

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

BETWEEN:

GOOGLE INC.

Appellant
(Appellant)

-and-

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

Respondents
(Respondents)

FACTUM OF THE INTERVENER
OPENMEDIA ENGAGEMENT NETWORK
Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I: OVERVIEW AND STATEMENTS OF FACTS

1. The Internet is an essential medium for expressive activity in Canadian society.
2. The ascension of the Internet as a vital medium for expression has occurred rapidly. Legislators and courts have responded to the unique policy and regulatory challenges associated with expression through the medium but significant gaps remain. One such gap is the circumstances under which expression can be restricted in the digital sphere.
3. Canada faces particular challenges in this regard. A lack of clarity over expression online — and the limits that can be imposed on such expression — has led courts to provide guidance on these issues numerous times over the past decade with varying results. The confusion will persist if an overarching framework to expression through the Internet is not developed.
4. Fortunately, an overarching framework can be found in this Court's extensive jurisprudence around restricting the *Charter* value of free expression through the various media of communication protected under section 2(b) of the *Charter*. The robust approach taken by this Court to protect free expression in the private law setting, combined with its recognition of the importance of the Internet as a medium for expression in Canadian society, provides the foundation for a framework for approaching and protecting expression online.
5. This uniquely Canadian framework accords with the foundations of our legal system, and provides much needed clarity to lower courts and parties with an interest in free expression online. It can be used to develop specific tests for limiting expression through the Internet in a variety of situations, including when injunctions are considered against search engines and the results they can display.
6. OpenMedia Engagement Network (“OpenMedia”) adopts the facts as set out in the facts of the Appellant and Respondents. It takes no position on the contested facts or merits of this appeal other than submitting that the interlocutory injunction considered implicates the *Charter* value of free expression.

PART II: QUESTION IN ISSUE

7. OpenMedia’s submissions set out a *Charter* values framework to expression through the Internet that can assist this Court in developing a robust test for when the results of a search engine can be restricted. It specifically submits that:
- a. courts must interpret and apply the common law in accordance with *Charter* values, including when considering injunctions that limit free expression;
 - b. courts must contextualize their interpretation and application of the common law in relation to the unique *Charter* values associated with expression through the Internet, a protected medium of communication under section 2(b) of the *Charter*;
 - c. facilitating the dissemination and flow of information through the Internet is a *Charter* value;
 - d. injunctions that restrict the ability of search engines to display and individuals to access expressive content on the World Wide Web limit the dissemination and flow of information online, implicating this *Charter* value;
 - e. the legal test for granting injunctions that restrict the results search engines can display must adequately assess and balance the *Charter* value of protecting the dissemination and flow of information online.

PART III: ARGUMENT

A. Courts Must Develop the Common Law in Accordance with *Charter* Values

1. Courts as Custodians of the Common Law

8. Courts have a duty to develop and apply the common law in accordance with *Charter* values.¹
9. This obligation arises out of the courts’ role as “custodians of the common law.”² As custodians of the common law, courts are required to “modify or extend the common law in order to comply with prevailing social conditions and values.”³

¹ *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at ¶¶91-99, [*Hill*], Book of Authorities of OpenMedia Engagement Network (**OpenMedia’s Authorities**), Tab 2.

² *R v Salituro*, [1991] 3 SCR 654 at 678, [*Salituro*], OpenMedia’s Authorities, Tab 3.

³ *Hill* at ¶91, OpenMedia’s Authorities, Tab 2.

10. The *Charter* occupies a critical role in defining the legal and social fabric of Canada.⁴ The *Charter* contains the “essential values and principles widely recognized in Canada, and more generally, within Western democracies.”⁵ Evolving social conditions and values in Canadian society reflect in the court’s understanding of the *Charter*, and by extension, its interpretation and application of the common law.⁶ This ensures that the common law develops in a manner that is consistent with both the constitution and values of Canadians.

2. Courts Have Modified the Common Law Test for Injunctions that Limit Expression

11. Courts have consistently exercised their duty to ensure that the common law complies with the *Charter* when considering injunctions that seek to limit free expression.

12. Canadians place a high value on free expression. As this Court has noted, free expression is foundational to the functioning of a democracy such as our own.⁷ It allows Canadians to search for and attain truth, participate in social and political decision-making, pursue self-fulfillment in its various forms, allow for the communal exchange of ideas, and achieve an abundance of other social goods.⁸ Our democratic system requires robust protections for free expression.

13. The importance of free expression in a functioning democracy has led to its entrenchment under section 2(b) of the *Charter*. Canadian courts have further recognized the importance of free expression by interpreting and applying section 2(b) in a broad manner, encompassing all forms of activity that conveys or attempts to convey meaning regardless of content.⁹

14. The robust maintenance of free expression in Canadian society extends to the development of common law tests for injunctions that seek to limit expression. The common law test for injunctions has been modified or replaced to comply with the *Charter* value of free expression in a variety of situations. This includes when injunctions

⁴ *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at ¶18, [*Pepsi-Cola*], OpenMedia’s Authorities, Tab 4.

⁵ *Ibid.*, OpenMedia’s Authorities, Tab 4.

⁶ *Salituro* at 670 and 675, OpenMedia’s Authorities, Tab 3.

⁷ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1336-1337, [*Edmonton Journal*], OpenMedia’s Authorities, Tab 5.

⁸ *Pepsi-Cola* at ¶32, OpenMedia’s Authorities, Tab 4.

⁹ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-971, OpenMedia’s Authorities, Tab 6.

have been sought to prevent journalists from reporting on court proceedings¹⁰ or stop picketing during labour disputes.¹¹ Compliance invariably entails a balancing of the *Charter* value of free expression with the other legal principles at stake.

15. In its analysis of whether the common law test adequately balances free expression, the court contextualizes expression in relation to the medium of communication through which it occurs. Canadian courts recognize that expression can only be understood and situated in relation to the medium through which it appears. The medium informs the contours, scope, and limits of expressive activity, and leads to the protection of incidental rights in order to allow for meaningful expression through a particular medium.
16. This nuanced approach reflects how the text of the *Charter* protects free expression. Section 2(b) of the *Charter* protects both expression and the “media of communication” through which expression occurs (emphasis added):¹²

2. Everyone has the following fundamental freedoms:...

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

17. Freedom of the press is widely recognized as a protected medium of expression under section 2(b) of the *Charter*.¹³ The press plays an important role in democracies by informing the public, holding institutions and those in power accountable, and facilitating the exchange of ideas.¹⁴
18. In *Dagenais v Canadian Broadcasting Corp.*,¹⁵ journalists challenged an injunction granted by a trial judge preventing them from reporting on a court proceeding on the grounds that it did not adequately balance the *Charter* value of free expression with an accused’s right to a fair trial. This Court agreed, finding that the adoption of the *Charter* elevated free expression to greater prominence and that the common law test for publication bans did not provide sufficient protection for freedom of expression.¹⁶ As a

¹⁰ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76.

¹¹ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

¹² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. 2(b) [*Charter*], OpenMedia’s Authorities, Tab 1.

¹³ The press is explicitly mentioned as a protected medium of communication under Section 2(b) of the *Charter*.

¹⁴ *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at ¶¶17-26, [*CBC v NB*], OpenMedia’s Authorities, Tab 9.

¹⁵ [1994] 3 SCR 835, [*Dagenais*].

¹⁶ *Ibid* at 874-878, OpenMedia’s Authorities, Tab 7.

result, the common law test was modified to reflect the principles of the *Charter*, and grant equal status to free expression and the right to a fair trial.

19. The unique nature of expression through the press informed the court's decision and how the *Charter* value would be protected, as reporting on criminal trials allowed the public to scrutinize the police and judiciary to ensure that the justice system operated as intended.¹⁷
20. This approach also led to the constitutional entrenchment of the open court principle as an incidental right to free expression through the press under section 2(b) of the *Charter*. Providing the public unfettered access to judicial proceedings demonstrates "that justice is administered in a non-arbitrary manner, according to the rule of law."¹⁸ The most practical way for this to occur is through the press.¹⁹ In order to inform the public on processes and outcomes of the justice system, journalists were granted the right to report on judicial proceedings, unless that right was restricted after a balancing of the *Charter* value of free expression.
21. The common law test for injunctions against secondary picketing underwent similar treatment by this Court after the adoption of the *Charter*. In *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.* ("*Pepsi-Cola*"),²⁰ a labour union challenged the constitutionality of an injunction preventing its members and supporters from picketing at secondary locations. The challenge was successful with this Court ruling that picketing encompasses an expressive component, and due to the historical significance of picketing in the labour context, was a vital medium of communication in our democracy.
22. Most of this Court's analysis focused on contextualizing the *Charter* value of free expression through picketing,²¹ and then directly assessing the common law test to ensure it adequately protects expression through the medium. In the end, this Court altered the common law test for injunctive relief to protect the *Charter* value of free expression by determining that an injunction will be granted against picketing at the premises of independent third parties only if "accompanied by the commission of a tort actionable at the instance of the primary company."²²

¹⁷ *R v Mentuck*, 2001 SCC 76 at ¶¶51-54, OpenMedia's Authorities, Tab 8.

¹⁸ *CBC v NB* at ¶22, OpenMedia's Authorities, Tab 9.

¹⁹ *Edmonton Journal* at 1339-1340, OpenMedia's Authorities, Tab 5.

²⁰ *Pepsi-Cola*, OpenMedia's Authorities, Tab 4.

²¹ *Ibid* at ¶¶23-35, OpenMedia's Authorities, Tab 4.

²² *Ibid* at ¶¶109-110, OpenMedia's Authorities, Tab 4.

23. In *Pepsi-Cola*, this Court identified secondary picketing as an incidental right to the *Charter* value of free expression through picketing.
24. Given the language of section 2(b) of the *Charter*, and the frameworks for protecting expression through the press and picketing developed by this Court, similar protections can be extended to expression through the Internet, a critical medium of communication in Canada.

B. The Internet is a Protected Medium of Communication under the *Charter*

1. The Internet is an Important Medium of Communication in Canada

25. OpenMedia submits that the Internet is a protected medium of communication under section 2(b) of the *Charter*.
26. The Internet is necessary for meaningful participation in everyday life. The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression declared Internet access a human right in 2011, emphasizing “the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.”²³
27. The Internet is ubiquitous with all forms of expression in Canadian society. It has revolutionized the nature of human connection, public discourse, education, the arts, business, scientific inquiry, journalism, politics, and nearly all other major aspects of public and private life. The medium enables civil rights movements, gives voice and representation to marginalized perspectives, democratizes the media, unleashes creativity, and ignites cultural and societal transformations.²⁴
28. Internet usage in Canada is among the highest in the world.²⁵ Canadians spend the most hours online and are third globally for the most web pages visited per month.²⁶ Nearly 87% of Canadian households have access to the Internet, second among G8 nations.²⁷ Statistics

²³ Frank LaRue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHCR, 17th Sess, UN Doc A/HRC/17/27 (2011) 1 at ¶¶67-68, OpenMedia’s Authorities, Tab 18.

²⁴ The Internet encompasses media of expression already entrenched under the *Charter*. For instance, both the press and picketing have migrated to the digital sphere in order to assist individuals in achieving their expressive aims. This reflects the pervasive and vital nature of the Internet as a medium of communication.

²⁵ comScore, Inc., *Canada 2015 Digital Future in Focus*, (Canada: comScore, Inc., 2015) at 6, OpenMedia’s Authorities, Tab 14.

²⁶ *Ibid.*

²⁷ Canadian Internet Registration Authority, *The Canadian Internet Factbook 2015*, (Canada: Canadian Internet Registration Authority, 2016) at 1, OpenMedia’s Authorities, Tab 15.

Canada reports that Canadians are increasingly turning to the Internet to research political issues.²⁸ Recognizing the importance of the Internet for political expression, the federal government has even created an [e-petition website](#) for Canadians to highlight issues of importance to their elected officials.²⁹ The Internet is an essential medium of expression that will only grow in prominence.

2. This Court Recognizes the Internet as a Protected Media of Communication

29. This Court’s jurisprudence around expression through the Internet has, in effect, treated the medium as if it were protected under section 2(b) of the *Charter*.
30. In *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*,³⁰ this Court described the Internet’s capacity to disseminate information as “one of the great innovations of the information age” whose “use should be facilitated rather than discouraged.”³¹
31. *Crookes v Newton*³² expanded on this finding, with this Court refusing to apply the traditional publication rule under the common law of defamation to hyperlinking. Applying the traditional publication rule would make individuals who hyperlinked to defamatory content liable for defamation. According to Abella J., hyperlinking held “core significance” to the dissemination and flow of information online.³³ Subjecting hyperlinking to the traditional common law publication rule would “have the effect of seriously restricting the flow of information and, as a result, freedom of expression.”³⁴
32. In *Crookes v Newton*, this Court recognized the Internet as a protected medium for expression in Canada. This Court interpreted, applied, and modified the common law in order to maintain the unfettered functioning of a core mechanism³⁵ that enabled expression through the Internet. The basis for this was that the common law test did not adequately protect free expression through the medium.

²⁸ Statistics Canada, *Spotlight on Canadians: Results from the General Social Survey* (Canada: Statistics Canada, September 14, 2015) at 11-12 and 16-19, OpenMedia’s Authorities, Tab 16.

²⁹ See: Parliament of Canada, “E-petitions: House of Commons,” *Parliament of Canada*, online: <<https://petitions.parl.gc.ca/>>.

³⁰ 2004 SCC 45 [*SOCAN*].

³¹ *SOCAN* at ¶40, OpenMedia’s Authorities, Tab 10.

³² 2011 SCC 47 [*Crookes*].

³³ *Crookes* at ¶¶33-36, OpenMedia’s Authorities, Tab 11.

³⁴ *Ibid*, OpenMedia’s Authorities, Tab 11.

³⁵ Core mechanisms that enable expression through the Internet are the technological processes and underlying infrastructure that allows for the open flow and accessibility of information throughout the medium.

33. Reading this Court's pronouncements on the importance of the Internet as a medium of communication along with its readiness to modify the common law in order to limit restrictions on expression through the medium, it appears as if the Internet is already recognized as a protected "media of communication" under section 2(b) of the *Charter*. What remains is an explicit articulation of a *Charter* values framework for expression through the Internet that will ensure that online expression is protected.

C. A *Charter* Values Framework to Protecting Expression through the Internet

34. This Court has already laid the foundation to a *Charter* values framework for expression through the Internet.

35. This Court has found the function of the Internet to be the dissemination of information.³⁶ As the most powerful medium of communication in the modern era for the dissemination of information, this Court has also recognized that use of the Internet should be facilitated, as it constitutes a social good.³⁷ This Court has ventured even further by preventing attempts to impede the core mechanisms that allow the Internet to disseminate the flow of information online.³⁸

36. This Court's approach to assessing and imposing restrictions on expression through the Internet mirrors the *Charter* value frameworks it has developed for injunctions that limit expression through the press and picketing. At its core, the frameworks recognize the importance of the medium for expression in Canada, contextualize expression to the core mechanisms of the medium, and require a balancing of the *Charter* value of expression with competing legal principles in order to restrict expression. The focus is not on expression itself, due to the content neutral principle that infuses free expression jurisprudence in Canada, but ensuring that the core mechanisms of the medium function effectively.

37. Drawing on this jurisprudence, OpenMedia submits that an explicit *Charter* values framework should be adopted by this Court to inform when expression through the Internet can be restricted. The framework contains the following elements, and serves as the foundation for approaching and imposing limits on expression through the Internet:

- a. the Internet is a critical medium of communication in Canada;

³⁶ *SOCAN* at ¶40, OpenMedia's Authorities, Tab 10.

³⁷ *Ibid*, OpenMedia's Authorities, Tab 10.

³⁸ *Crookes* at ¶¶16-43, OpenMedia's Authorities, Tab 11.

- b. the Internet's basic and intended function is the dissemination of information;
 - c. facilitating the dissemination and flow of information through the Internet is a *Charter* value associated with free expression;
 - d. the Internet has a number of core mechanisms that allow for information to be disseminated through the medium;
 - e. restricting or impairing the ability of the core mechanisms of the Internet to function limits the dissemination of information through the medium, implicating the *Charter* value of free expression; and
 - f. for restrictions to be imposed on the core mechanisms of the Internet, they must be necessary to prevent irreparable harm, engage an equally important legal principle, and be minimally impairing.
38. This framework can guide courts in developing context-specific tests for limiting expression through the Internet in a variety of situations. For instance, in the interpretation of statutes, adjudication of copyright infringement and defamation claims, and even assessing the common law test for injunctions that seek to restrict the results search engines can display. The framework ensures that the legal tests developed to restrict expression online adequately balance and protect the *Charter* value of free expression.
- D. Applying the *Charter* Values Framework for Expression through the Internet to the Test for Injunctive Relief against Search Engines**
39. OpenMedia submits that the “important public interests”³⁹ raised in this appeal can be addressed through the *Charter* values framework it proposes.
40. Search engines are a core mechanism for the dissemination of information through the Internet. There are [over 1 billion websites on the World Wide Web](#).⁴⁰ These websites contain expressive content and are integral to the way people share information online.
41. Search engines sift through, categorize, summarize, and display websites to Internet users, who are able to search and access this expressive content by searching key terms.⁴¹ By the same process, search engines allow publishers to reach an audience with their expressive content by indexing their websites for search on the World Wide Web.

³⁹ *Equustek Solutions Inc. v Google Inc.*, 2015 BCCA 265 at ¶¶102 and 104, OpenMedia's Authorities, Tab 13.

⁴⁰ Internet Live Stats, “Total Number of Websites” (12 September 2016), *Internet Live Stats* (Counter), online: <<http://www.internetlivestats.com/watch/websites/>>, OpenMedia's Authorities, Tab 17.

⁴¹ As established in *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 767, OpenMedia's Authorities, Tab 12: freedom of expression “protects listeners as well as speakers,” or in this case Internet users, publishers, and search engines.

42. Without search engines, it would be virtually impossible for Canadians to access expressive content on the World Wide Web in a meaningful way. Internet users would be limited to entering Uniform Resource Locators into the address bar of their web browser, hoping that one of the addresses entered would lead to the desired website. Publishers, for their part, would be hoping that someone would stumble on their website through the same erratic method. The Internet's ability to act as a conduit for the dissemination of information would be greatly diminished without the existence of search engines.
43. For this reason, restrictions on the results search engines can display impede the dissemination and flow of information online, implicating the *Charter* value of free expression through the Internet.
44. In order for an injunction to deindex a website from a search engine's results, a court must balance the *Charter* value of free expression through the Internet with a competing legal principle at stake. This will require the court to be satisfied that deindexing is necessary to prevent irreparable harm, is being done to protect or support an equally important legal principle, and minimally impairs the *Charter* value of free expression through the Internet.

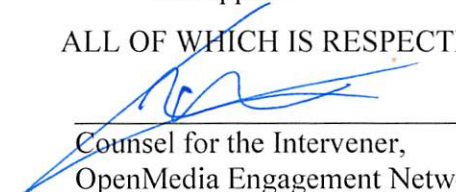
PART IV: SUBMISSIONS CONCERNING COSTS

45. OpenMedia does not seek its costs of this appeal. OpenMedia should not be ordered to pay the whole or any part of the costs of this appeal.

PART V: ORDER REQUESTED

46. OpenMedia respectfully requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 26th DAY SEPTEMBER 2016.



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