# Grand Moot 2015: Freedom of Expression and the Right to be Forgotten

*Moot Problem*

**Panel:** **Members of the 2015 Grand Moot Panel (Supreme Court of Flavelle)**

Justice Michael Moldaver (Supreme Court of Canada)
Justice Robert Sharpe (Court of Appeal for Ontario)
Justice Julie Thorburn (Ontario Superior Court of Justice)

**Mooters:** **For the Appellant:**

Veenu Goswami
Joe Bricker

**For the Respondent:**

Dave Marshall
Hana Dhanji

**Date:** October 1, 2015

**Location:** Victoria College Chapel (VC 213)
University of Toronto
Toronto, Ontario

**Program:**

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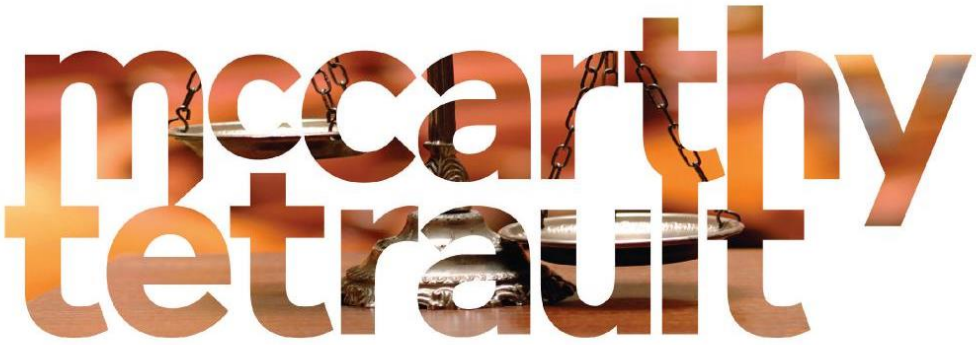
| Doors | 4:30pm |
| Opening Remarks | 5:00pm |
| Problem Overview | 5:05pm |
| Grand Moot | 5:15pm |
| Reception | 6:45pm |

UNIVERSITY OF TORONTO FACULTY OF LAW

**Special thanks to:**



## Summary of the Case

1. This appeal addresses whether search results generated by computer algorithms fall within the ambit of protection for freedom of expression established by Section 2(b) of the *Flavellian Charter of Rights and Freedoms*. It also addresses the legal and policy implications of the so-called "Right to be Forgotten" and how it ought to be interpreted and applied.

2. Brettly Greenberg is a resident of the city of Stacey. Stacey is in the common law province of Falconer, in the country of Flavelle. Flavelle has a Constitution, system of government, judicial system, and common law history identical to that of Canada.

3. Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.

4. The Superior Court of Falconer and the Court of Appeal for Falconer have jurisdiction over all issues raised in their respective decisions below.

5. In this appeal, the world's largest and most profitable international search engine, Boondoggle Inc. (the "**Appellant"**), seeks to strike down Flavelle's *Improving Search Results and Protecting Your Internet Legacy Act* (the "***Act"***). The *Act* establishes a national "Right to be Forgotten" through amendments to the Flavelle *Personal Information Protection and Electronic Documents Act (**"PIPEDA"**)*.

6. Section 2 of the *Act* empowers the Privacy Commissioner of Flavelle, on receipt of an application from an individual, to order Search Engines to remove certain links from the Search Results that are displayed in response to searches containing the Applicant's name. The web pages linked to by the Search Results are not removed and may still be displayed in response to searches for other terms. Section 4 of the *Act* reads:

   > 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.

   The full text of the *Act* is reproduced below.

7. Alternatively, Boondoggle seeks to quash an Order made by the Privacy Commissioner of Flavelle requiring that Boondoggle remove certain search results relating to Mr. Brettly Greenberg in response to his Application.

## Legislative History

8. In 2014, the Parliament of Flavelle passed Bill C-85, *An Act to Amend the Personal Information Protection and Electronic Documents Act* (short title: the *Improving Search Results and Protecting Your Internet Legacy Act*). The government stated that the legislation was based on the recommendations of the Royal Commission on Internet and Technology Regulatory Reform (the **"Stewart Commission"**). The Commission was established in response to concerns raised by Flavellians regarding the growing power wielded by modern technology companies, whose activities often fall outside existing regulatory frameworks.

9. The Stewart Commission heard testimony from ordinary Flavellians, privacy experts, business leaders, and other stakeholders. The Commission found that landlords, employers, creditors, friends, family, and neighbours make many consequential decisions based on information accessed via search listings.

10. The Commission also found that there is a significant power imbalance between ordinary individuals and the operators of search engines. The Commission came to this conclusion on the basis that operators control the ranking of search results for individuals' names while the named individuals have almost no recourse to challenge the results.

11. The Commission identified a gap in existing privacy protections. The Commission determined that there is 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. The Commission decided that Flavellians should be able to remove such information from search results to mitigate these adverse effects.

12. The Commission noted that some commentators advocated for existing provisions of *PIPEDA* to be interpreted as including a "Right to be Forgotten." However, the Commission felt that clarity was needed and that the right would be best protected by express statutory language.

13. To minimise the effect on freedom of expression, nothing in the new provisions permits an Order removing the linked-to web pages themselves.[1] Following an Order, the linked-to web pages remain online and may be linked to by results for other search terms.

14. The Commission looked to the European Union's (EU) experience with the so-called "Right to be Forgotten" in drafting recommended provisions for the *Act*. However, it tailored the proposed legislation to suit the Flavellian context and to address some criticisms of the EU's implementation of the right.

15. Privacy advocates praised the legislation while search engines and media outlets vigorously denounced it. Austin Lisa, Director of the Flavelle Privacy Advocacy Centre (FPAC), said: "too many reputations have been destroyed because of search engines' simplistic and self-serving ethos that 'information wants to be free.' Information that interests the public is not always in the public interest." Phillip Jims,

[1] There may be other, unrelated legal bases for removal of a web page. For example, under the *status quo,* courts may order removal of defamatory content or content displayed in violation of other provisions of *PIPEDA*.

CEO of another major international search engine, FindLiberty Inc., referred to the legislation as "worse than anything Orwell ever imagined," claiming that it signalled no less than the "death-knell of freedom in Flavelle."

16. Since the enactment of the legislation, the Privacy Commissioner of Flavelle has received a flood of Applications, some with obvious merit and many without any merit whatsoever.

17. In one case, the Flavellian Minister of Defence was captured on video complaining about "ice cold camembert" served on a Flavelle Airways flight. In his Application, the Minister claimed the video "undermined his authority" and posed "risk to the safety and security of all Flavellians." The Minister's request was denied without written reasons and the Privacy Commissioner made a discretionary order requiring the Minister to pay the costs of the review.

18. In another case, a widow whose husband was killed decades ago in a brutal gang murder made an Application because her name was listed in news articles about the murder. Details about how she reacted to the murder were also included in the articles. In her Application, the widow wrote that neighbours and colleagues have mentioned the articles to her and asked her about the murder. She claimed that the continued link between her name and the articles about her husband's murder made it all but impossible to put his death behind her. The Privacy Commissioner granted the request and made an Order under Section 2 of the *Act*.

19. This case below is the first time a decision of the Privacy Commissioner under the *Act* has come before the courts for judicial review.

## The Application

20. Brettly Greenberg is a 72-year-old lawyer and former politician. In 2000, he retired from a successful 20-year career as Member of Parliament for Falconer-Birge East. He is known for serving as "Minister for Library Renewal" and "Critic for Delayed Construction Projects." In his retirement speech, Greenberg cited a desire to "retreat from the public gaze" and escape the constant attention of journalists. He referred to the editor-in-chief of popular local newspaper *Ultra Vires* as a "vulture" and "disgrace to his family and community."

21. Shortly after retiring, Greenberg joined the prominent corporate law firm Stern Niblett LLP to serve as a Partner in its "Government Relations" practice group.

22. The Application relates to criminal charges brought by the Flavelle National Policing Authority (FNPA) against Brettly Greenberg in 2008. Greenberg was charged with fraud in connection with misappropriating several hundred thousand dollars from a client's trust fund. The police alleged that these funds had paid for Greenberg's new vacation home in Muskoka.

23. Media organisations were quick to report on the charges and the scandal (colloquially referred to as "Muskoka-gate") overwhelmed all other press relating to Greenberg. The entire first page of search results for "Brettly Greenberg" now links to articles related to the allegations. Former colleagues, current politicians, lawyers, and others were quick to denounce Greenberg. One former colleague said

Greenberg had engaged in "completely unacceptable behaviour" and he was "glad to see the police reacting so quickly and appropriately to these serious and likely true allegations."

24. Subsequent facts came to light that completely undermined the allegations. Another lawyer at the firm had gained access to Greenberg's computer login details and appropriated the funds for himself through Greenberg's account. In 2009, the Crown quietly withdrew all charges against Greenberg on the grounds that there was no reasonable prospect of conviction, stating that there was no evidence Greenberg ever participated in or had knowledge of the fraud.

25. The media, however, almost entirely ignored this outcome. The only references indicating the withdrawal of charges against Greenberg are found on the later pages of search results, along with a few other articles praising his Parliamentary service.

26. Prior to filing an Application with the Privacy Commissioner, Greenberg wrote to Boondoggle requesting that it voluntarily take down the search results in question. Boondoggle replied that, although it sympathized with his situation, it was not their policy to take down search results except in accordance with applicable law. Boondoggle stated that it would not compromise on its commitment to free speech and access to information. The company suggested Greenberg seek out interview opportunities with media to create new content that might rank highly in his search listings.

27. Boondoggle is used by millions of Flavellians on a regular basis. Its search results are generated by indexing almost all web pages in existence and using a regularly-updated proprietary algorithm to generate results in response to user queries.

## The Decisions Below

### The Application to and Decision of the Privacy Commissioner (Officer Macrae)

28. Brettly Greenberg submitted an Application to the Privacy Commissioner. He set out a litany of adverse effects that he attributed to the search results related to the criminal charges. Greenberg claimed that the results portray him as a dishonest criminal, which has led many of his friends and colleagues to distance themselves from him.

29. Greenberg wrote that he has recently been searching for a new job, but after submitting hundreds of applications, has received only a few interviews and no offers. In response to Greenberg's queries, several employers alluded to the story and their fear of being associated with him. Greenberg had previously served as volunteer Treasurer of his granddaughter's school's Parent-Teacher Association for several years, but he was not re-elected this year, despite a consistent record of balanced budgets. His successful opponent for Treasurer repeatedly raised the fraud charges in the campaign.

30. Boondoggle provided reply submissions. Boondoggle argued that the truth is always in the public interest and that the linked-to articles were true because Greenberg was, in fact, charged with fraud. Boondoggle also argued that there is a broader public interest in the news articles because they highlight problems with how the FNPA investigates crimes with political implications and because the stories provide context for the subsequent exculpatory stories. Finally, Boondoggle argued that the adverse

effects were limited, if not non-existent, because Greenberg was still paid well by Stern Niblett LLP to sit in on client meetings and convey "gravitas" through his presence, despite losing the other job opportunities.

31. After reviewing the Application, Privacy Review Officer Macrae granted an Order. He found there was minimal public interest in having the impugned search listings display in response to online search queries for Greenberg's name because Greenberg was no longer a public figure, and the allegations were incomplete and irrelevant in light of the Crown's withdrawal of the charges. He found that the stories' broader public interest, including with respect to helping Flavellians understand how the FNPA operates, was not impaired by the Order because they remained accessible through Search Results for other terms, like "Muskoka-gate."

32. Officer Macrae accepted as a matter of fact the harms listed in Greenberg's Application. He went on to find that those harms clearly outweighed any residual public interest in access to the search results. He noted, in particular, the impact these results have had on Greenberg's employment prospects and his standing in the community.

33. Officer Macrae also made reference to statistical evidence properly before him that showed that search engine users only look beyond the first page of search results 10% of the time. Consequently, he found that the later positive stories did not mitigate the damage.

34. Officer Macrae issued an Order, pursuant to Section 2 of the *Act*:

> The application is granted. The Search Engines are directed to remove all Search Results for "Brettly Greenberg" that link to the impugned content.
>
> The Search Engines shall comply with this Order within 30 days of the date of the decision. Failure to comply shall result in a fine of $10,000 per day.

**The Judgment of the Superior Court for Falconer (Popoff J.)**

35. Boondoggle brought an application for Judicial Review pursuant to Section 8 of the *Act*. The parties consented to an order staying the decision of Officer Macrae pending the hearing and any appeals.

36. Concurrently with the Application for Judicial Review, Boondoggle Inc. brought an application for relief pursuant to Section 52 of the *Constitution Act, 1982,* asking the Court to strike down the newly inserted Part 7 of the *Act* in its entirety as violating freedom of expression under Section 2(b) of the *Flavellian Charter of Rights and Freedoms*.

37. Popoff J. struck down the impugned provisions. Popoff J. accepted the submission of Boondoggle that Orders under the *Act* infringe freedom of expression in a manner not justified in a free and democratic society. Popoff J. characterized the impugned provisions as infringing the Section 2(b) rights of three groups: the individuals creating and operating the search engine, the publishers of content linked to by the search results, and the readers of information linked to by the search results. Popoff J. held that

"search engines are a crucial vehicle for access to information" and that "search results themselves constitute a unique form of expression akin to editorial judgment or compilation."

38. Popoff J. declined to save the law under Section 1 of the *Charter*. While conceding that the objective of Parliament was pressing and substantial, Popoff J. found that the means chosen to address this objective were not proportionate to the infringement on freedom of expression. Popoff J. accepted that there was no more minimally impairing means of achieving Parliament's chosen objective. However, she expressed skepticism that Parliament's policy goal could ever be achieved in a manner justifiable in a free and democratic society, stating that "it would be hard to conceive of a version of these provisions in which the salutary effects would outweigh the deleterious consequences."

39. In a strongly worded defense of a right she characterized as being of "primordial importance," Popoff J. held:

> It is not for unaccountable tribunals to decide for the public what is in the public interest to know; our free press and individual Flavellians can make that determination for themselves. I have great faith in the ability of ordinary Flavellians; they will surely not rush to judgment and form impressions based on isolated reports.

40. Having invalidated the impugned provisions, Popoff J. was not required to address whether Officer Macrae's decision was unreasonable. Popoff J. commented, however, that had she been required to do so, she would have found Officer Macrae's decision to be unreasonable in light of the fact that, although false, the allegations were nevertheless a matter of public interest about a (retired) public figure.

**The Judgment of the Court of Appeal for Falconer (Smith J.A. for the Majority, with whom Faherty J.A. concurred; Giorgio J.A. dissenting in part/concurring in the result)**

*Smith J.A. for the Majority*

41. Smith J.A. reversed the decision of Popoff J. and upheld the *Act*. While Smith J.A. agreed that the *Act* infringed Section 2(b), she found that Flavelle had discharged its onus to prove that the infringement was justified in a free and democratic society. Smith J.A. held:

> With new technologies come new challenges. Though as Flavellians we must safeguard freedom of expression, so too must we recognize its limits. The advent of the internet has brought with it much benefit, but it has also created immense capacity for harm to reputation and privacy. This *Act* represents a narrowly tailored means of addressing power imbalances between ordinary citizens and unaccountable search engines.
>
> As Sharpe J.A. held in *Jones v. Tsige*, "Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance, and various property rights." And, since Sharpe J.A.'s ruling in 2012, aspects of privacy have also been protected by the "intrusion upon seclusion" cause of action. This legislation builds on and fills a gap not addressed by existing causes of action.

42. Smith J.A. held that Popoff J. erred in giving insufficient weight to the pressing and substantial objective of Parliament as articulated in the Stewart Commission report.

43. Smith J.A. further held that the decision of Officer Macrae was reasonable. She noted that information linked to Brettly Greenberg's name by the Search Engines, while technically "true," was extremely misleading. She acknowledged that, at the time of the proceedings and their immediate aftermath, there was a public interest in this information. However, the passage of time and the withdrawal of the charges diminished any public interest. All that remained, she wrote, was "the clear and specific harm to Mr. Greenberg occasioned by these search results."

*Giorgio J.A. (dissenting in part/concurring in the result)*

44. Giorgio J.A. agreed with the majority that Officer Macrae's decision was reasonable. He wrote separately, however, to express his view that Section 2(b) was not engaged on the facts. Therefore, a Section 1 analysis was, in his view, unnecessary.

45. First, Giorgio J.A. held that creators and operators of search engines cannot assert that algorithmically-generated search results constitute their "expression." He noted repeated references to "human activity" in the freedom of expression jurisprudence. Giorgio J.A. found that search listings are the product of a computer algorithm created by different people in different countries at different times. Since no individual human being exercised judgment to "create" or "express" the particular search results relating to the Applicant, the results do not fall within the ambit of expression protected by Section 2(b).

46. Second, Giorgio J.A. held that the publishers' freedom of expression is not infringed because the articles remain published on their website. Publishers' Section 2(b) rights do not include the right to have their articles linked to by search listings.

47. Third, Giorgio J.A. held that, although it is important to take into account the interests of readers and the general public in accessing information, a successful Section 2(b) claim must be linked to expressive activity on the part of an identifiable creator.

48. In the result, Giorgio J.A. agreed with the majority that both the *Act* and the decision of Officer Macrae should be upheld.

## Issues on Appeal

Boondoggle has been granted leave to appeal the Court of Appeal's decision to the Supreme Court of Flavelle. Mr. Greenberg has declined to make separate submissions and endorses the submissions of the Privacy Commissioner.

The Court is being asked to decide the following issues:

1. Does the *Improving Search Results and Protecting Your Internet Legacy Act* violate Section 2(b) of the *Flavellian Charter of Rights and Freedoms*?

2. If the Act is found to breach Section 2(b), is the *Act* justified as a reasonable limit pursuant to Section 1 of the *Charter*?
3. If the impugned provisions are found to be constitutional, was the decision of Privacy Review Officer Macrae to grant an Order under Section 2 of the *Act* reasonable?

## Text of the *Act*

*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 part of a 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; for greater clarity, the removal of "Search Results" does not result in the removal of any underlying content, only links to that content that are generated in response to keyword queries.

   "Search Engine" means any entity included in the list created by the Privacy Commissioner under Section 5 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. Upon receipt of an Application, the Privacy Commissioner or his or her designate shall forward the Application to Search Engines and the Search Engines may provide reply submissions within 30 days.

4. 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.

5. 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.

6. 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 5 of this Part.

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

8. An application for judicial review of a decision made under Section 2 of this Part may be made to the Superior Court of the province in which the Applicant resides.