

**FEDERAL COURT OF APPEAL**

BETWEEN:

**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.**

**VIDEOTRON LTD.**

Respondents

- and -

**CANADIAN INTERNET REGISTRATION AUTHORITY**

**THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC**

**INTEREST CLINIC**

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Intervenors

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## OVERVIEW

1. At its root, this appeal stems from an action for copyright infringement by the Respondents against the operators of online services that, for a nominal fee, provide users in Canada and abroad with unauthorized access to a massive amount of television programming and motion pictures, including programming for which the copyright is owned by or exclusively licensed to the Respondents. Given the clearly illegal and highly lucrative nature of their activities, the operators of these services (“GoldTV Services”) put in place measures to remain anonymous and avoid prosecution.
2. Facing the untenable prospect of their content remaining continuously infringed, the Respondents launched an action against these anonymous operators on a “John Doe” basis and obtained interim and interlocutory injunctive relief against them. Despite substituted service of the injunctions upon the Defendants, they never appeared on the record and important aspects of the GoldTV Services remained in operation.
3. Because enjoining the Defendants from *distributing* infringing content was ineffective, the Respondents sought an injunction that would preclude Canadian users from *receiving* the Defendants’ infringing content. In practice, this entails ordering Internet Service Providers to impede access to the GoldTV Services by their subscribers, a remedy known as a “site-blocking injunction”.
4. On November 15, 2019, the Honourable Mr. Justice Gleeson granted the Respondents’ motion. In his detailed reasons, he concluded that the Federal Court possesses broad injunctive powers for the protection of a plaintiff’s rights, including the power to issue injunctions against third parties that are not wrongdoers but that are in a position to put an end to the infringement or otherwise assist a plaintiff. This power, which does not necessarily or exclusively rest on statutory law but rather on the Court’s powers in equity, is notably reflected in the long-recognized Norwich and Mareva-type injunctions, in search engine de-indexing injunctions very recently upheld by the Supreme Court, and in a recent UK case where the Court of Appeal of England and

Wales upheld a site-blocking injunction in a statutory and equitable framework analogous to the present case.

5. In issuing the injunction under appeal, Mr. Justice Gleeson was explicitly mindful of the principles of net neutrality, of the telecommunications law “common carrier” doctrine, and of the *Charter* right to freedom of expression. He concluded that these principles do not trump the Federal Court’s equitable powers, but rather that they should be considered in deciding whether an injunction is just and equitable in the circumstances. Mr. Justice Gleeson was also mindful of the CRTC’s jurisdiction and properly held that the *Telecommunications Act* neither interferes with the Federal Court’s clear jurisdiction in this context, nor gives the CRTC a veto over Orders made by the Federal Court pursuant to this jurisdiction.

6. Applying these principles to the vast evidentiary record before him, Mr. Justice Gleeson held that the Respondents were entitled to the relief sought, subject to the injunction containing numerous safeguards to protect the interests of those who could be affected by his Order.

7. The Appellant disagrees with Mr. Justice Gleeson’s findings, mostly for policy reasons. Be that as it may, the Order appealed from is well-founded in fact and law, and it must therefore stand.

## **PART I – CONCISE STATEMENT OF FACTS**

### **A. Background: evolution of piracy and its effects on the Respondents**

8. Piracy is an age-old problem faced by the producers and owners of copyright in media content, and is exacerbated by the fact that those who illegally reproduce and distribute infringing copies of protected works go to great lengths to conceal their identity and the true nature of their activities in order to avoid the legal consequences of their actions.<sup>1</sup>

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<sup>1</sup> *Bell Canada v Lackman*, 2018 FCA 42, paras. 49-50 (de Montigny J.A.) [*Lackman*]; *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38, para. 1 (Brown J.)

9. Over the years, the tools used to distribute infringing content have moved from physical media (ex.: counterfeit CDs and DVDs), to satellite signal piracy, to peer-to-peer Internet systems (ex.: Napster, Kazaa, BitTorrent), to online streaming.<sup>2</sup> Each new technological advance brings infringing content closer to (sometimes unsuspecting)<sup>3</sup> users, while at the same time allowing infringers to move away from the spotlight and remain anonymous.

10. The present case is the latest chapter in this story.

11. Canadian courts have so far successfully adapted to advances in piracy technology by turning to their broad discretionary powers in order to issue remedies that can effectively put an end to the infringement, including injunctions adapted to the specific needs of each case.

12. The Federal Courts' familiarity with the technology relevant to the present matter dates back to 2016. At the time, the Respondents Bell Media Inc., Groupe TVA Inc., Rogers Media Inc. (the “**Respondents**”) and their affiliates noticed the appearance and rapid proliferation of “pre-loaded set-top boxes” on the Canadian market. Set-top boxes are electronic devices that can be connected to any standard television in order to provide additional functionalities and by themselves are not necessarily illegal.

13. “Pre-loaded” set-top boxes are preconfigured with a selection of applications designed to provide unauthorized access to live and on-demand motion pictures, television programs and television stations. They are typically advertised as a cheap or

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[*Voltage*]; see also: *Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, 2011 FC 776, para. 173 (Russell J.)

<sup>2</sup> See for example: *Long Shong Pictures (H.K.) Ltd. v NTC Entertainment Ltd.* (2000), 6 CPR (4th) 509 (O’Keefe J.) (FC) (CDs and DVDs); *Titan Sports Inc. v Mansion House (Toronto) Ltd.* (1989), 28 CPR (3d) 199 (MacKay J.) (FC) (satellite piracy); *BMG Canada Inc. v John Doe*, 2004 FC 488 (Von Finckenstein J.) (peer-to-peer systems); *Lackman*, *supra* note 1 and Affidavit of Yves Rémillard, dated July 15, 2019 (“Rémillard Aff.”), para. 13 [Joint Appeal Book (“AB”), Vol. 4, Tab 15] (streaming)

<sup>3</sup> *Bell Canada v 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, para. 26 (Tremblay-Lamer J.) [*iTVBox*]

no-monthly-fee alternative to legitimate television services, and their intuitive and sophisticated interface vastly simplifies and expands access to infringing content.<sup>4</sup>

14. As the owners or exclusive licensees of copyright in television programming in Canada,<sup>5</sup> the Respondents were understandably concerned about the rapidly growing availability of these devices on the market.

15. On June 1, 2016, at the Respondents' request, the Honourable Madam Justice Tremblay-Lamer issued an interlocutory injunction in Federal Court File No. T-759-16 against five (5) retailers of pre-loaded set-top boxes that operated online and/or from established brick-and-mortar locations in Canada.<sup>6</sup> Due to their rapidly increasing presence on the market, the injunction allows the plaintiffs to implead additional retailers as they are identified on the market. Approximately 175 defendants are now named in that matter,<sup>7</sup> some of which have attempted to evade service and/or have been accused of and found guilty of contempt of Court.<sup>8</sup>

16. The pre-loaded set-top boxes sold by these defendants are often configured with a few types of applications and services, including:

- a) The “Kodi” application – a media player that allows users to play video and audio content located on their electronic devices – along with customized “addons” that provide access to infringing content on the Internet. This application

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<sup>4</sup> Affidavit of Shawn Omstead dated July 15, 2019 (“Omstead Aff.”), paras. 52-58 [AB, Vol. 1, Tab 11]

<sup>5</sup> Omstead Aff., paras. 16-17, Exhibit SO-3 [AB, Vol. 1, Tabs 11 and 11C]; Affidavit of Peggy Tabet, dated July 15, 2019 (“Tabet Aff.”), paras. 11-12, Exhibit PT-3 [AB, Vol. 3, Tabs 13 and 13C]; Affidavit of Colette Watson, dated July 16, 2019 (“Watson Aff.”), paras. 13-14, Exhibit CW-4 [AB, Vol. 6, Tabs 16 and 16D]

<sup>6</sup> *iTVBox*, supra note 3

<sup>7</sup> *Bell Canada v Red Rhino Entertainment Inc.*, 2019 FC 1460, para. 7 (Norris J.) [*Red Rhino*]

<sup>8</sup> *Bell Canada v Wesley*, 2016 FC 1379 (LeBlanc J.); *Bell Canada v Wesley*, 2018 FC 66 (Roy J.); Order Validating Service dated May 6, 2019, Federal Court File No. T-759-16 (Tabib P.) (unreported); *Red Rhino*, supra note 7, para. 68; Order dated September 6, 2018, Federal Court File No. T-759-16 (Tabib P.) (unreported); Omstead Aff., paras. 59-60 [AB, Vol. 1, Tab 11]

bundle typically provides free and unlimited access to infringing television programming and motion pictures.

b) Subscription-based Internet streaming services that transmit unauthorized live and on-demand television content and motion pictures from around the world, including Canada (“**Unauthorized Subscription Services**”, also sometimes referred to as “Private IPTV Services”). These services are available without geographic restriction and operate on a subscription-based model. For a very low monthly fee (ex.: \$15 per month), users can access a content offering that is significantly more extensive (ex.: thousands of television stations and a vast array of on-demand content) compared to legitimate and licensed television services that are available at an even remotely comparable price.

17. On February 20, 2018, this Court issued an injunction against the Canadian distributor of most of the infringing Kodi add-ons installed on pre-loaded set-top boxes.<sup>9</sup> As a result, these applications fell out of favour and Unauthorized Subscriptions Services gained in popularity.<sup>10</sup> With time, Unauthorized Subscriptions Services also moved away from being predominantly available on pre-loaded set-top boxes and are now accessible on many other devices and platforms, such as computers, tablets, mobile phones, etc.<sup>11</sup>

18. This matter pertains to Unauthorized Subscription Services that blatantly and massively infringe the Respondents’ copyright in their television programming.

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<sup>9</sup> *Lackman*, supra note 1; Omstead Aff., paras. 61-63 [AB, Vol. 1, Tab 11]

<sup>10</sup> Rémillard Aff., paras. 14-15 [AB, Vol. 4, Tab 15]

<sup>11</sup> Affidavit of Anthony Martin, dated July 15, 2019 (“Martin Aff.”), para. 39 [AB, Vol. 3, Tab 14]

## **B. The underlying action for copyright infringement against the GoldTV Services and the John Doe Defendants**

### *i. The GoldTV Services*

19. On July 18, 2019, the Respondents launched an action for copyright infringement in the underlying Federal Court file against the operators of two of the most popular Unauthorized Subscription Services in Canada, both known as “GoldTV” (the “**GoldTV.biz Service**” and the “**GoldTV.ca Service**”, collectively the “**GoldTV Services**”), which together attracted nearly 250,000 monthly visits.<sup>12</sup>

20. From a user’s perspective, the experience of subscribing to and using one of the GoldTV Services is highly intuitive and almost akin to the experience with a legitimate television service,<sup>13</sup> except for the lower subscription cost, the larger amount of content, and the important distinction that the GoldTV Services operate without the authorisation of copyright owners, including the Respondents.<sup>14</sup>

21. Users can easily purchase a monthly subscription on the GoldTV Services’ websites or that of a reseller.<sup>15</sup> Once subscribed, they are presented with an electronic program guide that emulates a legitimate television service and that provides unauthorized access to hundreds or thousands of stations.<sup>16</sup>

22. Needless to say, users who subscribe to one of the GoldTV Services have no incentive to maintain their subscriptions to legitimate television services.<sup>17</sup>

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<sup>12</sup> Martin Aff., paras. 45 and 66 [AB, Vol. 3, Tab 14]

<sup>13</sup> Martin Aff., paras. 38-39, 59-60 and 72-75 [AB, Vol. 3, Tab 14]

<sup>14</sup> Martin Aff., paras. 46 and 67 [AB, Vol. 3, Tab 14]; Rémillard Aff., paras. 22 and 24 [AB, Vol. 4, Tab 15]; Omstead Aff., para. 5 [AB, Vol. 1, Tab 11]; Watson Aff., para. 4 [AB, Vol. 6, Tab 16]; Tabet Aff., para. 5 [AB, Vol. 3, Tab 13]

<sup>15</sup> Martin Aff., paras. 56-57 and 69 [AB, Vol. 3, Tab 14]; Rémillard Aff., paras. 25 and 33-40 [AB, Vol. 4, Tab 15]

<sup>16</sup> Martin Aff., paras. 59 and 72-74 [AB, Vol. 3, Tab 14]

<sup>17</sup> *iTVBox*, supra note 3, para. 31

*ii. The John Doe Defendants and the interim and interlocutory injunctions*

23. Given the highly lucrative nature of their illicit activities and their advanced technical knowledge, the operators of online infringing services generally – and of Unauthorized Subscription Services specifically – often use a number of methods to avoid prosecution, such as never using their real identity in online activities, registering websites with false information, controlling their websites through offshore corporations, having offshore bank accounts, using false business names and identities to receive payments, etc.<sup>18</sup> As a result, their identification and prosecution almost always require considerable time and resources, and are often simply impossible.<sup>19</sup>

24. The present case is no different. Despite their best investigative efforts, the Respondents were unable to identify the operators of the GoldTV Services.<sup>20</sup> The Respondents therefore launched the underlying action against two “John Doe” Defendants: John Doe 1 dba GoldTV.biz and John Doe 2 dba GoldTV.ca.

25. On July 25, 2019, the Honourable Mr. Justice LeBlanc issued an interim injunction against the John Doe Defendants, enjoining them from operating the GoldTV Services.<sup>21</sup> Given the Defendants’ anonymity, the injunction was accompanied by an Order for substituted service, pursuant to which the Plaintiffs served them by e-mail and online forms with the Statement of Claim, the interim injunction and their motion materials for an interlocutory injunction.<sup>22</sup>

26. On August 8, 2019, following a hearing at which the Defendants failed to appear, the Honourable Madam Justice Kane issued an interlocutory injunction against them in essentially the same terms as the interim injunction, accompanied by a similar Order

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<sup>18</sup> Martin Aff., para. 33 [AB, Vol. 3, Tab 14]; Rémillard Aff., paras. 16d) and 56-57 [AB, Vol. 4, Tab 15]

<sup>19</sup> Rémillard Aff., paras. 16d) and 58 [AB, Vol. 4, Tab 15]

<sup>20</sup> Rémillard Aff., paras. 61 and 68 [AB, Vol. 4, Tab 15]

<sup>21</sup> Order issued by Mr. Justice LeBlanc on July 25, 2019 [AB, Vol. 1, Tab 6]

<sup>22</sup> Order issued by Mr. Justice LeBlanc on July 25, 2019 [AB, Vol. 1, Tab 7]; Affidavit of Florence-Élyse Ouellette, dated July 29, 2019, (“Ouellette Aff.”) paras. 4-12 [AB, Vol. 7, Tab 22]

for substituted service.<sup>23</sup> The Plaintiffs served these Orders upon the Defendants on the same day.<sup>24</sup>

27. Following the issuance of these injunctions, it appears that the operator(s) of the GoldTV.ca Service deactivated the service, at least temporarily.<sup>25</sup> They have however not filed a Statement of Defence in the underlying action, nor have they otherwise appeared on the record. As for the GoldTV.biz Service, it remained entirely operational.<sup>26</sup> Its operator(s) are also in default and have not otherwise appeared on the record, and there is no indication that they will do so in the future.

### **C. The site-blocking injunction under appeal**

28. Given the ongoing activities of the GoldTV.biz Service, the Respondents brought a further motion before the Honourable Mr. Justice Gleeson (the “**Motion Judge**”) on September 11 and 12, 2019, for an interlocutory injunction directed at eleven (11) third party Internet service providers (“**ISPs**”, the “**Third Party Respondents**” in the Court below) who provide residential Internet services to the vast majority of Canadian users. The Respondents sought an Order enjoining the ISPs to impede access to the GoldTV.biz Service (and to the GoldTV.ca Service if it were to be reactivated) by their Internet subscribers.

29. The Third Party Respondent / Appellant Teksavvy Solutions Inc. opposed the motion on the merits, while another Third Party Respondent (Distributel Communications Limited) opposed only the form of the injunction sought. The other Third Party Respondents consented to or did not oppose the motion.

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<sup>23</sup> Order issued by Madam Justice Kane on August 8, 2019 [AB, Vol. 1, Tab 9]; Order issued by Madam Justice Kane on August 8, 2019 [AB, Vol. 1, Tab 10]

<sup>24</sup> Third Affidavit of Florence-Elyse Ouellette, dated September 3, 2019 (“3<sup>rd</sup> Ouellette Aff.”), paras. 5-14 [AB, Vol. 10, Tab 33]

<sup>25</sup> Third Affidavit of Anthony Martin, dated September 3, 2019 (“3<sup>rd</sup> Martin Aff.”), paras. 32-39 [AB, Vol. 9, Tab 32]

<sup>26</sup> 3<sup>rd</sup> Martin Aff., para. 27 [AB, Vol. 9, Tab 32]

30. On November 15, 2019, the Motion Judge issued an interlocutory injunction in essentially the terms sought by the Respondents (the “**site-blocking injunction**”), accompanied by detailed reasons. The Motion Judge notably held that he had jurisdiction to issue the site-blocking injunction and that the Respondents had met the applicable test for its issuance. The site-blocking injunction also contains a mechanism to update the list of blocked websites associated with the GoldTV Services if and when its operators attempt to circumvent the effects of the injunction. This is the decision under appeal.

31. Since the issuance of the initial John Doe injunctions and subsequently since the issuance of the site-blocking injunction, the operator(s) of the GoldTV.biz Service have periodically modified its infrastructure in an attempt to evade the injunctions’ effect.<sup>27</sup> By their nature, the site-blocking injunction and these circumvention attempts collectively heavily disrupt (or flatly preclude) the ability of Canadian users to reliably access the GoldTV.biz Service, and of its operator(s) to successfully continue infringing the Respondents’ copyright.<sup>28</sup>

## **PART II – POINTS IN ISSUE**

32. The issues raised in the present appeal are as follows:

- a) What is the standard of review applicable to the discretionary decision of a motion judge granting an interlocutory injunction?
- b) Did the Motion Judge err in finding that a site-blocking injunction is available at law and that the Federal Court has jurisdiction to issue this remedy?
- c) Does the *Charter* apply to the Order under appeal and, if so, did the Motion Judge err in its application?

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<sup>27</sup> Second Affidavit of Yves Rémillard, dated September 3, 2019 (“2<sup>nd</sup> Rémillard Aff.”), paras. 8-15 [AB, Vol. 9, Tab 31]; 3<sup>rd</sup> Martin Aff., paras. 15-27 [AB, Vol. 9, Tab 32]; Fourth Affidavit of Anthony Martin, dated December 3, 2019, paras. 15-32 [AB, Vol. 10, Tab 38], Third Affidavit of Yves Rémillard, paras. 8-11 [AB, Vol. 10, Tab 39]

<sup>28</sup> Affidavit of Erone Quek, dated July 22, 2019 (“Quek Aff.”), paras. 74-98 [AB, Vol. 6, Tab 21]

d) Did the Motion Judge err in concluding that a site-blocking injunction is just and equitable in the circumstances and that the Respondents met the applicable test for its issuance?

## **PART III – SUBMISSIONS**

### **A. Standard of Review**

33. In its memorandum of fact and law, the Appellant never addresses the applicable standard of review and often fails to explicitly qualify the nature of the Motion Judge’s alleged errors. In some cases, the Appellant clearly presents policy arguments unsuited for this forum rather than identifying reviewable errors of fact or law.

34. Many of the Appellant’s arguments also turn on the Motion Judge’s exercise of his discretion and assessment of the evidence. While the Appellant may disagree with these findings, they ought not to be overturned absent a palpable and overriding error, which is a highly deferential standard.<sup>29</sup>

### **B. The Federal Court has jurisdiction to issue a site-blocking injunction to protect a plaintiff’s rights under the *Copyright Act***

35. The essence of the Appellant’s argument on this ground is that because the *Copyright Act* is a “complete code” of rights and remedies for the protection and enforcement of copyright, which does not *specifically* and *explicitly* mention site-blocking injunctions, this remedy is necessarily unavailable at law.

36. To support this proposition, the Appellant attempts to draw a contrast between the situation in Europe, where the availability of site-blocking injunctions was codified in a European Parliament Directive<sup>30</sup> and locally implemented in various European

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<sup>29</sup> *Housen v Nikolaisen*, 2002 SCC 33, paras. 8, 10 and 27 (Iacobucci and Major JJ.); see also: *Imperial Manufacturing Group Inc. v Decor Grates Inc.*, 2015 FCA 100, paras. 19, 29 and 40 (Stratas J.A.); *Canada v South Yukon Forest Corporation*, 2012 FCA 165, para. 46 (Stratas J.A.)

<sup>30</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001*, art. 8(3)

jurisdictions, and our Parliament’s alleged decision not to explicitly spell out this remedy in the *Copyright Act*.

37. The Appellant’s argument on this point raises a number of issues that can be simplified as follows: are site-blocking injunctions available under the *Copyright Act*; does the Federal Court have jurisdiction to issue a site-blocking injunction; is that jurisdiction limited by statute; should the Federal Court decline to exercise its jurisdiction due to policy or procedural considerations; and does the jurisdiction of the Canadian Radio-television and Telecommunications Commission (“CRTC”) under the *Telecommunications Act* trump that of the Federal Court.

*i. The Copyright Act and the Federal Courts Act grant clear jurisdiction and discretionary powers for the issuance of site-blocking injunctions*

38. It should not be contentious that when a party’s property rights are unlawfully encroached upon, Courts of equity have essentially unfettered discretion to issue injunctions to remedy the encroachment.<sup>31</sup>

39. As such, even if a “complete code” statute such as the *Copyright Act* does not explicitly mention injunctions, that remedy is still available to protect property rights under the statute. For matters within its jurisdiction, the Federal Court’s remedial powers are coextensive with those of provincial Courts of inherent jurisdiction, and Courts of inherent jurisdiction possess the power to issue injunctions to protect a party’s rights even without explicit statutory grant:

The Minister’s jurisdiction argument is based on the *Income Tax Act* (the “Act”) being a complete code. The Minister argues that the fact that there are statutory stays in respect of collection of certain types of debts under the Act, and that there is no statutory stay in respect of collection of unremitted payroll deductions, imply that Parliament’s intent is that the Federal Court have [sic] no jurisdiction to grant a discretionary stay.

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<sup>31</sup> *Hamilton (City) v Loucks*, 2003 CarswellOnt 3663, paras. 25-27 (Henderson J.) (Ont. SCJ); see also: *Anne of Green Gables Licensing Authority Inc. v Avonlea Traditions Inc.*, [2000] OJ No 740, para. 279 (Wilson J.) (Ont. SCJ); *Hudson’s Bay Co. v White*, 1997 CarswellOnt 313, para. 37 (Lederman J.) (Ont. SCJ)

An analogous argument was made with respect to the *Canada Labour Code*, in *B.M.W.E. v. Canadian Pacific Ltd*, McLachlin J. (as she then was) pointed out at page 499 that:

The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where “no adequate alternative remedy exists” the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters ...

At pages 501 - 502 she noted that:

If the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief.

The remedial powers of the Federal Court are coextensive with the inherent jurisdiction of a provincial superior court in matters within the Federal Courts’ statutory jurisdiction: see *Canada (Human Rights Commission) v. Canadian Liberty Net*, at paragraph 38.

Having regard to these authorities, I do not accept the Minister’s complete code argument. In an appropriate case, the Federal Court has jurisdiction to grant a discretionary stay or injunction with respect to matters arising under the Act.<sup>32</sup>

40. In any event, the *Copyright Act* does explicitly provide that “where copyright has been infringed, the owner of the copyright is, **subject to this Act, entitled to all remedies by way of injunction** [...] and otherwise **that are or may be conferred by law** for the infringement of a right.”<sup>33</sup> The Federal Court has jurisdiction to enforce the civil remedies provided by the *Copyright Act*<sup>34</sup> and, consequently, has jurisdiction to issue an injunction to put an end to the infringement.

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<sup>32</sup> *Swiftsure Taxi Co., Re*, 2005 FCA 136, paras. 3-6 (Rothstein J.A.), references omitted; see also: *B.M.W.E. v Canadian Pacific Ltd.*, [1996] 2 SCR 495, paras. 5 and 8 (McLachlin J.); *Teledyne Industries Inc. v Lido Industrial Products Ltd.* (1982), 68 CPR (2d) 204, at 227 (Addy J.) (FC); see also *Cimon Ltd v Bench Made Furniture*, (1964), 48 CPR 31, at 66 (Jackett P.) (Ex Ct)

<sup>33</sup> *Copyright Act*, R.S.C., 1985, c. C-42, s. 34(1) [*Copyright Act*]

<sup>34</sup> *Copyright Act*, s. 41.24

41. In the present case, the Motion Judge had to consider whether the scope of the Federal Court’s clear injunctive powers under the *Copyright Act* include the ability to issue the site-blocking injunction under appeal, which is directed at third party ISPs rather than at the Defendants.

42. At the outset of his analysis, he correctly held that sections 4 and 44 of the *Federal Courts Act* establish the Federal Court as a Court of equity and grant it the broad power to issue injunctions whenever it appears just or convenient to do so.<sup>35</sup>

43. It is well established that the power of Courts of equity to issue injunctions is not limited to enjoining defendants; they may bind third parties in various contexts.<sup>36</sup>

44. This principle notably gave rise to two well-recognized types of injunction directed at third parties, which do not derive from specific statutes but rather from the broad injunctive powers of Courts of equity: Norwich-type injunctions that enjoin third parties to disclose information in their possession to a plaintiff, and Mareva-type injunctions that enjoin financial institutions to freeze a defendant’s assets. In both cases, the third party is innocent but its assistance is necessary to allow the plaintiff to enforce its rights against the defendant.<sup>37</sup>

45. The Supreme Court recently recognized that this principle can apply to different and novel types of injunction. In *Equustek*, the injunction ordered Google to de-index a defendant’s website from its search engine results. As is the case for third parties bound by Norwich and Mareva-type injunctions, Google was not a wrongdoer, but its assistance was necessary to preserve the plaintiff’s rights.<sup>38</sup>

46. In finding that the injunctive power of Courts of equity includes the ability to issue “de-indexing” injunctions, the Supreme Court found support not only in the long-

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<sup>35</sup> *Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 4 and 44 [F.C.A.]

<sup>36</sup> *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34, para. 28 (Abella J.) [*Equustek*]; see also: *Glaxo Wellcome PLC v Minister of National Revenue*, (1998), 81 CPR (3d) 372, paras. 20 and 33 (Stone J.A.) (FCA)

<sup>37</sup> *Equustek*, supra note 36, paras. 31 and 33

<sup>38</sup> *Equustek*, supra note 36, paras. 34-35

standing availability of Norwich and Mareva-type injunctions in Canada, but also in the recent decision of the Court of Appeal of England and Wales in *Cartier*.<sup>39</sup> That decision is particularly relevant to the present case as it relates to a similar remedy issued in a similar factual and statutory context.

47. In *Cartier*, the plaintiffs had identified websites that advertised and sold counterfeit copies of products bearing their trademarks.<sup>40</sup> The plaintiffs sent cease and desist letters directly to the websites' anonymous operators, which they simply ignored.<sup>41</sup> To put an end to the infringement, the plaintiffs sought an injunction enjoining third party ISPs to block access to the impugned websites.<sup>42</sup>

48. While the UK copyright act explicitly provides that this remedy is available in copyright infringement matters, the plaintiffs' cause of action was grounded in trademarks law and, much like in the present case, the applicable statute did not explicitly confirm the availability of site-blocking injunctions.<sup>43</sup> As a result, the ISPs in *Cartier* raised the same argument as the Appellant here: the remedy is unavailable because the applicable statute does not mention it.<sup>44</sup>

49. The Court of Appeal of England and Wales dismissed the ISPs' arguments and upheld the High Court's reasoning that its ability to issue a site-blocking injunction was grounded in its inherent injunctive powers, independent of any statutory grant.<sup>45</sup>

50. The High Court's power to issue discretionary site-blocking injunctions regardless of explicit statutory grant stems from its general injunctive powers, provided

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<sup>39</sup>*Equustek*, supra note 36, para. 32; *Cartier International AG v British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 (England and Wales Court of Appeal) [*Cartier CA*]

<sup>40</sup> *Cartier CA*, supra note 39, paras. 1, 3, 10 and 21

<sup>41</sup> *Cartier International AG v British Sky Broadcasting Ltd.*, [2014] EWHC 3354, para. 198 (Arnold J.) (England and Wales High Court)

<sup>42</sup> *Cartier CA*, supra note 39, paras. 3 and 22

<sup>43</sup> *Cartier CA*, supra note 39, para. 5

<sup>44</sup> *Cartier CA*, supra note 39, para. 75

<sup>45</sup> *Cartier CA*, supra note 39, paras. 51-56, see also paras. 46-53 and 57-58

at s. 37(1) of the *Senior Courts Act 1981*. As the Motion Judge correctly observed, these powers mirror those granted by s. 44 of the *Federal Courts Act*.<sup>46</sup>

51. Consequently, the Motion Judge correctly held that the Federal Court possesses sufficient jurisdiction to issue a site-blocking injunction against the Appellant and the other Third Party Respondents. His decision on this point must stand.

*ii. The Federal Court's jurisdiction is not restricted by statute*

52. The Appellant's argument that the Federal Court's injunctive powers are restricted by the silence of the *Copyright Act* is based on an incorrect and inverted understanding of the Court's jurisdiction. The Federal Court's ability to issue specific types of injunctions does not flow from statutes such as the *Copyright Act*, but from its powers in equity.

53. As recently confirmed by the Supreme Court, the power of Courts of equity to issue injunctions is virtually unlimited and can only be restricted by statutory provisions to that effect:

Injunctions are equitable remedies. “The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited.”<sup>47</sup>

54. In order to argue that a type of injunction is unavailable, it is therefore not sufficient to demonstrate that the *Copyright Act* does not explicitly grant that power. Rather, a clear statutory restriction of the Court's inherent injunctive powers must be identified. The Appellant identifies various provisions of the *Copyright Act* that deal with injunctions, including a single section that restricts the Court's ability to issue this remedy in a very specific context (against buildings and other structures),<sup>48</sup> but none that restrict the Court's ability to issue the site-blocking injunction under appeal.

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<sup>46</sup> *Bell Media Inc. v GoldTV.biz*, 2019 FC 1432, paras. 48-49 (Gleeson J.) [AB, Vol. 1, Tab 3] [FC Decision]

<sup>47</sup> *Equustek*, supra note 40, para. 23

<sup>48</sup> *Copyright Act*, s. 40(1)

55. The Appellant suggests that because Parliament did not address site-blocking when it amended the *Copyright Act* in 2012 to add certain liability exemptions for intermediaries and provide for certain specific remedies against them, this remedy is necessarily unavailable. This argument misconstrues the law on equitable injunctions. None of the amendments directly or indirectly restrict the Court's ability to issue the remedy under appeal, which is not grounded in the alleged liability of any intermediary.

56. The Motion Judge's jurisdiction to issue the injunction under appeal was therefore unrestricted by statute and he committed no reviewable error in that regard.

***iii. No legal principle or compelling factual element would justify overturning the Motion Judge's exercise of his discretion in issuing the injunction under appeal***

57. The Appellant also attempts to support its position by raising ancillary arguments to the effect that 1) the injunction under appeal is not an appropriate interlocutory remedy; and 2) Courts are ill-equipped to issue and supervise its implementation.

**A site-blocking injunction is an appropriate interlocutory remedy**

58. In the specific circumstances of this case, the injunction under appeal properly fulfills the role of a typical interlocutory injunction that preserves a plaintiff's rights until a final determination on the merits.

59. In normal circumstances, a plaintiff can obtain an interim injunction valid for up to fourteen (14) days,<sup>49</sup> convert it into an interlocutory injunction valid until final judgment,<sup>50</sup> and seek a permanent injunction at trial. Assuming that the defendant respects the injunctions and that the plaintiff succeeds at trial, the plaintiff's rights will be preserved indefinitely from the issuance of the interim injunction.

60. That said, it is important to consider the nature of the Defendants and of their activities in the present case: they operate blatantly infringing websites,<sup>51</sup> unsurprisingly go to great lengths to hide their identity,<sup>52</sup> and show no respect for the

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<sup>49</sup> *Federal Courts Rules*, SOR/98-106, r. 374 [F.C.R.]

<sup>50</sup> F.C.R., r. 373

<sup>51</sup> Martin Aff., paras. 61-62 and 76-77 [AB, Vol. 3, Tab 14]

<sup>52</sup> Rémillard Aff., paras. 54-61 and 65-68 [AB, Vol. 4, Tab 15]

authority or process of the Federal Court. Despite having been served with the Statement of Claim, motion materials, and the interim and interlocutory injunctions issued against them, neither of the Defendants has served a Statement of Defence, the GoldTV Services remain at least partially active,<sup>53</sup> and its operators take measures to attempt to circumvent Orders of the Court.<sup>54</sup>

61. In contrast with a standard case, the interim and interlocutory injunctions issued against the Defendants simply cannot effectively protect the Respondents' rights. There is no indication that the Defendants will appear on the record, file a Statement of Defence, or participate at trial. The Respondents remain unable to identify the Defendants despite their best efforts,<sup>55</sup> such that a final judgment cannot be effective. It also goes without saying that the likelihood of the Defendants satisfying an award of damages or profits is nil.

62. The situation faced by the Respondents was dire: their rights were blatantly infringed and they continuously suffered extensive damages as a result of the infringement. Yet, the Respondents had no efficient recourse against the Defendants, who could continue profiting from their infringing activities without fear of having to respect a permanent injunction or satisfy a final judgment at trial.

63. Because the Respondents and the Court could not effectively ensure that the Defendants would cease **distributing** infringing content, the Respondents sought an alternative form of relief that has the same practical effect: impeding access to these services so that Canadian Internet subscribers cannot **receive** the infringing content distributed by the Defendants.

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<sup>53</sup> Ouellette Aff., paras. 4-12 [AB, Vol. 7, Tab 22]; Second Affidavit of Florence-Élyse Ouellette, dated August 6, 2019 (“2<sup>nd</sup> Ouellette Aff.”), paras. 6-8 [AB, Vol. 7, Tab 26]; 3<sup>rd</sup> Ouellette aff., paras. 5-14 [AB, Vol. 10, Tab 33]; 3<sup>rd</sup> Martin Aff., paras. 27 and 39 [AB, Vol. 9, Tab 32]

<sup>54</sup> 2<sup>nd</sup> Rémillard Aff., para. 15 [AB, Vol. 9, Tab 31]; 3<sup>rd</sup> Martin Aff., para. 39 [AB, Vol. 9, Tab 32]

<sup>55</sup> Remillard Aff., paras. 59-61 and 65-68 [AB, Vol. 4, Tab 15]

64. The site-blocking injunction under appeal is also only valid for a two-year term,<sup>56</sup> a reasonable period for an interlocutory injunction that is valid until final judgment. As the Supreme Court noted in *Equustek*, “*the length of an interlocutory injunction does not, by itself, convert its character from a temporary to a permanent one.*”<sup>57</sup>

65. As such, the site-blocking injunction under appeal properly fulfills the purpose of an interlocutory injunction: it preserves the Respondents’ rights on an expedited basis by precluding the distribution of and access to infringing content in Canada, and it is temporary in nature.

66. In any event, injunctions aimed at innocent third parties to preserve a plaintiff’s rights can be issued on an interlocutory basis, as is routinely the case of Mareva- and Norwich-type injunctions, and as the Supreme Court recently confirmed in *Equustek*.

*The Federal Court is equipped to issue and oversee site-blocking injunctions*

67. The Appellant’s arguments to the effect that Courts should decline to issue site-blocking injunctions because they are ill-equipped to do so is strictly a policy position and the Appellant does not attempt to identify any reversible error of fact or law in the Motion Judge’s decision. For that reason alone, these arguments should be given no weight in this appeal.

68. In any event, the Appellant’s arguments are unsupported by law or evidence:

- a) The legal framework for the issuance of interlocutory injunctions by Canadian Courts is well established and, as the Motion Judge correctly did and as more fully set out in section D below, various relevant factors can be assessed and applied on a case-by-case basis at each step of the test.<sup>58</sup>
- b) There is no support for the argument that site-blocking injunctions are better suited for the administrative branch of government. In fact, as more fully set out

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<sup>56</sup> FC Decision, supra note 46, para. 115

<sup>57</sup> *Equustek*, supra note 36, para. 51

<sup>58</sup> FC Decision, supra note 46, paras. 51 and 70

in subsection B.iv. below, the CRTC has already explicitly declined jurisdiction over copyright disputes and site-blocking injunctions.

- c) The Motion Judge carefully crafted the injunction under appeal to strike a balance between the Respondents' need to update the injunction on an ongoing basis as the Defendants' infringing infrastructure evolves, the Court's intention to oversee that process, and the need to put in place a streamlined mechanism to do so.<sup>59</sup> It is not unusual for this type of injunction to require updating on a relatively regular basis, as was the case of the de-indexing injunction in *Equustek*<sup>60</sup> and of site-blocking injunctions in the UK.<sup>61</sup>
- d) The Motion Judge correctly considered the risk of over-blocking and the effectiveness of site-blocking in issuing the injunction under appeal.<sup>62</sup> The Appellants identify no reviewable error of fact or law in that reasoning.

**iv. *Section 36 of the Telecommunications Act does not affect the Federal Court's ability to issue the site-blocking injunction under appeal***

69. The Appellant's argument based on s. 36 of the *Telecommunications Act* raises two sub-questions, both explicitly and correctly answered in the negative by the Motion Judge in his decision:

- a) Notwithstanding the Federal Court's clear jurisdiction to issue the site-blocking injunction under appeal, should the Motion Judge have declined jurisdiction in favour of the CRTC; and

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<sup>59</sup> FC Decision, supra note 46, paras. 106-110

<sup>60</sup> *Equustek*, supra note 36, para. 42; *Equustek Solutions Inc. v Jack*, 2015 BCCA 265, paras. 26-27 (Groberman J.A.)

<sup>61</sup> *Twentieth Century Fox Film Corporation & Ors v Sky UK Ltd & Ors*, [2015] EWHC 1082, para. 64 (Birss J.) (England and Wales High Court); *Football Association Premier League Ltd. v British Telecommunications PLC*, [2017] EWHC 480, para. 25. (Arnold J.) (England and Wales High Court); *Cartier CA*, supra note 39, paras. 19 and 133.

<sup>62</sup> FC Decision, supra note 46, paras. 71-81 and 93-94

b) Once the Federal Court has issued a site-blocking injunction, is its implementation subject to CRTC approval?

Section 36 of the Telecommunications Act does not grant the CRTC jurisdiction over the subject-matter of this dispute or the remedy ordered by the Motion Judge

70. The Appellant essentially argues that the CRTC has exclusive jurisdiction to order site-blocking by virtue of s. 36 of the *Telecommunications Act*, which reads:

Except where the Commission [the CRTC] approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.<sup>63</sup>

71. This provision is a particular codification of the long-standing “common carrier doctrine”, which provides that the function of a content “carrier” should be carried out separately from that of a content “supplier” and that the carrier should be “content neutral” in that role. The common carrier is bound to carry goods or services and cannot unjustly discriminate or charge differently based on factors such as the type of content it carries.

ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content.<sup>64</sup>

[...] the oldest principles of the law of carriers, for “a common carrier is as much bound to carry goods as an innkeeper is to lodge a guest”<sup>65</sup>

72. The common carrier doctrine applies not only to ISPs, but also to other types of carriers (ex.: railways, telephone companies, etc.). In fact, s. 36 of the *Telecommunications Act* tracks the earlier codification of the common carrier doctrine found in s. 8 of the *Bell Canada Act*, a provision that was repealed when the *Telecommunications Act* was enacted:

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<sup>63</sup> *Telecommunications Act*, S.C. 1993, c. 38, s. 36

<sup>64</sup> *Reference re Federal Courts Act (Canada)*, 2012 SCC 4, para. 5 (Per curiam)

<sup>65</sup> *Graham & Strang v Dominion Express Co*, 1920 CarswellOnt 56, para. 37  
(Masten J.) (Ont. SCJ) [*Graham & Strang*]

Where the Company provides services or facilities for the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic systems, it shall act solely as a telecommunications common carrier and shall not control the contents or influence the meaning or purpose of messages transmitted, emitted or received.<sup>66</sup>

73. Put simply, the objective of s. 36 of the *Telecommunications Act* is to ensure that common carriers – including Third Party Respondents in the Court below – remain neutral in their carriage of telecommunication signals by prohibiting them from unilaterally controlling the content they carry, for example for commercial, anti-competitive or policy purposes.

74. The present case does not involve a common carrier unilaterally controlling or influencing the content it carries at its own discretion, for example in order to provide itself with an undue advantage over competitors or to disadvantage legitimate communicators. Rather, it involves the Court concluding that a communication is illegal on a strong and uncontested *prima facie* basis and, as a result, enjoining common carriers to block access to that content.

75. The CRTC itself has already held that it lacks jurisdiction in this context: it cannot interpret or apply the *Copyright Act* to conclude that a communication is infringing, and it cannot enjoin ISPs to block access to *any* content under s. 36.<sup>67</sup>

76. As correctly noted by the Motion Judge, the Appellant did not challenge the CRTC's conclusions on its jurisdiction,<sup>68</sup> neither does it do so on appeal. As a result, this conclusion is not an issue in the present appeal and the jurisdictional framework within which the Motion Judge issued his decision is clear: the Federal Court has jurisdiction over the subject-matter and remedy sought by the Respondents, and the CRTC has jurisdiction over neither.

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<sup>66</sup> *Bell Canada Act*, S.C. 1987, c.19., s. 8

<sup>67</sup> *Telecom Decision CRTC 2018-384*, paras. 61, 64, 65 and 67

<sup>68</sup> FC Decision, *supra* note 46, para. 38

*CRTC approval is not required to implement an injunction issued by the Federal Court*

77. The Appellant incorrectly suggests that ISPs may require CRTC authorization in order to implement the site-blocking injunction after its issuance.

78. The Appellant first attempted to raise this argument during the hearing before the Motion Judge, who allowed the filing of supplemental representations on this point.<sup>69</sup> The Appellant elected not to pursue this argument and submitted no authority in support of that position.<sup>70</sup>

79. The Appellant's position is untenable considering applicable legal precedent. Indeed, the Supreme Court recently confirmed that hindering access to a website that provides infringing content does not interfere with the principle of content neutrality,<sup>71</sup> and that the CRTC cannot interfere or conflict with the provisions and enforcement of the *Copyright Act*.<sup>72</sup>

80. A harmonious interpretation of the *Copyright Act* and *Telecommunications Act* could not support the Appellant's position that the CRTC has a veto power over Orders of the Federal Court in copyright matters. Where an ISP is not attempting to unilaterally influence the meaning or purpose of the content it carries but is instead simply implementing an injunction issued by the Federal Court, CRTC approval cannot be required.

81. It is therefore clear that the Federal Court possesses the jurisdiction to issue the injunction under appeal, that this jurisdiction is not restricted by any applicable statutory provision, and that the CRTC's jurisdiction under the *Telecommunications Act* neither ousts nor supplements the Federal Court's jurisdiction in this context. The Motion Judge committed no reviewable error in that regard and his decision must stand.

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<sup>69</sup> FC Decision, *supra* note 46, para. 32

<sup>70</sup> FC Decision, *supra* note 46, para. 40

<sup>71</sup> *Equustek*, *supra* note 36, para. 49

<sup>72</sup> *Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68, paras. 39 and 45 (Rothstein J.); FC Decision, *supra* note 46, para. 41

**C. The Charter does not apply to the Order under appeal and the Motion Judge properly considered freedom of expression in the exercise of his discretion**

*i. The Order under appeal is not an act of government that attracts Charter scrutiny*

82. The Appellant correctly states that the *Charter* does not normally apply to Court Orders in private disputes.<sup>73</sup>

83. This principle is subject to few limited exceptions that were recognized in very particular cases where Orders were analogous to acts of government that can attract *Charter* scrutiny. In *BCGEU*,<sup>74</sup> the *Charter* applied to an injunction issued by the Chief Justice of British Columbia, on his own motion, prohibiting picketing outside the Courts. The injunction was therefore public in nature and akin to an act of government. In *Rahey*,<sup>75</sup> s. 11(b) of the *Charter* applied to the unusually late Order of a criminal Court denying an application for a directed verdict of acquittal. Neither of these cases comes remotely close to the situation of the present matter.

84. The Appellant's position falls apart when it argues that Orders issued in private disputes that rely on statutory law automatically and invariably attract *Charter* scrutiny. The only authority cited on this point is a prominent constitutional text by the late Prof. Peter W. Hogg, stating that where “*a court order is issued on the court's own motion for a public purpose (as in BCGEU), or in a proceeding to which government is a party (as in any criminal case, such as Rahey), or in a purely private proceeding that is governed by statute law, then the Charter will apply to the court order.*”

85. Prof. Hogg does not cite any authority in support of the last part of this statement, because none appears to exist. When taken in context, the statement shows an attempt to reconcile the Supreme Court's findings in *Dolphin Delivery* (Courts are not “government” for the purpose of the *Charter*), with those in *BCGEU* and *Rahey*. Yet,

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<sup>73</sup> *Dolphin Delivery Ltd. v R.W.D.S.U., Local 580*, [1986] 2 SCR 573, at 598-599 (McIntyre J.) [*Dolphin Delivery*]

<sup>74</sup> *B.C.G.E.U., Re*, [1988] 2 SCR 214 (Dickson C.J.C.)

<sup>75</sup> *Rahey v R.*, [1987] 1 SCR 588

with all due respect to Prof. Hogg, there is simply no constitutional, statutory or jurisprudential support to argue that the *Charter* automatically applies to Orders issued in purely private disputes governed by statute law.

86. The Appellant also submits *Nortel Networks*<sup>76</sup> as supporting this conclusion. However, in that case, the Ontario Superior Court of Justice refers to that same statement by Prof. Hogg and explicitly declines to make a finding as to whether the *Charter* applies to its Order. In *obiter*, the Court stated:

In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. **While it is not strictly necessary for me to decide whether the *Charter* applies to such an order** in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan **may be** subject to the *Charter*.<sup>77</sup>

87. Again with all due respect to Prof. Hogg, a correct statement of the law is not that the *Charter* applies to Orders issued under statutory law, but rather that it applies to statutory provisions, which may be struck if they unjustifiably offend the *Charter*:

Can it be said in the case at bar that the required element of government intervention or intrusion may be found? In *Blainey*, s. 19(2) of the *Ontario Human Rights Code*, an Act of a legislature, was the factor which removed the case from the private sphere. If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case — assuming for the moment an infringement of the *Charter* — would be on all fours with *Blainey* and, subject to s. 1 of the Charter, the statutory provision could be struck down. **In neither case would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a statutory provision violative of the *Charter*.**

In the case at bar, however, we have no offending statute. [...]<sup>78</sup>

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<sup>76</sup> *Nortel Networks Corp, Re*, 2017 ONSC 700, paras. 24-25 (Newbould J.) [*Nortel Networks*], Factum TekSavvy, para. 86

<sup>77</sup> *Nortel Networks*, supra note 76, para. 25

<sup>78</sup> *Dolphin Delivery*, supra note 73, at 603

88. In that context, to invoke *Charter* application, the Appellant would have had to challenge one or more of the statutory provisions on which the Respondents rely, ex.: s. 27 or s. 34(1) of the *Copyright Act* (respectively defining copyright infringement and listing available remedies, including injunctions) or s. 44 of the *Federal Courts Act* (granting the Federal Courts injunctive powers over matters within its jurisdiction, including copyright). It did not do so and cannot now attempt to challenge the remedy obtained by the Respondents by seeking to apply the *Charter* to the Order under appeal.

89. The Motion Judge's decision not to perform a strict *Charter* analysis (which was not requested by the Appellant before him) was therefore correct, and there is no basis for this Court to review this aspect of his decision.

#### *ii. The Motion Judge considered freedom of expression in his analysis*

90. The Appellant argues that if strict *Charter* scrutiny does not apply to the injunction under appeal, it should have nevertheless been considered by the Motion Judge because the law must be developed consistently with *Charter* values.

91. First, the Supreme Court has heavily qualified this principle: when the law is unambiguous, and absent a challenge on constitutional grounds, Courts should avoid turning to the *Charter* for interpretation or application purposes.<sup>79</sup>

92. In the present case, the law on copyright infringement is unambiguous and remains unchallenged. Canadian Courts (including the Federal Courts) routinely issue injunctions to enjoin the distribution of clearly infringing content, without resorting to *Charter* values such as freedom of expression. Blatant copyright infringement is not protected expression under the *Charter* and, in such cases, s. 2(b) does not apply.<sup>80</sup>

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<sup>79</sup> *Bell ExpressVu v Rex*, 2002 SCC 42, paras. 61-66 (Iacobucci J.)

<sup>80</sup> *Cie générale des établissements Michelin - Michelin & Cie v CAW - Canada*, (1996), 71 CPR (3d) 348 at 391-392 (Teitelbaum J.) (FC); *Drolet v Stiftung Galsbotchaft*, 2009 FC 17, at para. 187 (de Montigny J.); *R. v James Lorimer & Co.*, (1983), 77 CPR (2d) 262, at 273 (Mahoney J.); *Equustek*, supra note 36, para. 48

93. The “bookstore analogy” used by the Appellant has no application in this case. While the injunction under appeal “removes books from the virtual shelves” of ISPs serving the majority of Canadian Internet users, these “books” do not contain expression that could attract *Charter* protection, and they are clearly illegal. Because these books’ authors, printers and publishers (the John Doe Defendants) cannot be located or practically enjoined, the Motion Judge ordered their removal from the ISPs’ shelves. This is a proper application of the discretion granted to Federal Court judges in the face of blatantly infringing activity.

94. Finally, if the availability of the remedy under appeal is considered sufficiently ambiguous to warrant consideration of *Charter* values, the Appellant suggests that freedom of expression should have been considered under the balance of convenience prong of the test. This is precisely what the Motion Judge did.<sup>81</sup>

**D. The Motion Judge appropriately held that the site-blocking injunction was just and equitable and that the Respondents met the applicable test for its issuance**

95. At the outset, the Appellant’s argument to the effect that the Motion Judge essentially “imported wholesale” the finding of Justice LeBlanc and Justice Kane on the Respondents’ entitlement to an injunction is simply contrary to a plain reading of the decision under appeal. The Motion Judge did not “presume” that the Respondents met the test for the issuance of an injunction; he explicitly reached an independent conclusion on every prong of the test on the basis of the applicable legal principles and of the evidence before him.<sup>82</sup>

96. With respect, the role of this Court is not to identify and decipher “undertones” in the Motion Judge’s decision, but rather to address errors of law or blatant and decisive errors of fact, of which there are none.

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<sup>81</sup> FC Decision, supra note 46, paras. 95 and 97

<sup>82</sup> FC Decision, supra note 46, paras. 57, 59-68 and 70-104

*i. The Respondents established a strong and uncontested *prima facie* case of copyright infringement*

97. As the Appellant correctly points out, the Motion Judge applied the interlocutory injunction test without explicitly mentioning that for mandatory injunctions, the threshold for the first step of the test is arguably that of a strong *prima facie* case, as opposed to the “serious issue” factor set out in *RJR-MacDonald*. In fairness to the Motion Judge, none of the parties (including the Appellant) insisted on that distinction in their written representations or at the motion hearing.

98. In any event, the Motion Judge did conclude that the Respondents made out a strong *prima facie* case of copyright infringement, which was never contested by the Appellant.<sup>83</sup> For the purposes of this case, this finding renders moot the distinction between the tests for general and mandatory interlocutory injunctions.

*ii. The Motion Judge’s finding of irreparable harm is supported by the jurisprudence and by the Respondents’ clear evidence to that effect*

99. Regardless of the applicable threshold at the first step of the test, it is trite law that a strong *prima facie* case will have an impact on the assessment of irreparable harm, especially in cases of blatant infringement:

That being said, I agree with the statement by Justice Annis in *Geophysical Service Inc* that a strong finding on one prong of the tripartite injunction test – as is the case here – may lower the threshold on the other two prongs:

[35] Moreover, the three prongs of the interlocutory injunction test are to some degree to be treated together and not as separate silo: Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora: Canada Law Book, 2010 at para 2.600) as quoted in *Morguard Corporation v InnVest Properties Ottawa GP Ltd*, 2012 ONSC 80 at para 12:

The terms ‘irreparable harm’, ‘status quo’ and ‘balance of convenience’ do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight

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<sup>83</sup> FC Decision, *supra* note 46, para. 57

categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another.

[36] There exist situations where the applicant's case is sufficiently strong that the threshold for meeting the other two factors can be set so low as to be irrelevant. I believe that this may have been the approach underlying the statement in Diamant Toys, above, that it was not necessary to establish irreparable harm where copying is blatant.<sup>84</sup>

100. Independently of this established principle, the Respondents brought forward clear, non-speculative and compelling evidence of irreparable harm. The record before the Motion Judge notably shows that the Defendants engage in copyright infringement on a massive scale,<sup>85</sup> that they cannot be identified,<sup>86</sup> that their services were part of the growing underground industry of Unauthorized IPTV Services,<sup>87</sup> and that these infringing services have an important yet virtually unquantifiable impact on the Canadian media industry, including on the Respondents.<sup>88</sup>

101. Furthermore, the Defendants' infringement is not limited to a finite set of works that were already published, that are identifiable by the Respondents and that could be listed in a limited-scope injunction. By their nature, the GoldTV Services illegally distribute the Respondents' programming (and that of third parties)<sup>89</sup> live and in parallel with authorized broadcasts, and thus in direct and immediate competition with rightsholders. Unless a broad injunction were issued to preclude access to that content, the amount of infringed works would be constantly growing and essentially unlimited.

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<sup>84</sup> *iTVBox*, supra note 3, para. 30

<sup>85</sup> Martin Aff., paras. 61-62, 76-77 and Exhibit AM-9 [AB, Vol. 3, Tabs 14 and 14I] and Exhibits AM-10, AM-16 and AM-17 [AB, Vol. 4, Tabs 14J, 14P and 14Q]; Rémillard Aff., paras. 20-24 and Exhibits YR-1 and YR-2 [AB, Vol. 4, Tabs 15, 15A and 15B]

<sup>86</sup> Rémillard Aff., paras. 54-61 and 65-68 [AB, Vol. 4, Tab 15]; 2<sup>nd</sup> Rémillard Aff., paras. 16-21 [AB, Vol. 9, Tab 31]

<sup>87</sup> Omstead Aff., paras. 35-41 [AB, Vol. 1., Tab 11]

<sup>88</sup> Omstead Aff., paras. 42-49 [AB, Vol. 1., Tab 11]

<sup>89</sup> Rémillard Aff., paras. 18-24 [AB, Vol. 4, Tab 15]

102. Needless to say, the likelihood that the Defendants could or would satisfy a final judgment on the merits – whether it reflects a disgorgement of profits, actual damages or statutory damages – is nil, which also weighs towards a finding of irreparable harm.<sup>90</sup>

103. The Respondents have extensive recent experience enforcing their rights in Canada.<sup>91</sup> Every case must naturally turn on its own merits, but it should nevertheless be noted that the Federal Courts have rightly and consistently held that the unauthorized distribution of the Respondents' television content in Canada would cause them and other similar rightsholders irreparable harm if an interlocutory injunction is not issued to enjoin these illegal activities.<sup>92</sup>

104. It cannot be seriously argued that the Respondents' evidence of irreparable harm was anything but clear and non-speculative, or that the Motion Judge committed a palpable and overriding error in his assessment of that evidence.

*iii. The Motion Judge properly exercised his discretion in considering various factors relevant to the balance of convenience analysis*

105. The Appellant's argument to the effect that the Motion Judge improperly exercised his discretion in assessing the balance of convenience in light of factors developed in similar cases in the United Kingdom is ill-founded.

106. On a plain reading of the Motion Judge's decision, the starting point of his balance of convenience analysis is clearly grounded in the fundamental principle that injunctions should be "just and equitable in all of the circumstances."<sup>93</sup> He found that

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<sup>90</sup> *Merck & Co. v Nu-Pharm Inc.*, (2000), 4 CPR (4th) 464, para. 27 (Muldoon J.) (FC); see also: R.J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Thomson Reuters: Proview, 2019) at 2.1.5

<sup>91</sup> *Omstead Aff.*, paras. 50-63 [AB, Vol. 1., Tab 11]

<sup>92</sup> *iTVBox*, supra note 3, para. 31; *Wesley (Mtlfreetv.com) v Bell Canada*, 2017 FCA 55 (Gauthier J.A.); *Lackman*, supra note 1, para. 47 (de Montigny J.A.); see also *Telewizja Polstat S.A. v Radiopol Inc.*, 2005 FC 1179, paras. 21-22 (Kelen J.); *Titan Linkabit Corp. v S.E.E. See Electronic Engineering Inc.* (1993), 48 CPR (3d) 62, at 78-79 (MacKay J.) (FC); *CHUM Ltd. v Stempowicz*, (2003), 27 CPR (4th) 448, at 460-461 (Snider J.) (FC)

<sup>93</sup> FC Decision, supra note 50, para. 51, citing *Equustek*, supra note 40, para. 25

the factors developed in the United Kingdom in the context of similar site-blocking injunctions would be “of assistance in assessing balance of convenience”, but that none of them would be determinative of that prong of the test.<sup>94</sup> The Motion Judge simply considered these factors holistically as part of the recognized framework for the issuance of interlocutory injunctions in Canada, noting that these factors were not exhaustive<sup>95</sup> and that they could vary from case to case.<sup>96</sup>

107. That said, it would have been difficult for the parties or the Motion Judge to identify and frame a set of factors that would be more appropriate to site-blocking injunctions than those developed by the Honourable Mr. Justice Arnold of the England and Wales High Court of Justice. The factors he developed in *Cartier*, which were upheld by the Court of Appeal of England and Wales, reflect a level of understanding and experience with site-blocking injunctions that can only benefit Canadian Courts in assessing when this remedy should be issued.

108. Also, while the Appellant now challenges the appropriateness of these factors on appeal, it tellingly did not dispute them (or suggest alternative factors) before the Motion Judge.<sup>97</sup>

109. The Motion Judge therefore properly exercised his discretion by considering numerous factors that are relevant to the balance of convenience analysis and, on the basis of the voluminous evidence before him, concluded that the Respondents were entitled to the injunction now under appeal. The Motion Judge committed no reviewable error of fact or law in that regard.

#### **PART IV – ORDER SOUGHT**

110. For the reasons set out above, the Respondents respectfully request that this appeal be dismissed with costs in favour of the Respondents.

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<sup>94</sup> FC Decision, supra note 46, paras. 53-54

<sup>95</sup> FC Decision, supra note 46, para. 54

<sup>96</sup> FC Decision, supra note 46, para. 70

<sup>97</sup> FC Decision, supra note 46, para. 47

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 2<sup>nd</sup> day of September 2020

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## **PART V – LIST OF AUTHORITIES**

### **LEGISLATION AND REGULATION**

#### Canada

1. *Bell Canada Act*, S.C. 1987, c.19.
2. *Copyright Act*, R.S.C., 1985, c. C-42
3. *Federal Courts Act*, R.S.C., 1985, c. F-7
4. *Federal Courts Rules*, SOR/98-106
5. *Telecommunications Act*, S.C. 1993, c. 38

#### Europe

6. *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001*
7. *Senior Courts Act*, 1981 c. 54

### **CASE LAW**

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8. *Anne of Green Gables Licensing Authority Inc. v Avonlea Traditions Inc.*, [2000] OJ No 740 (Ont. SCJ)
9. *B.C.G.E.U., Re*, [1988] 2 SCR 214
10. *B.M.W.E. v Canadian Pacific Ltd.*, [1996] 2 SCR 495
11. *Bell Canada v 1326030 Ontario Inc.*, 2016 FC 612
12. *Bell Canada v Lackman*, 2018 FCA 42
13. *Bell Canada v Red Rhino Entertainment Inc*, Order Validating Service dated May 6, 2019, Federal Court file T-759-16 (unreported)
14. *Bell Canada v Red Rhino Entertainment Inc.*, 2019 FC 1460
15. *Bell Canada v Vincent Wesley dba MTLFreeTV.com*, 2016 FC 1379

16. *Bell Canada v Vincent Wesley dba MTLFreeTV.com*, 2018 FC 66
17. *Bell Canada v Watchnsavenow Inc.*, Order dated September 6, 2018, Federal Court No. T-759-16 (unreported)
18. *Bell ExpressVu v Rex*, 2002 SCC 42
19. *Bell Media Inc. v GoldTV.biz*, 2019 FC 1432
20. *BMG Canada Inc. v John Doe*, 2004 FC 488
21. *Canada v South Yukon Forest Corporation*, 2012 FCA 165
22. *CHUM Ltd. v Stempowicz*, (2003), 27 CPR (4th) 448 (FC)
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24. *Cimon Ltd v Bench Made Furniture Corp.*, (1964), 48 CPR 31 (Ex Ct)
25. *Dolphin Delivery Ltd. v R.W.D.S.U. Local 580*, [1986] 2 SCR 573
26. *Drolet v Stiftung Galsbotchaft*, 2009 FC 17
27. *Equustek Solutions Inc. v Jack*, 2015 BCCA 265
28. *Glaxo Wellcome PLC v Minister of National Revenue*, (1998), 81 CPR (3d) 372 (FCA)
29. *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34
30. *Graham & Strang v Dominion Express Co*, 1920 CarswellOnt 56 (Ont. SCJ)
31. *Hamilton (City) v Loucks*, 2003 CarswellOnt 3663 (Ont. SCJ)
32. *Housen v Nikolaisen*, 2002 SCC 33
33. *Hudson's Bay Co. v White*, 1997 CarswellOnt 313 (Ont. SCJ)
34. *Imperial Manufacturing Group Inc. v Decor Grates Inc.*, 2015 FCA 100
35. *Long Shong Pictures (H.K.) Ltd. v NTC Entertainment Ltd.* (2000), 6 CPR (4th) 509 (FC)
36. *Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, 2011 FC 776
37. *Merck & Co. v Nu-Pharm Inc.*, (2000), 4 CPR (4th) 464 (FC)
38. *Nortel Networks Corp, Re*, 2017 ONSC 700
39. *R. v James Lorimer & Co.*, (1983) 77 CPR (2d) 262 (FCA)
40. *Rahey v R.*, [1987] 1 SCR 588
41. *Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68

42. *Reference re Federal Courts Act (Canada)* 2012 SCC 4
43. *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38
44. *Swiftsure Taxi Co., Re*, 2005 FCA 136
45. *Teledyne Industries Inc. v Lido Industrial Products Ltd.* (1982), 68 CPR (2d) 204 (FC)
46. *Telewizja Polstat S.A. v Radiopol Inc.*, 2005 FC 1179
47. *Titan Linkabit Corp. v S.E.E. See Electronic Engineering Inc.* (1993), 48 CPR (3d) 62 (FC)
48. *Titan Sports Inc. v Mansion House (Toronto) Ltd.* (1989), 28 CPR (3d) 199 (FC)
49. *Wesley (Mtlfreetv.com) v Bell Canada*, 2017 FCA 55

#### Europe

50. *Cartier International AG v British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (England and Wales High Court)
51. *Cartier International AG v British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 (England and Wales Court of Appeal)
52. *Football Association Premier League Ltd. v British Telecommunications PLC*, [2017] EWHC 480 (England and Wales High Court)
53. *Twentieth Century Fox Film Corporation & Ors v Sky UK Ltd & Ors*, [2015] EWHC 1082 (England and Wales High Court)

#### **REGULATORY DECISIONS**

54. *Telecom Decision CRTC 2018-384*

#### **SECONDARY SOURCES**

55. R.J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Thomson Reuters: Proview, 2019)