SUPREME COURT OF FLAVELLE

ON APPEAL FROM

THE COURT OF APPEAL FOR FALCONER

BETWEEN:

BOONDOGGLE, INC.

Appellant

– and –

FLAVELLE (PRIVACY COMMISSIONER)

Respondent

FACTUM OF THE APPELLANT

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PART I—OVERVIEW

1. This appeal concerns the efforts of Brettly Greenberg, a prominent lawyer and retired politician, to suppress information of legitimate public interest—and the constitutionality of the law that allows him to do it. Recently, the Government of Flavelle passed the *Improving Search Results and Protecting Your Internet Legacy Act* (the "***Act***"). The *Act* establishes a "Right to be Forgotten."[1] In applying for and obtaining an order under the *Act* (the "**Order**"), Greenberg seeks to prevent search engines from displaying results pertaining to him which, in his view, no Flavellian Internet user should ever be able to readily access.

2. The law on which Greenberg relies drastically undercuts the freedom of expression of the Appellant, Boondoggle Inc. ("**Boondoggle**")—Flavelle's largest search engine—and of Flavellians as a whole. It disregards the rationales for that freedom, including the search for truth, self-government, and self-expression. The *Act* imposes a system that undermines all three, allowing people to remove Internet search results that are embarrassing, unflattering, or undesired—regardless of whether the information in the results is factually true, and subject only to the loosely defined discretion of the Privacy Commissioner. And it does all of this without compelling justification, overreaching in its attempt to protect reputation and privacy. In Greenberg's case, the *Act* has been used to eliminate search results to which Flavellians deserve access.

3. The *Act* infringes freedom of expression under s. 2(b) of the Flavellian *Charter of Rights and Freedoms* (the "***Charter***"). It cannot be justified as a reasonable limit under s. 1 of the *Charter*. If the *Act* is found constitutional, the decision to grant an order was unreasonable. On these grounds, Boondoggle requests that the judgment below be overturned.

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[1] *An Act to Amend the Personal Information Protection and Electronic Documents Act,* SF 2015, c 1 [*"PIPEDA Amendment Act*"].

PART II—THE FACTS

A. Factual background

4. Brettly Greenberg is a 72-year old lawyer and former politician. In 2000, he retired from political life and joined a prominent Flavellian law firm where he remains gainfully employed.[2]

5. In 2008, Greenberg was charged with fraud. The Flavelle National Police Authority ("**FNPA**") alleged that he misappropriated funds to pay for a new Muskoka holiday home. After information emerged casting doubt on the allegations, the Crown withdrew all charges. [3]

6. Given Greenberg's public profile and the nature of the allegations, articles mentioning the allegations quickly rose to the top of the search results. Greenberg asked Boondoggle to remove the results. Boondoggle refused, citing its commitment to free speech and access to information.[4]

B. Privacy Officer Macrae's initial order

7. After Boondoggle refused to alter the results, Greenberg applied to the Privacy Commissioner for an order. He cited a number of adverse effects that had arisen since the investigation. In reply submissions, Boondoggle stated that the articles were true, as Greenberg *was* investigated for fraud, and that the truth is always in the public interest. It also drew attention to broader reasons why the results might be in the public interest. [5]

8. Privacy Review Officer Macrae granted an order. In his written reasons, he stated that there was minimal public interest in the results. He accepted as fact the harms that Greenberg claimed.[6]

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[2] Problem, at paras 20-21.
[3] *Ibid* at paras 22-24.
[4] *Ibid* at paras 23-26.
[5] *Ibid* at paras 28-34.
[6] *Ibid* at paras 28-34.

C. Judicial review in the Superior Court of Falconer

9. Boondoggle exercised its right under the *Act* to seek judicial review of the Order in the Superior Court of Falconer. It also brought an application to have s. 7 of the *Act* declared unconstitutional, on the ground that it violates freedom of expression. Justice Popoff struck down the *Act* on that ground, stating that "search engines are a crucial vehicle for access to information." She declined to rescue it under s. 1 and found that she would have found Officer Macrae's order unreasonable if she had been required to rule on that question. [7]

D. Appeal in the Court of Appeal for Falconer

10. In the Court of Appeal for Falconer, Justice Smith reversed the decision of Justice Popoff and upheld the *Act*. While agreeing that the *Act* infringes freedom of expression, Justice Smith found that Flavelle had demonstrated that the infringement was justified, particularly given Greenberg's privacy interests. She also held that Officer Macrae's decision was reasonable.[8] Justice Giorgio arrived at the same result on different grounds. Most notably, he denied that the *Act* infringes freedom of expression. [9]

11. Boondoggle sought and obtained leave to appeal to the Supreme Court of Flavelle.

[7] Problem, at paras 35-40.
[8] *Ibid* at paras 41-42.
[9] *Ibid* at paras 44-48.

PART III—ISSUES AND ARGUMENTS

12. There are three issues on this appeal:

1. Whether the *Act* infringes freedom of expression under s. 2(b) of the *Charter*;
2. If the *Act* infringes freedom of expression under s. 2(b) of the *Charter*, whether it is justified under s. 1 of the *Charter*;
3. If the *Act* is found constitutional, whether the decision granting an order to Brettly Greenberg was reasonable

13. In respect of these, the Appellant argues that:

A. The *Act* infringes freedom of expression under s. 2(b) of the *Charter*;

B. The *Act* is not saved under s. 1 of the *Charter*;

C. Even if the *Act* is constitutional, the Order was unreasonable and should be overturned

A. The *Act* infringes freedom of expression under s. 2(b) of the *Charter*

14. In *Irwin Toy v Quebec,* the Supreme Court of Canada established a two-part test for determining whether there has been a violation of s. 2(b). Plaintiffs must first establish that the restricted activity falls within the scope of s. 2(b).[10] They must then demonstrate that the purpose or effect of the impugned legislation is to restrict freedom of expression.[11]

15. Search results are precisely the kind of expression that the *Charter* seeks to protect. They constitute expressive activity falling within the scope of s. 2(b). They are also a crucial medium for the expressive activities of online content creators. As such, safeguarding the *Charter* rights of those content creators requires according s. 2(b) protection to search results. In either case, the *Act* constitutes an infringement of s. 2(b).

[10] *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 at para 40 [*Irwin Toy*].
[11] *Ibid* at para 47.

i. Search engine results fall within the scope of s. 2(b)

16. Search engine results fall squarely within the scope of s. 2(b). They represent value judgements made by search engine operators about the quality of web content. They are also a form of advice provided to Internet users. Finally, they are a vital medium for the expressive activities of web content creators.

a. Search engine results represent value judgements about web content quality

17. Search engines rank web content based on a subjective evaluation of quality and relevance. Websites with embedded content, high-quality media and high traffic perform better.[12] This is not an accident. Rather, this tendency reflects calculated judgements on the part of search engine operators about the type of web content that they believe should be prioritized. In making these judgements, search engine operators are "conveying meaning" by conveying their preferences about web content to the public.

18. These judgements involve the exercise of editorial discretion and should be safeguarded under s. 2(b) for three reasons. First, the *Charter*'s freedom of expression guarantee is broad. The Supreme Court of Canada has recognized that s. 2(b) is to be given a "large and liberal interpretation."[13] Any activity that "conveys or attempts to convey a meaning" falls within the scope of the guarantee.[14] The *Charter* also extends protection to an "infinite variety of forms of expression," as long as some attempt is made to convey meaning.[15] Editorial discretion fits neatly within this broad, inclusive framework. The decision about which search results to include

[12] Marcus Tober, Dr. Leonhard Hennig & Daniel Furch, "SEO Ranking Factors and Rank Correlations 2014—Google US," Searchmetrics White Paper, (2014) <http://www.searchmetrics.com/knowledge-base/ranking-factors-2014/> at 16-23, 25, 26 [SEO Ranking Factors].
[13] *Ford v Quebec (AG)*, [1988] 2 SCR 712 at para 59 [*Ford*].
[14] *Irwin Toy*, supra note 10 at para 41.
[15] *Ibid* at para 41.

or exclude in response to a query reflects an attempt to convey meaning and should be afforded *Charter* protection.

19. Second, the Supreme Court of Canada's rulings in *Slaight Communications v Davidson* and *RJR-MacDonald v Canada* extended s. 2(b) protection to the right to say nothing on a subject.[16] These rulings implicitly accept that the decision of what to include and exclude from expression—essentially, editorial discretion—is itself a protected element of s. 2(b). Additionally, a number of lower courts have explicitly granted editorial discretion protection under s. 2(b).[17]

20. Third, the Supreme Court of the United States has recognized that the protection of editorial discretion is an "elementary principle of the First Amendment."[18] In *Miami Herald Publishing v Tornillo,* Chief Justice Burger recognized that a newspaper "is more than a passive receptacle or conduit for news, comment, and advertising."[19] His words are equally applicable to search engines, given that they institute criteria via their algorithms for what constitutes high-quality web content. Additionally, multiple American lower courts have directly classified search engine results as speech, on the grounds that they constitute opinion protected by the First Amendment.[20]

b. Search engine results are a form of advice provided to Internet users

21. Search engine results are a form of advice provided to Internet users. Every time a user searches a term on Boondoggle, they are implicitly seeking the search engine operator's opinion on

[16] *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at 1080 [*Slaight*]; *RJR-MacDonald v Canada (AG)*, [1995] 3 SCR 199 at para 113.
[17] *Trieger v Canadian Broadcasting Corp.* (1988), 54 DLR (4th) 143 **(**Ont HCJ); *May v Canadian Broadcasting Corp./Radio Canada*, 2011 FCA 130.
[18] *Miami Herald Publishing v Tornillo,* 418 US 241 (1974) at 261 [*Tornillo*]; *Pittsburgh Press v Pittsburgh Commission on Human Relations*, 413 US 376 (1973).
[19] *Tornillo,* supra note 18 at 258.
[20] *Search King v Google Technology* (2003), (WD Okla) (available on Westlaw); *KinderStart.Com v Google Technology* (2007), (ND Ca) (available on Westlaw).

the web content most relevant to that query. This is a form of expression at the heart of the s. 2(b) guarantee.[21]

22. Search engine results are also sensitive to the individual needs of each user. Search engine operators factor in the preferences of the user commissioning a search. They analyse search terms in conjunction with the user's IP address and personal search history.[22] Consequently, it is possible for two people to enter the same term into a search engine and receive different results. Search results can therefore be understood as an expression of opinion on the part of search engine operators as to what web content is most relevant to each individual user.

23. Further, different search engines produce different results for similar search terms. These distinctions demonstrate variance in the opinions of search engine operators, and militate in favour of the inclusion of search results within s. 2(b).

c. Search engine results are the product of human judgement

24. The judgement of Justice Giorgio in the Court of Appeal highlighted the necessity of human judgement to engage s. 2(b). His ruling reflects a misunderstanding of algorithms and search engines. Algorithms reflect human judgement. They serve as proxies for the preferences of their human creators. Their use is necessitated by the number of users and volume of content on the Internet. The search results they generate are the same ones that their creators would have arrived at, merely delivered in a significantly faster and more precise manner. By extension, the value judgements reflected in those search results are attributable to human judgement.

25. Justice Giorgio also erred in his analysis of the need for an "identifiable creator" to engage s. 2(b). His concurring opinion attaches significance to the fact that algorithms are designed by "different engineers in different countries and different times." Expression, however, is no less

[21] *Slaight,* supra note 16 at 1057; *National Bank of Canada v Retail Clerks' International,* [1984] 1 SCR 269 at 296.
[22] SEO Ranking Factors, supra note 12 at 10.

deserving of protection because it is the product of many creators. The Supreme Court of Canada has recognized in numerous judgements that the s. 2(b) guarantee extends to commercial expression.[23] Crucially, the Court did not require a specification of the individual responsible for the commercial expression in any of those cases. It was sufficient that the expression was tied to a particular commercial entity. Likewise, Justice Lebel remarked in *Guignard* that "*commercial enterprises* have a constitutional right to engage in activities to inform and promote, by advertising [emphasis added]."[24] This lends weight to the claim that commercial expression need only be linked to an identifiable commercial entity to engage s. 2(b).

d. Search engine results are a vital medium for online expression

26. Search engine results are a vital medium for online expression. As such, legislation restricting access to them implicates the s. 2(b) rights of web content creators.

27. There is a strong jurisprudential basis for extending s. 2(b) protection to search results as a medium of expression. In *Irwin Toy*, the Supreme Court of Canada established that legislation aimed at restricting the method of conveying expression could infringe s. 2(b).[25] This principle was further developed in *Ford v Quebec*, where the same Court held that s. 2(b) included the right to expression in the language of one's choosing.[26] The Court rejected the submission that there was a meaningful distinction between medium and message for the purposes of s. 2(b) protection, given the intimate relationship between language and the content of expression.[27]

28. The Supreme Court of Canada has also recognized that signs are an important and protected medium for conveying meaning through advertising. In *Vann Niagara v Oakville*, a

[23] *Irwin Toy*, supra note 10; *Ford,* supra note 13; *Rocket v Royal College of Dental Surgeons of Ontario,* [1990] 2 SCR 232.
[24] *R v Guignard,* 2002 SCC 14 at para 23.
[25] *Irwin Toy,* supra note 10 at para 49.
[26] *Ford,* supra note 13 at para 60.
[27] *Ibid* at para 42.

municipal by-law limiting the size of ground signs to 80 square feet was found to infringe the freedom of expression of a company seeking to display 200 square foot billboards.[28] In *R v Guignard*, a by-law prohibiting advertising displays outside industrial areas was deemed unconstitutional.[29]

29. Search results are as vital to web content as signs are to advertisements and language is to thought. The search results associated with online content should not merely be considered a means of access. Rather, search results are part and parcel of the expressive activity of content creators, in the same way that signs are fundamentally interwoven with the expressive activity of advertisers.

30. The search result listings assigned to web content by search engine operators are a crucial component of most online expression. Users have to seek out web content through fixed entry points. Search engines are one of users' most frequent entry points. Consequently, search results play a crucial role in broadcasting the existence of web content to users. They play the same role for online users that signs play for users walking through a mall or a street. Consequently, they are also entitled to s. 2(b) protection.

ii. The *Act* infringes s. 2(b)

31. In *Irwin Toy*, the Supreme Court of Canada laid out two avenues for plaintiffs seeking to establish an infringement of their s. 2(b) rights. They can demonstrate that the purpose of the impugned legislation is to restrict expressive activity. Alternatively, they can demonstrate that the effect of the impugned legislation is to restrict access to an activity that supports the principles and values on which freedom of expression is based.[30]

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[28] *Vann Niagara v Town of Oakville*, 2003 SCC 65.
[29] *Guignard*, supra note 24.
[30] *Irwin Toy*, supra note 10 at para 52.

a. The purpose of the *Act* is to limit access to search results

32. The *Act* infringes the s. 2(b) rights of Boondoggle. To paraphrase Chief Justice Dickson in *Keegstra*, the *Act* is aimed at search results.[31] It is expressly based on recommendations from the Stewart Commission. One of these recommendations was that Flavellians should be able to remove information from search results to mitigate adverse effects to their reputation and privacy. As such, it is apparent that the *Act* was intended to limit access to search results. Consequently, if it is accepted that search results constitute expressive activity, the *Act* is clearly an infringement of s. 2(b).

33. The *Act* also infringes the s. 2(b) rights of web content creators and users. While its stated purpose is to limit access to search results, it seeks to protect reputation and privacy by making it prohibitively difficult to access certain online content. Consequently, its purpose is also to restrict access to the work of web content creators.

b. The effect of the *Act* is to limit access to web content

34. Alternatively, the effect of the *Act* is to limit access to web content. Legislation can infringe s. 2(b) if, in effect, it restricts access to an expressive activity that supports the principles and values underlying the *Charter's* freedom of expression guarantee.[32]

35. Search results provide links to web content. That web content is a direct form of expressive activity by content creators and incontrovertibly covered by s. 2(b). Consequently, legislation that removes search results implicates the s. 2(b) rights of web content creators and users by making it significantly harder to access web content.

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[31] *R v Keegstra*, [1990] 3 SCR 697 at para 33.
[32] *Ibid* at para 31.

36. The typical Internet user reaches web content through search engines. More than 90% of web users used search engines in 2012.[33] A 2010 Online Computer Library Centre report indicated that over 80% of users used search engines as their primary means of locating information.[34] Users rarely possess the web address for specific articles, particularly those located on smaller content providers. Thus, the *Act* will significantly impair the ability of users to reach web content. As such, it infringes the s. 2(b) rights of online content providers.

37. The crucial connection between search results and web content was implicitly recognized by the Supreme Court of Canada in *Crookes v Newton*. Justice Abella remarked that without hyperlinks, "the web would be like a library without a catalogue: full of information, but with no sure means of finding it."[35] Justice Abella's reasoning is equally applicable to search engine results. An online article without a corresponding search result is a like a novel confined to a library with over thirty million books and a severely diminished catalogue. The author of that novel does not have the freedom to express herself in any meaningful sense. Nor do web content creators who have search result listings to their work removed.

38. Further, access to the material of online content creators via search results supports the values underpinning s. 2(b). In *Keegstra,* Chief Justice Dickson recognized the importance of free expression as an essential precondition of the search for the truth, a mechanism for promoting the free flow of ideas, and a vital tool in fostering individual self-development.[36] Access to search engine results furthers all three of these objectives.

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[33] Kristen Purcell, Joanna Brenner & Lee Rainie, "Search Engine Use 2012," PEW Research Centre Report, (2012) <http://www.pewinternet.org/2012/03/09/search-engine-use-2012/> at 5.
[34] Lynn Silipigni Conaway & Timothy J. Dickey, "The Digital Information Seeker: Report of the Findings from Selected OCLC, RIN, and JISC User Behaviour Projects," (2010) Online Computer Library Centre Report, < http://www.oclc.org/research/themes/user-studies/dis.html> at 6.
[35] *Crookes v Newton*, 2011 SCC 47 at para 34.
[36] *Keegstra* supra note 31 at paras 87-89.

39. User access to search results aids in the search for the truth. Access to search results provides individuals with a tremendous reservoir of content which they can use to discuss, critique, and deepen existing knowledge. Access to search results also promotes the free flow of ideas. By providing users with efficient access to the opinions of their peers, they contribute immensely to the free exchange of viewpoints that is essential to the healthy functioning of democratic institutions. Finally, access to search results fosters individual self-development. Search engines allow users to gain access to a wealth of information on topics of their choosing, and to form and express their own beliefs and opinions.

B. The *Act* is not saved by s. 1 of the *Charter*

40. The *Act* purports to protect individuals from public access to information that, while true, may have adverse and unfair effects on their privacy and reputation. This is a sufficiently pressing and substantial objective to overcome the low bar of the first stage of the *Oakes* test.[37] The Supreme Court of Canada has consistently recognized that individuals have an interest in protecting their reputations and privacy.[38] The *Act*'s provisions are also rationally connected to its objective. However, they do not minimally impair freedom of expression and their negative effects outweigh their positive effects. As such, they cannot be justified under s. 1.

i. The *Act* is not minimally impairing

41. The *Act* is not "carefully tailored so that rights are impaired no more than necessary."[39] There are alternative schemes that would provide comparable protection to applicants without undermining the s. 2(b) rights of web users, content creators and search engine operators.

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[37] Peter Hogg, *Constitutional Law of Canada,* 2014 student ed (Toronto: Carswell, 2014) at 38-23.
[38] *Grant v Torstar*, 2009 SCC 61 at para 3 [*Grant*]*; R v Dyment*, [1988] 2 SCR 417 at para 16.
[39] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 145 [*Hutterian Brethren*].

42. A law that establishes a basic presumption of public interest and placed the onus upon the applicant to prove overriding adverse effects would accord greater respect to the s. 2(b) rights of content creators and search engine operators, while achieving comparable benefits in protecting the reputation and privacy of individuals. This presumption would be appropriate for two reasons. First, it would be consonant with the central nature of the free speech guarantee to Flavellian constitutional democracy. Second, it would better reflect the nature of the adversarial system established by the *Act*, whereby search engines have a commercial incentive to avoid challenging rulings.

43. A second option open to the legislature was to draft a law that provided the Privacy Commissioner greater guidance on the approach to take when balancing adverse effects to the individual with the public interest. In particular, the *Act* could have provided some indication of the kinds of adverse effects and public interests with which the legislative scheme is concerned.

ii. The *Act's* negative effects outweigh its positive effects

44. Even if the *Act* survives the first three stages of the *Oakes* test, it falls at the final hurdle. Privacy and reputation do not receive or deserve the same broad protection as freedom of speech. Even if they did, the *Act* is limited in advancing them, and may actively undermine them. Finally, the severe negative effects of the *Act* on freedom of speech overwhelm its positive effects with respect to privacy and reputation.

45. In the case at bar, the final stage of the *Oakes* analysis is determinative. As the Supreme Court of Canada noted in *Dagenais v Canadian Broadcasting Corp.,* this part of the test requires that there be "a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective" and "*a*

proportionality between the deleterious and the salutary effects of the measures [emphasis in original]." [40]

a. Privacy and reputation do not receive or deserve the same protection as freedom of expression

46. Freedom of expression is crucial to our—and every—democracy. It is a fundamental freedom under the *Charter*—the "matrix, the indispensable condition, of nearly every other freedom."[41] Thus, as the Supreme Court of Canada held in *Edmonton Journal v Alberta,* s. 2(b) rights should be restricted only in "the clearest of circumstances."[42]

47. In contrast, privacy and reputation, while both important, are protected only in limited circumstances. There is no freestanding right to privacy under the *Charter*.[43] Though provincial common law and statutes recognize some privacy rights, these rights generally apply only to deliberate or reckless breaches.[44] The Canadian federal *Personal Information Protection and Electronic Documents Act* applies only to the narrow context of collection and retention of private personal information—not, as under the *Act,* public information a person wishes were private.[45] These limits flow from the fact that, in a free and open society, over-broad protection of privacy would be both impractical and undesirable.

48. The same is true of reputation. There is no *Charter* right to reputation. The common law does not and should not provide a blanket to smother all information that might reasonably

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[40] *Dagenais v Canadian Broadcasting Corp.,* [1994] 3 SCR 835 at para 95; *Hutterian Brethren,* supra note 39 at para 76.
[41] *R v Sharpe,* [2001] 1 SCR 45 at para 23, endorsing the remarks of Cardozo J in *Palko v* Connecticut, 302 US 319 (1937) at 327.
[42] *Edmonton Journal v Alberta,* [1989] 2 SCR 1326 at para 3.
[43] *Euteneier v Lee* (2005), 77 OR (3rd) 621 (CA) at para 63; *Jones v Tsige,* 2012 ONCA 32 at paras 39-46 [*Tsige*].
[44] Per *Tsige,* supra note 43, Ontario's common law now recognizes the narrow tort of "intrusion upon seclusion." Regarding provincial privacy statutes, see, for instance, *Privacy Act* (British Columbia), RSBC 1996 c 373 (which requires the invasion be committed "willfully and without claim of right"); *Privacy Act* (Manitoba), CCSM, c P125 ("substantially, unreasonably, and without claim of right"); *An Act Respecting the Protection of Personal Privacy* (Newfoundland), RSNL 1990, c P-122 ("willfully and without a claim of right"); *Privacy Act* (Saskatchewan), Revised Statutes of Saskatchewan 1978, c P-24 ("willfully and without claim of right").
[45] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s. 3 ("Purpose").

diminish Flavellians in the eyes of fellow citizens. Instead, it protects reputation only against false statements. Even where false statements are concerned, that protection is limited. As the Supreme Court of Canada explained in *WIC Radio v Simpson,* while reputation is important, "nor should an overly solicitous regard for personal reputation be permitted to 'chill' freewheeling debate on matters of public interest."[46]

b. The law is limited in achieving its positive effects and potentially undermines them

49. In any event, the law is limited in its ability to achieve positive effects with respect to privacy and reputation, and may even undermine them. In the first place, the law covers only a small amount of the practically obtainable information about a person. The curious or malicious may still be able to find much of the information an order might conceal.

50. More than that, the "right to be forgotten" often works against its own declared goals. Mario Consteja González, whose suit inaugurated the European "right to be forgotten," is far better known as a result of his request than he would have been had he remained an otherwise obscure private citizen involved in debt recovery proceedings.[47] The protracted legal efforts of former Formula One executive Max Mosley to suppress search results pointing to a sadomasochistic "orgy" are likely as well known as the "orgy" itself.[48] A search of the "right to be forgotten" inevitably yields long lists of articles taken down as a result of the right.[49]

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[46] *WIC Radio v Simpson,* 2008 SCC 40 at para 2.
[47] *Google Spain v AEPD and Mario Consteja González* (2014), (European Court of Justice) (available on InfoCuria).
[48] *Max Mosley v Google Inc. and Google UK Ltd.*, [2015] EWHC 59 (QB).
[49] See, for example, "Telegraph stories taken down as a result of the "Right to be Forgotten," *Daily Telegraph* (3 September 2015) online: <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>.

c. The law drastically undermines freedom of expression

51. Several fatal effects on freedom of speech outweigh any potential benefits of the law. First, and for reasons explained above, it potentially renders search results of legitimate public interest less practically accessible, thus curtailing the free expression of search engines, content creators, and users.

52. Additionally, under the *Act,* there is a strong likelihood that search engines, inundated with requests, will prefer to forego the expense of contesting them. This is particularly true for small search engines.[50] Search engines do not necessarily have any commercial incentive to dispute the availability of particular search results, because their revenue is tied to the display of advertisements, which appear every time a search occurs, regardless of the results. Thus, there will be a strong incentive for search engines either to yield to personal requests to take down information—of the sort Greenberg first made in this case—or not to contest applications to the Privacy Commissioner. This scenario especially harms the rights of content creators: the accessibility of their content will often depend on a search engine that may have no direct interest in vindicating, or limited practical ability to defend, content creators' freedom of speech.

d. The law gives excessive power to the Privacy Commissioner, in a context unsuited to adjudication

53. The *Act* provides excessive and vaguely defined powers to the Privacy Commissioner, in a context ultimately unsuited to adjudicative resolution. The *Act* directs the Commissioner or his designate to consider only two things: adverse effects on the claimant and the public interest.[51] Troublingly, the statute on its face appears to allow results to be suppressed even where they are true and in the public interest, if the effect on an individual reputation is severe enough. In any

[50] "EU Data Protection law: a 'right to be forgotten?'," House of Lords European Union Committee Report (2014), <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/40.pdf> at ch 3, para 35.
[51] *PIPEDA Amendment Act,* s. 4.

event, the statute provides no clear guidance on how these factors should be weighed. It thus substitutes the loosely defined discretion of an administrative officer for the robustness of public debate. It allows scope for the decision-maker to impose his or her own version of the public interest.

54. More fundamentally, the Commissioner is simply unable to assess all of what might make something of public interest *in this particular context*. "Public interest" is inherently a broad term. In *London Artists Ltd. v Littler,* Lord Denning noted the breadth of what might fall under it in the context of defamation:

> [W]henever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.[52]

55. In this context, no adjudicator can decide whether information may be relevant, because that adjudicator will not be able to contemplate all of the purposes for which a piece of information might be relevant. If two concerned parents seek to hire a babysitter, for example, concerns about that person's past associations or spent convictions may raise legitimate concerns that would likely be cached away under the *Act* should the potential babysitter seek an order. Ultimately, relevance properly belongs in the eye of 3 billion beholders—the rough number of people who used the Internet in 2014.[53]

56. In the terminology of Professor Lon Fuller, the matters the *Act* seeks to adjudicate have "polycentric" elements, as any one removal of results has impacts reverberating across the Internet, which are unknowable *a priori.*[54] When such issues are submitted to adjudication, the

[52] *London Artists Ltd. v Littler Grade Organisation*, [1969] 2 QB 375 (CA).
[53] Victor Luckerson, "Internet users surge to almost 3 Billion in 2014," *Time Magazine* (25 November 2014) online: <http://time.com/3604911/3-billion-internet-users/>.
[54] Lon Fuller, "The Forms and Limits of Adjudication," 92 Harv L Rev 353 (1978), 394-404 [Fuller].

result is often "guesses at facts not proved and not properly matters for anything like judicial notice"—an apt description of what occurred in this case.[55] Attempting to resolve such disputes through *ad hoc* orders will create an Internet shot through with holes and gaps, with the average Flavellian unable to account for what appears on the Internet and why. Because the *Act* allows claimants to decide exactly which results they would like removed, it trades the coherence of search engines, operating according to carefully engineered algorithms and known principles, for the private desires of claimants.

e. The law undermines the search for truth

57. The search for truth is one of the core justifications for freedom of expression. This is why courts and legislatures have generally been reluctant to suppress factually true information unless severe harms can be shown. In a vibrant constitutional democracy like Flavelle, the relevance of particular information is best left to individual Flavellians to determine. In the context of hate speech under the *Criminal Code,* for instance, truth is an absolute defence.[56] Substantial truth is a defence to libel.[57] Unlike these curtailments of freedom of speech, this law allows the suppression of factually true information. The *Act* is thus fundamentally out of step with the free speech jurisprudence.

58. It is also out of step with the principles that underlie that jurisprudence. To adapt the words of Justice Holmes of the Supreme Court of the United States, the best test of an idea's validity and relevance ought to be "the power of the thought to get itself accepted in the competition of the market," not who can seek intervention by the authorities first.[58] Even if one believes that these principles may not always win out in a free market of speech, as Professor

[55] Fuller, supra note 54 at 401.
[56] *Criminal Code,* RSC 1985, c C-46, s. 319(3)(a).
[57] *Grant,* supra note 38 at paras 32-33.
[58] *Abrams v United States*, 250 US 616 (1919) at 630.

Frederick Schauer notes, "the reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter."[59]

C. Even if the *Act* is constitutional, the Order was unreasonable and should be overturned

59. Even if the *Act* passes constitutional muster, Officer Macrae's order should be overturned. Officer Macrae's order was unreasonable. It failed to adequately consider the significant public interest in the search results. That public interest outweighs any claimed adverse effects of the search results. Accordingly, the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."[60]

i. The standard of review

60. The Order deserves less deference than other administrative decisions, even when reviewed on the same standard, otherwise might. The parties have agreed throughout these proceedings that the standard of review is reasonableness, as defined by the Supreme Court of Canada in *Dunsmuir v New Brunswick.*[61]

61. While reasonableness is a deferential standard, it is not infinitely so. Two key points should infuse this Court's application of the standard of review in this case. First, the context here suggests that less deference is owed to administrative decisions under the *Act* than in other

[59] Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) at 34.
[60] *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47 [*Dunsmuir*].
[61] *Ibid*.

contexts in which reasonableness applies. Though reasonableness is a unified standard, it "takes its colour from the context," entailing differing applications in different contexts. [62]

62. This case lacks the typical features that would suggest a highly deferential application. The decision was reached on a written application, with no oral hearing. Thus, Officer Macrae would have no greater ability to appreciate the factual record than a reviewing court. Unlike a labour arbitrator, for instance, Officer Macrae is not an expert operating under an intricate and specialized regime. Such considerations as the "public interest" and adverse effects on an applicant do not require "concepts and language often unique to [the decision-maker's] area of expertise," nor "rendering decisions that are often counter-intuitive to a generalist."[63] They are also readily appreciable by lay-people, to say nothing of reviewing courts.

63. Second, the decision bears certain hallmarks of discretion. As the Supreme Court of Canada has repeatedly emphasized, no discretion is unconstrained.[64] A discretionary decision can be overturned if the decision-maker failed to take into account relevant factors or failed to give appropriate weight to relevant factors—as occurred here.[65] The wording of the statute makes clear that in determining whether to grant an order, the Commissioner is exercising discretion. The *Act* says that upon receiving an application, the relevant official "*may* make an Order requiring the removal of Internet search results… [emphasis added]"[66]

ii. There is a public interest in the search results

64. In arriving at his decision, Officer Macrae understated the public interest in the availability of the search results. In focusing mainly on the fact that Greenberg is a former

[62] *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59; Matthew Lewans, "Deference and Reasonableness Since Dunsmuir," (2012) 38:1 Queen's LJ 59.
[63] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 13.
[64] *Roncarelli v Duplessis*, [1959] SCR 121 at 140; *CUPE v Ontario (Minister of Labour),* 2003 SCC 29 at para 106.
[65] *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 72-75.
[66] *PIPEDA Amendment Act,* s. 4.

politician and the purported irrelevance of the results, Officer Macrae undervalued the various other elements of the public interest at play.

65. The wording of the *Act* makes clear that in deciding whether to grant an order, the officer "shall" take into account both the public interest and the adverse consequences on the applicant. As the Federal Court of Canada noted in *Friends of the Earth v Canada,* that word ("shall") "is construed as imperative in a statutory context, and when used it almost always creates a mandatory obligation."[67] The decision lacks the "justification, transparency, and intelligibility" that would allow a reviewing court to understand precisely *why* Officer Macrae arrived at his conclusion that the results were not in the public interest.[68]

a. The allegations are of legitimate public interest

66. The allegations were and are of legitimate public interest, both when they arose and in the present. As Boondoggle has noted throughout these proceedings, it is simply true that Greenberg was investigated for fraud, and this is a vital part of the Flavellian public record.

67. Moreover, in a democracy, the public lives of politicians—current and former—are of significant public interest in themselves. Broadly, politicians do not have the same reasonable expectation of privacy over their lives as ordinary members of the public. This is part of the Faustian pact they make in return for being entrusted to govern. This insight in part informs the relaxed standards applied to libel defendants on matters of public interest.[69] Alleged wrongdoing, even after politicians leave office, can raise legitimate concerns about how politicians conduct themselves in office and the affairs of government more broadly.

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[67] *Friends of the Earth v Canada (Governor in Council),* 2008 FC 1183 at para 34.
[68] *Dunsmuir,* supra note 64 at para 47.
[69] *Grant,* supra note 38; *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520 (High Court of Australia); *New York Times v Sullivan*, 376 US 254 (1964).

b. Officer Macrae neglected the broader public interest

68. In exercising his discretion, Officer Macrae also ignored the other public interests at stake in the availability of the search results at the time the Order was made. He thus crafted a remedy with a sword and not a scalpel, seeing the public interest only from Greenberg's necessarily limited perspective. The Order makes it that much harder for members of the public to see and assess the conduct of the police and the media over the entire course of the investigation. The conduct in this case raises serious concerns about how allegations involving politicians and public figures are investigated and reported.

69. There are several further public interests at play. First, Officer Macrae failed to consider the impact on Boondoggle's freedom of expression under s. 2(b) of the *Charter,* implicit in the notion of "public interest." As the Supreme Court of Canada noted in *Doré v Barreau du Québec,* if a decision disproportionately limits a *Charter* guarantee, it is unreasonable.[70] There is scant indication in Officer Macrae's reasons that he considered the impact the Order would have on the freedom of expression of Boondoggle, content creators, or web users.

70. Moreover, there is a public interest in knowing—in order to improve—the way the FNPA operates in investigating crimes with political implications. There is also a public interest in preserving the integrity of the historical record, in order for Flavellians to be able to conduct research, understand recent events, and participate in their democracy.

iii. The public interest outweighs any adverse effects on Greenberg

71. In this case, the public interest outweighs any adverse effects on Greenberg. There is no demonstrated link between the search results and the adverse effects. To the extent one could be

[70] *Doré v Barreau du Québec,* 2012 SCC 12 at para 7.

shown, Greenberg could counteract them without an order, and the public interest outweighs any adverse effects stemming from the search results.

a. There is no demonstrated link between the results and the adverse effects

72. As the Supreme Court of Canada has noted, a decision can be unreasonable where a decision-maker made unreasonable inferences from the factual record.[71] While Greenberg claims several adverse effects from the availability of the results, it is unreasonable to infer from the factual record that there is any necessary link between the effects and the results—as the text and overall purpose of the *Act* demand. S. 4 of the *Act* requires that the Privacy Commissioner consider "any adverse effects on the individual *resulting from the ongoing public connection between his or her name and the information linked to by the Search Results* [emphasis added]."[72] Because there is no demonstrated link between the results and the claimed adverse effects, it would also be unreasonable to infer that an order would counteract them.

73. Greenberg first claims that his friends and family have distanced themselves from him.[73] However, Greenberg's friends and family would have known of both the investigation and exoneration at the time they occurred, regardless of whether Boondoggle listed links to them.

74. Similarly, Greenberg claims adverse employment effects.[74] However, most employers conduct far more extensive Internet searches on their employees' backgrounds than simple search engine queries. These include police background checks, which will often reveal charges that did not result in convictions. Even were this not the case, most prospective employers would likely have known of the allegations from the initial reporting of them, given Greenberg's status

[71] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper*, 2013 SCC 34 at para 63, per Rothstein and Moldaver JJ dissenting; *Delios v Canada (AG)*, 2015 FCA 117 at para 27.
[72] *PIPEDA Amendment Act,* s. 4.
[73] Problem, at para 28.
[74] *Ibid* at para 29.

as a former politician. That Greenberg continues to be gainfully employed at Stern Niblett LLP also contradicts any suggestion that he is no longer able to earn a living.

75. While Greenberg was not re-elected to his granddaughter's school's Parent Teacher Association, there is no indication that the allegations were the ultimate reason he lost.[75] They are one of many variables that might explain why people did not vote for him.

b. The public interest outweighs any adverse effects stemming from the search results

76. Even if there were a link between the availability of the results and the claimed adverse effects, the public interest would still outweigh the effects on Greenberg. The public interest in this case is broad. It includes search engines' freedom of speech and the public right to know about other information related to the events in question.

77. In contrast, the impact on Greenberg is both localized and not sufficiently severe to merit the Privacy Commissioner's intervention. For instance, even if the results may have made it more difficult for Greenberg to be employed, this is a small price to pay given the public interest at stake in this case.

c. Greenberg himself is best-placed to counteract any adverse effects

78. As the decisions below have noted, Greenberg can himself contradict any negative impressions stemming from the search results, which should have rendered the Commission particularly reluctant to grant an order. As the Supreme Court of the United States elegantly wrote in *Whitney v California,* "if there be time to expose through discussion the falsehood and

[75] Problem, at para 29.

fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[76]

79. Greenberg is uniquely able to produce "more speech." As a former politician and a person of relative means, he has unique access to the media in order to contradict aspersions cast on him. In enlisting a government agency to curate his online reputation, Greenberg's application ignores the significant public interest in having the results available.

PART IV—ORDER SOUGHT

80. The Appellant requests that this Honourable Court allow the Appeal and strike down the *Act.* In the alternative, the Appellant requests that Officer Macrae's order be quashed.

81. ALL OF WHICH is respectfully submitted this 14th day of September, 2015 by:

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[76] *Whitney v California,* 274 US 357 (1927) at 377.

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SCHEDULE B—TEXT OF RELEVANT STATUTES

An Act Respecting the Protection of Personal Privacy **(Newfoundland), RSNL 1990, c P-122**

s. 3: Violation of privacy

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

An Act to Amend the Personal Information Protection and Electronic Documents Act, **SF 2015, c 1**

Part 7 – Right to be Forgotten

Definitions

1. In this Part,

"Personal Data" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

a. information relating to the educational, medical, criminal, financial, familial, personal, or employment history of the individual;
b. the personal opinions or views of the individual;
c. the views or opinions of another individual about the individual.

"Search Results" means any listing of results returned by a Search Engine in response to a keyword query, including lists of items with titles, hyperlinks to full versions of webpages, and descriptions showing where keywords have matched with content on any web page.

"Search Engine" means any entity included in the list created by the Privacy Commissioner under Section 4 of this Part.

2. Upon receipt of an Application by any Flavellian Citizen or Permanent Resident, the Privacy Commissioner of Flavelle or his or her designate may make an Order requiring the removal of internet search results containing Personal Data relating to the Applicant's name.

3. In deciding whether to make an Order pursuant to Section 2 of this Part, the Privacy Commissioner or his or her designate shall consider:

a. The public interest in access to the Search Results; and
b. Any adverse effects on the individual resulting from the ongoing public connection between his or her name and the information linked to by the Search Results.

4. The Privacy Commissioner or his or her designate shall identify and maintain a List of Search Engines operating within Flavelle for the purposes of enforcing this Part.

5. Upon granting an Order pursuant to Section 2 of this Part, the Privacy Commissioner or his or her designate shall serve notice of the Order on all Search Engines included in the List established pursuant to Section 4 of this Part

6. The Privacy Commissioner shall establish penalties for non-compliance with an Order.

7. An application for judicial review of a decision made under Section 2 of this Part may be made to the Superior Court.

Canadian *Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Freedom of Expression

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

***Criminal Code,* RSC 1985, c C-46.**

s. 319: Hate Propaganda

(1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2) Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true

***Personal Information Protection and Electronic Documents Act,* SC 2000, c 5**

s. 3: Purpose

The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

***Privacy Act* (British Columbia), RSBC 1996, c 373**

s. 1: Violation of privacy actionable

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

***Privacy Act* (Manitoba), CCSM, c P125**

s. 2: Violation of privacy

(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

***Privacy Act* (Saskatchewan), Revised Statutes of Saskatchewan 1978, c P-24**

s. 2: Violation of privacy

It is a tort, actionable without proof of damage, for a person, wilfully and without claim of right, to violate the privacy of another person.