - c. It is part of Google's ordinary business to alter search results and Google has the ability to do so without cost or inconvenience;⁷

⁴ Reasons for Judgment of Fenlon J., paras 148 [LTA Tab 4]; Court of Appeal Judgment, paras 106 – 107 [LTA Tab 6].

⁵ Court of Appeal Judgment, paras 40 – 45 and 51 – 55 [LTA Tab 6].

⁶ Reasons for Judgment of Fenlon J., paras 10, 113, 152, and 156 [LTA Tab 4]; Court of Appeal Judgment, paras 18 – 19 [LTA Tab 6].

- d. Since the Datalink defendants have disappeared, the plaintiffs have no reasonable alternative to enforce their rights;⁸
 - e. The plaintiffs' claims arise from intellectual property; Google did not allege or prove any foreign law suggesting that foreign courts might come to a different conclusion about the issues in this case.⁹
- ii. Google's defence to the application below was based on a very narrow censorship thesis – that the Order below might block legitimate websites of the Datalink defendants – which their witness admitted, on cross-examination, was irrelevant to this case. This should have been the end of the matter. However, Google now claims that the Order offends the public's right to free access to information on the internet. In this vein Google refers to *Charter* concepts like (i) freedom of expression's protection of the marketplace of ideas, (ii) publication ban cases, (iii) internet content neutrality, and (iv) a "chilling effect" alleged.

None of these claims were argued below.¹⁰ It would be dangerous to give judgment without a related record and the benefit of the consideration of these issues by the Chambers Judge and the Court of Appeal.

- iii. The plaintiffs operate a small Burnaby technology business and are merely trying to enforce their rights by seeking to uphold the effectiveness of multiple court orders granted in their favour. In contrast, Google has no stake in this appeal. The Order does not create any cost or inconvenience for Google and only represents a very small divergence, if any, from Google's ordinary practice.

Errors in Application

11. Google has made a number of mistakes in its statement of facts, which have lead to errors in its analysis.

12. First, the Order under appeal is interlocutory, not permanent.¹¹ This is clear on the face of the Order, which reads:

⁷ Reasons for Judgment of Fenlon J., paras 139 and 153 [LTA Tab 4]; Court of Appeal Judgment, paras 23 and 103 [LTA Tab 6].

⁸ Reasons for Judgment of Fenlon J., para 156 [LTA Tab 4]; Court of Appeal Judgment, para 105 [LTA Tab 6].

⁹ Reasons for Judgment of Fenlon J., paras 85 and 144 [LTA Tab 4]; Court of Appeal Judgment, para 93 [LTA Tab 6].

¹⁰ Google's factum in the Court of Appeal [Tab 2I].

“...until the conclusion of the trial of this action or further order of this court.”

The Court of Appeal was at pains to emphasize this fact,¹² and that “if the character of the websites changes, it is always open to the defendants or others to seek a variation of the injunction...”

The ability of parties and others with identifiable interests to apply to vary the terms of the injunction is an important safeguard to ensure that it is not more restrictive than necessary.¹³

And, while the Datalink defendants have had their defence struck and a warrant issued for the arrest of their principal, no judgment has been entered against them and there are other defendants who deny that the plaintiffs have any IP at all. Several trial dates have been adjourned as new defendants are discovered; the plaintiffs fully expect that the case will proceed to trial.

13. Second, the global Order does not go beyond what is necessary to protect the commercial interests of the plaintiffs.¹⁴ The Chambers Judge made a finding that the global Order was necessary to protect the plaintiffs’ commercial interests and the integrity of the court.¹⁵

14. Third, the assumption of jurisdiction was not based only on the facts that Google sells advertising in British Columbia and indexes BC websites.¹⁶ The Chambers Judge referred to some of the evidence demonstrating Google’s multiple connections with British Columbia, including that Google has an interactive website and that it actively collects data from BC residents which it uses in its business.¹⁷ There was also other evidence that she did not reference:

- i. Google operates wholly owned subsidiaries in Canada, including Google Canada Corp. (Delaware), Google Payment Canada Corp. (Nova Scotia), and Google

¹¹ Contrary to Google’s Memorandum of Argument, paras 4 and 9a [LTA Tab 9]. Temporal limitations were not argued below (see Court of Appeal Judgment, para 112 [LTA Tab 6]), and Google’s related complaint (in Google’s Memorandum of Argument, para 55[LTA Tab 9]) that the plaintiffs intellectual property rights are time limited is mostly wrong: copyright is a time-limited right, but claims based on trade secrets (breach of confidence) and passing off (common law trademarks) are not.

¹² Court of Appeal Judgment, paras 94 and 112 [LTA Tab 6].

¹³ Court of Appeal Judgment, at paras. 110 – 111 [LTA Tab 6].

¹⁴ Google’s Memorandum of Argument, para 4 [LTA Tab 9].

¹⁵ Reasons for Judgment of Fenlon J, para 148 [LTA Tab 4].

¹⁶ Contrary to Google’s Memorandum of Argument, para 8d and 17 [LTA Tab 9].

¹⁷ Court of Appeal Judgment, paras 51 – 55 [LTA Tab 6].

Payment Corp. (Delaware). The two “Google Payment” companies are extra-provincially registered in BC,¹⁸ and one of them operates the “Google Wallet” online payment system, by which users contract directly with both Google and its BC resident subsidiary.¹⁹

- ii. Google owns the domain “Google.ca”,²⁰ and the address that Google has given with its domain registration is in Ontario.²¹
 - iii. Google owns the trademark in Canada for ‘Google’²² which, as a matter of law, means that Google carries on business in Canada.²³
 - iv. Keyword advertising (which Google calls “AdWords”) is Google’s main source of revenue.²⁴ Google allows advertisers to display their ads, for a fee, directly above or beside the ordinary search results (called “organic search results”) that internet users see in response to any particular Google search – this is the business that the Chambers Judge was referring to in her jurisdiction analysis.²⁵ And, during the course of the proceedings below, Google continued to accept money from the Datalink Defendants to advertise the impugned websites in this way.²⁶
15. Fourth, it is somewhat misleading to describe Google’s search results as “automatic”.²⁷ Google generates its search results by a computer algorithm that Google created,²⁸ which ranks

¹⁸ Reasons for Judgment of Fenlon J., paras 29 – 30 [LTA Tab 4]; this means they are deemed to be resident in BC: *CJPTA*, ss 3(d) and 7(b).

¹⁹ Affidavit #16 of Dermot Devine, pages 2 – 15 and 41 – 43 [Tab 20].

²⁰ Cross-Examination of Steven Smith, page 35, lines 29 – 35, and Exhibit 6 [Tab 2H].

²¹ *Perfect 10 Inc. v. Google* [2011] FCJ No. 48 (TD) at para 4 [Book of Authorities to the Response (“BA”) Tab O].

²² See Affidavit #6 of John Zeljkovich, pages 3 – 16 [Tab 2X], and *Perfect 10 Inc. v. Google* [2011] FCJ No. 48 (TD) at para 4 [BA Tab O].

²³ This is because Google is only entitled to register a trademark where they have used the trademark in Canada (or made it known in Canada in association with wares or services). With respect to services, a trademark is deemed to be used in association with services if it is used or displayed in the performance of advertising of those services: *Trade-Marks Act*, s. 2, 4(2), 16(1). However, “use in Canada” of a trademark in respect of services is not established by mere advertising of the service in Canada coupled with performance of the services elsewhere. “Use in Canada” requires that the services be performed in Canada and that the trademark be used or displayed in the performance or advertising in Canada of such services: *Porter v. Don the Beachcomber* [1966] Ex CR, 982, at para 17 [BA Tab P].

²⁴ Reasons for Judgment of Fenlon J, para 54 [LTA Tab 4].

²⁵ Reasons for Judgment of Fenlon J, paras 50 – 63 [LTA Tab 4].

²⁶ Even after they advised the plaintiffs and the court that they had stopped – but the Chambers Judge accepted that this was inadvertent; see Reasons for Judgment of Fenlon J, para 50 [LTA Tab 4].

²⁷ Google’s Memorandum of Argument, para 3 [LTA Tab 9].

websites based on criteria that Google determined²⁹ as a matter of editorial choice.³⁰ Google's search results are then generated by Google's algorithm. However, Google interferes, on a daily basis, with its algorithm-generated search results,³¹ whether by reason of (i) morality;³² (ii) statute,³³ or what Google calls (iii) "voluntary compliance" with court orders,³⁴ and alters its search results (iv) on behalf of clients who pay for the advertising on which its business depends.³⁵

16. Fifth, neither the plaintiffs nor the courts below have ever suggested that Google could be sanctioned merely for carrying on its business of providing search results.³⁶ The plaintiffs did not seek any remedy against Google until they had put Google on notice of the underlying court orders. Google's reference to "unpredictable cost and chilling effect"³⁷ is unhelpful hyperbole – Google has never asserted any cost or inconvenience.³⁸ There is no evidence of any chilling effect.

17. Sixth, the order in question is clearly effective.³⁹ Google is the dominant player in the search engine market and no online business can survive if it cannot be found on Google.⁴⁰

²⁸ Steven Smith Affidavit, paragraph 4 [Tab 2U]. Mr. Smith has no personal knowledge of the operation of Google's algorithm [Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H]], but the following points can be discerned. See also Cross-Examination of Steven Smith, page 4, lines 44 – 47 [Tab 2H].

²⁹ Cross-Examination of Steven Smith, page 13, line 23 to page 14, line 29 [Tab 2H].

³⁰ Cross-Examination of Steven Smith, page 14, lines 22 – 29, and page 18, lines 13 – 46 [Tab 2H].

³¹ Reasons for Judgment of Fenlon J., para 8 [LTA Tab 4].

³² Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4].

³³ Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results: Cross-Examination of Steven Smith, page 12, lines 29 – 36, page 14, lines 36 – 42, and page 20, lines 23 – 46 [Tab 2H].

³⁴ Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4].

³⁵ Reasons for Judgment of Fenlon J., para 55 [LTA Tab 4].

³⁶ Google's Memorandum of Argument, para 31 [LTA Tab 9].

³⁷ Google's Memorandum of Argument, para 31 [LTA Tab 9].

³⁸ Reasons for Judgment of Fenlon J., para 153 [LTA Tab 4].

³⁹ Contrary to Google's Memorandum of Argument, para 45 [LTA Tab 9].

⁴⁰ Reasons for Judgment of Fenlon J., para 152 [LTA Tab 4]; Court of Appeal Judgment, paras 19 and 27 [LTA Tab 6].

Facts of the underlying dispute

18. The plaintiffs operate a small Burnaby technology business. They manufacture networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.⁴¹

19. The plaintiffs claim that the Datalink defendants, while acting as a distributor of the plaintiffs' products, conspired with one of the plaintiffs' former engineering employees to design and manufacture a competing product, the GW1000. The plaintiffs say that the Datalink defendants designed, manufactured, and sold their competing product using the plaintiffs' trade secrets and trademarks.⁴²

20. From the outset of the proceedings the Datalink defendants failed to comply with court orders. They abandoned the proceedings and their defences were struck.⁴³ In July 2012, Mr. Justice Punnett granted a *Mareva* injunction freezing the worldwide assets of the Datalink defendants, including all their inventory.⁴⁴ In August 2012, Madam Justice Fenlon issued a "Confidentiality Order" including an injunction prohibiting the Datalink defendants from dealing with broad classes of intellectual property.⁴⁵ Thus, both the Confidentiality Order (thou shalt not use intellectual property) and the *Mareva* injunction (thou shalt not sell inventory) prohibited the Datalink defendants from carrying on business.

21. However, the Datalink defendants did carry on business. They now operate as a clandestine⁴⁶ company and carry on business on the impugned websites⁴⁷ from an undisclosed

⁴¹ Reasons for Judgment of Fenlon J, para 3 [LTA Tab 4].

⁴² Reasons for Judgment of Fenlon J, paras 4 – 5 [LTA Tab 4]. While the plaintiffs do have some late registered trademarks, the core of their trademark claim is the tort of passing off, which is sometimes said to give rise to a "common law trademark".

⁴³ Reasons for Judgment of Fenlon J, para 6 [LTA Tab 4] and see also Reasons for Judgment of Dickson J., June 20, 2012 [Tab 2A]. The defence of the third Datalink defendant, Datalink Technologies Gateways LLC (which was added to the proceedings), was not struck until the Order of Gropper J. on March 8, 2013 [Tab 2G].

⁴⁴ Reasons for Judgment of Punnett J., October 10, 2012 [Tab 2E].

⁴⁵ Reasons for Judgment of Fenlon J., August 3, 2012 [Tab 2B]; Order of Fenlon J., August 3, 2012 [Tab 2C].

⁴⁶ Court of Appeal Judgment, para 18 [LTA Tab 6].

⁴⁷ Reasons for Judgment of Fenlon J, para 7 [LTA Tab 4]. See also Reasons for Judgment of Fenlon J., August 3, 2012, para 29 [Tab 2B].

location, selling the GW1000 to customers all over the world.⁴⁸ The purpose of the impugned websites is purely commercial – to make money selling their illegal product in violation of multiple court orders.⁴⁹ The court has issued a warrant for Morgan Jack’s arrest, but bailiffs have not been able to locate him.⁵⁰

Involvement of Google

22. Google is the dominant player in the search engine market, and no business conducted on the internet can succeed unless it can easily be found on Google.⁵¹ Before the Order was granted, Google provided direct links to the Datalink defendants’ websites, on which the Datalink defendants continue to sell their GW1000 product in violation of multiple court orders, to any member of the public who conducted a Google search for it.⁵²

23. The Chambers Judge found that plaintiffs were suffering irreparable harm by the Datalink defendants’ ongoing sales on the internet, and that Google was inadvertently facilitating that harm through its search engines.⁵³

24. In September 2012 the plaintiffs wrote to Google to advise them of the matters set out above and asked Google to cease indexing the websites of the Datalink defendants, anywhere in the world.⁵⁴ Google refused, and the plaintiffs issued the application below.

25. Google operates what it calls a “voluntary compliance” program with respect to court orders. After Google was served with the application below, Google proposed that the plaintiffs obtain yet another order, this time expressly prohibiting the Datalink defendants from carrying

⁴⁸ Reasons for Judgment of Fenlon J, paras 76 and 148 [LTA Tab 4]. See also Affidavit #2 of Robert Huth [Tab 2R], and Affidavit #3 of Dermot Devine [Tab 2M].

⁴⁹ Affidavit #13 of Dermot Devine, pages 14 – 82 [Tab 2N]; Affidavit #18 of Dermot Devine, pages 7 – 78 [Tab 2P]; Affidavit #7 of Sarah Perkonig, pages 71 – 81 [Tab 2S]. The courts below have not made any express finding on this – since it was not directly in issue – but see the Court of Appeal Judgment, para 110 [LTA Tab 6].

⁵⁰ Warrant, Groves J., September 26, 2012 [Tab 2D].

⁵¹ Reasons for Judgment of Fenlon J, paras 32 and 152 [LTA Tab 4]; Affidavit #4 of John Blown, paras 6 – 10 [Tab 2L]; Cross Examination of Steven Smith, pages 7 – 8 [Tab 2H].

⁵² Reasons for Judgment of Fenlon J, paras 113 and 152 [LTA Tab 4]. Affidavit #16 of Dermot Devine, pages 35 – 40 [Tab 2O]; Affidavit #7 of Sarah Perkonig [Tab 2S].

⁵³ Reasons for Judgment of Fenlon J, paras 10, 113, 152, 156 [LTA Tab 4].

⁵⁴ Affidavit #13 of Dermot Devine, page 5 [Tab 2N].

on business on their websites, which Google would “voluntarily” comply with. However, Google refused to de-index entire websites – it would only de-index individual “urls” (subpages of those websites) provided to them by the plaintiffs.⁵⁵

26. The plaintiffs agreed to try Google’s approach.⁵⁶ The plaintiffs and Google appeared before Mr. Justice Tindale in December 2012, who granted the “Website Order” prohibiting the Datalink defendants from “...operating or carrying on business through any website”.⁵⁷

27. The Datalink defendants still did not comply. They continued to operate in violation of the

- i. *Mareva* Order of Mr. Justice Punnett;
- ii. Confidentiality Order of Madam Justice Fenlon; and the
- iii. “Website Order” of Mr. Justice Tindale.

28. In January and February 2013 Google advised the plaintiffs that it had de-indexed 345 specific urls from its websites worldwide. The plaintiffs later discovered that this was not true – Google had only de-indexed those urls on google.ca,⁵⁸ but the matter returned to court initially because for every url Google de-indexed at the plaintiffs’ request, another one rose up to take its place.⁵⁹

29. The plaintiffs sought an order that Google stop displaying any part of the impugned websites, on Google’s search results worldwide. The Chambers Judge found that the plaintiffs’ had no alternative to the application brought against Google,⁶⁰ and that the relief sought against Google would not cause Google any expense or inconvenience.⁶¹ She found that in the

⁵⁵ Reasons for Judgment of Fenlon J, paras 9 [LTA Tab 4].

⁵⁶ Reasons for Judgment of Fenlon J, para 71 [LTA Tab 4].

⁵⁷ Order of Tindale J., December 13, 2012 [Tab2F].

⁵⁸ Reasons for Judgment of Fenlon J, para 75 [LTA Tab 4]; Google’s Amended Application Response, paras 2, 12, 14, 16, and 18; Affidavit #27 of Dermot Devine, paras 2 – 3 and pages 5 – 27 [Tab 2Q]; Affidavit #6 of John Zeljkovich, para 9 [Tab 2X].

⁵⁹ This was the “whack-a-mole” problem referred to by the courts below: Reasons for Judgment of Fenlon J, paras 70 – 76 [LTA Tab 4], and Court of Appeal Judgment, para 25 [LTA Tab 6].

⁶⁰ Reasons for Judgment of Fenlon J, paras 70 – 76 [LTA Tab 4]; see also Affidavit #6 of John Zeljkovich, para 6 [Tab 2X].

⁶¹ Reasons for Judgment of Fenlon J, para 153 [LTA Tab 4].

circumstances of this case a global order was necessary to protect both the plaintiffs' rights and the integrity of the court.⁶²

Google's censorship claims

30. The central theme of Google's opposition to the application below, after their claim that they are outside the jurisdiction of the court, was their claim that de-indexing the entirety of the Datalink defendants' websites would be censorship, because some of the conduct on those sites might not be unlawful.⁶³

31. Google's evidence on censorship was presented in the affidavit of Steven Smith. Mr. Smith works in the "Legal Removals" team of Google's legal department, which is a dedicated team of 40 people that responds to requests, like the plaintiffs', to remove content from search results.⁶⁴ Mr. Smith's affidavit was the only evidence in support of Google's censorship thesis, so the plaintiffs focussed on it in their cross-examination of Mr. Smith. And Mr. Smith, when presented with the inconsistencies in Google's position, admitted that Google's censorship thesis had no application to the facts of this case.⁶⁵

32. Mr. Smith swore that he had personal knowledge of the matters in his affidavit, but it became clear during his cross-examination that this was almost completely untrue. He was not involved in any of Google's dealings with the plaintiffs or the defendants, and did not supervise those who were,⁶⁶ so he had no evidence to offer on Google's conduct in this case. He gave evidence on the role of Google Canada when he did not know anything about the operations of that company.⁶⁷ Mr. Smith also had almost no evidence to offer on the policy issues at stake. He

⁶² Reasons for Judgment of Fenlon J, para 148 [LTA Tab 4].

⁶³ Affidavit of Steven Smith, paragraph 18 [Tab 2U].

⁶⁴ Cross-Examination of Steven Smith, page 2, lines 34 – 44 [Tab 2H].

⁶⁵ Because the Website Order is not about content – it prohibits the Datalink defendants from carrying on business on any website at all: Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [Tab 2H].

⁶⁶ Cross-Examination of Steven Smith: (i) page 24, lines 21 – 45, (ii) page 26 lines 33 to page 27, line 9, and (iii) pages 28 – 31, and in particular page 30, line 37 to page 31, line 7, (iv) page 36, line 31 to page 38, line 21 [Tab 2H]

⁶⁷ Cross-Examination of Steven Smith, page 7, lines 2 – 4, and page 21, line 3, to page 23, line 6 [Tab 2H].

did not know anything about the Google algorithm,⁶⁸ had no role in policy analysis or development,⁶⁹ and did not know anything about what other teams at Google do in respect of their power to change search results,⁷⁰ or anything about what Google has done historically in this regard.⁷¹

33. Anticipating that this might be the case, the plaintiffs wrote, before the cross examination, to ask that Mr. Smith inform himself about the past practices of Google in the alteration of search results. Google refused.⁷²

PART II – STATEMENT OF ISSUES

34. The sole issue is whether leave should be granted. The respondents concede that the appeal raises some issues of national importance, but say that leave should be denied in the circumstances of this case.

PART III – STATEMENT OF ARGUMENT

Can a court order a search engine to block search results?

35. The internet, like all other fields of human endeavour, is subject to law. And, Google, like all other natural persons, is also subject to law.

36. Google’s argument below was that the Court did not have the territorial competence to make an order against Google because Google is non-resident in British Columbia and its search service is located outside British Columbia. The degree of Google’s connections to British Columbia, and Google’s related claim that search business is separate from its advertising business, were the main focus of the hearing before the Chambers Judge.

37. Before the Chambers Judge, Google also argued that the order sought was censorship – based on the narrow idea that requiring Google to go beyond its “voluntary compliance” regime

⁶⁸ Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H].

⁶⁹ Cross-Examination of Steven Smith, page 28, lines 10 – 21 [Tab 2H].

⁷⁰ Cross-Examination of Steven Smith, (i) page 19, lines 22 – 26, and (ii) page 39, lines 9 – 27 [Tab 2H].

⁷¹ Cross-Examination of Steven Smith, (i) page 8, line 23 to page 10, line 10, (ii) page 11, lines 19 – 47, (iii) page 18, line 47 to page 19, line 11 [Tab 2H].

⁷² Affidavit #11 of Sarah Perkonig, pages 27 – 29 [Tab 2T].

and de-index all of the impugned websites – as opposed to individually vetted pages – might possibly affect legitimate content. In this regard, Google relied on the Affidavit of Stephen Smith. However, when Mr. Smith was cross-examined on his Affidavit, he agreed that Google’s censorship thesis had no application to the facts of this case,⁷³ and both courts below rejected it. The Court of Appeal summarized the point as follows:

- “that possibility . . . is entirely speculative”;
- “there is no evidence that the websites in question have ever been used for lawful purposes”;
- there is no “reason to believe that the domain names are in any way uniquely suitable for any sort of expression other than the marketing of illegal product”.⁷⁴

New Arguments

38. Google did not anchor its censorship thesis in any legal framework until the case was appealed, when Google raised the *Charter* for the first time in relation to similar arguments about restraints on the Datalink defendants’ speech. Google did not develop this argument and referred to it in only two paragraphs of the appellant’s factum.⁷⁵

39. Google has now recast its argument completely, with its primary focus being the new claim that the Order under appeal suppresses the public’s right to free access to information on the internet, and as such is an impermissible interference with *Charter* protected freedom of expression. Of the 11 cases Google now relies on (in paragraphs 22 to 56 of its memorandum), only *Crookes* and *Dagenais* were in Google’s arguments below (and for narrower purposes).⁷⁶

⁷³ Because the Website Order is not about content – it prohibits the Datalink defendants from conducting any business at all on the internet. Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [Tab 2H], and see Reasons for Judgment of Fenlon J., paras 138 to 145 [LTA Tab 4].

⁷⁴ Court of Appeal Judgment, para 110 [LTA Tab 6].

⁷⁵ Google’s factum para 104 [Tab 2I].

⁷⁶ *Dagenais* only for the proposition that the common law should reflect *Charter* principles (see Google’s factum para 103), and *Crookes* only for the proposition that hyperlinks are not publications (see Google’s factum para 76). The new cases were relied on by one of the intervenors, but this is no answer since intervenors may not take the case away from the parties – as the plaintiffs submitted to the Court of Appeal.

Inadequate Record

40. The plaintiffs' expert evidence is limited because Google keeps the details of its operations secret.⁷⁷ And since the matter proceeded as an interlocutory motion against a non-party, Google was not obliged to give discovery of documents or be examined for discovery.⁷⁸

41. The cross-examination of Mr. Smith was the plaintiff's sole opportunity to obtain evidence from Google. But since Google chose to present a witness who knew nothing about the issues in the case (either as it was first conceived or as it has now been recast) and refused to have their witness inform himself, the plaintiffs have been prevented from developing their case. And, since Mr. Smith has admitted to having no knowledge of most of what is in his affidavit, Google has presented almost no evidence at all. This problem was amplified when Google raised the *Charter* for the first time in the Court of Appeal, and it has been further amplified now that Google has recast its argument again in this court.

Mind the Gap

42. Google's new argument is that the freedom of expression in issue is the public's right to find the prohibited websites on Google. No such right exists. Google alters its algorithm-generated search results every day, as part of its ordinary course of business, and no member of the public can assert a right, against Google, to find the impugned websites on Google.

43. It does not matter whether the absence of the Datalink websites from Google's search results arises from (a) Google's own processes or (b) an order of the court issued to protect its process from a flagrant contempt. However, if there is any substance to Google's new arguments, it must depend on how much the Order under appeal differs from Google's ordinary practice – meaning how big the gap is between the two.⁷⁹

⁷⁷ Affidavit #3 of John Blown (October 25, 2012), paras 4 and 7 [Tab 2K].

⁷⁸ The Chambers Judge commented on this issue: Reasons for Judgment of Fenlon J., paras 19 – 21 [LTA Tab 4].

⁷⁹ See Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4], where the Chambers Judge made a similar point in relation to the arguments that were then before her.

44. From the limited record on this issue, it appears that there is very little difference, if any, between the Order and Google’s practice. Google interferes with its algorithm-generated search results on a daily basis. For example:

- i. Google posts AdWords results above, or beside, the organic search results generated by its algorithm. Google does indicate which results are ads, but the labelling may not be apparent to an ordinary user.⁸⁰
- ii. Google alters its search results to avoid generating links to child pornography sites, but not in the case of pornography generally.⁸¹ Google also alters its search results to avoid generating links to “hate speech” sites, although it is not clear if this is achieved in part by filters in the algorithm, or just by Mr. Smith’s content removal team.⁸²

45. However, some important gaps of knowledge remain. Mr. Smith did not know anything about the Google algorithm,⁸³ or what other teams at Google do in respect of their power to change search results,⁸⁴ or anything about what Google has done historically in this regard.⁸⁵

Here are some examples of the missing information:

- i. Most website owners want to be found on Google, and an entire industry has sprung up (called “search engine optimization”, or “SEO”) to assist websites to get better rankings on Google. Effective SEO involves “gaming” the Google algorithm, but when this goes too far Google punishes the website by de-indexing it.⁸⁶ Mr. Smith was not able to shed any light on this topic.
- ii. There was fresh evidence presented to the Court of Appeal, which was not admitted (based on the issues that were before that court), that if Google had followed its standard practices it would ordinarily have de-indexed all of the impugned websites

⁸⁰ See Cross-Examination of Steven Smith, page 4 (line 17) to page 6 (line 36), and Exhibit 1 [Tab 2H]; Reasons for Judgment of Fenlon J, para 55 [LTA Tab 4].

⁸¹ Cross-Examination of Steven Smith, page 14, lines 47 to page 16, line 32, and Exhibits 3 and 4 [Tab 2H].

⁸² Cross-Examination of Steven Smith, page 16, line 39 to the end of page 17, and then page 38, line 34 to page 39, line 3, and Exhibits 5 and 7 [Tab 2H], and see Reasons for Judgment of Fenlon J. para 139 [LTA Tab 4].

⁸³ Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H].

⁸⁴ Cross-Examination of Steven Smith, (i) page 19, lines 22 – 26, and (ii) page 39, lines 9 – 27 [Tab 2H].

⁸⁵ Cross-Examination of Steven Smith, (i) page 8, line 23 to page 10, line 10, (ii) page 11, lines 19 – 47, (iii) page 18, line 47 to page 19, line 11 [Tab 2H].

⁸⁶ Cross-Examination of Steven Smith, page 19, lines 27 to page 20, line 20 [Tab 2H].

for violating Google's SEO policies.⁸⁷ If leave is granted, the respondents will have to apply to present this evidence to the court to be considered, in relation to Google's new arguments, as a matter of first instance.

- iii. Google argues, in essence, that only it (or other search engines) can decide what is found on the internet, and that the law should have no place. But here again there is appears to be little difference between the effect of the Order under appeal and Google's ordinary practice, because Google regularly alters its search results to comply with the law.⁸⁸
 - a. Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results,⁸⁹ but we do not know whether Google removes this content on all its sites worldwide, or only on Google.com.
 - b. There are media reports⁹⁰ that Google paid \$500 million to the United States Department of Justice for knowingly accepting advertising for foreign pharmacies that were illegal according to American law.⁹¹ Google objected when the plaintiffs asked Mr. Smith about these reports.⁹²
 - c. There is good reason, from media reports, to believe that Google alters search results to comply with other countries' laws as well. For example, Google has recently entered into a draft settlement with EU competition regulators by which it has accepted legal restrictions on the search results it generates.⁹³ The most infamous example is Google's foray into China.⁹⁴ However, Mr. Smith had no knowledge of these events either, so we are left with more important gaps of knowledge.⁹⁵

⁸⁷ The plaintiffs received documents (from the Datalink defendants' SEO consultant – a late-added defendant) that led them on a fresh train of enquiry: Affidavit #1 (CA) of John Zeljkovich [Tab 2W], and Affidavit #1 (CA) of John Blown [Tab 2J].

⁸⁸ Cross-Examination of Steven Smith, page 14, lines 36 – 42 [Tab 2H].

⁸⁹ Cross-Examination of Steven Smith, page 12, lines 29 – 36, and page 20, lines 23 – 46 [Tab 2H].

⁹⁰ The respondents concede that these reports, and those referred to in the next paragraph, are not admissible for the truth of their contents. However, Google had the ability to disclose accurate information, or at a minimum to produce a witness with knowledge of the relevant evidence, and chose not to.

⁹¹ Affidavit #27 of Dermot Devine, para 7 and pages 43 – 44 [Tab 2Q].

⁹² Cross-Examination of Steven Smith, page 8, lines 17 to page 9, line 44 [Tab 2H].

⁹³ Affidavit #27 of Dermot Devine, para 6 and pages 38 – 41 [Tab 2Q].

⁹⁴ Affidavit #27 of Dermot Devine, para 5 and pages 34 – 37 [Tab 2Q].

⁹⁵ Cross-Examination of Steven Smith, page 8, lines 17 to page 9, line 44 [Tab 2H].

46. An appellant cannot raise new arguments on appeal unless all relevant evidence is in the record.⁹⁶ And leave should not be granted unless it is beyond doubt⁹⁷ that the plaintiffs could not have given any answer if Google’s new arguments had been raised at first instance.

... I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.⁹⁸

Freedom of Expression

47. The Order below merely directs Google to cease directing users to the impugned websites, which exist only to promote a business that the court below has issued three separate orders prohibiting. The “expression” on these websites does not further any of the purposes of protecting freedom of expression⁹⁹ – it is unlawful speech directed solely at making money off an illegal activity.¹⁰⁰

48. The Order under appeal has a very narrow practical impact. It is directed only at a specific list of websites in a highly specialized niche engineering market. The only internet users who are affected by the Order are those few businesses who are searching online for one of these products, and instead of finding the illegal GW1000 product, they will likely find the plaintiffs’ products. This, based on the multiple court orders issued below, is as it should be.¹⁰¹

⁹⁶ Brown, *Supreme Court of Canada Practice 2014* (Toronto: Thomson Reuters, 2013) at 385 [BA Tab W]. See also Sopinka and Gelowitz, *The Conduct of an Appeal*, 3rd ed (Markham: LexisNexis, 2012) at 92 [BA Tab Y]; *R v Brown*, 1993 CarswellAlta 412 at para 10, [1993] 2 SCR 918, (SCC) [BA Tab Q].

⁹⁷ *Alberta v. Nilsson* 2002 ABCA 283 at paras 170 – 172 [BA Tab A].

⁹⁸ *Lamb v. Kincaid* (1907) 38 SCR 516 [BA Tab K]

⁹⁹ As summarized in Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007 ff.) at 43.4 [BA Tab X].

¹⁰⁰ See: *R. v. Keegstra* [1990] 3 SCR 697 at 760, 766 [BA Tab S]; *RJR-MacDonald Inc. v. Canada* [1995] 3 SCR 199 at paras 71, 132 [BA Tab U]; *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232 at 245 [BA Tab V]; *R. v. Butler* [1992] 1 SCR 452 at 501 [BA Tab R]; *Hill v. Church of Scientology* [1995] 2 SCR 1130 at para 106 [BA Tab I]; *R v. Lucas* [1998] 1 SCR 439 at para 94 [BA Tab T]; *Canada v. JTI-Macdonald Corp* [2007] 2 SCR 610 at para 68 [BA Tab E].

¹⁰¹ The plaintiffs’ claims arise from intellectual property concepts that are widely recognized internationally – this case has nothing to do with an attempt to export local moral standards to the world.

49. As noted above, the “Website Order” of Mr. Justice Tindale, which was one of the foundations of the Order under appeal, was obtained at Google’s request. Google cannot now argue that this Order violates freedom of expression in some way.

Extra-territoriality

50. It has long been settled that the court can exercise its *in personam* jurisdiction in a way that has extra-territorial effect. English, and then Canadian, courts have been exercising this jurisdiction for 250 years.¹⁰² The Supreme Court of British Columbia regularly grants *Mareva* injunctions against worldwide assets,¹⁰³ and there is no doubt that the court can exercise its *in personam* jurisdiction by granting injunctions against non-residents.¹⁰⁴

51. The internet, as all parties have noted, is not subject to borders. Traditional concepts of territoriality are therefore of limited use,¹⁰⁵ but to the extent that the traditional approach is useful, we do not have a complete record here either.

52. With respect to jurisdiction, Google’s argument at first instance was based only on the idea that Google was outside the jurisdiction of the court generally, and in particular because its search business was distinct from its advertising business. Google did not argue that the jurisdiction analysis should be different for Google’s websites – other than Google.ca – until the matter reached the Court of Appeal so the plaintiffs did not focus on this issue when they developed their evidence or when they cross-examined Mr. Smith.¹⁰⁶

¹⁰² Reasons for Judgment of Fenlon J., at paras 11, 104, 108, 119 – 120, 125 – 126, and 145 – 150 [LTA Tab 4]; *Duke v. Andler* [1932] S.C.R. 734, at 737, 740 – 741 [BA Tab G]; *Catania v. Giannattasio* [1999] O.J. (CA) No. 1197 at para 12 [BA Tab F]; *Minera Aquiline Argentina v. IMA Exploration* 2006 BCSC 1102 at paras 163 to 170, 176 – 180 [BA Tab M], and 2007 BCCA 319, at paras 88 – 92 [BA Tab N]; *Amchem v. British Columbia* [1993] 1 SCR 897 [BA Tab B].

¹⁰³ The ability to impose obligations outside the jurisdiction, on non-parties within the jurisdiction, is what gives a *Mareva* injunction its impact – otherwise rogues would only need to locate their bank accounts in Calgary in order to insulate themselves from the effect of a BC *Mareva*.

¹⁰⁴ See: *Impulsoria Turistica v. Transat Tours Canada* 2007 SCC 20 at paras 1, 2, 6 – 8 [BA Tab J]; *Barrick Gold v. Lopehandia* [2004] OJ No. 2329 (CA) [BA Tab D].

¹⁰⁵ Reasons for Judgment of Fenlon J, paras 37 – 49 [LTA Tab 4].

¹⁰⁶ Google did argue that the court should not make an order that went beyond google.ca, but this was a submission that the order sought was too broad, not a submission that the court did not have the jurisdiction to make it: see Reasons for Judgment of Fenlon J. para 145 [LTA Tab 4]. Google’s

53. Google did not disclose where its servers (where it hosts the information that allows it to respond to users' search queries) are located except to say that they are not in British Columbia.¹⁰⁷ Google claimed that the decisions about removing websites from search results are made in California,¹⁰⁸ but late evidence that they submitted established that some of these decisions are made in Ireland,¹⁰⁹ and we do not know where the actions to remove content are taken,¹¹⁰ or if the location of these decisions and/or actions depends on whether we are dealing with Google.ca, Google.com, Google.fr, or any other of Google's national websites.

54. What this all means is that there is also not an adequate record to develop any alternative (non-territoriality based) framework for jurisdiction over internet activities.

55. And even Google's initial "voluntary" de-indexing on Google.ca required Google to take action outside of Canada.

I note again that on the record before me, the injunction would compel Google to take steps in California or the state in which its search engine is controlled, and would not therefore direct that steps be taken around the world. That the effect of the injunction could reach beyond one state is a separate issue. Even an order mandating or enjoining conduct entirely within British Columbia may have such extraterritorial, or even worldwide effect.¹¹¹

jurisdiction argument is summarized at Reasons for Judgment of Fenlon J. para 11 [LTA Tab 4]– it was not based on which website was in issue.

¹⁰⁷ Reasons for Judgment of Fenlon J. para 25 [LTA Tab 4]; Court of Appeal Judgment, para 20 [LTA Tab 6]. In fact even this is not clear – Google merely advised the court of these facts and presented no evidence on the point. As matters stand, we do not know whether the computers that control Google's search services are the same as the servers that contain the data Google collects to respond to search queries, or if these are different again from the data that Google collects on individual users so that it can send them targeted advertising.

¹⁰⁸ Reasons for Judgment of Fenlon J. para 30 [LTA Tab 4], but Google did not present any evidence to establish this.

¹⁰⁹ Affidavit #1 of Tugce Vulas [Tab 2V].

¹¹⁰ See Reasons for Judgment of Fenlon J. para 146, where the Chambers Judge alluded to this distinction [LTA Tab 4].

¹¹¹ Reasons for Judgment of Fenlon J, paras 146 – 147 [LTA Tab 4].

Comity

56. As for the arguments that the Order may violate the laws of other jurisdictions, Google chose not to allege or prove any such laws.¹¹² The Court of Appeal found that there was no chance that prohibiting the defendants from advertising wares that violated the intellectual property rights of the plaintiffs would offend the core values of any country:

... From a comity perspective, the question must be whether, in taking jurisdiction over this matter, British Columbia courts have failed to pay due respect to the right of other courts or nations....

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

... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.¹¹³

Injunctions against non-parties

57. This is not a question of national importance. The proposition that courts possess inherent jurisdiction to restrain the actions of non-parties is widely recognized,¹¹⁴ and the Court has inherent jurisdiction to maintain the rule of law and to control its own process.¹¹⁵

Conclusion

58. A ruling from this court on the scope of the court's ability to control illegal conduct on the internet has very broad potential implications, not only for e-commerce but for privacy & data protection, intellectual property and anti-counterfeiting, reputation (defamation), national

¹¹² Reasons for Judgment of Fenlon J, para 144 [LTA Tab 4], and see the Court of Appeal Judgment at paras 91 – 93 [LTA Tab 6].

¹¹³ Judgment of the Court of Appeal below, at paras. 91, 93 – 94 [LTA Tab 6].

¹¹⁴ See: *Greenpeace Canada v. MacMillan Bloedel* [1994] BCJ No. 2148 (CA) at para 37 [BA Tab H]; *MacMillan Bloedel v. Simpson*, [1996] 2 SCR 1048, paras 23, 26, 33 37 [BA Tab L]; *Attorney General v. Punch* [2003] 1 AC 1046 (HL), in particular at paras 4 and 43 [BA Tab C]; *Barrick Gold v. Lopehandia* [2004] OJ No. 2329 (CA) at para 77 [BA Tab D].

¹¹⁵ *MacMillan Bloedel v. Simpson*, [1996] 2 SCR 1048 at para 15 [BA Tab L].

security, and indeed the rule of law – keeping in mind that the Datalink defendants are not selling counterfeit handbags or watches – they are selling sophisticated engineering products to sophisticated businesses – if the court cannot act in the face of this misconduct where does it stop?

59. Google has no stake in this fight, and it has failed to provide almost any relevant evidence.

60. It is submitted that there is too much at stake to engage in a review of the issues proposed by Google based on an incomplete record and where Google has substantially recast its main argument. The preferable approach is to refuse leave and reconsider the issues on another occasion, and with the benefit of the judgments of other courts after they have considered the implications of the decisions below in a wider range of circumstances.

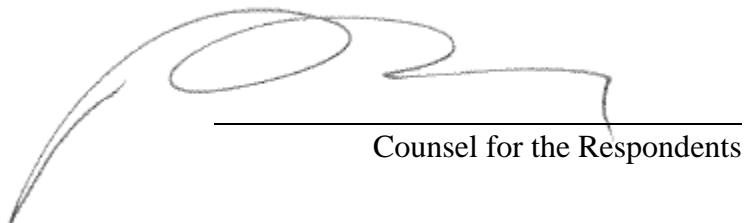
PART IV – SUBMISSIONS ON COSTS

61. The respondents seek costs.

PART V – ORDER SOUGHT

62. The application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of October, 2015.



Counsel for the Respondents

PART VI – TABLE OF AUTHORITIES

TAB		Paragraph
	Jurisprudence	
A.	<i>Alberta v. Nilsson</i> 2002 ABCA 283	46
B.	<i>Amchem v. British Columbia</i> [1993] 1 SCR 897	50
C.	<i>Attorney General v. Punch</i> [2003] 1 AC 1046 (HL)	57
D.	<i>Barrick Gold v. Lopehandia</i> [2004] OJ No. 2329	50, 57
E.	<i>Canada v. JTI-Macdonald Corp</i> [2007] 2 SCR 610	47
F.	<i>Catania v. Giannattasio</i> [1999] O.J. No. 1197	50
G.	<i>Duke v. Andler</i> [1932] S.C.R. 734	50
H.	<i>Greenpeace Canada v. MacMillan Bloedel</i> [1994] BCJ No. 2148	57
I.	<i>Hill v. Church of Scientology</i> [1995] 2 SCR 1130	47
J.	<i>Impulsoria Turistica v. Transat Tours Canada</i> 2007 SCC 20	50
K.	<i>Lamb v. Kincaid</i> (1907) 38 SCR 516	46
L.	<i>MacMillan Bloedel v. Simpson</i> , [1996] 2 SCR 1048	57
M.	<i>Minera Aquiline Argentina v. IMA Exploration</i> 2006 BCSC 1102	50
N.	<i>Minera Aquiline Argentina v. IMA Exploration</i> 2007 BCCA 319	50
O.	<i>Perfect 10 Inc. v. Google</i> [2011] FCJ No. 48 (TD)	14
P.	<i>Porter v. Don the Beachcomber</i> [1966] Ex CR, 982	14
Q.	<i>R. v. Brown</i> , 1993 CarswellAlta 412, [1993] 2 SCR 918, (SCC)	46
R.	<i>R v. Butler</i> [1992] 1 SCR 452	47
S.	<i>R v. Keegstra</i> [1990] 3 SCR 697	47
T.	<i>R v. Lucas</i> [1998] 1 SCR 439	47
U.	<i>RJR-MacDonald Inc. v. Canada</i> [1995] 3 SCR 199	47

- V. *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 47
232

Academic Commentary

- W. Brown, Henry S., *Supreme Court of Canada Practice 2014* (Toronto: Thomson Reuters, 2013) 46
- X. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007 ff.) 47
- Y. Sopinka and Gelowitz, *The Conduct of an Appeal*, 3rd ed (Markham: LexisNexis, 2012) 46

PART VII – STATUTORY PROVISIONS

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, ss. 3(d) and 7(b)
Trade-Marks Act, R.S.C., 1985, c. T-1, s. 2, 4(2), 16(1)

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, ss. 3(d) and 7(b)

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.

7 A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in British Columbia,
- (b) pursuant to law, it
 - (i) has registered an address in British Columbia at which process may be served generally, or
 - (ii) has nominated an agent in British Columbia upon whom process may be served generally,
- (c) it has a place of business in British Columbia, or
- (d) its central management is exercised in British Columbia.

Trade-Marks Act, R.S.C., 1985, c. T-1, s. 2, 4(2), 16(1)

2. “trade-mark”

« *marque de commerce* »

“trade-mark” means

- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade-mark;

4 (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

16. (1) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with goods or services is entitled, subject to section 38, to secure its registration in respect of those goods or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

- (a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;
- (b) a trade-mark in respect of which an application for registration had

2. « *marque de commerce* »

“trade-mark”

« *marque de commerce* » Selon le cas :

- a) *marque employée par une personne pour distinguer, ou de façon à distinguer, les produits fabriqués, vendus, donnés à bail ou loués ou les services loués ou exécutés, par elle, des produits fabriqués, vendus, donnés à bail ou loués ou des services loués ou exécutés, par d’autres;*
- b) *marque de certification;*
- c) *signe distinctif;*
- d) *marque de commerce projetée.*

4 (2) Une *marque de commerce* est réputée employée en liaison avec des services si elle est employée ou montrée dans l’exécution ou l’annonce de ces services.

16. (1) Tout requérant qui a produit une demande selon l’article 30 en vue de l’enregistrement d’une *marque de commerce* qui est enregistrable et que le requérant ou son prédécesseur en titre a employée ou fait connaître au Canada en liaison avec des produits ou services, a droit, sous réserve de l’article 38, d’en obtenir l’enregistrement à l’égard de ces produits ou services, à moins que, à la date où le requérant ou son prédécesseur en titre l’a en premier lieu ainsi employée ou révélée, elle n’ait créé de la confusion :

- a) soit avec une *marque de commerce* antérieurement employée ou révélée au Canada par une autre personne;
- b) soit avec une *marque de commerce* à l’égard de laquelle une demande

been previously filed in Canada by any other person; or

(c) a trade-name that had been previously used in Canada by any other person.

d'enregistrement avait été antérieurement produite au Canada par une autre personne;

c) soit avec un nom commercial qui avait été antérieurement employé au Canada par une autre personne.

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.

APPLICANT

-and-

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

RESPONDENTS

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
VOLUME I (Tabs 1-2M, Pages 1-192)
(EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, and CLARMA
ENTERPRISES INC., RESPONDENTS)
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TABLE OF CONTENTS

<u>TAB</u>	<u>PAGE</u>
VOLUME I (Tabs 1-2M)	
1. Response Memorandum	
PART I – STATEMENT OF FACTS.....	1
Overview.....	1
Errors in Application.....	3
Facts of the underlying dispute.....	7
Involvement of Google.....	8
Google’s censorship claims.....	10
PART II – STATEMENT OF ISSUES.....	11
PART III – STATEMENT OF ARGUMENT.....	11
Can a court order a search engine to block search results?.....	11
New Arguments.....	12
Inadequate Record.....	13
Mind the Gap.....	13
Freedom of Expression.....	16
Extra-territoriality.....	17
Comity.....	19
Injunctions against non-parties.....	19
Conclusion.....	19
PART IV – SUBMISSION ON COSTS.....	20
PART V – ORDER SOUGHT.....	20
PART VI – TABLE OF AUTHORITIES.....	21
PART VII – STATUTORY PROVISIONS.....	22
2. Documents Relied Upon	
A. Oral Reasons for Judgment of Justice Dickson, Supreme Court of British Columbia, June 20, 2012.....	26
B. Oral Reasons for Judgment of Justice Fenlon, Supreme Court of British Columbia, August 3, 2012.....	32
C. Order of Justice Fenlon, Supreme Court of British Columbia, August 3, 2012.....	41

D. Warrant – Contempt, Supreme Court of British Columbia, dated Sept 26, 2012.....	45
E. Reasons for Judgment of Justice Punnett, Supreme Court of British Columbia, Oct 10, 2012.....	46
F. Order Made After Application, Supreme Court of British Columbia, December 13, 2012.....	66
G. Order Made After Application, Supreme Court of British Columbia, March 8, 2013.....	69
H. Cross Examination of Steven Smith, Supreme Court of British Columbia, May 21, 2013.....	71
I. Appellant’s Factum, Court of Appeal, dated August 29, 2014.....	119
J. Affidavit #1 (CA) of John Blown, dated September 26, 2014.....	165
K. Affidavit #3 of John Blown, dated October 25, 2012.....	175
L. Affidavit #4 of John Blown, dated December 11, 2012.....	177
M. Affidavit #3 of Dermot Devine, dated March 10, 2012.....	182

VOLUME II (Tabs 2N-2Q)

N. Affidavit #13 of Dermot Devine, dated November 13, 2012.....	1
O. Affidavit #16 of Dermot Devine, dated December 6, 2012.....	83
P. Affidavit #18 of Dermot Devine, dated December 11, 2012.....	126
Q. Affidavit #27 of Dermot Devine, dated July 11, 2013.....	222

VOLUME III (Tabs 2R-2T)

R. Affidavit #2 of Robert Huth, dated February 7, 2012.....	1
S. Affidavit #7 of Sarah Perkonig, dated March 14, 2013.....	77
T. Affidavit #11 of Sarah Perkonig, dated July 11, 2013.....	190

VOLUME IV (Tabs 2U-2X)

U. Affidavit of Steven Smith, dated April 17, 2013.....	1
V. Affidavit #1 of Tugce Vulas, dated February 5, 2014.....	16
W. Affidavit #1 (CA) of John Zeljkovich, dated September 26, 2014.....	22
X. Affidavit #6 of John Zeljkovich, dated July 12, 2013.....	72

Book of Authorities filed separately.

PART I – STATEMENT OF FACTS

Overview

1. This case is about the rule of law in the face of illegal conduct on the internet.
2. The plaintiffs (respondents here) obtained multiple court orders against the Datalink defendants,¹ including three separate orders that prohibited them from carrying on business anywhere in the world. The Datalink defendants, whose customers are mostly outside of Canada, evaded all of these orders by carrying on business on the internet, from an undisclosed location.
3. The plaintiffs advised Google (the applicant here) of this state of affairs and asked Google to stop listing the illegal Datalink websites on search results, because if these websites cannot be found on Google, no online business can survive.
4. Google refused the plaintiffs' request even though Google de-lists websites every day as part of its ordinary business, and can do so without cost or inconvenience.²
5. The Chambers Judge found that by displaying the Datalink defendants' websites on its search results, Google is facilitating the ongoing breach of court orders.³ She found that the plaintiffs had no reasonable alternative, and that directing Google to stop displaying the Datalink websites was the only way for the court orders to be made effective.
6. Google has a website for almost every country in the world. For example, Google.ca is targeted at Canada, Google.com at the United States, Google.fr at France, Google.de at Germany, and so on. However, like every other website on the internet, Google's websites can be accessed from anywhere, so Canadian users can easily access Google.com or any other site.

¹ Morgan Jack and the various companies named Datalink. There are now six other defendants who are not included: engineers Andrew Crawford (the former plaintiffs former employee who is alleged to be the source of the trade secret theft), Lee Ingraham, and Frank Geiger, the website SEO consultant Mike Bunker, and Igor and Alexander Cheifot, who were the subjects of an *Anton Piller* search in March of 2015 and who have since fled and had their defences struck.

² Reasons for Judgment of Fenlon J., paras 139 and 153 [Application for Leave to Appeal (“LTA”) Tab 4]; Court of Appeal Judgment, paras 23 and 103 [LTA Tab 6].

³ Reasons for Judgment of Fenlon J, paras 113, 152, 156 [LTA Tab 4].

7. The Chambers Judge further found that, in order for the orders to be made effective, even within Canada, Google must stop displaying the Datalink websites on Google's search results on all of Google's websites, not just Google.ca.⁴

8. There is nothing remarkable about the concept that the internet, like all other fields of human endeavour, is subject to law. Nor is there anything remarkable about an order being made *in personam* against a party within the jurisdiction of the court, to take certain steps outside the jurisdiction. English, and then Canadian, courts have been exercising this jurisdiction for 250 years.

9. If the court cannot act effectively in the face of websites whose purpose is to evade the orders of this court, then we no longer live in a world ruled by law. Google would have the internet remain a lawless zone, in which court orders are meaningless (or at least, for everyone but the very few who have the resources to litigate in many jurisdictions at once).

10. The respondents agree that some of the issues proposed by Google are of national, and indeed international, importance which this court will one day wish to address. However, leave should be denied for three reasons:

- i. The Court of Appeal made detailed findings and gave clear and strong Reasons for Judgment:
 - a. Google has extensive contacts with British Columbia and is within the jurisdiction of the court;⁵
 - b. Google is facilitating the breach of multiple court orders by the Datalink defendants, whose illegal business cannot survive if it cannot be found on Google;⁶
 - c. It is part of Google's ordinary business to alter search results and Google has the ability to do so without cost or inconvenience;⁷

⁴ Reasons for Judgment of Fenlon J., paras 148 [LTA Tab 4]; Court of Appeal Judgment, paras 106 – 107 [LTA Tab 6].

⁵ Court of Appeal Judgment, paras 40 – 45 and 51 – 55 [LTA Tab 6].

⁶ Reasons for Judgment of Fenlon J., paras 10, 113, 152, and 156 [LTA Tab 4]; Court of Appeal Judgment, paras 18 – 19 [LTA Tab 6].

- d. Since the Datalink defendants have disappeared, the plaintiffs have no reasonable alternative to enforce their rights;⁸
 - e. The plaintiffs' claims arise from intellectual property; Google did not allege or prove any foreign law suggesting that foreign courts might come to a different conclusion about the issues in this case.⁹
- ii. Google's defence to the application below was based on a very narrow censorship thesis – that the Order below might block legitimate websites of the Datalink defendants – which their witness admitted, on cross-examination, was irrelevant to this case. This should have been the end of the matter. However, Google now claims that the Order offends the public's right to free access to information on the internet. In this vein Google refers to *Charter* concepts like (i) freedom of expression's protection of the marketplace of ideas, (ii) publication ban cases, (iii) internet content neutrality, and (iv) a "chilling effect" alleged.

None of these claims were argued below.¹⁰ It would be dangerous to give judgment without a related record and the benefit of the consideration of these issues by the Chambers Judge and the Court of Appeal.

- iii. The plaintiffs operate a small Burnaby technology business and are merely trying to enforce their rights by seeking to uphold the effectiveness of multiple court orders granted in their favour. In contrast, Google has no stake in this appeal. The Order does not create any cost or inconvenience for Google and only represents a very small divergence, if any, from Google's ordinary practice.

Errors in Application

11. Google has made a number of mistakes in its statement of facts, which have lead to errors in its analysis.

12. First, the Order under appeal is interlocutory, not permanent.¹¹ This is clear on the face of the Order, which reads:

⁷ Reasons for Judgment of Fenlon J., paras 139 and 153 [LTA Tab 4]; Court of Appeal Judgment, paras 23 and 103 [LTA Tab 6].

⁸ Reasons for Judgment of Fenlon J., para 156 [LTA Tab 4]; Court of Appeal Judgment, para 105 [LTA Tab 6].

⁹ Reasons for Judgment of Fenlon J., paras 85 and 144 [LTA Tab 4]; Court of Appeal Judgment, para 93 [LTA Tab 6].

¹⁰ Google's factum in the Court of Appeal [Tab 2I].

“...until the conclusion of the trial of this action or further order of this court.”

The Court of Appeal was at pains to emphasize this fact,¹² and that “if the character of the websites changes, it is always open to the defendants or others to seek a variation of the injunction...”

The ability of parties and others with identifiable interests to apply to vary the terms of the injunction is an important safeguard to ensure that it is not more restrictive than necessary.¹³

And, while the Datalink defendants have had their defence struck and a warrant issued for the arrest of their principal, no judgment has been entered against them and there are other defendants who deny that the plaintiffs have any IP at all. Several trial dates have been adjourned as new defendants are discovered; the plaintiffs fully expect that the case will proceed to trial.

13. Second, the global Order does not go beyond what is necessary to protect the commercial interests of the plaintiffs.¹⁴ The Chambers Judge made a finding that the global Order was necessary to protect the plaintiffs’ commercial interests and the integrity of the court.¹⁵

14. Third, the assumption of jurisdiction was not based only on the facts that Google sells advertising in British Columbia and indexes BC websites.¹⁶ The Chambers Judge referred to some of the evidence demonstrating Google’s multiple connections with British Columbia, including that Google has an interactive website and that it actively collects data from BC residents which it uses in its business.¹⁷ There was also other evidence that she did not reference:

- i. Google operates wholly owned subsidiaries in Canada, including Google Canada Corp. (Delaware), Google Payment Canada Corp. (Nova Scotia), and Google

¹¹ Contrary to Google’s Memorandum of Argument, paras 4 and 9a [LTA Tab 9]. Temporal limitations were not argued below (see Court of Appeal Judgment, para 112 [LTA Tab 6]), and Google’s related complaint (in Google’s Memorandum of Argument, para 55[LTA Tab 9]) that the plaintiffs intellectual property rights are time limited is mostly wrong: copyright is a time-limited right, but claims based on trade secrets (breach of confidence) and passing off (common law trademarks) are not.

¹² Court of Appeal Judgment, paras 94 and 112 [LTA Tab 6].

¹³ Court of Appeal Judgment, at paras. 110 – 111 [LTA Tab 6].

¹⁴ Google’s Memorandum of Argument, para 4 [LTA Tab 9].

¹⁵ Reasons for Judgment of Fenlon J, para 148 [LTA Tab 4].

¹⁶ Contrary to Google’s Memorandum of Argument, para 8d and 17 [LTA Tab 9].

¹⁷ Court of Appeal Judgment, paras 51 – 55 [LTA Tab 6].

Payment Corp. (Delaware). The two “Google Payment” companies are extra-provincially registered in BC,¹⁸ and one of them operates the “Google Wallet” online payment system, by which users contract directly with both Google and its BC resident subsidiary.¹⁹

- ii. Google owns the domain “Google.ca”,²⁰ and the address that Google has given with its domain registration is in Ontario.²¹
- iii. Google owns the trademark in Canada for ‘Google’²² which, as a matter of law, means that Google carries on business in Canada.²³
- iv. Keyword advertising (which Google calls “AdWords”) is Google’s main source of revenue.²⁴ Google allows advertisers to display their ads, for a fee, directly above or beside the ordinary search results (called “organic search results”) that internet users see in response to any particular Google search – this is the business that the Chambers Judge was referring to in her jurisdiction analysis.²⁵ And, during the course of the proceedings below, Google continued to accept money from the Datalink Defendants to advertise the impugned websites in this way.²⁶

15. Fourth, it is somewhat misleading to describe Google’s search results as “automatic”.²⁷ Google generates its search results by a computer algorithm that Google created,²⁸ which ranks

¹⁸ Reasons for Judgment of Fenlon J., paras 29 – 30 [LTA Tab 4]; this means they are deemed to be resident in BC: *CJPTA*, ss 3(d) and 7(b).

¹⁹ Affidavit #16 of Dermot Devine, pages 2 – 15 and 41 – 43 [Tab 20].

²⁰ Cross-Examination of Steven Smith, page 35, lines 29 – 35, and Exhibit 6 [Tab 2H].

²¹ *Perfect 10 Inc. v. Google* [2011] FCJ No. 48 (TD) at para 4 [Book of Authorities to the Response (“BA”) Tab O].

²² See Affidavit #6 of John Zeljkovich, pages 3 – 16 [Tab 2X], and *Perfect 10 Inc. v. Google* [2011] FCJ No. 48 (TD) at para 4 [BA Tab O].

²³ This is because Google is only entitled to register a trademark where they have used the trademark in Canada (or made it known in Canada in association with wares or services). With respect to services, a trademark is deemed to be used in association with services if it is used or displayed in the performance of advertising of those services: *Trade-Marks Act*, s. 2, 4(2), 16(1). However, “use in Canada” of a trademark in respect of services is not established by mere advertising of the service in Canada coupled with performance of the services elsewhere. “Use in Canada” requires that the services be performed in Canada and that the trademark be used or displayed in the performance or advertising in Canada of such services: *Porter v. Don the Beachcomber* [1966] Ex CR, 982, at para 17 [BA Tab P].

²⁴ Reasons for Judgment of Fenlon J, para 54 [LTA Tab 4].

²⁵ Reasons for Judgment of Fenlon J, paras 50 – 63 [LTA Tab 4].

²⁶ Even after they advised the plaintiffs and the court that they had stopped – but the Chambers Judge accepted that this was inadvertent; see Reasons for Judgment of Fenlon J, para 50 [LTA Tab 4].

²⁷ Google’s Memorandum of Argument, para 3 [LTA Tab 9].

websites based on criteria that Google determined²⁹ as a matter of editorial choice.³⁰ Google's search results are then generated by Google's algorithm. However, Google interferes, on a daily basis, with its algorithm-generated search results,³¹ whether by reason of (i) morality;³² (ii) statute,³³ or what Google calls (iii) "voluntary compliance" with court orders,³⁴ and alters its search results (iv) on behalf of clients who pay for the advertising on which its business depends.³⁵

16. Fifth, neither the plaintiffs nor the courts below have ever suggested that Google could be sanctioned merely for carrying on its business of providing search results.³⁶ The plaintiffs did not seek any remedy against Google until they had put Google on notice of the underlying court orders. Google's reference to "unpredictable cost and chilling effect"³⁷ is unhelpful hyperbole – Google has never asserted any cost or inconvenience.³⁸ There is no evidence of any chilling effect.

17. Sixth, the order in question is clearly effective.³⁹ Google is the dominant player in the search engine market and no online business can survive if it cannot be found on Google.⁴⁰

²⁸ Steven Smith Affidavit, paragraph 4 [Tab 2U]. Mr. Smith has no personal knowledge of the operation of Google's algorithm [Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H]], but the following points can be discerned. See also Cross-Examination of Steven Smith, page 4, lines 44 – 47 [Tab 2H].

²⁹ Cross-Examination of Steven Smith, page 13, line 23 to page 14, line 29 [Tab 2H].

³⁰ Cross-Examination of Steven Smith, page 14, lines 22 – 29, and page 18, lines 13 – 46 [Tab 2H].

³¹ Reasons for Judgment of Fenlon J., para 8 [LTA Tab 4].

³² Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4].

³³ Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results: Cross-Examination of Steven Smith, page 12, lines 29 – 36, page 14, lines 36 – 42, and page 20, lines 23 – 46 [Tab 2H].

³⁴ Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4].

³⁵ Reasons for Judgment of Fenlon J., para 55 [LTA Tab 4].

³⁶ Google's Memorandum of Argument, para 31 [LTA Tab 9].

³⁷ Google's Memorandum of Argument, para 31 [LTA Tab 9].

³⁸ Reasons for Judgment of Fenlon J., para 153 [LTA Tab 4].

³⁹ Contrary to Google's Memorandum of Argument, para 45 [LTA Tab 9].

⁴⁰ Reasons for Judgment of Fenlon J., para 152 [LTA Tab 4]; Court of Appeal Judgment, paras 19 and 27 [LTA Tab 6].

Facts of the underlying dispute

18. The plaintiffs operate a small Burnaby technology business. They manufacture networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.⁴¹

19. The plaintiffs claim that the Datalink defendants, while acting as a distributor of the plaintiffs' products, conspired with one of the plaintiffs' former engineering employees to design and manufacture a competing product, the GW1000. The plaintiffs say that the Datalink defendants designed, manufactured, and sold their competing product using the plaintiffs' trade secrets and trademarks.⁴²

20. From the outset of the proceedings the Datalink defendants failed to comply with court orders. They abandoned the proceedings and their defences were struck.⁴³ In July 2012, Mr. Justice Punnett granted a *Mareva* injunction freezing the worldwide assets of the Datalink defendants, including all their inventory.⁴⁴ In August 2012, Madam Justice Fenlon issued a "Confidentiality Order" including an injunction prohibiting the Datalink defendants from dealing with broad classes of intellectual property.⁴⁵ Thus, both the Confidentiality Order (thou shalt not use intellectual property) and the *Mareva* injunction (thou shalt not sell inventory) prohibited the Datalink defendants from carrying on business.

21. However, the Datalink defendants did carry on business. They now operate as a clandestine⁴⁶ company and carry on business on the impugned websites⁴⁷ from an undisclosed

⁴¹ Reasons for Judgment of Fenlon J, para 3 [LTA Tab 4].

⁴² Reasons for Judgment of Fenlon J, paras 4 – 5 [LTA Tab 4]. While the plaintiffs do have some late registered trademarks, the core of their trademark claim is the tort of passing off, which is sometimes said to give rise to a "common law trademark".

⁴³ Reasons for Judgment of Fenlon J, para 6 [LTA Tab 4] and see also Reasons for Judgment of Dickson J., June 20, 2012 [Tab 2A]. The defence of the third Datalink defendant, Datalink Technologies Gateways LLC (which was added to the proceedings), was not struck until the Order of Gropper J. on March 8, 2013 [Tab 2G].

⁴⁴ Reasons for Judgment of Punnett J., October 10, 2012 [Tab 2E].

⁴⁵ Reasons for Judgment of Fenlon J., August 3, 2012 [Tab 2B]; Order of Fenlon J., August 3, 2012 [Tab 2C].

⁴⁶ Court of Appeal Judgment, para 18 [LTA Tab 6].

⁴⁷ Reasons for Judgment of Fenlon J, para 7 [LTA Tab 4]. See also Reasons for Judgment of Fenlon J., August 3, 2012, para 29 [Tab 2B].

location, selling the GW1000 to customers all over the world.⁴⁸ The purpose of the impugned websites is purely commercial – to make money selling their illegal product in violation of multiple court orders.⁴⁹ The court has issued a warrant for Morgan Jack’s arrest, but bailiffs have not been able to locate him.⁵⁰

Involvement of Google

22. Google is the dominant player in the search engine market, and no business conducted on the internet can succeed unless it can easily be found on Google.⁵¹ Before the Order was granted, Google provided direct links to the Datalink defendants’ websites, on which the Datalink defendants continue to sell their GW1000 product in violation of multiple court orders, to any member of the public who conducted a Google search for it.⁵²

23. The Chambers Judge found that plaintiffs were suffering irreparable harm by the Datalink defendants’ ongoing sales on the internet, and that Google was inadvertently facilitating that harm through its search engines.⁵³

24. In September 2012 the plaintiffs wrote to Google to advise them of the matters set out above and asked Google to cease indexing the websites of the Datalink defendants, anywhere in the world.⁵⁴ Google refused, and the plaintiffs issued the application below.

25. Google operates what it calls a “voluntary compliance” program with respect to court orders. After Google was served with the application below, Google proposed that the plaintiffs obtain yet another order, this time expressly prohibiting the Datalink defendants from carrying

⁴⁸ Reasons for Judgment of Fenlon J, paras 76 and 148 [LTA Tab 4]. See also Affidavit #2 of Robert Huth [Tab 2R], and Affidavit #3 of Dermot Devine [Tab 2M].

⁴⁹ Affidavit #13 of Dermot Devine, pages 14 – 82 [Tab 2N]; Affidavit #18 of Dermot Devine, pages 7 – 78 [Tab 2P]; Affidavit #7 of Sarah Perkonig, pages 71 – 81 [Tab 2S]. The courts below have not made any express finding on this – since it was not directly in issue – but see the Court of Appeal Judgment, para 110 [LTA Tab 6].

⁵⁰ Warrant, Groves J., September 26, 2012 [Tab 2D].

⁵¹ Reasons for Judgment of Fenlon J, paras 32 and 152 [LTA Tab 4]; Affidavit #4 of John Blown, paras 6 – 10 [Tab 2L]; Cross Examination of Steven Smith, pages 7 – 8 [Tab 2H].

⁵² Reasons for Judgment of Fenlon J, paras 113 and 152 [LTA Tab 4]. Affidavit #16 of Dermot Devine, pages 35 – 40 [Tab 2O]; Affidavit #7 of Sarah Perkonig [Tab 2S].

⁵³ Reasons for Judgment of Fenlon J, paras 10, 113, 152, 156 [LTA Tab 4].

⁵⁴ Affidavit #13 of Dermot Devine, page 5 [Tab 2N].

on business on their websites, which Google would “voluntarily” comply with. However, Google refused to de-index entire websites – it would only de-index individual “urls” (subpages of those websites) provided to them by the plaintiffs.⁵⁵

26. The plaintiffs agreed to try Google’s approach.⁵⁶ The plaintiffs and Google appeared before Mr. Justice Tindale in December 2012, who granted the “Website Order” prohibiting the Datalink defendants from “...operating or carrying on business through any website”.⁵⁷

27. The Datalink defendants still did not comply. They continued to operate in violation of the

- i. *Mareva* Order of Mr. Justice Punnett;
- ii. Confidentiality Order of Madam Justice Fenlon; and the
- iii. “Website Order” of Mr. Justice Tindale.

28. In January and February 2013 Google advised the plaintiffs that it had de-indexed 345 specific urls from its websites worldwide. The plaintiffs later discovered that this was not true – Google had only de-indexed those urls on google.ca,⁵⁸ but the matter returned to court initially because for every url Google de-indexed at the plaintiffs’ request, another one rose up to take its place.⁵⁹

29. The plaintiffs sought an order that Google stop displaying any part of the impugned websites, on Google’s search results worldwide. The Chambers Judge found that the plaintiffs’ had no alternative to the application brought against Google,⁶⁰ and that the relief sought against Google would not cause Google any expense or inconvenience.⁶¹ She found that in the

⁵⁵ Reasons for Judgment of Fenlon J, paras 9 [LTA Tab 4].

⁵⁶ Reasons for Judgment of Fenlon J, para 71 [LTA Tab 4].

⁵⁷ Order of Tindale J., December 13, 2012 [Tab2F].

⁵⁸ Reasons for Judgment of Fenlon J, para 75 [LTA Tab 4]; Google’s Amended Application Response, paras 2, 12, 14, 16, and 18; Affidavit #27 of Dermot Devine, paras 2 – 3 and pages 5 – 27 [Tab 2Q]; Affidavit #6 of John Zeljkovich, para 9 [Tab 2X].

⁵⁹ This was the “whack-a-mole” problem referred to by the courts below: Reasons for Judgment of Fenlon J, paras 70 – 76 [LTA Tab 4], and Court of Appeal Judgment, para 25 [LTA Tab 6].

⁶⁰ Reasons for Judgment of Fenlon J, paras 70 – 76 [LTA Tab 4]; see also Affidavit #6 of John Zeljkovich, para 6 [Tab 2X].

⁶¹ Reasons for Judgment of Fenlon J, para 153 [LTA Tab 4].

circumstances of this case a global order was necessary to protect both the plaintiffs' rights and the integrity of the court.⁶²

Google's censorship claims

30. The central theme of Google's opposition to the application below, after their claim that they are outside the jurisdiction of the court, was their claim that de-indexing the entirety of the Datalink defendants' websites would be censorship, because some of the conduct on those sites might not be unlawful.⁶³

31. Google's evidence on censorship was presented in the affidavit of Steven Smith. Mr. Smith works in the "Legal Removals" team of Google's legal department, which is a dedicated team of 40 people that responds to requests, like the plaintiffs', to remove content from search results.⁶⁴ Mr. Smith's affidavit was the only evidence in support of Google's censorship thesis, so the plaintiffs focussed on it in their cross-examination of Mr. Smith. And Mr. Smith, when presented with the inconsistencies in Google's position, admitted that Google's censorship thesis had no application to the facts of this case.⁶⁵

32. Mr. Smith swore that he had personal knowledge of the matters in his affidavit, but it became clear during his cross-examination that this was almost completely untrue. He was not involved in any of Google's dealings with the plaintiffs or the defendants, and did not supervise those who were,⁶⁶ so he had no evidence to offer on Google's conduct in this case. He gave evidence on the role of Google Canada when he did not know anything about the operations of that company.⁶⁷ Mr. Smith also had almost no evidence to offer on the policy issues at stake. He

⁶² Reasons for Judgment of Fenlon J, para 148 [LTA Tab 4].

⁶³ Affidavit of Steven Smith, paragraph 18 [Tab 2U].

⁶⁴ Cross-Examination of Steven Smith, page 2, lines 34 – 44 [Tab 2H].

⁶⁵ Because the Website Order is not about content – it prohibits the Datalink defendants from carrying on business on any website at all: Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [Tab 2H].

⁶⁶ Cross-Examination of Steven Smith: (i) page 24, lines 21 – 45, (ii) page 26 lines 33 to page 27, line 9, and (iii) pages 28 – 31, and in particular page 30, line 37 to page 31, line 7, (iv) page 36, line 31 to page 38, line 21 [Tab 2H]

⁶⁷ Cross-Examination of Steven Smith, page 7, lines 2 – 4, and page 21, line 3, to page 23, line 6 [Tab 2H].

did not know anything about the Google algorithm,⁶⁸ had no role in policy analysis or development,⁶⁹ and did not know anything about what other teams at Google do in respect of their power to change search results,⁷⁰ or anything about what Google has done historically in this regard.⁷¹

33. Anticipating that this might be the case, the plaintiffs wrote, before the cross examination, to ask that Mr. Smith inform himself about the past practices of Google in the alteration of search results. Google refused.⁷²

PART II – STATEMENT OF ISSUES

34. The sole issue is whether leave should be granted. The respondents concede that the appeal raises some issues of national importance, but say that leave should be denied in the circumstances of this case.

PART III – STATEMENT OF ARGUMENT

Can a court order a search engine to block search results?

35. The internet, like all other fields of human endeavour, is subject to law. And, Google, like all other natural persons, is also subject to law.

36. Google’s argument below was that the Court did not have the territorial competence to make an order against Google because Google is non-resident in British Columbia and its search service is located outside British Columbia. The degree of Google’s connections to British Columbia, and Google’s related claim that search business is separate from its advertising business, were the main focus of the hearing before the Chambers Judge.

37. Before the Chambers Judge, Google also argued that the order sought was censorship – based on the narrow idea that requiring Google to go beyond its “voluntary compliance” regime

⁶⁸ Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H].

⁶⁹ Cross-Examination of Steven Smith, page 28, lines 10 – 21 [Tab 2H].

⁷⁰ Cross-Examination of Steven Smith, (i) page 19, lines 22 – 26, and (ii) page 39, lines 9 – 27 [Tab 2H].

⁷¹ Cross-Examination of Steven Smith, (i) page 8, line 23 to page 10, line 10, (ii) page 11, lines 19 – 47, (iii) page 18, line 47 to page 19, line 11 [Tab 2H].

⁷² Affidavit #11 of Sarah Perkonig, pages 27 – 29 [Tab 2T].

and de-index all of the impugned websites – as opposed to individually vetted pages – might possibly affect legitimate content. In this regard, Google relied on the Affidavit of Stephen Smith. However, when Mr. Smith was cross-examined on his Affidavit, he agreed that Google’s censorship thesis had no application to the facts of this case,⁷³ and both courts below rejected it. The Court of Appeal summarized the point as follows:

- “that possibility . . . is entirely speculative”;
- “there is no evidence that the websites in question have ever been used for lawful purposes”;
- there is no “reason to believe that the domain names are in any way uniquely suitable for any sort of expression other than the marketing of illegal product”.⁷⁴

New Arguments

38. Google did not anchor its censorship thesis in any legal framework until the case was appealed, when Google raised the *Charter* for the first time in relation to similar arguments about restraints on the Datalink defendants’ speech. Google did not develop this argument and referred to it in only two paragraphs of the appellant’s factum.⁷⁵

39. Google has now recast its argument completely, with its primary focus being the new claim that the Order under appeal suppresses the public’s right to free access to information on the internet, and as such is an impermissible interference with *Charter* protected freedom of expression. Of the 11 cases Google now relies on (in paragraphs 22 to 56 of its memorandum), only *Crookes* and *Dagenais* were in Google’s arguments below (and for narrower purposes).⁷⁶

⁷³ Because the Website Order is not about content – it prohibits the Datalink defendants from conducting any business at all on the internet. Cross-Examination of Steven Smith, pages 24 – 27 and 31 – 33, and in particular page 33, lines 4 – 45 [Tab 2H], and see Reasons for Judgment of Fenlon J., paras 138 to 145 [LTA Tab 4].

⁷⁴ Court of Appeal Judgment, para 110 [LTA Tab 6].

⁷⁵ Google’s factum para 104 [Tab 2I].

⁷⁶ *Dagenais* only for the proposition that the common law should reflect *Charter* principles (see Google’s factum para 103), and *Crookes* only for the proposition that hyperlinks are not publications (see Google’s factum para 76). The new cases were relied on by one of the intervenors, but this is no answer since intervenors may not take the case away from the parties – as the plaintiffs submitted to the Court of Appeal.

Inadequate Record

40. The plaintiffs' expert evidence is limited because Google keeps the details of its operations secret.⁷⁷ And since the matter proceeded as an interlocutory motion against a non-party, Google was not obliged to give discovery of documents or be examined for discovery.⁷⁸

41. The cross-examination of Mr. Smith was the plaintiff's sole opportunity to obtain evidence from Google. But since Google chose to present a witness who knew nothing about the issues in the case (either as it was first conceived or as it has now been recast) and refused to have their witness inform himself, the plaintiffs have been prevented from developing their case. And, since Mr. Smith has admitted to having no knowledge of most of what is in his affidavit, Google has presented almost no evidence at all. This problem was amplified when Google raised the *Charter* for the first time in the Court of Appeal, and it has been further amplified now that Google has recast its argument again in this court.

Mind the Gap

42. Google's new argument is that the freedom of expression in issue is the public's right to find the prohibited websites on Google. No such right exists. Google alters its algorithm-generated search results every day, as part of its ordinary course of business, and no member of the public can assert a right, against Google, to find the impugned websites on Google.

43. It does not matter whether the absence of the Datalink websites from Google's search results arises from (a) Google's own processes or (b) an order of the court issued to protect its process from a flagrant contempt. However, if there is any substance to Google's new arguments, it must depend on how much the Order under appeal differs from Google's ordinary practice – meaning how big the gap is between the two.⁷⁹

⁷⁷ Affidavit #3 of John Blown (October 25, 2012), paras 4 and 7 [Tab 2K].

⁷⁸ The Chambers Judge commented on this issue: Reasons for Judgment of Fenlon J., paras 19 – 21 [LTA Tab 4].

⁷⁹ See Reasons for Judgment of Fenlon J., para 139 [LTA Tab 4], where the Chambers Judge made a similar point in relation to the arguments that were then before her.

44. From the limited record on this issue, it appears that there is very little difference, if any, between the Order and Google’s practice. Google interferes with its algorithm-generated search results on a daily basis. For example:

- i. Google posts AdWords results above, or beside, the organic search results generated by its algorithm. Google does indicate which results are ads, but the labelling may not be apparent to an ordinary user.⁸⁰
- ii. Google alters its search results to avoid generating links to child pornography sites, but not in the case of pornography generally.⁸¹ Google also alters its search results to avoid generating links to “hate speech” sites, although it is not clear if this is achieved in part by filters in the algorithm, or just by Mr. Smith’s content removal team.⁸²

45. However, some important gaps of knowledge remain. Mr. Smith did not know anything about the Google algorithm,⁸³ or what other teams at Google do in respect of their power to change search results,⁸⁴ or anything about what Google has done historically in this regard.⁸⁵

Here are some examples of the missing information:

- i. Most website owners want to be found on Google, and an entire industry has sprung up (called “search engine optimization”, or “SEO”) to assist websites to get better rankings on Google. Effective SEO involves “gaming” the Google algorithm, but when this goes too far Google punishes the website by de-indexing it.⁸⁶ Mr. Smith was not able to shed any light on this topic.
- ii. There was fresh evidence presented to the Court of Appeal, which was not admitted (based on the issues that were before that court), that if Google had followed its standard practices it would ordinarily have de-indexed all of the impugned websites

⁸⁰ See Cross-Examination of Steven Smith, page 4 (line 17) to page 6 (line 36), and Exhibit 1 [Tab 2H]; Reasons for Judgment of Fenlon J, para 55 [LTA Tab 4].

⁸¹ Cross-Examination of Steven Smith, page 14, lines 47 to page 16, line 32, and Exhibits 3 and 4 [Tab 2H].

⁸² Cross-Examination of Steven Smith, page 16, line 39 to the end of page 17, and then page 38, line 34 to page 39, line 3, and Exhibits 5 and 7 [Tab 2H], and see Reasons for Judgment of Fenlon J. para 139 [LTA Tab 4].

⁸³ Cross-Examination of Steven Smith, (i) page 12, lines 37 – 47, (ii) page 16, lines 25 – 28, and (iii) page 35, lines 2 – 20 [Tab 2H].

⁸⁴ Cross-Examination of Steven Smith, (i) page 19, lines 22 – 26, and (ii) page 39, lines 9 – 27 [Tab 2H].

⁸⁵ Cross-Examination of Steven Smith, (i) page 8, line 23 to page 10, line 10, (ii) page 11, lines 19 – 47, (iii) page 18, line 47 to page 19, line 11 [Tab 2H].

⁸⁶ Cross-Examination of Steven Smith, page 19, lines 27 to page 20, line 20 [Tab 2H].

for violating Google's SEO policies.⁸⁷ If leave is granted, the respondents will have to apply to present this evidence to the court to be considered, in relation to Google's new arguments, as a matter of first instance.

- iii. Google argues, in essence, that only it (or other search engines) can decide what is found on the internet, and that the law should have no place. But here again there is appears to be little difference between the effect of the Order under appeal and Google's ordinary practice, because Google regularly alters its search results to comply with the law.⁸⁸
 - a. Google receives almost 900 notices per week under the US *Digital Millennium Copyright Act*, to remove content from search results,⁸⁹ but we do not know whether Google removes this content on all its sites worldwide, or only on Google.com.
 - b. There are media reports⁹⁰ that Google paid \$500 million to the United States Department of Justice for knowingly accepting advertising for foreign pharmacies that were illegal according to American law.⁹¹ Google objected when the plaintiffs asked Mr. Smith about these reports.⁹²
 - c. There is good reason, from media reports, to believe that Google alters search results to comply with other countries' laws as well. For example, Google has recently entered into a draft settlement with EU competition regulators by which it has accepted legal restrictions on the search results it generates.⁹³ The most infamous example is Google's foray into China.⁹⁴ However, Mr. Smith had no knowledge of these events either, so we are left with more important gaps of knowledge.⁹⁵

⁸⁷ The plaintiffs received documents (from the Datalink defendants' SEO consultant – a late-added defendant) that led them on a fresh train of enquiry: Affidavit #1 (CA) of John Zeljkovich [Tab 2W], and Affidavit #1 (CA) of John Blown [Tab 2J].

⁸⁸ Cross-Examination of Steven Smith, page 14, lines 36 – 42 [Tab 2H].

⁸⁹ Cross-Examination of Steven Smith, page 12, lines 29 – 36, and page 20, lines 23 – 46 [Tab 2H].

⁹⁰ The respondents concede that these reports, and those referred to in the next paragraph, are not admissible for the truth of their contents. However, Google had the ability to disclose accurate information, or at a minimum to produce a witness with knowledge of the relevant evidence, and chose not to.

⁹¹ Affidavit #27 of Dermot Devine, para 7 and pages 43 – 44 [Tab 2Q].

⁹² Cross-Examination of Steven Smith, page 8, lines 17 to page 9, line 44 [Tab 2H].

⁹³ Affidavit #27 of Dermot Devine, para 6 and pages 38 – 41 [Tab 2Q].

⁹⁴ Affidavit #27 of Dermot Devine, para 5 and pages 34 – 37 [Tab 2Q].

⁹⁵ Cross-Examination of Steven Smith, page 8, lines 17 to page 9, line 44 [Tab 2H].

46. An appellant cannot raise new arguments on appeal unless all relevant evidence is in the record.⁹⁶ And leave should not be granted unless it is beyond doubt⁹⁷ that the plaintiffs could not have given any answer if Google’s new arguments had been raised at first instance.

... I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.⁹⁸

Freedom of Expression

47. The Order below merely directs Google to cease directing users to the impugned websites, which exist only to promote a business that the court below has issued three separate orders prohibiting. The “expression” on these websites does not further any of the purposes of protecting freedom of expression⁹⁹ – it is unlawful speech directed solely at making money off an illegal activity.¹⁰⁰

48. The Order under appeal has a very narrow practical impact. It is directed only at a specific list of websites in a highly specialized niche engineering market. The only internet users who are affected by the Order are those few businesses who are searching online for one of these products, and instead of finding the illegal GW1000 product, they will likely find the plaintiffs’ products. This, based on the multiple court orders issued below, is as it should be.¹⁰¹

⁹⁶ Brown, *Supreme Court of Canada Practice 2014* (Toronto: Thomson Reuters, 2013) at 385 [BA Tab W]. See also Sopinka and Gelowitz, *The Conduct of an Appeal*, 3rd ed (Markham: LexisNexis, 2012) at 92 [BA Tab Y]; *R v Brown*, 1993 CarswellAlta 412 at para 10, [1993] 2 SCR 918, (SCC) [BA Tab Q].

⁹⁷ *Alberta v. Nilsson* 2002 ABCA 283 at paras 170 – 172 [BA Tab A].

⁹⁸ *Lamb v. Kincaid* (1907) 38 SCR 516 [BA Tab K]

⁹⁹ As summarized in Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007 ff.) at 43.4 [BA Tab X].

¹⁰⁰ See: *R. v. Keegstra* [1990] 3 SCR 697 at 760, 766 [BA Tab S]; *RJR-MacDonald Inc. v. Canada* [1995] 3 SCR 199 at paras 71, 132 [BA Tab U]; *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232 at 245 [BA Tab V]; *R. v. Butler* [1992] 1 SCR 452 at 501 [BA Tab R]; *Hill v. Church of Scientology* [1995] 2 SCR 1130 at para 106 [BA Tab I]; *R v. Lucas* [1998] 1 SCR 439 at para 94 [BA Tab T]; *Canada v. JTI-Macdonald Corp* [2007] 2 SCR 610 at para 68 [BA Tab E].

¹⁰¹ The plaintiffs’ claims arise from intellectual property concepts that are widely recognized internationally – this case has nothing to do with an attempt to export local moral standards to the world.

49. As noted above, the “Website Order” of Mr. Justice Tindale, which was one of the foundations of the Order under appeal, was obtained at Google’s request. Google cannot now argue that this Order violates freedom of expression in some way.

Extra-territoriality

50. It has long been settled that the court can exercise its *in personam* jurisdiction in a way that has extra-territorial effect. English, and then Canadian, courts have been exercising this jurisdiction for 250 years.¹⁰² The Supreme Court of British Columbia regularly grants *Mareva* injunctions against worldwide assets,¹⁰³ and there is no doubt that the court can exercise its *in personam* jurisdiction by granting injunctions against non-residents.¹⁰⁴

51. The internet, as all parties have noted, is not subject to borders. Traditional concepts of territoriality are therefore of limited use,¹⁰⁵ but to the extent that the traditional approach is useful, we do not have a complete record here either.

52. With respect to jurisdiction, Google’s argument at first instance was based only on the idea that Google was outside the jurisdiction of the court generally, and in particular because its search business was distinct from its advertising business. Google did not argue that the jurisdiction analysis should be different for Google’s websites – other than Google.ca – until the matter reached the Court of Appeal so the plaintiffs did not focus on this issue when they developed their evidence or when they cross-examined Mr. Smith.¹⁰⁶

¹⁰² Reasons for Judgment of Fenlon J., at paras 11, 104, 108, 119 – 120, 125 – 126, and 145 – 150 [LTA Tab 4]; *Duke v. Andler* [1932] S.C.R. 734, at 737, 740 – 741 [BA Tab G]; *Catania v. Giannattasio* [1999] O.J. (CA) No. 1197 at para 12 [BA Tab F]; *Minera Aquiline Argentina v. IMA Exploration* 2006 BCSC 1102 at paras 163 to 170, 176 – 180 [BA Tab M], and 2007 BCCA 319, at paras 88 – 92 [BA Tab N]; *Amchem v. British Columbia* [1993] 1 SCR 897 [BA Tab B].

¹⁰³ The ability to impose obligations outside the jurisdiction, on non-parties within the jurisdiction, is what gives a *Mareva* injunction its impact – otherwise rogues would only need to locate their bank accounts in Calgary in order to insulate themselves from the effect of a BC *Mareva*.

¹⁰⁴ See: *Impulsoria Turistica v. Transat Tours Canada* 2007 SCC 20 at paras 1, 2, 6 – 8 [BA Tab J]; *Barrick Gold v. Lopehandia* [2004] OJ No. 2329 (CA) [BA Tab D].

¹⁰⁵ Reasons for Judgment of Fenlon J, paras 37 – 49 [LTA Tab 4].

¹⁰⁶ Google did argue that the court should not make an order that went beyond google.ca, but this was a submission that the order sought was too broad, not a submission that the court did not have the jurisdiction to make it: see Reasons for Judgment of Fenlon J. para 145 [LTA Tab 4]. Google’s

53. Google did not disclose where its servers (where it hosts the information that allows it to respond to users' search queries) are located except to say that they are not in British Columbia.¹⁰⁷ Google claimed that the decisions about removing websites from search results are made in California,¹⁰⁸ but late evidence that they submitted established that some of these decisions are made in Ireland,¹⁰⁹ and we do not know where the actions to remove content are taken,¹¹⁰ or if the location of these decisions and/or actions depends on whether we are dealing with Google.ca, Google.com, Google.fr, or any other of Google's national websites.

54. What this all means is that there is also not an adequate record to develop any alternative (non-territoriality based) framework for jurisdiction over internet activities.

55. And even Google's initial "voluntary" de-indexing on Google.ca required Google to take action outside of Canada.

I note again that on the record before me, the injunction would compel Google to take steps in California or the state in which its search engine is controlled, and would not therefore direct that steps be taken around the world. That the effect of the injunction could reach beyond one state is a separate issue. Even an order mandating or enjoining conduct entirely within British Columbia may have such extraterritorial, or even worldwide effect.¹¹¹

jurisdiction argument is summarized at Reasons for Judgment of Fenlon J. para 11 [LTA Tab 4]– it was not based on which website was in issue.

¹⁰⁷ Reasons for Judgment of Fenlon J. para 25 [LTA Tab 4]; Court of Appeal Judgment, para 20 [LTA Tab 6]. In fact even this is not clear – Google merely advised the court of these facts and presented no evidence on the point. As matters stand, we do not know whether the computers that control Google's search services are the same as the servers that contain the data Google collects to respond to search queries, or if these are different again from the data that Google collects on individual users so that it can send them targeted advertising.

¹⁰⁸ Reasons for Judgment of Fenlon J. para 30 [LTA Tab 4], but Google did not present any evidence to establish this.

¹⁰⁹ Affidavit #1 of Tugce Vulas [Tab 2V].

¹¹⁰ See Reasons for Judgment of Fenlon J. para 146, where the Chambers Judge alluded to this distinction [LTA Tab 4].

¹¹¹ Reasons for Judgment of Fenlon J, paras 146 – 147 [LTA Tab 4].

Comity

56. As for the arguments that the Order may violate the laws of other jurisdictions, Google chose not to allege or prove any such laws.¹¹² The Court of Appeal found that there was no chance that prohibiting the defendants from advertising wares that violated the intellectual property rights of the plaintiffs would offend the core values of any country:

... From a comity perspective, the question must be whether, in taking jurisdiction over this matter, British Columbia courts have failed to pay due respect to the right of other courts or nations....

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

... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.¹¹³

Injunctions against non-parties

57. This is not a question of national importance. The proposition that courts possess inherent jurisdiction to restrain the actions of non-parties is widely recognized,¹¹⁴ and the Court has inherent jurisdiction to maintain the rule of law and to control its own process.¹¹⁵

Conclusion

58. A ruling from this court on the scope of the court's ability to control illegal conduct on the internet has very broad potential implications, not only for e-commerce but for privacy & data protection, intellectual property and anti-counterfeiting, reputation (defamation), national

¹¹² Reasons for Judgment of Fenlon J, para 144 [LTA Tab 4], and see the Court of Appeal Judgment at paras 91 – 93 [LTA Tab 6].

¹¹³ Judgment of the Court of Appeal below, at paras. 91, 93 – 94 [LTA Tab 6].

¹¹⁴ See: *Greenpeace Canada v. MacMillan Bloedel* [1994] BCJ No. 2148 (CA) at para 37 [BA Tab H]; *MacMillan Bloedel v. Simpson*, [1996] 2 SCR 1048, paras 23, 26, 33 37 [BA Tab L]; *Attorney General v. Punch* [2003] 1 AC 1046 (HL), in particular at paras 4 and 43 [BA Tab C]; *Barrick Gold v. Lopehandia* [2004] OJ No. 2329 (CA) at para 77 [BA Tab D].

¹¹⁵ *MacMillan Bloedel v. Simpson*, [1996] 2 SCR 1048 at para 15 [BA Tab L].

security, and indeed the rule of law – keeping in mind that the Datalink defendants are not selling counterfeit handbags or watches – they are selling sophisticated engineering products to sophisticated businesses – if the court cannot act in the face of this misconduct where does it stop?

59. Google has no stake in this fight, and it has failed to provide almost any relevant evidence.

60. It is submitted that there is too much at stake to engage in a review of the issues proposed by Google based on an incomplete record and where Google has substantially recast its main argument. The preferable approach is to refuse leave and reconsider the issues on another occasion, and with the benefit of the judgments of other courts after they have considered the implications of the decisions below in a wider range of circumstances.

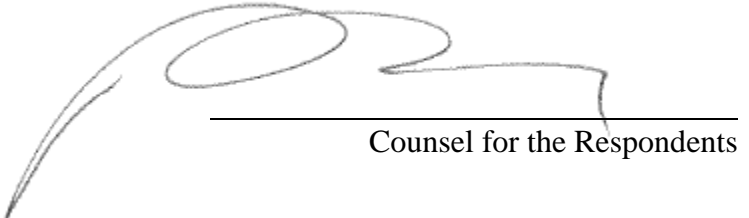
PART IV – SUBMISSIONS ON COSTS

61. The respondents seek costs.

PART V – ORDER SOUGHT

62. The application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of October, 2015.



Counsel for the Respondents

PART VI – TABLE OF AUTHORITIES

TAB	Paragraph
Jurisprudence	
A. <i>Alberta v. Nilsson</i> 2002 ABCA 283	46
B. <i>Amchem v. British Columbia</i> [1993] 1 SCR 897	50
C. <i>Attorney General v. Punch</i> [2003] 1 AC 1046 (HL)	57
D. <i>Barrick Gold v. Lopehandia</i> [2004] OJ No. 2329	50, 57
E. <i>Canada v. JTI-Macdonald Corp</i> [2007] 2 SCR 610	47
F. <i>Catania v. Giannattasio</i> [1999] O.J. No. 1197	50
G. <i>Duke v. Andler</i> [1932] S.C.R. 734	50
H. <i>Greenpeace Canada v. MacMillan Bloedel</i> [1994] BCJ No. 2148	57
I. <i>Hill v. Church of Scientology</i> [1995] 2 SCR 1130	47
J. <i>Impulsoria Turistica v. Transat Tours Canada</i> 2007 SCC 20	50
K. <i>Lamb v. Kincaid</i> (1907) 38 SCR 516	46
L. <i>MacMillan Bloedel v. Simpson</i> , [1996] 2 SCR 1048	57
M. <i>Minera Aquiline Argentina v. IMA Exploration</i> 2006 BCSC 1102	50
N. <i>Minera Aquiline Argentina v. IMA Exploration</i> 2007 BCCA 319	50
O. <i>Perfect 10 Inc. v. Google</i> [2011] FCJ No. 48 (TD)	14
P. <i>Porter v. Don the Beachcomber</i> [1966] Ex CR, 982	14
Q. <i>R. v. Brown</i> , 1993 CarswellAlta 412, [1993] 2 SCR 918, (SCC)	46
R. <i>R v. Butler</i> [1992] 1 SCR 452	47
S. <i>R v. Keegstra</i> [1990] 3 SCR 697	47
T. <i>R v. Lucas</i> [1998] 1 SCR 439	47
U. <i>RJR-MacDonald Inc. v. Canada</i> [1995] 3 SCR 199	47

- V. *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 47
232

Academic Commentary

- W. Brown, Henry S., *Supreme Court of Canada Practice 2014* (Toronto: Thomson Reuters, 2013) 46
- X. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007 ff.) 47
- Y. Sopinka and Gelowitz, *The Conduct of an Appeal*, 3rd ed (Markham: LexisNexis, 2012) 46

PART VII – STATUTORY PROVISIONS

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, ss. 3(d) and 7(b)
Trade-Marks Act, R.S.C., 1985, c. T-1, s. 2, 4(2), 16(1)

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, ss. 3(d) and 7(b)

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.

7 A corporation is ordinarily resident in British Columbia, for the purposes of this Part, only if

- (a) the corporation has or is required by law to have a registered office in British Columbia,
- (b) pursuant to law, it
 - (i) has registered an address in British Columbia at which process may be served generally, or
 - (ii) has nominated an agent in British Columbia upon whom process may be served generally,
- (c) it has a place of business in British Columbia, or
- (d) its central management is exercised in British Columbia.

Trade-Marks Act, R.S.C., 1985, c. T-1, s. 2, 4(2), 16(1)

2. “trade-mark”

« *marque de commerce* »

“trade-mark” means

- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade-mark;

4 (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

16. (1) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with goods or services is entitled, subject to section 38, to secure its registration in respect of those goods or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

- (a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;
- (b) a trade-mark in respect of which an application for registration had

2. « *marque de commerce* »

“trade-mark”

« *marque de commerce* » Selon le cas :

- a) *marque employée par une personne pour distinguer, ou de façon à distinguer, les produits fabriqués, vendus, donnés à bail ou loués ou les services loués ou exécutés, par elle, des produits fabriqués, vendus, donnés à bail ou loués ou des services loués ou exécutés, par d’autres;*
- b) *marque de certification;*
- c) *signe distinctif;*
- d) *marque de commerce projetée.*

4 (2) Une *marque de commerce* est réputée employée en liaison avec des services si elle est employée ou montrée dans l’exécution ou l’annonce de ces services.

16. (1) Tout requérant qui a produit une demande selon l’article 30 en vue de l’enregistrement d’une *marque de commerce* qui est enregistable et que le requérant ou son prédécesseur en titre a employée ou fait connaître au Canada en liaison avec des produits ou services, a droit, sous réserve de l’article 38, d’en obtenir l’enregistrement à l’égard de ces produits ou services, à moins que, à la date où le requérant ou son prédécesseur en titre l’a en premier lieu ainsi employée ou révélée, elle n’ait créé de la confusion :

- a) soit avec une *marque de commerce* antérieurement employée ou révélée au Canada par une autre personne;
- b) soit avec une *marque de commerce* à l’égard de laquelle une demande

been previously filed in Canada by any other person; or

(c) a trade-name that had been previously used in Canada by any other person.

d'enregistrement avait été antérieurement produite au Canada par une autre personne;

c) soit avec un nom commercial qui avait été antérieurement employé au Canada par une autre personne.