

**FEDERAL COURT OF APPEAL**

**B E T W E E N:**

TEKSAVVY SOLUTIONS INC.

Appellant

and

BELL MEDIA INC.,  
GROUPE TVA INC.,  
ROGERS MEDIA INC.,  
JOHN DOE 1 DBA GOLDTV.BIZ,  
JOHN DOE 2 DBA GOLDTV.CA,  
BELL CANADA,  
BRAGG COMMUNICATIONS INC. dba EASTLINK,  
COGECO CONNEXION INC.,  
DISTRIBUTEL COMMUNICATIONS LIMITED,  
FIDO SOLUTIONS INC.,  
ROGERS COMMUNICATIONS CANADA INC.,  
SASKATCHEWAN TELECOMMUNICATIONS HOLDING CORPORATION,  
SHAW COMMUNICATIONS INC.,  
TELUS COMMUNICATIONS INC. and  
VIDEOTRON LTD.

Respondents

**MEMORANDUM OF FACT AND LAW OF  
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## OVERVIEW

1. This is an appeal of a site-blocking order made by Justice Gleeson of the Federal Court; the first of its kind in Canada.
2. Less than two weeks after commencing a proceeding for online copyright infringement, the Respondents in this appeal filed a motion for a new type of interlocutory injunction. The motion named eleven Internet Service Providers (ISPs) as third-party respondents, and asked the Court to order these ISPs to block certain website addresses. This motion—a request for a novel, onerous and open-ended remedy—was brought on an urgent basis and based on untested *prima facie* evidence.
3. Only one ISP—the Appellant, TekSavvy—opposed the merits of the motion. Many of the other ISPs are either controlled by the Respondents or have investments in content or other media interests. After a hearing, the motion judge granted the order.
4. In so doing, Gleeson J extended the scope of interlocutory injunctions in copyright beyond what was available at law. Site-blocking is a powerful, draconian, and technically complex remedy, yet has no statutory basis. Since becoming copyright owners, the Respondents and their affiliates have been lobbying before Parliament and the CRTC—so far unsuccessfully—for its availability. Without a statutory basis, their attempts to obtain this remedy from the courts should also fail.
5. The motion judge ought to have declined to order this remedy because it goes against Parliament’s intention under the *Copyright Act* and the *Telecommunications Act*. As with all copyright remedies, the availability of this remedy is a legislative decision for Parliament.
6. In addition, this remedy is not appropriate as an interlocutory remedy, because it grants the Respondents relief beyond what would be available to them after trial.
7. Further, in granting the order, the motion judge failed to consider the important *Charter* free expression interests at stake.
8. Finally, he made several legal errors in his analysis of whether such an injunction was just and equitable in the circumstances.

9. For all these reasons, the motion judge ought not to have ordered this remedy. This Court should quash the motion judge's order.

## **PART I - STATEMENT OF FACTS**

### **A. THE PARTIES**

10. The Appellant TekSavvy Solutions Inc. ("TekSavvy") is an independent, competitive ISP. TekSavvy provides residential, commercial, and wholesale telecommunications services to more than 300,000 Canadian homes and businesses across Canada.<sup>1</sup> An ISP is a company that provides its customers access to the Internet by providing the infrastructure necessary to connect the customer's devices to the rest of the Internet, either through a physical wired connection or through a wireless connection.<sup>2</sup>

11. The Respondents (moving parties)<sup>3</sup> Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc. are large broadcasters in Canada. They own or exclusively license the Canadian rights to communicate television programs to the public by telecommunication. The Respondents also directly broadcast subscription-based television programming on Internet services.

12. The Respondents are affiliates of ISPs (for example, Bell Media Inc. is affiliated with Bell Canada, an ISP named in the motion). Thus, together these companies are both ISPs and copyright owners, also known as "vertically integrated ISPs". By contrast, TekSavvy is not vertically integrated: it does not own the copyright in media content that is broadcast or distributed.<sup>4</sup> However, TekSavvy competes directly with the Respondents in the ISP market.<sup>5</sup>

13. In 2012, the Respondents and their affiliated companies advocated against strong measures to discourage online copyright infringement. For example, before a Parliamentary Committee reviewing reforms to the *Copyright Act*,<sup>6</sup> Bell Canada

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<sup>1</sup> Affidavit of Paul Stewart, sworn August 23, 2019 at para 2 [Stewart Aff.], Appeal Book [AB], Vol 7, Tab 29, p 2145.

<sup>2</sup> Affidavit of Erone Quek, sworn July 22, 2019 at para 15, AB Vol 6, Tab 21, p 1783.

<sup>3</sup> Throughout this Memorandum, "Respondents" refers to the plaintiffs and moving parties Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc. The third-party respondents to the motion are generally referred to as "third-party ISPs".

<sup>4</sup> Stewart Aff. at para 4, AB Vol 7, Tab 29, p 2145.

<sup>5</sup> Stewart Aff. at para 5, AB Vol 7, Tab 29, p 2145.

<sup>6</sup> RSC 1985, c C-42 [*Copyright Act*].



Enterprises’ (“Bell”) counsel, Tanya Woods, testified in support of Bell’s neutral role as an ISP:

... By providing Internet service we’re a common carrier, and as a common carrier we’re neutral. That’s decided by the Telecommunications Act. We open the door to all kinds of things. We give you the ability to do whatever you like. ... But to make the assumption that ISPs have some kind of control over the Internet would be false. We can’t control what goes on online, and we can’t control what people do online. We’re simply neutral. ... As an ISP, we’re totally neutral. We offer a technology; it does many, many things. Unfortunately, there are people who use it to do bad things.<sup>7</sup>

14. Since the 2012 copyright reforms, the Respondents “have changed their stripes”.<sup>8</sup> As vertically integrated companies, the Respondents and their affiliates now advocate for stronger copyright protections.

15. In January 2018, the Respondents took part in a coalition that made an application to the Canadian Radio-television and Telecommunications Commission (“CRTC”) requesting a regime for the blocking of websites, or “site-blocking”.<sup>9</sup> Specifically, the coalition (called the “Fairplay Coalition”) requested that the CRTC create a regime to identify websites and online services that infringe copyright, and require ISPs to block end-user access to those websites and services.<sup>10</sup> The CRTC denied the application.<sup>11</sup>

16. In late 2018, the Respondents’ affiliates tried again to institute stronger copyright enforcement, this time at the House of Commons Standing Committee on Industry, Science and Technology (the “INDU Committee”), in the course of the Committee’s statutory review pursuant to section 92 of the *Copyright Act*.

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<sup>7</sup> Testimony of Tanya Woods, Counsel, Regulatory Law, Bell, CHUM Radio, House of Commons Legislative Committee on Bill C-11, 41st Parl, 1st Sess, (1 March 2012) at 0940, 0945 (excerpt).

<sup>8</sup> Canadian Media Concentration Research Project Intervention in FairPlay Proceeding at para 24 [CMCRP FairPlay Intervention], Stewart Aff., Exh. D, AB Vol 8, Tab 29D, p 2261.

<sup>9</sup> FairPlay Coalition Application to CRTC, Affidavit of Shawn Olmstead, sworn July 15, 2019, Exh. SO-21 [Olmstead Aff.], AB Vol 2, Tab 11U, p 447. See also CRTC, Telecom Decision CRTC 2018-384 [CRTC FairPlay Decision], Olmstead Aff., Exh. SO-24, AB Vol 3, Tab 11X, p 763: footnote 2 contains a partial list of the stakeholders that took part in the FairPlay Coalition, including the Respondents.

<sup>10</sup> CRTC FairPlay Decision at para 6, Olmstead Aff., Exh. SO-24, AB Vol 3, Tab 11X, p 764.

<sup>11</sup> CRTC FairPlay Decision at para 71, Olmstead Aff., Exh. SO-24, AB Vol 3, Tab 11X, p 778.

17. Bell urged Parliament to explicitly enact a provision in the *Copyright Act* providing for a site-blocking injunction remedy, based on a similar provision from the E.U.:

... we recommend that the [Copyright] Act be amended to include a new provision that specifically empowers courts to order, in appropriate cases, intermediaries to stop doing business with, displaying search results from, providing access to, or otherwise supporting commercial scale piracy websites. To craft the provision, we recommend looking to Article 8(3) of the European Union’s *Directive on the harmonisation of certain aspects of copyright and related rights in the information society*...

For such remedies to provide a practical means to address the issue of piracy, however, the Act must be amended to provide for them explicitly and directly.<sup>12</sup>

18. Rogers Communications Inc.’s (“Rogers”) submission echoed the call for an injunctive remedy for ISPs, based on an Australian statute:

The [Copyright] Act should allow rightsholders to apply for a court order requiring intermediaries to take steps to prevent infringing activities online. For instance, such a provision would allow a court to order an ISP to disable access to IP addresses and other electronic locations online in order to prevent the unauthorized distribution of copyrighted content [...]

A proposed amendment, modelled on section 115A of Australia’s Copyright Act is recommended for inclusion in the Act. [...]<sup>13</sup>

19. The INDU Committee presented its report to Parliament in June 2019. With respect to site-blocking, the INDU Committee did not recommend that a site-blocking remedy be added into the *Copyright Act*. Rather, the Committee recommended that the government “consider” possible “tools to provide injunctive relief” to deal with online copyright infringement, but in so doing, give “paramount importance” to net neutrality.<sup>14</sup>

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<sup>12</sup> BCE Submission to Standing Committee on Industry, Science and Technology, December 10, 2018 at paras 26, 26 (emphasis added), see also paras 5, 21-27.

<sup>13</sup> Rogers Communications Inc Submission to Standing Committee on Industry, Science and Technology, December 10, 2018 at paras 13, 15 (emphasis added), see also paras 10-15.

<sup>14</sup> INDU Committee Report, p 98, Stewart Aff., Exh. J, AB Vol 8, Tab 29J, p 2518.

## B. THE COPYRIGHT ACTION

20. On July 18, 2019—mere weeks after the release of the INDU Committee report—the Respondents commenced an action in Federal Court against the John Doe defendants (the “GoldTV defendants”). The action alleges that since March or June 2017, the GoldTV defendants have made available to the public certain websites that provide unauthorized access to content copyrighted by the plaintiffs (the “infringing GoldTV services”).<sup>15</sup>

21. On July 25, 2019, in an *ex parte* proceeding before Justice LeBlanc, the Respondents obtained a 14-day interim injunction against the GoldTV defendants.<sup>16</sup> Based on *prima facie* findings, the GoldTV defendants were ordered to immediately disable the infringing GoldTV services. On August 8, 2019, Justice Kane issued an interlocutory injunction to the same effect, based on the same evidence.<sup>17</sup> That motion was not *ex parte*; however, it was uncontested, as the GoldTV defendants did not appear.

## C. THE SITE-BLOCKING MOTION

22. On July 29, 2019, four days after LeBlanc J’s interim injunction order, the Respondents brought a motion for an interlocutory injunction against eleven third-party ISPs. The Respondents sought an order that the third-party ISPs block various domains, subdomains and Internet Protocol (“IP”) addresses of the GoldTV defendants (the “Target Websites”). Schedule 1 of that draft order set out the Target Websites to be blocked. No wrongdoing is alleged against the third-party ISPs.<sup>18</sup>

23. A site-blocking order had never before been issued by a Canadian court.<sup>19</sup>

24. The Respondents stated that the GoldTV defendants had not complied with the interim injunction order and that the GoldTV services were still active.<sup>20</sup>

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<sup>15</sup> Statement of Claim, *Bell Media Inc et al v John Doe 1 dba GoldTV.biz et al* at paras 24 and 34, Court file no. T-1169-19 [Statement of Claim], AB Vol 1, Tab 4, pp 111, 115.

<sup>16</sup> Order of LeBlanc J dated July 25, 2019 [“Interim injunction Order”], AB Vol 1, Tab 6, p 163.

<sup>17</sup> Order of Kane J dated August 8, 2019 [“Interlocutory injunction Order”], AB Vol 1, Tab 9, p 200.

<sup>18</sup> *Bell Media v GoldTV.Biz*, 2019 FC 1432 at para 105 [Motion decision], AB Vol 1, Tab 2.

<sup>19</sup> Motion decision at para 8, AB Vol 1, Tab 2.

<sup>20</sup> Notice of Motion for interlocutory injunction binding third parties at para 8, AB Vol 1, Tab 8, p 184; Second Affidavit of Anthony Martin, sworn July 29, 2019, AB Vol 7, Tab 23, p 2080.

25. The Respondents led little evidence of any efforts to either locate the GoldTV defendants or to enforce the injunction against them.<sup>21</sup> Indeed, the Respondents brought the site-blocking motion before the interlocutory injunction against the GoldTV defendants was even in place.

26. Despite its unprecedented nature, the motion was brought on a highly expedited basis in late July. The Notice of Motion was filed July 29, 2019 and made returnable August 7, 2019.<sup>22</sup> The motion record consisted of nearly 400 pages, and over 500 pages of authorities. The eleven newly-named respondent ISPs were given mere days to decide whether and how to respond to the motion. The reasons for this urgency are not apparent, as the Respondents allege that GoldTV had been operating since 2017.<sup>23</sup>

27. At the behest of the third-party ISPs and on consent of the parties, by order of Kane J dated August 7, 2019, the hearing of the motion was adjourned to September 11-12, 2019.

28. On the eve of the hearing, the Respondents filed a revised proposed draft order. Among other things, the revised order included an amended Schedule 1 (list of Target Websites), based on changes in GoldTV's behaviour since August.<sup>24</sup>

29. Of the eleven named third-party ISPs, many are either directly owned by the Respondents,<sup>25</sup> or themselves have affiliated media arms.<sup>26</sup> Two ISPs, TekSavvy and Distributel Communications Ltd. ("Distributel"), opposed the motion: TekSavvy opposed the legal basis of the motion, while Distributel opposed certain terms of the

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<sup>21</sup> See Affidavit of Yves Rémillard sworn July 15, 2019 at paras 61-68, AB Vol 4, Tab 15, pp 1181-1182: Bell's investigator states that he performed a "diligent investigation" to identify the operator of GoldTV.biz Service, but does not set out any specific steps taken, other than the investigation of one related website. For potential effective methods that could have been used, see Stewart Aff. at paras 39-49, AB Vol 7, pp 2159-2162.

<sup>22</sup> See Notice of Motion, AB Vol 1, Tab 8, p 181.

<sup>23</sup> Statement of Claim at paras 24 and 34, AB Vol 1, Tab 4, pp 111, 115.

<sup>24</sup> See Federal Court Docket, T-1169-19, 11 September 2019. The revised Order was based on the Fourth Affidavit of Anthony Martin, sworn September 3, 2019, paras 28-31; AB Vol 9, Tab 32, pp 2768-2769. Note that the list of Target Websites in Schedule 1 of the November 15 Order is different from that in the draft order in the Notice of Motion.

<sup>25</sup> Namely Bell Canada, Fido Solutions Inc., Rogers Communications Canada Inc., and Videotron Ltd.

<sup>26</sup> For example, Shaw Communications Inc.

proposed order. TekSavvy also filed extensive evidence on the alternative efforts the Respondents could have made to enforce their copyright.<sup>27</sup>

30. Justice Gleeson granted the Respondents' motion in a written Order dated November 15, 2019 ("the November 15 Order" or "the Order"). He found that he had jurisdiction to make the requested order, and that the Order was just and equitable in the circumstances. He granted a slightly modified version of the draft order the Respondents had requested. He ordered the third-party ISPs to block or attempt to block access to the Target Websites for two years from the date of the Order.

31. On December 4, 2019, just over two weeks after the issuance of the November 15 Order, the Respondents requested an amendment to the November 15 Order pursuant to paragraph 2 of that Order,<sup>28</sup> which was granted on the terms sought.<sup>29</sup>

32. On March 11—two days before this Memorandum was filed—the Respondents requested yet another amendment to the Order. They submitted further affidavit evidence and a further revised Schedule 1.<sup>30</sup>

## **PART II – POINTS IN ISSUE**

33. In this appeal, this Court must decide the following:

1. Is an interlocutory site-blocking injunction for copyright infringement available at law? **[No.]**
2. If so, did the motion judge err in law in failing to take into account freedom of expression in deciding whether the injunction was just and reasonable in the circumstances? **[Yes.]**
3. Did the motion judge otherwise err in law in finding that a site-blocking injunction was just and equitable in the circumstances? **[Yes.]**

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<sup>27</sup> See Stewart Affidavit, AB Vols 7-9, Tab 29, with Exhs. LL-PP.

<sup>28</sup> Correspondence of December 4, 2019 from Plaintiffs to the Court, AB Vol 10, Tab 36, p 2890.

<sup>29</sup> Order of December 20, 2019, AB Vol 10, Tab 35, p 2884.

<sup>30</sup> Federal Court Docket, T-1169-19, 11 March 2020, Docs 81-84.

### PART III – ARGUMENT

#### A. AN INTERLOCUTORY SITE-BLOCKING INJUNCTION FOR COPYRIGHT INFRINGEMENT IS NOT AVAILABLE AT LAW

34. In deciding whether this novel type of injunction is available, the motion judge failed to exercise his equitable jurisdiction in light of both the statutory context and the nature of an interlocutory injunction. Based on a correct interpretation of the scheme of the *Copyright Act* and the *Telecommunications Act*,<sup>31</sup> it is clear that Parliament did not intend for site-blocking to be available as an interlocutory remedy in a copyright proceeding. Further, this injunction is not appropriate at an interlocutory stage because its aim and purpose go well beyond the aims of an interlocutory injunction—to preserve rights until trial.

35. The motion judge incorrectly relied on *Equustek* for the proposition that a site-blocking injunction is available at law.<sup>32</sup> In *Equustek*, the Supreme Court of Canada recognized a new type of injunction: the Court granted an interlocutory injunction against an innocent third-party (Google) to de-index certain websites from its search engine. However, *Equustek* does not stand for the proposition that site-blocking injunctions are available as a matter of law. *Equustek* applies and does not change the fundamental law of injunctions: they are equitable and discretionary remedies,<sup>33</sup> and each interlocutory injunction will depend on its context.<sup>34</sup>

36. Crucially, the legislative and factual context at bar is very different from that of *Equustek*. First, *Equustek* involved trademark and trade secrets rather than copyright; thus, the legislative scheme and available remedies are markedly different.

37. Second, in *Equustek*, there was no statutory impediment to Google de-indexing the sites from its own search engine; no authorization was needed to do so. By contrast, as will be set out below, there are several statutory impediments to site-blocking under the *Copyright Act* and *Telecommunications Act*. A search engine such as Google has control and discretion over how it lists sites and requires no regulatory approval to

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<sup>31</sup> SC 1993, c 38 [*Telecommunications Act*].

<sup>32</sup> Motion decision at paras 23-26; See *Google v Equustek Solutions*, 2017 SCC 34 [*Equustek*].

<sup>33</sup> *Equustek* at paras 22-23.

<sup>34</sup> *Ibid* at para 25.

exercise this discretion. In contrast, by virtue of net neutrality (discussed below), an ISP has no control over the web content to which it provides access, and requires approval from the CRTC to block web content.<sup>35</sup>

38. Third, the type of injunction at issue here is much more powerful: in *Equustek*, the injunction was to de-index a site from a search engine, but the website would nevertheless remain accessible on the Internet. In the case at bar, the injunction is for the named ISPs to block all access to various websites.

39. Fourth, the plaintiff Equustek had adduced evidence that it had made numerous efforts to locate the defendants overseas, but had been unable to do so.<sup>36</sup> The plaintiff had also obtained several prior injunctions in the three years leading up to the de-indexing injunction.<sup>37</sup> By contrast, in this case, the Respondents did not adduce any evidence of meaningful efforts to identify, locate and engage directly with the GoldTV defendants in the mere two weeks between commencing the copyright proceeding and requesting the site-blocking Order. The Respondents' failure to directly target the GoldTV defendants is unjustified, especially since the Respondents allege that the GoldTV defendants have been operating since 2017.<sup>38</sup> In comparison to *Equustek*, the moving parties here asked for an injunction that is more onerous and yet they made far less effort prior to requesting it.

40. Thus, while *Equustek* recognized a new type of injunction, the injunction at bar is a distinct type of injunction that, until the Order of the Federal Court, had not yet been recognized at law. *Equustek* cannot be used to circumvent the full analysis of whether such an injunction is available. Rather, the proper approach is to analyze the appropriateness of this type of injunction on its own merits.

***1. The site-blocking remedy is not available in this statutory context***

41. In *Equustek*, the majority expressly accepted the proposition that a Court's equitable powers are not unlimited; they are necessarily subject to statutory restrictions.<sup>39</sup> In *Equustek*, no statutory restrictions applied to the injunction sought.

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<sup>35</sup> See *Telecommunications Act*, s 36.

<sup>36</sup> *Equustek* at para 52.

<sup>37</sup> *Equustek* at paras 3-17.

<sup>38</sup> Statement of Claim at paras 24 and 34, AB Vol 1, Tab 4, pp 111, 115.

<sup>39</sup> *Equustek* at para 23; see also Ian Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9<sup>th</sup> ed, Prymont, NSW: Lawbook, 2014, at p 333.

Such is manifestly not the case here. A site-blocking order for copyright infringement engages both the *Copyright Act* and the *Telecommunications Act*. First, site-blocking is not an available remedy for copyright infringement under the *Copyright Act*. Further, court-ordered site-blocking offends the common carrier principle enshrined in s. 36 of the *Telecommunications Act*.

*a. Site-blocking is not an available remedy under the Copyright Act*

42. This case concerns remedies for a *prima facie* finding of copyright infringement. As the Supreme Court has reiterated many times, copyright is a creature of statute, and all rights and remedies must be grounded in the *Copyright Act*.<sup>40</sup> In deciding that this remedy was available, the motion judge failed to carry out a meaningful statutory interpretation of the *Copyright Act*. Instead, he relied on a partial reading of one part of one provision (s. 34(1)). This led him to an overly broad interpretation of the remedies available under the *Act* that flouts three fundamental principles of copyright law.

*(i) The applicable principles of interpretation*

43. Three key principles are critical to understanding remedies in copyright law. First, the *Copyright Act* is a complete code of rights and remedies. Second, the *Copyright Act* carefully balances the rights of copyright holders and users. Third, the *Copyright Act* is the product of Parliament’s careful legislative choices, including the choice to protect net neutrality.

44. First, the *Copyright Act* is a complete code of rights and remedies. As the Supreme Court reiterated most recently, “[c]opyright in Canada is a creature of statute and the rights and remedies afforded by the *Copyright Act* are exhaustive.”<sup>41</sup> Since the *Act* is exhaustive, all remedies for a breach of copyright must be grounded in the *Act*.<sup>42</sup> In deciding whether a given remedy is available under the *Act*, the *Act* must be

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<sup>40</sup> See most recently *Keatley Surveying Ltd v Teranet*, 2019 SCC 43 at para 40 [Keatley], and FN 41.

<sup>41</sup> *Keatley* at para 40. See also *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 9 [CCH]; *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 82 [SOCAN]. See also s. 89 of the *Copyright Act*: “[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament.”

<sup>42</sup> *CCH* at para 9.



interpreted according to the modern principle of statutory interpretation: the words must be read in accordance with their text, context and purpose, and in light of the statute as a whole.<sup>43</sup> As will be argued below, the motion judge failed to do this.

45. Second, the *Copyright Act* is intended to balance the rights of copyright owners and users, and Gleeson J’s interpretation failed to balance these rights. In the words of Justice Binnie in *Théberge*:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator [...]

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.<sup>44</sup>

46. The Supreme Court has employed this balancing approach in several instances: to interpret the scope of the fair dealing exception in the *Act*,<sup>45</sup> to interpret the obligations under the notice and notice remedy in the *Act* (discussed below),<sup>46</sup> and, most recently, to interpret the scope of Crown copyright under s. 12 of the *Act*.<sup>47</sup>

47. Third, when interpreting the *Copyright Act*, it is important to consider Parliament’s careful legislative choices and balancing of interests. Parliament has expressly considered and rejected some powerful remedies for online copyright infringement, including site-blocking. Notably, in the course of the 2012 reforms to the *Act*, copyright holders argued for both a site-blocking regime and for a “notice and takedown” regime to deal with online copyright infringement.<sup>48</sup> Parliament considered but rejected these options in favour of a less powerful but more balanced “notice and notice” system.<sup>49</sup> While a “notice and takedown” regime would require ISPs to

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<sup>43</sup> *Ibid* at para 13; see also *SOCAN* at para 82; *Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at para 52.

<sup>44</sup> *Galerie d’art du Petit Champlain v Théberge*, 2002 SCC 34 at paras 30-31 [*Théberge*]; cited in *Keatley* at para 43. See also *SOCAN* at para 88.

<sup>45</sup> See *CCH* at para 48; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at paras 8-11; cited in *Keatley* at paras 44-46.

<sup>46</sup> *Rogers Communications v Voltage Pictures, LLC*, 2018 SCC 38 at paras 22, 25-27 [*Voltage*].

<sup>47</sup> See *Keatley* at para 47.

<sup>48</sup> CMCRC FairPlay Intervention at para 20, *Stewart Aff.*, Exh. D, AB Vol 8, Tab 29D, p 2260.

<sup>49</sup> See *Voltage* at para 26.

“respond expeditiously by removing or blocking access” to copyright-infringing material,<sup>50</sup> a “notice and notice” system merely requires ISPs to forward notices from copyright owners to Internet subscribers, alerting them that their accounts have been linked to allegedly infringing activities.<sup>51</sup>

48. The Supreme Court has found that in opting for the “notice and notice” system, Parliament balanced the rights of interested parties, including ISPs, and expressly chose not to put in a comprehensive framework to eliminate all copyright infringement online.<sup>52</sup>

49. By contrast, site-blocking is an even stronger remedy than notice and takedown. It is also subject to greater potential error. Gleeson J’s recognition of a new site-blocking remedy extends copyright remedies much farther than Parliament clearly intended when it rejected a less onerous remedy in 2012. As such, the recognition of this remedy flouts the clear legislative choices made by Parliament.

50. These choices also include safeguarding net neutrality for ISPs. In 2012, the liability exemptions for ISPs were maintained<sup>53</sup> and a new set of exemptions was added. The new section 31.1 exempts ISPs from copyright liability where they act as neutral conduits for content: it states that they do not infringe copyright “solely by reason of” providing the technological means to infringe copyright.<sup>54</sup> The addition of this provision demonstrates that Parliament carefully considered net neutrality for ISPs and expressly enshrined it in the *Copyright Act*. As will be discussed below, this principle is also enshrined in the *Telecommunications Act*.<sup>55</sup> This principle must be given full weight in any interpretation of remedies under the *Copyright Act*.

(ii) *The motion judge’s interpretation*

51. The motion judge’s interpretation of the *Copyright Act* sits in stark contrast to a proper statutory interpretation according to the principles outlined directly above.

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Copyright Act*, ss 41.25, 41.26.

<sup>52</sup> *Voltage* at paras 22, 24-26. Indeed, Minister Tony Clement stressed that “[f]rankly, for a bill of this scope, balance is our only option”: CMCRC FairPlay Intervention at para 23, Stewart Aff., Exh. D, AB, Vol 8, Tab 29D, p 2261.

<sup>53</sup> *Copyright Act*, s 2.4(1)(b).

<sup>54</sup> *Copyright Act*, s 31.1.

<sup>55</sup> *Telecommunications Act*, s 36.

The entirety of the motion judge’s statutory interpretation is found in three paragraphs of his reasons.<sup>56</sup> He failed to take into account any of the three principles above in his interpretation of the *Copyright Act*.

52. Without submissions, and without carefully considering the entire scheme of the *Copyright Act*, the motion judge found that s. 34(1) of the *Copyright Act* grounds the site-blocking remedy. Subsection 34(1) of the *Copyright Act* reads as follows:

| <b>Copyright</b>                                                                                                                                                                                                                                                | <b>Droit d’auteur</b>                                                                                                                                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right. | 34 (1) En cas de violation d’un droit d’auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours — en vue notamment d’une injonction, de dommages-intérêts, d’une reddition de compte ou d’une remise — que la loi accorde ou peut accorder pour la violation d’un droit. |

53. Rather than setting out the entire provision, the motion judge recited a truncated version of this provision. He stated that “a copyright owner is ‘entitled to all remedies by way of injunction [...] that are or may be conferred by law for the infringement of a right’”.<sup>57</sup> From this, he concluded that the term “injunction” in s. 34(1) includes the right to seek relief against a third-party, referencing *Equustek* as authority for this conclusion. As set out above, *Equustek* was a trade secrets proceeding and has no relevance for the interpretation of the *Copyright Act*.

54. The motion judge failed to read s. 34(1) in context, in light of all the other carefully crafted remedies in the *Copyright Act*, and in light of the fundamental policy choices and principles articulated above. For example, he failed to appreciate that s. 34(1) is the first provision in Part IV, entitled “Civil Remedies”. It is followed by dozens of specific remedies, including several specific injunction remedies.<sup>58</sup> In

<sup>56</sup> Motion decision at paras 28-30, AB Vol 1, Tab 2.

<sup>57</sup> Motion decision at para 29, AB Vol 1, Tab 2.

<sup>58</sup> See e.g. provisions limiting the remedy to injunction in certain situations (ss 39(1), 41.2, 41.27(1)), setting out factors to consider in establishing the terms of injunction in certain situations (s 41.27(4.1)), extending the scope of injunction (ss 39.1(1), 39.1(2)), and limiting the availability of injunction (ss 40(1), 41.27(4.2)).

interpreting the scope of the term “injunction” in s. 34(1), the motion judge considered neither the provision’s function within Part IV, nor the meaning of the other terms in that provision (such as “subject to this Act”).<sup>59</sup>

55. Further, he altogether failed to consider the three overarching principles of interpretation of the *Copyright Act* set out by the Supreme Court: the complete code principle, the balancing of interests, and net neutrality. As a result, his overly broad interpretation of “injunction” in s. 34(1) flouts the complete code principle, upsets the balance between the rights of copyright holders and users, and contravenes the net neutrality principle. Had the motion judge considered s. 34(1) in light of the proper principles, he would have concluded that s. 34(1) does not provide the statutory basis for an interlocutory site-blocking injunction. Rather, he would have found that there is no statutory basis for such a remedy anywhere in the *Copyright Act*.

***b. A site-blocking injunction frustrates s. 36 of the Telecommunications Act***

56. A second statutory limitation on the Court’s equitable jurisdiction to grant this type of injunction lies in s. 36 of the *Telecommunications Act*. This section embodies a fundamental principle of telecommunications law; further, it provides a statutory regime for control of Internet access by the CRTC rather than by courts. The motion judge’s Order overwrites and frustrates this provision; as such, he should have declined to make the Order.

57. Section 36 provides that a Canadian carrier “shall not control the content” of telecommunications “[e]xcept where the Commission approves otherwise”.<sup>60</sup> This provision enshrines the common carrier principle for telecommunications carriers: at law, carriers—including ISPs—are not permitted to limit Internet content without a CRTC order.<sup>61</sup>

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<sup>59</sup> The term “subject to this Act” is used 10 times in the *Copyright Act*.

<sup>60</sup> *Telecommunications Act*, s 36.

<sup>61</sup> See *Association canadienne des télécommunications sans fil c Procureure générale du Québec*, 2018 QCCS 3159 at paras 115-116, 119 [*Association canadienne*].

58. The common carrier doctrine is not merely one factor among many to be weighed in the balance of convenience as the motion judge did.<sup>62</sup> It is a mandatory proposition of law related to the availability of site-blocking that cannot be ignored.

59. In *Reference re Broadcasting Act*, the Supreme Court confirmed the role of ISPs within the telecommunications and broadcasting regime: in contrast to broadcasters, which have some measure of control over programming, ISPs can and should have no such control:

[...] ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue in the reference question, they take no part in the selection, origination, or packing of content. [...] <sup>63</sup>

60. Before the motion judge, the Respondents argued that the common carrier doctrine does not oblige a carrier to carry unlawful goods. For this, they relied upon a century-old prohibition-era transportation case.<sup>64</sup> Surely if this were a current principle of telecommunications law, there would be more recent and relevant authority. By the Respondents' logic, ISPs could—and should—block any Internet content that they (or others) provisionally deem unlawful. This is not the law: s. 36 clearly prohibits any blocking of content without CRTC approval, subject to CRTC policies.<sup>65</sup>

61. The Order circumvents clear statutory intent about the fundamental role of ISPs in the Internet architecture. It also thwarts Parliament's intent that where the content of the Internet is to be controlled, this control will be exercised by the CRTC.

62. The CRTC has considered its authority under s. 36. In 2006, the CRTC declined to grant *ex parte* interim mandatory site-blocking, even in the face of “extremely serious” hate speech content.<sup>66</sup> In 2009, in its *Review of the Internet traffic management practices of Internet service providers*, the CRTC found that any site-blocking requires CRTC approval, and such approval would only be granted in

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<sup>62</sup> See Motion decision at paras 96-97, AB Vol 1, Tab 2.

<sup>63</sup> *Reference re Broadcasting Act*, 2012 SCC 4 at para 5 [emphasis added].

<sup>64</sup> *Graham & Strang v Dominion Express Company*, 1920 Carswell ON 56 (ONSC) at para 37; cited at Motion decision at para 96, AB Vol 1, Tab 2. In that case, the defendant carrier was ordered to carry the liquor, despite such provisional—but ultimately erroneous—deeming by the Board of License Commissions for Ontario.

<sup>65</sup> See *Association canadienne* at para 119.

<sup>66</sup> CRTC, Telecom Commission Letter, 8622-P49-200610510, p 2.

“exceptional circumstances”, in light of the numerous policy objectives of the *Telecommunications Act*.<sup>67</sup>

63. Thus, the settled law since at least 2009 is that all site-blocking requires CRTC approval, yet the CRTC does not have the authority to create an agency for copyright-related site-blocking.<sup>68</sup> If Parliament intended mandatory site-blocking to be available for copyright infringement, it would have conferred this power on an administrative tribunal under the relevant statutes. With respect, it is not for this Court to second-guess Parliament’s policy choices for the control of the Internet by circumventing the regime set up under the *Telecommunications Act*.

64. The motion judge's Order overwrites and interferes with the statutory scheme of the *Telecommunications Act*. It also creates a conundrum for the third-party ISPs subject to the motion at bar: Does s. 36 of the *Telecommunications Act* require these ISPs to seek permission from the CRTC to implement the court-ordered site-blocking? If not, does the motion judge’s Order render s. 36 of the *Telecommunications Act* redundant, or supplant CRTC jurisdiction in this area?

65. In any event, this Order frustrates the purpose of s. 36 of the *Act*: it takes the Internet-monitoring function out of the hands of the CRTC, where Parliament intended it to be. As such, the motion judge should have declined to make the Order.

## ***2. Site-blocking is not appropriate as an interlocutory remedy***

66. Site-blocking is not an appropriate interlocutory remedy. Rather, it is essentially a final remedy more powerful than anything the Respondents could obtain at the end of trial.

67. The purpose of an interlocutory injunction is to preserve rights until trial.<sup>69</sup> As a general rule, “[i]nterlocutory injunctive relief will not normally be granted where there is no prospect for a specific remedy being granted at the trial.”<sup>70</sup> Although exceptions to this rule are recognized (for example, *Mareva* injunctions), the list of exceptions should not be expanded without due consideration.

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<sup>67</sup> CRTC, Telecom Regulatory Policy 2009-657 at para 122.

<sup>68</sup> CRTC FairPlay Decision at paras 60-67, *Olmstead Aff.*, Exh. SO-24, AB Vol 3, Tab 11X, p 776.

<sup>69</sup> *Equustek* at para 24; *RJR — MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*].

<sup>70</sup> Hon Robert J Sharpe, *Injunctions and Specific Performance*, (loose-leaf consulted on 11 March 2020), (Toronto: Thompson Reuters, 2019) at para 2.570 [Sharpe].

68. This injunction does not fulfill the purpose of an interlocutory injunction. It goes well beyond preserving the Respondents' rights until trial. A number of features of the Order reveal its inappropriateness as an interlocutory remedy:

- a. Based on *prima facie* findings, the Respondents have obtained relief more powerful than what they could obtain after the claim is finally adjudicated. The underlying copyright claim has not been advanced, let alone finally adjudicated.
- b. The Order was granted for a renewable two-year period—it is wholly untethered to the result after final judgment of the claim on its merits.
- c. The third-party ISPs were not named in the initial Statement of Claim. Rather, the Respondents obtained *prima facie* liability findings on an *ex parte* basis against the GoldTV defendants, then joined the third-party ISPs only for the site-blocking injunction. As such, the site-blocking Order grants the Respondents relief they would not be entitled to after trial, but based only on *prima facie* and uncontested findings.

69. Simply put, site-blocking does not preserve the Respondents' rights until trial; it provides a distinct and powerful final remedy against alleged copyright infringement unrelated to the result at trial.

***3. In the absence of a legislative framework, courts are ill-equipped to make site-blocking orders and should decline to make such orders***

70. Site-blocking is a complex remedy that requires ongoing supervision and interferes with the basic infrastructure of the Internet. It should not be undertaken in the absence of a clear statutory framework to guide its scope and implementation. The availability, scope and forum for site-blocking are policy choices best left to Parliament.

71. In countries that allow site-blocking, there is a legislative regime with codified factors. For example, the UK amended its *Copyright, Designs and Patents Act 1988* to

comply with the EU Copyright Directive,<sup>71</sup> adding a provision enabling the granting of “[...] an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.”<sup>72</sup> UK courts consider various requirements in determining whether the site-blocking order should issue.<sup>73</sup> These factors are largely based on a 2004 EU Enforcement Directive regarding the enforcement of intellectual property rights.<sup>74</sup>

72. Australia now has a statutory site-blocking regime with statutory factors. In 2015, Australia amended its *Copyright Act 1968* to provide a site-blocking remedy for copyright-infringing websites outside Australia. The legislation codifies the factors which a court must consider in granting the remedy.<sup>75</sup>

73. By way of contrast, prior to Ireland’s 2012 enactment of a site-blocking regime, the High Court of Ireland expressly ruled in 2010 that it did not have a legislative basis to order site-blocking.<sup>76</sup>

74. Some countries have explicitly rejected site-blocking. Notably, the U.S. *Stop Online Piracy Act* bill, which would have required ISPs to block access to copyright infringing websites, failed in 2011 due to large public protests and opposition to the bill in Congress.<sup>77</sup> Professor Geist also reports that “[c]ourts in several countries, including Mexico, Austria and Greece, have ruled that site blocking is disproportionate, noting that copyright owners may have failed to exhaust other potential remedies”.<sup>78</sup>

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<sup>71</sup> European Parliament and Council of the European Union, “Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society”, art 8(3), Official Journal L 167.

<sup>72</sup> *Copyright, Designs and Patents Act 1998*, 1988, c 48, s 97A (United Kingdom).

<sup>73</sup> *Cartier International AG v British Sky Broadcasting Ltd*, [2016] EWCA Civ 658 at para 100 [Cartier EWCA].

<sup>74</sup> European Parliament and Council of the European Union, “Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights”, art 3, Official Journal L 157 [EU Enforcement Directive]; see also *Cartier EWCA* at paras 29, 80, 100-101.

<sup>75</sup> *Copyright Act 1968*, No 63, 1968, s 115A(5) (Australia).

<sup>76</sup> *EMI Records [Ireland] Ltd & Ors v UPC Communications Ireland Ltd*, [2010] IEHC 377 ¶137.

<sup>77</sup> CMCRP FairPlay Intervention at para 172, Stewart Aff., Exh. D, AB Vol 8, Tab 29D, p 2314.

<sup>78</sup> Professor Geist FairPlay Intervention at para 89, Stewart Aff., Exh. I, AB Vol 8, Tab 29I, pp 2467-2468. See also CMCRP FairPlay Intervention at para 171, Stewart Aff., Exh. D, AB Vol 8, Tab 29D, p 2313.



75. In *FairPlay*, the applicants (including the Respondents in this appeal) asked the CRTC to implement site-blocking for copyright infringement. They suggested that the CRTC set up an administrative regime to deal with site-blocking, complete with a new administrative agency.<sup>79</sup> Although the CRTC ultimately denied the application, the proposal rightly suggests that site-blocking is a complex and highly technical remedy best overseen by an administrative agency. Courts should exercise caution to avoid overstepping their judicial role in fashioning remedies that are better suited to the administrative branch of government.<sup>80</sup>

76. Further, the motion judge failed to consider that the need for continual updating of the Order will consume judicial resources. As a matter of law, the need for ongoing judicial supervision is relevant to whether an injunction should issue, particularly for mandatory injunctions.<sup>81</sup> At the hearing, it was obvious that this Order would need continuous updating. The list of Target Websites (Schedule 1) from the Notice of Motion required updating even before the hearing. The November 15 Order provides for supervised updates to the list of blocked sites every two weeks for the two-year duration of the order.<sup>82</sup> Indeed, the November 15 Order required updating mere weeks after it was made,<sup>83</sup> and still another amendment was requested in March 2020.<sup>84</sup> Thus, the Order leaves open the possibility of dozens of judicial amendments over its two-year duration. However, the motion judge did not consider whether this need for ongoing judicial supervision was a reason to decline to make the Order.

77. Given that the Respondents describe a widespread problem with copyright infringement online,<sup>85</sup> the Federal Court can expect many more such site-blocking motions. For each order, the Court will maintain a supervisory role for the duration of the order. Cumulatively, this will place a significant strain on judicial resources.

78. There are several other reasons why courts are ill-suited to wade into site-blocking:

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<sup>79</sup> CRTC *FairPlay* Decision at para 11, *Olmstead Aff.*, Exh. SO-24, AB Vol 3, Tab 11X, p 765.

<sup>80</sup> *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 34.

<sup>81</sup> *Sharpe* at paras 1.260-1.290.

<sup>82</sup> Motion decision, p 36, para 2 of Order, AB Vol 1, Tab 2.

<sup>83</sup> Order of December 20, 2019, AB Vol 10, Tab 35, p 2884.

<sup>84</sup> Federal Court Docket, T-1169-19, 11 March 2020, Docs 81-84.

<sup>85</sup> *Olmstead Aff.* At paras 35-41, AB Vol 1, Tab 11, pp 224-225.

- a. The risks of over-blocking and compromising the integrity of the Internet are real, and are heightened in the absence of legislative guidance.<sup>86</sup> As highlighted by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, this has serious implications for free expression.<sup>87</sup> These risks have already been realized in Canada: in 2005, Telus unilaterally blocked access to a pro-union website and inadvertently blocked access to 766 other websites across the world hosted on the same server, containing unrelated content.<sup>88</sup>
- b. There is strong evidence that site-blocking is ineffective because it is easy to circumvent.<sup>89</sup> The ineffectiveness of the remedy is itself reason to decline to order a remedy.<sup>90</sup>

**B. THE MOTION JUDGE FAILED TO TAKE INTO ACCOUNT FREEDOM OF EXPRESSION IN DECIDING WHETHER THE ORDER WAS JUST AND EQUITABLE IN THE CIRCUMSTANCES**

79. Section 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>91</sup> protects freedom of expression. Where, as here, expressive rights have been infringed, the justification framework set out in *R v Oakes*<sup>92</sup> applies. In the alternative, the Order engages *Charter* values of expression, and these *Charter* values should be integrated into the test for granting injunctions. On either of these standards, the motion judge erred in granting the Order without considering the *Charter* rights and values at play.

**1. The expressive interests at issue**

80. The Supreme Court has identified freedom of expression as “[a]mong the most fundamental rights possessed by Canadians.”<sup>93</sup> The scope of freedom of expression is

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<sup>86</sup> See Professor Geist FairPlay Intervention at paras 97ff, Stewart Aff., Exh. I, AB Vol 8, Tab 29I, p 2471.

<sup>87</sup> UN Special Rapporteur Intervention in FairPlay Proceeding at para 22, Stewart Aff., Exh. H, AB Vol 8, Tab 29H, p 2441.

<sup>88</sup> Professor Geist FairPlay Intervention at para 99, Stewart Aff., Exh. I, AB Vol 8, Tab 29I, p 2472.

<sup>89</sup> CMCRRP FairPlay Intervention at para 186, Stewart Aff., Exh. D, AB Vol 8, Tab 29D, p 2318; Canadian Network Operators Consortium FairPlay Intervention at paras 4, 10, 16, 22, 23, 37, 65, 67, 77, Stewart Aff., Exh. F, AB Vol 8, Tab 29F, pp 2365, 2367-2371, 2375, 2382-2384, 2387; Internet Society FairPlay Intervention, pp 6, 22, Stewart Aff., Exh. G, AB Vol 8, Tab 29G, pp 2399, 2415.

<sup>90</sup> See *Equustek* at para 77 (per Côté and Rowe JJ, dissenting); *Spry* at pp 419-20.

<sup>91</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>92</sup> [1986] 1 SCR 103 [*Oakes*].

<sup>93</sup> *R v Sharpe*, 2001 SCC 2 at para 21.

very broad,<sup>94</sup> and includes the fundamental goal of individual self-fulfillment.<sup>95</sup> This freedom applies to the Internet, which is a “huge communications facility,”<sup>96</sup> and which “enables individuals to seek, receive and impart information and ideas of all kinds.”<sup>97</sup>

81. Two groups affected by the Order engage in overtly expressive activities on the Internet. First, the ISPs are engaged in expressive activity when they provide users with access to a wide range of websites. Commercial activity is protected expression under the *Charter*.<sup>98</sup> More specifically, book sellers and information retailers benefit from the protection of s. 2(b).<sup>99</sup> The Order effectively removes books from the virtual shelves of some (but not all) ISPs, at the behest of the Respondents, and thereby interferes with the ISPs’ expressive commercial activities.

82. The second group whose expressive activities are subject to the Order is the customers of the ISPs.<sup>100</sup> These individuals browse the Internet and access websites – an activity that is a central vehicle of individual self-fulfillment in modern society. The Order narrows the scope of available Internet content and thereby constrains users’ expressive freedom.

83. The fact that the content subject to the Order may be unlawful is not relevant for the purposes of assessing whether it is expressive content under s. 2(b). The Supreme Court decision in *RWDSU v Dolphin Delivery Ltd*, in which tortious picketing was found to be constitutionally protected expression, is conclusive on this point.<sup>101</sup> Even criminalized conduct is not removed from the ambit of s. 2(b) solely on the basis

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<sup>94</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969-971 [*Irwin Toy*].

<sup>95</sup> *Ibid* at 976; *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 37; and *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 765 [*Ford*].

<sup>96</sup> *SOCAN* at para 8.

<sup>97</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Human Rights Council, 17th Sess. (2011) A/HRC/17/27 at para 67.

<sup>98</sup> *Ford* at 764-767; *Irwin Toy* at 971.

<sup>99</sup> *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 41 [*Little Sisters*]; *Information Retailers Assn of Metropolitan Toronto v Metropolitan Toronto (Municipality)* (1985), 22 DLR (4th) 161 at para 37 (ONCA) [*Information Retailers*].

<sup>100</sup> See *Information Retailers* at para 37; *Little Sisters* at para 41: “The Constitution protects the right to receive expressive material as much as it does the right to create it”.

<sup>101</sup> [1986] 2 SCR 573 at 588 [*Dolphin Delivery*].

of its unlawfulness.<sup>102</sup> Violence is the definitive marker of the outer boundary of freedom of expression.<sup>103</sup> The Order is directed at alleged copyright infringement, which is a statutory tort.<sup>104</sup> No violence is alleged. Thus, the content subject to the Order falls within the ambit of s. 2(b).

## 2. *The Order violates the Charter*

### a. *The Order infringes section 2(b)*

84. When either the purpose or the effects of governmental action constrain expressive activity, an infringement of s. 2(b) occurs.<sup>105</sup> The Order blocks certain content, deliberately preventing users from accessing that content and ISPs from allowing access to that content. As such, the purpose of the Order is clearly to constrain expressive activity.

85. Furthermore, the Order is an exercise of “governmental action.” Court orders, on their own, do not normally attract *Charter* scrutiny,<sup>106</sup> and the *Charter* does not apply to an injunction issued in a dispute between private parties governed entirely by the common law.<sup>107</sup> However, the *Charter* will apply, as Peter Hogg observes, to a court order issued “in a purely private proceeding that is governed by statute law.”<sup>108</sup> Where a legislature enacts a code restructuring the relationships of private citizens in accordance with a set of public policy preferences, private litigation arising under such a regime is determined by governmental action.

86. Thus, the *Charter* will apply to a discretionary court order made under insolvency legislation,<sup>109</sup> and by the same logic, the *Charter* will apply to an order issued in the course of a statutory infringement action under the *Copyright Act*. Private litigation under such circumstances is entirely distinguishable from the situation in

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<sup>102</sup> *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1182-1183 (per Lamer J (as he then was)).

<sup>103</sup> *Irwin Toy* at 970; *Montréal (City) v 2952-1366 Québec*, 2005 SCC 62 at para 60 [*Montreal*]; *Dolphin Delivery* at 588.

<sup>104</sup> *Tokatlidis v MxN Media Corp*, 2009 CarswellOnt 9016 at para 12 (SCJ).

<sup>105</sup> *Irwin Toy* at 971-973; *Montreal* at para 56.

<sup>106</sup> *Dolphin Delivery* at 600.

<sup>107</sup> *Ibid* at 602-603.

<sup>108</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007) at §37-22 [Hogg].

<sup>109</sup> *Nortel Networks Corp, Re*, 2017 ONSC 700 at paras 24-25.

*Dolphin Delivery*, which was grounded in tort law; “[n]o government was involved in the dispute, and no statute applied to the dispute.”<sup>110</sup>

***b. The infringement cannot be justified under section 1***

87. Where a court order governed by statute law infringes freedom of expression, a section 1 analysis is required in order to determine if the infringement is justified.<sup>111</sup> A party seeking to uphold a limitation on a *Charter* right bears the onus and must provide evidence.<sup>112</sup> Given the fundamental constitutional importance of freedom of expression, “the rights enshrined in s. 2(b) should [...] only be restricted in the clearest of circumstances.”<sup>113</sup>

88. The Order is prescribed by law, but none of the other requirements of the *Oakes* test is met.

89. The Order’s purpose is neither pressing nor substantial. In the present circumstances, the Respondents have failed to provide any evidence that their copyright interests are so pressing and substantial as to require the exceptional protection of an invasive site-blocking order. At the end of the day, it is only the quantum of the Respondents’ profits that is potentially at stake.

90. Nor is the Order rationally connected to its purpose. Under *Oakes*, an infringing measure “must be carefully designed to achieve the objective in question. [It] must not be arbitrary, unfair or based on irrational considerations.”<sup>114</sup> The Order, however, is arbitrary in that the plaintiffs chose to name only selected ISPs, effectively leaving millions of users free to access the blocked sites.<sup>115</sup> It gives large media companies the power to choose which of their affiliates’ ISP competitors they will silence. Further, blocking orders can be easily circumvented, both by users seeking to access protected content and by a party such as GoldTV, which can easily set up an alternate site to

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<sup>110</sup> Hogg at §37-22.

<sup>111</sup> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 948-951 (*per* McLachlin J, as she then was) [*Dagenais*]; *Dolphin Delivery* at 589-592.

<sup>112</sup> *Oakes* at 136-138.

<sup>113</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1336.

<sup>114</sup> *Oakes* at 139.

<sup>115</sup> See Stewart Aff. at paras 27-30, AB Vol 7, Tab 29, pp 2152-2154, and related Exhs. T-BB.

pirate material subject to copyright.<sup>116</sup> In fact, GoldTV has already done this, as evidenced by the three amendments to Schedule 1 requested to date.

91. The Order is also not minimally impairing. The Respondents have not exhausted any alternate avenues,<sup>117</sup> and instead have obtained a remedy that risks capturing lawful content.<sup>118</sup>

92. The deleterious effects outweigh the salutary effects. As discussed, the evidence suggests that the Order serves no pressing purpose and has minimal beneficial effects. By contrast, the Order not only burdens certain third-party ISPs, but also violates a fundamental *Charter* freedom.

93. The Order is a disproportionate means to secure goals that have not been demonstrated to be either pressing or substantial. It cannot be saved under s. 1.

***3. In deciding whether the Order was just and equitable, the motion judge ought to have considered Charter values***

94. Should this Court find that a strict *Charter* analysis does not apply in this case, it remains that freedom of expression is a fundamental *Charter* value engaged in this case. The law must be developed and applied in a manner that is consistent with *Charter* values.<sup>119</sup> In assessing whether a site-blocking Order is appropriate, this Court should integrate the *Charter* value of free expression into the three-part test for granting injunctions.

95. Justice Gleeson devoted extraordinarily little attention to freedom of expression in his reasons.<sup>120</sup>

96. Where *Charter* values such as freedom of expression are implicated, the common law must evolve in accordance with those *Charter* values.<sup>121</sup> For example, in *Pepsi-Cola*, the Supreme Court modified the common law tort of secondary picketing

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<sup>116</sup> *Ibid* at paras 17-24, and Exhs. L, P, Q, R, and S, pp 2149-2151.

<sup>117</sup> *Ibid* at paras 39-49, and Exhs. LL to PP, AB Vol 7, Tab 29, pp 2159-2162.

<sup>118</sup> UN Special Rapporteur Intervention in FairPlay Proceeding at paras 4, 18, Stewart Aff. Exh. H, AB Vol 8, Tab 29H, pp 2424, 2427; Professor Geist Intervention in FairPlay Proceeding at paras 99-101, Stewart Aff. Exh. I, AB Vol 8, Tab 29I, pp 2472-2474.

<sup>119</sup> *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 20-22 [*Pepsi-Cola*]; *Dolphin Delivery* at 603.

<sup>120</sup> Motion decision para 97, AB Vol 1, Tab 2.

<sup>121</sup> *Pepsi-Cola* at paras 37, 67.

to take into account the important freedom of expression *Charter* values at stake in such cases.<sup>122</sup> In *Dagenais v Canadian Broadcasting Corp* and *R v Mentuck*,<sup>123</sup> the Court employed *Charter* methodology to articulate a test for when a discretionary publication ban can be granted. The test incorporates both a necessity criterion<sup>124</sup> and a balancing criterion.<sup>125</sup> In *Grant v Torstar Corp*, the Supreme Court employed *Charter* values of expression to recognize a new defence to defamation: responsible communication on matters of public interest.<sup>126</sup> In *Jones v Tsige*, the Court of Appeal for Ontario applied *Charter* values of privacy in recognizing a new common law tort: intrusion upon seclusion.<sup>127</sup>

97. The British Columbia Court of Appeal recently followed this methodology in the context of an interlocutory injunction in a copyright proceeding. In *Vancouver Aquarium*, the Court of Appeal overturned a chambers judge’s decision to grant an interlocutory injunction. The Court found that the chambers judge had failed to take into account the *Charter*-protected expressive interests at play. The Court found that these expressive interests should have been accounted for under the “balance of convenience” part of the injunction test.<sup>128</sup> In considering these expressive interests under the balance of convenience analysis, the Court of Appeal found that the *Charter* value of freedom expression weighed against granting the injunction.<sup>129</sup>

98. This Court should follow that methodology in the case at bar. To weigh freedom of expression within the “balance of convenience” inquiry, two requirements are paramount: First, the starting point must be the expressive interests at stake.<sup>130</sup> Second, the inquiry must assign to these interests a weight consistent with *Charter* values.

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<sup>122</sup> *Pepsi-Cola* at paras 15-22, 26-37.

<sup>123</sup> 2001 SCC 76 [*Mentuck*].

<sup>124</sup> Namely, the publication ban must be necessary in order to prevent a “real and substantial risk” to trial fairness, because “reasonably alternative measures will not prevent the risk”: see *Mentuck* at para 32; *Dagenais* at 878.

<sup>125</sup> Namely, the salutary effects of the ban must outweigh the deleterious effects to the free expression of those affected: see *Mentuck* at para 32; *Dagenais* at 878.

<sup>126</sup> *Grant v Torstar Corp*, 2009 SCC 61 at paras 41-65.

<sup>127</sup> *Jones v Tsige*, 2012 ONCA 32 at paras 45-46, 66.

<sup>128</sup> *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at paras 72-82 [*Vancouver Aquarium*].

<sup>129</sup> *Vancouver Aquarium* at para 82.

<sup>130</sup> See *Pepsi-Cola* at paras 37, 67.

99. In the case at bar, the expressive interests are those outlined at paragraphs 80-82 of this Memorandum: the expressive interests of the ISPs and their customers. The motion judge erred by failing to find that expressive interests were at play. He erred in summarily concluding that the conduct's alleged unlawfulness excluded the consideration of *Charter*-protected expressive interests:<sup>131</sup> as demonstrated above, unlawful conduct is no bar to the protection of expressive activity. Further, he erred by giving the expressive interests no weight whatsoever in the balance of convenience analysis. Had he given the expressive interests a weight appropriate to the *Charter* values at stake, this would have militated against granting the injunction.

### **C. THE ORDER WAS NOT JUST AND EQUITABLE IN THE CIRCUMSTANCES**

100. To decide whether the site-blocking Order was just and equitable in the circumstances, the motion judge applied the three-part test set out in *RJR-MacDonald*: an interlocutory injunction will issue if (1) there is a serious issue to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours the requesting party.<sup>132</sup> As just argued, this third step also requires consideration of the *Charter*-protected expressive interests at play.

101. In addition to his failure to consider the *Charter*-protected interests, the motion judge made three errors of law in his articulation and application of the test for interlocutory injunction. First, he erred in his analysis of irreparable harm by relying too heavily on the prior injunction findings and by finding that speculative harm can be irreparable harm. Second, he erred in applying lower thresholds than required for both irreparable harm and balance of convenience. Third, he erred in law by importing factors from a foreign jurisdiction into the injunction test. These errors of law led him to apply the wrong standard at all three stages, and thereby to find that the injunction was just and equitable in the circumstances. Had he not made these errors of law, he would not have reached such a conclusion.

#### ***1. The motion judge erred in law in his analysis of irreparable harm***

102. The motion judge erred in law in relying too heavily on the earlier findings of irreparable harm made in the course of the interim and interlocutory injunctions issued against the GoldTV defendants. In relying upon these findings, the motion judge

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<sup>131</sup> See Motion decision at para 97, AB Vol 1, Tab 2.

<sup>132</sup> See Motion decision at para 43, AB Vol 1, Tab 2; *RJR-MacDonald* at 347-349.



essentially presumed that irreparable harm had been made out, and thereby placed the onus on the third-party ISPs to disprove irreparable harm.

103. Under the *RJR-MacDonald* test, irreparable harm is not presumed; rather, it must be alleged and proved, and the evidence must be clear and not speculative.<sup>133</sup> In their motions for interim and interlocutory injunction against the GoldTV defendants, the Respondents had alleged irreparable harm. In granting these interim and interlocutory injunctions, Justices LeBlanc and Kane respectively made implicit findings of irreparable harm.<sup>134</sup> Justice LeBlanc's findings were made *ex parte*, and Justice Kane's findings were made on an uncontested basis.

104. However, Justices LeBlanc and Kane's findings on irreparable harm could not simply be imported wholesale into this injunction. The earlier findings were made with respect to irreparable harm if the injunctions *against the GoldTV defendants* did not issue, whereas in the injunction at bar, the motion judge needed to ask whether irreparable harm would result if the site-blocking injunction *against the third-party ISPs* did not issue. Further, TekSavvy brought evidence that after the interlocutory injunction of Justice Kane, the alleged harm was already being cured.<sup>135</sup>

105. The motion judge needed to make his own findings of irreparable harm. However, there is no indication that the motion judge considered afresh the Respondents' evidence of irreparable harm. Except for a passing mention that the infringing activity is ongoing, the motion judge's reasons on irreparable harm do not canvass the evidence proffered by the Respondents as to irreparable harm.<sup>136</sup> Rather, most of his reasons on irreparable harm are focused on the evidence and arguments of TekSavvy. The undertone is that irreparable harm was somehow presumed based on the *prima facie* findings in the earlier injunctions, and that TekSavvy had failed to rebut this presumption. This was an error of law.

106. Had the motion judge canvassed the Respondents' evidence, he would have found that the evidence did not establish irreparable harm. The Respondents had

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<sup>133</sup> *Syntex v Novopharm Ltd*, (1991) 126 NR 114 (FCA) at para 15 [*Syntex*].

<sup>134</sup> See Interim injunction Order, AB Vol 1, Tab 6, p 163; and Interlocutory injunction Order, AB Vol 1, Tab 9, p 200.

<sup>135</sup> Stewart Aff. at paras 32-34, see also Exhs. CC, DD, AB Vol 9, Tabs 29CC, 29DD, pp 2626, 2642.

<sup>136</sup> See Motion decision at paras 59-68, AB Vol 1, Tab 2.

offered no evidence of specific irreparable harm flowing from the alleged copyright infringement. Rather, the Respondents had put forward bald allegations of the negative impacts of copyright infringement, but without any tangible evidence of harm.<sup>137</sup> Further, the Respondents offered no evidence to establish that any harm could not be compensated in a damages award.

107. Further, the motion judge erred in finding that speculative and non-quantifiable harm could meet the threshold for irreparable harm. He found that since “there is no agreed upon methodology” for quantifying the financial harm to the Respondents from the copyright infringement, “[i]t is not evident that losses are readily quantifiable or compensable”.<sup>138</sup> As a matter of law, harm that is hard to quantify does not equate to irreparable harm.<sup>139</sup> Rather, evidence of irreparable harm must be clear and compelling, and not speculative.<sup>140</sup> The Respondents’ failure to provide evidence of a quantifiable harm does not lead to the conclusion that they face irreparable harm.

108. In any event, any financial harm—even harm that is difficult to quantify—can be compensated by way of a statutory damages award at the end of trial. If successful in this proceeding, the plaintiffs would be entitled to statutory damages under the *Copyright Act*.<sup>141</sup> Thus, even if damages are not quantifiable at the end of trial, the Respondents would still be entitled to statutory damages. As such, the harm from the continued breach of copyright is compensable at the end of trial.

**2. The motion judge erred in applying lower thresholds than required for irreparable harm and balance of convenience**

109. The motion judge erred in law in lowering the thresholds at the second and third steps based on his findings at the first step. At the first step, “serious issue”, he found that a “strong *prima facie* case” had been made out.<sup>142</sup> Based on this finding, he found

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<sup>137</sup> See *Olmstead Aff.* at para 43, AB Vol 1, Tab 11, p 225; see also Affidavit of Colette Watson, sworn July 16, 2019, at para 39, AB Vol 6, Tab 16, p 1616; Affidavit of Peggy Tabet sworn July 15, 2019, at para 30, AB Vol 3, Tab 13, p 796.

<sup>138</sup> Motion decision at para 66, AB Vol 1, Tab 2.

<sup>139</sup> See *The Regents of University of California v I-Med Pharma*, 2016 FC 606 at para 32 [*I-Med Pharma*].

<sup>140</sup> See e.g. *Newbould v Canada*, 2017 FCA 106 at para 29; *Syntex; Aventis Pharma SA v Novopharm Ltd.*, 2005 FC 815 at paras 59-61, aff’d 2005 FCA 390; and *I-Med Pharma* at para 33.

<sup>141</sup> *Copyright Act*, s 38.1.

<sup>142</sup> Motion decision at paras 57-58, 97, AB Vol 1, Tab 2.

that a lower threshold could be applied at the other two stages of the injunction test.<sup>143</sup> In so doing, he overlooked the fact that a mandatory injunction such as this one<sup>144</sup> attracts higher scrutiny at the first step of the injunction test: rather than a “serious issue to be tried”, the threshold at the first step is a “strong *prima facie* case”.<sup>145</sup> Thus, for this injunction a “strong *prima facie* case” was simply the basic threshold that had to be met in this case at the first step; it was no reason to lower the threshold at the other steps of the injunction test, as the motion judge did.

### ***3. The motion judge erred in law in importing factors from a foreign jurisdiction into the injunction test***

110. The motion judge fettered his discretion and distorted the analysis by relying on UK law to structure the analysis at both the second and third steps of the injunction test.

111. At the Respondents’ behest, the motion judge imported factors from the England and Wales Court of Appeal (“EWCA”) decision in *Cartier*.<sup>146</sup> Based on the 2004 EU Enforcement Directive,<sup>147</sup> the EWCA set out eight factors to consider in deciding whether a site-blocking order should issue. The motion judge decided that the first factor—“necessity”—should be assessed under the irreparable harm of the injunction test, while the other seven factors should be assessed under balance of convenience.<sup>148</sup> Under balance of convenience, he did indeed consider those seven factors, and no others. This structure led him to commit three errors of law.

112. First, he erred in examining the alternatives to site-blocking under the irreparable harm branch,<sup>149</sup> where, logically, these considerations belong under balance of convenience. Second (and flowing from the first), he erred in failing to consider alternatives and less intrusive means within the balance of convenience analysis. These considerations weigh against granting the injunction, yet the motion

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<sup>143</sup> Motion decision at paras 56-58, 66, 97, AB Vol 1, Tab 2, relying on *Bell Canada v 1326030 Ontario (iTVBox.net)*, 2016 FC 612.

<sup>144</sup> See Motion decision at para 1, AB Vol 1, Tab 2.

<sup>145</sup> *R v CBC*, 2018 SCC 5 at para 15.

<sup>146</sup> *Cartier EWCA*; see Motion decision at para 52, AB Vol 1, Tab 2.

<sup>147</sup> EU Enforcement Directive, art 3, Official Journal L 157, June 22, 2004; see also *Cartier EWCA* at paras 29, 80, 100-101.

<sup>148</sup> Motion decision at para 53-54, AB Vol 1, Tab 2.

<sup>149</sup> See Motion decision at paras 53, 61, 64, 65, AB Vol 1, Tab 2.

judge failed to consider them in the balance of convenience. He failed to weigh the evidence that several alternatives to site-blocking are available and were not tried here. In the balance of convenience, he failed to take into account that the Respondents had taken no steps to identify the defendants, to enforce the previous injunctions, or to deprive GoldTV of its payment stream.<sup>150</sup>

113. Third, in tying his analysis to the *Cartier* factors, he failed to carry out what he himself stated was the central analysis within the balance of convenience analysis: an overall balancing of the burden of a site-blocking order to the Respondents, the third-party ISPs, and the general public.<sup>151</sup> By tying the analysis to *Cartier*, he also failed to give serious weight to the *Charter* expressive interests at play. Thus, in importing the factors from foreign law, the motion judge failed to carry out a proper analysis of both irreparable harm and balance of convenience.

#### **D. CONCLUSION**

114. The motion judge's errors in this appeal arise from the misguided attempt to craft a remedy that is not provided for in Canadian law. Absent legislative authority, Canadian courts should not wade into site-blocking: as a (draconian) copyright remedy that implicates Canada's telecommunications regime, its availability is a policy decision best left for Parliament.

115. If site-blocking is not available, the Respondents will not be left without a remedy. Far from it. There are many steps they can take to locate the GoldTV defendants and enforce the interlocutory injunction already in place. Further, they can advance their copyright action against the GoldTV defendants in Federal Court, and obtain a final judgment with all the remedies that come with it. Finally, they can continue participating in the parliamentary process to have a site-blocking remedy added to the *Copyright Act*.

#### **PART IV – STATEMENT OF THE ORDER SOUGHT**

116. The Appellant asks that this appeal be allowed, the orders of the motion judge be set aside, with costs of this appeal and of the hearing in the Federal Court.

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<sup>150</sup> Stewart Aff. at paras 41-42, AB Vol 7, Tab 29, pp 2159-2160.

<sup>151</sup> Motion decision at para 44, AB Vol 1, Tab 2.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of March 2020



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## PART V - LIST OF AUTHORITIES

### Domestic Legislation

1. *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11
2. *Copyright Act*, RSC 1985, c C-42
3. *Telecommunications Act*, SC 1993, c 38

### Domestic Legislative History

4. Testimony of Tanya Woods, Counsel, Regulatory Law, Bell, CHUM Radio, Legislative Committee on Bill C-11, 41st Parl, 1st Sess, (1 March 2012) (excerpt)

### Foreign Legislation

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6. European Parliament and Council of the European Union, “Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights”, Official Journal L 157
7. *Copyright Act 1968*, No 63, 1968 (Australia)
8. *Copyright, Designs and Patents Act 1988*, 1988, c 48 (United Kingdom)

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25. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69
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27. *Montréal (City) v 2952-1366 Québec*, 2005 SCC 62
28. *Newbould v Canada*, 2017 FCA 106
29. *Nortel Networks Corp, Re*, 2017 ONSC 700
30. *Reference re Broadcasting Act*, 2012 SCC 4
31. *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123
32. *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311
33. *Rogers Communications v Voltage Pictures, LLC*, 2018 SCC 38
34. *R v CBC*, 2018 SCC 5
35. *R v Mentuck*, 2001 SCC 76

36. *R v Oakes*, [1986] 1 SCR 103
37. *R v Sharpe*, 2001 SCC 2
38. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573
39. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8
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49. Canadian Radio-television and Telecommunications Commission, Telecom Regulatory Policy 2009-657

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