Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC

APPELLANT

- and -

BELL MEDIA INC AND OTHERS

RESPONDENTS

MOTION RECORD
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

Caza Saikaley SRL/LLP
#250-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

Alyssa Tomkins (atomkins@plaideurs.ca)
James Plotkin (jplotkin@plaideurs.ca)

Tel: +1 613-565-2292
Fax: +1 613-565-2087

Counsel for the Proposed Intervener

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Tamir Israel

Tel: +1 613-562-5800 ext 2914
Fax: +1 613-562-5417
Email: tisrael@cippic.ca

Counsel for the Proposed Intervener

TO: **OFFICE OF THE REGISTRY**
Federal Court of Appeal

AND TO: **CONWAY BAXTER WILSON LLP/SRL**
#400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin Baxter (cbaxter@conway.pro)
Julie Mouris (jmouris@conway.pro)

Tel: +1 613-288-0149
Fax: +1613-688-0271

Counsel for the Appellant, Teksavvy Solutions Inc

AND TO: **SMART & BIGGAR**
#3300-1000 de la Gauchetière Street West
Montréal, PQ H3B 4W5

François Guay (fguay@smart-biggar.ca)
Guillaume Lavoie Ste-Marie (glavoiestemarie@smart-biggar.ca)
Joshua Neubarth (jneubarth@smart-biggar.ca)
Olivier Jean-Lévesque (ojean-levesque@smart-biggar.ca)

Tel: +1 514-954-1500
Fax: +1 514-954-1396

Counsel for the Respondents, Bell Media Inc, Groupe TVA Inc, Rogers Media Inc, Bell Canada, Fido Solutions Inc, Rogers Communications Canada Inc and Videotron Ltd

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WRITTEN REPRESENTATIONS

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1. By way of this motion, the Moving Party, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order, in the form of Schedule "A" to its Notice of Motion, for leave to intervene in this proceeding.[1]

PART I - THE FACTS

2. The decision under appeal in this proceeding would establish a novel website-blocking remedy, compelling Canadian Internet Service Providers to prevent Canadians from accessing websites found on a *prima facie* basis to have infringed Canadian copyright laws. The decision is both novel and potentially wide-ranging. It implicates interests beyond those of the parties to the proceeding, including the rights of Internet subscribers in Canada under section 2(b) of the *Charter of Rights and Freedoms*. The Moving Party seeks leave to intervene on the public interest dimensions of this appeal.

3. CIPPIC is a legal clinic based at the University of Ottawa. CIPPIC's mandate is to research and advocate in the public interest on issues arising at the intersection of law and technology. CIPPIC regularly intervenes before courts, tribunals, and other decision-making bodies in order to bring forward important public interest perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will impact online freedom of expression, the *Copyright Act*'s legislative balance between copyright holders' and users' rights, and the enforcement role played by Internet intermediaries when users of their services are

[1] Notice of Motion, Moving Party's Motion Record, Tab 1.

accused of infringing various legal rights.[2] CIPPIC has extensive and distinct institutional knowledge and expertise relating to the specific impact of intermediary-based rights enforcement on digital expression and legal doctrine. Indicative examples include:

- CIPPIC's testimony before the House of Commons Legislative Committee on Bill C-32 (the *Copyright Modernization Act*, March 8, 2011);
- CIPPIC's participation as a party in the regulatory proceeding that let do Telecom Decision CRTC 2018-384 (refusing an application to establish an independent body for compelling ISPs to block access to websites alleged to have infringed copyright law);
- CIPPIC's interventions in *National Post v Fournier*, FCA File Nos A-394-12 & A-395-12 (the obligations imposed on online discussion platforms with respect to user activity alleged to have infringed the *Copyright Act*); *Rogers Communications v Voltage Pictures*, 2018 SCC 38 (obligations imposed on ISPs by the *Copyright Act* when copyright holders seek their assistance in identifying alleged infringers); and *Crookes v Newton*, 2011 SCC 47 (whether publication occurs where an individual or a search engine posts a hyperlink to content alleged to contain defamatory statements); and
- through its membership in the Civil Society Information Society Advisory Council to the OECD, CIPPIC's input into "The Role of Internet Intermediaries in Advancing Public Policy", (OECD, 2011).[3]

PART II - POINTS IN ISSUE

4. The only issue in this motion is whether CIPPIC should be granted leave to intervene.

PART III - SUBMISSIONS

5. Under Rule 109 of the *Federal Court Rules* ("Rules"), the Court has the power to grant any person leave to intervene in a proceeding.[4] Paragraph 109(2)(b) requires a proposed intervener to describe how its proposed participation will assist the court in determining the factual or legal issues before it.[5] Rule 3 generally requires that the *Rules* be applied "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[6]

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[2] Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6-14.
[3] Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, para 5.
[4] *Federal Court Rules*, SOR/98-106, Rule 109.
[5] *Federal Court Rules*, SOR/98-106, paragraph 109(2)(b)
[6] *Federal Court Rules*, SOR/98-106, Rule 3.

6. The test for granting public interest intervener status is flexible and discretionary. The factors to be considered were affirmed in *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, and are listed in *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120.[7] These factors are non-exhaustive, and their relative weight and emphasis is contextually driven.[8] In this instance, the central consideration is whether the moving party has demonstrated its proposed intervention will assist the Court in determining the public dimensions of a factual or legal issue before it in an expeditious manner.[9]

7. It may be sufficient to establish an organization's capacity to assist the court by demonstrating that its interest in an appeal is 'genuine' rather than 'jurisprudential' in nature,[10] based on its institutional competence on the legal or factual matters at issue.[11] Where an organization can demonstrate practical experience with the legal context of its proposed intervention, its interest is 'genuine' and indicative of its ability to offer useful insights on the effects of competing legal interpretations.[12] Practical experience can be demonstrated through 'on the ground' experience with the legal or factual context at issue or through a history of high-profile interventions in appellate courts on related matters.[13] By contrast, where an organization would focus its intervention on the effect competing interpretations will have on its members or the general state of the law, its interest will be jurisprudential in nature and insufficient.[14]

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[7] *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 40.

[8] *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 42.

[9] *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 40; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19; *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 5-6, 9 and 18; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 6.

[10] *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 6 and 20-21.

[11] *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, paras 19 and 28-29; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 11.

[12] *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19.

[13] *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, paras 11 and 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19.

[14] *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 20-22; *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34, para 30.

8. A public interest organization must further demonstrate through its proposed submissions that it will offer useful insights distinct from those of other parties. An organization can do so by proposing submissions that "invoke a body of jurisprudence that existing parties have not invoked, ask [the Court] to interpret certain jurisprudence differently, or acquaint the Court with the larger implications associated with its ruling."[15] The level of granular particularity with which an organization must establish this non-duplicative utility can vary. Where an organization has demonstrated substantial institutional expertise, less granular particularity is required.[16] Where an organization is not drawing on substantial institutional expertise in its proposed submissions, it must demonstrate its capacity for useful differentiation with greater particularity in its proposed submissions.[17]

9. Finally, a number of residual contextual factors are relevant. First, a proposed intervener cannot expand the issues raised by the parties, and should file its motion to intervene expeditiously so as not to disrupt pre-existing timelines.[18] Where an appeal raises novel and complex issues with important public dimensions, it becomes additionally important for the Court to be exposed to perspectives beyond those offered by the parties before it.[19] Also, where a proposed intervention would remedy or create an 'inequality of arms' among parties, this can impact whether its intervention will be granted or not.[20]

10. CIPPIC's interest in this proceeding is genuine, and arises from its long history of involvement in online expression, balanced copyright, and the enforcement role played by various Internet intermediaries with respect to user-initiated rights infringement. CIPPIC's historic involvement has included substantial on-the-ground experience

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[15] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102, para 49.

[16] *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17; *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19 and paras 27-29; *Gitxaala Nation v Canada*, 2015 FCA 73, paras 32 and 34, and paras 21 and 25.

[17] *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, para 19.

[18] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174, para 15; *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34, para 29; *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 15.

[19] *Lukács v Canada (Transportation Agency)*, 2014 FCA 292, para 19; *Gitxaala Nation v Canada*, 2015 FCA 73, para 35.

[20] *Gitxaala Nation v Canada*, 2015 FCA 73, paras 23-24 and 35-36.

advising entities impacted by competing intermediary-based enforcement models, and has included numerous high profile interventions in appeals that defined a rights-enforcement role for Internet intermediaries.[21] CIPPIC has a comparable record of institutional involvement in advocating for interpretations that fully realize the legislative balance between copyright and users' rights which permeates the *Copyright Act*.[22] CIPPIC will draw on this institutional expertise to provide the court with insights into the legislative purpose underpinning the intermediary enforcement regime for copyright.[23] In addition, CIPPIC's proposed submissions (detailed below) invoke a body of jurisprudence that the parties to the proceeding have not invoked, and will acquaint the Court with the broader implications raised by its ruling.

11. A number of residual contextual factors weigh in favour of granting CIPPIC's proposed intervention. CIPPIC has sought leave to intervene in a timely manner, and its intervention will not impede the just and expeditious determination of the matters before the Court. CIPPIC has coordinated with other known potential interveners in order to avoid duplication, and will continue to do so should it be granted leave to intervene.[24]

12. The website blocking order adopted by the Court below is novel, complex, and implicates public dimensions that CIPPIC is well placed to address. No order of this type has been previously issued in Canada.[25] The detrimental impact of the order under appeal will fall most heavily on Internet users in Canada. Yet the ISP third party respondents to the order sought in the court below are predominantly aligned with the Applicant or neutral as to the remedy in question.[26] While the single Appellant in this proceeding is capable of advancing concerns on its customers' behalf, CIPPIC's mandate is to advocate in the public interest on matters arising at the intersection of law and technology, and is better placed to speak to these impacts.

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[21] Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6(i) and (iii), 7(iii)-(vii) and (ix), 8(iii), 10(i) and (iii), and 11.

[22] Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 6, 7(ii)-(iv), (vi) and (viii), 8(ii)-(iii), 9(ii)-(v), 10(ii) and 11.

[23] *Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120, para 17.

[24] Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, para 17.

[25] *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, para 8.

[26] *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, para 3.

CIPPIC'S PROPOSED SUBMISSIONS LEVERAGE ITS EXPERTISE AND WILL BE USEFUL AND DISTINCTIVE

13. The grounds for appeal are set out in the Appellant's Notice of Appeal, namely that:

    a. The Judge erred in law in finding that the remedy for ordering Third Party Responding Internet Service Providers to block access to websites (the "site-blocking remedy") was available at law, including in particular, that it was available under the *Copyright Act*, RSC 1985, c C-42 (the "*Copyright Act*").

    b. The Judge erred in law in finding that section 36 of the *Telecommunications Act*, SC 1993, c 38 (the "*Telecommunications Act*") did not apply to the site-blocking Order ... given that section 36 provides that Canadian carriers cannot control the content of telecommunications that they carry for the public without the approval of the Canadian Radio-television and Telecommunications Commission.

    c. The Judge erred in law in his interpretation and application of the test for a mandatory injunction under *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"). In particular, the Judge erred in law by importing and substituting factors from foreign jurisdictions into the *RJR-MacDonald* test.

    d. The Order ought to be set aside because it is not compliant with section 2(b) of the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the "*Charter*"), and affects the free speech of millions of Canadian Internet users.

    CIPPIC's proposed submissions will provide a different, yet relevant and valuable, perspective on these grounds without expanding the issues as framed by the parties.

14. Specifically, CIPPIC's proposed submissions will address the following points:

    a. ISP-based website blocking is an intrusive remedy, incompatible with the right to free expression, the legislative balance between copyright holders' and users' rights that sits at the heart of the *Copyright Act*, and principles of common carriage found in the common law and encoded into the *Copyright Act* and the *Telecommunications Act*;

b. Section 36 of the *Telecommunications Act* provides the Canadian Radio-television and Telecommunications Commission ("CRTC") with an important role to play in securing net neutrality, including by ensuring that ISP-based traffic handling measures are not excessive or disruptive in their application. ISP-based website blocking orders have a significant potential to disrupt communication networks and interfere with future network innovation.[27] Any ISP-based website blocking order must therefore ensure it does not undermine the CRTC's legislatively mandated role for monitoring net neutrality and ISP interference with transmitted content;

c. Parliament enacted a complete, specific and comprehensive regime for Internet intermediaries in the *Copyright Act*, with clearly articulated roles for different types of intermediaries such as Internet Service Providers, search engines, and content hosts. This comprehensive regime was designed to carefully balance the interests of competing stakeholders in addressing the issue of online piracy. It purposefully excludes website blocking injunctions issued against ISPs for user-generated infringement, even as it expressly includes such relief for other intermediaries such as search engines. Remedies for copyright infringement must be found in the *Copyright Act*, and more specifically, in the complete regime adopted by Parliament for intermediary rights enforcement. The Court's reliance on its inherent powers of injunctive relief must be informed by this legislative context;

d. Website blocking remedies should not issue as interim relief. In this instance, no additional steps are being taken to bring the defendants before the Court to defend their actions. It is therefore possible for the Court to determine now, on a final basis, whether the websites in question infringe copyright. In other contexts, courts have recognized the importance of rigorously testing the factual and legal basis of a copyright infringement claim prior to enlisting Internet intermediaries. The intrusive nature of ISP-based website blocking orders is such that these should not issue on a *prima facie* basis alone, particularly in legislative contexts where they are not

[27] See, for example, CRTC, Enforcement and Compliance Branch, Commission Letters to Rogers Communications Inc, Re Section 36 of the *Telecommunications Act*, and Paragraphs 126 and 127 of *Telecom Regulatory Policy CRTC 2009-657*, CRTC File #545613, dated January 20, 2012; February 29, 2012; and June 28, 2012, CIPPIC Motion Record, Tab 5.

available as a final remedy. The test for a permanent injunction must be met, including the obligation to rigorously demonstrate that monetary compensation cannot make the plaintiff whole; and

e. A website blocking injunction, if available, should remain extraordinary in nature, and factors justifying its issuance in particular instances must be strictly applied. In light of the intrusiveness of such remedies, they must only issue as a last resort, where less intrusive and more effective remedies have been shown to fail. The test for issuing injunctive relief of this nature must therefore be applied stringently, in particular with respect to criteria such as 'necessity' and 'effectiveness'. The record of this Appeal demonstrates that less intrusive, more effective options are readily available to the Respondents, and therefore fails to demonstrate that this new and intrusive remedy is necessary for addressing the problem of online copyright infringement in Canada.

15. In addressing these points, CIPPIC will draw on its extensive institutional expertise and its perspective as an organization whose mandate is to advocate in the public interest.

PART IV - ORDER SOUGHT

16. CIPPIC respectfully requests that its motion for leave to intervene be granted, with conditions set out in Schedule A to its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2020

Alyssa Tomkins
Counsel for the Proposed Intervener

Caza Saikaley SRL/LLP
#250-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

Tel: +1 613-565-2292
Fax: +1 613-565-2087
Email: atomkins@plaideurs.ca

James Plotkin
Counsel for the Proposed Intervener

Caza Saikaley SRL/LLP
#250-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

Tel: +1 613-564-8271
Fax: +1 613-565-2087
Email: jplotkin@plaideurs.ca

Tamir Israel
Counsel for the Proposed Intervener

Samuelson-Glushko Canadian Internet
Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law,
Common Law Section
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Tel: +1 613-562-5800 x 2914
Fax: +1 613-562-5417
Email: tisrael@cippic.ca

PART V - AUTHORITIES

Statutory Provisions	
1.	*Federal Court Rules*, SOR/98-106, Rules 3 and 109
Regulatory Decisions	
2.	Canadian Radio-television and Telecommunications Commission, Enforcement and Compliance Branch, Commission Letters to Rogers Communications Inc, Inc, Re Section 36 of the *Telecommunications Act*, and Paragraphs 126 and 127 of *Telecom Regulatory Policy CRTC 2009-657*, CRTC File #545613, dated January 20, 2012; February 29, 2012; and June 28, 2012
Case Law	
3.	*Atlas Tube Canada ULC v Canada (National Revenue)*, 2019 FCA 120
4.	*Bell Media Inc v GoldTV.Biz*, 2019 FC 1432
5.	*Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34
6.	*Gitxaala Nation v Canada*, 2015 FCA 73
7.	*Lukács v Canada (Transportation Agency)*, 2014 FCA 292
8.	*Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120
9.	*Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44
10.	*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102
11.	*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174