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BRIEFING NOTE

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BC Court to Google: ***Look out, our reach could be greater than yours!***

***Equustek Solutions Inc v Jack et al*, 2014 BCSC 1063 BC**

In an unprecedented decision handed down this month, Madam Justice Fenlon of the BC Supreme Court issued an injunction ordering Google Inc. ("Google"), a company incorporated in Delaware and headquartered in California, to de-index and block all of the defendants' websites that were used to sell and market goods in violation of the plaintiff's intellectual property rights. The decision comes after a landmark European Union court ruling last month that ordered Google and other search engines to honour citizens' "right to be forgotten", requiring them to remove objectionable links at citizens' requests.

Madam Justice Fenlon's order arises in the context of an ongoing dispute between two industrial equipment companies. The defendant Datalink was formerly a distributor of products manufactured by the plaintiff Equustek and its predecessor, Equus. For a number of years, Datalink promoted these products using its own logos and heavily marketed them as "Datalink" products through various Datalink and associated websites. Following a failed merger in and around 2003, Equustek decided it would start marketing products under its own name, but would permit Datalink to continue selling Equustek-labeled products.

The relationship broke down in 2010 after Equustek discovered that Datalink and its owners, while advertising and accepting orders for Equustek products, were actually filling those orders with their own line of products based on stolen Equustek designs and engineering. Equustek commenced litigation and sought interim orders to remove URLs of Datalink websites that were selling the pirated products.

Equustek's efforts, however, were largely unsuccessful. Notwithstanding various court orders banning them from carrying on any business through any website, Datalink and its principals continued to sell the pirated products through an ever-expanding network of websites by simply generating new URLs. Equustek brought the present application after Google Canada had

voluntarily blocked hundreds of Datalink URLs from Google.ca search results, arguing that more had to be done to stop Datalink from continuously and flagrantly breaching the court's orders in the underlying action. It was noted that although the defendants were once based in Vancouver, they now appeared to have left the jurisdiction and were operating elsewhere predominantly as a virtual company.

Equustek implored the court to order that Google block all Datalink websites from its search engines *worldwide*, noting that Google's removal of Datalink websites only from Google.ca searches was practically useless as both domestic and international users could still access the defendants' websites through other country's Google websites. This meant that any user in Canada could still search for and purchase pirated Datalink products by simply initiating their searches through "www.google.com" instead of "www.google.ca", circumventing any blocks created by the Canada-specific search engine.

Google argued that the court did not have jurisdiction to make an order granting worldwide relief. It took the position that even if the court had authority to enjoin its conduct, that such an order should be limited to Google.ca, the website designated for Canada. Google contended that no court has or ever should make an order that has global reach, particularly against a third party merely offering people who wish to search the internet with a "passive information site". Madam Justice Fenlon was not persuaded by Google's arguments. She concluded that, far from being a passive, Google's search engines were actually facilitating the defendants' ongoing breaches and that an end had to be put to this "endless game of 'whac-a-mole'." In her view, the fact that an order could have extra-territorial effects, intended or not, was a "separate issue" from whether it was "just or convenient" in the circumstances to make that order.

The decision appears to shrug off the consequences that could flow from every state in the world asserting jurisdiction over Google's worldwide search services. According to Madam Justice Fenlon, these were "*natural consequence[s] of Google doing business on a global scale, not from flaw[s] in the territorial competence analysis…*"

This decision, if upheld and adopted by other courts, could have implications going beyond the European "right to be forgotten" ruling. The European Court of Justice's latest order currently applies only to countries in the European Union and is based on individuals' requests to have outdated and embarrassing information removed. This is not the case with *Equustek,* which could force global de-indexing of corporate websites where any local court considers it appropriate to do so.

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That the court has jurisdiction to control its own processes is undoubtedly of great importance. However, does and should that jurisdiction empower our court (or any court for the matter) to compel third party online search engines to block and remove entire domains worldwide? If upheld, the decision could open the possibility that any court could decide for the world *who* and *what* could be posted *where*. Google has indicated that it intends to appeal the decision. It remains to be seen whether Madam Justice Fenlon's attempt to control Google's behaviour worldwide will withstand appeal and if so, what this will mean for the future of the internet, a seemingly borderless and virtually untamable creature.

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