

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. and
VIDEOTRON LTD.**

Respondents

**MOTION RECORD OF THE MOVING PARTIES,
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 PREMIER LEAGUE LIMITED, AND
DAZN LIMITED.**

(re: Motion for Leave to Intervene Under Rule 109 of the *Federal Courts Rules*)

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and DAZN Limited

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FEDERAL COURT OF APPEAL

BETWEEN:

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Appellant

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B	Notice of Appeal of Teksavvy Solutions Inc. dated November 25, 2019
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NOTICE OF MOTION

(re: Motion for Leave to Intervene Under Rule 109 of the *Federal Courts Rules*)

TAKE NOTICE THAT the International Publishers Association (“**IPA**”), International Association of Scientific, Technical and Medical Publishers (“**STM**”), Association of American Publishers (“**AAP**”), The Publishers Limited (“**UK Publishers Association**”), Canadian Publishers’ Council (“**CPC**”), Association of Canadian Publishers (“**ACP**”), The Football Association Premier League Limited (“**The Premier League**”), and DAZN Limited (“**DAZN**”) (collectively, the “**Moving Parties**”) will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An Order:

- (a) pursuant to Rule 109 of the *Federal Courts Rules*, granting the Moving Parties leave to intervene in the appeal by Teksavvy Solutions Inc. (“**Teksavvy**”) from the decision rendered by Justice Gleeson on November 15, 2019, in Court File Number T-1169-19 (the “**Decision**”)¹, pursuant to the following terms and directions:
- (i) the Moving Parties shall be permitted to file a memorandum of fact and law of no more than twenty pages on a deadline to be determined by this Court;
 - (ii) the Moving Parties may make oral submissions at the hearing of this appeal;
 - (iii) the memorandum and oral submissions shall be restricted to the grounds and issues indicated in paragraphs 26-27 of this Notice of Motion;
 - (iv) the Moving Parties shall take the evidentiary record as they find it, and shall not add to it;
 - (v) The style of cause in this Appeal shall be amended to include the Moving Parties as interveners;
 - (vi) The Moving Parties shall be served with electronic versions of all materials filed and to be filed by other parties and interveners; and
 - (vii) the Moving Parties shall neither seek costs nor be liable for costs;
- (b) pursuant to Rule 369 of the *Federal Courts Rules*, permitting this motion to be decided on the basis of written representations; and

¹ Decision by Justice Gleeson in Court File Number T-1169-19, reported as *Bell Media Inc. v. GoldTV.Biz*, 2019 FC 1432, Motion Record (“**MR**”), Tab 1A.

- (c) such further and other relief as counsel may advise and/or this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

A. The Decision Under Appeal and the Appellant's Grounds of Appeal

2. The Federal Court of Appeal is seized of an appeal by Teksavvy (the "**Appeal**"), a third party Internet Service Provider ("**ISP**"), seeking to set aside the Order issued by Justice Gleeson which determined that the Third-Parties in this proceeding shall block or attempt to block access by their customers to the websites or online services identified as the "Target Websites".

3. The Plaintiffs/Respondents were successful in obtaining a site-blocking Order. This is a landmark precedent that has very significant importance to the Moving Parties and for the enforcement of copyright on the Internet.

4. Teksavvy's Notice of Appeal raises four grounds of appeal, namely, that Justice Gleeson erred in law: (1) in finding that the remedy of site-blocking orders was available at law; (2) in finding that section 36 of the *Telecommunications Act*, SC 1993, c. 38, did not apply to the site-blocking Order; and (3) in interpreting and applying the test for a mandatory injunction under the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 by importing factors from foreign jurisdictions into the Canadian test for granting injunctions. The fourth ground of appeal raised by Teksavvy is that the Order should be set aside because it is not compliant with section 2(b) of the *Canadian Charter of Rights and Freedom*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c-11.

5. The Moving Parties seek leave to intervene to assist this Court in understanding the broader impacts of this Appeal as it relates to the importance of formulating a principled basis for deciding when site blocking orders against ISPs are appropriate, having regard to the need to balance the values of freedom of expression with the need for effective and useful online remedies that preserve the rule of law in the Internet context, and that foster compliance with Canada's treaty obligations in respect of copyright.

B. The Moving Parties' Interest in the Appeal

6. The Moving Parties form two separate groups that seek to intervene in the Appeal. The first is a broad coalition of Canadian and international publisher associations whose members are publishers of all manner of books, journals, and scientific publications (the “**publisher group**”). The second, the sports group, is comprised of DAZN and the Premier League. They own or has exclusive licenses to make available and otherwise communicate to the public valuable sports programming content in Canada and internationally (the “**sports group**”).

7. The Moving Parties and/or their members have extensive experience in blocking orders to combat piracy in their industries. They or their members have successfully obtained blocking orders to protect copyrights in numerous countries including United Kingdom, Ireland, Spain, Belgium, Denmark, Italy, France, Germany, Sweden, and Austria, Norway, and Singapore. Moreover, they have extensive experience in how these orders can be calibrated to sensitively balance the need for these orders to be effective and to protect the rights and interests of Internet service providers (ISPs) and Internet users.

8. The Moving Parties have a direct and significant interest in this appeal. A successful appeal of Justice Gleeson’s order would have serious implications for online enforcement of their copyrights.

9. The Moving Parties seek leave to intervene to assist this Court in understanding that the important values of freedom of expression can be carefully preserved without undermining effective and useful online remedies that support legal frameworks required by the creative sectors to invest in the creation and dissemination of copyright works, and in a way that fosters the rule of law in the Internet context, and compliance with Canada’s international treaty obligations in respect of copyright.

C. The Moving Parties’ Distinct Perspective and Expertise

10. The IPA is the world’s largest federation of national, regional and specialist publishers’ associations. The IPA represents all segments (trade fiction, non-fiction, education, academic, and professional) of book and journal publishing, in print and digital formats, around the world. It represents the interests of book and journal publishers in international fora and wherever publishers’ interests are at stake. It comprises 83 organizations from 69 countries across Africa,

Asia, Australasia, Europe, and the Americas. The IPA is headquartered at 23 Avenue de France, 1202 Geneva, Switzerland.

11. The STM is a non-profit international trade association that is organized for the benefit of scholarly, scientific, technical, medical and professional publishers. It is actively engaged in anti-piracy activities on behalf of its members and has intervened in other cases involving copyright infringement. The STM's business addresses are Prins Willem-Alexanderhof 5, 2595 BE, The Netherlands, and 267 Banbury Road, OX2 7HT, United Kingdom.

12. The AAP represents leading book, journal, and education publishers in the United States. It is a member of several domestic and international organizations and coalitions whose objective is to promote strong copyright laws and enforcement regimes. It has wide experience on matters of public policy that impact intellectual property. The AAP has assisted courts around the world on multiple occasions serving as an intervener and *amicus curiae* in copyright matters. The AAP's headquarter is at 455 Massachusetts Avenue, NW Suite 700, Washington, DC 20001, United States of America.

13. The UK Publishers Association represents companies of all sizes and specialisms. Its members produce digital and print books, audiobooks, research journals and educational resources across genres and subjects. The UK Publishers Association's membership includes global companies as well as independent publishers and university presses. North America (including Canada) is a crucial market for UK publishers. The UK Publishers Association's head office address is 50 Southwark Street, First Floor, London SE1 1UN, United Kingdom.

14. The CPC is a trade association based in Toronto. It represents the interests of publishing companies that publish, in Canada, books and other media for elementary and secondary schools, colleges and universities, professional and reference markets, the retail and library sectors. It has broad experience on the subject matters of intellectual property, freedom of expression, and the Internet. The CPC has been granted leave to intervene by this Court and the Supreme Court of Canada including in cases involving both intellectual property rights and freedom of expression issues such as *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34. The CPC is headquartered at 3080 Yonge Street, Suite 6060, Toronto, Ontario M4N 3N1, Canada.

15. The ACP is a trade association that represents approximately 115 Canadian-owned and controlled book publishers from across the country. The members of the ACP sell books and other publications for a variety of purposes including for educational, research and reference purposes and for general interest in leisure and reading. The ACP has also been granted leave to intervene by this Court and the Supreme Court of Canada including in the Supreme Court of Canada case, *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34. The ACP's head office address is 174 Spadina Avenue, Suite 306, Toronto, Ontario, M5T 2C2, Canada.

16. The Premier League is the organizing body of the top level competition for football (soccer) clubs in England and Wales. It owns copyrights in the audio-visual coverage of all matches. The Premier League has been actively engaged in fighting online piracy through its anti-piracy program for many years. The Premier League has experience in obtaining various types of blocking injunctions in numerous jurisdictions, including dynamic blocking orders that address different circumvention tactics used by pirates. The Premier League's headquarter is at 57 North Wharf Road, Brunel Building, W2 1HQ London, United Kingdom.

17. DAZN is one of the world's largest providers of live streaming of sports and sporting events in the world. It operates in nine countries including Canada, the United States, Italy, Germany, Switzerland, Austria, Spain, Japan, and Brazil DAZN has exclusive copyright licenses that enable it to live stream sports events to the public including programming for sports such as NFL football, soccer, baseball, hockey, rugby, boxing, tennis, mixed martial arts and darts. It and its licensors have significant experience in obtaining blocking orders in numerous jurisdictions. DAZN's office address is at Hanover House, Plane Tree Crescent, Feltham TW13 7BZ, United Kingdom.

18. The Moving Parties have a track record of participating in relevant fora around the world with the purpose of tackling the issue of piracy while at the same time advocating for and promoting the protection of freedom of expression.

19. The Moving Parties have represented the interests of rights-holders both in their home countries and internationally. These organizations have direct experience with, and knowledge about, foreign laws as they relate to freedom of expression and the enforcement of copyright. In

particular, these organizations have knowledge on foreign jurisprudence relating to blocking orders and freedom of speech.

D. Why the Moving Parties Seek to Intervene and Have Vital Interest in the Appeal

20. The Moving Parties or their members have made extensive investments in order to create, market, and disseminate works. Illegitimate sites and services adversely affect legitimate markets for the sale and licensing of works. Blocking orders are often the only practical way in which markets can be protected from being flooded with access to infringing works. The Moving Parties are concerned that the arguments raised by the Appellant, if accepted by this Court, would significantly impact the ability to enforce their rights in Canada.

21. Further, if blocking orders are not available in Canada there will be an erosion in the belief that there should be payments for accessing and reproducing works. This would also undermine the rule of law that applies on the Internet as it does to everywhere else.

22. The Appellant opposes site blocking orders on the ground that they infringe Charter values or cannot be justified under Section 1 of the Charter“ and because “blocking is disproportionate” and “has serious implications for free expression”.

23. The Moving Parties are concerned that a decision that denies blocking order relief in Canada, or which makes it available but subject to conditions which limit its usefulness, or which is based on reasons that a blocking order violates fundamental rights of freedom of speech, could have global impacts on the enforcement of copyrights.

24. Canada has agreed in international treaties to ensure that it provides enforcement procedures that permit effective and expeditious action by right holders against copyright infringement that occurs in the online environment. The Moving Parties have a vital interest in ensuring that Canada construes the remedies under the *Copyright Act* in a manner consistent with Canada’s treaty obligations in respect of copyright and, in particular, by affirming the availability of blocking orders to provide remedies against online copyright piracy.

25. The enforcement proceedings in which the Moving Parties have been involved provide them with a distinct perspective on the way in which blocking orders should be issued to balance

the need for efficacy including with respect to the exigencies of their industries and freedom of expression rights.

E. The Moving Parties' Proposed Participation in the Appeal

26. As will be set out more fully in the Moving Parties' Written Representations, if the Moving Parties are granted leave to intervene, they intend to make the following submissions:

- (a) Enforcing copyrights against online infringers of copyrights does not violate freedom of speech values or rights.
- (b) Blocking orders against ISPs to prevent infringing copies of works from being made available (either by streams or downloads) from piracy websites, servers, applications, services, or other online sources or locations do not violate freedom of expression rights.
- (c) In deciding whether and how to grant blocking orders, the Court should balance the legitimate interests of copyright holders, ISPs and internet users.
- (d) Orders that require ISPs to block piracy websites, servers, applications, services, or other online sources or locations, should be made that appropriately balances the need for efficacy and usefulness, proportionality, and freedom of expression rights and that promotes the rule of law in the online context.
- (e) Blocking orders are expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements in the online environment. This remedy is consistent with and is or may be required to enable Canada to fulfil its treaty obligations in respect of copyright.

27. The Moving Parties will, through its submissions, seek to assist this Court in understanding the broader impacts of this Appeal as it relates to the importance of formulating a principled basis for balancing the values of freedom of expression with the need for effective and useful online remedies that preserve the rule of law in the Internet context, and that foster compliance with Canada's treaty obligations in respect of copyright.

28. The Moving Parties' submissions will be distinct from those in the other interveners' submissions. The Moving Parties' submissions will not require that they supplement the record before this Court.

THE FOLLOWING GROUNDS AND DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) the affidavit of Paul Doda, sworn May 7, 2020;
- (b) the affidavit of Stefan Sergot, sworn May 7, 2020;
- (c) the affidavit of Sam Moorhouse, sworn May 7, 2020;
- (d) the pleadings and proceedings herein;
- (e) the *Federal Courts Rules*, SOR/98-106, as amended, Rules 109 and 369;
- (f) the grounds stated in the written representations of the Moving Parties filed herewith; and
- (g) such further and other grounds as counsel may advise and/or this Honourable Court may permit.

May 8, 2020



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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. and
VIDEOTRON LTD.**

Respondents

**NOTICE OF MOTION OF THE MOVING
PARTIES, 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 PREMIER
LEAGUE LIMITED, AND DAZN LIMITED.**

(re: Motion for Leave to Intervene Under Rule 109 of
the *Federal Courts Rules*)

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Council, Association of Canadian Publishers, The
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DAZN Limited.

Federal Court



Cour fédérale

Date: 20191115

Docket: T-1169-19

Citation: 2019 FC 1432

Ottawa, Ontario, November 15, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**BELL MEDIA INC. GROUPE TVA INC.
ROGERS MEDIA INC.**

**Plaintiffs/
Moving Parties**

and

**JOHN DOE 1 dba GOLDTV.BIZ
JOHN DOE 2 dba GOLDTV.CA**

Defendants

and

**BELL CANADA
BRAGG COMMUNICATIONS INC. dba
EASTLINK
COGECO CONNEXION INC.
DISTRIBUTEL COMMUNICATIONS
LIMITED
FIDO SOLUTIONS INC.
ROGERS COMMUNICATIONS CANADA
INC. SASKATCHEWAN
TELECOMMUNICATIONS SHAW
COMMUNICATIONS INC.
TEKSAVVY SOLUTIONS INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.**

Third Party Respondents

ORDER IN T-1169-19

THIS COURT ORDERS that:

1. Within fifteen (15) days of the issuance of this Order, the Third Party Respondents shall block or attempt to block access by at least their residential wireline Internet service customers to the websites or online services identified at Schedule 1 to this Order (the “Target Websites”), by blocking or attempting to block access to all of the Target Websites’ domains, subdomains and IP addresses identified therein. For clarity, the GoldTV.ca Service is a Target Website for the purpose of this Order. Schedule 1 to this Order is empty for the GoldTV.ca Service as of the date of issuance of this Order, and may be supplemented by the Plaintiffs if and when appropriate in accordance with paragraph 2 of this Order.
2. If the Plaintiffs are made aware of any other domain, subdomain or IP address that has as its sole or predominant purpose to enable or facilitate access to the Target Websites:
 - a) the Plaintiffs may serve and file an affidavit and proposed amended Schedule 1:
 - (i) identifying the additional domain(s), subdomain(s) or IP address(es);
 - (ii) stating such additional domain, subdomain or IP address has as its sole or predominant purpose to enable or facilitate access to the Target Websites and that any additional IP address is not associated with any other active domain; and

- (iii) proposing to supplement Schedule 1 to this Order to include such additional domain, subdomain, and IP address;
 - b) any Third Party Respondent may bring a motion to object to the additional proposed domain, subdomain and IP address by serving and filing a motion record within ten (10) business days of service of the Plaintiffs' affidavit and proposed amended Order;
 - c) if no Third Party Respondent brings a motion to object within ten (10) business days in accordance with paragraph 2(b), the Court may grant the Order without further proceedings.
- 3. The Third Party Respondents have no obligation to verify whether the Plaintiffs' updates to Schedule 1 to this Order are correct, and are wholly reliant on the Plaintiffs accurately identifying the domains, subdomains or IP addresses associated with the Target Websites.
- 4. If and once they become or are made aware of the following situations, the Plaintiffs must notify the Third Party Respondents as soon as reasonably practicable:
 - a) any domain, subdomain or IP address contained in Schedule 1 to this Order (as updated) no longer has for sole or predominant purpose to enable or facilitate access to the Target Websites, in which case the Plaintiffs shall provide to the Third Party Respondents and file with the Court an updated Schedule 1 removing said domain, subdomain or IP address and the Third Party Respondents shall no longer be ordered to block or attempt to block access to said domain, subdomain, or IP address; and

- b) any IP address contained in Schedule 1 to this Order (as updated) hosts one or more active website(s) other than the Target Websites, in which case the Third Party Respondents shall no longer be ordered to block or attempt to block access to said IP address.
5. Notices and service of documents under this Order may be made by the Plaintiffs, the Third Party Respondents and their agents to one another by electronic means at addresses to be determined and agreed upon by them. Service and filing of documents pursuant to paragraph 2 may be made no more frequently than every ten (10) business days.
6. To the extent practicable, where access to a Target Website is blocked by a Third Party Respondent pursuant to this Order, that Third Party Respondent must take reasonable steps to make available the following information to its residential Internet service customers who attempt to access the Target Website and whose access is blocked:
- a) that access has been blocked by this Order;
 - b) the identity of the Plaintiffs and the Federal Court File for this matter; and
 - c) a statement to the effect that the operators of the Target Websites (i.e. the John Doe Defendants), the operators of any other website who claim to be affected by this Order, and any Internet service customer affected by the Order, may apply to the Court to seek a variation of this Order pursuant to paragraph 10 below.
7. A Third Party Respondent will be deemed to have complied with paragraphs 1 and 2 of this Order if it uses the technical means set out in Schedule 2 to this Order, or alternative or equivalent technical means, provided that the Third Party Respondents notify the Plaintiffs of the change.

8. If a Third Party Respondent, in complying with this Order, is unable to implement one of the steps referred to in Schedule 2 of this Order, that Third Party Respondent must, within fifteen (15) business days of service of this Order, or of the expiry of the ten (10) business day period referred to in paragraphs 2 b) and c) of this Order, notify the Plaintiffs of the step or steps it has taken and why it could not comply with the Order.
9. A Third Party Respondent shall not be in breach of this Order if it temporarily suspends, for no longer than is reasonably necessary, its compliance with paragraphs 1 and 2, in whole or in part, when such suspension is necessary to: correct or investigate potential over-blocking that is caused or suspected to be caused by the steps taken pursuant to paragraphs 1 and 2; maintain the integrity or quality of its Internet services or the functioning of its blocking system(s); upgrade, troubleshoot or maintain its Internet services or blocking system(s); prevent or respond to an actual or potential security threat to its network or systems; provided that the Third Party Respondent (i) gives notice to the Plaintiffs ahead of (or, if necessary, as soon as reasonably practical following) such suspension and provides the reason for such suspension and an estimate of its duration or (ii) if the suspension does not last longer than 48 hours, uses commercially reasonable efforts to maintain a record of the suspension and provides that record to the Plaintiffs upon request. The Plaintiffs shall treat any information received pursuant to this paragraph confidentially and shall use it solely for the purposes of monitoring and ensuring compliance with this Order.
10. The operators of the Target Websites (i.e. the John Doe Defendants), the operators of any other website who claim to be affected by this Order, and any Internet service customer of the Third Party Respondents affected by the Order, may bring a motion to seek a variation

of this Order insofar as this Order affects their ability to access or distribute non-infringing content by serving and filing a motion record within thirty (30) days of the first occurrence of the event that allegedly effects them and that results from this Order.

11. The Plaintiffs shall indemnify and save harmless the Third Party Respondents for:
 - a) the reasonable marginal cost of implementing paragraphs 1 and 6 of this Order and updating the implementation of this Order in response to notifications and/or service from the Plaintiffs pursuant to paragraphs 2 and 4; and
 - b) any reasonably incurred loss, liability, obligation, claim, damages, costs (including defence costs), or expenses resulting from a third party complaint, demand, action, claim, application or similar proceeding whether administrative, judicial, or quasi-judicial in nature, in respect of the Third Party Respondents as a result of their compliance with the Order.

12. With respect of the costs referenced in paragraph 11 a) of this Order:
 - a) The Third Party Respondents shall provide the Plaintiffs with an invoice setting out the claimed cost elements and the total cost claimed after having complied with one or more terms of this Order;
 - b) The Plaintiffs shall, within thirty (30) days of receipt of the invoice, either (i) pay the invoice or (ii) serve and file a motion disputing the reasonableness of the costs claimed in the invoice, failing which the costs shall be deemed to be reasonable; and

- c) In the event the Plaintiffs fail to pay the invoice or serve and file the motion referred to in paragraph 12 b), the Third Party Respondents shall no longer be required to comply with terms of this Order with respect to the domains, subdomains, or IP addresses to which the invoice relates.
13. This Order shall terminate two (2) years from the date of issuance, unless the Court orders otherwise.
14. All without prejudice to the ability of any Third Party Respondents to subsequently seek to stay, vary, or set aside this Order or to oppose on any basis any other related or similar Order sought by any Plaintiffs or any other party.
15. There shall be no costs on the motion.

"Patrick Gleeson"

Judge

Schedule 2 – Technical Means

1. For domains identified in Schedule 1 (as updated): DNS blocking, or alternatively DNS re-routing to comply with paragraph 6 of the Order.
2. For domains, subdomains or specific paths identified in Schedule 1 (as updated): DNS blocking or DNS re-routing, or at the Third Party Respondent's election URL path blocking, to the extent that the Third Party Respondent's existing technical infrastructure allows this blocking method. For certainty:
 - (a) for domains and subdomains identified in Schedule 1 (as updated), the Third Party Respondents do not need to implement URL path blocking if they implement DNS blocking or DNS re-routing in accordance with paragraph 1 of this Schedule 2.
 - (b) no Third Party Respondent shall be required to acquire the hardware and software necessary to put in place URL path blocking.
3. For the IP addresses identified in Schedule 1 (as updated): IP address blocking or IP address re-routing. For certainty, IP address blocking, or IP address re-routing, shall only be required to block IP addresses in respect of which the Plaintiffs or their agents notify the Third Party Respondents that, to the best of their knowledge, the server associated with the notified IP address does not also host an active website other than the Target Websites.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1169-19

STYLE OF CAUSE: BELL MEDIA INC. GROUPE TVA INC. ROGERS MEDIA INC. v JOHN DOE 1 DBA GOLDTV.BIZ JOHN DOE 2 DBA GOLDTV.CA AND BELL CANADA BRAGG COMMUNICATIONS INC. DBA EASTLINK COGECO CONNEXION INC. DISTRIBUTEL COMMUNICATIONS LIMITED FIDO SOLUTIONS INC. ROGERS COMMUNICATIONS CANADA INC. SASKATCHEWAN TELECOMMUNICATIONS SHAW COMMUNICATIONS INC. TEKSAVVY SOLUTIONS INC. TELUS COMMUNICATIONS INC. VIDEOTRON LTD.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 11, 2019,
SEPTEMBER 12, 2019

ORDER AND REASONS: GLEESON J.

DATED: NOVEMBER 15, 2019

APPEARANCES:

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Guillaume Lavoie Ste-Marie
Joshua Neubarth
Olivier Jean-Lévesque

FOR THE PLAINTIFFS

NO APPEARANCE

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Julie Mouris

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(TEKSAVVY SOLUTIONS INC.)

Timothy M. Lowman

FOR THE THIRD PARTY
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Vincent de Grandpré

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1169-19

STYLE OF CAUSE: BELL MEDIA INC. GROUPE TVA INC. ROGERS MEDIA INC. v JOHN DOE 1 DBA GOLDTV.BIZ JOHN DOE 2 DBA GOLDTV.CA AND BELL CANADA BRAGG COMMUNICATIONS INC. DBA EASTLINK COGECO CONNEXION INC. DISTRIBUTEL COMMUNICATIONS LIMITED FIDO SOLUTIONS INC. ROGERS COMMUNICATIONS CANADA INC. SASKATCHEWAN TELECOMMUNICATIONS SHAW COMMUNICATIONS INC. TEKSAVVY SOLUTIONS INC. TELUS COMMUNICATIONS INC. VIDEOTRON LTD.

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Court File No. A-440-19

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. and
VIDEOTRON LTD.

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU
by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.



IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 25, 2019

Issued by:
(Registry Officer)

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~~A SIGNÉ L'ORIGINAL~~

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of the Honourable Mr. Justice Gleeson of the Federal Court dated November 15, 2019, by which it was ordered that the Third Party Respondents to the motion shall, on the terms set out in the Order, block or attempt to block access to the websites or online services identified in Schedule 1 of the Order, for a period of two years from the date of the Order.

THE APPELLANT ASKS that:

- (i) The Order of Justice Gleeson be set aside;
- (ii) The costs of this appeal and of the hearing in the Federal Court be awarded to the Appellant; and
- (iii) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. The Judge erred in law in finding that the remedy of ordering Third Party Respondent Internet service providers to block access to websites (the “site-blocking remedy”) was available at law, including in particular, that it was available under the *Copyright Act*, RSC 1985, c C-42 (the “*Copyright Act*”).
2. The Judge erred in law in finding that section 36 of the *Telecommunications Act*, SC 1993, c 38 (the “*Telecommunications Act*”) did not apply to the site-blocking Order of this Court, given that section 36 provides that Canadian carriers cannot control the content of telecommunications that they carry for the public without the approval of the Canadian Radio-television and Telecommunications Commission.
3. The Judge erred in law in his interpretation and application of the test for a mandatory injunction under *RJR-MacDonald Inc v Canada (Attorney General)*, [1994]

1 SCR 311 (“*RJR-MacDonald*”). In particular, the Judge erred in law by importing and substituting factors from foreign jurisdictions into the *RJR-MacDonald* test.

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

5. Such further and other grounds as counsel may advise and this Honourable Court may permit.

6. The *Copyright Act*.

7. Sections 7 and 36 of the *Telecommunications Act*.

8. The *Charter*.


9. The *Federal Courts Act*, RSC 1985, c F-7.


10. The *Federal Courts Rules*, SOR/98-106.

11. The *Order Issuing and Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355.

12. The *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumers Interests and Innovation*, SOR/2019-227.

13. The Appellant proposes that the appeal be heard in the city of Ottawa.



I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____ day of _____ **NOV 25 2019** A.D. 20_____
Dated this _____ day of **NOV 25 2019** 20_____


**KIMBERLY LALONDE
REGISTRY OFFICER
AGENT AU GREFFE**

November 25, 2019

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FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC.

Appellant

and

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

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE APPELLANT, TEKSAVVY SOLUTIONS INC.**

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FEDERAL COURT OF APPEAL

B E T W E E N:

TEKSAVVY SOLUTIONS INC.

Appellant

and

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

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE APPELLANT, TEKSAVVY SOLUTIONS INC.**

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OVERVIEW

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

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

PART I - STATEMENT OF FACTS

A. THE PARTIES

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

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

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

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

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

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

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

⁴ Stewart Aff. at para 4, AB Vol 7, Tab 29, p 2145.

⁵ Stewart Aff. at para 5, AB Vol 7, Tab 29, p 2145.

⁶ RSC 1985, c C-42 [*Copyright Act*].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. THE COPYRIGHT ACTION

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

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

C. THE SITE-BLOCKING MOTION

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

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

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

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

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

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

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

¹⁹ Motion decision at para 8, AB Vol 1, Tab 2.

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

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

26. Despite its unprecedented nature, the motion was brought on a highly expedited basis in late July. The Notice of Motion was filed July 29, 2019 and made returnable August 7, 2019.²² The motion record consisted of nearly 400 pages, and over 500 pages of authorities. The eleven newly-named respondent ISPs were given mere days to decide whether and how to respond to the motion. The reasons for this urgency are not apparent, as the Respondents allege that GoldTV had been operating since 2017.²³

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

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

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

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

²² See Notice of Motion, AB Vol 1, Tab 8, p 181.

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

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

²⁵ Namely Bell Canada, Fido Solutions Inc., Rogers Communications Canada Inc., and Videotron Ltd.

²⁶ For example, Shaw Communications Inc.

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

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

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

32. On March 11—two days before this Memorandum was filed—the Respondents requested yet another amendment to the Order. They submitted further affidavit evidence and a further revised Schedule 1.³⁰

PART II – POINTS IN ISSUE

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

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

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

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

²⁹ Order of December 20, 2019, AB Vol 10, Tab 35, p 2884.

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

PART III – ARGUMENT

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

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

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

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

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

³¹ SC 1993, c 38 [*Telecommunications Act*].

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

³³ *Equustek* at paras 22-23.

³⁴ *Ibid* at para 25.

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

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

39. Fourth, the plaintiff Equustek had adduced evidence that it had made numerous efforts to locate the defendants overseas, but had been unable to do so.³⁶ The plaintiff had also obtained several prior injunctions in the three years leading up to the de-indexing injunction.³⁷ By contrast, in this case, the Respondents did not adduce any evidence of meaningful efforts to identify, locate and engage directly with the GoldTV defendants in the mere two weeks between commencing the copyright proceeding and requesting the site-blocking Order. The Respondents' failure to directly target the GoldTV defendants is unjustified, especially since the Respondents allege that the GoldTV defendants have been operating since 2017.³⁸ In comparison to *Equustek*, the moving parties here asked for an injunction that is more onerous and yet they made far less effort prior to requesting it.

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

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

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

³⁵ See *Telecommunications Act*, s 36.

³⁶ *Equustek* at para 52.

³⁷ *Equustek* at paras 3-17.

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

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

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

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

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

(i) The applicable principles of interpretation

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

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

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

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

⁴² *CCH* at para 9.

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

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

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

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

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

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

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

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

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

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

⁴⁷ See *Keatley* at para 47.

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

⁴⁹ See *Voltage* at para 26.

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

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

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

50. These choices also include safeguarding net neutrality for ISPs. In 2012, the liability exemptions for ISPs were maintained⁵³ and a new set of exemptions was added. The new section 31.1 exempts ISPs from copyright liability where they act as neutral conduits for content: it states that they do not infringe copyright “solely by reason of” providing the technological means to infringe copyright.⁵⁴ The addition of this provision demonstrates that Parliament carefully considered net neutrality for ISPs and expressly enshrined it in the *Copyright Act*. As will be discussed below, this principle is also enshrined in the *Telecommunications Act*.⁵⁵ This principle must be given full weight in any interpretation of remedies under the *Copyright Act*.

(ii) *The motion judge’s interpretation*

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

⁵⁰ *Ibid.*

⁵¹ *Copyright Act*, ss 41.25, 41.26.

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

⁵³ *Copyright Act*, s 2.4(1)(b).

⁵⁴ *Copyright Act*, s 31.1.

⁵⁵ *Telecommunications Act*, s 36.

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

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

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

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

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

⁵⁶ Motion decision at paras 28-30, AB Vol 1, Tab 2.

⁵⁷ Motion decision at para 29, AB Vol 1, Tab 2.

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

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

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

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

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

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

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

⁶⁰ *Telecommunications Act*, s 36.

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

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

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

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

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

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

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

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

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

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

⁶⁵ See *Association canadienne* at para 119.

⁶⁶ CRTC, Telecom Commission Letter, 8622-P49-200610510, p 2.

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

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

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

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

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

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

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

⁶⁷ CRTC, Telecom Regulatory Policy 2009-657 at para 122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76. Further, the motion judge failed to consider that the need for continual updating of the Order will consume judicial resources. As a matter of law, the need for ongoing judicial supervision is relevant to whether an injunction should issue, particularly for mandatory injunctions.⁸¹ At the hearing, it was obvious that this Order would need continuous updating. The list of Target Websites (Schedule 1) from the Notice of Motion required updating even before the hearing. The November 15 Order provides for supervised updates to the list of blocked sites every two weeks for the two-year duration of the order.⁸² Indeed, the November 15 Order required updating mere weeks after it was made,⁸³ and still another amendment was requested in March 2020.⁸⁴ Thus, the Order leaves open the possibility of dozens of judicial amendments over its two-year duration. However, the motion judge did not consider whether this need for ongoing judicial supervision was a reason to decline to make the Order.

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

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

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

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

⁸¹ *Sharpe* at paras 1.260-1.290.

⁸² Motion decision, p 36, para 2 of Order, AB Vol 1, Tab 2.

⁸³ Order of December 20, 2019, AB Vol 10, Tab 35, p 2884.

⁸⁴ Federal Court Docket, T-1169-19, 11 March 2020, Docs 81-84.

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

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

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

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

1. The expressive interests at issue

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

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

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

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

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

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

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

⁹² [1986] 1 SCR 103 [*Oakes*].

⁹³ *R v Sharpe*, 2001 SCC 2 at para 21.

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

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

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

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

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

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

⁹⁶ *SOCAN* at para 8.

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

⁹⁸ *Ford* at 764-767; *Irwin Toy* at 971.

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

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

¹⁰¹ [1986] 2 SCR 573 at 588 [*Dolphin Delivery*].

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

2. *The Order violates the Charter*

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

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

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

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

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

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

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

¹⁰⁵ *Irwin Toy* at 971-973; *Montreal* at para 56.

¹⁰⁶ *Dolphin Delivery* at 600.

¹⁰⁷ *Ibid* at 602-603.

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

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

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

b. The infringement cannot be justified under section 1

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

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

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

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

¹¹⁰ Hogg at §37-22.

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

¹¹² *Oakes* at 136-138.

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

¹¹⁴ *Oakes* at 139.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁰ Motion decision para 97, AB Vol 1, Tab 2.

¹²¹ *Pepsi-Cola* at paras 37, 67.

to take into account the important freedom of expression *Charter* values at stake in such cases.¹²² In *Dagenais v Canadian Broadcasting Corp* and *R v Mentuck*,¹²³ the Court employed *Charter* methodology to articulate a test for when a discretionary publication ban can be granted. The test incorporates both a necessity criterion¹²⁴ and a balancing criterion.¹²⁵ In *Grant v Torstar Corp*, the Supreme Court employed *Charter* values of expression to recognize a new defence to defamation: responsible communication on matters of public interest.¹²⁶ In *Jones v Tsige*, the Court of Appeal for Ontario applied *Charter* values of privacy in recognizing a new common law tort: intrusion upon seclusion.¹²⁷

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

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

¹²² *Pepsi-Cola* at paras 15-22, 26-37.

¹²³ 2001 SCC 76 [*Mentuck*].

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

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

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

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

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

¹²⁹ *Vancouver Aquarium* at para 82.

¹³⁰ See *Pepsi-Cola* at paras 37, 67.

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

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

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

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

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

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

¹³¹ See Motion decision at para 97, AB Vol 1, Tab 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁸ Motion decision at para 66, AB Vol 1, Tab 2.

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

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

¹⁴¹ *Copyright Act*, s 38.1.

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

that a lower threshold could be applied at the other two stages of the injunction test.¹⁴³ In so doing, he overlooked the fact that a mandatory injunction such as this one¹⁴⁴ attracts higher scrutiny at the first step of the injunction test: rather than a “serious issue to be tried”, the threshold at the first step is a “strong *prima facie* case”.¹⁴⁵ Thus, for this injunction a “strong *prima facie* case” was simply the basic threshold that had to be met in this case at the first step; it was no reason to lower the threshold at the other steps of the injunction test, as the motion judge did.

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

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

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

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

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

¹⁴⁴ See Motion decision at para 1, AB Vol 1, Tab 2.

¹⁴⁵ *R v CBC*, 2018 SCC 5 at para 15.

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

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

¹⁴⁸ Motion decision at para 53-54, AB Vol 1, Tab 2.

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

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

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

D. CONCLUSION

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

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


PART IV – STATEMENT OF THE ORDER SOUGHT

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

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

¹⁵¹ Motion decision at para 44, AB Vol 1, Tab 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of March 2020





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PART V - LIST OF AUTHORITIES

Domestic Legislation

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

Domestic Legislative History

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

Foreign Legislation

5. European Parliament and Council of the European Union, “Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society”, Official Journal L 167
6. European Parliament and Council of the European Union, “Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights”, Official Journal L 157
7. *Copyright Act 1968*, No 63, 1968 (Australia)
8. *Copyright, Designs and Patents Act 1988*, 1988, c 48 (United Kingdom)

Domestic Jurisprudence

9. *Association canadienne des télécommunications sans fil c Procureure générale du Québec*, 2018 QCCS 3159
10. *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815
11. *Bell Canada v 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612
12. *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2
13. *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13

14. *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835
15. *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62
16. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326
17. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712
18. *Google v Equustek Solutions*, 2017 SCC 34
19. *Graham & Strang v Dominion Express Company*, 1920 Carswell ON 56 (ONSC)
20. *Grant v Torstar Corp*, 2009 SCC 61
21. *Information Retailers Assn of Metropolitan Toronto v Metropolitan Toronto (Municipality)* (1985), 22 DLR (4th) 161 (ONCA)
22. *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927
23. *Jones v Tsige*, 2012 ONCA 32
24. *Keatley Surveying Ltd v Teranet*, 2019 SCC 43
25. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69
26. *MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311
27. *Montréal (City) v 2952-1366 Québec*, 2005 SCC 62
28. *Newbould v Canada*, 2017 FCA 106
29. *Nortel Networks Corp, Re*, 2017 ONSC 700
30. *Reference re Broadcasting Act*, 2012 SCC 4
31. *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123
32. *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311
33. *Rogers Communications v Voltage Pictures, LLC*, 2018 SCC 38
34. *R v CBC*, 2018 SCC 5
35. *R v Mentuck*, 2001 SCC 76

36. *R v Oakes*, [1986] 1 SCR 103
37. *R v Sharpe*, 2001 SCC 2
38. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573
39. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8
40. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36
41. *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45
42. *Syntex v Novopharm Ltd*, (1991) 126 NR 114 (FCA)\
43. *The Regents of University of California v I-Med Pharma*, 2016 FC 606
44. *Théberge v Galerie d'art du Petit Champlain*, 2002 SCC 34
45. *Tokatlidis v MxN Media Corp*, 2009 CarswellOnt 9016 (SCJ)
46. *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395
47. *Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252

Domestic Regulatory Decisions

48. Canadian Radio-television and Telecommunications Commission, Telecom Commission Letter, 8622-P49-200610510
49. Canadian Radio-television and Telecommunications Commission, Telecom Regulatory Policy 2009-657

Foreign Jurisprudence

50. *Cartier International AG v British Sky Broadcasting Ltd*, [2016] EWCA Civ 658
51. *EMI Records [Ireland] Ltd & Ors v UPC Communications Ireland Ltd*, [2010] IEHC 377

Secondary Sources

52. BCE Submission to Standing Committee on Industry, Science and Technology, December 10, 2018
53. Hogg, Peter W. *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007)
54. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Human Rights Council, 17th Sess. (2011) A/HRC/17/27.
55. Rogers Communications Inc Submission to Standing Committee on Industry, Science and Technology, December 10, 2018
56. Sharpe, Hon Robert J, *Injunctions and Specific Performance*, (loose-leaf consulted on 11 March 2020), (Toronto: Thompson Reuters, 2019)
57. Spry, Ian, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed, Prymont, NSW: Lawbook, 2014

Court File No. A-440-19

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. and
VIDEOTRON LTD.**

Respondents

AFFIDAVIT OF PAUL DODA

(Pursuant to Rule 109 of the *Federal Courts Rules*)

I, Paul Doda, of the City of New York, in the state of New York, hereby solemnly affirm and declare as follows:

1. I am the General Counsel, Litigation & Compliance, at Elsevier Inc. (“**Elsevier**”), a science, technical and medical publisher with offices throughout the United States, Europe, Asia, Latin America, and other parts of the world, a position I have held since 2017, and I have been employed at Elsevier in similar roles since 2007. My practice since 2010 has included an increasing focus on copyright enforcement and anti-piracy matters. My

experience spans civil copyright disputes and criminal copyright matters in various countries, including the United States, Germany, Switzerland, India, Vietnam, and South Korea.

2. I previously served as Chair of the Association of American Publishers (“**AAP**”)’s Online Piracy Working Group and AAP’s Committee on International Strategies (formerly the Content Protection & Policy Committee), and continue as a member of AAP’s Committee on Copyright Law and Policy. I have also served as Chair of the International Publishers Association (“**IPA**”)’s Copyright Committee and as a member of IPA’s Anti-Piracy Task Force. In addition, I have also served as a member of the Science, Technical and Medical Publishers’ Association (“**STM**”)’s Enforcement Task Force, as well as Deputy General Counsel-Litigation for Elsevier. Elsevier is also a member of the Canadian Publishers’ Council (“**CPC**”).
3. Prior to joining Elsevier in 2007, I was Vice President and Assistant General Counsel at Elsevier’s sister company, LexisNexis, where I represented several businesses in the legal information industry. Before moving in-house, I was a litigator in private practice with the law firm Sills Cummis, in New Jersey
4. I have been deeply involved and taken a leadership role not only on behalf of Elsevier but for the publishing industry as a whole in these previous capacities with regard to anti-piracy matters. I also have been involved in extensive copyright enforcement cases, including blocking cases in Belgium, France, Germany, Italy, Portugal, Spain, Sweden, Russia, and the United Kingdom. I have also testified before the United States Congress concerning the challenges of copyright enforcement under the *US Digital Millennium Copyright Act* (DMCA). My related journal article, *Distinguishing Common Carriers from Common Thieves*, was published by The Journal of the Copyright Society of the United States, in 2016.
5. I make this affidavit in support of a motion for leave to intervene in the appeal A-440-19, by a coalition of domestic and international publishing industry associations, namely, the International Publishers Association (“**IPA**”), the International Association of Scientific,

Technical and Medical Publishers (“**STM**”), the Association of American Publishers (**AAP**), the Publishers Association Limited (“**UK Publishers Association**”) and the Canadian Publishers’ Council (“**CPC**”), and the Association of Canadian Publishers (the “**ACP**”). In this affidavit, the coalition of publishers is referred to collectively as the “**Proposed Publisher Interveners**”.¹

6. The Proposed Publisher Interveners and their members have a longstanding involvement in all aspects of Canadian and international publishing, including as publishers of all manner of books, journals, and scientific publications including educational, scholarly, academic, technical, and professional publications, fiction and non-fiction, in print and digital formats. Their members include both Canadian-owned book publishers from every province and publishing sector, and international book publishers with operations in Canada and across the globe.
7. The Proposed Publisher Interveners have represented the interests of publishers and have monitored and advocated on developments in copyright law and enforcement both domestically and internationally.
8. I have personal knowledge of the information set out below. Where I do not have personal knowledge, I have been informed of the information in my capacity as General Counsel, Litigation & Compliance, global litigation counsel of Elsevier, or from my roles with and knowledge about the Proposed Publisher Interveners, or from the sources of information disclosed herein, and in each case I verily believe the information to be true.

The Underlying Appeal

9. On November 15, 2019, Justice Gleeson of the Federal Court of Canada granted a blocking order (the “**Order**”) in favour of leading Canadian broadcasters, namely, Bell Canada, Rogers Communications, and Videotron (the “**Plaintiffs/Respondents**”). The Order set

¹ Among the Proposed Interveners is also the Football Association Premier League Limited (“**The Premier League**”) and DAZN Limited (“**DAZN**”).

out a highly relevant precedent for publishers, as it compelled the Third-Party Internet service providers (the “ISPs”) to block access to certain websites and domains to protect the broadcasters’ copyrighted programming from online illegal streaming services. The decision granting the Order is reported as *Bell Media Inc. et al v GOLDTV.BIZ*, 2019 FC 1432.

10. I am advised by our counsel that the only Third-Party ISP that opposed the motion and filed an appeal (Court File No. A-440-19) is the Canadian ISP Teksavvy Solutions Inc. Since then, other entities have sought leave to intervene to make submissions in the Federal Court of Appeal supporting Teksavvy’s position against blocking. I was advised by our Canadian legal counsel and verily believe that these entities are: (a) CIRA, a Canadian domain name authority; (b) CIPPIC, an anti-copyright public interest advocacy group; and (c) the British Columbia Civil Liberties Union (the “BCCLA”).

The Proposed Publisher Interveners

11. As set out in detail below, the Proposed Publisher Interveners and their members have a deep involvement in the many different aspects of publishing and the publishing industries.
12. I provide below some information about the Proposed Publisher Interveners. The direct or indirect members of the Proposed Publisher Interveners publish and/or distribute their works in Canada and own the copyrights or have exclusive licenses in these works.

The International Publishers Association – IPA

13. I am advised by Hugo Setzer, President of IPA, and I verily believe the facts set out in paragraphs 14 to 23 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the IPA).

- (a) Background

14. The IPA is the world's largest federation of national, regional and specialist publishers' associations. It is headquartered at 23 Avenue de France, 1202 Geneva, Switzerland. The IPA represents all segments (trade fiction, non-fiction, education, academic, and professional) of book and journal publishing, in print and digital formats, around the world. It represents the interests of publishers in international fora and wherever publishers' interests are at stake.
15. The IPA is a non-profit and non-governmental organization that was founded in France in 1896 to promote and protect publishing and to raise awareness for publishing in the context of economic, cultural, and political development. The IPA actively opposes censorship and promotes copyright, literacy, and the freedom to publish. Its membership comprises more than 83 organizations from more than 69 countries in Africa, Asia, Australia, Europe and the Americas.

(b) Expertise

16. The IPA enjoys observer status at United Nations ("UN") organizations, including the World Intellectual Property Organization ("WIPO"), and the UN Educational Scientific and Cultural Organization ("UNESCO"). The IPA also maintains a close relationship with the World Trade Organization. As such, the IPA influences the international landscape of copyright policy in various ways.
17. The IPA has attended diplomatic conferences on copyright issues and made oral and written submissions outlining the views or concerns of the publishing industry on numerous initiatives to ensure the needs of the book and journal publishing industry are considered by diplomatic delegates in voting on the adoption of treaties and policies. In November 2014, the IPA took part as an observer in the Committee on Development and Intellectual Property's Fourteenth Session in Geneva.
18. An advocate for copyright awareness, protection and promotion, the IPA organises and participates in major conferences and symposia to identify issues and offer guidance in the interest of the international publishing community.

19. In 2013 and 2014, the IPA submitted comments in copyright consultations in Australia, Ireland, France, Germany, Nigeria, Norway, and Saudi Arabia and supported its members in their submission in numerous jurisdictions, including in collaboration with the other proposed publisher interveners in several of the matters listed hereinafter.
20. In June 2018, the French Publishers Association, one of the IPA's members, made submissions to the Standing Committee on Industry, Science and Technology regarding the statutory review provided for in the 2012 Canadian *Copyright Modernization Act* as part of its study on Copyright Legislation.
21. On June 5, 2018, IPA's President testified before the Canadian House of Commons Standing on Industry, Science and Technology on the topic of Canada becoming an international outlier because of its broad exception for educational uses and the subsequent "legislation through the courts" that has seen fair dealing equated with users' rights.
22. In June 2008, IPA made submissions before the European Parliament Human Rights Subcommittee on the suppression of freedom of speech in Tunisia, recommending ways in which the European Parliament could work with local and international non-governmental organizations to advance and protect freedom of speech values.
23. IPA has also commented on proposals for several legislative initiatives or amendments, including with respect to intellectual property rights and UNESCO claims regarding indigenous cultural heritage and artistic expressions.

The International Association of Scientific, Technical and Medical Publishers – STM

24. I am advised by Carlo Scollo Lavizzari of STM, attorney admitted to practice in Switzerland, South Africa, England and Wales, and legal counsel to STM, and verily believe the facts set out in paragraphs 25 to 31 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the STM).

(a) Background

25. The STM is a non-profit international trade association and its secretariat is a foundation legally registered in Amsterdam. The STM is organized for the benefit of scholarly, scientific, technical, medical, and professional publishers and its members assist national and international organizations and communications industries with the publication, dissemination, storage, and retrieval of scientific, technical and medical research and information including in the electronic environment.
- (a) Expertise
26. The STM has had a dedicated Enforcement Task Force (the “**ETF**”) since 2004. The ETF was established in 2007 as a self-funding committee of the STM Copyright and Legal Affairs Committee to support selected cases of copyright enforcement. The STM has employed significant resources to assist its members in dealing with infringement and piracy of copyrights, including in the following representative matters:
- (a) *Publishers v. library.nu and ifile.it*, where STM obtained an injunction from the regional court in Munich against two closely interrelated Internet platforms that collect, and make accessible and usable, masses of e-book pirate copies.
- (b) *American Chemical Society et al v. ResearchGate GmbH*, Court No. 8:2018cv03019 (D. Md. 2019), where STM made recommendations to ResearchGate urging the site to adopt an automated system that would immediately flag copyright-infringing articles before they were uploaded to prevent them from appearing publicly on the site.
- (c) *The Authors Guild, Inc. v. Google, Inc.* (2d Cir Oct 16), where STM intervened in lawsuit against Google Inc. for copyright infringement for scanning millions of titles and making them available via libraries and making snippets of the titles available via online search.
27. On February 22, 2019, the STM made submissions to South Africa regarding the Copyright Amendment Bill (B-13 of 2017) stating that the provisions of the new section 6A have the

potential to undermine the investments publishers make in scholarly communication to the detriment of the authors the provision is intended to benefit.

28. The STM has presented on some of the new and recurring problems that exist in publishing online, including piracy concerns, for example, at the STM Frankfurt Conference entitled “Surviving Our Mid-Life Crisis: Forward from Forty” in 2009.
29. The STM protection of copyright initiatives include the STM Permission Guidelines it has established to facilitate many routine permission requests among publisher signatories.
30. On September 15, 2015, the STM made submissions in South Africa regarding the South African Draft Copyright Amendment Bill, concerning (1) unwarranted expansion of State copyright; (2) freedom of contract and counter-productive State interference; and (3) US-style fair use exception.
31. On August 29, 2014, the STM made submissions in Australia concerning the Discussion Paper “Online Copyright Infringement”, in respect of the need to promote cooperation between rightsholders and ISPs to act on infringements.

The Association of American Publishers – AAP

32. I am advised by M. Luisa Simpson, Senior Vice President, Global Policy, of AAP, and verily believe the facts set out in paragraphs 33 to 38 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the AAP).

(a) Background

33. The AAP is a non-profit association established in the United States, with headquarters in Washington, DC (455 Massachusetts Ave, NW, Suite 700, Washington, DC). It represents the leading book, journal, and education publishers in the United States on matters of law and policy and advocates for values of freedom of speech as well as outcomes that incentivize the publication of creative expression, professional content, and learning

solutions. AAP has taken enforcement actions in several foreign jurisdictions to protect and enforce the copyrights of its member publishers.

34. The AAP is a member of several domestic and international organizations and coalitions whose objective is to promote strong copyright laws and enforcement regimes. These organizations include the IPA, as described above, and the International Intellectual Property Alliance (“IIPA”). The IIPA is a private sector coalition, formed in 1984, of trade associations representing United States copyright-based industries working to improve international protection and enforcement of copyrighted materials including through international treaties, and to open foreign markets closed by piracy and other market access barriers.

(b) Expertise

35. The AAP has wide experience on many matters of public policy that impact intellectual property in various ways. The AAP has assisted courts around the world on multiple occasions serving as an intervener and *amicus curiae*. For example, AAP was involved in the following cases related to subject matter of intellectual property and the Internet:

- (a) *Amicus Curiae in Google LLC v Oracle America, Inc.*, 886 F.3d 1179 (Fed. Cir. 18), concerning whether software programmers may copy functional names present in software code so long as they do not copy the underlying source code implementing the function (Judgement issued in February 2020);
- (b) *Amicus Curiae in UMG Recordings, Inc. et al v Kurbanov*, regarding whether a U.S. rights holder may bring action against a foreign-based site in U.S. courts (Judgement issued in March 2019);
- (c) *Amicus Curiae in Capital Records, LLC v Redigi Inc.*, concerning emblematic copyright case on whether “used” creative digital content can be resold in the online environment (Judgement issued in May 2017);

- (d) *The Authors Guild v. Google Inc.* (1:05-cv-08136, District Court, S.D. New York), concerning copyright infringement by Google for developing its Google Book Search database.
36. On July 15, 2019, the AAP made submissions to the Senate Committee on the Judiciary in support of the Committee's forthcoming markup of the Copyright Alternative in Small-Claims Enforcement Act of 2019 ("**CASE Act**") and encouraging the development of the CASE Act to resolve copyright claims that would otherwise remain unresolved.
37. On June 26, 2019, the AAP filed comments with the United States Federal Trade Commission urging the commission to more closely scrutinize the behaviour of dominant online platforms that pervade every aspect of the economy.
38. In September 2019, the AAP again advised and provided recommendations to the Office of the United States Trade Representative (USTR) for its 2019 Review of Notorious Markets for Counterfeiting and Piracy ("Notorious Markets List"), which highlights online and physical piracy markets and encourages the responsible authorities in the countries associated with those markets to intensify efforts to combat piracy as an illegal activity. The Notorious Markets List is an out-of-cycle review conducted by USTR under the auspices of the annual Special 301 process, and has been published separately from the annual Special 301 Report since February 2011.

The UK Publishers Association

39. I am advised by Catriona Stevenson, General Counsel of the UK Publishers Association, and verily believe the facts set out in paragraphs 40 to 47 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the UK Publishers Association).

- (a) Background

40. The UK Publishers Association is a non-profit organization which was established in 1896 and is headquartered in London, United Kingdom (First Floor, 50 Southwark Street, London, SE1 1UN).
41. The UK Publishers Association is the member organization for UK publishing, representing companies of all sizes and specialisms. Its members produce digital and print books, audiobooks, research journals and educational resources across genres and subjects. In 2018, UK publishing had a turnover of £6bn, with export income accounting for 59% of revenues. The UK Publishers Association's membership includes global companies as well as independent publishers and university presses. North America (including Canada) is an important market for UK publishers. Total physical book exports to the North America region across consumer, education and academic publishing totalled £128m in 2018 and total journal exports totalled £714m.
42. The UK Publishers Association is a member of several domestic and international industry organizations, including the IPA, as described above; the Federation of European Publishers, an independent, non-commercial association which represents 28 national associations of book publishers across the EU and EEA; and the British Copyright Council, a not-for-profit organisation that provides a forum for discussion of copyright law and related issues at UK, European and International levels.
43. The work of the UK Publishers Association focusses on ensuring that the value of publishing and its economic and cultural contribution are recognised. The UK Publishers Association engages with governments in respect of key policies and laws that impact and support publishing. It advocates for strong copyright laws at home and abroad. It also promotes the values of freedom of speech at home and abroad. It serves its members through policy, legal and public affairs work, running industry campaigns, and through a range of key member services including export and content protection (anti-piracy) support.

(b) Expertise

44. In the UK, copyright holders can take action against ISPs to enforce their rights in relation to infringing websites. The right to seek a website blocking injunction is specifically set out in section 97A of the *Copyright, Designs and Patents Act 1988* as amended (CDPA), implementing Article 8(3) of the *Copyright Directive (2001/29/EC)*, which states that: “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

45. In *Twentieth Century Fox Film Corporation and others v Newzbin Ltd* [2010] EWHC 608 (Ch), the English High Court granted website blocking injunctions requiring ISPs to block access to websites containing material with copyright-infringing material. Since then, the English courts have granted blocking injunctions in respect of hundreds of websites containing copyright-infringing material, and their proxies, in applications brought by rightsholders from across the creative industries as well as the Football Association Premier League. Site blocking has become a relatively straightforward route of enforcement in respect of internet piracy, as applications can be decided without cross-examination of witnesses and/or disclosure and it is rare to see ISPs or rights-holders appealing the substance of orders granted. Indeed, some European countries, notably Denmark and Portugal, have introduced voluntary MOUs or codes of conduct to streamline and simplify website blocking procedures further. Others have administrative regimes.

46. In May 2015, in an action managed by the UK Publishers Association, a website blocking order was obtained from the English High Court under section 97A CDPA, requiring ISPs to block user access to seven websites containing material which was found to infringe copyright, plus proxy sites. This order remains in place and the UK Publishers Association is required to ensure that the data within it remains relevant. Several hundred proxy sites have been added to the block list since the order was first made. Additionally, the UK Publishers Association has in the past supported website blocking actions brought by BPI, the industry association which represents the UK recorded music industry. UK Publishers Association members have also taken blocking actions independently in a number of countries.

47. The UK Publishers Association is also a stakeholder in PIPCU (Police Intellectual Property Crime Unit), a specialist unit within the City of London Police tasked with tackling serious and organised intellectual property crime with a particular focus on offences committed online. The UK Publishers Association has contributed pirate sites to PIPCU's Infringing Websites List (IWL) – a list of sites that have been verified as providing copyright protected content illegally. The IWL is shared with digital advertisers and advertisement agencies so that they can ensure advertisements are not placed on such sites.

The Canadian Publishers' Council – CPC

48. I am advised by David Swail, President of the CPC, and I verily believe the facts set out in paragraphs 49 to 59 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the CPC).

(a) Background

49. The CPC is a national trade association representing the interests of Canadian publishers. Members of the CPC include wholly owned Canadian organizations and subsidiaries of international publishing companies. The members of the CPC include educational publishers in the K-12, college, university, and post-graduate sectors such as Pearson Education Canada, McGraw-Hill Ryerson Limited, John Wiley & Sons Canada Limited, Elsevier Canada, MacMillan Canada, Oxford University Press, and Scholastic Canada Limited. These members and others publish textbooks, other educational and academic works, works of reference, and journals. Many of the CPC's education-focused members are engaged in developing digital instructional solutions, such as eTexts and adaptable on-line resources, and are deeply concerned with the prospect that these emerging solutions could be compromised by a decision that reduces the efficacy of the rule of law over the Internet and other digital networks.
50. The CPC members also include publishers of general interest fiction and non-fiction for adults and children, such as Harlequin Enterprises Ltd., HarperCollins Canada Limited, Penguin Random House of Canada Limited, Hachette Book Group Canada, and Simon &

Schuster Canada. Affiliate members who participate in the CPC's intellectual property undertakings include Carswell/Canada Law Book, and LexisNexis Canada and Thomson Reuters, all of whom are increasingly involved in the digital economy through their online portals, which give access to a considerable array of research materials for professional and educational audiences.

51. Beyond publishing and selling original Canadian-written books and other publications, the CPC members also represent, on an exclusive basis, the publishing programs of companies in other countries that have no Canadian corporate presence. Today, the CPC members employ many thousands of Canadians and collectively account for nearly three-quarters of all domestic sales of English-language books in Canada. Together, the CPC members have more than 40,000 Canadian titles in print. Annually, members invest more than \$50 million in their Canadian publishing and manufacturing endeavours and pay more than \$25 million in advances and royalties to Canadian authors.
52. The CPC represents the Canadian publishing community on the international level in the IPA. The CPC is also a member of the International Federation of Reprographic Rights Organizations (the "**IFRRO**"). The IFRRO is the chief international network of collective management organizations and creators' and publishers' associations in the text and image spheres. It works to protect and enable easy legal access to copyright material and has dealt with many challenges raised by the dissemination of content over the Internet and other digital networks.
53. Through these two organizations, the CPC has participated for many years in multilateral negotiations affecting publishers, including on issues related to the development of international digital publishing standards, the promotion of publishers' and authors' interests worldwide, their interest in advancing free speech, and the enforcement of rights online.
54. The CPC also maintains regular contact with the Association of American Publishers and the UK Publishers Association. Several members of the CPC have associated companies

in other jurisdictions such as the United States, the UK, France, Germany, Austria, Netherlands, Spain, Belgium, Sweden, South Africa, India, and Australia.

55. The Proposed Publisher Interveners exploit intellectual property rights in many different settings, including digital works that are disseminated broadly online through authorized channels and through new models supported by the flexibility of Internet-based digital technologies (including rental models and interactive models).

(b) Expertise

56. The CPC was founded in 1910. Over this time, it has gained a deep understanding of the Canadian publishing industry and has brought this wide experience to bear on many matters of public policy. The CPC has assisted this Court and the Supreme Court of Canada as an intervener in the following cases touching, *inter alia*, on the subject matters of intellectual property, freedom of expression, and the Internet:

- (a) *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34, an emblematic and first case requiring a search-engine company (Google) to de-index websites that promote the sale of stolen intellectual property, a decision which supports efforts to curb internet-based infringement of a range of digital products, including ebooks, audiobooks and scanned print books.
- (b) *York University v the Canadian Copyright Licensing Agency (“Access Copyright”)*, 2020 FCA 77, a matter concerning enforceability of tariffs where the Court recognized that rights of copyright owners are appropriately compensated through license agreements with publishers or aggregators, transactions permissions from publishers or other copyright collections, or existing fair dealing exceptions under the *Copyright Act*.
- (c) *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (“Access Copyright”), concerning the fair dealing exception to copyright infringement;

- (d) *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (“CCH”), a seminal case on Canadian copyright law and the fair dealing defence;
 - (e) *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, concerning the defence of fair comment in an action for defamation;
 - (f) *Grant v. Torstar Corp.*, 2009 SCC 61, and *Quan v. Cusson*, 2009 SCC 62, concerning the defence of responsible communication on matters of public interest in a pair of actions for defamation;
 - (g) *National Post, et al. v. Her Majesty the Queen*, 2010 SCC 16, concerning freedom of expression and the scope of protection for confidential journalistic sources; and
 - (h) *Crookes v. Newton*, 2011 SCC 47, regarding whether hyperlinking constitutes publication.
57. The CPC has appeared before the Standing Committee on Canadian Heritage many times and, on multiple occasions, before the Standing Committee on Finance, the Standing Committee on Foreign Affairs and International Trade, the Senate Banking, Trade and Commerce Committee, and the Senate Social Affairs, Science and Technology Committee. The CPC appeared before the Special Committee of Parliament, which was established to consider the repeal of the Foreign Investment Review Act and the enactment of the Investment Canada Act. The CPC has also made representations to Canadian policy-makers on matters involving trade including the Free Trade Agreement and the North American Free Trade Agreement. The CPC has also appeared before government bodies numerous times on GST and tax harmonization issues.
58. The CPC has also frequently made representations to government and other institutions in respect of copyright and intellectual property matters. In past years, the CPC has published position papers and submitted briefs to governmental bodies on copyright, including submissions to the Joint Legislative Committee regarding Bill C-32: A Bill to Amend Canada’s Copyright Act; a discussion paper on the WIPO Copyright Treaty entitled “Submissions on A Framework for Copyright Reform and Consultation Paper on Digital

Rights Issues”; and a submission to the CRTC concerning Public Notice CRTC 1994-130 on Copyright and the Information Highway.

59. In the 2009 copyright consultations sponsored by the Federal Departments of Industry and Canadian Heritage, the CPC delivered a detailed series of written submissions suggesting how the government could achieve its stated goals for copyright reform. Among other topics, these submissions covered fair dealing and the educational, library, and distance learning exceptions. The CPC was a joint author with the Canadian Educational Resources Council of a detailed submission to the Ontario Ministry of Community and Social Services regarding an accessible information and communication standard for persons with disabilities, and also made three submissions to the Departments of Foreign Affairs and International Trade on the intellectual property and database protection provisions of the proposed comprehensive economic agreement between Canada and the European Union.

The Association of Canadian Publishers – ACP

60. I am advised by Kate Edwards, Executive Director of the ACP, and I verily believe the facts set out in paragraphs 61 to 68 of this affidavit (and in other portions of this affidavit that refers to information about the activities of the ACP).

(a) Background

61. The ACP represents 115 Canadian-owned book publishers, with members from every province and publishing sector. The members of the ACP include Annick Press Limited, Broadview Press, Canadian Museum of History, Canadian Scholars’ Press Inc., Coach House Books, Dundurn Press, House of Anansi Press, Inhabit Media, Kids Can Press, McGill-Queen’s University Press, Playwrights Canada Press, Portage & Main Press, Thompson Educational Publishing, University of Alberta Press, University of British Columbia Press, University of Manitoba Press, University of Toronto Press and Wilfrid Laurier University Press.

62. The members of the ACP sell books and other publications for a variety of purposes including for educational, research and reference purposes and for general interest in leisure and reading. Many texts are also made available in electronic formats.
63. The ACP was instrumental in launching the eBOUND Canada program in March 2009. Acting as a digital arm of the ACP, eBOUND Canada is a not-for-profit organization dedicated to advancing Canadian publishers' engagement in the digital marketplace regardless of their size or level of expertise. Its growing number of programs includes ebook distribution, digital asset management, conversion services, and professional development. Through eBOUND, ACP is also currently engaged in leading industry efforts to support the production and distribution of digital books in accessible formats (i.e., formats for readers with print or perceptual disabilities). The significant investments made by the ACP and its members in the eBOUND initiative are reliant on publishers' rights being enforceable in the digital arena.

(b) Expertise

64. The ACP, and its predecessor the Independent Publishers' Association, has represented the interests of Canadian-owned publishers for nearly 50 years. For decades, the ACP has monitored and commented on developments in copyright in Canada and elsewhere on behalf of its members. Its publications include "The Canadian English-Language Book Publishing Industry Profile," (2018), "Net Benefit: Canada's Policy on Foreign Investment in the Book Industry," (2017), and "Public Opinions on the Value of Books in the English Language Book Sector," (2015).
65. Over the past many years, the ACP's positions have assisted in policy development within the Department of Industry, Trade and Commerce, and for the Book Publishing Policy and Programs section of the Department of Canadian Heritage. The ACP made submissions to government on Bill C-32, *An Act to Amend the Copyright Act* in 2012, and to the Department of Innovation, Science and Economic Development in 2017 on options for reform of the Copyright Board of Canada. The ACP also made submissions to the Standing Committee on Industry, Science and Technology and the Standing Committee on Canadian

Heritage during copyright reform consultations in 2009, the 2018 statutory review of the *Copyright Act*, and also appeared before both committees on this subject in April 2018 and October 2018, respectively. ACP makes regular submissions to the Standing Committee on Finance's pre-budget consultations, and appeared before the Committee in September 2017. ACP provided a submission to Global Affairs Canada on the renegotiation and modernization of the North American Free Trade Agreement in 2017. ACP provided a brief to the Department of Canadian Heritage in 2016 on the "Canadian Content in a Digital World" consultations.

66. The ACP has commissioned a series of extensive studies on the use of Canadian materials in domestic schools and libraries. These include a key ACP study, "The Crisis in Canada's School Libraries", and a follow-up study, "A Sampling Survey of Response to The Crisis in Canada's School Libraries: The Case for Reform and Reinvestment", which involved extensive interviews of stakeholders in the education and school library communities including principals, teacher-librarians, administrators, education professors, parent groups and book wholesalers, in order to analyze the best methods for marketing Canadian textbooks and general-interest books to educators and teacher-librarians. In 2017, the ACP published "Digital Trends and Initiatives in Education: The Changing Landscape for Canadian Content," which explored how Canadian content in digital formats is being acquired in the K-12 and post-secondary education sectors.
67. At the provincial level, the ACP participated in the 2015 Ontario Cultural Strategy consultations, including by proposing a number of means by which the cultural sector could respond to digital challenges and opportunities.
68. The ACP has also intervened in other cases including *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34, *York University v the Canadian Copyright Licensing Agency* 2020 FCA 77, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, and *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

Why the Proposed Publisher Interveners Seek to Intervene and Have Vital Interest in the Appeal

69. This Court is being asked to consider for the first time whether blocking orders can be made against an ISP to assist in enforcing copyrights online. The Appellant submits that such orders cannot be made.
70. Members of the Proposed Publisher Interveners have made extensive investments in order to create, market, and distribute their works. Increasingly publishers in Canada and internationally have made significant investments to produce digital works including e-books and digital versions of their works. Unfortunately, illegitimate sites and services engaged in infringing activities make available unauthorised copies of works over the Internet thus affecting legitimate markets for the sale and licensing of works of members of the Proposed Publisher Interveners.
71. It is impossible to quantify the total losses suffered by the publishing industry from piracy affecting their works. However, they are substantial. A recent study by Digimarc, a brand protection company, estimated that losses to publishers from illegal downloads of only e-books was U.S. \$315 million in lost sales to the U.S. e-book market per year.² Even a single pirate site can potentially cause hundreds of millions of dollars in lost sales. For example, Sci-Hub, a notorious website that hosts infringing copies of scholarly journal articles has pirated approximately 85% of all global scholarly journal article output, including between 80%-97% of the articles published by the eight largest publishers in the sector, all of whom are members of STM. Using Sci-Hub's own usage information taken from its site, Sci-Hub is estimated to have caused hundreds of millions of dollars in damages (US) in lost subscription revenue to the science publishing industry.³
72. These piracy sites are frequently outside of the jurisdiction of local courts and even if court orders are made against them, the operators do not comply with these orders and cease their

² Neilsen/Digimarc "Inside the Mind of a Book Pirate", Winter/Spring 2017 online @ <https://www.digimarc.com/docs/default-source/default-document-library/inside-the-mind-of-a-book-pirate.pdf>

³ Based on information provided by Sci-Hub, the losses are calculated as follows. Scholarly publishers provide subscriptions to institutional and corporate customers, with article download usage as a primary basis for determining subscription pricing. Sci-Hub is estimated to have diverted approximately 200,000,000 article downloads from legitimate publisher sites over the course of its existence, resulting in an approximate \$300,000,000 (US) decrease in subscription revenue to publishers. Publishers also offer articles on an a la carte purchase basis; many millions of dollars more in losses are estimated from lost sales from this type of offering.

infringing operations. Accordingly, blocking orders are often the only practical way in which domestic markets can be protected from being flooded with access to infringing copies of works.

73. The Proposed Publisher Interveners are concerned that the arguments raised by the Appellant, if accepted by this court, would significantly impact our members' ability to enforce rights in different settings. ISPs play an essential role in connecting users to information published over the Internet including licensed digital content of its members. Regrettably however, ISPs are also the conduit that enables persons to view and download infringing copies of works. If court orders cannot be practically enforced directly against website and operators of other infringing online locations, often the only available option to enforce the order is to require an intermediary such as an Internet Service Provider (ISP) to block access to the website, servers, or other online locations so that, in practice, it cannot be located and effect can be given to copyright rights.
74. Members of the Proposed Publisher Interveners are concerned that if the Appellant's submissions are accepted by this Court, it would severely undermine the ability of publishers to prevent infringing content being made available in Canada or to have court orders enforced online. Accordingly, members of the Proposed Publisher Interveners have a very significant financial and business interest in the outcome of this appeal.
75. I am advised by our counsel that the Appellant opposes blocking orders on the ground that they infringe Charter values or cannot be justified under Section 1 of the Charter.⁴ It relies on, among other sources, a report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. It also argues that courts are ill equipped to make blocking orders because "blocking is disproportionate" and "has serious implications for free expression".⁵

⁴ Teksavvy Memorandum of Fact and Law, Issue B.

⁵ Teksavvy Memorandum of Fact and Law, Issue A3 and paras. 73, 78.

76. As creators and publishers, the Proposed Publisher Interveners are vitally interested in protecting freedom of expression rights as well as their rights to prevent their copyrights from being infringed by unauthorised file sharing sites. A decision by this court that gives effect to these arguments could have sweeping implications for other online enforcement of copyrights including against other intermediaries and online service providers such as large social media services, cyber lockers, search engines, Internet portals, and linking sites. It could also potentially result in this Court limiting the scope or type of blocking orders that a court may make, thus limiting the usefulness of blocking orders against ISPs.
77. The Proposed Publisher Interveners can only prosper and make re-investments in new works, or new ways of delivering works, if they are able to obtain a reasonable return on their investments. Another major concern of the Proposed Publisher Interveners' members is that if the public becomes accustomed to accessing content for free, it will foster a belief that the content should be available without charge, create a reluctance to pay for the works of its members, and undermine the rule of law on the Internet. It is not feasible for publishers to compete against "free". The inability to effectively enforce rights online can help contribute to a downward spiral in which publishers make investments in the creation and distribution of works but the widespread availability of infringing copies online makes it hard to license or obtain compensation for uses of their works. Thus, if effective remedies against infringers are not available, there will be further erosion in the belief that there should be payments for accessing and reproducing works. This would also undermine the rule of law that applies on the Internet as it does to everywhere else.
78. As described above, many publishers publish their works in Canada and around the world. Decisions from Commonwealth courts dealing with the scope of equitable relief in enforcing copyrights can and do influence other courts. As an example, the motions court Judge relied extensively on blocking order decisions made in the United Kingdom. The Proposed Publisher Interveners are concerned that a decision that denies such relief in Canada, or which makes it available but subject to conditions which limit its usefulness, or which bases its decision on reasons such as that a blocking order violates fundamental rights of freedom of speech, could have global impacts in other jurisdictions. Conversely,

a decision that grants effective relief here and which finds that freedom of speech rights are not violated by blocking orders can also be expected to help develop jurisprudence around the world that endorses the effective remedy of blocking orders to combat online copyright infringement. The members of the Proposed Publisher Interveners will thus be affected in future cases by the outcome of this appeal.

79. Canada is also a party to numerous bilateral and multilateral conventions and treaties that require Canada to have measures that permit effective action against any act of infringement of copyright rights including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements of copyright. These obligations exist, for example, in Article 14 of the World Trade Organization TRIPS Agreement (“*TRIPS Agreement*”),⁶ Article 14 of the WIPO Copyright Treaty (“*WCT*”), Article 20.79 of the recently ratified Canada-United States-Mexico Agreement (“*CUSMA*”), and the Article 18.71 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“*CPTPP*”). Under the *TRIPS Agreement*, *CUSMA* and *CPTPP* remedies for copyright infringement must also not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. The *CUSMA* and *CPTPP* also include express provisions requiring Parties to the treaties, in a manner consistent with Article 41 of the TRIPS Agreement, to provide enforcement procedures that permit effective and expeditious action by right holders against copyright infringement that occurs in the online environment. The Parties must also ensure that legal remedies are available for rightsholders to address that copyright infringement. In addition, under these treaties, Parties are required to provide legal incentives for ISPs to cooperate with copyright owners to deter the unauthorised storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorised storage and transmission of copyrighted materials.⁷

⁶ WTO, Uruguay Round of Multilateral Trade Negotiations, signed by ministers in Marrakesh on 15 April 1994.

⁷ *CUSMA*, Art. 20.89, *CPTPP*, Art. 18.82

80. I am advised by our counsel that where possible, Canadian courts seek to interpret Canadian copyright laws consistent with Canada's treaty obligations in respect of copyright.⁸ The Proposed Publisher Interveners have a vital interest in ensuring that Canada construes the remedies under the *Copyright Act* in a manner consistent with Canada's treaty obligations in respect of copyright and, in particular, by affirming the availability of blocking orders to provide remedies against online copyright piracy.

The Proposed Publisher Interveners Have a Distinct Perspective

81. As associations whose members span the entire continuum of Canadian and international publishers, the Proposed Publisher Interveners are uniquely qualified to advise this Court on the impacts of the present appeal on publishers in Canada. By reason of the history and breadth of their members' domestic and international experiences in the publishing industry, the Proposed Publisher Interveners can bring unique and different perspectives to this proceeding. In tandem with the other proposed interveners to this intervention, the Football Association Premier League Limited and DAZN Limited. (together with the Proposed Publisher Interveners, the "**Proposed Interveners**"), the Proposed Publisher Interveners will be able to leverage international experience and international case law developments that the Appellant has not referred to and of which the Court might not otherwise be aware.
82. As noted above, the Canadian Publishers' Council (along with the ACP and others) intervened in *Google Inc v. Equustek Solutions Inc.*, 2017 SCC 34, in which the Supreme Court of Canada confirmed that the Court had the jurisdiction to make a world-wide de-indexing order against the Google and that it was appropriate to make such order in that intellectual property case. I am advised by our counsel that in rendering its decision, the

⁸ See, for example, *C.A.P.A.C. v. CTV Television Network* (1968), 68 D.L.R. (2d) 98 (S.C.C.); *Bishop v. Steven's*, [1990] 2 S.C.R. 467; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.

Court relied on international jurisprudence on the availability of de-indexing orders internationally that were put before the court in the submissions made by the Canadian Publishers' Council and the ACP (among others).⁹

83. The Canadian Publishers' Council and ACP also intervened in the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13. In that case, the Canadian Publishers' Council and ACP put before the court international jurisprudence and other materials from outside of Canada that were considered by the Court. Moreover, I am advised by our counsel that in cases involving intellectual property rights, the Supreme Court often relies on jurisprudence from outside of Canada to help resolve domestic copyright related issues.¹⁰ Further, our counsel advises that in *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, the Supreme Court stated that in considering the "International Context" that "The mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results".¹¹
84. As noted above, the Appellant opposes blocking orders on the ground that they infringe Charter values or cannot be justified under Section 1 of the Charter and because, it argues, courts are ill equipped to make blocking orders because the orders are disproportionate and this has serious implications for free expression. The Appellant refers to international primary and secondary sources of law for these assertions.¹²
85. The members of the Proposed Publisher Interveners have direct experience with, and knowledge about, foreign laws as they relate to enforcement of copyright rights, and in

⁹ See para. 39.

¹⁰ See, for example, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, cases in which our counsel here acted for one of the parties.

¹¹ At para. 13, relying on *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336.

¹² Teksavvy Memorandum of Fact and Law, see especially paragraphs 74, 78 and the footnotes therein.

particular, foreign jurisprudence as it relates to freedom of speech rights, how to calibrate orders that enforce copyrights to balance the needs for effectiveness with the interests of freedom of speech rights and proportionality.

86. The members of the Proposed Publisher Interveners have extensive experience in using and clearing the copyrights of others in the creation, publishing, and distributing of books, journals and other publications as well as in enforcing their copyrights against infringers. Their businesses and experiences are thus distinctly different from both the Appellant and Respondent in this case.
87. The appeal in issue involves solely the availability of blocking orders against sites that stream television programming. However, for book publishers, the pirate sites and services that infringe or enable the infringements of copyrights use different technologies such as BitTorrent, a decentralized file sharing technology that facilitates distribution of copies of works including e-books (and other materials) and websites sites that make available works for downloading. Examples of notorious sites that are involved in infringing the copyrights of members of the Proposed Publisher Interveners are Sci-Hub (referred to above) and LibGen. Members of the Proposed Publisher Interveners have obtained blocking orders against these sites internationally, including Spain, Belgium, Denmark, Italy, France, Germany, Sweden, and Austria.
88. In May 2015, the UK Publishers Association brought an application for a blocking order based on the impact of piracy sites on sales of books. The UK Publishers Association obtained an order from the High Court in England which compelled major ISPs (such as BT, Virgin Media, Sky, TalkTalk and EE) to make inaccessible websites such as Ebookee, LibGen, Freshwap, AvaxHome, Bookfi, Bookre, and Freebookspot which comprised around 80% of pirate material. Members of the Proposed Publisher Interveners have also been engaged in other online anti-piracy efforts including in major cases against the notorious library.nu, Rapidshare, and Uploaded sites.

89. These enforcement proceedings described in this Affidavit give the Proposed Publisher Interveners a distinct perspective on the way in which blocking orders should be issued to balance the need for efficacy, proportionality, and freedom of expression rights.
90. The Proposed Publisher Interveners have a deep appreciation of the bilateral and multilateral international treaty obligations in respect of copyright including the obligations of contracting parties under the *TRIPS Agreement*, *WCT*, *CUSMA*, and *CPTPP*. In fact, the IPA, AAP, UK Publishers Association, and STM were involved in advising or submitting to governments and other organizations such as the World Intellectual Property Organization (*WIPO*) legal and factual information on the measures these treaties, or some of them, should include to ensure that publishers' copyrights could be effectively enforced including online. Neither the Appellant nor the Respondent has this perspective or can assist the Court, as the Proposed Publisher Interveners can, in appreciating Canada's international obligations in respect of copyright that have a bearing on the submissions the Proposed Interveners propose to make in this Appeal.
91. The Proposed Publisher Interveners are uniquely positioned to help the court understand the ramifications of the Appeal. The perspectives of the Proposed Publisher Interveners and their members are entirely different than those of the parties. The Proposed Publisher Interveners' participation in this matter will therefore provide the Court with a distinct perspective that will not be represented by any of the other parties.

What the Proposed Interveners Intend to Argue If Granted Leave to Intervene

92. As noted above, the Appellant opposes blocking orders on the ground that they allegedly infringe Charter values or cannot be justified under Section 1 of the Charter. It also argues that courts are ill equipped to make blocking orders because "blocking is disproportionate" and "has serious implications for free expression".
93. The Proposed Publisher Interveners are familiar with how courts in other jurisdictions, including jurisdictions with strong constitutional rights that protect freedom of expression rights, take these interests into account in deciding whether and how to grant blocking

orders that balance the interests of copyright holders, ISPs, and internet users. The Proposed Publisher Interveners are also familiar with Canada's treaty obligations in respect of copyright that have a bearing on this Appeal.

94. If granted leave to intervene in this proceeding, the Proposed Interveners intend to make the following submissions (the "Submissions"):
- (a) Enforcing copyrights against online infringers of copyrights does not violate freedom of speech values or rights.
 - (b) Blocking orders against ISPs to prevent infringing copies of works from being made available (either by streams or downloads) from piracy websites, servers, applications, services, or other online sources or locations do not violate freedom of expression rights. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression analysis is flawed, is inconsistent with the international jurisprudence, and should not be relied on by this Court.
 - (c) In deciding whether and how to grant blocking orders, the Court should balance the legitimate interests of copyright holders, ISPs and internet users.
 - (d) Orders that require ISPs to block piracy websites, servers, applications, services, or other online sources or locations, should be made that appropriately balances the need for efficacy and usefulness, proportionality, and freedom of expression rights and that promotes the rule of law in the online context.
 - (e) Blocking orders are expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements in the online environment. This remedy is consistent with and is or may be required to enable Canada to fulfil its treaty obligations in respect of copyright.
95. The Proposed Publishing Interveners will, through the Submissions, seek to assist this Court in understanding the broader impacts of this Appeal as it relates to the importance of formulating a principled basis for deciding when blocking orders against ISPs are

appropriate with the focus being on the balance between the values of freedom of expression, the need for effective and useful online remedies that preserve the rule of law in the Internet context and that foster compliance with Canada’s treaty obligations in respect of copyright.

- 96. The Submissions will be primarily based on international authorities, orders made by foreign courts, and treaties that Canada is required to implement in respect of copyright. The Submissions will also endeavor to show the relevance of these international authorities to Canadian law including ss.1 and 2(b) of the *Canadian Charter of Rights and Freedoms*.
- 97. I expect that the submissions of the Proposed Publisher Interveners will bring to the Court’s attention leading international decisions, including those from the United Kingdom, European Union, the Commonwealth, Asia, and the United States, many of which would not otherwise be cited to this Court.
- 98. The Proposed Publisher Interveners do not intend to take a position on the specific facts of the case under appeal, but only on its broader implications for members of creative industries, and for publishers in particular. The Proposed Publisher Interveners will not expand the factual record or introduce new legal issues not presently before the Court.
- 99. The Proposed Publisher Interveners will not seek the costs of this motion or the Appeal.

AFFIRMED BEFORE ME at the City of)
Toronto, in the Province of Ontario, this 7th)
day of May, 2020.)

DocuSigned by:)
Bruna Kalinowski)
98F3A57A2818443...)

A Commissioner for taking Affidavits for the)
Province of Ontario)

DocuSigned by:)
Paul Doda)
FDD12907FA284BB...)

PAUL DODA

Court File No. A-440-19

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. and
VIDEOTRON LTD.**

Respondents

**AFFIDAVIT OF PAUL DODA, AFFIRMED
MAY 7, 2020, FOR THE PROPOSED
PUBLISHER INTERVENERS**

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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 Premier League Limited, and
DAZN Limited.

Court File No. A-440-19

FEDERAL COURT OF APPEAL

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

- and -

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SHAW COMMUNICATIONS INC.,
TELUS COMMUNICATIONS INC. and
VIDEOTRON LTD.**

Respondents

AFFIDAVIT OF STEFAN SERGOT

(Pursuant to Rule 109 of the *Federal Courts Rules*)

I, Stefan Sergot, of the City of London, in the United Kingdom, hereby solemnly affirm and declare as follows:

1. I am Head of Legal - Enforcement at the Football Association Premier League Limited (“**the Premier League**”). I have been employed by the Premier League since 2013 and have held this position since 2019. I therefore have personal knowledge of the facts to which I hereinafter depose. Where I do not have such knowledge, I have stated the grounds for my information and belief and believe it to be true.

2. I am advised by our counsel that on November 15, 2019, Justice Gleeson of the Federal Court of Canada issued a decision in favour of major Canadian broadcasters, namely, Bell Canada, Rogers Communications, and Videotron (“the **Plaintiffs**”), setting out a very important precedent for rights-holders by granting a site blocking order (“the **Order**”) to protect the broadcasters’ copyrighted programming from online illegal streaming services. The decision granting the Order is *Bell Media Inc. et al v GOLDTV.BIZ*, 2019 FC 1432.
3. I am also advised by our counsel that one Canadian Internet Service Provider (“**ISP**”), Teksavvy Solutions Inc., opposed the motion for the site blocking order in the first instance and filed its Notice of Appeal (Court File No. A-440-19; the “**Appeal**”) on November 25, 2019, appealing the Order.
4. Counsel for the Premier League has also advised that at least three proposed interveners have now sought leave to intervene to make submissions in support of the Appellant’s position against site blocking in the Federal Court of Appeal. Those proposed interveners are CIRA, a Canadian domain name authority, CIPPIC and the BCCLA, British Columbia Civil Liberties Union.
5. As Head of Legal - Enforcement of the Premier League, I have been involved in numerous administrative and court proceedings on intellectual property issues of interest to the copyright holders.
6. I swear this affidavit in support of a motion for leave to intervene in the Appeal (the “**Motion**”). The Motion is brought by a coalition of domestic and international participants in the publishing industry — namely, the International Publishers Association (“**IPA**”), the International Association of Scientific, Technical and Medical Publishers (“**STM**”), the Association of American Publishers (“**AAP**”), the Publishers Association Limited (“**UK Publishers**”) the Canadian Publishers’ Council (“**CPC**”) and Association of Canadian Publishers (the “**ACP**”) — as well as the Premier League and DAZN Limited (“**DAZN**”). In my affidavit, I will refer to the coalition of publishers collectively as the “**Proposed Publisher Intervenors**”.

Background

7. The Premier League is the organising body of the top level competition for football (soccer) clubs in England and Wales, which is currently known as the Premier League (the "**Competition**"). The Premier League is owned by the 20 constituent member clubs of the Competition from time to time (the "**Member Clubs**"). Each Member Club is separately owned and operates a professional football team. The Premier League's head office address is 57 North Wharf Road, London, W2 1HQ. Each season, 380 matches are played by the Member Clubs in the Competition (the "**Matches**"). The Premier League is authorised by the Member Clubs to license broadcasters throughout the world to provide and offer audio-visual coverage of the Matches. The Premier League owns copyright in the audio-visual coverage of all Matches, including films comprising the footage and in artistic works which appear within that footage.
8. A significant proportion of the Premier League's revenue derives from the sale of licences relating to the audio-visual rights in the Matches. The Premier League is shown in a total of 188 of the world's 193 countries recognised by the United Nations. In Canada the Premier League's only authorised broadcast licensee is DAZN, a broadcaster which offers an over-the-top sports streaming service. The fees associated with these licences are vital to the Competition's quality and success, as well as the projects and causes the Premier League supports around the world.
9. I understand that at issue in the underlying Appeal is the use of blocking injunctions as a means to combat online piracy. Piracy is a major and constant threat faced by the content industry, whether sport, music, television, film or otherwise.

Expertise

10. The Premier League has been actively engaged in fighting online piracy through its anti-piracy programme for many years. Amongst other measures, this has involved pursuing blocking injunctions requiring Internet Service Providers ("**ISPs**") to prevent access by their consumers to certain infringing online sources and services. The Premier League has

experience in obtaining various types of blocking injunctions in numerous jurisdictions, including dynamic blocking orders that address different circumvention tactics used by pirates. I list below some representative blocking orders and judgements obtained by the Premier League:

- (a) *FAPL v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch) – England & Wales – relating to the blocking of streaming websites (July 16, 2013)
- (b) *FAPL v British Telecommunications PLC & Ors* [2017] EWHC 480 (Ch) (*FAPL v BT I*) – England & Wales – relating to the blocking of streaming servers (March 13, 2017)
- (c) *FAPL v British Telecommunications PLC & Ors* [2017] EWHC 1877 (Ch) (*FAPL v BT II*) – England & Wales – relating to the blocking of streaming servers (July 25, 2017)
- (d) *FAPL v Get AS & Ors* (Case No. 18-039103TVI-OTI R/02) – Norway – relating to the blocking of streaming websites (June 1, 2018)
- (e) *FAPL v British Telecommunications PLC & Ors* [2018] EWHC 1828 (Ch) (*FAPL v BT III*) – England & Wales – relating to the blocking of streaming servers (July 18, 2018)
- (f) *Singnet & Ors v MI Limited & Ors* (HC-ORC-7304-2018) – Singapore – relating to the blocking of authentication servers (November 2, 2018)
- (g) *FAPL v MI Limited & Ors* (HC-OS 331-2019) – Singapore – relating to the blocking of streaming websites (April 9, 2019;)
- (h) *FAPL v British Telecommunications PLC & Ors* (*FAPL v BT IV*) – England & Wales – relating to the blocking of streaming servers (July 15, 2019)
- (i) *FAPL v Eircom Limited Trading & Ors* [2019] IEHC 615 – Ireland – relating to the blocking of streaming servers (July 15, 2019)

(j) *FAPL v MI Limited & Ors* (HC-ORC-211-2020) – Singapore – relating to the blocking of streaming websites (March 5, 2020)

11. Blocking injunctions have shown to be an effective, proportionate, and targeted method for blocking access to unauthorised content. The nature of piracy of live sports broadcasts and the challenges of identifying and locating infringers make it difficult for court systems to quickly respond to violations. In the Premier League’s experience, blocking has successfully been used to address some of these problems while at the same time balancing the interests of rights-holders, ISPs, and consumers.

Why the Premier League Seeks to Intervene and Has a Vital Interest in the Appeal

12. The Premier League is concerned that if the Appellant’s submissions are accepted by the Court, it would significantly impact the Premier League’s, and other rights-holders’, ability to enforce its rights and would allow the practice of online piracy to grow. As such, the Premier League has a significant commercial interest in the outcome of the Appeal.
13. Sports rights’ owners including the Premier League rely heavily on the income derived from the sale of broadcasting rights as the sale of these rights, particularly live rights, creates an income stream that is reinvested into every aspect of sport; administration, governance and regulatory services; training elite athletes and youth training; running tournaments and competitions; building and improving stadia and spectator facilities; community programmes such as coaching, social inclusion programmes; and improving local sporting infrastructure. Sports rights’ holders create some of the world’s most valuable ‘content’. Whilst this content brings in revenues, which can be re-invested back into sport, it also suffers from fraudulent enterprises who seek to exploit such content without contributing to the development and advancement of sport.
14. Each year, the Premier League invests significant resources to devising and implementing means for protecting its copyright and the audio-visual rights it licenses to authorised broadcasters around the world.

15. The Premier League supports the use of blocking injunctions to address the many challenges posed by online piracy and believes that they can be used effectively and proportionately to reduce access to blocked online locations and promote the purchase of legal content.
16. The Premier League also has an interest in ensuring that this Court is aware of the different types of blocking orders that have been made around the world so that any decision rendered in this Appeal is informed by experience in other jurisdictions. In this regard, the Premier League also has an interest in helping to inform this Court on how other jurisdictions have issued orders so as to balance the needs for effectiveness with the interests of freedom of speech rights and proportionality.

The Premier League Has a Distinct Perspective

17. As stated above, the Premier League has extensive experience of numerous forms of blocking injunctions in various jurisdictions. The Premier League's first successful blocking application was in relation to the streaming website FirstRow Sports in 2013 in the United Kingdom.
18. In 2017, the Premier League for the first time obtained a blocking order from the High Court of England and Wales allowing it to dynamically, during the course of Matches, block streaming servers delivering unauthorised live streams of Matches. I can confirm that in the United Kingdom the courts have shown confidence in the accuracy and general efficiency of targeting of piracy through blocking and that there has been no genuine instance of over-blocking through this form of dynamic server-level blocking.
19. The Premier League, since 2017, has pursued blocking injunctions in jurisdictions outside the United Kingdom, including in Norway, Singapore and Ireland.
20. The Premier League has also supported the efforts of other rights-holders to secure blocking injunctions. In March 2018, the Premier League supported an application filed by FairPlay Canada, a coalition of over twenty-five media companies representing Canada's film, TV, radio, sports entertainment, and music industries, requesting the Canadian Radio-television

and Telecommunications Commission (“**CRTC**”) to play a role in identifying and forcing ISPs to block pirate websites. I understand that the request was denied by the CRTC on the basis of lack of jurisdiction under the *Telecommunications Act*.

21. In April 2018, the Premier League also filed Letters of Support in two anti-piracy matters where content holders were seeking blocking orders in Australia.
 - (a) *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582 – Australia – relating to the blocking of authentication servers (April 27, 2018; decision available)
 - (b) *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434 – Australia – relating to the blocking of authentication servers (September 20, 2018; decision available)
22. The Premier League brings to this Court a perspective different than the parties to this Appeal. The Premier League is a sports rights-holder and has a depth of experience of the different types of blocking injunctions and how courts have drafted blocking orders to foster effective and efficient anti-piracy efforts while being mindful of the interests of ISPs and Internet users.

What the Premier League Intends to Argue If Granted Leave to Intervene

23. By reason of its international experience, I believe that the Premier League can bring different perspectives to the proceeding and will put before the Court a number of international precedents that demonstrate how courts in other jurisdictions have approached the use of blocking injunctions as a means of addressing online piracy. In tandem with the Proposed Publisher Interveners, namely, the coalition of publishers IPA, STM, AAP, UK Publishers, CPC, and ACP, the Premier League will leverage international experience to present to the Court case law developments examining the appropriate balance for the granting of orders against ISPs while preserving freedom of speech rights.

- 24. The intended arguments of the Premier League are set out in detail in the Affidavit of Paul Doda under the heading "What the Proposed Interveners Intend to Argue If Granted Leave to Intervene".
- 25. The Premier League does not intend to take a position on the specific facts of the case under appeal, but only on its broader implications for members of creative industries, and the Premier League in particular. The Premier League will not expand the factual record or introduce new legal issues not presently before the Court.
- 26. The Premier League will not seek the costs of this motion or the Appeal.

AFFIRMED BEFORE ME at the City of)
 Toronto, in the Province of Ontario, this 7th)
 day of May, 2020.)

DocuSigned by:)

Bruna Kalinoski)

98F3A57A2818443...)

A Commissioner for taking Affidavits for the)
 Province of Ontario)

DocuSigned by:)

Stefan Sergot)

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STEFAN SERGOT

Court File No. A-440-19

FEDERAL COURT OF APPEAL

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

- and -

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GROUPE TVA INC.,
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JOHN DOE 1 DBA GOLDTV.BIZ,
JOHN DOE 2 DBA GOLDTV.CA,
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SASKATCHEWAN TELECOMMUNICATIONS
HOLDING CORPORATION,
SHAW COMMUNICATIONS INC.,
TELUS COMMUNICATIONS INC. and
VIDEOTRON LTD.**

Respondents

**AFFIDAVIT OF STEFAN SERGOT,
AFFIRMED MAY 7, 2020, FOR THE PREMIER
LEAGUE**

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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 Premier League Limited, and
DAZN Limited.

Court File No. A-440-19

FEDERAL COURT OF APPEAL

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

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SHAW COMMUNICATIONS INC.,
TELUS COMMUNICATIONS INC. and
VIDEOTRON LTD.**

Respondents

NOTICE OF MOTION

AFFIDAVIT OF SAM MOORHOUSE

(Pursuant to Rule 109 of the *Federal Courts Rules*)

I, Sam Moorhouse, of the City of London, in the United Kingdom, hereby solemnly affirm and declare as follows:

1. I am Head of Legal, International for the DAZN sports service (as further described below), and have held this position since November 2018. I was employed by Perform Investment Limited (which subsequently changed its name to DAZN Limited (“**DAZN**”)) in May 2016, until August 2019 when my employment contract was transferred to Perform Media

Services Limited (which subsequently changed its name to DAZN Media Services Limited). I have personal knowledge of the facts to which I hereinafter depose. Where I do not have such knowledge, I have stated the grounds for my information and belief and believe it to be true.

2. I am advised by our counsel that on November 15, 2019, Justice Gleeson of the Federal Court of Canada issued a decision in favour of major Canadian broadcasters, namely, Bell Canada, Rogers Communications, and Videotron (“the **Plaintiffs**”), setting out a very important precedent for rights-holders by granting a site blocking order (“the **Order**”) to protect the broadcasters’ copyrighted programming from online illegal streaming services. The decision granting the Order is *Bell Media Inc. et al v GOLDTV.BIZ*, 2019 FC 1432.
3. I am also advised by our counsel that one Canadian Internet Service Provider (“**ISP**”), Teksavvy Solutions Inc., opposed the motion for the site blocking order in the first instance and filed its Notice of Appeal (Court File No. A-440-19; the “**Appeal**”) on November 25, 2019 appealing the Order.
4. I am also advised by our counsel that at least three proposed interveners have now sought leave to intervene to make submissions in support of the Appellant’s position against site blocking in the Federal Court of Appeal. Those proposed interveners are CIRA, a Canadian domain name authority, CIPPIC, and the BCCLA, British Columbia Civil Liberties Union.
5. I swear this affidavit in support of a motion for leave to intervene in the Appeal (the “**Motion**”). The Motion is brought by a coalition of domestic and international participants in the publishing industry — namely, the International Publishers Association (“**IPA**”), the International Association of Scientific, Technical and Medical Publishers (“**STM**”), the Association of American Publishers (“**AAP**”), the Publishers Association Limited (“**UK Publishers Association**”) the Canadian Publishers’ Council (“**CPC**”), the Association of Canadian Publishers (the “**ACP**”), and the Football Association Premier League Limited

(the “**Premier League**”) — as well as DAZN. In my affidavit, I will refer to the coalition of publishers collectively as the “**Proposed Publisher Interveners**”.¹

6. The DAZN service is an audio-visual internet streaming service dedicated to sports that provides its subscribers via its website or App with access to events, both live and on demand, on connected devices including smart TVs, smartphones, tablets, games consoles and PCs (“**DAZN Service**”).
7. DAZN is one of the world’s largest providers of live streaming sports and sporting events in the world. In 2019, the App for the DAZN Service was recognised as the number one revenue generating application by Sensor Tower, a third party that monitors the global app economy.² The DAZN Service is available in nine countries including Canada, the United States, Italy, Germany, Switzerland, Austria, Spain, Japan, and Brazil.
8. The DAZN Service was launched in Canada in July 2017. DAZN has exclusive copyright licenses that enable it to live stream sports events to the public. By virtue of an exclusive licence with the NFL, the DAZN Service is the only place for Canadians to watch every single live NFL game. Also streamed on the DAZN Service on an exclusive basis in Canada is the NFL RedZone, a popular American sports television channel owned and operated by NFL Network. The DAZN Service also carries NFL Sunday Ticket, a sports package that broadcasts National Football League (NFL) regular season games unavailable on local affiliates stations.
9. DAZN also streams on an exclusive basis on the DAZN Service in Canada (and has licenses that permit it to stream in other jurisdictions where it operates) sports events and shows of other valuable sports properties, including the Premier League (which is

¹ The interests of the Proposed Publisher Interveners in the Appeal as well as their mandate and expertise, are described in the Affidavit of Paul Doda, which I reviewed. The interests of the Premier League and its expertise is set out in the affidavit of Stefan Sergot, which I have also reviewed. I have read the reasons of the Proposed Publisher Interveners and the Premier League for intervening in this Appeal. For brevity I will not repeat them here though they are applicable as well to the reasons the DAZN is intervening.

² See, “The State of Sports Apps Report: Top Sports Apps by Revenue and Growth Forecast” online @ <https://sensortower.com/blog/top-sports-apps-by-revenue-and-growth-forecast>.

described in the affidavit of Stefan Sergot), Union of European Football Associations (UEFA), Champions League (an annual club football competition organised by the Union of European Football Associations and contested by top-division European clubs, deciding the competition winners) and Europa League (Europe's secondary club football tournament organised by UEFA).

10. DAZN also streams on an exclusive basis on the DAZN Service in Canada (and has licenses that permit it to stream in other jurisdictions where it operates) MLS Live (a subscription service dedicated to the United States Major League Soccer), MLB Network (a television sports channel dedicated to baseball that is primarily owned by Major League Baseball), Six Nations Rugby (an annual international men's rugby union competition between the teams of England, France, Ireland, Italy, Scotland, and Wales) and Rugby Union (European Premiership rugby).
11. DAZN also has exclusive license rights to stream other types of sporting events on the DAZN Service in Canada (and has licenses that permit it to stream in other jurisdictions where it operates) such as boxing via Matchroom Boxing and Golden Boy Promotions (two of the world's leading boxing promoters), mixed martial arts via Bellator MMA (American mixed martial arts combat sport promotions), hockey via Kontinental Hockey League (an international professional ice hockey league), tennis via WTA (Women's Tennis Association), and darts via the Professional Darts Corporation (a professional darts organisation in the United Kingdom).

Why DAZN Seeks to Intervene and Has a Vital Interest in the Appeal

12. A very significant proportion of DAZN's revenue is earned from subscription revenues from customers. These revenues are necessary to support all of the streaming technologies DAZN uses and to otherwise operate the business, for marketing purposes, and to compensate our licensors for the valuable rights we rely on. Our licensors, in turn, rely on these revenues to organize and produce sporting events and the original content our subscribers desire.

13. Online piracy of sports programming around the world undermines the market for legitimate subscriptions to our service. The global nature of the internet means that illegal streams from other jurisdictions are readily consumed in Canada and vice versa and one of the biggest drivers of sports programming piracy is the availability of illicit services. The fact that potential subscribers in Canada can directly access illegal content through the Internet has a significant negative impact on our subscriber numbers and in turn, our revenue. The operators of these unlicensed services, whether content wholesalers or resellers, make vast sums of money and profit as they are able to offer their products and services without the costs of securing the legitimate rights, unlike DAZN that invests substantial amounts of revenue into new sports rights or renewals of existing rights.
14. DAZN has experience in anti-piracy enforcement matters relating to protecting sports content in its markets. Generally, DAZN is unable to protect its sports content against piracy singlehandedly and has to retain the services of third party anti-piracy service providers to locate and to attempt to take down illegitimate and illegal online content, using fingerprinting and watermarking technologies as well as take down notices; and such help comes at a considerable cost. Further, the rates of take down vary considerably and depend on whether the unauthorised streamed content is on (i) social media sites or (ii) websites and/or IPTV services. Many social media services have a built-in mechanism for takedown of unauthorised content, and depending on the social media service, take down can be effective & timely. However, DAZN has found it is practically impossible to take down unauthorised streamed content from websites, servers, and/or IPTV services. In the first instance, it may be near on impossible to identify any legal entity responsible for operating a pirate streaming service, due to their attempts to hide their identity. Where an operator of the pirate service or a service provider facilitating the unauthorised streaming of content are identified, the majority of takedown notices are ignored. Even in the few scenarios where DAZN (or its service provider) does get a response, the responses are not timely enough to protect DAZN's streaming of its legitimate live sports content. It is important to note that when DAZN is successful in taking down illegally streamed content from social media sites, but is unsuccessful in taking down the same content on websites, servers, and/or IPTV services, this drastically undermines DAZN's efforts on social media. For

illustration purposes, during just one live sports event, DAZN may take down tens or even hundreds of links to unauthorised streamed content on social media sites, but if that same content is available even on just one website, it allows consumers to simply migrate to that website.

15. As a consequence, DAZN has recognised that blocking orders can be a highly effective tool to prevent websites and/or IPTV services from streaming unauthorised content into the territories in which our service is available. Indeed, blocking access to unlawful sites and IP addresses within a particular territory disrupts the availability of unauthorised content and drives the public to legitimate services. Moreover, these blocking orders are already available in many countries such as, for example, the United Kingdom, and EU/EEA member states, including our markets such as Germany, Italy and Spain.
16. Blocking orders have been used by our licensors in many countries to combat sports content piracy. Proceedings taken by our licensor, the Premier League, are described in the Affidavit of Stefan Sergot. Other rights holders of sport content have also obtained blocking orders. For example, in *Union Des Associations Européennes De Football v British Telecommunications Plc & Ors* [2017] EWHC 3414 (Ch) (21 December 2017), the claimant UEFA, another one of our licensors, obtained a blocking order in the United Kingdom requiring UK Internet service providers (ISPs) to block, or at least impede, access by their customers to streaming servers which deliver infringing live streams of UEFA Competition matches to UK consumers. In *Matchroom Boxing Ltd & Anor v British Telecommunications Plc & Ors* [2018] EWHC 2443 (Ch) (20 September 2018) another one of our licensors obtained a blocking injunction in respect of streaming servers which delivered infringing live streams of footage of professional boxing matches staged by Matchroom.
17. Other rights holders of sport content have also obtained blocking orders. For example, a Spanish broadcaster, Telefónica Audiovisual Digital, the holder of the broadcasting rights of La Liga (the men's top professional football division of the Spanish football league system), and another one of our licensors, obtained a blocking injunction in Spain against 44 pirate sites. The blocklist was required to be dynamically updated with new entries

(sites, IP addresses, URLs) without the requirement for new court orders. In Italy, the League National Professional Serie A (LNPA), another one of our licensors, owner of the top football league in Italy, undertook a programme of obtaining a series of blocking injunctions against illicit streaming services in the territory.

18. In order to combat sports programming streaming piracy the courts have tailored the blocking relief to address the exigencies of the problem. In this regard, an order could be made that blocks numerous websites, domains, and/or URLs in just one order. Other orders have contained the following three features. First, the blocks which the ISPs are obliged to implement apply to servers and not specific websites. Second, the ISPs are only required to block the relevant server for the length of time that the sporting event in question is being broadcast (for example, while a Premier League match is being played). Third, the list of servers to be blocked is reset on a regular basis (in some cases weekly) so that those that no longer meet the criteria are removed, and new ones that are taking over the activity are added. The orders frequently require ISPs to block internet users' access to servers hosting infringing streams of live sporting events.³ These orders are designed to be effective, whilst also respecting the interests of ISPs and freedom of speech rights of Internet users (such as by including measures that prevent over blocking).
19. As site blocking is an effective remedy that that can help to combat piracy of sports content, DAZN is hopeful this remedy will be available in Canada. DAZN seeks to inform this Court about the types of orders that have been found necessary to combat the particular kinds of infringement that sports leagues have encountered so that this Court is aware of how its decision could affect the rights and interests of DAZN and its licensors.
20. DAZN has a perspective than is different from the Parties to this Appeal and intends to provide a useful perspective different from those of the Parties to the Appeal.

³ See, "Live blocking injunctions: a knock-out blow for infringers?" Sports Score, online at <https://www.sportsscore.co.uk/blog/2018/12/14/live-blocking-injunctions>.

What the DAZN Intends to Argue If Granted Leave to Intervene

- 21. The intended arguments of DAZN are set out in the Affidavit of Paul Doda under the heading "What the Proposed Interveners Intend to Argue If Granted Leave to Intervene".
- 22. DAZN does not intend to take a position on the specific facts of the case under appeal, but only on its broader implications for members of creative industries, and the sports leagues and its licensees in particular. DAZN will not expand the factual record or introduce new legal issues not presently before the Court.
- 23. DAZN will not seek the costs of this motion or the Appeal.

AFFIRMED BEFORE ME at the City of)
 Toronto, in the Province of Ontario, this 7th)
 day of May, 2020.)

DocuSigned by:)
Bruna Kalinoski)
98F3A57A2818443)
 _____)
 A Commissioner for taking Affidavits for the)
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Court File No. A-440-19

FEDERAL COURT OF APPEAL

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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

**AFFIDAVIT OF SAM MOORHOUSE
AFFIRMED MAY 7, 2020, FOR THE
PROPOSED PUBLISHER INTERVENERS**

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Publishers, American Association of Publishers, The
Publishers Association Limited, Canadian Publishers'
Council, Association of Canadian Publishers, The
Football Association Premier League Limited, and
DAZN Limited.

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. and
VIDEOTRON LTD.**

Respondents

**WRITTEN REPRESENTATIONS OF THE MOVING PARTIES,
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 PREMIER LEAGUE LIMITED, AND DAZN
LIMITED.**

(re: Motion for Leave to Intervene Under Rule 109 of the *Federal Courts Rules*)

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Canadian Publishers, The Football
Association Premier League Limited,
and DAZN Limited.

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PART I—STATEMENT OF FACTS

1. Overview

1. This appeal by Teksavvy Solutions Inc. (“**Teksavvy**”) is from a landmark precedent granting the first-ever Canadian blocking injunction (the “**Order**”) against Internet service providers (“**ISPs**”). The decision being appealed is of significant importance to the Moving Parties and for the enforcement of copyright on the Internet.

2. The Moving Parties form two separate groups that seek to intervene in the appeal (collectively, the “**Proposed Intervenors**”). The first is a broad coalition of Canadian and international publisher associations whose members are publishers of all manner of books, journals, and scientific publications (the “**publisher group**”). The publisher group comprises the International Publishers Association (“**IPA**”), the International Association of Scientific, Technical and Medical Publishers (“**STM**”), the Association of American Publishers (“**AAP**”), the Publishers Association Limited (“**UK Publishers Association**”), the Canadian Publishers’ Council (“**CPC**”), and the Association of Canadian Publishers (the “**ACP**”).

3. The second, the sports group, is comprised of DAZN Limited (“**DAZN**”) and the Football Association Premier League Limited (“**the Premier League**”). They own or have exclusive licenses to make available and otherwise communicate to the public valuable sports programming content in Canada and internationally (the “**sports group**”).

4. The Proposed Intervenors and/or their members have extensive experience in blocking orders to combat piracy in their industries. They or their members have successfully obtained blocking orders to protect copyrights in numerous countries including United Kingdom, Ireland, Spain, Belgium, Denmark, Italy, France, Germany, Sweden, and Austria, Norway, and Singapore. Moreover, they have extensive experience in how these orders can be calibrated to sensitively balance the need for these orders to be effective and to protect the rights and interests of ISPs and Internet users.

5. The decision under appeal required the Third-Party ISPs to block access to certain websites and domains to protect the broadcasters’ copyrighted programming from

online illegal streaming services. In his reasons, Justice Gleason held that blocking orders have proven effective in several jurisdictions, and since the Third-Parties' subscribers represent a significant percentage of ISP subscribers in Canada, the Order will likely reduce overall access to the infringing services and protect the Plaintiffs' rights while limiting harm.¹

6. Teksavvy (the “**Appellant**”) opposes such orders on the grounds, *inter alia*, that the courts are ill equipped to order blocking in a way that is proportionate, and that blocking has serious implications for Charter values of free expression and cannot be justified under section 1 of the *Charter*.²

7. The Proposed Interveners have a direct and significant interest in this appeal. Together, they represent hundreds of copyright holders around the world who make extensive investments for creating, marketing, and distributing works in the digital market. A successful appeal of Justice Gleason's order would detrimentally affect the Proposed Interveners and have serious implications for online enforcement of their copyrights including against other online service providers such as cyber lockers, Internet portals, and other sites and services.

8. The Proposed Interveners seek leave to intervene to assist this Court in understanding that the important values of freedom of expression can be carefully preserved without undermining effective and useful online remedies that support legal frameworks required by the creative sectors to invest in the creation and dissemination of copyright works, and in a way that foster the rule of law in the Internet context, and compliance with Canada's international treaty obligations in respect of copyright.

9. None of these considerations will be raised by the parties, and the Proposed Interveners will not seek to add to the record below or require any additions to the evidentiary record before this Court to make its submissions.

¹ Decision by Justice Gleason in Court File No. T-1169-19 dated November 15, 2019, reported as *Bell Media Inc. et al v GOLDTV.BIZ*, 2019 FC 1432 (the “**Decision**”), ¶81, Motion Record (“**MR**”), Tab 1A.

² Memorandum of Fact and Law of Teksavvy Solutions Inc. dated March 13, 2020, Issue A3, Issue B, and ¶73 and 78, MR, Tab 1C.

2. The Facts

A. The Decision Under Appeal and the Appellant's Grounds of Appeal

10. This Court is seized of an appeal by Teksavvy seeking to set aside the Order issued by Justice Gleeson that determined that the Third-Parties in this proceeding shall block or attempt to block access by their customers to the websites or online services identified as the "Target Websites",³ which are online illegal streaming services doing business as goldtv.ca (the "GoldTV Services").

11. The Plaintiffs/Respondents, owners or exclusive licensees of the rights to broadcast the programming in question in Canada, were successful in obtaining the blocking Order. This is a landmark precedent that has very significant importance to the Proposed Interveners and for the enforcement of copyright on the Internet.⁴

12. The Defendants/Non-Respondents in this proceeding are anonymous, defaulting defendants who have never filed a defence in this action. Teksavvy is one of the eleven Third-Party ISPs participating in this proceeding, and the only ISP that has appealed the blocking Order.⁵

13. Teksavvy's Notice of Appeal raises four grounds of appeal,⁶ namely, that Justice Gleeson erred in law: (1) in finding that the remedy of site-blocking orders was available at law; (2) in finding that section 36 of the *Telecommunications Act*, SC 1993, c. 38, did not apply to the site-blocking Order; and (3) in interpreting and applying the test for a mandatory injunction under the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 by importing factors from foreign jurisdictions into the Canadian test for granting injunctions. The fourth ground of appeal raised by Teksavvy is that the Order should be set aside because it is not compliant with section 2(b) of the *Charter*.⁷

³ Decision, ¶3, MR, Tab 1A.

⁴ Affidavit of Paul Doda sworn May 7, 2020 ("**Doda Affidavit**"), ¶9, MR, Tab 2; Affidavit of Stefan Sergot sworn May 7, 2020 ("**Sergot Affidavit**"), ¶2, MR, Tab 3; Affidavit of Sam Moorhouse sworn May 7, 2020 ("**Moorhouse Affidavit**"), ¶9, MR, Tab 4.

⁵ Notice of Appeal of Teksavvy Solutions Inc. dated November 25, 2019, MR, Tab 1B.

⁶ *Ibid*, ¶1-4, MR, Tab 1B.

⁷ *Canadian Charter of Rights and Freedom*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c-11, Book of Authorities ("**BOA**"), Tab 1.

B. The Proposed Interveners

14. The IPA is the world's largest federation of national, regional and specialist publishers' associations. The IPA represents all segments (trade fiction, non-fiction, education, academic, and professional) of book and journal publishing, in print and digital formats, around the world. It represents the interests of book and journal publishers in international fora and wherever publishers' interests are at stake. It comprises 83 organizations from 69 countries across Africa, Asia, Australasia, Europe, and the Americas. The IPA is headquartered at 23 Avenue de France, 1202 Geneva, Switzerland. The IPA actively opposes censorship and promotes copyright, literacy, and the freedom to publish.⁸

15. The STM is a non-profit international trade association that is organized for the benefit of scholarly, scientific, technical, medical and professional publishers. It is actively engaged in anti-piracy activities on behalf of its members and has intervened in other cases involving copyright infringement. The STM's business addresses are Prins Willem-Alexanderhof 5, 2595 BE, The Netherlands, and 267 Banbury Road, OX2 7HT, United Kingdom.⁹

16. The AAP represents leading book, journal, and education publishers in the United States. It is a member of several domestic and international organizations and coalitions whose objective is to promote strong copyright laws and enforcement regimes. It has wide experience on matters of public policy that impact intellectual property. It also advocates for values of freedom of speech as well as outcomes that incentivize the publication of creative expression. The AAP has assisted courts around the world on multiple occasions serving as an intervener and *amicus curiae* in copyright matters. The AAP's headquarter is at 455 Massachusetts Avenue NW, Washington, DC, United States of America.¹⁰

17. The UK Publishers Association represents companies of all sizes and specialisms. Its members produce digital and print books, audiobooks, research journals and

⁸ Doda Affidavit, ¶14-15, MR, Tab 2.

⁹ Doda Affidavit, ¶25-26, MR, Tab 2.

¹⁰ Doda Affidavit, ¶33-34, MR, Tab 2.

educational resources across genres and subjects. The UK Publishers Association's membership includes global companies as well as independent publishers and university presses. North America (including Canada) is an important market for UK publishers. The work of the UK Publishers Association focusses on ensuring that the value of publishing and its economic and cultural contribution are recognized. The UK Publishers Association advocates for strong copyright laws as well as the values of freedom of speech at home and abroad. The UK Publishers Association's head office address is 50 Southwark Street, London SE1 1UN, United Kingdom.¹¹

18. The CPC is a trade association based in Toronto. It represents the interests of publishing companies that publish, in Canada, books and other media for elementary and secondary schools, colleges and universities, professional and reference markets, the retail and library sectors. It has broad experience on the subject matters of intellectual property, freedom of expression, and the Internet. The CPC has participated for many years in multilateral negotiations affecting publishers, including on issues related to the promotion of publishers' and authors' interests worldwide, their interest in advancing free speech, and the enforcement of rights online. The CPC has been granted leave to intervene by this Court and the Supreme Court of Canada including in cases involving both intellectual property rights and freedom of expression issues such as *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34. The CPC is headquartered at 3080 Yonge Street, Suite 6060, Toronto, Ontario, M4N 3N1, Canada.¹²

19. The ACP is a trade association that represents approximately 115 Canadian-owned and controlled book publishers from across the country. The members of the ACP sell books and other publications for a variety of purposes including for educational, research and reference purposes and for general interest in leisure and reading. The ACP has also been granted leave to intervene by this Court and the Supreme Court of Canada including in the Supreme Court of Canada case, *Google Inc. v Equustek Solutions Inc. et*

¹¹ Doda Affidavit, ¶40-41, 43 MR, Tab 2.

¹² Doda Affidavit, ¶49-55, MR, Tab 2.

al., 2017 SCC 34. The ACP's head office address is 174 Spadina Avenue, Suite 306, Toronto, Ontario, M5T 2C2, Canada.¹³

20. The Premier League is the organizing body of the top level competition for football (soccer) clubs in England and Wales. It owns copyrights in the audio-visual coverage of all matches. The Premier League has been actively engaged in fighting online piracy through its anti-piracy program for many years. The Premier League has experience in obtaining various types of blocking injunctions in numerous jurisdictions, including dynamic blocking orders that address different circumvention tactics used by pirates. The Premier League's headquarter is at 30 Gloucester Place London, W1U 8PL, United Kingdom.¹⁴

21. DAZN is one of the world's largest providers of live streaming of sports and sporting events in the world. It operates in nine countries including Canada, the United States, Italy, Germany, Switzerland, Austria, Spain, Japan, and Brazil. DAZN has exclusive copyright licenses that enable it to live stream sports events to the public including programming for sports such as NFL football, soccer, baseball, hockey, rugby, boxing, tennis, mixed martial arts and darts. It and its licensors have significant experience in obtaining blocking orders in numerous jurisdictions. DAZN's office address is at Hanover House Plane, Tree Crescent Feltham, TW13 7BZ, United Kingdom.¹⁵

C. The Proposed Interveners' Expertise

22. In this appeal, Teksavvy opposes blocking orders on the ground that they infringe *Charter* values or cannot be justified under Section 1 of the *Charter*. Further, it submits that the courts are ill equipped to make blocking orders because the orders are disproportionate and this has serious implications for free expression. Teksavvy relies upon international primary and secondary sources of law for these assertions.¹⁶

¹³ Doda Affidavit, ¶¶61-68, MR, Tab 2.

¹⁴ Sergot Affidavit, ¶7, MR, Tab 3.

¹⁵ Moorhouse Affidavit, ¶¶7-11, MR, Tab 4.

¹⁶ Notice of Appeal of Teksavvy Solutions Inc. dated November 25, 2019, MR, Tab 1B; Memorandum of Fact and Law of Teksavvy Solutions Inc. dated March 13, 2020, MR, Tab 1C.

23. Collectively, the Proposed Interveners have a track record of participating in relevant fora around the world with the purpose of tackling the issue of piracy while at the same time advocating for the protection of freedom of expression.¹⁷

24. The Proposed Interveners have represented the interests of rights-holders both in their home countries and internationally. They have direct experience with, and knowledge about, foreign laws as they relate to the enforcement of copyright. In particular, they have knowledge on foreign jurisprudence relating to blocking orders and freedom of speech.¹⁸

25. The Proposed Interveners or their members have successfully obtained blocking orders to protect copyrights in numerous countries including United Kingdom, Ireland, Spain, Belgium, Denmark, Italy, France, Germany, Sweden, and Austria, Norway, and Singapore.¹⁹

26. The Canadian Publishers' Council (along with the ACP and others) intervened in *Google Inc v. Equustek Solutions Inc.*, 2017 SCC 34, in which the Supreme Court of Canada confirmed that the Court had the jurisdiction to make a world-wide de-indexing order against the Google and that it was appropriate to make such order in that intellectual property case. In rendering its decision, the Court relied on international jurisprudence on the availability of de-indexing orders internationally that were put before the court in the submissions made by the Canadian Publishers' Council and the ACP.²⁰

27. In addition, the Canadian Publishers' Council and ACP also intervened in the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13. In that case, the Canadian Publishers' Council and ACP put before the court international

¹⁷ Doda Affidavit, ¶16-23, ¶26-31, ¶35-38, ¶44-47, ¶56-59, ¶64-68, MR, Tab 2; Sergot Affidavit, ¶10-11, MR, Tab 3; Moorhouse Affidavit, ¶14, MR, Tab 4.

¹⁸ Doda Affidavit, ¶83, MR, Tab 2; Sergot Affidavit, ¶16, MR, Tab 3; Moorhouse Affidavit, ¶14, MR, Tab 4.

¹⁹ Sergot Affidavit, ¶10, MR, Tab 3, Doda affidavit, ¶87-88, MR, Tab 2, Moorhouse Affidavit, ¶16-17, MR, Tab 4.

²⁰ Doda Affidavit, ¶80, MR, Tab 2.

jurisprudence and other materials from outside of Canada that were considered by the Court.²¹

28. The Proposed Publisher Interveners and their members span the entire continuum of Canadian and international publishers. As such, they are uniquely qualified to advise this Court on the impacts of the present appeal on publishers in Canada.²² Their members' domestic and international experiences in the publishing industry provide different perspectives to these proceedings. In tandem with the other proposed interveners of the sports group,²³ the Proposed Publisher Interveners will leverage international experience and international case law developments that Teksavvy has not referred to and of which the Court might not otherwise be aware.²⁴

29. The Proposed Interveners have experience with, and knowledge about, foreign laws as they relate to enforcement of copyright rights, and in particular, foreign jurisprudence as it relates to freedom of speech rights, how to calibrate orders that enforce copyrights to balance the needs for effectiveness with the interests of freedom of speech rights and proportionality.²⁵

30. The enforcement proceedings in which the Proposed Interveners have been involved provide them with a distinct perspective on the way in which blocking orders should be issued to balance the need for efficacy including with respect to the exigencies of their industries, proportionality, and freedom of expression rights.²⁶

PART II—SUBMISSIONS

1. The Test for Intervention

31. The Court has discretion under Rule 109 to grant this motion if it believes that the participation of the Proposed Interveners will assist in the determination of any factual or

²¹ Doda Affidavit, ¶81, MR, Tab 2.

²² Doda Affidavit, ¶79, MR, Tab 2.

²³ Sergot Affidavit, ¶23, MR, Tab 3.

²⁴ Doda Affidavit, ¶79, MR, Tab 2; Sergot Affidavit, ¶23, MR, Tab 3.

²⁵ Doda Affidavit, ¶80, MR, Tab 2; Sergot Affidavit, ¶11 and 23, MR, Tab 3.

²⁶ Doda Affidavit, ¶87, MR, Tab 2; Sergot Affidavit, ¶16-19, MR, Tab 3; Moorhouse Affidavit, ¶18-19, MR, Tab 4.

legal issues in the Appeal.²⁷ This Court set out the test for leave to intervene in *Rothmans*,²⁸ and updated it in *Pictou*, by Stratas J.A., to focus on the following factors:

I. Has the proposed intervenor complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervenor status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervenor status should be granted.

II. Does the proposed intervenor have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervenor has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervenor advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervenor been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of

²⁷ *Canada (Attorney General) v. United States Steel Corp.*, 2009 CarswellNat 5933, ¶6, BOA, Tab 13; *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 408, ¶13, BOA, Tab 20.

²⁸ *Rothmans, Benson & Hedges Inc. v. Canada (A.G.)* (1989), [1990] 1 FC 90 (C.A.), ¶3, aff'g, [1990] 1 FC 74 (T.D.), ¶12, BOA, Tab 33. The *Rothmans* test involves the following six criteria:

- (1) Is the proposed intervenor directly affected by the outcome?
- (2) Does there exist a justiciable issue and a veritable public interest?
- (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- (5) Are the interests of justice better served by the intervention of the proposed third party?
- (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

However, this Court had held that it was not necessary for all of these factors to be satisfied in order for leave to intervene to be granted: *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119 (Chambers), ¶5(c), BOA, Tab 22; *Canada (Attorney General) v. United States Steel Corp.*, 2009 CarswellNat 5933 (F.C.), ¶7, BOA, Tab 13.

every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?²⁹

32. The *Pictou* factors, referred to by a full panel of the Court of Appeal in *Ontario Federation*³⁰ and in *Bauer*³¹, govern this motion and all of the factors are met here.

2. The Proposed Interveners Have a Genuine and Vital Interest

33. The Proposed Interveners possess valuable copyrights in relation to their works. If Teksavvy's appeal is allowed, the Proposed Interveners will be precluded from fully exploiting those rights. The works created, and published by the members of the Proposed Publisher Interveners, as well as the sports productions of the Premier League soccer matches, are original works protected under the *Copyright Act*.³² As the owners and/or exclusive licensees of these copyrights in Canada, the Proposed Interveners have a number of exclusive rights under the *Copyright Act*.³³

34. The Proposed Interveners or their members have made extensive investments in order to create, market, distribute and disseminate works.³⁴ The losses from pirate sites and services are substantial. Even a single pirate site can potentially cause hundreds of millions of dollars in lost sales. These illegitimate sites and services adversely affect legitimate markets for the sale and licensing of works. They reduce subscribers to legitimate services and have a significant negative impact on subscriber numbers and in turn, revenues. Operators of these illegitimate sites and services make vast sums of

²⁹ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶11, BOA, Tab 11.

³⁰ *Ontario Federation of Anglers and Hunters v. Alderville Indian Band*, 2014 FCA 145, ¶23, leave to appeal refused, [2014] S.C.C.A. No. 344, BOA, Tab 28.

³¹ *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, BOA, Tab 34.

³² RSC 1985, c. C-42, BOA, Tab 2.

³³ See section 3 of the *Copyright Act*, BOA, Tab 2, which states:

"3. (1) For the purposes of this Act, "**copyright**", **in relation to a work, means the sole right to produce or reproduce the work** or any substantial part thereof in any material form whatever, **to perform the work** or any substantial part thereof **in public** or, if the work is unpublished, to publish the work or any substantial part thereof, **and includes the sole right**

...

(f) in the case of any literary, dramatic, musical or artistic work, **to communicate the work to the public by telecommunication, ... and to authorize any such acts.**" [emphasis added]

³⁴ Doda Affidavit, ¶27, 51, 63, 70, and 75, MR, Tab 2; Sergot Affidavit, ¶13-14, MR, Tab 3.

money as they are able to offer their products and services without the costs of securing the legitimate rights.³⁵

35. Blocking orders are often the only practical way in which markets can be protected from the increasingly accessibility to infringing works.³⁶ The Proposed Interveners are concerned that the arguments raised by Teksavvy, if accepted by this Court, would significantly impact the ability to enforce their rights in Canada.³⁷

36. The Proposed Interveners are concerned that a decision that denies blocking order relief in Canada, or which makes it available but subject to conditions which limit its usefulness, or which is based on reasons that a blocking order violates fundamental rights of freedom of speech, could have impacts on the enforcement of copyrights in Canada and in other jurisdictions.³⁸

37. Canada has agreed in international treaties to ensure that it provides enforcement procedures that permit effective and expeditious action by right holders against copyright infringement that occurs in the online environment. The Proposed Interveners have a vital interest in ensuring that Canada construes the remedies under the *Copyright Act* in a manner consistent with Canada's treaty obligations in respect of copyright and, in particular, by affirming the availability of blocking orders to provide remedies against online copyright piracy.³⁹

38. The Proposed Interveners have vital legal and proprietary stake in the outcome of the Appeal.⁴⁰ Their interest goes beyond mere jurisprudential interest,⁴¹ or interest as

³⁵ Doda Affidavit, ¶70-71, MR, Tab 2; Sergot Affidavit, ¶9, 13, MR, Tab 3; Moorhouse Affidavit, ¶13, MR, Tab 4.

³⁶ Doda Affidavit, ¶70, MR, Tab 2; Sergot Affidavit, ¶11, MR, Tab 3, Moorhouse Affidavit, ¶14-16, MR, Tab 4.

³⁷ Doda Affidavit, ¶71, MR, Tab 2; Sergot Affidavit, ¶12, MR, Tab 3.

³⁸ Doda Affidavit, ¶76, MR, Tab 2; Sergot Affidavit, ¶12, MR, Tab 3.

³⁹ Doda Affidavit, ¶77-78, MR, Tab 2.

⁴⁰ *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers) at ¶10, BOA, Tab 30 (“[A]ny interest is sufficient, subject always to the exercise of discretion”).

⁴¹ *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2015 FCA 34 (Chambers), ¶30, BOA, Tab 16.

meddling competitors.⁴²

39. Further, as organizations with a track record of successful experiences obtaining various types of blocking orders in different jurisdictions—including dynamic blocking orders that address different circumvention tactics used by pirates⁴³—the Proposed Interveners clearly possess considerable knowledge, skills and resources that are relevant to the issues before the Court and which can greatly assist this Court. The second *Pictou* factor is therefore met.

3. The Proposed Interveners Will Provide a Distinct and Valuable Perspective

40. As Stratas J.A. noted in *Pictou*, the “key question” on a motion for intervention is the third *Pictou* factor of “whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter”.⁴⁴

41. If the Proposed Interveners are granted leave to intervene, they will assist the Court in determining the legal issue related to Teksavvy’s ground of appeal on the impact of blocking orders on freedom of expression rights. This is one of the controlling ideas on which the case will turn,⁴⁵ and based upon which the Proposed Interveners will make their submissions.⁴⁶

42. Although the Proposed Interveners are not required to explain their proposed submissions with particularity on this motion,⁴⁷ an outline is provided below to

⁴² *Canada (A.G.) v. United States Steel Corp.*, 2010 FC 1330, ¶31, BOA, Tab 12.

⁴³ Sergot Affidavit, ¶10, MR, Tab 3.

⁴⁴ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶9, BOA, Tab 11. In the same paragraph, Stratas J.A. added that “[a]lmost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter”. **See also** *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, ¶7 and 9, BOA, Tab 14.

⁴⁵ *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, ¶28, BOA, Tab 14.

⁴⁶ *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 33 (Chambers), ¶4, BOA, Tab 36. **See also:** Notice of Appeal dated November 25, 2019, MR, Tab 1B; Memorandum of Fact and Law of Teksavvy Solutions Inc. dated March 13, 2020, MR, Tab 1C.

⁴⁷ *Lukacs v. Canada (Canadian Transportation Agency)*, 2014 FCA 292 (Chambers), ¶28-29, BOA, Tab 26. **cf.** *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, ¶10, 28, 32-35 and 40, BOA, Tab 14.

demonstrate to this Court the distinct and valuable perspective the Proposed Interveners will provide if granted leave to intervene, particularly in respect to international jurisprudence and international treaties as they relate to formulating a principled basis for deciding when blocking orders are appropriate with the focus being on the balance between the values of freedom of expression, the need for effective and useful online remedies that preserve the rule of law in the Internet context and that foster compliance with Canada's treaty obligations in respect of copyright.⁴⁸

43. None of the submissions the Proposed Interveners seek to make, as indicated below, is already reflected in the record before the Court or in the submissions that the parties have made or are likely to make in the appeal.⁴⁹

A. No Violation of *Charter's* Freedom of Speech Values or Rights

44. The Appellant has put in issue in this appeal whether blocking orders infringe freedom of speech right including the *Charter's* guarantee of freedom of expression. Neither this Court nor the Supreme Court have directly considered the extent to which blocking orders granted to protect copyright encroach on *Charter*-protected freedom of expression.

45. Issues associated with blocking raise for consideration the fundamental need to recognize the interests of copyright holders in the enforcement of their economic rights as well as that the infringement of copyright in works can also violate their human rights. Blocking orders also potentially raise issues of freedom of speech and how these values can be appropriately balanced with the rights and interests of copyright holders.

46. These issues have been extensively canvassed by foreign courts and international tribunals including the Court of Justice of the European Union, the European Court of Human Rights (ECHR), as well as by courts in numerous countries such as United Kingdom, Belgium, France, Norway, Netherlands, Germany, Finland, Spain, Norway Portugal, and Sweden. The issues have also been examined in jurisdictions with strong constitutional protections for freedom of speech such as under Article 11 of the EU

⁴⁸ Doda Affidavit, ¶95, MR, Tab 2; Sergot Affidavit, ¶23, MR, Tab 3.

⁴⁹ Notice of Appeal dated November 25, 2019, MR, Tab 1B.

Charter of Fundamental Rights.⁵⁰ As representatives of copyright holders, the Proposed Interveners will provide valuable perspective on this issue by referring this Court to relevant international instruments and jurisprudence which addresses these fundamental issues.

47. The Proposed Interveners, as creators and users of copyright materials, have a longstanding interests in advancing and protecting freedom of speech values and in public policy issues affecting the cultural industries.⁵¹ The CPC and/or ACP have also intervened in *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34 (whether a global de-indexing order violates freedom of speech rights), *National Post, et al. v. Her Majesty the Queen*, 2010 SCC 16 (concerning freedom of expression and the scope of protection for confidential journalistic sources), and *Crookes v. Newton*, 2011 SCC 47 (regarding whether hyperlinking which involves an important means of disseminating information on the Internet constitutes publication for the purposes of defamation).⁵²

48. The members of the Proposed Interveners have direct experience with, and knowledge about, foreign laws as they relate to enforcement of copyright rights, and in particular, foreign jurisprudence as it relates to freedom of speech rights, how to calibrate orders that enforce copyrights to balance the needs for effectiveness with the interests of freedom of speech rights and proportionality.⁵³

49. The Proposed Interveners are familiar with how courts in other jurisdictions, including jurisdictions with strong constitutional rights that protect freedom of expression rights, take these interests into account in deciding whether and how to grant blocking orders that balance the interests of copyright holders, ISPs, and internet users.⁵⁴

⁵⁰ For a summary of the jurisprudence, see Barry Sookman, *Sookman: Computer, Internet and Electronic Commercial Law*, vol 2 (Toronto: Carswell, 2019) at s.3.7(x)(ii) at pp. 3-730.32-370-44, BOA, Tab 37.

⁵¹ Doda Affidavit, ¶22, MR, Tab 2, Sergot Affidavit, ¶17-19, MR, Tab 3, Moorhouse Affidavit, ¶18-19, MR, Tab 4.

⁵² Doda Affidavit, ¶56 and 68, MR, Tab 2.

⁵³ Doda Affidavit, ¶83, MR, Tab 2.

⁵⁴ Doda Affidavit, ¶89, MR, Tab 2; Sergot Affidavit, ¶16 and 23, MR, Tab 3; Moorhouse Affidavit, ¶15-16, MR, Tab 4.

B. United Nations' Position on Freedom of Opinion and Expression Should Not Be Relied on by the Court

50. Teksavvy argues that the Federal Court of Appeal should set aside the blocking order because it infringes on fundamental human rights relying on the United Nations Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.⁵⁵

51. The Proposed Interveners will submit that The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression analysis is flawed, is inconsistent with the international jurisprudence that the interveners will put before this Court including the jurisprudence from courts in the European Union, and should not be relied on by this Court.⁵⁶

C. Balancing Efficacy, Usefulness, Proportionality, and Freedom of Expression To Promote the Rule of Law on the Internet

52. As noted above, the Proposed Interveners are concerned that a decision that makes blocking order available but subject to conditions which limit its usefulness could have impacts on the enforcement of copyrights in Canada and in other jurisdictions.⁵⁷

53. The Proposed Interveners will, if granted leave to intervene in this Appeal, provide examples from international jurisprudence to show how blocking injunctions have successfully been issued to address the many challenges posed by online piracy and to reduce access to blocked online locations, whilst at the same time being sensitive to freedom of expression issues and that include terms that appropriately balances the need for efficacy and usefulness, and freedom of expression rights in the online context.⁵⁸

D. Canada's Treaty Obligations

54. The outcome of this Appeal may impact Canada's ability to comply with international treaty obligations in Article 14 of the World Trade Organization TRIPS

⁵⁵ Doda Affidavit, ¶73 and 92, MR, Tab 2.

⁵⁶ Doda Affidavit, ¶ 92, MR, Tab 2.

⁵⁷ Doda Affidavit, ¶76, MR, Tab 2; Sergot Affidavit, ¶12, MR, Tab 3.

⁵⁸ Doda Affidavit, ¶74, 76, 87, MR, Tab 2; Sergot Affidavit, ¶11, 15, 16-18, 23, MR, Tab 3.

Agreement (“*TRIPS Agreement*”),⁵⁹ Article 14 of the WIPO Copyright Treaty (“*WCT*”), Article 20.79 of the recently ratified Canada-United States-Mexico Agreement (“*CUSMA*”), and the Article 18.71 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“*CPTPP*”).

55. These treaty obligations are important to assessing whether blocking orders should be recognized in Canada. As the Supreme Court of Canada said in *Hape*:

*...[C]ourts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result... [T]he legislature is presumed to act in compliance with Canada’s obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. ...*⁶⁰

56. Under the *TRIPS Agreement*, *CUSMA* and *CPTPP* remedies for copyright infringement must not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. The *CUSMA* and *CPTPP* also include express provisions requiring Parties to the treaties, in a manner consistent with Article 41 of the *TRIPS Agreement*, to provide enforcement procedures that permit effective and expeditious action by right holders against copyright infringement that occurs in the online environment.

57. Under these treaties, Parties are required to provide legal incentives for ISPs to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials.⁶¹ Canada’s international treaty

⁵⁹ Doda Affidavit, ¶77, MR, Tab 2, see also *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 410, Annex 1C (entered into force 1 January 1995), BOA, Tab 7.

⁶⁰ *R. v. Hape*, [2007] 2 SCR 292, ¶53, BOA, Tab 29, *emphasis added*; See also *C.A.P.A.C. v. CTV Television Network* (1968), 68 D.L.R. (2d) 98 (S.C.C.), BOA, Tab 10; *Bishop v. Steven’s*, [1990] 2 SCR 467, BOA, Tab 9; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, BOA, Tab 32; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, BOA, Tab 19.

⁶¹ *Canada-United States-Mexico Agreement*, 30 November 2018, Art. 20.89, BOA, Tab 5; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, Arts. 18.71, 18.82 (entered into force 30 December 2018), BOA, Tab 6.

obligations underscores the importance of affirming the availability of blocking orders as a remedy available to rights-holders in Canada.⁶² This is re-enforced by decisions of the Supreme Court that emphasize the desirability “that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results”.⁶³

4. Other Intervention Criteria Are Met

58. The Proposed Interveners also meet the other intervention criteria — namely, the first, fourth and fifth *Pictou* factors — in this motion.

59. As to the *first* factor, the Proposed Interveners have complied with the requirements of Rule 109(2) in its Notice of Motion. Further, the supporting affidavits of Paul Doda,⁶⁴ Stefan Sergot,⁶⁵ and Sam Moorhouse,⁶⁶ contain a detailed and well-particularized explanation for why the intervention is warranted.⁶⁷

60. As to the *fourth* factor, the matters in this appeal have assumed such a public and important dimension that the Court should expose itself to perspectives beyond those advanced by the existing parties before it.⁶⁸ The appeal raises significant legal issues regarding how blocking injunctions may affect freedom of speech rights of individual Canadians and the Canadian society.⁶⁹ As such, the Appeal raises matters that go far beyond the private interests of any of the parties, thus justifying the intervention.⁷⁰

⁶² Doda Affidavit, ¶77, MR, Tab 2.

⁶³ *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, ¶13, BOA, Tab 24.

⁶⁴ Doda Affidavit, MR, Tab 2.

⁶⁵ Sergot Affidavit, MR, Tab 3.

⁶⁶ Moorhouse Affidavit, MR, Tab 4.

⁶⁷ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶10 and 14, BOA, Tab 11.

⁶⁸ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶9 and 28, BOA, Tab 11.

⁶⁹ Memorandum of Fact and Law of Teksavvy Solution Inc. dated March 13, 2020, ¶20-24, MR, Tab 1C.

⁷⁰ *Canadian Blood Services / Société canadienne du sang v. Freeman*, 2006 CarswellOnt 2362 (ON S.C.), ¶23, BOA, Tab 15; *Incredible Electronics Inc. v. Canada (Attorney General)*, 2006 CarswellOnt 3291 (ON S.C.) ¶92, BOA, Tab 25.

61. Further, this is not an appeal involving a large number of parties. There is only one Appellant and one set of Respondents before the Court. Accordingly, permitting the Proposed Interveners to intervene will not cause the Attorney General to be “drown[ed] out” by the voices from the other side.⁷¹

62. Moreover, one of the entities who has also sought leave to intervene — namely, the British Columbia Civil Liberties Union (BCCLA) — is expressly raising *Charter* issues in support of Teksavvy’s position against site blocking. This Court would greatly benefit from the arguments that the Proposed Interveners will make in this respect.

63. As to the *fifth* factor, the proposed intervention is consistent with Rule 3.⁷² The Proposed Interveners have brought its motion in a timely manner pursuant to the Federal Court of Appeal Direction by Stratas J.A. dated April 24, 2020.⁷³ Further, the matters it intends to raise do not duplicate the matters raised in the Notice of Appeal or Memoranda filed by the parties in the motion for leave to appeal,⁷⁴ and the Proposed Interveners are prepared to be bound by the evidentiary record before this Court.⁷⁵ Nor will the parties suffer any prejudice given the fact that the issues the Proposed Interveners will address are closely related to those already in issue.⁷⁶ Accordingly, the intervention will not unduly disrupt the progress of the appeal.⁷⁷

64. In addition, the Proposed Interveners will seek to avoid duplication with the arguments of the parties and other interveners. Counsel for the Proposed Interveners has and will consult with counsel for FIAPF and the Music Industry Associations group to

⁷¹ *Gitxaala Nation v. Canada*, 2015 FCA 73 (Chambers), ¶21-23, BOA, Tab 21.

⁷² *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, ¶39, BOA, Tab 34.

⁷³ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶10, BOA, Tab 11; *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2015 FCA 34 (Chambers), ¶29, BOA, Tab 16; *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 33 (Chambers), ¶8-11, BOA, Tab 36.

⁷⁴ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶30-31, BOA, Tab 11.

⁷⁵ *Lukacs v. Canada (Canadian Transportation Agency)*, 2014 FCA 292 (Chambers), ¶20, BOA, Tab 26.

⁷⁶ *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers), ¶32, BOA, Tab 11.

⁷⁷ *Lukacs v. Canada (Canadian Transportation Agency)*, 2014 FCA 292 (Chambers), ¶20, BOA, Tab 26.

ensure they make distinct submissions based on their respective perspectives and expertise.

5. The Intended Submissions of the Proposed Interveners'

65. If granted leave to intervene, the Proposed Interveners intend to make the following submissions (the "Submissions"):

- (a) Enforcing copyrights against online infringers of copyrights does not violate freedom of speech values or rights.
- (b) Blocking orders against ISPs to prevent infringing copies of works from being made available (either by streams or downloads) from piracy websites, servers, applications, services, or other online sources or locations do not violate freedom of expression rights. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression analysis is flawed, is inconsistent with the international jurisprudence, and should not be relied on by this Court.
- (c) In deciding whether and how to grant blocking orders, the Court should balance the legitimate interests of copyright holders, ISPs and internet users.
- (d) Orders that require ISPs to block piracy websites, servers, applications, services, or other online sources or locations, should be made that appropriately balances the need for efficacy and usefulness, proportionality, and freedom of expression rights and that promotes the rule of law in the online context.
- (e) Blocking orders are expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements in the online environment. This remedy is consistent with and is or may be required to enable Canada to fulfil its treaty obligations in respect of copyright.

66. The Submissions will seek to assist this Court in understanding the broader impacts of this Appeal as it relates to the importance of balancing the values of

freedom of expression with the need for effective and useful online remedies that preserve the rule of law in the Internet context and that foster compliance with Canada's treaty obligations in respect of copyright.

67. The Submissions will be primarily based on international authorities, orders made by foreign courts, and treaties that Canada is required to implement in respect of copyright. The Submissions will also endeavor to show the relevance of these international authorities to Canadian law including ss.1 and 2(b) of the *Canadian Charter of Rights and Freedoms*.

PART III—ORDER SOUGHT

68. The Proposed Interveners respectfully request an Order:
- a. Granting the Proposed Interveners leave to intervene in this appeal;
 - b. Permitting the Proposed Interveners to file a memorandum of fact and law no longer than 20 pages;
 - c. Permitting the Proposed Interveners to present oral argument not exceeding 30 minutes at the hearing of this appeal;
 - d. Determining that the style of cause in this Appeal be amended to include the Moving Parties as interveners;
 - e. Determining that the Proposed Interveners be served with electronic versions of all materials filed and to be filed by other parties and interveners; and
 - f. Such further and other Order as to this Honourable Court seems just.
69. The Proposed Interveners respectfully also request that no costs be awarded either for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2020.



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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 Premier
League Limited, and DAZN Limited.

**SCHEDULE “A”
LIST OF AUTHORITIES**

A. Statutes, Regulations, and Treaties

1. *Canadian Charter of Rights and Freedom*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c-11, section 2(b)
2. *Copyright Act*, RSC 1985, c. C-42, s 3
3. *Telecommunications Act*, SC 1993, c. 38, s 36
4. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 25 I.I.C. 209, Art. 14 (entered into force 1 January 1995)
5. *Canada-United States-Mexico Agreement*, 30 November 2018, Art. 20.89
6. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, Arts. 18.71, 18.82 (entered into force 30 December 2018)
7. *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 410, Annex 1C (entered into force 1 January 1995)
8. *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, I.L.M. 65, Art. 14 (entered into force 6 March 2002)

B. Case Law

9. *Bishop v. Steven’s*, [1990] 2 SCR 467
10. *C.A.P.A.C. v. CTV Television Network* (1968), 68 DLR. (2d) 98 (SCC)
11. *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (Chambers)
12. *Canada (A.G.) v. United States Steel Corp.*, 2010 FC 1330
13. *Canada (Attorney General) v. United States Steel Corp.*, 2009 CarswellNat 5933 (F.C.)
14. *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151
15. *Canadian Blood Services / Société canadienne du sang v. Freeman*, 2006

- CarswellOnt 2362 (ON S.C.)
16. *Canadian Doctors for Refugee Care v. Canada (A.G.)*, 2015 FCA 34
 17. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13
 18. *Crookes v. Newton*, 2011 SCC 47
 19. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34
 20. *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 408
 21. *Gitxaala Nation v. Canada*, 2015 FCA 73
 22. *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119 (Chambers)
 23. *Google Inc. v Equustek Solutions Inc. et al.*, 2017 SCC 34
 24. *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76
 25. *Incredible Electronics Inc. v. Canada (Attorney General)*, 2006 CarswellOnt 3291 (ON S.C.)
 26. *Lukacs v. Canada (Canadian Transportation Agency)*, 2014 FCA 292 (Chambers)
 27. *National Post, et al. v. Her Majesty the Queen*, 2010 SCC 16
 28. *Ontario Federation of Anglers and Hunters v. Alderville Indian Band*, 2014 FCA 145, leave to appeal refused, [2014] S.C.C.A. No. 344
 29. *R. v. Hape*, [2007] 2 SCR 292
 30. *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 SCR 335 (Chambers)
 31. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311
 32. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35
 33. *Rothmans, Benson & Hedges Inc. v. Canada (A.G.)* (1989), [1990] 1 FC 90 (C.A.), aff'g [1990] 1 FC 74 (T.D.)
 34. *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44

35. *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336
36. *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 33 (Chambers)

C. Secondary Sources

37. Barry Sookman, *Sookman: Computer, Internet and Electronic Commercial Law*, vol 2 (Toronto: Carswell, 2019)

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. and
VIDEOTRON LTD.**

Respondents

**WRITTEN REPRESENTATIONS OF THE
MOVING PARTIES,
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 PREMIER
LEAGUE LIMITED, AND DAZN LIMITED.**

(re: Motion for Leave to Intervene Under Rule 109 of
the *Federal Courts Rules*)

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Council, Association of Canadian Publishers, The
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SHAW COMMUNICATIONS INC.,
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Respondents

**MOTION RECORD OF
THE MOVING PARTIES,
INTERNATIONAL PUBLISHERS
ASSOCIATION, INTERNATIONAL
ASSOCIATION OF SCIENTIFIC, TECHNICAL
AND MEDICAL PUBLISHERS, AMERICAN
ASSOCIATION OF PUBLISHERS, THE
PUBLISHERS ASSOCIATION LIMITED,
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