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*Canada Supreme Court—international comity—speech rights—jurisdiction over the internet—conflict of laws—data across borders—multinational tech companies*

GOOGLE INC. v. EQUUSTEK SOLUTIONS INC. [2017] 1 S.C.R. 824. At <https://scc-csc.lexum.com/scc-csc/scc-csc/en/16701/1/document.do>.

Supreme Court of Canada, June 6, 2017.

In *Google v. Equustek*, the Supreme Court of Canada ordered Google to delist all websites used by Datalink, a company that stole trade secrets from Equustek, a Canada-based information technology company.<sup>1</sup> Google had agreed to do so in part, but with respect to searches that originated from google.ca only, the default browser for those in Canada. Equustek however, argued the takedowns needed to be global in order to be effective. It thus sought an injunction ordering Google to delist the allegedly infringing websites from all of Google's search engines—whether accessed from google.ca, google.com, or any other entry point. Google objected. The Canadian Supreme Court, along with the two lower Canadian courts that considered the issue, sided with Equustek (para. 54). The ruling sets up a potential showdown between Canadian and U.S. law and raises critically important questions about the appropriate geographic and substantive scope of takedown orders, the future of free speech online, and the role of intermediaries such as Google in preventing economic and other harms.

The case between Google and Equustek arose out of a dispute that did not involve Google at all. Rather, it was an intellectual property dispute involving two then-Canada-based companies that manufacture networking devices permitting complex industrial equipment made by one manufacturer to communicate with equipment made by a different manufacturer. Specifically, the Canada-based Equustek accused Datalink, which at the time operated in Vancouver, of stealing its trade secrets and manufacturing and selling a competing device online.

In response to credible allegations by Equustek, the trial court ordered Datalink to return all source code and other intellectual property that belonged to Equustek, to stop referring to Equustek on its websites, and to direct interested customers to Equustek instead of selling them their competing device, as Datalink had been doing. Datalink, however, failed to comply, fled the jurisdiction, and continued to carry on its business from outside Canada. In response, Equustek reached out to Google for help. At Equustek's request, Google voluntarily delinked 345 webpages associated with Datalink. Google did not delink the entire websites maintained by Datalink, but rather individual webpages. Moreover, Google only delinked the

<sup>1</sup> Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 824 (Can.).

sites that were accessed via google.ca; the relevant webpages were still available if searches were conducted from google.com, google.fr, or any other access point.

In response, Equustek returned to the trial court and asked for an interlocutory injunction requiring Google to delink all of the websites used by Datalink and to do so on a global basis. Equustek presented four key arguments as to why Google's actions were insufficient to protect its interests and why the company, despite being a non-party to the underlying dispute, should be enjoined to protect Equustek's interests during the pendency of the trial. First, Google is the global search engine of choice, accounting for approximately 70–75 percent of internet searches worldwide. Second, most of Datalink's sales were to purchasers outside Canada, where the de-indexing on google.ca would have no effect. Third, Canadian customers could still access the webpages by simply typing in another Google URL. And fourth, the de-indexing of webpages as opposed to websites meant that new pages were being launched almost as soon as the infringing ones were delisted<sup>2</sup>—what the trial court described as “an endless game of ‘whac-a-mole.’”<sup>3</sup>

Google countered that, as a non-party to the underlying dispute, it should be immune from any such injunction. Google further argued that even if an injunction were granted, it should be geographically limited, covering searches originating from google.ca only. Google warned that the worldwide injunction sought by Equustek risked conflict with foreign law and raised free speech concerns.

Both the trial court and intermediary appellate ruled in favor of Equustek, concluding that a global interlocutory injunction was both appropriate and necessary to protect Equustek's interests in protecting its intellectual property. By a vote of 7–2 the Canadian Supreme Court affirmed, rejecting each of Google's key arguments.

The Supreme Court first determined that a non-party such as Google could be subject to an injunction. According to the Court, Google was aware of and facilitated wrongdoing committed by Datalink, and it could thus be compelled to stop doing so (para. 34). The Court further emphasized that Google's position as the search tool of choice for a high percentage of internet users made it a key player in facilitating the underlying harm (para. 18). Based on these facts, the Court concluded an injunction was both appropriate and necessary.

Second, the Canadian Supreme Court assessed the scope of the injunction. It concluded, as did the two lower courts, that the injunction had to be global to be effective. In the Court's words: “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” (para. 41). The Court also noted that even though the effect of the injunction was global, the burden on Google was minimal. It need not engage in multiple actions in multiple jurisdictions; rather, it could achieve a global delisting from its headquarters in California with minimal effort and cost (para. 43).

Third, the Court rejected Google's comity-based claims regarding the risk of conflicts with foreign law. The Court emphasized that the speech at issue was not associated with “core values” of other countries, including freedom of expression concerns (para. 45). Rather, it

<sup>2</sup> I use the terms de-index and delist interchangeably to refer to act that Google was being asked to perform, namely the removal of particular webpages and websites from search results.

<sup>3</sup> *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, para. 72 (Can.).

involved the facilitation of the unlawful sale of goods—speech that most countries would deem a “legal wrong” (para. 44).

The Court further noted that it was not asking Google to monitor content, but was instead ordering it to delist specific, identified websites. And it stated that Google regularly engages in precisely these kinds of global delistings with respect to child pornography, hate speech, and copyright violations. The Court went on to note, however, that

[i]f Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly.” (Para. 46)

Judges Cote and Rowe dissented for three key reasons. First, they warned that the injunction, while labeled interlocutory, was final in effect. With the injunction in place, Equustek had little to no incentive to proceed to trial; it already received all of the relief, if not more, than it could get from winning the case against Datalink (paras. 64–65).

Second, the dissent disagreed with the standard applied by the majority. True, Google “inadvertently facilitate[ed]” the harms committed by Datalink (para. 79). But so did the companies that supplied material to produce Datalink’s products, the companies that sold Datalink’s products, and possibly even the local utility company that delivers power to places where Datalink operates (para. 71). According to the dissenters, Google did not aid or abet the specific, prohibited act—the carrying out of Datalink’s business on the web. Thus, whereas an internet service provider could be directed to block access to an infringing website, a party like Google, which “merely assist[ed] in finding the websites,” should not be subject to an order that it de-index otherwise available information (para. 73).

Third, and relatedly, the dissent noted that the injunction was not sufficiently effective to be justified. After all, even if Google delinked the relevant websites, they could still be found and accessed via other search engines, links, email, and social media (para. 79).

In passing, the dissenters also noted that the “worldwide effect” of the injunction “could raise concerns regarding comity,” although they neither identified any specific conflicting laws nor elaborated on what would constitute such a concern (para. 80).

Defeated in the Canadian courts, Google turned to the United States, seeking an injunction to prevent enforcement. Google argued that the order, in light of its global reach, violated its First Amendment rights, Section 230 of the Communications Decency Act (CDA), which provides legal immunity to providers of interactive online service for content created by others, and principles of international comity.<sup>4</sup> Google also emphasized that the order was ineffective; allegedly infringing websites were available via other search engines and social media accounts.<sup>5</sup>

In a November 2017 ruling, a U.S. district court granted a preliminary injunction, which was made permanent a month later in a default judgment because Equustek did not appear.<sup>6</sup> Importantly, the district court did not reach Google’s First Amendment and comity

<sup>4</sup> Google’s Notice of Motion and Motion for Preliminary Injunctive Relief at 6–20, *Google LLC v. Equustek Solutions Inc.*, No. 5:17-CV-04207-EJD (N.D. Cal. July 27, 2017).

<sup>5</sup> *Id.* at 8–9, 15.

<sup>6</sup> Order Granting Pl. Mot. For Default Judgment and Permanent Injunctive Relief, *Google LLC v. Equustek Solutions Inc.*, No. 5:17-CV-4207-EJD, 2017 BL 450437 (N.D. Cal. Dec. 14, 2017).

claims. Rather it relied on Section 230 of the CDA,<sup>7</sup> concluding that Google was covered by the statute's immunity provisions and, therefore, that Equustek could not have obtained the kind of injunction it received in the Canadian courts had it filed suit in U.S. court. The court ruled that Google would suffer "irreparable injury" if it were forced to delink the offending sites. According to the U.S. district court, the "balance of equities favor[ed] Google because the [Canadian court] injunction would deprive it of the benefits of U.S. federal law."<sup>8</sup>

Moreover, while the court explicitly avoided ruling on the First Amendment claim, it did note that the CDA was designed to protect "free speech on the internet."<sup>9</sup> The court thus emphasized that the Canadian injunction "undermines the policy goals of Section 230 and threatens free speech on the global internet."<sup>10</sup>

With the U.S. injunction in hand, Google returned to the Canadian courts, seeking an order lifting or, in the alternative, modifying the original injunction and limiting it to sites accessed via searches from google.ca. In an April 2018 decision, the Canadian trial court recognized that rescission or modification would be appropriate if in fact the order required Google to violate U.S. law. But it concluded that nothing in the U.S. court's ruling indicated that such a conflict existed. As the Canadian trial court put it: "there is no suggestion that any U.S. law prohibits Google from de-indexing." It went on to note that "[a] party being restricted in its ability to exercise certain rights is not the same thing as that party being required to violate the law."<sup>11</sup>

The Canadian court further highlighted the fact that the U.S. court declined to reach the First Amendment issue. As a result, there was no basis to think that the injunction infringed on the United States' "core values." The court thus rejected Google's claim. It concluded that even if the United States would not aid with enforcement, Canada could continue to take independent steps to enforce the injunction against Google.

The court also rejected a separate argument raised by Google—that improvements in technology enabled it to use geoblocking to restrict search results for any user that it could identify as located in Canada, regardless of their entry point for a search. The trial court concluded that this was at best a partial solution, given, in particular, the fact that most of Datalink's sales originated outside of Canada.<sup>12</sup>

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The case raises critically important questions about the appropriate scope of global injunctions, the future of free speech on the internet, and the prospect for harmonization (or not) of rules regulating online content across borders. Most commentary—at least most U.S.-based commentary—raises alarm bells about the Canadian court orders. The Canadian Supreme

<sup>7</sup> See 47 U.S.C. § 230(c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

<sup>8</sup> Google LLC v. Equustek Solutions Inc., 2017 WL 5000834, at \*3 (N.D. Cal. Nov. 2, 2017).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*4.

<sup>11</sup> Equustek Solutions Inc. v. Jack, 2018 BCSC 610, para. 20 (Can.).

<sup>12</sup> *Id.* at para. 30.

Court ruling has, among other things, been called “dangerous,”<sup>13</sup> “ominous,”<sup>14</sup> and something to be “feared.”<sup>15</sup>

Such commentary takes the perspective that global delinking orders are, in just about all cases, to be resisted. The concern: they impose restrictions on speech and the flow of information, with global effect. This is particularly troubling when employed by authoritarian or repressive regimes that are seeking to suppress dissent.

There is a valid basis for these concerns. The *Equustek* case is after all, not the only instance in which a court has sought to issue a takedown or delisting order with global reach. The Court of Justice of the European Union is considering two separate cases in which national courts have demanded that Google and Facebook, respectively, take down allegedly infringing material. In the case against Google, the French Data Protection Agency argues that information covered by the “right to be forgotten” should be taken down on a global scale. The agency has rejected as insufficient Google’s efforts to delink the covered material when accessed from European-based access points (such as google.fr) and to fully block access (via geolocation blocking) for anyone searching from the same country as that of the data subject that asserted the right. As in *Equustek*, the French Data Protection Agency has argued that this does not sufficiently protect the data subject’s rights—given the possibility that the restrictions can be bypassed and the information could be found via different access points.<sup>16</sup> The case against Facebook involves an Austrian court’s demand that the social media company delink allegedly libelous speech targeting the former leader of the Green Party, and do so on a global scale. U.S. press reports that the infringing speech included posts that called Ms. Gławiscznig-Piesczek “lousy traitor,” “corrupt oaf,” and “member of a fascist party” among other names.<sup>17</sup> The two European cases raise concerns about a race to the bottom—leading to a globally censored internet—if every country can impose its view of undesirable speech on the rest of the globe.

<sup>13</sup> Eugene Volokh, *Canadian Court Orders Google to Remove Search Results Globally*, WASH. POST (June 29, 2017), at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/29/canadian-court-orders-google-to-remove-search-results-globally> (calling the ruling “potentially quite dangerous”).

<sup>14</sup> Daphne Keller, *Ominous: Canadian Court Orders Google to Remove Search Results Globally*, STAN. L. CTR INTERNET & SOC’Y BLOG (June 28, 2017), at <http://cyberlaw.stanford.edu/blog/2017/06/ominous-canadian-court-orders-google-remove-search-results-globally> (describing the opinion as “ominous” and raising concerns about “the message that it sends to other courts and governments”).

<sup>15</sup> Michael Geist, *Global Internet Takedown Orders Come to Canada: Supreme Court Upholds International Removal of Google Search Results*, MICHAEL GEIST (June 28, 2017), at <http://www.michaelgeist.ca/2017/06/global-internet-takedown-orders-come-canada-supreme-court-upholds-international-removal-google-search-results> (warning of a possible parade of horrors, including a “a Chinese court order[] to remove Taiwanese sites from the index” and an “Iranian court order[] to remove gay and lesbian sites from the index”); see also Aaron Mackey, Corynne McSherry & Vera Ranieri, *Top Canadian Court Permits Worldwide Internet Censorship*, EFF (June 28, 2017), at <https://www.eff.org/deeplinks/2017/06/top-canadian-court-permits-worldwide-internet-censorship>. But see Andrew Keane Woods, *No, The Canadian Supreme Court Did Not Ruin the Internet*, LAWFARE (July 6, 2017), at <https://www.lawfareblog.com/no-canadian-supreme-court-did-not-ruin-internet>.

<sup>16</sup> See Conseil d’État [CE] [highest administrative court], July 19, 2017, 399922 (Fr.), at <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC>; see also Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179 (2018).

<sup>17</sup> *Die Grünen v. Facebook Ireland Ltd.*, Case No. 5 R 5/17t, Decision – Procedural Outcome (Austria Court of Appeal May 5, 2017); Laurel Wamsley, *Austrian Court Rules Facebook Must Delete Hate Speech*, NPR (May 8, 2017), at <https://www.npr.org/sections/twotwo-way/2017/05/08/527398995/austrian-court-rules-facebook-must-delete-hate-speech>; Natasha Lomas, *ECJ to Rule on Whether Facebook Needs to Hunt for Hate Speech*, TECHCRUNCH (Jan. 11, 2018), at <https://techcrunch.com/2018/01/11/ecj-to-rule-on-whether-facebook-needs-to-hunt-for-hate-speech>.

There is, however, a range of speech that is widely accepted as dangerous, harmful, or otherwise insidious. Yelling fire in a crowded theater can yield criminal manslaughter charges (assuming the result is stampede and death). Meanwhile, court-ordered takedowns pursuant to the Digital Millennium Copyright Act run into the millions per year—implemented by Google, Facebook, and other internet service providers on a global scale.<sup>18</sup> There is also relatively widespread agreement that, in cases of clear copyright infringement, global takedowns are the only way to adequately protect the copyrighted material at stake.

The *Equustek* dispute seems closer to the copyright takedown cases than the right to be forgotten or Austrian libel cases. According to the allegations in the case, Datalink stole trade secrets, engaged in trademark infringement, and continued to benefit from these violations via the sale of counterfeit goods. In such circumstances, it seems appropriate that the court should be able to take steps to protect against ongoing infringements, including restrictions on the sale of counterfeit goods. As with copyright, it is hard to imagine a legitimate free speech principle that would permit Datalink, or any other equivalent company, from engaging in the kind of conduct that it was accused of doing. In at least some cases, restrictions will need to be implemented globally in order to be effective.

If that analysis is right, then the most concerning issues arising out of the *Equustek* litigation relate to the scope of what is being delisted (whether global or not) and to questions of effectiveness, rather than the geographic reach of the order. As to scope, Google is being ordered to delink entire websites as opposed to webpages; Google argues that this potentially puts it in the position of de-indexing a range of legitimate speech in an attempt to reach illegitimate speech.

Moreover, as Google—as well as the dissenting judges in the Canadian Supreme Court case—notes, the delisting order is not the most effective means of dealing with the issue—and perhaps not particularly effective at all. After all, the information is available on other sites and potentially spread by social media and email. As both Google and the dissenting Canadian Supreme Court judges noted, more effective remedies would look to the website hosting service, impose an injunction on a broader array of social media services and search engines, and/or take alternative steps to freeze Datalink's assets in its most current known place of operations—France (paras. 78–79, 81).

In fact, if anything, the case highlights how, in a world tightly interconnected by an internet that can almost instantly spread information across borders, comity concerns cut in both directions.<sup>19</sup> There is, as the critics of the Canadian Supreme Court decision rightly note, a clear need to consider the international effect of global takedown orders—and to take seriously the importance of respecting the right to free expression on a global basis. At the same time, however, there are often situations in which anything short of a global takedown order will be insufficient for a domestic court to protect a litigant's rights or interests. In those cases, judges should look behind the veil of foreign court orders and comity assertions. Simply

<sup>18</sup> These operate via a rather unique notice and takedown mechanism, pursuant to which copyright holders and their agents can demand takedowns of allegedly infringing material. All service providers are required to appoint and register a particular agent to receive such demands. An individual whose work has been affected by such takedown orders can file a counter-notice, which, if not otherwise resolved, will likely lead to litigation.

<sup>19</sup> See also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159–60 (2007) (making a similar point with respect to France's case against Yahoo! over the availability of Nazi memorabilia and Holocaust denial material).

because a foreign court or government claims a conflict does not mean that it is true—as the Canadian trial court recognized in the second round of the litigation.

After all, not all speech is created equal. And speech intermediaries should not be forever protected from court-ordered intervention, simply because a foreign court would not have independently issued an equivalent order. There is thus a need to distinguish between orders designed to protect tangible economic or bodily harms and those that restrict the full flow of ideas and perspectives—even if potentially insulting. Drawing these lines will inevitably be difficult and messy, particularly since it is often easy to reframe efforts to stifle unpopular speech as efforts to protect economic interests, security, or both.

Seen in this light, the outcry over *Equustek* is based on the precedent it sets for the future rather than the specific facts of the case. And there is valid reason to be concerned, given the prospects for a race to the bottom—with the most censorious regime setting restrictive speech norms worldwide. But the mere fact that the injunction reached an intermediary, and that it was imposed on a global scale, does not necessarily make it invalid.<sup>20</sup> After all, limited delinkings will not always adequately protect the underlying rights at stake; global implementation may be required to ensure effectiveness. Mediating the competing interests at stake will require careful attention to the nature of asserted conflicts and the relevant equities at stake, as well as a recognition that not all speech is equally deserving of protection.

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<sup>20</sup> See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401 (2017) (recognizing the CDA immunity may at times go too far).