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

RESPONDENTS

CANADIAN INTERNET REGISTRATION AUTHORITY, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS-FIAPPF, CANADIAN MUSIC PUBLISHERS ASSOCIATION, INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS, MUSIC CANADA, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, INTERNATIONAL PUBLISHERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL AND MEDICAL PUBLISHERS, AMERICAN ASSOCIATION OF PUBLISHERS, THE PUBLISHERS ASSOCIATION LIMITED, CANADIAN PUBLISHERS' COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, THE FOOTBALL ASSOCIATION PREIMER LEAGUE LIMITED, DAZN LIMITED and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN INTERNET REGISTRATION AUTHORITY AND OF THE INTERVENER, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC

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PART I - STATEMENT OF FACT

1. The interveners submit three reasons for restraint when courts are asked to order common carriers to block Internet communications. CIPPIC submits (A) ISP-based blocking remedies disrupt the *Copyright Act*'s balanced intermediary enforcement regime. CIRA submits (B) telecommunications law constrains the power to order blocking; and (C) detailed statutory schemes limit blocking norms and practices abroad.

PART II - ISSUES

2. The issues are as framed in the Appellant's memorandum of fact and law.

PART III - SUBMISSIONS

A. The *Copyright Act*'s intermediary enforcement regime excludes ISP blocking.

A.1 Equitable discretion must be informed by implicated legal regimes.

3. When exercising discretion to issue injunctive relief, courts must consider relevant statutory and common law. *RJR–Macdonald* provides only a "general framework"[1] that, to borrow a phrase from administrative law, takes its "colour from the context".[2]

4. That courts must tailor their equitable authority to the specific legal circumstances is uncontroversial. Sometimes the contextual criteria are express, as with labour injunctions where the applicant must demonstrate reasonable efforts to obtain police assistance before seeking an injunction.[3] Other times the criteria are jurisprudential. This Court will deny an interlocutory injunction in a patent or industrial design case where infringement and validity are in issue and the defendant undertakes to account.[4] Implicated statutory schemes such as the *Copyright Act* and the *Telecommunications Act* likewise provide guidance through their respective text, context and purpose, as canvassed below.[5]

5. Before addressing the copyright context, it is important to note that the court cannot merely state it concludes the plaintiff has a strong *prima facie* case. Reasons are the primary mechanism by which judges account to parties, the public and appellate courts for their decisions.[6] As observed in the administrative law context—where procedural

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1 *R v Canadian Broadcasting Corp*, [2018] 1 SCR 196, 2018 SCC 5, ¶13 (*CBC*).
2 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, ¶89 [*Vavilov*]; *Warman v Fournier*, 2012 FC 803, ¶¶18-21 [*Fournier*].
3 See for example: *Courts of Justice Act*, RSO 1990, c C.43, s 102(3).
4 *Apotex Inc v Bayer Inc*, 2018 FCA 32, ¶51, [2018] 4 FCR 58.
5 See for example: *Théberge v Galerie d'Art du Petit Champlain Inc*, [2002] 2 SCR 336, 2002 SCC 34, [*Théberge*] per Gonthier, J, dissenting, but not on this point, ¶¶101-102; *Fournier*, ¶¶18-21.
6 *R v Sheppard*, [2002] 1 SCR 869, 2002 SCC 26, ¶15.

fairness requirements are "eminently variable" and generally, if not always, lower than the judicial standard—the reasons must provide "[e]*nough information…so parties can assess whether or not to exercise their rights of review, the supervising court can review what has been done, and the public can scrutinize what has happened*."[7] This requirement is arguably heightened in a judicial setting involving an exceptional remedy.

A.2 General remedial powers cannot undermine limits on copyright remedies.

6. The 'colour' that *Copyright Act* provisions bring to the court's general remedial powers emerges from the *Act*'s purpose: to provide a "*balance between promoting the public interest in…dissemination of works…and obtaining a just reward for the creator*" or, specifically, a balance between the rights of users and copyright holders.[8] Provisions within the *Act* must therefore be read not only in terms of what is expressly granted to copyright holders, but also what is withheld.[9] This context bears on whether and how general statutory[10] and common law[11] powers interface with the *Act*.

7. The balance principle must inform the common law's application to copyright matters, regardless of whether that common law is expressly referenced in the Act or another statute.[12] For example, the Supreme Court has held that section 12 of the *Act*, which generally preserves common law Crown prerogative, must accord with the balance at the heart of the *Act*.[13] Similarly, this Court held that provisions in the *Interpretation Act* recognizing a common law presumption of Crown immunity cannot interfere with one of the *Copyright Act*'s detailed and balanced statutory schemes.[14]

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7 *Vavilov*, ¶76-81; *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, ¶15.

8 *Théberge*, ¶30; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427, 2004 SCC 45, [*SOCAN*] ¶¶88-89; *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13 [*CCH*]; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2020-168*, [2012] 3 SCR 489, 2012 SCC 68, [*Reference re Broadcasting*] ¶¶64-66; *Entertainment Software Assoc v Society Composers*, 2020 FCA 100, ¶67.

9 *Théberge*, ¶31; *Reference re Broadcasting*, ¶66. *Charter*, section 2(b) also protects listeners as well as speakers: Intervener, British Columbia Civil Liberties Association, Memorandum of Fact and Law.

10 For example, open-ended powers of a subordinate regulator: *Reference re Broadcasting*, ¶¶64-66.

11 *Reference re Broadcasting*, ¶¶59, 67 and 78; *Fournier*, ¶18-21.

12 E.g. compare s 34.1 (general discretionary injunctive relief) and ss 41.27 (3) and (4.1)(specific regime for injunctions against information location tools).

13 *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43, ¶¶42, 47 and 48.

14 *Manitoba v Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91 [*Access Copyright*].

8. Even absent conflict with an express provision general powers, such as the open-ended equitable relief under appeal, cannot disturb the balance struck in the *Act*.[15] Courts respect this balance by examining specific provisions with careful attention to their context and underlying purpose. In *Reference re Broadcasting*, the Supreme Court struck down use of a general regulatory power to grant copyright holders control over distribution undertaking signals retransmission.[16] Failing to include these undertakings in a detailed *Copyright Act* scheme governing control over broadcaster retransmission was sufficient to create an implicit user right—one that could not be dislodged by a general power.[17]

9. Courts are especially hesitant to rely on general powers if doing so would interfere with how the *Act* allocates control over communication of subject matter. Encouraging the dissemination of works is one of the *Act*'s core concerns, and one of its two driving purposes.[18] This core concern encompasses not only control granted to copyright holders over communication of subject matter, but also any limits on that control. Such limits constitute users' rights to receive subject matter over particular communication networks.[19]

10. This framework applies to remedial powers of general application, including the equitable injunctive power at issue here. For example, the *Act* expressly recognized courts' inherent interlocutory powers to seize copyright-infringing works before judgment. The *Act* does not specify, however, whether this general remedy extends to moral rights infringements.[20] In *Théberge*, the Supreme Court interpreted the *Act*'s silence to preclude seizure as a moral rights remedy, in part due to the remedy's highly intrusive nature.[21] Courts likewise cannot order the remedy at issue here without considering its intrusive impact on the balance struck in the intermediary-based enforcement regime outlined below.

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15 *Reference re Broadcasting*, ¶¶63-64 and 67, 70, 78; *Access Copyright*, ¶48; *Fournier*, ¶¶18-21: ("It would be contrary to Parliament's intent to find that an injunction is presumptively available for an infringement if the application is brought outside the limitation period.").

16 *Reference re Broadcasting*, ¶¶29-32, and 78.

17 *Reference re Broadcasting*, ¶¶59, 63-64, 67, 70 and 78.

18 *Bell Canada v Canada (AG)*, 2017 FCA 249, ¶¶45-46, rev'd on other grounds, 2019 SCC 66.

19 *Reference re Broadcasting*, ¶¶63-64, 67, 70, 75 and 78: "copyright owners 'should not be permitted to stop retransmission because this activity is too important to Canada's communications system.'"

20 *Théberge*, per Binnie, J, ¶¶76-79 and per Gonthier, J, dissenting, ¶¶129-134.

21 *Théberge*, ¶78.

A.3 ISP-based blocking unbalances the copyright intermediary enforcement regime.

11. The *Copyright Act* encodes balance in a detailed regime that articulates specific roles for different intermediaries.[22] Parliament recognised the need to restrict copyright holders' control over the distribution of infringing subject matter, and the corresponding users' right to receive works through a particular sort of intermediary. The balance struck in these provisions reflects Parliament's awareness of the different and intrusive impact that results when Internet Service Providers ("ISP") are used to remove infringing content. These remedies therefore should only issue as a last resort or, better still, be left to Parliament.

12. An intermediary is defined as an entity providing the "means" of communicating works in a 'neutral' manner.[23] The intermediary regime adopted in the *Copyright Modernization Act* addresses three categories of intermediaries: search engines (Information Location Tools), content hosts (digital memory providers) and ISPs (Network Service Providers).[24] Of these, only ISPs are common carriers, subject to common law and *Telecommunications Act* requirements and liability immunities designed to limit interference with content.[25]

13. This intermediary regime contains several detailed components. Responding to the Supreme Court's invitation, Parliament clarified the liability and remedy exposure of ISPs and encoded the common law concept of 'authorization' as applicable to different intermediaries.[26] The *Act* similarly establishes specific contexts in which rights holders can enlist intermediaries to assist in rights enforcement tasks.

14. This regime demonstrates that the balance Parliament struck between competing rights strongly disfavours the use of intermediaries as removal tools for infringing content[27]—particularly so if the intermediary is an ISP. The injunctive relief expressly provided against search engines further implies that the remedy under appeal is unavailable.

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22 *Rogers Communications Inc v Voltage Pictures LLC*, [2018] 2 SCR 643, 2018 SCC 38, [*Voltage*] ¶¶22-25.

23 *SOCAN*, ¶92; *Bell Canada v Lackman*, 2018 FCA 42 [*Lackman*], ¶¶23-27.

24 *Copyright Act*, RSC 1985, c C-42, ss 41.25(1)(a)-(c).

25 See discussion in Section B, below; *Electric Despatch co of Toronto v Bell Telephone Co of Canada*, (1891) 20 SCR 83; *Dominion Telegraph Company v Silver*, (1882) 10 SCR 238, and Law Commission of Ontario, "Defamation Law in the Internet Age", March 2020 [LCO], p 74.

26 *SOCAN*, ¶127; *Voltage*, ¶27; *Copyright Modernization Act*, SC 2010, c 20, "This enactment amends the *Copyright Act* to…clarify Internet service providers' liability"; Testimony of Craig McTaggart, Director, Broadband Policy, TELUS, House of Commons Legislative Committee on Bill C-32, 40(3), March 22, 2011, 1100; *Copyright Act*, s 27(2.3).

27 *Théberge*, ¶78; *SOCAN*, ¶101; *Reference re Broadcasting*, ¶¶66-67 & 70; *Fournier*, ¶¶18-21.

15. **Liability & Remedy Limitations.** The *Act* removes liability where ISPs, in operating digital network access services, provide the means for individuals to reproduce or telecommunicate protected subject matter.[28] It similarly removes liability for content hosts who provide digital memory where individuals store protected subject matter for the purpose of communicating it over digital networks.[29] The liability of search engines is not so limited. Instead, the *Act* restricts remedies available against search engines found liable for copyright infringement.[30] Authorization is also codified by the *Act*, which limits the liability and remedy in instances where the intermediary is found to be an 'enabler' of copyright infringement.[31] These liability and remedial limitations voice Parliament's indication that intermediary liability would lead to disproportionate content removal.[32]

16. **Codified Intermediary Enforcement Actions.** The *Act* explicitly encodes a robust set of intermediary actions that copyright holders can engage to enforce their rights.[33] Content hosts and ISPs must forward notices of alleged infringement to customers, and preserve customer information within their control so copyright holders can pursue the primary infringer if they wish.[34] Remedies against intermediaries who fail to meet their notice-forwarding or data preservation obligations are limited to statutory damages.[35]

17. **Removal Obligations.** The *Act* explicitly recognizes specific intermediary enforcement actions that lead to removal of infringing content. These include:

    - **Search Engines**: Where a search engine hosts a copy of content originally hosted elsewhere, it must remove that copy within 30 days of receiving a notice of claimed infringement if the work has already been removed from its original location.[36] If it fails to comply, it loses the remedy limitation granted by the *Act*.
    - **Search Engines**: Search engines found liable for copyright infringement are subject to first party injunctions, but remain immunized from other remedies.[37] A first party injunction against an infringing search engine can only issue if the

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28 *Copyright Act*, ss 31.1(1)-(3).
29 *Copyright Act*, s 31.1(4).
30 *Copyright Act*, ss 41.27(1)-(2) and (5).
31 *Copyright Act*, ss 27(2.3)-(2.4), 31.1(6) & 41.27(4); *SOCAN*, ¶127; *Lackman*, ¶¶28-36; *Voltage*, ¶27.
32 *SOCAN*, ¶127. See footnote 26, above and LCO, p 74.
33 *Voltage*, ¶¶22-25.
34 *Copyright Act*, ss 41.25(1)(a)-(b) and 41.26(1)(a) & (b), respectively. *Voltage*, ¶6.
35 *Copyright Act*, s 41.26(3); *Voltage*, ¶27.
36 *Copyright Act*, s 41.27(3).
37 *Copyright Act*, s 41.27(1).

copyright holder can establish a list of prescribed factors including that no less burdensome and comparably effective means are available.[38] Wide injunctions are never available as a remedy against search engines.[39]

- **Content Hosts:** A content host must remove copyrighted material if it is aware (or made aware) of a court decision holding that the individual storing the content in its digital memory has done so by infringing copyright.[40] If it fails to comply, it loses the liability limitation granted to it by the *Act*.

Within this scheme, the *Act* recognizes limited content removal obligations against search engines and content hosts, but none against ISPs. Parliament was urged to encode third-party injunctive relief against all intermediaries based on international examples.[41] Instead it opted for first-party injunctive relief against search engines only, while clarifying that ISPs have no liability whatsoever.[42] While not explicitly foreclosing ISP injunctions, this scheme recognizes the more intrusive nature of content removal remedies issued against ISPs as opposed to other types of intermediaries in other legislative contexts, distinguishing it from the remedy issued in decisions such as *Equustek*.[43]

18. The injunction issued below is not consonant with the balance struck in this legislative scheme. The *Act* articulated specific contexts providing for intermediary assistance in enforcement, representing a balance between the interests of copyright holders and the rights of users.[44] The *Act* specifically outlines conditions in which copyright holders can prevent intermediaries from facilitating the dissemination of infringing subject matter.[45] The absence of any power to control ISP-based dissemination of infringing subject matter at all is, within the scheme of the *Act*, a users' right to ISP-based dissemination.[46]

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38 *Copyright Act*, s 41.27(4.1).
39 *Copyright Act*, ss 39.1 and 41.27(4.2).
40 *Copyright Act*, s 31.1(5).
41 Canadian Music Publishers Association, C-11 Submission, November 29, 2011, pp 9-12; Testimony of Catharine Saxberg, Executive Director, Canadian Music Publishers Association, C-11 Committee, House of Commons Legislative Committee on Bill C-11, 41(1), March 6, 2012, 0905.
42 *CCH*, ¶¶5 & 85-86 (no s 34(1) injunctive relief available in absence of liability); House of Commons, Legislative Committee on Bill C-11, CC11 Committee Report, 41(1). March 15, 2012, Cl 47(f).
43 *Google Inc v Equustek Solutions Inc*, [2017] 1 SCR 824, 2017 SCC 34 [*Equustek*]; *Crookes v Newton*, [2011] 3 SCR 269, 2011 SCC 47, ¶21; LCO, pp 72-75.
44 *Copyright Act*, ss 31.1 & 41.25-41.27. *Reference re Broadcasting*, ¶¶63-64 and 67, 70, 78; *Access Copyright*, ¶48; *Fournier*, ¶¶18-21; *Théberge*, ¶¶30 and 78.
45 *Copyright Act*, ss 31.1(5), 41.27 (1), (3), (4.1) and (4.2); *Reference re Broadcasting*, ¶75: *SOCAN*, ¶¶88-89; *Bell Canada v Canada (AG)*, 2017 FCA 249, ¶¶45-46, rev'd on other grounds, 2019 SCC 66.
46 *SOCAN*, ¶¶88-89; *Reference re Broadcasting*, ¶¶63-64, 67, 70, 75 and 78.

19. Finally, in contrast to other statutory contexts,[47] the first-party injunctive relief against search engines will only issue where the copyright holder establishes harm of sufficient severity,[48] and only as a last resort.[49] Further, search engines cannot be required by first-party injunction to remove infringing subject matter not explicitly pleaded.[50] The unavailability of wide injunctions effectively limits relief against search engines to the removal of specific online locations associated with specific infringing works explicitly before the court.[51] The order issued against GoldTV is a first-party wide injunction as it enjoins the defendants from communicating any of the plaintiffs' works, not only those explicitly identified in their pleadings.[52] In contrast, the injunction under appeal, itself contingent on that order, is even wider in scope as it prevents the defendants from communicating *any* subject-matter—or anything *at all*—through named ISPs.[53]

20. Relying on a general remedial power to create a new remedy against an ISP substantially disrupts the balance carefully struck by Parliament by ignoring its hesitance to rely on ISPs for content removal and its prohibition of wide injunctions against search engines. The limits placed on the intermediary enforcement regime are "important element[s] of the balance struck by the statutory copyright scheme"—they constitute a user right, "not a loophole".[54] Parliament "had good reason not to authorize"[55] such a remedy. This Court, as a court of law and equity, should therefore decline to exercise its discretion to do so.

21. The critical and intersecting role of the *Telecommunications Act*, which places additional limitations on blocking by common carriers such as ISPs, reinforces this conclusion.

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47 *Microsoft Corp v 9038-3746 Ontario Inc*, 2006 FC 1509, ¶¶130 & 136-138; *Equustek*, ¶8.

48 *Copyright Act*, s 41.27(4.1)(a). Contrast *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432, [GoldTV] ¶¶66-67.

49 *Copyright Act*, s 41.27(4.1)(b)(iv). Contrast *GoldTV*, ¶¶64-65.

50 *Copyright Act*, ss 41.27(4.2) & 39.1; *Thomson v Afterlife Network Inc*, 2019 FC 545 [*Afterlife*], ¶¶49-54; *Trader v CarGurus*, 2017 ONSC 1841 [*CarGurus*], ¶¶69-71; *Microsoft Corp v 127916 Ontario Ltd*, 2009 FC 849, ¶52; *Microsoft Corporation v 9038-3746 Ontario Inc*, 2006 FC 1509, ¶136.

51 By contrast, see *Equustek Solutions Inc v Jack*, 2014 BCSC 1063, ¶9.

52 Order of Justice LeBlanc, FC File No T-1169-19, July 25, 2019, clauses 1(a)(iv)-(v) and (b)(iv)-(v): "(the "Plaintiffs Programs", examples of which are listed in Appendix 1 hereto)".

53 *Afterlife*, ¶¶49-54; *CarGurus*, ¶¶69-71. By contrast, first party wide injunctions are available if the conditions in s.39.1 are met: *Nintendo of America v King*, 2017 FC 246, ¶¶175-177; contrast: *Bell Canada v 1326030 Ontario Inc (iTVBox.net)*, 2016 FC 612, ¶33, aff'd 2017 FCA 55; and *Wenham v Canada (Attorney General)*, 2018 FCA 199, ¶¶43-44.

54 *SOCAN*, ¶¶89-90, 92, 101 and 127; *Fournier*, ¶¶18-21.

55 *Théberge*, ¶78; *SOCAN*, ¶127: "A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory ... procedure as has been done in the European Community and the United States."

B. Telecommunications law constrains the power to order blocking.

B.1 Copyright and telecommunications law must be interpreted harmoniously.

22. The *Telecommunications Act*[56] and related Cabinet regulations[57] establish a polycentric telecommunications policy and delegate powers to the Canadian Radio-television and Telecommunications Commission (CRTC) to further that policy. To this end, section 36 of the *Telecommunications Act* requires that a common carrier not "control or influence" the telecommunications it carries "[e]xcept where the Commission approves otherwise". Blocking internet traffic controls or influences telecommunications.[58] Yet the decision appealed suggests that telecommunications law does not constrain the courts' jurisdiction or discretion to order blocking without CRTC approval (¶42, ¶¶96-97) nor allow the CRTC to "interfere" with such an order (¶41, citing *Reference re Broadcasting*).

23. *Reference re Broadcasting* did establish that the CRTC cannot create an entirely new regulatory regime that operationally conflicts or is incompatible with the purposes of applicable legislation.[59] Here, however, there need be no such conflict or incompatibility. Rather than relegate either telecommunications or copyright law to secondary status, courts ought to interpret both statutes to stand together harmoniously.

24. The issue in the CRTC's FairPlay decision was also different than here. The CRTC correctly found in FairPlay that it cannot mandate blocking as a copyright remedy under sections 24 and 24.1 of the *Telecommunications Act*.[60] But, as it previously decided, the CRTC can and must review and authorize blocking under section 36.[61]

25. Instead of reasoning that the Court's general ability to grant copyright remedies leaves no

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56 SC 1993, c 38, s 7.

57 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 [*Policy Direction (2006)*]; *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227 [*Policy Direction (2019)*].

58 *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶121-22.

59 *Reference re Broadcasting*, ¶¶39, 45.

60 *Application to disable online access to piracy websites*, Telecom Decision CRTC 2018-384, 2 October 2018, ¶¶60-62, 67.

61 *Application for relief regarding section 12 of the Quebec Budget Act*, Telecom Decision CRTC 2016-479, 9 December 2016, ¶¶7, 18-21 [*Re Quebec Budget Act*]; *Decision re application of Richard Warman*, Telecom Commission Letter 8622-P49-200610510, 24 August 2006.

room for the *Telecommunications Act*, consider how telecommunications law requires policy scrutiny of certain copyright remedies. That is how the relevant statutes can be, as Justice Rothstein emphasized in *Reference re Broadcasting*, "read together so as to *avoid* conflict".[62] A coherent, harmonious statutory interpretation requires review of applications for blocking orders against the telecommunications policy objectives Parliament enacted[63] by the body Parliament tasked[64] or, at least, by the courts.

B.2 The legislative text, context, and purpose require policy scrutiny of blocking.

26. Subordinating or ignoring telecommunications law contravenes the text, context, and purpose of the statute and regulations. The requirement to act "solely as a common carrier" and not "control the contents nor influence the meaning or purpose" of telecommunications, first in the *Bell Canada Special Act*[65] and then in section 36 of the *Telecommunications Act*, exists in the context of the common carrier's obligation to avoid discrimination. Section 36's chapeau captures the concept as: "neutralité quant au contenu". Decisions as to when such discrimination furthers the purposes of the *Act*, clearly stated in sections 7 and 8, are expressly delegated to the CRTC under section 47.

27. The CRTC understood this scheme when it required prior regulatory review of a program for Bell Canada to block "access by minors to programmes that contain descriptions of sexual conduct".[66] The CRTC confirmed this scheme recently, deciding that even if ISPs are compelled by an otherwise-valid legal obligation to block unlicensed gambling sites, "the Act prohibits" such blocking "without prior Commission approval", to be granted "only … where it would further the telecommunications policy objectives".[67]

28. This scheme is not unusual in respect of common carriers.[68] It leaves room for the courts to adjudicate and remedy copyright infringement. But it also leaves room to apply the *Telecommunications Act* in reviewing those rare remedies that require telecommunications common carriers to interfere in the content they carry.

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62 *Reference re Broadcasting*, ¶38, emphasis by Rothstein J.
63 *Telecommunications Act*, ss 7, 8, 47 and 36.
64 *Telecommunications Act*, s 36 (delegation to "the Commission").
65 SC 1967-68, c 48, s 6, adding s 5(3) to SC 1948, c 81.
66 *Re 976 Services – Billing and Collection*, Telecom Letter Decision CRTC 92-5, 26 June 1992.
67 *Re Quebec Budget Act*, Telecom Decision CRTC 2016-479, 9 December 2016, ¶¶7, 18-21.
68 See, similarly, *Canada Post Corporation Act*, RSC 1985, c C-10, ss 43-47, assigning review of postal delivery-blocking to a Minister-appointed Board of Review.

29. Evidence "to the effect that the cost of implementation and the exclusion of some third party ISPs from the scope of the order will potentially negatively impact the competitive position of smaller ISPs including Teksavvy" (¶98) must be weighed against telecommunications policy objectives. Specifically, would the order: "render reliable and affordable telecommunications services of high quality accessible to Canadians"; "promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada"; "foster affordability and lower prices, particularly when telecommunications service providers exercise market power"; and "reduce barriers into the market and to competition"?[69]

30. Similarly, "assertions of a negative competitive impact" (¶99) must be assessed not only in this narrow context but also considering telecommunications policy concerns with the vertical integration of common carriers and content providers. As put by a 2019 Parliamentary committee considering blocking orders: "It is not hard to imagine a situation where one vertically integrated ISP-rights-holder seeks an injunction that would apply to another ISP-rights-holder, who would gladly provide it with little contest given that they share similar interests in the outcome of the case."[70] Here, related companies predominated as both the applicants seeking the remedy and the third-party common carriers implementing it. Apprehension of such difficulties, and how to weigh them against polycentric telecommunications objectives, is exactly the role Parliament assigned to the CRTC for review and approval of telecommunications blocking.[71]

C. Detailed statutory schemes limit blocking norms and practices abroad.

C.1 International law leaves room for Parliament's distinct enforcement scheme.

31. Copyright treaties say nothing about blocking orders, injunctions against ISPs, or online intermediaries' role in copyright enforcement. The WIPO Internet Treaties, for example, require parties to ensure that "enforcement procedures … permit effective action against any act of infringement … including expeditious remedies to prevent infringements."[72]

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69 *Telecommunications Act*, ss 7(b), 7(e), 8, 47(b); *Policy Direction (2019)*, ss 1(a)(ii), (v).

70 *Statutory Review of the Copyright Act*, Report of the Standing Committee on Industry, Science, and Technology, House of Commons, 42nd Parl, 1st S, pp 97-98.

71 See CRTC, Navigating Convergence, February 2010, s 4.2.

72 WIPO Copyright Treaty, 20 December 1996, 2186 UNTS 121 at 156, art 14(2) (entered into force 5 March 2002); WIPO Performances and Phonograms Treaty, 20 December 1996, 2186 UNTS 203 at 253, art 23(2) (entered into force 19 May 2002).

But those general words cannot now be contorted as a "make-weight" for interpreting domestic laws.[73] Moreover, there is no recognized legal norm, customary rule, or state practice constituting public international law on blocking orders. To the contrary, Canada's recent trade deals reinforce Parliament's intent about blocking. For example, the Canada United States Mexico Agreement expressly permits Canada to preserve the distinctive approach to different intermediaries' role in copyright enforcement established by the 2012 statutory reforms, from which blocking is conspicuously absent.[74]

C.2 Other jurisdictions base blocking orders on explicit statutory regimes.

32. Comparative legal analysis can help distinguish foreign blocking schemes from Canadian law. Where legislators prescribed statutory reforms, such as in Australia, the United Kingdom (UK), and elsewhere in the European Union (EU), courts grant blocking orders. Where legislators considered and rejected a statutory scheme for site blocking, such as in the United States (US), courts typically do not.

33. A blocking scheme was proposed in the United States in a pair of 2011 bills detailing how applications would work, including threshold criteria and tailored measures for different classes of intermediaries.[75] The controversial bills did not become law. As such, ISP-based blocking in the US is contemplated only under an explicit, narrow provision with limited scope.[76] Because American courts have not generally endorsed blocking orders, copyright owners in the United States are asking legislators for statutory reform.[77]

34. In contrast to the US and Canada, Australian legislation is "deliberately prescriptive; it is intended as a precise response to a specific concern raised by copyright owners."[78]

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73 *Entertainment Software Assoc v Society Composers*, 2020 FCA 100, ¶76.

74 Agreement Between the United States of America, the United Mexican States, and Canada, 30 November 2018, Annex 20-B (Annex to Section J), p 62; *Canada-United States-Mexico Agreement Implementation Act*, SC 2020, c 1; *Copyright Modernization Act*, SC 2012, c 20.

75 US, Bill HR 3261, *Stop Online Piracy Act*, 2011, §§102-104; US, Bill S 968, *PROTECT IP Act*, 112th Cong, 2011, §3(d)(2).

76 US, *Digital Millennium Copyright Act*, 17 U.S.C. §512(j)(1)(B)(ii). Some US orders against first-party defendants purport to bind non-parties who are "in active concert or participation" with defendants under *Federal Rules of Civil Procedure* Rule 65(d)(2)(C) or the *All Writs Act*, 28 USC §1651.

77 US, *Hearing on Approaches to Foreign Jurisdictions to Copyright Law and Internet Piracy Before the US Senate Committee on the Judiciary*, 116th Cong, 10 March 2020 (Stanford K. McCoy).

78 Austl, Commonwealth, Senate, *Copyright Amendment (Online Infringement) Bill 2015*, *Revised Explanatory Memorandum*, (2015), ¶1.

Section 115A of Australia's copyright statute—enacted in 2015[79] after human rights and financial assessments, and tweaked in 2018[80] to address unforeseen consequences—sets "an intentionally high threshold test".[81] The remedial powers in the *Federal Court of Australia Act 1976*[82] are as broad as in Canada's *Federal Courts Act*. And like Canada, the principles of equity evolved in Australia from common UK traditions. But Australia's Parliament was nonetheless compelled to legislate a specific regime for blocking orders.

35. Australia's statutory scheme cross-references the definition of "carriage service provider" to the *Telecommunications Act 1997* to promote consistency with telecommunications law.[83] Separately, an "online search engine provider" may be ordered to take reasonable steps to not refer users to an online location. In comparison, the courts in Canada would need to reconcile (or ignore) the *Telecommunications Act*'s and *Copyright Act*'s rules differentiating "information location tools", for which blocking injunctions are explicitly contemplated, from "providers of network services", for which they are not.[84]

36. Also, under Australia's scheme, only "an online location outside Australia" can be blocked.[85] This "important limitation on the power of the Court", wrote Justice Nicholas, "may reflect an assumption that other provisions of the Act provide copyright owners with adequate remedies in respect of online locations situated within Australia".[86] Parliament retained this limit as a rebuttable presumption in Australia's statutory scheme.[87] The narrow US statutory provision also limits blocking to foreign locations.

37. The *de jure* rule in Australia and the US is a *de facto* rule elsewhere. The blocked site in the English test case known as *NewzBin2*, for example, was hosted in Sweden at a domain registered to a Seychelles company.[88] A decision blocking the infamous "Pirate

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79 *Copyright* Amendment *(Online Infringement) Bill 2015*, (Cth), No 80/2015.
80 *Copyright* Amendment *(Online Infringement) Bill 2018*, (Cth), No 157/2018.
81 Austl, Commonwealth, Senate, *Copyright Amendment (Online Infringement) Bill 2015*, *Revised Explanatory Memorandum*, (2015), ¶6.
82 Federal Court of Australia Act 1976 (Cth), No 156/1976, ss 23, 43.
83 *Copyright Act 1968*, (Cth), No 63/1968, ss 10, 115A; *Telecommunications Act 1997*, No 47/1997, s. 7.
84 *Copyright Act*, ss. 41.25-41.27.
85 *Copyright Act 1968*, (Cth), No 63/1968, s 115A(1).
86 *Roadshow Films Pty Ltd v Telstra Corporation Ltd*, [2016] FCA 1503, ¶38.
87 *Copyright* Amendment *(Online Infringement) Bill 2018*, (Cth), No 157/2018.
88 *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc*, [2011] EWHC 1981 (Ch),

Bay" noted that its operators left the jurisdiction of Swedish (and English) courts, with one said to be in Cambodia operating a Seychelles company.[89] Those findings contrast with the evidence before this Court.[90]

38. In *NewzBin2*, Justice Arnold explained the UK's governing scheme of interwoven legislation, including domestic and European human rights law, and domestic and European intellectual property law.[91] He also noted decades of English and European jurisprudence considering issues related to blocking, concluding: "no uniform approach has emerged among European courts … given that Member States have implemented Article 8(3) of Information Society Directive in different ways".[92] After numerous judgments of the Court of Justice for the European Union (CJEU)[93] that assessment remains fair. Cases from EU member states like Austria, France, Germany, the Netherlands, Spain, Sweden, and elsewhere are, therefore, not particularly helpful to this Court, even if Canada were bound by similar international laws, which it is not.

39. The *obiter dictum* from *Cartier*[94]—speculating that perhaps English courts could or should order blocking even absent a detailed legislative scheme—is, therefore,

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[*NewzBin2*] ¶58.

89 *Dramatico Entertainment Ltd & Ors v British Sky Broadcasting Ltd & Ors*, [2012] EWHC 268 (Ch), ¶12.

90 The record here shows a contact for the Canadian domain name at apartment complex in Toronto, and includes text messages with a Toronto area (647) phone number: Affidavit of Yves Rémillard, sworn July 15, 2019, ¶¶32, 67 and Exhibits YR-4, YR-39, Shared Appeal Book at volume 4, tab 15, pp 1164, 1410, 1605; Affidavit of Paul Stewart, sworn August 23, 2019, ¶40, Shared Appeal Book at volume 7, tab 29, p 2144; Second Affidavit of Yves Rémillard, sworn September 3, 2019, ¶¶10-11 and Exhibits YR-40 and YR-41, Shared Appeal Book at volume 9, tab 31, pp 2749, 2955, 2757.

91 *NewzBin2*, ¶¶75-91, citing the *Human Rights Act 1998* (UK), c 42; Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No.005 (as amended); European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; *The Electronic Commerce (EC Directive) Regulations 2002*, SI 2002/2013; European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; *Copyright and Related Rights Regulations 2003*, SI 2003/2498; sections 97A and 191A of the *Copyright, Designs, and Patents Act 1988*; European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; and *The Intellectual Property (Enforcement, etc.) Regulations 2006*, SI 2006/1028.

92 *NewzBin2*, ¶¶92-96, 97.

93 See, for example, *Scarlet Extended SA v Societe Belge des Auteurs Cornpositeurs et Editeurs SCRL (SABAM)*, Case 70/10, [2011] ECR I-11959; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten v Tele2 Telecommunication GmbH*, Case C-557/07, [2009] ECR I-1227, and *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*, Case C-314/12, EU:C:2014:192.

94 *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658, [*Cartier*].

inapplicable in Canada. The issue in *Cartier* was whether English courts could order site blocking in the context of trademarks not copyrights. Because the *InfoSoc Directive* pertains specifically to copyright, for trademarks the UK is bound only to implement the *E-Commerce Directive* and *Enforcement Directive*. Lord Justice Kitchen confirmed that English courts had "the obligation" to "adopt a conforming interpretation" of the *Senior Courts Act*.[95] Moreover, experience with blocking in the UK's copyright context—which is distinct from Canada's—enabled the first instance judge in *Cartier* (Justice Arnold) to reach his decision "drawing upon the threshold conditions … under s.97A".[96]

40. The Irish High Court, in a similar situation to Canada's now, was blunt about its inability to order blocking. Justice Charleton, before his elevation to the Supreme Court of Ireland, ruled that he could not follow the High Court of England and Wales on blocking. After lengthy review of relevant statutes, he ruled: "Respecting, as it does, the doctrine of separation of powers and the rule of law, the Court cannot move to grant injunctive relief … even though that relief is merited on the facts."[97] Justice McGovern issued a blocking order in another case only after legislative reform in Ireland.[98] The Irish Court recognized the limits of equitable jurisdiction that it, like Australian and Canadian courts, shares with the UK, and its general remedial powers of injunctive relief.[99]

C.3 Canadian courts should rigorously apply Canada's legal threshold for blocking.

41. Only after statutory thresholds are satisfied should courts examine discretionary factors. The list of factors in *Cartier* actually comes from the detailed recitals of the European statutory scheme for IP enforcement. Necessity, for example, is not only about protecting the plaintiff's rights from irreparable harm (¶¶52-53). In *Cartier*, the Court of Appeal endorsed the High Court's analysis that the *Enforcement Directive* necessitates remedies available under English law include injunctions.[100] The High Court had also explained that human rights can only be restricted where necessary to protect other human rights, in which case a further proportionality analysis is required. In other words, this particular

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95 *Cartier*, ¶¶56-74; *Marleasing SA v La Comercial Internacional de Alimentacion* SA, C-106/89, [1990] ECR I-4135.
96 *Cartier*, ¶74.
97 *EMI Records (Ireland) Ltd & ors v UPC Communications Ireland Ltd*, [2010] IEHC 377, ¶¶ 134, 138.
98 *EMI Records Ireland Ltd & ors v UPC Communications Ireland Ltd & ors*, [2013] IEHC 274, ¶11.
99 *Supreme Court of Judicature (Ireland) Act 1877*, s.28(8).
100 *Cartier*, ¶¶103-106.

factor is about the necessity of site blocking under inter/supranational copyright and human rights law. Those issues have been debated extensively in the European Parliament, CJEU, and EU national courts.

42. Canadian courts should not take shortcuts around the legal analysis of discretionary factors. *Cartier* ought not be the checklist for blocking orders in Canada without distinctly Canadian legislative, policy, and jurisprudential consideration.

43. In lieu of the factors derived from European directives, Canadian courts should emphasize the core question of proportionality. On one side of proportionality is a spectrum of copyright enforcement options, ranging from less to more intrusive. On the other side are an array of economic impacts, human rights, public interests, internet governance, and technical and policy considerations. The fulcrum between these is the principle of minimal impairment. Less intrusive options should be tried first. The most intrusive option (blocking) should be ordered last.

44. When assessing the spectrum of enforcement options available, citing no evidence that other measures would be effective (¶¶64-65) misplaces the onus and burden of proof. Third parties need not prove other options would be effective. Applicants must prove other options have not been effective. On the other side of the scale, laws protecting freedom of expression and regulating common carriage warrant more than a few comingled sentences (¶97). Policymakers, legislators, and judges around the world have carefully considered each issue under the laws of their particular jurisdiction. The same level of scrutiny should apply in Canada.

PART IV - ORDER SOUGHT

45. CIRA and CIPPIC request that no costs be awarded for or against either intervener.

PARAGRAPHS 1-21 AND 45 ARE RESPECTFULLY SUBMITTED this 3rd day of August, 2020

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TEKSAVVY SOLUTIONS INC (Appellants)	AND	BELL MEDIA INC AND OTHERS (Respondents)	AND	CANADIAN INTERNET REGISTRATION AUTHORITY AND OTHERS (Interveners)

FEDERAL COURT OF APPEAL

MEMORANDUM OF FACT AND LAW OF THE INTERVENERS, THE CANADIAN INTERNET REGISTRATION AUTHORITY AND THE SAMEULSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC

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