

## INSURE UPDATES

## IN THIS ISSUE

## Contents

Supreme Court of Canada Expands the Scope of Injunctive Relief to Protect Canadian Intellectual Property Worldwide: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34



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## Supreme Court of Canada Expands the Scope of Injunctive Relief to Protect Canadian Intellectual Property Worldwide: [Google Inc. v. Equustek Solutions Inc.](#), 2017 SCC 34

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### Case Comment

On June 28, 2017, the Supreme Court of Canada (“SCC”) released its decision in *Google Inc. V. Equustek Solutions Inc.*, wherein it confirmed the ability of Canadian courts to grant pre-trial injunctive relief against a non-party, with world-wide effect.

### Background

Equustek Solutions Inc., a small technology company that manufactures networking devices, sued its former distributor, Datalink Technologies Gateways LLC (“Datalink”), in British Columbia alleging that Datalink was re-labelling Equustek’s products and passing them off as their own, and was using Equustek’s confidential corporate information to manufacture its own products for sale. Datalink filed statements of defence disputing Equustek’s claims, but eventually abandoned the proceedings and left the province.

In the course of the Datalink proceedings, Equustek obtained a pre-trial interlocutory injunction ordering Datalink to cease operating or carrying on business through any website and freezing Datalink's worldwide assets, including its product inventory. Equustek also obtained Orders requiring Datalink to return Equustek's confidential information, prohibiting Datalink from using Equustek's confidential information or referencing Equustek or its products on Datalink's websites, and ordering Datalink to post notices on its website.

Datalink ignored the injunction and Orders, and continued selling its products on its websites from an unknown location. Equustek obtained contempt Orders from the BC court, and an arrest warrant was issued, but those remedies were ineffective to stop the internet sales because the location of Datalink was unknown.

Equustek requested that Google de-index Datalink's websites from its search results, but Google refused. Equustek then sought an order requiring Google to do so. Google agreed to remove specific webpages if an order was made prohibiting Datalink from carrying on business on the Internet through any website. Between December 2012 and January 2013, Google de-indexed 345 specific webpages associated with Datalink from Google's Canadian search site, google.ca. It did not, however, de-index all of Datalink's websites, and the sites remained indexed for searching on all other Google search websites outside of Canada. De-indexing the webpages in this manner proved to be ineffective because Datalink created new webpages on its existing websites to replace them, and even Canadians could still search for these pages by using non-Canadian Google search sites accessible from within Canada.

Equustek ultimately sought and obtained from the BC court a pre-trial injunction with global effect, ordering Google to de-index Datalink's websites from its searches and preventing it from displaying such websites in search results generated by any of its worldwide search engines. Google appealed this decision to the Court of Appeal for British Columbia, which upheld the injunctions and dismissed the Appeal. Google then appealed to the SCC.

### Supreme Court of Canada Decision

In a 7-2 decision, the SCC upheld the pre-trial injunction with world-wide effect and dismissed Google's Appeal. The SCC confirmed that the BC court had jurisdiction over Google, even though it was not a party to the lawsuit between Equustek and Datalink, and that the BC court could make an order prior to trial that applied to Google's operations globally.

Google advanced two main arguments in opposition to the injunction. First, it challenged the court's jurisdiction to grant the order, arguing that as a non-party to the action, it should not be bound by an injunction, and arguing that any injunction should apply in Canada only. Second, Google argued that the injunction was not just and equitable in the circumstances.

The SCC held that injunctive relief can be ordered against someone who is not a party to the underlying lawsuit. The SCC determined that where non-parties are so involved in the wrongful acts of others that they facilitate the harm, even if they themselves are not guilty of wrongdoing, they can be subject to interlocutory injunctions. The SCC found that Datalink was unable to carry on business in a commercially viable way without its websites appearing in Google search results. Therefore, Google's assistance was necessary to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek. The SCC stated: "*Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.*"<sup>1</sup>

The SCC further determined that a court may grant an injunction with global reach "... where it is necessary to ensure the injunction's effectiveness."<sup>2</sup> In this case, the breaches were occurring on the internet from an unknown location somewhere in the world. The SCC acknowledged that, "[t]he only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates - globally."<sup>3</sup> Otherwise, if the injunction was only effective in Canada, or applied only to the Canadian Google search engine, it would not be effective to

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<sup>1</sup> Paragraph 35

<sup>2</sup> Paragraph 38

<sup>3</sup> Paragraph 41

prevent Datalink from continuing its internet business and causing harm to Equustek in the global marketplace.

On the issue of whether it was just and equitable to grant the injunction, the SCC found that it was just and equitable for a variety of reasons. It held that Google failed to demonstrate that complying with the injunction would require it to breach the laws of another jurisdiction, or would violate its freedom of expression. The SCC acknowledged that if Google's freedom of expression were violated, the court could amend the order. Google was being asked to do something that was easily within its power to do, was very similar to what it had previously volunteered to do, and would not result in any material inconvenience or harm to Google.

The two dissenting judges disagreed with this result on the basis that the remedy was akin to a final and permanent order, since it removed all incentive for Equustek to proceed with the action. They held that the test for a permanent injunction had not been met, and it was not appropriate to grant this type of permanent relief without a full evidentiary foundation such as would be available at trial.

### **Impact of the Supreme Court of Canada's Decision**

This decision confirms that non-parties in a lawsuit are subject to pre-trial injunctions in cases where they are so involved in the wrongful acts of others, that they facilitate the harm, even if they themselves are not guilty of wrongdoing.

The SCC has also confirmed the ability of a Canadian court to issue an injunction that governs conduct anywhere in the world, where it is necessary to ensure the injunction's effectiveness.

This case is expected to have broad-ranging implications given the global reach of the internet and the businesses that rely upon it.

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