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A Crack in Crookes? New Defamation Risks for Search Engines

In *AB v Google*, the Court of Appeal of Québec held that internet intermediaries, such as search engines, may be liable for listing hyperlinks to undisputedly false and defamatory content. This decision represents a significant development in Canadian defamation law, particularly given the Court's interpretation and application of the Supreme Court of Canada's ruling in *Crookes v Newton*.

Background

AB is a businessman living in Québec. In 2006, one of his former employees published an online allegation that AB had been "convicted of child molestation" in the 1980s.

AB discovered the post in 2007, and the RCMP certified in 2009 that he had no criminal record. Thereafter, Google cooperated with AB's requests to remove (or "de-index") the link from its search engine.

In 2015, Google changed its position, relying on the Supreme Court of Canada's decision in *Crookes*. In that case, the Court held that hyperlinking to defamatory content did not constitute "publication" of that content. While Google agreed to remove the title and excerpt surrounding the URL related to AB, it left a "bare link" to the post.

The Trial Decision

In 2016, AB brought a claim against Google in Québec, seeking damages and a permanent injunction to prevent Google from indexing the hyperlink. Google did not dispute the illicitness of the post.

AB argued that Google had violated Québec's *Act to establish a legal framework for information technology* (the *IT Framework Act*), which imposes liability where an internet intermediary becomes aware of illicit activity by its users and fails to act promptly to cease providing services to them.

The trial judge agreed with AB, holding that Google's post-2015 conduct violated the *IT Framework Act*, which in turn attracted liability under the *Québec Civil Code*. The Court ordered Google to pay AB $500,000 in compensatory damages, declined to award punitive damages, and issued a permanent

injunction requiring Google to de-index the website links, but only within Québec.

Both parties appealed various aspects of the order to the Court of Appeal of Québec.

The Court of Appeal of Québec Decision

On appeal, Google argued that, under *Crookes*, hyperlinks do not constitute "publication" of defamatory content (and, therefore, could not be illicit). The Court rejected this defence, stating that *Crookes* addressed content creators whose articles included hyperlinks to defamatory content published by others, not intermediaries like Google.

The Court also cautioned against transplanting common law reasoning into Québec's fault-based civil law framework. The Court held that section 22 of the *IT Framework Act* imposes an affirmative duty on internet intermediaries to remove content where there is a reasonable level of certainty that the content constitutes illicit activity. As a result, the Court held that "[t]he contextual analysis is not the same" in Québec as it is in common-law jurisdictions. In the Court's view, the failure to de-index to serious accusations that are evidently defamatory on their face could constitute illicit activity within the meaning of the *IT Framework Act*.

Despite affirming liability against Google, the Court reduced the compensatory damages from $500,000 to $25,000. The Court concluded that the trial judge erred by, among other things, awarding damages for injuries arising from the defamatory allegation itself, which traced back to 2007, rather than damages arising from Google's indexing of the link after 2015.

The Court allowed AB's appeal on punitive damages and granted an award of $1.5 million because Google knew the consequences of its refusal to act, even if it did not believe its conduct was unlawful.

The Court declined AB's request to extend the injunction worldwide, distinguishing the Supreme Court of Canada's 2017 ruling in *Google Inc v Equustek Solutions Inc* for three reasons:

1. In *Equustek*, the injunction was interlocutory and could be amended. This was a permanent injunction;
2. *Equustek* was aimed at countering illegal sales contrary to intellectual property rules. It did not invoke the fundamental *Charter* value of freedom of expression; and
3. Since the *Equustek* decision, Google changed its system to automatically redirect Canadian users to the Canadian search engine, even when they request another jurisdiction.

Key Takeaways

While this decision is not binding in common-law jurisdictions, *AB v Google* represents a potentially significant shift in Canadian defamation law, with an appellate court arguably endorsing a narrower interpretation of *Crookes* than previously understood.

Expect plaintiffs outside of Québec to argue that intermediaries with actual knowledge of clearly defamatory content should be liable for a failure to act, even in the absence of a court order.

Businesses operating online platforms, search engines, or other services that host or index third-party content throughout Canada should consider whether *Crookes* can still be seen as a complete defence. Such intermediaries may want to re-evaluate their response protocols. Delays or blanket refusals to take down illicit content may even lead to punitive damages awards for intermediaries that knowingly index links to such content. We note, however, that the significant punitive damages award in this case was governed by the rules of the *Québec Civil Code*.

Finally, businesses should note that technical architecture matters. Evidence of geo-redirection systems that help confine Canadian users to Canadian search results, even in common-law jurisdictions, may be a relevant factor with respect to the scope of any injunctions. However, the enforcement issues for plaintiffs, which arose because an United States court declined to enforce the Supreme Court of Canada's decision in *Equustek* , may persist.

Looking Ahead

If Google seeks leave to appeal, the Supreme Court will have an opportunity to clarify intermediary liability throughout Canada. In the meantime, businesses and individuals should take note: the balance between freedom of expression and accountability for online harms continues to evolve.