

**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.

Appellant
(Appellant)

- and -

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

Respondents
(Respondents)

- and -

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. This appeal raises the issue of whether an order of a domestic court that restricts the right to freedom of expression and information (“**freedom of expression**”) of people in every other country in the world is consistent with international human rights law. The order of the B.C. courts (the “**Order**”) requires the Appellant, Google, to remove information that would otherwise be available to individuals accessing information on the Internet (“**Information Seekers**”). The impact of the Order is not limited to British Columbia or Canada, but has immediate and global impact on the freedom of expression of Information Seekers everywhere. The Order therefore has serious implications beyond the rights of Google and the Respondents (“**Equustek**”), and has significant precedential consequences, both within the Canadian legal system and around the world.
2. In granting the Order, the B.C. courts failed to adequately consider its deleterious impact on freedom of expression and, despite its international application, failed to consider international human rights law or policy, grounding the Order solely in domestic law. Consequently, the precedent set by the Order poses a significant threat to international human rights, including the international right to freedom of expression.

PART II - POSITION ON THE APPELLANT’S QUESTION

3. Freedom of expression, which provides “the vehicle for the exchange and development of opinions”, is indispensable “for the full development of the person”, is “essential for any society” and is part of the foundation “for every free and democratic society”.¹ As the United Nations Human Rights Committee has stated: “Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”²

¹ *General comment no 34, Article 19, Freedoms of opinion and expression*, UNHRC, 102nd Sess, UN Doc CCPR/C/GC/34 (12 September 2011) at para 2 [*General comment no 34*], online: <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>. See also Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2015)6 Principles for the free, transboundary flow of information on the Internet*, 1224th Mtg of the Ministers’ Deputies (1 April 2015) at para 1, online: <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2015\)6](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2015)6)> [Rec 2015].

² *General comment no 34, ibid* at para 3. See also Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNHRC, 17th Sess, Agenda item 3, UN Doc A/HRC/17/27 (16 May 2011) at paras 67 [La Rue Report] online: <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/17/27>.

4. The international right to freedom of expression includes the right to seek and receive information, and protects all forms of expression and means of dissemination, regardless of frontiers.³ The operating presumption is always a full guarantee of protection, and any restriction to freedom of expression is the exception.⁴ Given that the unimpeded flow of information on the Internet is vital to freedom of expression, including for participation in social, educational, cultural and political issues,⁵ access to content available on the Internet must only be restricted in exceptional circumstances, pursuant to a clear legal framework grounded in international law.⁶

5. Therefore, the interveners Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, and Center for Technology and Society (collectively, the “**International Coalition**”), submit that, in determining whether or not such exceptional circumstances exist, courts must consider – and the International Coalition’s proposed framework is rooted in – fundamental principles derived from, and the contemporary interpretation of, instruments of international law, such as the *Universal Declaration of Human Rights* (“**UDHR**”),⁷ the *International Covenant on Civil and Political Rights* (“**ICCPR**”)⁸, the *American Convention on Human Rights* (“**ACHR**”)⁹, the *African Charter on Human and Peoples’ Rights* (“**ACHPR**”)¹⁰ and the *European Convention on Human Rights* (“**ECHR**”)¹¹. By incorporating these considerations, the proposed test ensures that the remedy issued is consistent

³ *General comment no 34*, *supra* note 1 at paras 11-12.

⁴ *Ibid* at paras 21-22; La Rue Report, *supra* note 2 at para 68.

⁵ See e.g. *Ahmet Yildirim v Turkey*, (Eur Ct HR) No 3111/10 (18 December 2012) at para 54 [*Yildirim*], online: <<http://hudoc.echr.coe.int/eng?i=001-115705>>; Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2011)8 of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet*, 1121st Mtg of the Ministers’ Deputies (21 September 2011) at paras 2-3, 7 [Rec 2011], online: <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2011\)8](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2011)8)>.

⁶ *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol 999, p 171 (16 December 1966) [ICCPR] art 19(3); *General comment no 34*, *supra* note 1 at paras 21-22; and see e.g. *Yildirim*, *ibid* at para 64; La Rue Report, *supra* note 2 at paras 2, 24-26, 69: “facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States” and at para 3: there should be “access to online content, without any restrictions except in a few limited cases permitted under international human rights law”.

⁷ *Universal Declaration of Human Rights*, GA Re 217(III), UNGAOR, 3d Sess, UN Doc A/810 (1948) art 19.

⁸ *Supra* note 6. The ICCPR is a multilateral treaty adopted by the UN General Assembly in 1966, in force since 1976 and ratified by 147 states (including Canada).

⁹ *American Convention on Human Rights*, “*Pact of San Jose*”, Costa Rica, 22 November 1969 art 13. See also Catalina Botero Marino, Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, *Freedom of expression and the Internet*, OEA/Ser.L/V/II, CIDH/RELE/INF. 11/13, (31 December, 2013) at paras 55-66, online: <http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20_WEB.pdf> [Marino Report].

¹⁰ *African Charter on Human and Peoples’ Rights*, “*Banjul Charter*”, 27 June 1981, 21 ILM 58 (1982) art 9.

¹¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI 1950 art 10.

with Canada's international treaty obligations and the international understanding of customary international human rights law. In particular, the International Coalition submits that a party seeking an order restricting freedom of expression beyond a domestic court's borders must show that:¹²

- (i) the order is valid under domestic law, and is sought in the jurisdiction in accordance with principles of state sovereignty and conflicts of law;
- (ii) the order is necessary for respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals; and
- (iii) the order's impact on human rights is proportional to the purpose and effect of the objective.

6. In light of the fundamental importance of freedom of expression, an injunction issued by a court in one country which restricts freedom of expression in another country will rarely, if ever, be consistent with international human rights law.¹³

PART III - ARGUMENT

A. The Order fails to consider human rights under international standards

i. The Internet is vital to the fundamental human right to freedom of expression

7. The right to freedom of expression, described by the Council of Europe as “a cornerstone of democratic society and...one of the basic conditions for its sustainability and progress and for the development of every human being”, is guaranteed through a number of international instruments such as the *UDHR* and the *ICCPR*, to which Canada is a party, as well as regional human rights treaties.¹⁴ In particular, Article 19(2) of the *ICCPR* provides:

¹² This test incorporates Article 19(3) of the *ICCPR*, *supra* note 6, which, as discussed in *General comment no 34*, *supra* note 1 at para 22, provides that restrictions “must be ‘provided by law’; they may only be imposed for [prescribed purposes]; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified [...], even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.

¹³ See e.g. La Rue Report, *supra* note 2 at para 25: “...legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life)”.

¹⁴ *UDHR*, *supra* note 7, art 19; *ECHR*, *supra* note 11 art 10; *ACHR*, *supra* note 9 art 13; *ACHPR*, *supra* note 10 art 9. See also Rec 2011, *supra* note 5 at paras 2-3, 7; Rec 2015, *supra* note 1 at para 1; La Rue Report, *supra* note 2 at para 68.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁵

8. The right to freedom of expression applies to online and offline activities, regardless of borders.¹⁶ The Internet, one of the “most powerful” and “essential tools” for increasing access to information and exercising freedom of expression, has become the main way for individuals around the world to participate in social, educational and political discussions and movements.¹⁷ Access to the Internet assists in the realization of other human rights and has heralded the greatest educational liberation, social justice-making and economic opportunity in history, particularly for people in the developing world.¹⁸ Accordingly, interference with access to information on the Internet infringes freedom of expression, and is only justified in “exceptional and limited circumstances prescribed by international human rights law”.¹⁹

ii. The Order ignores state sovereignty and principles of comity

9. The Order goes beyond requiring an illegal website to be taken down or blocked. By requiring Google to alter the contents of search results available to Information Seekers in other countries, thereby impacting their freedom of expression, the Order violates the principle of state sovereignty under international law. For example, the *Charter of the United Nations* is based on

¹⁵ ICCPR, *supra* note 6 art 19(2).

¹⁶ General comment no 34, *supra* note 1 at paras 11-12. See also Rec 2011, *supra* note 5 at para 2; Yildirim, *supra* note 5 at para 50; La Rue Report, *supra* note 2 at para 23.

¹⁷ See e.g. La Rue Report, *ibid* at para 2: “[T]he Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies”; also at paras 19-20. See also Council of Europe, Foreign Affairs Council, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, 12 May 2014 Council Mtg, online: <https://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf> at para 14: Freedom to seek and receive information “...is a key component of democratic governance as the promotion of participatory decision-making processes is unattainable without adequate access to information”; Yildirim, *ibid* at para 54: “[T]he Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest”.

¹⁸ See e.g. La Rue Report, *ibid* at para 22.

¹⁹ La Rue Report, *ibid* at para 68: “there should be as little restriction as possible to the flow of information via the Internet” since even supposedly “limited” restrictions on Internet access can have significant impact. See also Yildirim, *supra* note 5 at paras 31, 54.

the principle of “sovereign equality of all its Members”,²⁰ and under the *ACHR* and *ECHR*, a state’s jurisdiction is generally limited to its geographic territory.²¹

10. The Order here, however, has immediate, global effect and deprives foreign countries of the opportunity, ordinarily available through principles of comity, to consider whether or not the Order is consistent with their laws and public policy before it is applied to individuals within their borders.²² A domestic court must not be permitted to ground both its authority to issue such an order and justification for the order solely in its domestic law, without regard to principles of international human rights law. Yet this is precisely what the B.C. courts did.²³ This is extremely problematic for a number of reasons.

11. First, based on the principles of comity and reciprocity, the Order opens the door for courts in other countries, perhaps less respectful of human rights than Canada, to impose global restrictions on freedom of expression through similar *ad hoc* remedies grounded solely in their own domestic law, without regard to international norms, laws or policies.²⁴ Equustek acknowledges, but is dismissive of this issue, asserting that “[c]ourts of repressive regimes will do what they will do regardless of what Canadian Courts say”.²⁵ Such a statement encourages a very dangerous approach to issuing orders with international effect, particularly ones which restrict freedom of expression. Just as Canada would expect countries affected by Canadian

²⁰ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 art 2, online: <<http://www.un.org/en/sections/un-charter/chapter-i/index.html>>.

²¹ See e.g. *Ben El Mahi and Others v Denmark*, (ECJ) No 5853/06 (11 December 2006) at 7-8, online: <<http://hudoc.echr.coe.int/eng?i=001-78692>>. See also Rec 2015, *supra* note 1 at para 5: “There is a need to promote a common international understanding, to consolidate norms and adhere to best practices on the free, transboundary flow of information on the Internet, while ensuring full compliance with international agreements... This includes State responsibility to ensure that actions within its jurisdiction do not interfere illegitimately with access to information in other States or negatively impact the transboundary flow of information on the Internet”. Recently, the U.K. Supreme Court upheld an injunction, limited to England and Wales, restricting the publication of alleged unlawful material on the Internet (and in print) there, despite online and print publication outside the U.K.: *PJS v News Group Newspapers Ltd*, [2016] UKSC 26 at paras 6-8.

²² See e.g. *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1095: “[O]ne of the basic tenets of international law [is] that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state’s law has no binding effect outside its jurisdiction”.

²³ *Equustek Solutions Inc v Jack*, 2014 BCSC 1063 at paras 133 and 150, [Equustek SC]; *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265 at e.g. paras 54-56, 84-88, 100 [Equustek CA].

²⁴ Based on the B.C. courts’ reasoning, any country may be able to assert jurisdiction over Google in order to restrict access to information all over the world. *Equustek SC*, *ibid* at para 64; *Equustek CA*, *ibid* at para 56.

²⁵ Respondents’ Factum at para 64.

orders to abide by them, so too must Canada be prepared to enforce similar orders made by courts in other countries.²⁶

12. Second, allowing domestic courts to issue global injunctions by applying domestic law to the parties before it, such that a plaintiff is not required to seek to enforce the injunction in other jurisdictions, creates a risk that the rights of non-parties affected by the Order – like Google or, as here, Information Seekers (many of whom may be outside Canada) – will not be considered. In the absence of an international rights framework that requires a domestic court to consider the human rights impact of an order, it would fall to non-parties to consider and advance the human rights concerns in issue, assuming they are willing and able to do so.²⁷ This is not a viable means of ensuring protection of fundamental international human rights.

13. Third, the Order is not a takedown or blocking order, but rather an order requiring Google to delist search results, making material unsearchable in every country in the world. Essentially, the Order directs the removal of hyperlinks by search engines which are not actually carrying or publishing the unlawful content, and creates an avenue for parties to engage in all sorts of censorship of the Internet and violation of the rights of Information Seekers.²⁸

²⁶ *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 52: “...the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity”.

²⁷ See Marino Report, *supra* note 9 at para 140 discussing intermediary liability, but applicable here: “Even if they had the requisite number of operators and attorneys to perform such an undertaking, as private actors, intermediaries are not necessarily going to consider the value of freedom of expression when making decisions about third-party produced content for which they might be held liable. In view of the uncertainty about potential liability, intermediaries can be expected to end up suppressing all of the information that they think, from any point of view, could potentially result in a judgment against them. A system of this kind would seriously affect small and medium-sized intermediaries, as well as those who operate under authoritarian or repressive regimes. It would also jeopardize the right of all persons to use the media they deem appropriate for the transmission of ideas and opinions.” See also ARTICLE 19, *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age* Principle 10 at 16 [Right to Share] online: <<https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>>. Therefore, while Google has sought to ensure that the courts consider the freedom of expression in issue in this case, enlisting third-party intermediaries as global power surrogates will have a chilling effect on free speech, as such companies may not have sufficient incentive or resources to enforce freedom of expression rights relating to content that is not their own.

²⁸ In *Crookes v Newton*, 2011 SCC 47 at paras 26-30, 34-36, 42 this Court was unwilling to impose liability for publication of defamatory content in relation to inclusion of hyperlinks.

B. Framework for considering an order which infringes freedom of expression

14. The *ICCPR* offers an important global yardstick against which the decision to issue orders that limit freedom of expression must be measured.²⁹ Consistent with the *ICCPR*, the International Coalition’s proposed framework for considering orders that may restrict freedom of expression ensures proper balancing of the competing rights and interests. In particular, a party seeking such an order must meet the test set out in paragraph 5 above.

i. Is the order valid under domestic law?

15. A threshold requirement is that an order be compliant with the court’s domestic or governing law. Restrictions on rights or freedoms must be “provided for by law”, meaning that they have a legal basis in domestic law, and are also sufficiently accessible, clear and predictable.³⁰ The order must also be sought in accordance with the principles of state sovereignty and conflict of laws. Particularly where freedom of expression is implicated, a domestic court must work from the basic premise that its jurisdiction is generally limited to its geographic territory, and that its orders must not interfere with the human rights of individuals in other countries.³¹ Accordingly, only in the most exceptional circumstances – circumstances not present in this case – will a domestic court be able to find that it has authority to issue an order such as this, which employs a third party, like Google, to take action that infringes the right to freedom of expression in countries outside its territorial jurisdiction.³²

ii. Is the order necessary?

16. An applicant must also demonstrate that the order is necessary to protect the rights (including human rights under international human rights law) or reputations of others, or to protect national security, public order, public health or morals. This list is exhaustive, and the

²⁹ *ICCPR*, *supra* note 6 art 19; *General comment no 34*, *supra* note 1 at paras 7-8, 22; 33-34; *La Rue Report*, *supra* note 2 at paras 28, 69. All state parties to the *ICCPR*, including Canada, must respect and ensure these rights within their territories or control, and all have a legal interest in the performance by every other state party of its obligations: *General comment no 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNHRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para 2.

³⁰ *General comment no 34*, *ibid* at paras 24-25. See also *Yildirim*, *supra* note 5 at para 57.

³¹ See e.g. Rec 2015, *supra* note 1 at paras 3-5.

³² See e.g. *ibid* at 7-8, Principles 1.2 and 2; Rec 2011, *supra* note 5 at 2, Principles 1.1.1 and 1.1.2.

requested order must be necessary to achieving one of these listed objectives.³³ In this appeal, the Order seeks to protect Equustek's intellectual property rights.

iii. Is the order proportional?

17. An order which restricts freedom of expression must "conform to the principle of proportionality", meaning that it must not be overbroad (i.e. the application of the order must be limited to the prescribed purpose of the order³⁴) and must be minimally intrusive (i.e. if substantially the same result can be achieved through less extraordinary means, those means should be pursued).³⁵ The remedy must be appropriate to achieve its protective function and proportionate to the interest being protected, and take into account the form of expression and means of dissemination.³⁶ It is "crucial to assess the impact...of that restriction not only from the point of view of the private parties directly affected by the measure, but also from the perspective of the impact on the functioning of the Internet", and the corresponding impact on the right to freedom of expression of all Information Seekers.³⁷

18. Essentially, this stage of the test ensures that, in all the circumstances, the impact of the order is justified. In other words, the question is whether the "interference complained of" corresponds "to a social need sufficiently pressing to outweigh the public interest in freedom of expression".³⁸ In particular, the impact on freedom of expression must be considered, including, in the context of journalistic, literary or artistic material, the extent to which the material is or is about to become available to the public, or the extent to which it is or would be in the public interest for the material to be published.³⁹

19. The Order, which is not limited in time or geography, is not proportional to the impact on freedom of expression. It is overly broad, and in requiring Google to delist search results in every country in the world, the Order goes beyond what is necessary to protect the rights of Equustek, implicates issues of sovereignty and does not provide the least intrusive means to achieve the

³³ See e.g. *General comment no 34*, *supra* note 1 at paras 22, 28-33; *La Rue Report*, *supra* note 2 at para 24.

³⁴ *General comment no 34*, *ibid* at para 22.

³⁵ *General comment no 34*, *ibid* at para 22. See also *La Rue Report*, *supra* note 2 at paras 68-69.

³⁶ *General comment no 34*, *ibid* at para 34.

³⁷ *Marino Report*, *supra* note 9 para 53.

³⁸ As described by the European Court of Human Rights in *The Sunday Times v The United Kingdom*, (Eur Ct HR) No 6538/74 (26 April 1979) at para 67, online: <<http://hudoc.echr.coe.int/eng?i=001-57584>>.

³⁹ *General comment no 34*, *supra* note 1 at paras 13, 20 and 38-39.

stated objective. In addition, by characterizing the freedom of expression rights in issue as relating primarily to the advertising and sale of goods that violated the intellectual property rights of the plaintiffs,⁴⁰ the B.C. courts too easily granted primacy to intellectual property rights. The B.C. courts failed to account for the significant negative impact that a global injunction grounded in domestic intellectual property law, might have on freedom of expression rights of Information Seekers around the world.

20. The Order also ignores the tension between intellectual property claims and the corresponding curtailment of free expression rights of Internet users. In several countries there has been an “alarming expansion” of copyright and other IP claims, sought by private actors without due respect to freedom of expression, to prevent access to content they wish to have removed from the Internet. Courts must be vigilant to ensure that free expression and other human rights are not marginalized at the expense of intellectual property rights in these contexts.⁴¹

21. In sum, an attempt to protect intellectual property rights based in Canada does not justify an order which enlists a third party to interfere with the right to freedom of expression of every Information Seeker in the world, in whatever country they may live.

C. Conclusion

22. Considering the international law principles of state sovereignty and comity, and in light of the importance of the international right to freedom of expression, the B.C. Courts should not have issued an Order which has an immediate and deleterious impact on freedom of expression

⁴⁰ *Equustek* CA, *supra* note 23 at paras 41, 58, 93; *Equustek* SC, *supra* note 23 at para 155.

⁴¹ See Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, UNHRC, 29th Sess, Agenda item 3, UN Doc A/HRC/28/57 (24 December, 2014), online: <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/57> at paras 2-4: “[S]ince the 1990s, a new wave of international intellectual property treaties has increased the tension between intellectual property and human rights standards”. In the context of international treaties see, at paras 51 and 94 where the Special Rapporteur noted that using “website blocking, content filtering” and intermediary liability to address threats to copyright holders, “could result in restrictions that are not compatible with the right to freedom of expression...”, and recommended that “[i]nternational copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression...and other human rights”. See also Marino Report, *supra* note 9 at paras 75-82; *The Right to Share*, *supra* note 27 at 15, Principles 9.1 to 9.3; Peter K Yu, “Digital Copyright Enforcement Measures and Their Human Right Threats” (December 5, 2013) at 8-9, also available in in Christopher Geiger, ed, *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945>.

of individuals in every country in the world. The Order is not necessary, nor is it proportional, and the exceptional circumstances in which such a remedy may be justified do not arise here.

23. Moreover, the failure of the B.C. courts to consider international human rights law in relation to the Order, which restricts the right to freedom of expression globally, sets a dangerous international precedent. If the decisions below are allowed to stand, they can be relied on by courts in other countries - which may be less respectful of human rights than Canada - to issue orders based solely in their domestic law that directly interferes with the right to freedom of expression of individuals around the world, including individuals in Canada.

PART IV - SUBMISSIONS REGARDING COSTS

24. The International Coalition does not seek costs, and asks that no award of costs be made against it.

PART V - ORDER SOUGHT

25. The International Coalition requests permission to make brief oral submissions in support of its position.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2016.

Paul Schabas

Kaley Pulfer

Blake, Cassels & Graydon LLP
Counsel for the Interveners,
Human Rights Watch, ARTICLE 19, Open Net
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PART VI - TABLE OF AUTHORITIES

(a) Cases

<u>No.</u>	<u>Case Name</u>	<u>Paragraph(s)</u>
1.	<i>Chevron Corp v Yaiguaje</i> , 2015 SCC 42, [2015] 3 SCR 69	11
2.	<i>Crookes v Newton</i> , 2011 SCC 47, [2011] SCR 269	13
3.	<i>Ben El Mahi and Others v Denmark</i> , (ECJ) No 5853/06 (11 December 2006)	9
4.	<i>Morguard Investments Ltd v De Savoye</i> , [1990] 3 SCR 1077	10
5.	<i>PJS v News Group Newspapers Ltd</i> , [2016] UKSC 26	9
6.	<i>The Sunday Times v The United Kingdom</i> , (Eur Ct HR) No 6538/74 (26 April 1979)	18
7.	<i>Ahmet Yildirim v Turkey</i> , (Eur Ct HR) No 3111/10 (18 December 2012)	4, 8, 15

(b) Secondary Authorities

<u>No.</u>	<u>Title</u>	<u>Paragraph(s)</u>
8.	ARTICLE 19, <i>The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age</i>	12, 20
9.	Council of Europe, Committee of Ministers, <i>Recommendation CM/Rec(2011)8 of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet</i> , 1121st Mtg of the Ministers' Deputies (21 September 2011)	4, 7, 8, 15
10.	Council of Europe, Foreign Affairs Council, <i>EU Human Rights Guidelines on Freedom of Expression Online and Offline</i> , 12 May 2014 Council Mtg	8
11.	Council of Europe, Committee of Ministers, <i>Recommendation CM/Rec(2015)6 Principles for the free, transboundary flow of information on the Internet</i> , 1224th Mtg of the Ministers' Deputies (1 April 2015)	3, 7, 9, 15,

<u>No.</u>	<u>Title</u>	<u>Paragraph(s)</u>
12.	<i>General comment no 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant</i> , UNHRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004)	14
13.	<i>General comment no 34, Article 19, Freedoms of opinion and expression</i> , UNHRC, 102nd Sess, UN Doc CCPR/C/GC/34 (12 September 2011)	3, 4, 5, 8, 14, 15, 16, 17, 18
14.	Frank La Rue, <i>Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression</i> , UNHRC, 17th Sess, Agenda item 3, UN Doc A/HRC/17/27 (16 May 2011)	3, 4, 6, 7, 8, 14, 16, 17
15.	Farida Shaheed, <i>Report of the Special Rapporteur in the field of cultural rights</i> , UNHRC, 29th Sess, Agenda item 3, UN Doc A/HRC/28/57 (24 December, 2014)	20
16.	Catalina Botero Marino, Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, <i>Freedom of expression and the Internet</i> , OEA/Ser.L/V/II, CIDH/RELE/INF. 11/13, (31 December, 2013)	5, 12, 17, 20
17.	Peter K Yu, “Digital Copyright Enforcement Measures and Their Human Right Threats” (December 5, 2013), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363945 ; also available in Christopher Geiger, ed. <i>Research Handbook on Human Rights and Intellectual Property</i> (Edward Elgar Publishing, 2015)	20

PART VII - RELEVANT STATUTES

African Charter on Human and Peoples' Rights “Banjul Charter”, 27 June 1981, 21 ILM 58 (1982)

ARTICLE 9

Every individual shall have the right to receive information.

Every individual shall have the right to express and disseminate his opinions within the law.

American Convention on Human Rights
“Pact of San Jose”, Costa Rica, 22 November 1969

ARTICLE 13. Freedom of Thought and Expression

1. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 3. a. respect for the rights or reputations of others; or
 4. b. the protection of national security, public order, or public health or morals.
5. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
6. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
7. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

European Convention for the Protection of Human Rights and Fundamental Freedoms
Rome, 4.XI 1950

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 10

Liberté d'expression

1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les Etats de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.

**Charter of the United Nations
26 June 1945, Can TS 1945 No 7**

CHAPTER 1, ARTICLE 2

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

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

**International Covenant on Civil and Political Rights,
United Nations, Treaty Series, vol 999, p 171 (16 December 1966)**

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - A. For respect of the rights or reputations of others;
 - B. For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19

1. Nul ne peut être inquiété pour ses opinions.
2. Toute personne a droit à la liberté d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.
3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires:
 - A. Au respect des droits ou de la réputation d'autrui;
 - B. A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques.

Universal Declaration of Human Rights
GA Re 217(III), UNGAOR, 3d Sess, UN Doc A/810 (1948)

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19

Tout individu a droit à la liberté d'opinion et d'expression, ce qui implique le droit de ne pas être inquiété pour ses opinions et celui de chercher, de recevoir et de répandre, sans considérations de frontières, les informations et les idées par quelque moyen d'expression que ce soit.