

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

BETWEEN:

GOOGLE INC.

Appellant
(Appellant)

-and-

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

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT
OPENMEDIA ENGAGEMENT NETWORK
Rule 47 and 55 of the Rules of the Supreme Court of Canada

OpenMedia Engagement Network, Applicant

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PART I: STATEMENTS OF FACTS

A. *Overview*

1. OpenMedia Engagement Network (“OpenMedia”) seeks leave to intervene in this appeal. OpenMedia is an independent non-profit advocacy organization committed to keeping the Internet open, accessible, and free. OpenMedia is the largest Internet and digital rights advocacy organization in Canada, and has a mandate of advancing a regulatory framework in Canada that recognizes the Internet as an essential medium for expression and engagement.
2. This appeal concerns the circumstances under which expression and access to the Internet can be restricted through an injunction against search engines and the World Wide Web results they can display.
3. OpenMedia’s proposed submissions present an analytical perspective that will be useful to the Court and different from those of the other parties. OpenMedia will bring the perspective of those in Canadian society who have an active interest in expression through the Internet and are seeking clarity on the limits that can be imposed on such expression. OpenMedia proposes to make submissions that will provide clarity to this area of law by:
 - a. outlining why the Internet is a protected “media of communication” pursuant to section 2(b) of the *Charter*;
 - b. situating the right to free expression through the Internet in the *Charter*, and identifying associated *Charter* values and incidental rights;
 - c. providing a broad *Charter* values framework for when expression can be limited in the context of the Internet; and
 - d. evaluating the test for injunctive relief proposed by the Appellant to ensure that it is consistent with *Charter* values.

B. *OpenMedia’s Direct Interest in the Proceedings*

4. Founded in 2008, OpenMedia has the mandate of advancing and supporting a regulatory framework in Canada that recognizes the Internet as an essential medium for expression and engagement.¹ The organization is directed by a volunteer board of directors, operated by staff, and supported by a community that approaches and utilizes the Internet from

¹ Affidavit of Meghan Sali, affirmed July 4, 2016 (**Sali Affidavit**), pages 5-6, ¶¶3-4.

unique and specialized perspectives, but share a common interest in protecting expression in the digital sphere.

5. OpenMedia is the largest Internet and digital rights organization in Canada, and is recognized internationally as a leading authority in this area. The organization has over 700,000 supporters, and is the only Canadian affiliate of the European Digital Rights Initiative, an exclusive network of civil and human rights organizations from around the world that promotes, protects and upholds fundamental human rights and freedoms in the digital sphere.²
6. The three pillars that inform the work of OpenMedia are freedom of expression, access, and privacy. Ms. Meghan Sali (“Sali”), the Communications Specialist with OpenMedia, defines these three pillars in her Affidavit at Tab 2 as follows:³
 - a. **Free Expression:** the Internet is a place for free dialogue and expression, allowing individuals to connect, communicate, and collaborate. Censorship and restrictions placed on the Internet are antithetical to the purpose and nature of the medium in a democratic society like Canada;
 - b. **Access:** access to the Internet should be viewed as a right in modern democracies. Universal access to fast, open, and affordable networks ensures that everyone can benefit from the Internet;
 - c. **Privacy:** state surveillance and improper treatment of sensitive personal information undermines the freedom that is at the core of the right to an open Internet in a free and democratic society.
7. OpenMedia is an active participant and has extensive experience in policy discussions over the regulation of the Internet in Canada. This includes through political organizing and campaigning, parliamentary lobbying and presentations, and participation in regulatory hearings and legal proceedings concerning the Internet and the digital rights of Canadians. In her Affidavit, Ms. Sali provides specifics on OpenMedia’s involvement in policy discussion around the regulation of the Internet in Canada:⁴
 - a. **Grassroots Organizing and Campaigning:** OpenMedia has led several dozen grassroots campaigns since 2008, with 25,000 to 500,000 participants per campaign. Notable OpenMedia campaigns include:

² Sali Affidavit, page 6, ¶4.

³ Sali Affidavit, page 6, ¶6.

⁴ Sali Affidavit, pages 6-7, ¶7.

- i. *Our Digital Future*: a crowd sourced and expert-reviewed digital policy report on free expression online based on the input of over 300,000 individuals from 155 countries;
 - ii. *Protect Our Privacy Coalition*: the largest pro-privacy coalition in Canada with over 30 major organizations and leading experts advocating for effective legal measures to safeguard citizens' privacy;
 - iii. *Stop the Meter*: a national campaign against usage-based billing fees for Internet access that involved over half-a-million Canadians, which to date, is the largest online campaign in Canadian history.
- b. **Parliamentary Lobbying and Presentations**: OpenMedia is registered as a lobbyist with the Office of the Commissioner of Lobbying, and has lobbied Members of Parliament and federal agencies on national security legislation, implementation of international treaties, telecommunications policy, and consumer protection measures that impact accessibility, expression, and privacy on the Internet. OpenMedia appears regularly before Parliamentary Standing Committees, including for: Industry, Science and Technology; International Trade; Public Safety and National Security; Justice; Canadian Heritage; and others.
- c. **Regulatory Hearings and Proceedings**: OpenMedia is a frequent participant in regulatory hearings and legal proceedings concerning telecommunications policy in Canada. The organization has intervened or participated in the following matters:
- i. *Bell Canada, et al v Amtelecom Limited Partnership, et al*, 2015 FCA 126: OpenMedia represented the rights of Canadian consumers against wireless service providers pursuant to the Wireless Code;
 - ii. *Telecom Decision CRTC 2016-60, Application to Review and Vary Telecom Regulatory Policy 2015-177*: OpenMedia argued that mandating full wholesale mobile virtual network operator access services would allow for sustainable competition in the wireless industry;
 - iii. *Telecom Notice of Consultation CRTC 2016-192, Examination of Differential Pricing Practices Related to Internet Data Plans*: OpenMedia is currently intervening in this proceeding on behalf of Canadian Internet users to address concerns against differential pricing practices related to Internet data plans;

- iv. *Telecom Regulatory Policy CRTC 2015-326, Review of Wholesale Wireline Services and Associated Policies*: OpenMedia argued that adopting open access rules and a fair wholesale services policy would allow for increased competition and innovation among high-speed Internet access service providers, as well as in the Canadian digital economy broadly;
 - v. *Telecom Notice of Consultation 2015-134, Review of Basic Telecommunications Services*: OpenMedia argued that high-speed internet access is essential to all Canadians, regardless of income or place of residence, and should therefore be subject to universal access obligations and binding minimum service quality standards;
 - vi. *Telecom Regulatory Policy CRTC 2015-177, Regulatory Framework for Wholesale Mobile Wireless Services*: OpenMedia argued that the adoption of fair wholesale access regulations for mobile wireless services would encourage competition and innovation for mobile wireless telecommunications in Canada;
 - vii. *Telecom Regulatory Policy CRTC 2013-271, The Wireless Code*: OpenMedia advocated for a mandatory code of conduct that would protect consumer and user interests among mobile wireless voice and data service providers.
8. In modern democracies like Canada, the Internet is the most important and pervasive medium of communication. The medium is critical to all forms of expression, including expression protected at section 2(b) of the *Charter*. Restricting search engines in the search results they can display represents a significant limitation on access and expression on the Internet that impacts all Canadians.
9. OpenMedia holds specialized knowledge and expertise on the use and mechanisms of the Internet, as well as in relation to the scope and substance of the right to free expression through this unique medium of communication. OpenMedia represents a diverse range of actors engaged in expression online. Through OpenMedia, they have collectively shaped various facets of law and policy concerning the Internet in Canada. This includes laws and policies around access, expression, and privacy. The diverse and specialized insight OpenMedia possesses, and extensive experience it has in policy discussions related to the regulation of the Internet in Canada, can assist the Court in developing an approach to limiting expression online that adequately situates and protects the right to free expression.

PART II: QUESTION IN ISSUE

10. The question to be determined on this motion is whether to grant OpenMedia leave to intervene in this appeal.

PART III: ARGUMENT

A. *The Test on a Motion for Intervention*

11. Rule 57(2) requires OpenMedia to:

set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

12. As per the sub-rule, OpenMedia must (1) set out the submissions it will advance in relation to the questions on which it proposes to intervene; (2) explain the relevance of those submissions to the proceeding; and (3) provide reasons to believe that the submissions will be useful to the Court and different from those of the other parties. Each element will be addressed in turn.

B. *OpenMedia's Proposed Submissions*

13. OpenMedia believes that this appeal presents the Court an opportunity to clarify the relationship between expression on the Internet and the *Charter* right to free of expression protected at section 2(b). Expression through the Internet frequently clashes with other legal rights.⁵ These clashes will continue to occur as the Internet acquires greater prominence as a medium of communication. However, there is no overarching framework for understanding and assessing the limits that can be imposed on expression in this context.

⁵ See: *Crookes v Newton*, 2011 SCC 47 [Crookes]: the right to reputation in the context of online defamation; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 [SOCAMP]: copyright infringement in the context of Internet caches; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34: interpreting the meaning of “communication” under s. 3(1)(f) of the *Copyright Act*, RSC 1985, c C-42 [Copyright Act] in the context of Internet downloads; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36: interpreting the meaning of “fair dealing” under s. 29 of the *Copyright Act* in the context of digital previews of musical works; *R v Spencer*, 2014 SCC 43: the privacy interests of Internet users and obligation of Internet Service Providers to protect the anonymity of Internet users in the context of criminal investigations; and numerous other examples.

14. OpenMedia proposes a broad *Charter* values framework for understanding and limiting expression in the digital sphere. This framework can guide courts in the development and application of limits on expression through the Internet in a variety of private law matters, including injunctions against search engines, defamation, copyright infringement, and statutory interpretation.
15. OpenMedia's proposed submissions overview the mechanisms of the Internet, situate the right to free expression through the Internet in the *Charter*, and outline a broad *Charter* values framework to assess and limit expression online. In particular, if OpenMedia is granted leave to intervene, it will make the following submissions:⁶
 - Courts must interpret and apply the common law in a manner that is consistent with *Charter* values, including whether to grant equitable remedies such as injunctions.⁷
 - The language of section 2(b) of the *Charter* protects both freedom of expression and the "media of communication" through which expression occurs:⁸

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and **other media of communication**.

- The right to free expression is conceptualized and understood in relation to its medium of communication, with the medium itself protected depending on its importance as a means for expression in Canadian society.
- For instance, both picketing⁹ and the press¹⁰ are protected media of communication under section 2(b). Courts have recognized the importance of these media of communication in Canadian society, as well as unique incidental rights to expression associated with each medium. In the picketing context, videotaping picket lines,¹¹

⁶ Sali Affidavit, page 9, ¶15.

⁷ *WDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, ¶93; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, ¶¶91-99; and *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, ¶¶18-22.

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11: "2. Everyone has the following fundamental freedoms:.. (b) freedom of thought, belief, opinion and expression, including freedom of the press and **other media of communication**" (emphasis added).

⁹ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

¹⁰ *Canadian Newspaper Co. v Canada (AG.)*, [1988] 2 SCR 122.

¹¹ *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62.

handing out pamphlets,¹² and secondary picketing¹³ have all been held to be incidental rights to free expression through the medium. With respect to the press, the open court principle¹⁴ is an example of an incidental right to free expression that is unique to it and protected under section 2(b).

- Frameworks to approach and assess the limits that can be imposed on expression are also informed by the medium of communication through which it occurs. The *Dagenais/Mentuck* Test,¹⁵ for example, demonstrates how the nature of the press informs the limits on expression through that particular medium of communication.
- The Internet is among the most prominent and important media of communication in Canada, and should be a protected medium of communication under section 2(b).
- The *Charter* right to free expression through the Internet has frequently clashed with other legal rights.¹⁶ However, the Court has only engaged in a piecemeal approach towards developing a robust framework for understanding expression through the Internet. A *Charter* values framework to expression through the Internet would provide much needed clarity to this area of law, and help inform limits on expression through the Internet in the private law context.
- The foundation to a *Charter* values framework to expression through the Internet has already been set down by the Court. In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 [*SOCAMP*], the Court identified the Internet as “one of the greatest innovations of the information age” whose “use should be facilitated rather than discouraged.”¹⁷ Building on this in *Crookes v. Newton*, 2011 SCC 47 [*Crookes*], the Court stated that actions that restrict the dissemination and flow of information on the Internet undermine free expression in the digital realm, and should be curtailed to the extent possible.¹⁸ In *Crookes*, this meant not subjecting hyperlinking to traditional publication rules. According to the Court, “[t]he Internet cannot... provide access to information without hyperlinks,” and that hyperlinking holds a “core significance” to the Internet’s ability to disseminate information.¹⁹ Subjecting hyperlinking to traditional publication rules would create a “chill” on the use of hyperlinks by

¹² *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8.

¹³ *Ibid.*

¹⁴ *Named Person v Vancouver Sun*, [2007] 3 SCR 253.

¹⁵ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76.

¹⁶ *Supra*, at note 5.

¹⁷ *SOCAMP*, ¶40.

¹⁸ *Crookes*, ¶¶34-36.

¹⁹ *Ibid.*, ¶36.

exposing individuals to liability for hyperlinking to defamatory content.²⁰ As a result, the Court identified hyperlinking as an incidental right to expression on the Internet since it was essential to the dissemination and flow of information through the medium.

- In *SOCAMP* and *Crookes*, the Court identified the Internet as a critical method of communication in Canadian society, and that protecting the dissemination and flow of information through the Internet is a *Charter* value. This is the foundation on which a broad *Charter* values framework to expression through the Internet can be developed.
- In the context of this appeal, another incidental right to the freedom of expression through the Internet is the right to publish, display and access content on the World Wide Web. There are over 1 billion websites on the World Wide Web. Search engines such as Google offer an indispensable service to Internet users by sifting through, categorizing, and displaying expressive content online. Without search engines, it would be nearly impossible to access or share expressive content through websites on the World Wide Web.
- Search engines, like hyperlinking, are one of the core mechanisms of the Internet that allow the medium to carry out its basic and intended function: the dissemination and flow of information.
- Injunctions preventing search engines from displaying certain websites limits the dissemination and flow of information online, infringing upon the right to expression through the Internet and related *Charter* values by restricting access and content.
- The test for injunctive relief against expression on the Internet proposed by the Appellant in its factum²¹ does not constitute a robust framework that adequately protects *Charter* values in the context of expression and access online. Facilitating the dissemination and flow of information on the Internet is a *Charter* value, and similar to freedom of the press under the *Dagenais/Mentuck* Test, it must be rigorously protected unless restrictions imposed upon it are necessary to prevent irreparable harm, and this harm must engage a competing *Charter* value or equally important legal principle. The threshold must be higher than a presumptive commercial or intellectual property interest that has not been proven.

²⁰ *Ibid*, ¶36.

²¹ Factum of the Appellant, Google Inc. (SCC Court File No. 36602) at ¶109-113.

C. *The Relevance of the Submissions to the Proceedings*

16. OpenMedia's proposed submissions are directly relevant to understanding the circumstances under which injunctions can be granted against search engines and the World Wide Web results they can display. The recognition and application of these factors must be consistent with *Charter* values, and OpenMedia proposes a broad *Charter* values framework for expression through the Internet that can be used to inform its limits.

D. *The Submissions Will be Useful and Different*

17. OpenMedia's proposed submissions present an analytical perspective that is distinct from the other parties.²²
18. The other parties' submissions do not focus on the Internet and the unique aspects of expression through this particular medium of communication. Neither do they propose a broad framework for assessing and imposing limits on expression in the digital realm. The Appellant, for instance, seems to focus its analysis on expression in a general sense, neglecting the fact that section 2(b) provides protection for the Internet as a media communication, similar to picketing and the press. This recognition is required to develop a robust test for limiting expression online that is consistent with *Charter* values. The Appellant's failure to appreciate this has led it to propose a test for granting injunctions against search engines that will undermine *Charter* values around expression through the Internet.
19. OpenMedia proposes to make legal submissions that will assist the Court in deciding the issue on appeal and in shaping the law. OpenMedia will make these submissions from the perspective of those who are involved in various facets and forms of expression on the Internet. These individuals and groups seek clarity between their expression through the Internet and the right to free expression protected at section 2(b) of the *Charter*. In particular, OpenMedia's submissions will:
- a. outline why the Internet is a protected "media of communication" pursuant to section 2(b) of the *Charter*;
 - b. situate the right to free expression through the Internet in the *Charter*, and identifying associated *Charter* values and incidental rights;
 - c. provide a broad *Charter* values framework for when expression can be limited in the context of the Internet; and

²² Sali Affidavit, page 12, ¶16.

- d. evaluate the test for injunctive relief proposed by the Appellant to ensure that it is consistent with *Charter* values.

PART IV: SUBMISSIONS CONCERNING COSTS

20. OpenMedia requests that there be no order as to the costs of this motion.

PART V: ORDER REQUESTED

21. OpenMedia respectfully requests that this Court grant it intervener status in this appeal, including the right to file a single factum not to exceed 10 pages in length, and the right to make oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 4th DAY JULY 2016.

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PART VI: TABLE OF AUTHORITIES

Jurisprudence	Cited At
<i>Crookes v Newton</i> , 2011 SCC 47	¶13, ¶15
<i>Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers</i> , 2004 SCC 45	¶13, ¶15
<i>Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 34	¶13
<i>Society of Composers, Authors and Music Publishers of Canada v Bell Canada</i> , 2012 SCC 36	¶13
<i>R v Spencer</i> , 2014 SCC 43	¶13
<i>Hill v Church of Scientology of Toronto</i> , [1995] 2 SCR 1130	¶15
<i>RWDSU v Dolphin Delivery Ltd.</i> , [1986] 2 SCR 573	¶15
<i>Canadian Newspaper Co. v Canada (AG.)</i> , [1988] 2 SCR 122	¶15
<i>Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401</i> , 2013 SCC 62	¶15
<i>R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.</i> , 2002 SCC 8	¶15
<i>Named Person v Vancouver Sun</i> , [2007] 3 SCR 253	¶15
<i>Dagenais v Canadian Broadcasting Corp.</i> , [1994] 3 SCR 835	¶15
<i>R v Mentuck</i> , 2001 SCC 76	¶15

PART VII: STATUTES AND REGULATIONS

<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11.
<p>Fundamental Freedoms</p> <p>2. Everyone has the following fundamental freedoms:</p> <p>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.</p>