

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Equustek Solutions Inc. v. Google Inc.*,
2015 BCCA 265

Date: 20150611
Docket: CA41923

Between:

**Equustek Solutions Inc., Robert Angus
and Clarma Enterprises Inc.**

Respondents
(Plaintiffs)

And

**Morgan Jack, Datalink Technologies Gateways Inc.
and Datalink Technologies Gateways LLC**

Respondents
(Defendants)

And

Google Inc.

Appellant
(Respondent)

And

**Canadian Civil Liberties Association, Electronic Frontier Foundation,
International Federation of Film Producers Associations and
International Federation of the Phonographic Industry**

Intervenors

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated
June 13, 2014 (*Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063,
Vancouver Docket S112421)

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Place and Date of Hearing: Vancouver, British Columbia
October 27 and 28, 2014

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Place and Date of Judgment: Vancouver, British Columbia
June 11, 2015

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Harris

Summary:

The plaintiffs alleged that the defendants designed and sold counterfeit versions of their product. They sued for trademark infringement and unlawful appropriation of trade secrets, and obtained injunctions prohibiting the defendants from carrying on their business. The defendants continued to carry on business, but did so in a clandestine manner using a variety of websites, and relying on web search engines to direct customers to those sites. The plaintiffs successfully applied to the court for an injunction prohibiting Google, which operates the world's most popular search engine, from delivering search results pointing to the defendants' websites. Google appealed, arguing that the injunction was beyond the jurisdiction of the court, that it improperly operated against an innocent non-party to the litigation and that it had an impermissible extraterritorial reach. Held: Appeal dismissed. Under the Court Jurisdiction and Proceedings Transfer Act, territorial competence over the action between the plaintiffs and defendants was sufficient to establish territorial competence over the injunction application. Google does not have resident employees, business offices, or servers in the Province, but its activities in gathering data through web crawling software, in distributing targeted advertising to users in British Columbia, and in selling advertising to British Columbia businesses are sufficient to uphold the chambers judge's finding that it does business in the Province. The court, therefore, had in personam jurisdiction over Google. In the circumstances, it was permissible to seek relief against Google, even though it was not a party to the litigation. The injunction did not violate principles of comity.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is an appeal by Google Inc. ("Google") from an interlocutory injunction that prohibits it from including specific websites in results delivered by its search engines.

[2] Google is not a party to the underlying litigation, nor is it alleged to have acted unlawfully or in contravention of existing court orders. The injunction granted against it is ancillary relief designed to ensure that orders already granted against the defendants are effective.

[3] Google contends that the injunction ought not to have been granted because the application did not have a sufficient connection to the Province to give the Supreme Court of British Columbia competence to deal with the matter. It also argues that the injunction represents an inappropriate burden on an innocent non-party to the litigation. Further, it contends that the extraterritorial reach of the

injunction is inappropriate and a violation of principles of comity. Finally, Google contends that the injunction should not have been granted because of its effect on freedom of speech.

[4] In addition to the submissions of the parties on these matters, the Court was assisted by submissions from intervenors. Of particular note were submissions by the Canadian Civil Liberties Association, which dealt with international aspects of freedom of speech.

[5] For reasons that follow, I am of the view that the order that was granted was one that was within the competence (i.e., jurisdiction) of the Supreme Court of British Columbia. The order did not violate any principles applicable to the granting of injunctions, nor did it violate norms of freedom of speech. The judge had evidence before her from which she was entitled to find the test for an injunction to have been made out. In the result, I would dismiss the appeal.

Preliminary Issues

Scope of the FIAPF/IFPI Intervention

[6] Two preliminary issues arise on this appeal. The first is the scope of the joint intervention of the International Federation of Film Producers Associations (“FIAPF”) and the International Federation of the Phonographic Industry (“IFPI”). Google takes the position that the factum filed by those intervenors goes beyond the issues on which they were granted leave to intervene. While Google has addressed all of the issues raised in the FIAPF/IFPI factum, it seeks an order that it be granted special costs against them in respect of the intervention.

[7] On September 23, 2014, I heard applications for intervenor status in this matter, and granted the FIAPF and the IFPI the right to intervene jointly and to file a ten-page factum. In my reasons (indexed as 2014 BCCA 448), I made it clear that the intervenors’ role would be a limited one:

[28] [I]t is important that intervenor status not be granted simply to have intervenors reiterate or support the arguments of the parties. The [FIAPF] and IFPI say, in their materials that:

The scope of a British Columbia court's order requiring non-party search engines to disable access to online illegal content and materials should be informed by reference to relevant legal developments in other jurisdictions. International legal developments can provide useful guidance on appropriate principles to govern the manner in which the court issues such orders, and may assist British Columbia courts to act in harmony with developing international jurisprudence. FIAPF and IFPI intend to bring to the Court's attention relevant jurisprudence from other jurisdictions which has a bearing on the issues on appeal not previously provided to the Court by either of the parties

[29] I am persuaded that such information, and submissions based on it, will be of assistance to the Court in this matter, and I grant the [FIAPF] and IFPI intervenor status limited to that area.

[8] The factum filed by the FIAPF/IFPI deals with the experience of courts of other countries in cases involving Internet abuses. It also discusses the role that equitable relief has been given in common law jurisdictions in cases dealing with the use of Internet resources in the violation of intellectual property rights.

[9] When the FIAPF/IFPI factum was filed, Google advised them of its view that the arguments presented went beyond the bounds of the intervention order. The intervenors filed a slightly revised factum with a view to meeting Google's concerns. Google contends that the arguments presented in the factum still extend beyond the scope of the intervention order.

[10] Google's concerns are, to some extent, understandable. The focus of the intervention was to be on international jurisprudence. A portion of the factum, however, deals with equitable principles, which might be thought to form part of domestic law.

[11] I am not, however, persuaded that the amended factum is objectionable. It deals with case law of non-Canadian jurisdictions. Where it refers to cases decided in common law jurisdictions, it does so in the context of developing areas of the law, and in particular, in the context of areas of law in which Canadian law will not necessarily develop in lock-step with the law of other common law jurisdictions. The

discussion of legal developments in other common law jurisdictions falls within the scope of the intervention order. I would add that the intervention has been of great assistance to the Court. I would, accordingly, not give effect to Google's objection.

Fresh Evidence

[12] The other preliminary issue to be dealt with is an application by the respondent to adduce fresh evidence. The fresh evidence consists of two affidavits. The first summarizes and exhibits recently disclosed documents that suggest that the defendants, early on in this litigation, were making efforts to ensure that their websites were listed in favourable positions in Google search results. The second affidavit is an expert opinion with respect to the new documents.

[13] The affidavits deal with a subject that is very much tangential to the issues on this appeal, and they do not provide any definitive new evidence that is likely to assist the Court. I am not persuaded that the fresh evidence ought to be admitted, and I would dismiss the application to adduce it.

Factual Background

[14] I turn, then, to the issues on the appeal.

[15] The plaintiffs design, manufacture and sell industrial network interface hardware. Their products allow different pieces of complex industrial equipment to communicate with one another.

[16] At one time, the defendants were distributors of the plaintiffs' product. The plaintiffs allege that the defendants began to re-label the product and pass it off as their own. Later, the defendants are said to have unlawfully acquired confidential information and trade secrets belonging to the plaintiffs and used the information to design and manufacture a competing product, the "GW1000". The defendants continued to advertise the plaintiffs' product for sale, but filled orders with their own competing product. The plaintiffs say that the defendants continue to sell the GW1000, and in doing so violate the plaintiffs' trade secrets and trademarks.

[17] In 2011, when the plaintiffs commenced their lawsuit against the defendants, the defendants' operations were based in Vancouver. A number of interlocutory orders were made early in the litigation, including orders that the defendants cease referencing the plaintiffs' products on their websites, that they publish a notice on their websites redirecting the plaintiffs' customers to the plaintiffs, and that they disclose customers' names to the plaintiffs. The defendants did not comply with the orders. Within a year of the lawsuit having been commenced, the defendants ceased to respond to communications in the litigation. In June 2012, the statement of defence of the first two defendants was struck, and in March 2013, the statement of defence of the third defendant was also struck.

[18] The defendants have changed their business operations since the lawsuit was commenced. They no longer operate from Vancouver. They offer their product for sale through a number of websites that they appear to control. They fill orders from unknown locations, apparently outside Canada. Although we are advised that the plaintiffs have made some efforts to determine where the defendants manufacture and warehouse their product, and to determine where the product is shipped from, they have not been successful. It appears that the locations have changed from time to time. The chambers judge described them as a "virtual company". As the product that they sell is a physical one which must be delivered to customers, it may be more accurate to describe their operations as "clandestine" than as "virtual".

[19] Web-based businesses, such as that now operated by the defendants, must have some method for directing potential customers to their websites. The defendants rely on web search engines to perform this function. Google operates the leading search engine worldwide; the chambers judge found that between 70 and 75% of all searches are conducted through Google. Sites operated by Microsoft ("Bing") and Yahoo account for most of the non-Google searches, though there are also smaller players in the search engine business. There is considerable force to the assertion made in the plaintiffs' factum:

Google is the dominant player in the search engine market, and no business conducted on the internet can succeed unless [it] can be easily found by a search on Google.

[20] Google is incorporated in Delaware and headquartered in California. It says that it does not have a physical presence in British Columbia, by which it means that it does not have offices or resident staff here, and that none of its servers are located in the Province.

[21] Google operates its search engine services through many different websites. Internet users with Canadian IP addresses – a group comprising almost all users accessing the Internet from within Canada – are, by default, redirected from “google.com” to “google.ca” when they perform searches. Users can, however, override this redirection behaviour to access the American site. Canadian users can also access dozens (perhaps hundreds) of Google websites directed at other countries by using the URLs for those sites (e.g., “google.co.in” for India; “google.es” for Spain; “google.fr” for France; and “google.com.tr” for Turkey).

[22] Google does not charge users to use its search engines. It earns money by displaying advertising along with its search results. Advertising is targeted. The specific ads that are displayed depend on the user’s location, the search terms that the user enters, and the user’s Internet search history. Google’s advertising customers include businesses in British Columbia. The advertising contracts are governed by the laws of California.

[23] Google delivers search results according to proprietary algorithms. It indexes much of the World Wide Web. Web pages may be excluded from Google’s search results for a variety of reasons, however. Google employs approximately 40 people to remove webpages it considers offensive from its indexing and result displays. As a matter of policy, however, it does not voluntarily block entire domains, subdomains, or websites from its services – instead, it excludes only specific webpages.

[24] In 2012, the plaintiffs sought an injunction against Google to force it to remove a number of websites used by the defendants from its search indexes. Google voluntarily removed some 345 URLs from search results on google.ca, but it was not willing to go further. In early 2013, the plaintiffs indicated that they were not satisfied with the arrangement, and the matter returned to court.

[25] The main problem initially identified by the plaintiff with the voluntary arrangement was that the defendants simply moved objectionable content to new pages within their websites to get around the voluntary de-indexing of specific pages. The plaintiffs described the effect as being like a game of “Whack-A-Mole”, in which the defendants were nimble enough to circumvent Google’s voluntary arrangement. Later, the plaintiffs became aware that the voluntary arrangement applied only to searches conducted on google.ca, and they also identified that as a problem. It is clear that the majority of sales of GW1000 devices are to purchasers in countries other than Canada. An arrangement limited to google.ca, therefore, is of limited value to the plaintiffs.

[26] The plaintiffs pressed their application to a hearing. After a lengthy hearing and further written submissions, the chambers judge granted an order, the operative part of which is as follows:

Within 14 days of the date of this judgment, Google Inc. is to cease indexing or referencing in search results on its internet search engines the websites listed in Schedule A, including all of the subpages and subdirectories of the listed websites, until the conclusion of the trial of this action or further order of this court.

[27] Similar orders were made in respect of two other lists of websites, and the contents of Schedule A have been modified by subsequent orders. According to the plaintiffs, the injunction has been effective in decreasing the number of the defendants’ websites that show up in search results, and (as importantly) the ranking of those sites within the search results. While the defendants are, to some extent, able to circumvent the order by setting up websites under domain names that are not included in the order, the pace of such activity is necessarily much slower than simply moving web content to a new page within an existing domain.

[28] Shortly after the injunction was granted, Google applied to this Court for leave to appeal and for a partial stay of the order. In reasons indexed as 2014 BCCA 295, leave to appeal was granted, but the application for a stay was dismissed.

Territorial Competence of the Court under the *CJPTA*

[29] The first issue on this appeal is the “territorial competence” of the Supreme Court of British Columbia over the injunction application. Pursuant to s. 2(2) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the “*CJPTA*”), “[t]he territorial competence of a British Columbia court is determined solely by reference to [Part 2 of that statute]”. The parties are agreed that the territorial competence of the Supreme Court to issue an injunction in this case depends on an assessment to be made under s. 3(e):

3. A court has territorial competence in a proceeding that is brought against a person only if

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

...

[30] The first difficulty in interpreting s. 3(e) lies in the use of the word “proceeding”. Google argues that the “proceeding” at issue is the injunction application itself, and says the court must determine whether that application has a real and substantial connection to British Columbia. The plaintiffs, on the other hand, argue that the “proceeding” is the action that they have brought against the defendants. They say that because the Supreme Court undoubtedly has territorial competence over that action, it also has territorial competence over ancillary applications arising out of the action.

[31] The terms “procedure” and “proceeding” are defined in s. 1 of the *CJPTA*:

“procedure” means a procedural step in a proceeding;

“proceeding” means an action, suit, cause, matter, petition proceeding or requisition proceeding and includes a procedure and a preliminary motion;

[32] The chambers judge, relying on these definitions, held that the relevant “proceeding” was the application for the injunction:

[24] [P]roceeding is defined broadly in s. 1 of the *CJPTA* as “an action, suit, cause, matter, petition proceeding or requisition proceeding and includes a procedure and a preliminary motion”. Thus, the “proceeding” with respect to which I must answer the question of jurisdiction is not the underlying dispute between the plaintiffs and defendants but the relief that is specifically sought against Google.

[33] I am not convinced that the definitions lead inexorably to that conclusion. Two different interpretations of the definition of “proceeding” are possible. The judge appears to have interpreted as if it read:

“proceeding” means an action, suit, cause, matter, petition proceeding, requisition proceeding, procedure or preliminary motion.

[34] In accordance with that reading of the definition, she reasoned that the injunction application was a separate “proceeding” for the purposes of the *CJPTA* and that territorial competence had to be determined by looking solely to the injunction application.

[35] The definition of “proceeding”, can however, be read as having the following meaning:

“proceeding” means an action, suit, cause, matter, petition proceeding or requisition proceeding, and such a proceeding includes any procedure or preliminary motion brought within it;

[36] While the two interpretations of the definition are both consistent with its strict wording, I am of the view that the language of the section favours the latter interpretation, since it explains and gives meaning to the words “and includes”.

[37] Further, requiring a court to determine territorial competence separately for each “procedure” within an action would lead to undesirable consequences and make the scheme of the statute unworkable. For example, where an out-of-province plaintiff was injured in a motor vehicle accident, the court might find itself to have territorial competence over the action, but unable to order disclosure of documents dealing with the long-term medical care of the plaintiff outside the Province, since

the application for disclosure would be treated for the purposes of the *CJPTA* as a separate “proceeding”. Slicing an action into individual procedures for the purpose of determining territorial competence would lead to litigation being unwieldy and impractical. Such consequences could not have been intended.

[38] In arguing that territorial competence over an action does not carry with it territorial competence over an injunction application against a non-party, Google refers to the 1994 commentaries accompanying the Uniform Law Conference of Canada model *Court Jurisdiction and Proceedings Transfer Act*, the model for the British Columbia statute. Commentary 10.3 states:

If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(e).

[39] This commentary is of limited assistance to Google. The commentary does not deal with the question of whether territorial competence over an action carries with it territorial competence over procedures within the action. Rather, it addresses the question of whether territorial competence over an action against one defendant carries with it territorial competence over an action against another defendant. The language of s. 3(e) clearly articulates the necessity, in a proceeding against a person, to demonstrate a real and substantial connection between British Columbia and the facts on which the proceeding against *that* person is based.

[40] Unlike an action against a defendant, I am of the view that the injunction application against Google is not, for the purposes of the *CJPTA*, its own “proceeding”. Because the underlying action is within the territorial competence of the Supreme Court, that court also has territorial competence over the injunction application.

[41] There is, in any event, a real and substantial connection between British Columbia and the facts on which the injunction application against Google was

based. The most important facts on which the injunction application is based – facts concerning the violation of trade secrets and of intellectual property rights – have a strong connection to the Province. Therefore, even if the *CJPTA* were to be interpreted as treating the injunction application as an independent proceeding, the requirements of s. 3(e) would be satisfied.

[42] I would, therefore, find that the judge made no error in concluding that the Supreme Court of British Columbia had territorial competence over the injunction application.

[43] In saying this, I note that the chambers judge’s analysis differed from the one I have presented. She concentrated on the relationship of Google to the Province, and analysed the relationship under s. 10 of the *CJPTA*. She considered three subsections of s. 10 of the statute:

10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,

...

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

[44] The judge found that ss. 10(a) and (h) were applicable, but rejected the proposition that s. 10(i) applied. She held that the presumption in favour of a “real and substantial connection” had not been rebutted, and that the court was competent to entertain the application for an injunction.

[45] While I am not convinced that there was any need to resort to s. 10 to find that the Supreme Court had territorial competence over the application, the judge's findings are relevant to another issue on this appeal – that of whether the Supreme Court has *in personam* jurisdiction over Google. I will, therefore, return to her analysis in discussing that issue.

Constitutional Limitations on Jurisdiction and Competence

[46] Google argues that, in determining the competence of the Supreme Court of British Columbia in this matter, we must consider matters that go beyond “territorial competence” under the *CJPTA*. We must, it says, be cognizant of the constitutional aspects of the real and substantial connection test, as reflected in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17:

[31] [W]e should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.

[32] As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

[33] The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to

ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

[34] This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits.

[47] The plaintiffs contend that this analysis is *obiter*, and that it should be rejected as not having been "carefully considered". They point out, correctly, that provincial superior courts do not derive their jurisdiction from s. 92 of the *Constitution Act, 1867*, and that the jurisdictional limitations that they have are not the same as those that apply to Provincial legislatures. In this regard, they cite from the decision of the Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 26:

... The notion of inherent jurisdiction has developed from the role of provincial superior courts in Canada's legal system. The unique historical feature of provincial superior courts, as opposed to the Federal Court, is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the *Constitution Act, 1867*, "as if the Union had not been made". Under s. 92(14), the provinces exercise authority over the "Administration of Justice in the Province", including the "Constitution, Maintenance, and Organization" of provincial superior courts. The unique institutional feature of these courts is that by s. 96 of the *Constitution Act, 1867*, judges of provincial superior courts are appointed by the Governor General, not by the provinces. Responsibility for s. 96 courts is thus shared between the two levels of government, unlike either inferior provincial courts, or courts created under s. 101. Estey J., in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-27, explained the unique nature of provincial superior courts in the following way:

The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the [*Constitution Act, 1867*] and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the [*Constitution Act, 1867*]).

[48] While it is clear jurisdiction or competence of a provincial superior court does not derive from s. 92 of the *Constitution Act, 1867*, I do not accept that the quoted passage from *Van Breda* should be dismissed as ill-considered *obiter*. While the details of constitutional limitations on court jurisdiction were not fully developed in *Van Breda*, there can be no doubt that such limits do exist. Further, when a statute such as the *CJPTA* is enacted by a provincial legislature, the statute itself must fall within provincial competence under s. 92 of the *Constitution Act, 1867* (presumably under s. 92(14) which establishes Provincial jurisdiction over “The Administration of Justice in the Province”).

[49] In *Van Breda*, the Supreme Court of Canada affirmed that the “real and substantial connection test” has both conflict of laws aspects and constitutional aspects. It pointed out that the test may be differently defined as a conflict of laws principle (where issues of practicality and of comity play important roles) and as a constitutional principle. A full elaboration of the differences was not necessary in *Van Breda*.

[50] While Google raises the issue of constitutional limitations on court jurisdiction, it has not articulated a comprehensive theory of such limitations. The plaintiffs, have, similarly, not attempted to do so. Rather, both sides have referred to a number of cases that they contend establish the contours of the extra-territorial remedial powers of the courts. In the circumstances, I do not propose to specifically address the constitutional aspects of the “real and substantial connection” test. I accept (as have the parties) that the jurisprudence is illustrative of the boundaries, and that the underlying principles that can be drawn from the cases should determine the result in this case.

***In Personam* Jurisdiction over Google**

[51] As I have indicated, the subject matter of the underlying litigation clearly has a “real and substantial connection” to British Columbia. Equally, Google’s services, which provide a link between the defendant’s products and potential customers, are substantially connected to the substance of the lawsuit. There remains, however, a

question of whether Google itself is substantially connected with British Columbia in a manner sufficient to allow the courts of this Province to assume *in personam* jurisdiction over it.

[52] As a result of the chambers judge's approach to territorial competence under the *CJPTA*, her analysis of the connection of Google to British Columbia is largely tied to provisions of s. 10 of that statute. The considerations that she took into account, however, are equally important to an analysis of whether Google's connections to the Province are sufficient to give the Supreme Court *in personam* jurisdiction over it. The judge analyzed the question of whether Google does business in the Province in considerable detail. I quote at length from that analysis, with which I am in agreement:

[34] Google says that the fact that an internet search is initiated in British Columbia does not equate to Google carrying on business in the province. Google argues that on the plaintiffs' reasoning there is not a country on earth whose civil courts could not assert jurisdiction over Google in respect of search results. Rather, suggests Google, "some form of actual not virtual presence is required". Google relies heavily on *Van Breda* in which LeBel J. wrote at para. 87:

[87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. [Emphasis added.]

Google did not quote that paragraph in full. The next line adds what is, in my view, an important qualification:

But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction.

In contrast to *Van Breda*, the matter before me involves e-commerce, or at least providing an "e-service".

[35] *Van Breda* indicates that a real and substantial connection cannot be derived from the mere fact that a passive website can be accessed in the

jurisdiction. To similar effect is *Thumbnail Creative Group Inc. v. Blu Concept Inc.*, 2009 BCSC 1833 [*Thumbnail*]. In that case the plaintiff claimed the defendant breached copyright by publishing the plaintiff's images. The defendant published these images in a book in the United States which could be purchased on the internet. Madam Justice Dickson said at para 19:

[19] ... use of the Internet in the course of conducting business does not mean the business in question is carried on globally for the purposes of a territorial competence analysis. As counsel for [the defendants] points out, if this were so the Supreme Court of British Columbia would have jurisdiction in any dispute involving any business that makes long-distance telephone calls into this province or relies upon the Internet. [The plaintiff] did not provide authority in support of this far reaching proposition, which is, in my view, unsustainable. [Emphasis added.]

[36] It follows from *Van Breda* and *Thumbnail* that the ability of someone in British Columbia to open a website created by a person in another country does not of itself give this Court jurisdiction over the creator of that website. Something more is required. In *Van Breda*, the Court considered factors such as whether the defendants' representatives regularly travelled to Ontario to further the defendants' promotional activities for its resorts and whether it distributed promotional materials in the province. In *Thumbnail*, Dickson J. considered that the connection between the defendants and British Columbia appeared to be limited to the sale of one copy of the defendant's book.

[37] E-commerce has exponentially increased the difficulty of determining whether a company is carrying on business in a particular jurisdiction; it raises the spectre of a company being found to carry on business all over the world, just as Google submits with some alarm. Kevin Meehan comments in "The Continuing Conundrum of International Internet Jurisdiction" (2008) 31 BC Int'l & Comp L Rev 345 at 349:

In the traditional analog world, it is relatively easy for courts to determine the geographical locations of the persons, objects, and activities relevant to a particular case. The geography of the digital world of the Internet, however, is not as easily charted. Content providers may physically reside, conduct their business, and locate their servers in a particular location, yet their content is readily accessible from anywhere in the world. Furthermore, attempts to identify the location of a particular user over the Internet have proven extremely difficult, and many Internet users compound this problem by intentionally hiding their location. Traditional principles of international jurisdiction, particularly territoriality, are poorly suited for this sort of environment of geographic anonymity. Courts have struggled to develop a satisfactory solution, yet no progress has been made toward a uniform global standard of Internet jurisdiction.

[38] In short, courts have traditionally focused on locating the behaviour in issue within a particular state's borders to ensure that "the connection between a state and a dispute cannot be weak or hypothetical [so as to] cast doubt upon the legitimacy of the exercise of state power over the persons

affected by the dispute” [Van Breda at para. 32]. Online activities, whether commercial or otherwise, are not so easily pigeonholed.

...

[47] Google submits that it merely offers a passive website to residents of British Columbia who wish to search the internet. It argues that its programs automatically generate search results without Google being actively involved in the particular search. Paragraph 23 of Google’s written submissions state:

[23] ... Google’s internet search engine allows users to enter keywords and then Google generates a list of results in a specific ranked order. Google’s search results are computer generated through the use of Google’s highly confidential and proprietary algorithm and methodology. Google’s web crawler program (referred to as “Googlebot”) reviews the content that is available on trillions of webpages or URLs over the internet. Search results are generated based on that content [within seconds].

[48] I conclude that Google’s internet search websites are not passive information sites. As a user begins to type a few letters or a word of their query, Google anticipates the request and offers a menu of suggested potential search queries. Those offerings are based on that particular user’s previous searches as well as the phrases or keywords most commonly queried by all users. As James Grimmelman writes in “The Structure of Search Engine Law” (2007-2008) 93 Iowa L Rev 1 at 10-11:

Search engines are also increasingly learning from the large volumes of query data they have accumulated. A user’s history of queries can provide useful information about her probable intentions -- for example, whether she tends towards navigational or transactional queries. Similarly, search engines gain useful feedback into their own successes and failures by seeing which results users click on or by noticing long strings of searches on related terms, which may indicate that the user is having trouble finding what she’s looking for.

[49] Google collects a wide range of information as a user searches, including the user’s IP address, location, search terms, and whether the user acts on the search results offered by “clicking through” to the websites on the list.

[50] In addition to its search services, Google sells advertising to British Columbia clients. Indeed, Google entered into an advertising contract with the defendants and advertised their products up to the hearing of this application. Google acknowledges it should not advertise for the defendants and filed an affidavit explaining its inadvertent failure to suspend the defendants’ Google account prior to the hearing.

[51] Although Google’s advertising business is marketed in Canada by Google Canada, British Columbia residents who wish to advertise on Google’s webpages contract directly with Google and make payments directly to Google. Although those contracts stipulate that disputes will be governed by California law and adjudicated in California courts, the “choice of laws” provision in those contracts does not alter the fact that Google is carrying on

a business in this province through advertising contracts with British Columbia residents.

[52] The Supreme Court of Canada noted that advertising in a jurisdiction is not by itself a sufficient connection to establish territorial competence: *Van Breda* at paras. 87, 114. But there is a difference between a company advertising its own services through a website or other media available to British Columbia residents, and engaging in the business of selling advertising space on the internet to other companies in British Columbia. There is uncontradicted evidence before me that Google sells advertising to British Columbia residents, including the defendants.

[53] Google submits that its advertising services are completely separate from its search services, and cannot justify the Court assuming jurisdiction over Google's search services. With respect, I do not agree with that proposition for two reasons.

[54] First, Google's business model is contextual advertising; the "context" is the search done using Google's search services. Ads are linked to either the subject matter of the search, or the history of the person searching. Google does not charge users of its search services. Rather, it sells space on its websites to advertisers whose ads are displayed alongside the search results generated by a user's query.

[55] These ads can relate to the topics searched. For example, if "Vancouver lawyers" is searched, a page showing a list of Vancouver lawyers will be generated. At the top of the list a number of ads show up for law firms that have paid Google in order to advertise there. Those ads look like the other search results but are marked by **Ad**.

[56] These ads can also be unrelated to the content of the search, but geared to a particular searcher. For example, if the user has in the past searched a retail website, ads for that retail outlet may appear on the page showing the search results for the query "Vancouver lawyers". Google can individually tailor the advertising seen by a user each time they search using the information in the search query and that user's own search history.

...

[64] I will address here Google's submission that this analysis would give every state in the world jurisdiction over Google's search services. That may be so. But if so, it flows as a natural consequence of Google doing business on a global scale, not from a flaw in the territorial competence analysis. As Janet Walker writes in *Castel & Walker: Canadian Conflict of Laws*, loose-leaf, 6 ed. (Markham, Ontario: LexisNexis, 2005), ch. 11 at 27, a legal person such as a corporation can be subject to multiple jurisdictions whether because it is resident there through registration, or because it is carrying on business in that jurisdiction. Further, the territorial competence analysis would not give every state unlimited jurisdiction over Google; jurisdiction will be confined to issues closely associated with the forum in accordance with private international law.

[53] There was considerable evidence before the chambers judge as to the nature of Google's enterprise, and the degree to which it can be said to do business in British Columbia. Her findings of fact are, of course, entitled to deference.

[54] While Google does not have servers or offices in the Province and does not have resident staff here, I agree with the chambers judge's conclusion that key parts of Google's business are carried on here. The judge concentrated on the advertising aspects of Google's business in making her findings. In my view, it can also be said that the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google's business.

[55] Google says that even if it is concluded that it carries on business in British Columbia, the injunction was not properly granted, because it did not relate to the specific business activities that Google carries on in the Province. In my view, the business carried on in British Columbia is an integral part of Google's overall operations. Its success as a search engine depends on collecting data from websites throughout the world (including British Columbia) and providing search results (accompanied by targeted advertising) throughout the world (including British Columbia). The business conducted in British Columbia, in short, is the same business as is targeted by the injunction.

[56] Google raises the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law. I agree with the chambers judge that it is the world-wide nature of Google's business and not any defect in the law that gives rise to that possibility. As well, however, the threat of multi-jurisdictional control over Google's operations is, in my opinion, overstated. Courts must, in exercising their powers, consider many factors other than territorial competence and the existence of *in personam* jurisdiction over the parties. Courts must exercise considerable restraint in granting remedies that have international ramifications. I turn, then, to consider the nature of that restraint.

Limits on the Granting of Injunctions

[57] Google contends that apart from territorial competence, as defined under the *CJPTA*, and the common law “real and substantial connection” test, there are other limitations on the granting of injunctions. Again, it points to the commentary of the Uniform Law Conference of Canada that accompanied the uniform model statute:

2.3. The Act defines a court’s territorial competence “in a proceeding” (section 3). It does not define the territorial aspects of any particular remedy. Thus, the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court’s own province or territory.

2.4 The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court’s jurisdiction by reference to the amount of the claim, the subject matter of a claim, or any other factor besides territorial connections.

[58] In my view, commentary 2.4 is of limited interest in this case. The subject matter at issue here – misappropriation of confidential information and violations of intellectual property rights – are clearly within the jurisdiction of a provincial superior court. Indeed, because provincial superior courts are courts of inherent jurisdiction, concerns of subject matter competence will arise in respect of them only when valid legislation serves to limit the inherent jurisdiction that would otherwise exist.

[59] On the other hand, commentary 2.3 is of significance in a case such as the present one. Particularly in respect of discretionary remedies and particularly in respect of equitable relief, courts in common law jurisdictions have imposed limits on the availability of relief.

[60] It is important to recognize that the issue is not, or at least not wholly, one of jurisdiction. Common law courts have limited their exercise of remedial powers, not simply due to concerns about jurisdiction, but also as a matter of curial self-restraint.

[61] In this case, Google argues that the authority of the Supreme Court to grant injunctive relief depends on the existence of a justiciable claim between the applicant and the respondent. It says that because the plaintiffs have not alleged

that Google has committed (or is about to commit) a legal wrong against them, they are not entitled to an order against Google.

[62] It is unusual for courts to grant remedies against persons who are not parties to an action. The reasons for this are obvious – most civil claims are concerned with the vindication of a right, and the remedial focus will be on that right. Further, notions of justice demand that procedural protections be afforded to a person against whom a remedy is sought. The usual method of providing such protections is to require the claimant to bring an action against the respondent, giving the respondent the rights of a party.

[63] A party claiming damages or equitable relief for a civil wrong, or a declaration of rights will normally be required to make the person against whom the claim is made a defendant in the action.

[64] This does not mean, however, that courts are powerless to make orders against non-parties. Google acknowledges discovery orders under the principles enunciated in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* (1973), [1974] A.C. 133 (H.L.) may be made against non-parties. There are, in fact, many types of orders that are routinely made against non-parties – subpoenas to witnesses, summonses for jury duty and garnishing orders are common examples. Many of these orders have a statutory basis or are purely procedural, but others derive from the inherent powers of the court or are more substantive in nature.

[65] With respect to injunctions specifically, there is support for Google's position in cases such as *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.*, [1979] A.C. 210 (H.L.), and *South Carolina Insurance Co. v. Assurantie Maatschappij "de Zeven Provinciën" N.V.* (1986), [1987] A.C. 24 (H.L.). In the latter case, Lord Brandon of Oakbrook said at 40:

The effect of [a number of authorities, including *Siskina*], so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions ..., limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade a legal or equitable right of the former for the enforcement of which the latter is amenable to the

jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.

[66] The exceptions referred to by the Court were anti-suit injunctions and freeze orders (generally referred to as *Mareva* injunctions). While all of the Law Lords agreed generally with Lord Brandon, Lord Goff of Chieveley (with whom Lord Mackay of Clashfern agreed), at 44, expressed reservations regarding the strict limitations on the availability of injunctions postulated Lord Brandon:

I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available.

[67] In *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 (H.L.), the doubt cast on Lord Brandon's *dicta* was even more pronounced. Lord Mustill (with whom the other Law Lords agreed) said, at 362:

I prefer not to engage the question whether the law is now firmly established in terms of Lord Brandon's statement, or whether it will call for further elaboration to deal with new practical situations at present unforeseen. For present purposes it is sufficient to say that the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action.

[68] Lord Browne-Wilkinson added certain observations, at 343, which were endorsed by Lord Keith of Kinkel and Lord Goff of Chieveley, and so had the support of a majority of the Law Lords:

...I should make it clear that I have merely been considering the effect of the decision in the *Siskina* on the assumption that it correctly states the law. The tests it laid down in absolute terms have already received one substantial modification: see *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58. Moreover, in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.* [1987] A.C. 24, Lord Goff of Chieveley (with whom Lord Mackay of Clashfern agreed) reserved the question whether the law as laid down by the *Siskina* (as subsequently modified) was correct in restricting the power to grant injunctions to certain exclusive categories. With respect, I share the same doubts as are there expressed and reserve the question for consideration when it arises.

[69] The scope of remedial jurisdiction and the practice of exercising that jurisdiction with restraint was recently considered in the comprehensive judgment of Arnold J. in *Cartier International AG v. British Sky Broadcasting Limited*, [2014] EWHC 3354 (Ch.). In that case, the plaintiffs were producers of luxury goods, for which they held well-known trademarks. They alleged that websites operating from abroad were being used to sell counterfeit merchandise that infringed their trademarks to people in England. The plaintiffs sought an injunction against a number of large English Internet service providers to require them block access to the offending websites. Subject to certain safeguards and limitations, the Court granted the order sought.

[70] The governing legislation in *Cartier* was s. 37(1) of the U.K.'s *Senior Courts Act 1981*, 1981 c. 54:

37(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

[71] Mr. Justice Arnold noted a lack of clarity in the jurisprudence respecting jurisdiction to grant an injunction, and concluded that the jurisdiction is, effectively, unlimited. He accepted that courts have observed limits on the availability of injunctions, but found those limits to be matters of practice rather than of jurisdiction, and not immutable:

[96] The extent of the Court's power to grant an injunction has been considered by the House of Lords, the Privy Council and the Supreme Court in at least 12 cases in the last 40 years: *Gouriet v Union of Post Office Workers* [1978] AC 335, *The Siskina* [1979] AC 210, *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, *British Airways Board v Laker Airways Ltd* [1985] AC 58, *South Carolina Insurance Co Ltd v Assurantie Maatschappij De Zeven Provinciën NV* [1987] AC 24, *Pickering v Liverpool Daily Post* [1991] 2 AC 370, *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, *Mercedes-Benz AG v Leiduck* [1996] AC 284, *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320, *Tasarruf Mevduatı Sigorta Fonu v Merrill Lynch Bank & Trust Company* [2011] UKPC 17, [2012] 1 WLR 1721 and *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889.

[97] Those authorities reveal a surprising divergence of views at the highest level. Analysis of the law is not helped by two factors. First, in many

of these cases the effect of section 37(1) was only indirectly in issue. For example, in some of the cases the immediate issue was one of service out of the jurisdiction. Secondly, some of the dicta in these cases contain what at first blush appear to be comprehensive statements of the law which on closer reading are revealed not to be exhaustive.

[98] In my judgment, the most authoritative statement of the law as it currently stands is to be found in the speech of Lord Scott of Foscote, with whom all the other members of the House of Lords agreed on this issue, in *Fourie v Le Roux*. Lord Scott's analysis can be summarised in three propositions. The first is that it is necessary to distinguish between the jurisdiction of the court - that is to say, its power to grant an injunction - and the practice of the court not to do so except in a certain way and under certain circumstances.

[99] The second is his statement at [25]:

“The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre-Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) powers of the Chancery courts, and other courts, to grant injunctions: see section 16 of the 1873 Act and section 19(2)(b) of the 1981 Act.”

[100] The third is the conclusion he drew at [30] from a review of many of the earlier authorities:

“My Lords, these authorities show, in my opinion, that, provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* [1979] AC 210 was decided and is unrecognisable from the practice to which Cotton LJ was referring in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 ...”

[101] In my view this statement of the law confirms the correctness of the analysis in Spry, *Equitable Remedies* (5th ed, 1997) at 323 which was cited with approval by Lord Woolf MR in *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775 at [20]:

“The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately, there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that

pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.”

[72] Ultimately, Arnold J. rejected the limitations set out in Lord Brandon’s *dicta* in *South Carolina Insurance Co.*:

[104] Counsel for the ISPs submitted that the Court’s jurisdiction to grant an injunction was, subject to two irrelevant exceptions, limited to two situations: (i) where one party to an action can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former, for the enforcement of which the latter is amenable to the jurisdiction of the Court; and (ii) where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable. Although this submission receives support from *dicta* in some of the authorities cited in paragraph 96 above, I do not accept it. In my judgment the decisions in *Broadmoor* and *Fourie v Le Roux* show that there is no such limit on the Court’s jurisdiction. It is true, that as a matter of practice, that the Court exercises its discretion in accordance with fairly well settled principles, but those principles are not immutable. On the contrary, as Lord Scott pointed out, they have evolved over time as the Court has faced new circumstances.

[73] Mr. Justice Arnold found that the English High Court had jurisdiction to require Internet service providers to block availability of the offending websites.

[74] Section 39(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 is rooted in the same predecessor legislation as s. 37(1) of the English *Senior Courts Act 1981*, and is in almost identical terms:

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[75] Canadian law on the authority to issue injunctions has paralleled that of England. In my view, Arnold J.’s conclusions with respect to the jurisdiction of English courts to grant injunctions are equally applicable to the Supreme Court of British Columbia.

[76] Canadian law has never endorsed the very strict limitations on the granting of injunctions set out in Lord Brandon’s *dicta* in *South Carolina Insurance Co.* In *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, the Supreme Court of

Canada held that Canadian courts have jurisdiction to grant injunctions in cases where there is a justiciable right, even if the court is not, itself, the forum where the right will be determined.

[77] Canadian courts have also long recognized that injunctions aimed at maintaining order need not be directed solely to the parties to the litigation. In *Bartle & Gibson v. Retail Wholesale and Department Store Union, Local 580* (1971), 18 D.L.R. (3d) 232, this Court upheld an interlocutory injunction purporting to prohibit “any one having knowledge of this Order” from picketing in certain places. In *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, the Supreme Court of Canada endorsed such language, stating, at para. 31:

It may be confidently asserted ... that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey.

[78] Google argues that *MacMillan Bloedel* does not represent an acknowledgement that superior courts have a general jurisdiction to grant injunctions against non-parties. Rather, it says, it is an example of the breadth of the contempt powers of superior courts. While injunctions can only be granted to protect justiciable claims of parties against other parties, non-parties who deliberately flout such injunctions can be liable for contempt of court.

[79] Google contends that a wide variety of orders directed at non-parties fall within this “contempt exception”, including provisions of *Mareva* injunctions directed at third parties. I have considerable difficulty accepting that proposition. Orders in the form endorsed by the Supreme Court of Canada in *MacMillan Bloedel* specifically enjoin non-parties to the litigation. Equally, orders ancillary to *Mareva* injunctions may be directed to financial institutions directly. Such orders directly enjoin third parties, and cannot be characterized as orders against the parties to the litigation.

[80] I acknowledge that the sort of orders I am discussing depend, in the final analysis, on the existence of a justiciable issue between the parties to the litigation. Where such a justiciable issue exists, however, the granting of injunctive relief

against third parties as an ancillary means of preserving the parties' rights is a well-established jurisdiction of the courts.

Injunctions with Extraterritorial Effect

[81] Google suggests that the limits on granting an injunction with extraterritorial effect are as follows:

As a matter of law, the court is not competent to regulate the activities of non-residents in foreign jurisdictions. This competence-limiting rule is dictated both by judicial pragmatism and considerations of comity. The pragmatic consideration is that the court should not make an order that it cannot enforce. The comity consideration is that the court refrains from purporting to direct the activities of persons in other jurisdictions and expects courts in other jurisdictions to reciprocate.

[82] In support of that proposition, Google relies on *United Services Fund (Trustee of) v. Richardson Greenshields of Canada Ltd.* (1988), 23 B.C.L.R. (2d) 1, a case in which this Court upheld the dismissal of an application by the defendant to examine an external auditor of the plaintiffs for discovery. The plaintiffs resided in the United States and carried on business there. Their external auditor resided in Texas, and had no connection to British Columbia. In dismissing the appeal, the Court stated, at p. 7:

The chambers judge, in my view, was right in holding that the order sought should not be made because the court cannot compel obedience to it, and because to make such an order would be to purport to exercise jurisdiction in a place beyond the territorial jurisdiction of the court.

[83] I accept that *United Services Fund* establishes the importance of both pragmatic considerations and of comity in determining the extent to which the Supreme Court will grant orders with extra-territorial effect. On the other hand, I do not accept that the case law establishes the broad proposition that “the court is not competent to regulate the activities of non-residents in foreign jurisdictions.”

[84] While British Columbia courts will generally have *in personam* jurisdiction over residents of the Province, the inverse – i.e., that British Columbia courts will not have *in personam* jurisdiction over non-residents – is not true. Courts may have *in*

personam jurisdiction over non-residents in a variety of situations. The chambers judge found that she had *in personam* jurisdiction over Google on the basis that it does business in the Province.

[85] Once it is accepted that a court has *in personam* jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to it making an order.

[86] At one time the courts of this Province refrained from granting injunctions that enjoined activities outside of British Columbia (*Zellers Inc. v. Doobay* (1989), 34 B.C.L.R. (2d) 187 (S.C.)). In 1988, however, the English Court of Appeal held that it had jurisdiction to issue a worldwide *Mareva* injunction (*Derby & Co. Ltd. v. Weldon*, [1990] Ch. 65). It is now over 25 years since the Supreme Court of British Columbia first issued a worldwide injunction (*British Columbia v. Shah* (1989), [1991] B.C.J. No. 3994). The jurisdiction to do so was re-confirmed in *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 and 100 B.C.L.R. (2d) 335, and is, today, well-established. Indeed, standard language for a worldwide *Mareva* injunction is included in the recent *Supreme Court of British Columbia Practice Direction – Model Order for Preservation of Assets*, PD-46.

[87] Other cases, as well, have confirmed the jurisdiction to make *in personam* orders with effects outside the Province. For example, in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319, this Court upheld an order against an Argentine subsidiary of a Canadian company requiring the Argentine company to transfer title to a mineral claim in Argentina to the Argentine plaintiff.

[88] In fact, British Columbia courts are called upon to adjudicate disputes involving foreign residents on a daily basis, and the fact that their decisions may affect the activities of those people outside the borders of British Columbia is not determinative of whether an order may be granted. In each case, the court must determine whether it has territorial competence under the *CJPTA*. 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, but they do not

result in a simple rule that the activities of non-residents in foreign jurisdictions cannot be affected by orders of Canadian courts.

[89] The concept of “comity” was described in *Spencer v. The Queen*, [1985] 2 S.C.R. 278 at 283 as follows:

“Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws

[90] This formulation has been echoed by the Supreme Court of Canada on several occasions: e.g., *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096; *Amchem Products Incorporated v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897 at 913-14; *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52 at para. 26. In *Pro Swing*, the majority added, at para. 27:

Comity is a balancing exercise. The relevant considerations are respect for a nation’s acts, international duty, convenience and protection of a nation’s citizens.

[91] I have already noted that this case exhibits a sufficient real and substantial connection to British Columbia to be properly within the jurisdiction of this Province’s courts. From a comity perspective, the question must be whether, in taking jurisdiction over this matter, British Columbia courts have failed to pay due respect to the right of other courts or nations. The only comity concern that has been articulated in this case is the concern that the order made by the trial judge could interfere with freedom of expression in other countries. The importance of freedom of expression should not be underestimated. As the Canadian Civil Liberties Association has said in its factum:

A nation’s treatment of freedom of expression is a core part of its self-determination, rooted in the nation’s historical and social context, and the ways in which its constitutional values (whether written or unwritten), norms and legal system have evolved.

[92] For that reason, courts should be very cautious in making orders that might place limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made.

[93] In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.

[94] I note, as well, that the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.

[95] I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. Several such cases are cited in the arguments of FIAPF/IFPI, including *APC v. Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grand Instance de Paris); *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grand Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog <https://inform.wordpress.com/2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/>) and *ECJ Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12 [2014], CURIA.

[96] I do not suggest that these rulings have been without controversy or problems (see, for example, *La Ligue contre le racisme et l'antisémitisme c. La Société YAHOO!Inc.*, Tribunal de Grande Instance de Paris (May 22, 2000 and November

20, 2000), Court File No. 00/05308 and *YAHOO! INC. v. La Ligue contre le racisme et l'antisémitisme*, 169 F.Supp. 2d 1181 (N. Dist. Cal., 2001) rev'd 379 F.3d 1120 (9th Cir., 2004) and 433 F.3d 1199 (9th Cir. *en banc*, 2006)). The extensive case law does indicate, however, that international courts do not see these sorts of orders as being unnecessarily intrusive or contrary to the interests of comity.

[97] Apart from the issue of comity, Google also argues that the order that was made is unenforceable. It takes umbrage with the trial judge's suggestion (made at paras. 96 and 97 of her judgment) that Google might be prevented from using the courts of British Columbia as a penalty for non-compliance with the order.

[98] I tend to agree with Google that barring it from access to the courts of the Province would be a draconian step, and not one that needs to be contemplated at this juncture. Given that Google does business in the Province, however, British Columbia courts are entitled to expect that it will abide by their orders. It is also likely that, in the event of non-compliance, there will be consequences that can be visited on the company.

[99] Google's arguments do not persuade me that there is either a jurisdictional or practical bar to the granting of an injunction of the sort pronounced by the chambers judge. I turn, then, to the question of the appropriate tests for the granting of such an injunction.

The Tests for the Granting of the Injunction

[100] The well-established tests for the granting of an interlocutory injunction are set out in *R.J.R-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The applicant must demonstrate that there is a serious question to be tried, that it will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours the granting of the injunction.

[101] It appears obvious that the plaintiffs satisfied the first two tests in this case. Their case against the defendants appears to be a very strong one – indeed, the defendants appear to have, for all intents and purposes, abandoned the defence of

the claim. Further, it is clear that unless the plaintiffs are able to prevent potential customers from accessing the defendant's websites, they will suffer damages which are unlikely to be recoverable at the end of the lawsuit.

[102] The real issue in this case is one of balance of convenience. In addition to balancing the interests of Google and of the plaintiffs, there are important public interests that must be taken into account in this case.

[103] The chambers judge carefully examined the evidence, and found that the injunction would not inconvenience Google in any material way, and that Google would not incur expense in complying with it. She also found that the granting of the injunction was the only practical way for the defendants' websites to be made inaccessible.

[104] Among the important issues of public interest are the importance of avoiding unnecessarily embroiling non-parties in litigation, the importance of avoiding unnecessary orders with extraterritorial effect, and freedom of expression. As I am of the view that the chambers judge dealt adequately with each of these issues, I propose to say little about them.

[105] The plaintiffs made considerable efforts attempting to track down the defendants, and find ways to eliminate their websites. The judge's finding that the granting of the injunction was the only practical way to impede the defendants from flouting the court's orders amounts to a finding that the involvement of Google in this matter was necessary.

[106] With respect to extraterritorial effects, Google has, in this Court, suggested that a more limited order ought to have been made, affecting only searches that take place on the google.ca site. I accept that an order with international scope should not be made lightly, and that where an order with only domestic consequences will accomplish all that is necessary, a more expansive order should not be made. In this respect, the jurisprudence dealing with freeze orders is helpful – where a domestic

Mareva injunction will freeze sufficient assets, the court should refrain from granting a more expansive world-wide injunction.

[107] The plaintiffs have established, in my view, that an order limited to the google.ca search site would not be effective. I am satisfied that there was a basis, here, for giving the injunction worldwide effect. I have already noted that applications can be made to vary the order should unexpected issues arise concerning comity.

[108] Finally, I note concerns expressed by Google and by the intervenors Canadian Civil Liberties Association and Electronic Frontier Foundation concerning the openness of the World Wide Web, and the need to avoid unnecessary impediments to free speech.

[109] The order made in this case is an ancillary order designed to give force to earlier orders prohibiting the defendants from marketing their product. Those orders were made after thorough consideration of the strength of the plaintiffs' and defendants' cases. Google does not suggest that the orders made against the defendants were inappropriate, nor do the intervenors suggest that those orders constituted an inappropriate intrusion on freedom of speech.

[110] There has, in the course of argument, been some reference to the possibility that the defendants (or others) might wish to use their websites for legitimate free speech, rather than for unlawfully marketing the GW1000. That possibility, it seems to me, is entirely speculative. There is no evidence that the websites in question have ever been used for lawful purposes, nor is there any reason to believe that the domain names are in any way uniquely suitable for any sort of expression other than the marketing of the illegal product. Of course, if the character of the websites changes, it is always open to the defendants or others to seek a variation of the injunction.

[111] The ability of parties and others with identifiable legal interests to apply to vary the terms of the injunction is an important safeguard to ensure that it is not more restrictive than necessary.

[112] The order under appeal is limited in time, as is usual in interlocutory orders, by the words “until the conclusion of the trial of this action or further order of the court”. In an injunction against a non-party, it may be appropriate for a court to consider a limitation that is defined in months or years rather than by the progress of the action. I note that in *Cartier*, at para. 265, Arnold J. expressed an intention to include a “sunset clause” in the injunction, suggesting that two years would be an appropriate period. As the issue of the temporal limitation on the injunction was not argued on this appeal, it is not appropriate to say more on this issue.

Conclusion

[113] I would dismiss the appeal.

“The Honourable Mr. Justice Groberman”

I agree:

“The Honourable Mr. Justice Frankel”

I agree:

“The Honourable Mr. Justice Harris”