June 2017

The New Frontier of Jurisdiction: Supreme Court of Canada Upholds Worldwide Injunction Against Google

The Supreme Court of Canada released its much anticipated decision this week in *Equustek v. Google Inc.*, an appeal by Internet giant Google of an order requiring it to change its search engine results worldwide.[1] The Internet and its complex global network of information and commerce pose certain challenges to traditional notions of territorial jurisdiction. The decision in *Equustek* confirms the wide breadth of Canadian courts' power to grant orders with extraterritorial effects, including against innocent non-parties to the underlying dispute. While this decision may depart in some respects from the approach that other countries' courts have taken, it remains to be seen what framework Canadian law will develop to guide when such orders should be granted (and when not).

The Case

The Supreme Court's decision concerns an injunction against Google that is ancillary to the plaintiff's main law suit. Equustek Solutions Inc. is a small technology company in B.C. that manufactures devices used in complex industrial equipment. It alleges that the defendants in the main action, including a company called Datalink, stole its confidential information and trade secrets and were selling Equustek's product as their own to online customers. Equustek

[1] 2017 SCC 24 [*Equustek* SCC]

obtained various orders aimed at curbing Datalink's illegal behaviour. Datalink eventually abandoned the law suit and fled B.C.. Datalink continues to conduct online sales from unknown locations abroad. Equustek asked Google to de-index Datalink's website so that it would not appear in the results of Google searches. Google offered some cooperation, removing individual webpages from searches conducted only on the Canadian version of the search engine, *google.ca*. As most of the illegal sales occur abroad, Equustek was not satisfied and brought an application in B.C. for an injunction requiring Google to remove Datalink's website from the results of all Google searches worldwide.

Both the B.C. Supreme Court and Court of Appeal considered whether they had jurisdiction to grant the order, which would require Google to take steps in California that would affect searches conducted anywhere in the world. Both courts held that the company's considerable business presence in the province, including advertising and revenue streams as well as the interactive nature of its website, gave the Court *in personam* jurisdiction over Google. Citing precedent, both courts held that an order can have effects outside of the court's territorial jurisdiction where the court has *in personam* jurisdiction over the party that is being enjoined. Accordingly, the order was granted and upheld on appeal. The Court of Appeal considered Google's arguments about territorial overreach. It held that the principle of 'comity' (which is the general deference and respect of each nation's courts for the acts and jurisdiction of others) must be considered in determining the proper scope of an order with extraterritorial effects.[2]

The Supreme Court of Canada's Decision

Justice Abella, writing for a seven judge majority of the Supreme Court, upheld the injunction against Google. In doing so she mostly adopted the analysis of the courts below, including as to the effect and operation of *in personam* jurisdiction.

[2] 2016 BCCA 265 [*Equustek* BCCA] at 84.

The majority's focus was largely on the test for granting injunctions, which requires (i) there be a serious issue to be tried, (ii) there would be irreparable harm if the injunction were not granted, and (iii) the balance of convenience to the parties favours granting the injunction. Google challenged the injunction on the basis that it would be ineffective, would have unnecessary and inappropriate extraterritorial reach, and raised issues of free speech.

The majority cited previous decisions upholding the power of courts to grant injunctions that bind innocent third parties. It also cited cases where courts granted injunctions with international effects. The majority observed that courts frequently make orders that compel third parties to assist in curbing bad behaviour, including *Norwich* orders (which can compel third parties to provide information) and *Mareva* injunctions (which can require third parties to freeze defendants' assets). Just as in those cases, here it was necessary to get the help of an innocent third party, Google, to prevent the defendants' breach of the B.C. court's orders.

Finally, the majority dismissed Google's arguments about comity as "theoretical", agreeing with the Court of Appeal that there was no realistic chance of the injunction offending the sensibilities of another nation, and that the injunction could be modified if that were to happen.

Justices Côté and Rowe wrote a dissenting opinion. They took the view that the Google injunction should not have been granted because it would effectively be a final resolution of the dispute. The injunction granted more equitable relief than Equustek sought in its main law suit against the defendants, so Equustek would have no incentive to continue prosecuting its claim. The injunction would also require ongoing court supervision to be enforced. The dissenting justices also questioned whether this was a proper case to enjoin a non-party at all because Google was not, in their view, aiding and abetting the defendants' wrongdoing. Finally, there were alternative remedies available that Equustek had not pursued. The dissenting

justices also noted that the worldwide effect of the Google injunction "*could* raise concerns regarding comity", though they did not explore these concerns.

The (Untraveled) Road Ahead

The *Equustek* case brought into sharp relief a tension between two trends in the law surrounding the power to grant orders with extraterritorial effects. On the one hand, the Supreme Court of Canada and other appellate courts have previously stressed the need to fashion effective remedies to address wrongs committed online. In the 2007 *Pro Swing Inc. v. ELTA Golf Inc.* decision, Chief Justice McLaughlin, writing for a majority of a Supreme Court, noted that private international law (the body of law that addresses issues of overlapping jurisdiction) must evolve to take account of modern realities, including a constant flow of products, wealth and people across the globe. She held that "*in the proper case, the limits of the courts' jurisdiction should be expanded, not narrowed.*"[3] Similarly, in *Barrick Gold v. Lopehandia* the Ontario Court of Appeal rejected the notion that courts should "*throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmission [on the Internet] around the world is ineffective.*"[4] On the other hand, the use of *in personam* jurisdiction to compel parties' behaviour abroad has long been exercised with restraint, as courts have recognized the inherent risk of territorial overreach. In *Pro Swing*, the Supreme Court of Canada noted a natural tendency towards judicial overreach caused by the arrival of the Internet. It cautioned that "*[e]xtraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems.*"[5] With its decision in *Equustek*, the Supreme Court appears to have pushed the balance further in favour of using equitable jurisdiction to craft effective remedies and become less concerned with overreach.

---

[3] *Pro Swing Inc. v. ELTA Golf Inc.* [*Pro Swing*] at 78-79.

[4] *Barrick Gold v. Lopehandia*, [2004] O.J. No. 2329 [*Lopehandia*] at 75.

[5] *Pro Swing* at 58 [Emphasis added].

Neither the majority nor minority at the Supreme Court addressed in detail a problem that has been taken up by courts elsewhere. Where the party being enjoined by an order is an innocent third party, to what extent should the Court be dictating their actions abroad? The majority in *Equustek* cited a number of Canadian and foreign cases for the proposition that a court may grant orders with extraterritorial effects against a party over whom it has in *personam* jurisdiction.[6] However, the authorities it cited reveal that other courts have been very cautious when telling third parties what to do outside of their territorial jurisdiction. For example, English jurisprudence has recognized that *in personam* jurisdiction over innocent third parties that carry on business in multiple countries poses a problem. English law very carefully circumscribes the extraterritorial effects of injunctions on third parties, for the most part leaving their extraterritorial effect to be determined by the relevant foreign court.[7] Even before *Equustek*, Canadian law has been inconsistent on this point.[8] The Supreme Court decision in *Equustek* does not temper or qualify the international effect of the injunction against Google – in fact, it positively endorses it: "*The problem in this case is occurring online and globally … The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates - globally.*"[9] In this sense, *Equustek* seems to push the limits of Canadian courts' territorial jurisdiction beyond that recognized in other countries.

---

[6] *Equustek* SCC at 38.

[7] English jurisprudence has led to model *Mareva* orders that include provisos that carefully circumscribe the extraterritorial effects of injunctions against non-parties. See Pitel and Valentine, "The Evolution of the Extra-Territorial *Mareva* Injunction in Canada: Three Issues", 2 J. Priv. Int'l L. 229 2006, cited in *Equustek* SCC at 33. And see *Babanaft International Co. S.A. v. Bassante*, [1990] 1 Ch. 13, cited in *Equustek* SCC at 38.

[8] See Pitel and Valentine, cited in *Equustek* SCC at 33.

[9] *Equustek* SCC at 41.

There is arguably a gap left by the existing framework for granting extraterritorial orders that *Equustek* does not address. A court can have in *personam* jurisdiction over an innocent non-party, like Google, by virtue of that party carrying on business within its territory. That *in personam* jurisdiction allows the court to deputize the non-party on a worldwide basis to ensure that its orders are being respected. This is a very powerful tool in the hands of Canadian courts, especially when we consider that a party like Google will likely have a business presence in all Canadian provinces and territories. Given Google's near universal presence and ability to shape international commerce and the exchange of information, there is an obvious risk of judicial overreach as applicants come before courts to request orders that invade the jurisdiction of other countries. The B.C. Court of Appeal in *Equustek* articulated the current framework for addressing this risk: "*In each case, the court must determine whether it has territorial competence …. If it does, it must also determine whether it should make the orders that are sought. Issues of comity and enforceability are concerns that must be taken into account…*".[10] This framework may be problematic because the Supreme Court has previously said that comity "*cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other nations*".[11] The Supreme Court has also said emphatically that justice requires a secure and predictable system of conflict of law rules. Comity is not a predictable set of rules or a legal test. It is, therefore, not an ideal referee of judicial overreach. The ground is fertile for a system of predictable rules to develop to fill the current gap.

The *Equustek* decision has confirmed that Canadian courts have broad power to grant extraterritorial relief against non-parties. We have yet to see what rules will develop to guide how courts exercise that power to grant effective remedies in the Internet Age while respecting the principle of comity.

---

[10] *Equustek* BCCA at 88.

[11] *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 at 74.

by Stephen Brown-Okruhlik, Peter Wells and Samantha Gordon.

For more information on this topic, please contact:

Toronto	Stephen Brown-Okruhlik	416.865.7043	stephen.brown-okruhlik@mcmillan.ca
Toronto	Peter Wells	416.307.4007	peter.wells@mcmillan.ca
Toronto	Samantha Gordon	416.865.7251	samantha.gordon@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.