Supreme Court Gives The Green Light To Global Orders To Take Down Search Results

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Overview

The Supreme Court of Canada confirmed for the first time in the recent decision *Google Inc*. v. *Equustek Solutions Inc*. that Canadian courts can order the worldwide removal of search results. In a divided decision (7-2), the Court upheld an interlocutory injunction prohibiting Google from displaying the websites of a company which allegedly counterfeited another company's products. The Supreme Court of Canada has demonstrated with this ruling that the Internet is not a "no law" land, and that Canadian courts are not powerless on this terrain. This can be viewed as good news for businesses and all those who fall victim to IP infringements, and possibly to other types of violations such as privacy breaches and defamatory comments. They can now seek a remedy that will hinder access to the objectionable content, not just within Canada but anywhere in the world.

At the same time, since the Supreme Court of Canada focused solely on the case at hand (the online sale of allegedly counterfeited products), it did not respond to concerns about the free flow of information on the Internet and the broader implications of its decision for freedom of expression. The issue here is that the Court's ruling could be viewed as legitimizing global takedown orders, and inviting other jurisdictions — which might not share our understanding of fundamental rights and freedoms — to follow suit in issuing such injunctions.

While such concerns are legitimate, the scope of the decision should not be overstated. In our view, the Court's reasoning should be confined to cases which involve activities that are likely to be considered illegal in most countries, such as the sale of counterfeited products. Canadian and foreign courts should therefore use caution before applying the Court's reasoning/ruling to cases in which freedom of expression issues and other fundamental rights are more clearly at stake.

Background

Equustek Solutions Inc. is a BC technology company which manufactures networking devices. One of Equustek's distributors, Datalink Technology Gateways Inc., allegedly

began to re-label the devices and pass it off as its own, and also used Equustek's trade secrets to design and sell a competing product. Equustek brought an action against Datalink, and obtained interlocutory injunctions to safeguard its interests pending trial. Datalink ignored the orders, left the jurisdiction and continued to carry on its business through its websites from an unknown location.

Google Inc. entered the scene when Equustek requested that it de-index Datalink's websites from its search engine. In response, Google asked that Equustek obtain an order prohibiting Datalink from operating on the Internet, and agreed to comply with such an order by removing search results for specific webpages. The BC Supreme Court granted an interlocutory injunction against Datalink, and Google began to remove search results from google.ca.

Such efforts proved ineffective. Datalink easily circumvented the orders by moving content to new pages within its websites. More importantly for our purposes, purchasers from outside Canada could still find Datalink's webpages on Google since search results only disappeared from google.ca. And even customers within Canada could access them through Google by using another country's URL (such as google.fr).

Equustek then sought a much more sweeping ban: an interlocutory injunction prohibiting Google from displaying search results for any Datalink websites anywhere in the world. The BC Supreme Court granted the interlocutory order despite Google's opposition. The BC Court of Appeal dismissed Google's appeal, and confirmed that superior courts could issue extraterritorial injunctions against non-parties enjoining them to remove online content. In the end, seven out of nine justices of the Supreme Court of Canada upheld the interlocutory injunction.

The majority opinion

Writing for the majority, Abella J first observes that, except for statutory restrictions, courts of equitable jurisdiction (such as the BC Supreme Court) have "unlimited" discretionary powers when it comes to issuing injunctions.

Justice Abella then confirms that the regular test for determining whether a court should grant an interlocutory injunction applies to a global takedown order against a non-party. The three-part test remains unchanged. As such, the court must simply assess whether there is a serious question to be tried, whether the plaintiff suffered irreparable harm, and whether the balance of convenience favours issuing the injunction. The majority concludes that such criteria are met in Equustek's case.

According to the majority, issuing an interlocutory injunction against a non-party such as a search engine is an appropriate remedy when the non-party facilitates the harm caused to the plaintiff. By way of comparison, Abella J gives the example of *Norwich* injunctions, which force a non-party to disclose information about the alleged perpetrator, and *Mareva* injunctions, which freeze assets held by a non-party.

In the case at hand, the majority finds that, by refusing to remove search results globally, Google was facilitating Datalink's breach of the order that prohibited it from carrying on its business on the Internet. In effect, Google was allowing Datalink to cause

further harm to Equustek. However, the majority is careful to note that Google's liability is not engaged.

Justice Abella then explains that an order may apply anywhere in the world when it is necessary to ensure its effectiveness in preventing irreparable harm. In this case, a worldwide order is considered necessary since most of Datalink's sales occur outside Canada. As Abella J puts it: “The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally.”

Regarding the balance of convenience, Abella J notes that Google can easily de-index websites, without incurring any significant expense. She points out that Google often remove search results related to child pornography, hate speech and, in some cases, alleged copyright infringements. The majority summarily dismisses any concerns about freedom of expression. Justice Abella opines that the content at stake (search results for Datalink's websites) does not engage free speech values. She adds that: "We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods."

Likewise, the majority describes issues of international comity as "theoretical". Justice Abella suggests that most jurisdictions would perceive the sale of pirated products as a legal wrong, and that, in any case, Google has failed to demonstrate that the order would violate the laws of any other jurisdictions. In her view, it would be inequitable to put the onus on Equustek to prove, country by country, where such an order would be legally permissible. In practice, the ruling leaves the task of proving that an injunction violates the laws of another nation to search engines (or any non-parties subject to the order) — which may or may not have the interest or resources to undertake such efforts.

The dissenting opinion

In their dissent, Côté and Rowe JJ do not challenge that courts have the power to grant global interlocutory injunctions to remove search results. However, they argue that, at least in this case, courts should have shown judicial restraint and refused to grant the order. While their opinion is not based — at least explicitly — on concerns for freedom of expression, they acknowledge that the order sought against Google is a "novel form of equitable relief" that should not be granted too easily.

Justices Côté and Rowe first point out that, in practice, the interlocutory injunction amounts to a final and permanent remedy since a trial against Datalink is unlikely to ever take place. This calls for a more robust and extensive review of the merits of the claims than the one that was carried out by the BC Supreme Court. In other words, caution should be exercised considering that the underlying allegations against Datalink have never been proven in court.

The minority opinion also disputes the majority's conclusion to the effect that Google facilitated Datalink's breach of the order prohibiting it from operating on the Internet. Technically speaking, Datalink websites would be online regardless of how visible they might be through Google. Contrary to the majority, Côté and Rowe JJ find that the injunction would impose a significant burden on Google, since it requires to take positive

steps to monitor Datalink's efforts to circumvent the order by launching new websites. The minority opinion then points out that the order has not been shown to be effective. While Google may be the most popular search engine, there would still be other ways to access Datalink websites.

Finally, Côté and Rowe JJ argue that such an equitable remedy should not be granted when there are alternative remedies at law. In the case at hand, there is information to the effect that Datalink has assets in France and therefore, they articulated the view that Equustek should request that French courts freeze those assets before seeking an injunction against Google.

Overall, the dissenting opinion offers some avenues to convince a court to refuse the issuance of a global takedown order against a non-party. One might try to show, for instance, that the order would be largely ineffective, that it would impose a heavy burden on the non-party, or that there are alternative remedies. The majority does not dispute the relevance of such factors, but only finds that, as a matter of fact, they do not apply in the case at hand.

Commentary

The Supreme Court of Canada has shown that Canadian courts have both the will and the capacity to intervene on the Internet on a worldwide scale. The decision affords a new — but exceptional — remedy to victims of IP infringements, and possibly of privacy violations, data breaches, and defamatory comments. In some circumstances, such victims might be able to obtain a court order that will impede access to the objectionable content, not just within Canada but anywhere in the world.

Both the majority and the minority opinions focus narrowly on the case at hand, that is, the online sale of allegedly counterfeited products. Thus, the Court apparently did not find it necessary to respond to concerns about the broader implications for freedom of expression. More specifically, it did not discuss the concerns expressed by intervenors such as Human Rights Watch that the injunction might embolden other jurisdictions — including the courts of repressive regimes — to issue worldwide orders requiring the removal of online content available to Canadians. The main point is that the Court's ruling could be misperceived as legitimizing efforts by foreign jurisdictions to police and control content on a global scale. As a matter of illustration, a foreign court could potentially cite it as a precedent to justify an order requiring a search engine to remove results for politically or religiously sensitive material. After all, why would it be acceptable for Canadian courts to issue global orders but not for other jurisdictions that might not share our conception of fundamental rights and freedoms?

Global orders issued by liberal democracies could also lead to disputes, especially if the Court's reasoning is applied in other contexts than IP infringements. The European Union and the United States, for instance, have diverging views on the proper scope of fundamental rights and freedoms, one example being the lack of consensus on the legitimacy of the "right to be forgotten", which illustrates the cultural transatlantic clash on the importance of privacy versus other rights, such as freedom of information and free speech.

While such concerns are legitimate, it is important not to overstate the scope of the Court's ruling. The decision is far from justifying or trivializing any global restrictions on

content. On the contrary, the case is confined to the narrow issue of stopping the online sale of allegedly counterfeited products — an activity widely considered illegal which does not directly engage fundamental rights and freedoms. Moreover, the majority makes clear that a global order is appropriate only insofar as it does not conflict with foreign laws. Otherwise, the order should be varied to avoid conflicts.

Hence, we believe that most concerns could be alleviated if Canadian and foreign courts apply the Court's reasoning with caution, only in cases which involve activities that are likely to be considered illegal in most countries, and that do not clearly engage fundamental rights and freedoms. Courts should be especially careful before extending the scope of the ruling to contentious issues such as privacy violations and defamation. In that regard, we would add that worldwide injunctions need to take into consideration differences in legal traditions and cultural sensitivities, although the Court is not explicit on this point.

Another area of concern is that the Court did not discuss the fact that search results may have inherent value in terms of freedom of expression, as it had done in earlier decisions in which it had raised the importance of the Internet's capacity to disseminate information. In *Crookes* v *Newton*, 2011 CSC 47, for instance, the Court emphasized that hyperlinks play a key role in providing access to information by communicating that content exists. In this ruling, the majority seems instead to have taken the view that search results have no value independent of the underlying content (the Datalink websites in this case).

In our view, the decision should not be read as undermining the Court's earlier statements about the importance of hyperlinks (or search results) for the exercise of freedom of expression. In *Crookes* v *Newton*, the issue was whether a website operator could be held liable for defamation for the mere publication of hyperlinks connected to defamatory material. The Court found that it was insufficient to engage the defendant's liability. The contrary view would have had a chilling effect on the flow of information on the Internet, since website operators might have stopped publishing hyperlinks to limit their exposure to liability. In the case at hand, however, the Court presumably assumed that there was little risk of seriously restricting the publication of search results. In fact, the majority opinion makes clear that Google is not liable for merely displaying Datalink websites, which echoes the concerns raised in *Crookes* v *Newton*. In other words, search engines are not compelled to remove search results preventively to limit their liability, which mitigates the impact on access to information.

It remains that, in the context of takedown orders against search engines, the Court's decision suggests that the value of search results, in terms of freedom of expression, is dependent on the value of the underlying content. In the case at hand, the Court took the view that Datalink websites hardly engaged any issues of free speech. However, when the underlying content is more clearly connected to one of the constitutionally recognized purposes of freedom of expression, that is democratic discourse, truth seeking, and self-fulfillment, we believe that courts should generally exercise restraint and refuse to grant the injunction, at least on an interlocutory basis.

In sum, we acknowledge that, in some exceptional cases, global takedown orders may be the only remedy available to safeguard a plaintiff's interests. Court should consider using them in the right circumstances. That being said, it should be borne in mind that the Court's ruling could set a precedent that might have unintended consequences all

across the globe, especially if applied to cases which do not involve activities that would be considered as illegal in most countries (*i.e.*, online sale of allegedly counterfeited products). Caution should therefore be used before applying this ruling and the Court's reasoning to other types of cases, for example, to cases in which freedom of expression issues and other fundamental rights are more clearly at stake, either in Canada or elsewhere in the world.

By

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