Worldwide Removal Order Upheld Against Google

The Supreme Court of Canada has upheld, by a 7-2 decision, an injunction issued by lower courts in British Columbia requiring Google, a non-party to the litigation, to globally remove or "de-index" the websites of the defendant so that they do not appear in any search results. This is the first such decision by Canada's highest court.

In *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 (available here) Equustek sued Datalink for various intellectual property violations relating to the manufacture and sale of a networking device. Interlocutory orders were made against Datalink but it did not comply and it cut any connections it had to British Columbia (para 7). It continued its conduct, operating from an unknown location and selling its device over the internet. After some cooperative efforts with Google (de-indexing specific web pages but not Datalink's entire websites) were unsuccessful to stop potential customers from finding Datalink's device, Equustek sought an interlocutory injunction stopping Google from including any parts of Datalink websites in its search results worldwide. Google acknowledged that it could do this relatively easily (paras 43 and 50) but it resisted the injunction.

The issue of the British Columbia court's *in personam* or territorial jurisdiction over Google featured prominently in the lower court decisions, especially that of Justice Fenlon for the British Columbia Supreme Court (available here). This is an interesting issue in its own right, considering the extent to which a corporation can be present or carry on business in a province in a solely virtual (through the internet) manner (rather than having any physical presence). There is considerable American law on this issue, including the much-discussed decision in *Zippo Manufacturing v Zippo Dot Com Inc.,* 952 F Supp 119 (WD Pa 1997). In the Supreme Court of Canada, Google barely raised the question of jurisdiction, leading the court to state that it had not challenged the lower courts' findings of *in personam* and territorial jurisdiction (para 37). So more on that issue will have to wait for another case.

The majority decision (written by Abella J) applies the standard three-part test for an interlocutory injunction (para 25). In doing so it confirms two important

points. First, it holds that a non-party can be made subject to an interlocutory injunction. It relies on considerable jurisprudence about *Norwich* orders and *Mareva* injunctions, both of which frequently bind non-parties. The common theme the court draws from these cases and applies to this case is the necessity of the non-party being bound for the order to be effective. In the majority's view, the injunction against Google is a necessity if the ongoing irreparable harm to Equustek is to be stopped (para 35). Second, it holds that an interlocutory injunction can be made with extraterritorial effect in cases in which the court has *in personam* jurisdiction over the entity being enjoined (para 38). Again, it made such an extraterritorial order in this case because that was, in its view, necessary for the injunction to be effective. An order limited to searches or websites in Canada would not have addressed the harm.

The dissenting judges (Cote J and Rowe J) accept both of these important points of law. They acknowledge that the court has the ability, in law, to issue such an injunction (para 55). But on the facts of this case they determine that the injunction should not have been granted, for several reasons. First, the injunction is not interlocutory but rather permanent, so that more restraint is warranted. In their view, Equustek will not continue the action against Datalink, content to have obtained the order against Google (paras 62-63). In response, the majority notes it is open to Google to apply in future to have the order varied or vacated if the proceedings have not progressed toward trial (para 51). Because they consider the injunction to be permanent, the dissenting judges object that no violation of Equustek's rights has as of yet been established on a balance of probabilities (para 66) such that there is no foundation for such a remedy. Since the majority considers the injunction to be interlocutory this issue does not arise for it.

Second, the dissent rejects the reliance on *Norwich* orders and *Mareva* injunctions, noting that in those cases the order does not enforce a plaintiff's substantive rights (para 72). In essence, this order is a step farther than the courts have gone in previous cases and not one the dissent is willing to take. The dissent also denies the injunction because (i) it is mandatory in nature rather than prohibitive, (ii) it is unconvinced that the order would be effective in reducing harm to Equustek and (iii) it thinks there is sufficient evidence that Datalink could be sued in France so that an alternative to enjoining Google is available. Aspects of this supplementary reasoning are open to debate. First, the distinction between mandatory and prohibitive orders is not overly rigid and in any event

mandatory orders are possible, especially in cases in which the target of the order can easily comply. Second, common sense suggests the injunction would have at least some impact on the ongoing alleged violations, even though of course there are other internet search engines. Moreover, the majority points out that it is "common ground that Datalink was unable to carry on business in a commercially viable way unless its websites were in Google's search results" (para 34). On the issue of effectiveness, the dissenting judges do not seem to be on this common ground. Third, proceedings against Datalink in France might or might not be viable. Even if it could be found in France, it could subsequently leave the jurisdiction and continue its operations elsewhere. So this seems a hard basis on which to deny Equustek the injunction.

It is fair for the dissent to point out that this injunction is not perfectly analogous to *Norwich* orders and *Mareva* injunctions. It does move beyond those cases. The debate is whether this is a reasonable incremental move in the jurisprudence relating to the internet or goes too far. The majority's overarching rationale for the move is the necessity of the injunction on these facts. Coupled with the ease with which Google can comply, this is a sufficient basis to evolve the law in the way the court does.