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 RESPONDENT

TABLE OF CONTENTS

PART I – OVERVIEW

1. Search engines wield disproportionate power over the way in which information appears to users of the Internet. The mere rank-ordering of this information in the form of search results can have destructive impacts on an individual's privacy, dignity and reputation. At issue in this appeal is whether the *Charter* shields machine-generated search results from legislation designed to mitigate their most harmful and lasting impacts on Flavellians' fundamental values.

2. The Government of Flavelle recently established a "right to be forgotten" through an amendment to a quasi-constitutional privacy statute, the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"). This right operates by vesting in Flavelle's Privacy Commissioner the power to order search engines to remove specific hyperlinks to Internet content from the results of search queries that include an Applicant's name. In deciding whether to make such an order, the Privacy Commissioner must weigh the harms to the individual posed by the impugned search results against the public interest in allowing the information to remain accessible by searching the Applicant's name.

3. In the digital era, where the dissemination and nearly infinite retention of personal information is unhindered by fiscal or technological constraints, new protections are necessary to preserve the balance between the freedom of expression and the protection of each Flavellian's privacy and reputation. The regime established by Flavelle's new "right to be forgotten" represents a constitutional and reasonable approach to achieving this balance.

PART II – FACTS

4. The Respondent accepts the statement of facts of Boondoggle, Inc. (the "**Appellant**" or "**Boondoggle**") as substantially correct, subject to the following clarifications and additions.

i. Legislative history

5. This appeal arose from an order issued pursuant to Section 2 of the *Improving Search Results and Protecting Your Internet Legacy Act* (the "***Act***"), adopted in 2014 in response to the recommendations of the Royal Commission on Internet and Technology Regulatory Reform (the "**Stewart Commission**").

6. Following wide stakeholder consultation, the Stewart Commission found that a "significant power imbalance [exists] between ordinary individuals and the operators of search engines."[1] In particular, the Stewart Commission found that search engines exert nearly unfettered and unchallengeable control over how web users are directed to online information.[2] Further, the Stewart Commission found that many consequential decisions are made by various parties, including employers, on the basis of information accessed via search results.[3]

7. In response to these findings, the Stewart Commission recommended that Flavellians be able to remove from online search results information that is "true, non-defamatory, and not protected by common law or statutory privacy rights that can, nevertheless, adversely and unfairly affect individual Flavellians."[4]

8. Since the adoption of the *Act*, the Privacy Commissioner of Flavelle (the "**Privacy Commissioner**") has received numerous applications pursuant to s. 2 of the *Act.*

[1] Problem, at para 10.
[2] Problem, at para 11.
[3] Problem, at para 9.
[4] Problem, at para 11.

ii. Factual background

9. Brettly Greenberg is a 72-year-old lawyer and former politician in Flavelle. After serving as a Member of Parliament and Cabinet Minister for 20 years, Mr. Greenberg joined the law firm of Stern Niblett LLP where he remains employed.

10. During his career at Stern Niblett LLP, Mr. Greenberg was the subject of unfounded accusations of criminality. The accusations were later proven false.

11. Media reports were produced about Mr. Greenberg's charges and about their subsequent withdrawal. Many of these reports are accessible via Boondoggle in response to search queries containing Mr. Greenberg's name. The most prominently displayed hyperlinks on these search result pages continue to refer to articles reporting on the charges against Mr. Greenberg and on the resulting scandal, not on the charges' withdrawal.

12. These search results have contributed to a one-sided public portrayal of Mr. Greenberg, which has had substantial negative impacts on his ability to obtain new employment, and on his standing in the community. Boondoggle has refused requests by Mr. Greenberg to reduce these harms by removing references to various hyperlinks that appear in response to search queries containing his name.

13. In response, Mr. Greenberg filed an application for an Order under s. 2 of the *Act.*

iii. Privacy Officer Macrae's Order

14. In response to Mr. Greenberg's application, Privacy Review Officer Macrae granted an Order pursuant to s. 2 of the *Act.* Officer Macrae found minimal public interest in the impugned search listings on the basis that Mr. Greenberg was no longer a public figure and that the allegations were "incomplete and irrelevant in light of the Crown's withdrawal of the charges."[5] Officer

[5] Problem, at para 31.

Macrae also held there to be minimal public interest in the search results more broadly, given that the articles referred to by the search results remained online and accessible through alternate search queries notwithstanding the Order. Finally, Officer Macrae accepted the harms claimed by Mr. Greenberg and found that these harms outweighed any public interest in allowing the impugned articles to remain in the search results.

iv. Superior Court for Falconer

15. Boondoggle appealed the decision of Officer Macrae to the Superior Court for Falconer. Popoff J. struck down the impugned provisions, holding that the *Act* could not be saved by an application of s. 1 as it faltered at the proportionality stage of the *Oakes* test.

16. Popoff J. also held in *obiter* that the decision of Officer Macrae to make an order under the *Act* was unreasonable.

v. Falconer Court of Appeal

17. The Falconer Court of Appeal reversed the decision of the Superior Court and upheld the *Act* as constitutional. Writing for the majority, Smith J.A. held that the *Act* infringed s. 2(b) of the *Charter*, but held that it could be saved under s. 1. Dissenting in part, Giorgio J.A. similarly found the *Act* to be compliant with the *Charter*, but on the basis that algorithmically-generated search results do not constitute "expression" and therefore do not engage the guarantee in s. 2(b) of the *Charter*.

18. The Court unanimously held that the decision of Officer Macrae was reasonable in the circumstances.

PART III – ISSUES AND ARGUMENTS

19. The Respondent respectfully submits that:

A. the *Act* does not violate the freedom of expression of search engines, search engine users, or the creators of online content guaranteed by s. 2(b) of the *Charter*;

B. in the alternative, if the *Act* is held to violate freedom of expression under s. 2(b) of the *Charter*, it is nonetheless justified as a reasonable limit under s. 1 of the *Charter*;

C. the decision of the Privacy Commissioner to grant an Order respecting Brettly Greenberg was reasonable.

A. The *Act* does not infringe freedom of expression guaranteed by s. 2(b) of the *Charter*

20. Hyperlinks displayed by online search engines in search results pages do not fall within the category of expression that the *Charter* seeks to protect. Search engine output represents a listing of hyperlinks to third-party content, ordered automatically by machine in accordance with a pre-programmed computer algorithm. Extending *Charter* protection to search engine output as the "expression" of search engines is not supported by either case law or the principles that underpin the s. 2(b) guarantee.

21. The *Act* does not infringe the freedom of expression of search engines. As search engine output is not "expression" for the purposes of s. 2(b) of the *Charter*, the freedom of expression of search engines is not engaged on the facts of the case at bar. Further, the *Act* does not violate the freedom of expression of either the users of search engines, or creators of online content.

i. Search engine output does not infringe the freedom of expression of search engines

22. The Appellant has failed to discharge its burden to establish that search engine output falls within the sphere of content of protected by s. 2(b).[6]

[6] *Irwin Toy v Quebec*, [1989] 1 SCR 927 at para 41 [*Irwin Toy*].

a. Search engine output is purely functional

23. While the Supreme Court of Canada has adopted a broad approach to interpreting the scope of the freedom of expression guarantee in s. 2(b), the freedom does not protect an unlimited scope of activity. In order to attract the protection of s. 2(b), activity must "convey or attempt to convey meaning," that is, it must have "content of expression."[7]

24. Search engine output is a purely functional, not expressive, activity. Professor Tim Wu posits that in American First Amendment jurisprudence, "[f]unctionality will usually be the line that divides [protected] speech and [unprotected] communications."[8] The distinction between purely functional activity and expressive activity closely maps onto the Canadian jurisprudential distinction between "purely physical" human activity that does not attract the protection of s. 2(b), and physical activity that has expressive content.[9] The function undertaken by search results is the carriage of third-party information. As a mere carrier, a search engine's "relationship to the information in question is simply too mechanical to make [the search engine] a speaker."[10]

25. Further, as mere conduits for the access and delivery of online information, search engines do not exercise editorial discretion, which involves an individual or individuals having "actively curated [a] sum total of information."[11] Search engine output consists of hyperlinks referring to third-party information, collected and displayed automatically by algorithm in response to a user's request. Further, as the Supreme Court of Canada held in *Crookes v Newton,* even when created deliberately by a human web programmer, a hyperlink is a merely "passive" way of making

[7] *Irwin Toy*, *supra* note 6 at paras 41-42.
[8] Timothy Wu, "Machine Speech" (2013) 161 U Pa L Rev 1495 at 1517.
[9] *Irwin Toy*¸ *supra* note 6 at 969.
[10] Wu, *supra* note 8 at 1520.
[11] Wu, *supra* note 8 at 1522.

information available, one that it is "content neutral – it expresses no opinion."[12] The relationship of the search engine to hyperlinked content is both passive and mechanical.

26. Similarly, search results do not possess the core characteristics of editorial discretion, which have given rise to First Amendment protection in the American jurisprudence. Search engines "[lack] specific choices as to content, lack specific knowledge as to what they are handling, [and] do not identify as the publishers of that information."[13] Further, search engine users do not associate search engine operators with the content referenced by search results. Notwithstanding the fact that users develop preferences for certain search engines based on how well those search engines approximate users' subjective evaluations of relevance, users are keenly aware that hyperlinked content remains the responsibility of third parties. Search engines also routinely disclaim responsibility for the content of material to which they hyperlink.[14]

b. Search engine output is not a form of advice or opinion

27. Contrary to the submissions of the Appellant, search results are not the expression of a search engine operator's opinion or advice. Search engines pose two challenges to the concepts of advice and opinion. The first is the absence of an identifiable human creator of search results. The second is the proper identification of the aspect(s) of search engine activity that constitute advice or opinion.

28. First, the absence of an identifiable human creator, and thus the absence of an identifiable thought process, is problematic for the appellant's claim that search results represent the expression of an opinion. Canadian courts have held that "[i]t cannot reasonably be said" that a

[12] *Crookes v Newton*, 2011 SCC 47 at para 30.
[13] Wu, *supra* note 8 at 1521.
[14] See *Trkulja v Google & Anor (No 5)*, [2012] VSC 533 at para 8; See also *Metropolitan International Schools (t/a Skillstrain and/or Train2Game) v Designtechnica Corp (t/a Digital Trends) & Ors*, [2009] EWHC 1765 (QB) ¶ 28.

corporation itself is capable of forming an opinion.[15] Further, as noted by the dissenting opinion of Giorgio J.A. in the decision below, search results are the product of a computer algorithm created by different people in different countries at multiple times. No individual human exercises judgment to create or express search results, nor does any human – individually or collectively – turn her mind to the specific subject matter queried by a given search engine user.

29. Second, the argument of the Appellant inaccurately defines the crux of the opinion expressed by search engines. While employees of search engines exercise value judgments in determining what markers of relevance will be evaluated as part of the process of designing a search algorithm, it cannot reasonably be said that each of the almost infinite results produced by these algorithms represent the opinions of one or more of the algorithm's designers. While search algorithms themselves may constitute protected expression, search results produced by those algorithms are not. It is the "disagreements about the most effective way to measure and implement relevance […] that constitute the 'opinion' in search."[16]

30. Further, individuals do not seek an opinion or advice from search engines. Both the creators and users of search engines acknowledge the nearly limitless quantities of information available on the Internet, and both recognize that it is impossible for any human mind to process the entirety of this information. Search engines represent an entirely novel way of locating information, one that differs fundamentally from seeking the subjective advice or opinion of another party. Instead, search engines produce rankings that represent "approximations of objectively but imperfectly observable characteristics of subjective user preferences."[17] Whereas differences in opinion across individuals result from differences in each party's subjective values and beliefs, differences in

[15] *B.C. (A.G.) v. Bd. of School Trustees of Sc. Dist. 65 (Cowichan),* [1985] 19 DLR (4th) 166 at para 14.
[16] James Grimmelman, "Speech Engines" (2014) 98 Minn L Rev 868 at 916.
[17] Grimmelman, *supra* note 16 at 915.

search results across searches and search engines are a product of deliberate, algorithmically-programmed distinctions in how user preferences are measured. A search engine is designed to be "something that understands exactly what [the user] mean[s] and gives [the user] back exactly what [he or she] wants."[18]

c. Search engine output is not protected by s. 2(b) by virtue of being a form of expression

31. Search engine output is not protected by s. 2(b) solely by virtue of being a medium by which the expression of others may be accessed. Canadian jurisprudence indicates clearly that some forms of expression, such as violence, are not protected by s. 2(b). The court has refrained, however, from articulating a generalized, bright-line test for determining when a form of expression will itself attract s. 2(b) protection irrespective of its expressive content. The test proposed by the Appellants – whether the form of expression is a "vital medium" for the expression[19] – is far too broad.

32. Canadian jurisprudence suggests that a *form* of expression will attract s. 2(b) protection only when it has, or it is *essential* to the communication of, expressive content. The Supreme Court of Canada's decision in *Irwin Toy* does not stand for the proposition that mere conduits for accessing a third party's expressive content attract protection under s. 2(b). Rather, the Court's narrower holding is that language itself has expressive content in the form of cultural identity, personal identity and individuality, and thus it is "not merely a means or medium of expression."[20]

33. Search engines differ fundamentally from forms of expression which are essential to the communication of expressive content and the exclusive purpose of which is to convey meaning. The removal of certain specified hyperlinks from search results does not remove the underlying

[18] Grimmelman, *supra* note 16 at 917.
[19] Factum of the Appellant, at para 26.
[20] *Ford v Quebec (Attorney General),* [1988] 2 SCR 712 at para 40 [*Ford*].

content from the Internet. Furthermore, masking specified hyperlinks from a particular search query does not remove those hyperlinks from other search queries conducted by the same search engine. As a result of the Order by Officer Macrae, hyperlinks to certain information will cease to appear in search results for queries including the specific words, "Brettly Greenberg." That information will not only remain on the Internet, however, it will continue to be searchable via Boondoggle in response to search queries such as "Muskoka-gate," which do not contain Mr. Greenberg's name.[21]

34. Additionally, contrary to the assertions of the Appellant, search engine results do not play a significant role in "structuring" the expressive content of the Internet. The results of a given search query may vary across search engines and individuals, and thus search results do not reveal an underlying organizational structure to the information available online. Additionally, searchability does not directly impact the content available on the Internet: there is no benefit to creators of web content in "cherry-picking" factors that they believe will be weighted by search engine algorithms. Rather, to gain search engine visibility, creators are advised to create "[h]igh-quality, relevant content"[22] with users of the internet, not search engines, in mind.

d. Search results do not promote the principles that underpin the freedom of expression

35. The Supreme Court of Canada has held that three principles underpin the freedom of expression guarantee. First, the freedom of expression creates a marketplace of ideas that facilitates the search for truth. Second, the freedom of expression enables full participation in social and political decision-making processes. Third, free expression contributes to individual self-

[21] Problem, at para 31.
[22] Marcus Tober, Dr. Leonhard Hennig & Daniel Furch, "SEO Ranking Factors and Rank Correlations 2014 Google US" (2014) Searchmetrics White Paper at 5, 81.

fulfilment and human flourishing.[23] Search engine results do not promote any of these three principles.

36. The failure of search engine output to promote any of these core justifying principles of the freedom of expression suggests that search engine output should be excluded from the protection provided by s. 2(b). Traditionally, the Court has declined to precisely delineate the basis upon which expressive activity may "fall[] outside the sphere of the guarantee," preferring instead to conduct such a balancing exercise under an s. 1 *Charter* analysis.[24] However, as noted by Chief Justice Dickson in *R v Keegstra,* the contextualized balancing approach taken by the Court "does not logically preclude the presence of balancing within s. 2(b)."[25] The Court has further noted that "[e]xactly what forms of expression will be excluded from s. 2(b) protection is an open question that will be settled on an ongoing basis by this Court as it deals with future cases."[26]

37. Protecting only expression which consists of social practices that meaningfully support the principles that undergird the guarantee in s. 2(b) is an approach which preserves the Court's large and liberal approach to constitutional interpretation. It also avoids "trivializ[ing] a fundamental guarantee which has been described as the cornerstone of democracy."[27]

38. Further, the failure of search engine output to fulfill any of these three principles also undermines the Appellant's submission that the effect of the *Act* is to limit the protected expression of search engines.

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[23] *Ford, supra* note 20 at para 56.
[24] *Irwin Toy, supra* note 6 at para 42.
[25] *R v Keegstra* [1990] 3 SCR 697 at para 40 [*Keegstra*].
[26] *Reference re ss. 193 and 194.1(1)(c) of the Criminal Code (Man.),* [1990] 1 SCR 1123 at para 83 [*Prostitution Reference*].
[27] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at para 108.

39. As noted by Professor Oren Bracha, it is clear that "the specific speech practices of connotative observations of relevance embodied in search results are hardly of normative relevance from the perspective of any of the common normative theories of freedom of speech."[28]

40. First, search engine output does not contribute meaningfully to the search for and identification of the truth. Although the information referred to in search engine results contributes to a "marketplace of ideas", search engine output itself does not. Importantly, search engine output does not contribute to the social practices of truth-seeking. The search for truth is characterized by "inquisitorial" social practices that have a "reasonable, substantial connection to the examination, validation, or refutation of the truth value of propositions."[29] Not all information or expression contributes to this process; indeed the Supreme Court of Canada has noted that "expression can be used to the detriment of our search for truth."[30] Search engine results consist of hyperlinks to information requested by an individual user, presented in an order estimated by an algorithm to be most relevant for that user. The connection of search engine output to the social practices of truth-seeking is simply "too remote and precarious to be of normative significance."[31]

41. Second, search engine output does not contribute to the "dialogical" processes of citizen engagement that are required by democratic governance.[32] Search results are produced automatically according to criteria that are pre-programmed into search algorithms. These results are *instrumentally* valuable to search users who seek to reach hyperlinked content and to producers of content who seek the largest possible audience for their content. However, particularly given that search results vary over time and across individual web users even in response to identical

[28] Oren Bracha, "The Folklore of Informationalism: The Case of Search Engine Speech" (2014) 82:4 Fordham L R 1629 at 1667.
[29] Bracha, *supra* note 28 at 1667.
[30] *Keegstra*, *supra* note 25 at para 87.
[31] Bracha, *supra* note 28 at 1668.
[32] Bracha, *supra* note 28 at 1668.

queries, they cannot be characterized as *intrinsically* valuable barometers of societal opinion on matters essential to democratic governance. Additionally, users and producers of content do not "interact" with search results, as the results represent mere conduits for accessing or disseminating content. It is the hyperlinked content, and not search results themselves, which users and producers of web content may consider, debate and discuss in furtherance of their democratic rights.

42. Last, search engine results do not promote individual self-autonomy. While the ability to access and to publish content on the Internet undoubtedly promotes the development of identity and self-realization, the contribution to these principles by the rankings inherent in search results is insignificant. As noted by Professor Bracha:

> Autonomy as a normative ground for freedom of speech identifies speech as a unique realm where there is a particularly strong and close connection between individual subjective choices or identities and their manifestation in the world.[33]

The Supreme Court of Canada has also provided jurisprudential recognition of this sentiment by protecting language on the basis that:

> Language itself *is* content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community [emphasis added].[34]

Search engine results can be readily distinguished from language in that the former contains no expressive content which itself contributes to the self-fulfillment of producers or consumers of online content.

[33] Bracha, *supra* note 28 at 1670.
[34] *Ford, supra* note 20 at para 42.

ii. The *Act* does not infringe the freedom of expression of web content creators or search engine users

43. The *Act* does not, either in purpose or in effect, infringe the freedom of expression of web content creators or the right of search engine users to possess that information.

44. The purpose of the *Act* is to preserve the privacy and dignity of individuals within the context of pre-existing, quasi-constitutional legislation in Flavelle.[35] In keeping with the underlying purpose of the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"), the *Act* attempts to strike a balance between individual privacy and the freedom of expression, incorporating into the weighing process the same deferential regard for democratic principles. The *Act* strikes this balance not by limiting what, or in what form, web content may be expressed, but rather by requiring search engines to selectively remove passive hyperlinks to certain web pages upon the issuance of an Order.

45. The mischief the *Act* seeks to redress is not the harms to an individual resulting from the expression of web content creators. The *Act* instead seeks to mitigate the harms to individuals resulting from the algorithmic ranking of web content on the output pages produced by search engines, independent of creators of web content. The case at bar is an example of the legislature seeking to "deal directly with the variety of harmful consequences which… ultimately flow from the communicative act," not to prohibit the expressive activity itself.[36]

46. The *Act* does not target the creators of web content, and does not "control or restrict attempts to convey a meaning" on the part of web content creators.[37] Notably, the *Act* does not provide for the removal or modification of any content produced online, nor does it provide for

[35] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401,* 2013 SCC 62 at para 19 [*UFCW*].
[36] *Prostitution Reference, supra* note 26 at para 114.
[37] *Prostitution Reference, supra* note 26 at para 88.

the outright removal of references to that content made by search engines. Content that is de-listed from search engine results pursuant to an Order under the *Act* remains accessible by web page URL, or via search engines that do not include the applicant's name.

B. In the alternative, the *Act* is saved by s. 1 of the *Charter*

47. If this honourable Court determines that search results constitute expression, then the Respondent submits that the *Act* represents a balanced and constitutionally permissible response to the novel and complex ways the Internet can damage the dignity and privacy of individuals.

48. What constitutes a reasonable limit on the freedom of expression, particularly to protect the quasi-constitutional privacy interests of individuals,[38] must be interpreted within the context of the new digital age. A so-called "right to be forgotten" was neither contemplated nor necessary in the era of print media because as time wore on, information disappeared organically or became difficult to access. A "right to be forgotten" has become necessary in the digital era, where the limitless and permanent retention of data occurs by default. Recognizing such a right in Canada via the *Act* is a logical extension of existing case law, and a necessary response to a growing social concern.[39]

i. Pressing and substantial objective

49. The parties agree that the *Act* addresses a sufficiently pressing and substantial objective to satisfy the first stage of the *Oakes* test.[40] The *Act* seeks to protect Flavellians from information available online that is true and non-defamatory but which can nonetheless adversely and unfairly affect individuals' privacy and reputation.[41] The *Act* further aims to rectify the gap in the existing privacy protections provided by common law and statute by providing a regime by which

[38] *Lavigne v Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53 at para 25.
[39] *Jones v Tsige,* 2012 ONCA 32 at para 15.
[40] *R v Oakes,* [1986] 1 SCR 103 at para 69.
[41] Problem, at para 11.

Flavellians can apply to have the link between negative information and their name removed from certain results pages produced by search engines.

ii. Rational connection

50. The parties agree that the impugned provisions of the *Act* providing for this regime are rationally connected to the pressing and substantial objective.

iii. Minimal impairment

51. The *Act* impairs the freedom of expression of search engine operators, content creators, and search engine users no more than is necessary to accomplish its objective. It provides Flavellians with a measure of control over their personal information on the Internet, protecting their dignity and privacy.[42] The Supreme Court of Canada held in *RJR-MacDonald* that "the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator… [provided the law] falls within a range of reasonable alternatives."[43]

52. The breadth of discretion granted to the Privacy Commissioner under the *Act* is not itself determinative of whether the *Act* minimally impairs the s. 2(b) guarantee. Particularly in light of their expertise and specialization, administrative decision-makers are often given wide discretionary powers which include the balancing of *Charter* values.[44] While broad, the discretion granted to the Privacy Commissioner under the *Act* is necessary to achieve the objective, and is not unlimited.

53. The *Act* does not provide for the removal of online information. An Order issued requires a search engine to remove a hyperlink – a mere reference to third-party online content – from the results page(s) of a specified search query. The effect of such an order is neither the removal of

[42] *UFCW*, *supra* note 35 at para 19.
[43] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160 [*RJR-MacDonald*].
[44] *Doré v Barreau du Québec*, 2012 SCC 12 at para 47 [*Doré*].

the content to which the results page(s) refer, nor a removal of the hyperlink from the search results pages of alternate search queries.[45]

54. The Appellant raises two alternative schemes which would, in the Appellant's submissions, produce comparable benefits to the impugned legislative regime. The mere existence of the alternative policies is not dispositive of the question of whether the *Act* is minimally impairing. As held by the Supreme Court of Canada in *Hutterian Brethren,* "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative…"[46] Additionally, in the case at bar, neither of the alternatives proposed by the Appellant impairs the freedom of expression to a lesser degree. In fact, they may be less effective in achieving the objective of the legislature.

55. The first alternate scheme suggested by the Appellant does not infringe the freedom of expression to any lesser degree than the regime provided by the *Act,* and would lead to no substantive change in the outcome of the Privacy Commissioner's decisions. The inclusion of a symbolic onus device would not change the fact that the Privacy Commissioner would still be required weigh the interests of both the applicant and the broader public interest in determining whether to make an order under s. 2 of the *Act*. An order would only be made if the harms to the individual were deemed to outweigh the benefit to the public interest of maintaining the *status quo.* Further, the result of this balancing exercise would remain the removal of certain hyperlinks from the impugned search results.

56. The second alternate scheme raised by the Appellant would require the legislature to specify, in greater detail, "the kinds of adverse effects and public interest factors" that the Privacy

[45] Problem, at para 31.
[46] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 54 [*Hutterian Brethren*], citing *RJR-MacDonald, supra* note 43 at para 160.

Commissioner should take into account when deciding whether to grant an order.[47] When administrative decision-makers are empowered to make a determination in the public interest, they must exercise discretion within certain bounds including those established by the *Charter.*[48] The decisions of Parliament to not statutorily entrench a more stringent definition of public interest and to not enunciate specific types of harm in the *Act* were deliberate decisions of policy, based on a broad consultative process undertaken by the Stewart Commission.[49] Additionally, the requirement that the Privacy Commissioner consider the public interest is not devoid of content. To adopt the Appellant's proposed alternative would be to tie the hands of the Privacy Commissioner, hindering his or her ability to take into account new conceptions of the public interest, in addition to new and unforeseen adverse effects. It would thereby render the Act less effective at achieving its objective. Further, there is no indication that this alternative would be less impairing of freedom of expression.

iv. Proportionality

57. As noted by the Appellant, the final stage of the *Oakes* analysis 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 "*a proportionality between the deleterious and the salutary effects of the measures*" [emphasis in original].[50]

58. The Supreme Court of Canada has affirmed that "freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance."[51] Moreover, the Court has noted that privacy is

[47] Factum of the Appellant, at para 43.
[48] *Congrégation des témoins de Jéhovah de St-Jérome-Lafontaine v Lafontaine (Village),* [2004] 2 SCR 650 at paras 6-7; *Roncarelli v Duplessis,* [1959] SCR 121 at 140; *Lindsay v Manitoba (Motor Transport Board),* [1989] CLD 1267 (MBCA), leave to appeal to SCC refused, [1990] 65 Man R (2d) 160.
[49] Problem, at para 9.
[50] *Dagenais v Canadian Broadcasting Corp,* [1994] 3 SCR 835 at para 95; *Hutterian Brethren, supra* note 45 at para 76-77.
[51] *UFCW, supra* note 35 at para 38.

increasingly important to consider in light of modern technological advances, particularly as it cuts across multiple rights protected by the Constitution.[52] The need for restrictions on freedom of expression to protect the privacy and reputation of Canadians has been recognized even in the realm of the publication of court proceedings. Governments and case reporters such as CanLII prevent judicial decisions from being indexed by search engines, recognizing that "the Internet is so far-reaching that the injury to the reputation of the parties goes far beyond what was intended when the principles of judicial transparency were formulated."[53]

a. The deleterious effects of the *Act* are limited

59. The deleterious effects of the *Act* on freedom of expression are limited. In particular, the expressive rights of the creators of online content and of search engine users are not affected by the *Act*, as all web content remains publicly available and accessible via Boondoggle using other search terms. The infringement on freedom of expression is limited to restrictions on the expressive content of Boondoggle's search result rankings, which has low public interest value relative to the adverse effects on the Applicant.

60. The public interest is not impaired by limiting the freedom of expression of search engines. In *Grant v Torstar,* the Supreme Court of Canada held that the public interest "is not synonymous with what interests the public,"[54] nor does it include "mere curiosity or prurient interests" in the private lives of public figures or celebrities.[55] To be of cognizable public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial

[52] See *R v Tessling*, 2004 SCC 67 at paras 23, 54.
[53] Chantal Bernier, "The Open Court Principle and Privacy Legislation in the Digital Age" (Remarks delivered at the Canadian Bar Association –Quebec Division, Employment and Labour Law, 27 September 2011), <https://www.priv.gc.ca/media/sp-d/2011/sp-d_20110927_cb_e.asp>.
[54] *Grant v Torstar,* 2009 SCC 61 at para 102 ["*Grant*"].
[55] *Grant, supra* note 54 at para 105.

concern because it affects the welfare of citizens."[56] The public appetite for information on a private subject does not render that matter one within the realm of the public interest.

61. Furthermore, the Court has held that "not all expression is equally worthy of protection."[57] The evaluation of worthiness of the expression is highly relevant to the s. 1 inquiry, for if the expression is of little value, it invites a more relaxed standard of proportionality.[58] According to the European Court of Justice's ruling on *Google v Gonzalez*, information online that is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in light of the time that has elapsed" would fall into this category of "low value" expression.[59] Given the time that has elapsed since the charges were erroneously laid against Mr. Greenberg, the inadequacy of the information contained in the hyperlinked articles, and the low level of public interest in the matter, the European standard would suggest that Mr. Greenberg's case falls under the category of expression lacking sufficient merit in relation to the harms created to warrant protection.

62. Additionally, the Appellant has failed to demonstrate that the *Act* will have a chilling effect on the expression of web content creators. The factual record discloses no evidence of such a chilling effect, nor has prior Canadian jurisprudence found a chilling effect on expression in the absence of indisputable evidence.[60]

b. The *Act*'s salutary effects outweigh its deleterious effects

63. The *Act* facilitates individuals' ability to participate fully in a free and democratic society by protecting their privacy. In *R v Lucas*, the Supreme Court of Canada affirmed that "[t]he

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[56] *Grant*, *supra* note 54 at para 105.
[57] *Keegstra*, *supra* note 25 at para 83, citing *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at para 28.
[58] Peter W. Hogg, *Constitutional Law of Canada*, 2014 Student ed (Toronto: Carswell, 2013) at 43-13.
[59] *Google Spain SL v Agencia Española de Proteccion de Datos (AEPD) Mario Costeja Gonzalez*, [2014] All ER (EC) 717 at para 92.
[60] *Canadian Broadcasting Corp v Ontario (Attorney General)*, 2015 ONSC 3131 at para 152.

protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society".[61]

64. The preservation of one's reputation is also essential in a democracy. The benefit that accrues to society from being able to put the past to rest is highly important. Historically, recorded past misconduct of individuals would have a natural lifecycle, particularly in the case of spent convictions. The troubling persistence of one's Internet legacy today is not only that it contributes to the detriment of an individual's reputation and dignity, but also that it has serious potential to undermine an important pillar of the criminal justice system: the full reintegration of an individual into society after rehabilitation.[62]

65. The impairment of one's reputation can also have important, negative socioeconomic consequences. Mr. Greenberg served in public office for 20 successful years. Despite this impressive record, his legacy was marred because of the unfounded allegations of fraud levelled against him. He has suffered from unwarranted social stigma and subsequent social ostracism. Mr. Greenberg was not re-elected as volunteer Treasurer of his granddaughter's parent teacher association, despite a consistent record of balanced budgets while in the position previously. Mr. Greenberg has also been barred from successfully seeking meaningful, new employment as a result of social distancing by employers. There are tangible harms to Mr. Greenberg, and to society writ large, when reputational attacks prevent one from obtaining gainful employment, as Mr. Greenberg suffered in this case.

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[61] *R v Lucas*, [1998] 1 SCR 439 at para 48.
[62] Law Reform Commission, *Report: Spent Convictions* (July 2007) at para 1.34 <http://www.lawreform.ie/_fileupload/Reports/rSpentConvictions.pdf>.

66. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. The Supreme Court of Canada has affirmed that:

> [W]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. [63]

67. The reputational harms and resulting social and economic consequences for Mr. Greenberg cannot be justified by his status as a former public figure. Though a politician may relinquish some reasonable expectation of privacy when he or she enters public office, it is not reasonable to expect that such a forfeiture of privacy is absolute, unconditional, or perpetual.

C. The order to grant an order under s. 2 of the *Act* was reasonable

68. The parties agree that the appropriate standard for substantive review of the Privacy Commissioner's decision to issue an order pursuant to s. 2 of the *Act* is reasonableness.[64] On this standard, the decision of Privacy Officer Macrae was reasonable.

i. Standard of review

69. A presumption arises that the appropriate standard of review is reasonableness, where prior jurisprudence does not suggest otherwise. Furthermore, the facts of the case at bar satisfy the criteria established by the Supreme Court of Canada for the application of the reasonableness standard.[65] In making an order under s. 2 of the *Act*, the Privacy Commissioner was required to consider and weigh two broad criteria, both of which represent questions of fact involving policy and a significant degree of discretion. Additionally, Officer Macrae interpreted the Privacy

[63] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 91 [*Alberta Public Service Reference*].
[64] Factum of the Appellant, at para 60.
[65] *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-54 [*Dunsmuir*].

Commissioner's home statute, one that is "closely connected to [the Commissioner's] function, with which it will have particular familiarity."[66] Furthermore, while the *Act* does not contain a strong privative clause, the absence of a privative clause is no longer determinative of the standard of review to be applied.

70. Canadian jurisprudence has firmly shut the door on the prospect of multiple, varied standards of "reasonableness." The sole remaining standard of reasonableness is characterized primarily by deference. This analysis is to be undertaken by examining whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law,"[67] and whether satisfactory reasons for that decision are provided.[68] These questions are to be answered jointly, not in a step-wise manner.[69] According to this standard, "as long as the process and outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."[70]

ii. The decision was reasonable in the circumstances

71. Officer Macrae's decision to issue an order pursuant to s. 2 of the *Act* was one of two acceptable and rational solutions in the circumstances of the case at bar.[71] Under the provisions of the *Act*, it is within the discretion of the Privacy Commissioner either to grant or to deny an order pursuant to s. 2, if the evidence supports the decision of the Commissioner. As previously noted, the *Act* implements a "right to be forgotten" by amending PIPEDA. The fact that PIPEDA deliberately balances two competing interests – an individual's right to privacy, and the needs of

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[66] *Alberta (Information & Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 at para 30 [*Alberta Teachers*].
[67] *Alberta Teachers, supra* note 66 at para 52.
[68] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 14 [*Newfoundland Nurses*].
[69] *Newfoundland Nurses, supra* note 68.
[70] *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59.
[71] *Dunsmuir, supra* note 65 at para 47.

the organization – it is foreseeable and reasonable that a decision under the *Act* would, in some cases, favour one of those interests. The particular impugned legislative provision in the case at bar was designed to extend this balancing exercise to the context of search engine output.

iii. Officer Macrae considered the appropriate factors

72. The reasons of Officer Macrae demonstrate that he considered all of the appropriate factors in determining whether to issue an order pursuant to s. 2, and that he was "alive to the question at issue,"[72] namely whether the balance of the public interest and the harms to Mr. Greenberg justified granting the Order. As noted by the Supreme Court of Canada in *Suresh*, if a decision-maker has "considered the appropriate factors in conformity with [legislation and the constitution], the court must uphold his decision. It cannot set [a decision] aside even if it would have weighed the factors differently and arrived at a different conclusion."[73]

73. Officer Macrae turned his mind to both the narrow and broad conceptions of the public interest associated with permitting the impugned search results to remain available in response to search queries of Mr. Greenberg's name. Officer Macrae's reasons demonstrate thorough consideration of the public interest in easy and immediate access to the stories about Mr. Greenberg, particularly in light of the incompleteness of the allegations reflected in the impugned search results and Mr. Greenberg's status as a former politician. Officer Macrae also considered the contribution of the search results to the public interest broadly, by examining the impact of such access to society's understanding of how policing in Flavelle operates.[74]

74. Officer Macrae further considered the harms to Mr. Greenberg individually from the continued ease of access to the linked-to articles by their continued inclusion in results to search

[72] *Newfoundland Nurses, supra* note 68 at para 26.
[73] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 38.
[74] Problem, at para 31.

queries for Mr. Greenberg's name, accepting as fact the impact of the continued ease-of-access to Mr. Greenberg's employment prospects and standing in community.[75]

75. Officer Macrae found, as a matter of fact, that the harms to Mr. Greenberg resulting from the impugned search results outweighed the public interest in a continued relationship between search queries for Mr. Greenberg's name and various hyperlinks to articles about the prior charges against him. The Appellant has not satisfied its burden of demonstrating why this Court should disturb Officer Macrae's factual determinations.

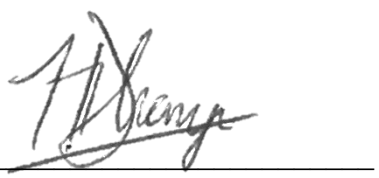
76. Further, the decision of Officer Macrae represents a proportionate balancing of freedom of expression with the statutory objective of the *Act* as required by the Supreme Court of Canada in *Doré.*[76] Officer Macrae considered the *Charter* interest impacted by the case at bar by weighing the public interest in permitting the impugned search results to remain available. In light of the significant ongoing harms to Mr. Greenberg resulting from these specific search results, Officer Macrae's decision does not represent an unreasonable balance of the s. 2(b) rights of the parties in the case at bar, or of the public writ large.

PART IV – ORDER SOUGHT

77. The Respondent requests that the Supreme Court of Flavelle:

> **DISMISS** the Appellant's constitutional challenge and application for judicial review;
> **UPHOLD** the decision of the Privacy Commissioner; and
> **AWARD** costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this fourteenth day of September, 2015.



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[75] Problem, at para 32.
[76] *Doré, supra* note 45 at para 58.

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SCHEDULE B – TEXT OF RELEVANT STATUTES

***An Act to Amend the Personal Information Protection and Electronic Documents Act*, S.F. 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