

Supreme Court of Canada upholds global search engine de-indexing decision: Five implications for internet intermediaries

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On June 27, 2017, the Supreme Court of Canada upheld an injunction that requires Google to remove an entire website from its global search index. The *Equustek v. Google* decision (*Equustek*) establishes that Canadian courts can make orders with extraterritorial, even global, effect against search engines and other innocent internet intermediaries, even those that do not have a physical presence in Canada, if that is the only effective means of preventing harm to other parties. The decision has important implications for the internet intermediaries that provide crucial elements of the internet's business and technical infrastructure, as well as for owners of intellectual property, which are addressed in a [separate Update](#).

The underlying case

As noted in a [previous Osler Update](#), the plaintiffs in the underlying case alleged that the defendants had unlawfully used their trade secrets to manufacture a competing product, which was being sold online. The plaintiffs obtained various orders from the British Columbia court limiting the ability of the defendants to sell the plaintiffs' products on their website. The defendants did not comply, abandoned their defence and ceased to operate from within British Columbia. Instead, the defendants continued to sell their product online from unknown whereabouts.

In 2012, the plaintiffs approached Google, an innocent non-party to the dispute, and requested that it de-index the defendants' websites. Google voluntarily removed 345 specific web page addresses (URLs) from search results on Google.ca, its Canada-specific search engine. The defendants evaded these steps by moving their content to different web pages, with different URLs.

The plaintiffs then successfully sought an order requiring Google to remove all web pages within the defendants' domain name from all of its search results worldwide, not just those found through Google.ca. This order was upheld first by the B.C. Court of Appeal and then the Supreme Court, whose decision has five key implications for internet intermediaries.

1. Canadian courts may assume jurisdiction over internet intermediaries located outside of Canada

The decision supports the assertion of jurisdiction by a Canadian court over an internet intermediary that provide services to Canadians, even if the intermediary has no physical presence within the Canadian court's jurisdiction.

Google, which operates primarily from California and has no physical presence in B.C., argued that the B.C. court lacked territorial competence over Google. The B.C. courts concluded that because Google carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of jurisdiction. Google did not challenge this finding before the Supreme Court. Instead, it argued that no injunction should be granted or, alternatively, the injunction should be limited to Canada (or google.ca) alone.

2. Canadian courts have jurisdiction to grant orders with extraterritorial effect

The Supreme Court found that where it is necessary to ensure the injunction's effectiveness, a Canadian court with jurisdiction over an internet intermediary could grant an injunction restraining the intermediary's activities anywhere in the world.

There was no dispute in *Equustek* that the defendants would not be commercially viable unless their websites were in Google's search results. The Supreme Court held that, much like a *Norwich* order (orders compelling non-parties to disclose information or produce documents) or a *Mareva* injunction (asset freezing orders) against a non-party, the interlocutory injunction in this case flowed from the necessity of Google's assistance to prevent the defendants from defying court orders and irreparably harming the plaintiffs. The Supreme Court held that, in this case, the only way to ensure that the de-indexing was effective was to have it apply globally.

3. Orders against internet intermediaries are not limited to de-indexing orders

In principle, the decision has significant implications for any company that provides internet technical or business infrastructure — even if they have no place of business in Canada. Although the remedy in this case was limited to removing a website from indexed search results, Canadian courts could grant other types of orders against Internet intermediaries to prevent wrongdoers from flouting court orders.

Examples could include ordering a top-level domain operator (such as ".COM" or ".CA") to deny use of a domain name, ordering an internet service provider or network operator to deny access to portions of the internet, ordering a cloud service provider to deny use of its infrastructure, or ordering an advertising network or exchange to deny access to its network or market.

The Supreme Court was careful to note, however, that Google did not suggest there was any material inconvenience or expense to de-indexing the websites. In a different case, where a court order would result in inconvenience or expense to an internet intermediary or others, that inconvenience and expense would weigh against the granting of the order.

4. Internet intermediaries can expect plaintiffs to seek similar orders in invasion of privacy and defamation cases

Although the decision arose in an intellectual property case, the decision is also likely to be relevant to cases where private information or defamatory material is published online. Where wrongdoers publish private or defamatory material and use the anonymity of the

internet to evade court orders to remove such content, plaintiffs could seek court orders requiring internet intermediaries to take steps to prevent further dissemination of the private or defamatory material. Such cases would, however, engage freedom of expression values that were absent in *Equustek*, where the majority decision by the Supreme Court pointedly emphasized that freedom of expression did not require the facilitation of the unlawful sale of goods.

5. The availability of orders against internet intermediaries is not unlimited

The decision does not give plaintiffs an unlimited ability to come to Canadian courts to obtain orders against innocent internet intermediaries. First, as noted above, an order against Google was made because it was found necessary to prevent the defendants from defying the B.C. court and harming the plaintiffs. Second, the B.C. courts clearly had jurisdiction over the defendants, who initially defended the proceedings. Where the Canadian court does not have, or chooses not to take, jurisdiction over a claim, the plaintiff presumably would not be able to obtain an injunction against an innocent non-party, such as an internet intermediary. Third, the Supreme Court made it clear that a non-party affected by such an order can return to court if there is new evidence that, for example, shows that the order violates the laws of another jurisdiction.

As a result, a plaintiff seeking an order against an internet intermediary in a future case will have to satisfy a Canadian court that the court has jurisdiction over the defendant and that orders against the defendant have been, or would be, ineffective. Even if the order is granted, the internet intermediary would have the ability to return to court and ask the court to modify or set aside the order based on subsequent developments.