

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Applicant
(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
(Respondents)

MEMORANDUM OF ARGUMENT OF TEKSAVVY SOLUTIONS INC.
Pursuant to Rule 25 of the Rules of the Supreme Court of Canada

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview

1. This case concerns the first-ever order by a Canadian court to block access to a website. This site-blocking order was made without a statutory basis and without any meaningful consideration of the expressive freedoms of Internet users.
2. All parties agree this order is “unprecedented”.¹ Six groups of interveners made submissions in the appeal. This appeal is unquestionably of public importance.
3. This appeal alters the landscape for copyright enforcement online. It raises several novel legal issues: How does the complete statutory code of the *Copyright Act* interact with a court’s equitable jurisdiction? How much should courts defer to Parliament’s decisions about what remedies to grant or withhold? When faced with a motion for a novel remedy that impacts the expressive rights of Internet users, how should *Charter* rights be taken into account in a court’s exercise of equitable jurisdiction?
4. These questions arise in the context of a copyright infringement action brought by Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc. (“the Plaintiffs”) against GoldTV.Biz and related entities (“the Defendants”). The Plaintiffs allege the Defendants stream content online in violation of the Plaintiffs’ copyright. Less than two weeks after commencing the infringement proceeding in Federal Court, the Plaintiffs filed a motion for a site-blocking order, a remedy not previously granted by a Canadian court, and not expressly provided for in the *Copyright Act*. 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 from being accessed by their users. The ISPs are innocent third parties—no wrongdoing is alleged against them. The motion was brought on an urgent basis, and based on untested *prima facie* evidence.
5. Only one ISP—the Applicant, TekSavvy—opposed the merits of the motion. Many of the other ISPs are either controlled by the Plaintiffs or have their own investments in content

¹ *Teksavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100 at para 1 [“Appeal Decision”], Application Record [AR], Tab 1B, p 57.

or other media interests. After a hearing, the motion judge granted the site-blocking order, and the Federal Court of Appeal upheld it on appeal.

6. In granting and upholding this order, neither the motion judge nor the Federal Court of Appeal seriously considered whether it was appropriate for a court to fashion such a novel remedy in light of the fundamentally statutory nature of copyright law and the *Copyright Act*'s status as an exhaustive code. In so doing, the courts below added a new arrow to copyright owners' quiver that disrupts the balance Parliament struck between the interests of copyright stakeholders.

7. Since a site-blocking order is effectively a final remedy, judicial recognition of site-blocking risks displacing and overtaking Parliament's carefully-crafted statutory regime for copyright remedies. This Court's guidance is required to clarify the proper roles for courts and Parliament in determining what means are available for copyright enforcement.

8. This question is not merely academic. In granting a site-blocking motion made at the very outset of infringement proceedings, the courts below crafted an enforcement mechanism more powerful than any remedy the Plaintiffs could have obtained after trial. This enforcement mechanism is attractive. Indeed, a second and far more draconian dynamic site-blocking motion is currently pending before the Federal Court in a separate infringement action.²

9. The approach taken by the courts below, which gives scant recognition to the order's impact on expressive rights, has the potential to profoundly reshape how copyright owners fight infringement online. Further, a site-blocking order is incompatible with the statutorily mandated neutrality of ISPs as common carriers, requiring as it does that ISPs police traffic on their networks rather than being the conduits of Internet traffic, as required by legislation.

10. This Court's guidance is also required on the question of how expressive rights—of the ISPs and every user of the Internet who may be affected by the broad reach of the site-blocking order—are to be taken into account by a court faced with a site-blocking motion. For example, site-blocking raises the real risk of blocking more content than intended, which clearly restricts

² See *Rogers Media Inc et al v John Doe 1, John Doe 2, and other unidentified persons who operate unauthorized streaming servers providing access to NHL live games in Canada*, Federal Court file T-955-21. Statement of claim filed June 15, 2021; site-blocking motion filed July 7, 2021.

expression. Does the *Charter* govern a court's exercise of its equitable jurisdiction, and if so, how? The proposed appeal offers this Court an opportunity to provide clarity on these issues and to ensure that any exercise of a court's remedial powers reflects the balance between users and owners mandated in the *Copyright Act*, the different roles of the judiciary and Parliament, and the *Charter*'s protection of free expression.

B. Statement of Facts

1. The Parties

11. In Canada, Internet access is provided to customers by ISPs: companies that provide the infrastructure necessary to connect their customers' devices to the rest of the Internet.³ ISPs do not, by virtue of their role as common carriers, create or regulate content online. Their function is to provide the means through which users access content on the Internet.

12. The Applicant, 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.⁴

13. The Plaintiffs in the underlying copyright infringement action (the Respondents in this leave application) Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc. (the "Plaintiffs") are large broadcasters in Canada. They own or exclusively license the Canadian rights to communicate television programs to the public by telecommunication, and directly broadcast subscription-based television programming on Internet services. All of the Plaintiffs are affiliated with ISPs, such that these companies are effectively both owners of copyright and the conduits through which that copyright is transmitted. Such entities are known as "vertically integrated ISPs." In contrast, TekSavvy is not vertically integrated and does not own the copyright in media content that is broadcast or distributed.⁵

³ *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432 at para 9 ["Motion Decision"], AR, Tab 1A, p 10.

⁴ Affidavit of Paul Stewart sworn August 23, 2019 at para 2 [Stewart Affidavit], AR, Tab 3A, p 124.

⁵ Stewart Affidavit at para 4, AR, Tab 3A, p 124.

2. The growth of vertical integration and the campaign to obtain a site-blocking remedy

14. In 2012, the Plaintiffs and their affiliated companies advocated against heavy-handed measures to discourage online copyright infringement. For example, before a Parliamentary Committee reviewing proposed reforms to the *Copyright Act*, counsel for Bell Canada Enterprises 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.⁶

15. Parliament significantly overhauled the *Copyright Act* in 2012.⁷ In the consultations that preceded these changes, copyright holders argued for an aggressive “notice and takedown” regime with respect to websites and services that enabled copyright infringement. As part of the Business Coalition for Balanced Copyright (“BCBC”), the Plaintiffs’ affiliates and other ISPs argued against this approach and supported the adoption of a less intrusive “notice and notice” regime, based on the view that “intermediaries should not unduly interfere with their customers’ online activities.”⁸ Parliament ultimately did what the Plaintiffs called for: it introduced the “notice and notice” regime.⁹ Parliament did not, despite significant advocacy from copyright holders, include a site-blocking scheme or a notice-and-takedown regime in the 2012 amendments to the *Copyright Act*.

⁶ Testimony of Tanya Woods, *Evidence*, House of Commons Legislative Committee on Bill C-11, 41st Parl, 1st Sess, (1 March 2012) at 0940, 0945 (excerpt, emphasis added), AR, Tab 3B, p 272.

⁷ *Copyright Modernization Act*, SC 2012, c 20.

⁸ Submission of the Business Coalition for Balanced Copyright to the Legislative Committee on Bill C-32, January 27, 2011, as reproduced in Canadian Media Concentration Research Project intervention in FairPlay Proceeding [CMCRP FairPlay Intervention] at para 21, Stewart Aff, Ex D, AR, Tab 3A.1, p 156.

⁹ *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*], ss 41.25, 41.26; see also *Copyright Modernization Act*, s. 47, amending s 41 of the *Copyright Act* to add ss 41.25, 41.26.

16. Since the 2012 copyright reforms, the Plaintiffs have “changed their stripes.”¹⁰ As vertically integrated companies that control both content and the conduit through which it is accessed online, the Plaintiffs and their affiliates now advocate for more intrusive copyright protections, including the very site-blocking orders they previously opposed.

17. In January 2018, the Plaintiffs took part in a coalition that made an application to the Canadian Radio-television and Telecommunications Commission (“CRTC”) requesting a site-blocking regime. Specifically, the coalition requested that the CRTC create a regime to identify websites and online services that infringe copyright, and require ISPs to block those websites and services.¹¹ The CRTC denied the application, finding it did not have jurisdiction to implement the proposed site-blocking regime and that the creation of new copyright remedies required clear statutory language in light of “Parliament’s intent in creating an exhaustive copyright code in the *Copyright Act*.”¹²

18. In late 2018, the Plaintiffs tried again to obtain stronger tools for enforcement of copyright, this time at the House of Commons Standing Committee on Industry, Science and Technology (the “INDU Committee”) during its statutory review of the *Copyright Act*. As part of this review, the INDU Committee conducted broad consultations, including with TekSavvy and the Plaintiffs.¹³

19. Bell urged Parliament to add a site-blocking injunction remedy to the *Copyright Act*. Bell Canada Enterprises, an affiliate of the Plaintiff Bell Media Inc., also suggested that statutory change was necessary for copyright holders to access site-blocking, writing that, “for such remedies to provide a practical means to address the issue of piracy, [...] the [Copyright] Act must be amended to provide for them explicitly and directly.”¹⁴

¹⁰ CMCRP FairPlay Intervention at para 24, Stewart Aff., Ex D, AR Tab 3A.1, p 156.

¹¹ CRTC, Telecom Decision CRTC 2018-384 at para 6.

¹² *Ibid.*

¹³ Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act*, June 2019, 42nd Parl, 1st Sess (excerpt) [“INDU Committee Report”], Stewart Aff, Ex J, AR, Tab 3A.3, pp 245-250.

¹⁴ BCE Submission to Standing Committee on Industry, Science and Technology, December 10, 2018 at para 26 (emphasis added), see also paras 5, 21-27, AR, Tab 3G, pp 354-357.

20. Rogers Communications Inc. and the BCBC also changed course and called for an explicit injunctive remedy to be added to the *Copyright Act*.¹⁵

21. In contrast, TekSavvy and others argued that the site-blocking regime proposed by copyright holders contradicted the principle of net neutrality, which requires ISPs to provide equal treatment to all Internet traffic, and could easily be circumvented and rendered ineffective. TekSavvy also noted that the proposal for site-blocking “stems from a convergence of interests derived from the vertical integration of telecommunications firms that runs contrary to the role of ISPs as common carriers.”¹⁶

22. The INDU Committee’s June 2019 report directly addressed site-blocking, recommending that

[...] the government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law.¹⁷

3. The Proceedings in the Courts Below

(a) The Copyright Infringement Action in Federal Court

23. On July 18, 2019, the Plaintiffs commenced an action in Federal Court against two 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.¹⁸

24. On July 25, 2019, in an *ex parte* proceeding, the Plaintiffs obtained a 14-day interim injunction against the GoldTV Defendants.¹⁹ Based on *prima facie* findings, the GoldTV Defendants were ordered to immediately disable the infringing GoldTV services. On August

¹⁵ Rogers Communications Inc submission to Standing Committee on Industry, Science and Technology, December 10, 2018 at paras 10-15, AR, Tab 3H, pp 359-360; Business Coalition for Balanced Copyright submission to Standing Committee on Industry, Science and Technology, December 10, 2018 at p 3, AR, Tab 3I, p 365.

¹⁶ INDU Committee Report, Stewart Aff, Ex J, AR, Tab 3A.3, p 249.

¹⁷ INDU Committee Report, Stewart Aff., Ex J, AR, Tab 3A.3, p 251 (emphasis added).

¹⁸ Statement of Claim, *Bell Media Inc et al v John Doe 1 dba GoldTV.biz et al* at paras 24 and 34, Federal Court file no. T-1169-19, AR, Tab 3C, pp 282, 286.

¹⁹ Order of LeBlanc J dated July 25, 2019, AR, Tab 3D.

8, 2019, the Federal Court issued an interlocutory injunction to the same effect, based on the same evidence.²⁰ That motion was not *ex parte*; however, it was uncontested, as the GoldTV Defendants did not appear.

(b) The Site-Blocking Motion

25. On July 29, 2019, four days after the interim injunction order was made, the Plaintiffs brought an urgent motion for an interlocutory injunction against eleven third-party ISPs. The Plaintiffs 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.²¹

26. A site-blocking order such as the one sought by the Plaintiffs had never before been issued by a Canadian court.²²

27. The Plaintiffs led little evidence of any efforts to either locate the GoldTV Defendants or to enforce the injunction against them.²³ Indeed, the Plaintiffs brought the site-blocking motion a mere four days after obtaining the interim injunction against the GoldTV Defendants, and before the interlocutory injunction was even in place.

28. Of the eleven named third-party ISPs, many are either directly owned by the Plaintiffs²⁴ or themselves have affiliated media arms.²⁵ Two ISPs, TekSavvy and Distributel Communications Ltd. (“Distributel”), opposed the motion: TekSavvy opposed on the legal

²⁰ Order of Kane J dated August 8, 2019, AR, Tab 3E.

²¹ Motion Decision at para 105, AR, Tab 1A, p 39.

²² Motion Decision at para 8, AR, Tab 1A, p 10.

²³ See Affidavit of Yves Rémillard sworn July 15, 2019 at paras 61-68 [Rémillard affidavit], AR, Tab 3F, pp 352-353: 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.

²⁴ Namely Bell Canada, Fido Solutions Inc., Rogers Communications Canada Inc., and Videotron Ltd.

²⁵ For example, Shaw Communications Inc.

basis of the motion, while Distributel opposed certain terms of the proposed order. TekSavvy also filed extensive evidence on the alternative efforts the Plaintiffs could have made to enforce their copyright.²⁶

29. The motion judge granted the Plaintiffs' motion on November 15, 2019 ("the GoldTV Order"), finding that he had equitable jurisdiction to make the requested order and that this jurisdiction was not displaced by the absence of site-blocking orders from the remedies provided by the *Copyright Act*. The motion judge also found that the requested order was just and equitable in the circumstances, in an analysis that gave scant consideration to the impact of this order on freedom of expression. He granted a slightly modified version of the draft order requested by the Plaintiffs. 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.

30. The order has required multiple amendments to the list of Target Websites to be blocked. The first such amendment was proposed on the eve of the hearing of the motion, when the Plaintiffs proposed a revised draft order. The order was amended on December 4, 2019, July 10, 2020 and November 13, 2020, with changes being made to the list of Target Websites each time. The Plaintiffs requested a further amendment to the list of Target Websites on August 20, 2021.²⁷

(c) Appeal to the Federal Court of Appeal

31. TekSavvy appealed the motion judge's decision. By order of Stratas J.A., six groups of interveners were granted leave to intervene: three groups were copyright holders, and three interveners were public interest organizations.²⁸

32. The Federal Court of Appeal dismissed TekSavvy's appeal. The Federal Court of Appeal's decision was fundamentally flawed in two respects. First, it failed to seriously

²⁶ See Stewart Affidavit, Exs LL-PP, AR, Tab 3A.4.

²⁷ Federal Court, "Recorded Entry Summary Information", Court File No. T-1169-19, online: <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files>.

²⁸ Appeal Decision, AR, Tab 1.A. The public interest organizations granted leave to intervene were the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), the Canadian Internet Registration Authority, and the British Columbia Civil Liberties Association.

consider whether it was possible or appropriate for the motion judge to create a novel remedy in light of the fundamentally statutory nature of copyright law and the *Copyright Act*'s status as an exhaustive code of rights and remedies. The Court did not address the impact of the introduction of such a remedy on the carefully crafted balance set by Parliament between the interests of copyright stakeholders. Second, the Federal Court of Appeal failed to meaningfully address the order's impact on the expressive rights of Internet users and third-party ISPs. The analytical framework endorsed by the Federal Court of Appeal is inadequate to address the impact of site-blocking on freedom of expression.

(d) New site-blocking motion

33. Less than a month after the Federal Court of Appeal rendered its decision, the Plaintiffs (joined by additional plaintiffs) commenced a new copyright action in Federal Court against unnamed defendants.²⁹ Shortly after filing the statement of claim, and without even obtaining an interim injunction against the unnamed defendants, the Plaintiffs filed a motion for a new, significantly broader, and dynamic site-blocking order. The motion names the same group of third-party ISPs as named in this appeal.

PART II – QUESTIONS IN ISSUE

34. This Court should grant leave in the proposed appeal because it raises the following questions of public importance:

1. Can the Federal Court exercise its equitable jurisdiction to grant a site-blocking order in proceedings undertaken under the *Copyright Act*?
2. If a site-blocking order is an available remedy, what analytical framework governs its use, and how must this framework account for the impact of such an order on freedom of expression?

²⁹ Unlike the GoldTV Order, which requires ISPs to block a list of Court-approved IP addresses, this motion seeks real-time site-blocking of any IP address the plaintiff telecommunication companies believe is communicating content without authorization. The site-blocking order sought in this motion provides for only retroactive, semi-annual reporting to the Courts.

PART III – ARGUMENT

A. Can the Federal Court exercise its equitable jurisdiction to grant a site-blocking order in proceedings undertaken under the *Copyright Act*?

35. The proposed appeal asks what is left of the courts’ equitable jurisdiction to grant a novel form of injunctive relief where Parliament decides, as it has done in Canada, to enact a comprehensive statutory scheme for copyright.

36. The availability and desirability of intrusive remedies for copyright infringement, including site-blocking, have been the subject of extensive debate and consultation by Parliament, the Government of Canada, and the CRTC. Before the GoldTV Order was granted, Canadian law did not recognize site-blocking as a remedy for copyright infringement. Indeed, as described above, it is a remedy that the Plaintiffs repeatedly said was unavailable to them under the *Copyright Act*, and that their affiliates actively lobbied against when the *Copyright Act* was last amended in 2012. Yet in granting the site-blocking order, the Federal Court granted precisely such a remedy to copyright owners and required unprecedented intervention by ISPs in the content available to Internet users across Canada. Both the Federal Court and Federal Court of Appeal characterized such an order as an exercise of the Court’s equitable jurisdiction, and held that this jurisdiction is not displaced or circumscribed by the *Copyright Act*.

37. The Court of Appeal’s holding that the motion judge could fashion a novel and sweeping copyright remedy constitutes a substantive change to the balance between the judicial and legislative branch, and to the balance struck by Parliament between copyright stakeholders. Copyright infringement is a cause of action entirely created and governed by the *Copyright Act*. The *Copyright Act* is a complete code, such that the rights and remedies afforded by the *Copyright Act* are exhaustive.³⁰ Further, as this Court recently affirmed, copyright law involves a careful balance “between copyright rights and user rights”.³¹ The *Copyright Act* does not provide for site-blocking by ISPs as a mechanism to enforce copyright. Part IV of the *Copyright Act* contains a number of specific provisions respecting providers of

³⁰ *Keatley Surveying Ltd v Teranet Inc.*, 2019 SCC 43 at para 40; *Théberge v Galerie d’Art du Petit Champlain inc*, 2002 SCC 34 at para. 5.

³¹ *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at paras 91-94.

network services,³² none of which provide for site-blocking.

38. The decision of the motion judge and Federal Court of Appeal to recognize a novel remedy not prescribed in statute calls into question the exhaustiveness of the remedial scheme in the *Copyright Act*, and constitutes a significant intrusion by the judicial branch into a complex and complete scheme designed by Parliament to carefully balance the rights and interests of copyright stakeholders.

39. The decisions below also raise serious questions about the institutional competence of the courts to balance competing stakeholder and societal interests in crafting a site-blocking remedy. In creating such a novel enforcement mechanism, the Federal Court had access only to the views of the parties to that motion: the three Plaintiff copyright holders and the respondent ISPs, several of which are vertically integrated with the Plaintiffs. Only TekSavvy opposed the motion for site-blocking on the merits. As such, the Federal Court did not have the benefit of a broad range of views on the effects and effectiveness of site-blocking. This stands in stark contrast to the extensive consultations conducted by Parliament, including with respect to site-blocking and other remedies, when it last amended the *Copyright Act*.³³

40. The approach sanctioned by the courts below also disregards the ongoing parliamentary oversight of the *Copyright Act* by virtue of section 92, which requires a parliamentary committee to review the *Copyright Act* every five years.³⁴ Indeed, during the INDU Committee’s review in 2019, it highlighted the complex policy implications of proposals to add site-blocking to Canada’s copyright regime. While the INDU Committee recommended that the federal government consider adding court-ordered site-blocking provisions to the *Copyright Act*, it added the critical caveat that “paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet” in crafting

³² See in particular *Copyright Act*, ss 41.25 – 41.27.

³³ This is similar to *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76 at para 183, regarding the patentability of certain subject matter, per Bastarache J: “In my view, this Court does not possess the institutional competence to deal with issues of this complexity, which presumably will require Parliament to engage in public debate, a balancing of competing societal interests and intricate legislative drafting.”

³⁴ *Copyright Act*, s 92.

this remedy.³⁵ No such policy implications were considered in the courts below. As the decisions below manifestly demonstrate, courts are not equipped to consider such complex and multi-faceted policy considerations.

41. This Court’s intervention is required to clarify whether courts have the competence to alter a statutory scheme that is the result of such extensive public debate, and which constitutes Parliament’s view of the appropriate balance of competing interests. Put another way, what room is left for a court to craft its own remedy where Parliament has declined to include precisely that remedy in a comprehensive statutory scheme of rights and remedies?

42. This Court’s guidance is also needed on the question of the relevance of the decision in *Equustek* to the court’s equitable jurisdiction in copyright. In *Equustek*, this Court recognized a new type of interlocutory injunction in a trademark and trade secrets context. The new injunction required a third-party search engine to de-index certain websites from its search engine.³⁶ The courts below relied heavily on *Equustek* in finding that they both could and should exercise their equitable jurisdiction to grant a site-blocking order in a copyright matter. It is far from clear that *Equustek* provides a jurisprudential basis for recognizing a novel equitable remedy for copyright holders. Guidance from this Court is required to clarify whether *Equustek*, which arose in a completely different statutory context, stands for the proposition that a court’s equitable jurisdiction authorizes it to grant a site-blocking order in copyright infringement proceedings.

43. Unlike in the present appeal, in *Equustek*, there was no statutory impediment to Google de-indexing the sites from its own search engine. On the contrary, Google acknowledged it “can, and often does, exactly what is being asked of it in this case, that is, alter search results.”³⁷ The same cannot be said of ISPs, which are explicitly prohibited by statute from controlling the content they carry, absent CRTC approval.³⁸ The Federal Court of Appeal held that this statutory prohibition “does not displace the Federal Court’s equitable powers of injunction, including the power to impose a site-blocking order.”³⁹ The proposed

³⁵ INDU Committee Report, Stewart Aff, Ex J, AR, Tab 3A.3, p 251 (emphasis added).

³⁶ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 [*Equustek*].

³⁷ *Ibid*, at para 50.

³⁸ *Telecommunications Act*, SC 1993, c 38, s 36.

³⁹ Appeal Decision at para 36, AR, TAB 1B, pp 70-71.

appeal raises the important question of whether such a robust view of a court's equitable jurisdiction can be reconciled with the carefully crafted statutory scheme governing telecommunications in Canada.

44. Although the Plaintiffs framed their motion as seeking an interlocutory injunction, site-blocking is effectively a final remedy. The purpose of an interlocutory injunction is to preserve rights until trial.⁴⁰ 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.”⁴¹ Although exceptions to this rule are recognized (for example, *Mareva* injunctions), the list of exceptions should not be expanded without due consideration from this Court. This order goes well beyond preserving the Plaintiffs’ rights until trial. Based on *prima facie* findings, the Plaintiffs obtained a new kind of relief more powerful than what they could obtain after a trial or default judgment. Indeed, since the site-blocking order was granted, the Plaintiffs have taken no further steps to advance the underlying copyright action in Federal Court.

45. The approach taken by the Federal Court of Appeal is not only discordant with Canada’s legislative schemes for copyright and telecommunications; it is also a departure from the approach taken in other jurisdictions. In countries where site-blocking is an available remedy, it is overwhelmingly a remedy created and governed by statutes, which codify the balancing of interests and other policy considerations deemed to be important by the legislature. Indeed, in an Internet piracy case decided prior to the enactment of such statutory authority, the High Court of Ireland held that the courts must defer to the manner in which the legislature “circumscribes and regulates the enforcement” of copyright, and concluded that the courts could not “take an area which has been properly legislated for as to the extent and balance of rights by the [legislature] and to take a different view.”⁴²

46. Should this Court grant leave in this appeal, it will have the opportunity to address the roles of the legislative and judicial branches when, as here, copyright holders seek to add

⁴⁰ *Equustek* at para 24; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*].

⁴¹ Hon Robert J Sharpe, *Injunctions and Specific Performance*, (loose-leaf consulted on 20 August 2021) (Toronto: Thompson Reuters, 2019) at para 2.570.

⁴² *EMI Records (Ireland) Ltd & ors v UPC Communications Ireland Ltd*, [2010] IEHC 377 at paras 86-87.

a new equitable arrow to their quiver of statutory remedies.

B. If a site-blocking order is an available remedy, what analytical framework governs its use, and how must that framework account for the impact of site-blocking on freedom of expression?

47. If leave to appeal is granted, this Court will also have the opportunity to clarify what analytical framework governs site-blocking orders, should they be available at all. In particular, this Court will be in a position to address how this framework is to account for the impact of such orders on freedom of expression. Such clarification is needed with respect to both (a) whether ISPs and Internet users benefit from the protection of freedom of expression in the context of site-blocking, and (b) how to account for the impact on expressive rights of Internet users and innocent third-party ISPs in the analytical framework governing site-blocking orders.

1. What expressive interests are engaged in a site-blocking order?

48. By its very nature, a site-blocking order has vast implications for the expressive rights of ISP customers—the public at large.⁴³ These individuals browse the Internet and access websites, activities that are central vehicles of individual self-fulfillment in modern society. Self-fulfillment is one of the three main purposes of freedom of expression.⁴⁴ Unlike the order to de-index a website upheld in *Equustek*, which made a website more difficult to locate online but did not wholly prevent access to it, the effect of a site-blocking order is to wholly prevent access to certain Internet content. If not crafted carefully, such site-blocking could easily capture content not subject to copyright or otherwise lawfully shared. This is referred to as over-blocking. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has explicitly raised this as a major risk associated with site-blocking.⁴⁵

⁴³ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 41 [*Little Sisters*]: “The Constitution protects the right to receive expressive material as much as it does the right to create it.”

⁴⁴ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976. The other two purposes are truth-finding and democratic discourse.

⁴⁵ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion

49. ISPs themselves also engage in expressive activity when they provide users with access to a wide range of websites, in a manner analogous to book sellers and information retailers, who also benefit from the protection of section 2(b) of the *Charter*.⁴⁶ The Federal Court of Appeal nonetheless found that, because of their neutral character and status as common carriers, ISPs' provision of internet access does not constitute expressive activity and is thus not subject to *Charter* protection.⁴⁷ This conclusion is directly contrary to the Ontario Court of Appeal's holding, in *Information Retailers*, that "[t]he freedom to distribute and sell is as essential as the freedom to publish, for without the means of disseminating expression, the publication would be of little value."⁴⁸ It is particularly troubling given the growing dominance of the Internet as a vehicle for accessing and disseminating expression, and the increasing concentration of internet service provision among a handful of vertically-integrated companies. This Court's intervention is required to clarify how the jurisprudence on freedom of expression, which clearly recognizes that commercial activity is protected under the *Charter* and recognizes the vital importance of protecting the entire dissemination process, applies to the provision of internet services by ISPs.

2. How must the analytical framework governing site-blocking orders account for the impact on expressive rights?

50. The motion judge and Federal Court of Appeal dealt summarily with the *Charter* impact of the site-blocking order requested by the Plaintiffs.⁴⁹ This cursory analysis is inconsistent with this Court's extensive case law on free expression, which takes a far more nuanced and robust approach to injunctions that limit expressive rights. Absent this Court's intervention, the anemic analytical framework used by the motion judge and upheld by the Federal Court of Appeal will be the test to be used whenever a plaintiff seeks to force a third-

and Expression, Intervention in FairPlay Proceeding at para 22, Stewart Aff, Ex H, AR, Tab 3A.2, p 228.

⁴⁶ *Information Retailers Assn of Metropolitan Toronto v Metropolitan Toronto (Municipality)* (1985), 52 OR (2d) 449 at para 37 [*Information Retailers*]; *Little Sisters* at para 41 (the appellants were book retailers; the *prima facie* limit on their free expression was uncontested).

⁴⁷ Appeal Decision at para 50, AR, Tab 1B, p 76.

⁴⁸ *Information Retailers* at para 41.

⁴⁹ Motion Decision at para 97, AR, Tab 1A, pp 37-38, citing to *Equustek* at para 48; Appeal Decision at paras 56, 79, AR, Tab 1B, pp 78, 86.

party ISP to block its own customers' access to online content. This Court's guidance is required to address three issues in the approach used below.

(a) The test from *RJR-MacDonald* is not appropriate where the injunction sought enjoins expression

51. Should this Court agree with the courts below that a site-blocking order is an available remedy in copyright infringement proceedings, this Court's intervention is needed to identify the appropriate test for when such an order should be granted. Both the motion judge and the Federal Court of Appeal identified the applicable test as that set out in *RJR-MacDonald Inc v Canada (Attorney General)*, which holds that a Court should exercise its discretion to grant an interlocutory injunction where (1) there is a serious issue to be tried; (2) the applicant would suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction.⁵⁰ The Federal Court of Appeal also upheld the motion judge's importation of factors drawn from *Cartier*, a UK decision used in applying a statutory site-blocking scheme based on a European Union directive.⁵¹

52. This Court has made clear that "any attempt to restrict the right [to freedom of expression] must be subjected to the most careful scrutiny."⁵² For this reason, this Court has repeatedly modified or declined to apply the *RJR-MacDonald* test when asked to limit expression, finding it inadequate to protect this right: for example, in defamation cases,⁵³ publication bans,⁵⁴ and secondary picketing injunctions.⁵⁵ While this Court has articulated the applicable test in different ways, this Court has expressed concern that judicial discretion to make orders limiting expressive rights be "subject to no lower a standard of compliance with the *Charter* than legislative enactment" through an approach that incorporates the "essence of s. 1 of the *Charter* and the *Oakes* test."⁵⁶ This Court's intervention is required to ensure that

⁵⁰ *RJR-MacDonald* at 347-349; Appeal Decision at para 60, AR, Tab 1B, p 79; Motion Decision at paras 43-54, AR, Tab 1A, pp 22-25.

⁵¹ Appeal Decision at paras 76-79, AR, Tab 1B, pp 85-86.

⁵² *R v Sharpe*, 2001 SCC 2 at para 22 [*Sharpe*].

⁵³ *Canada (Human Rights Commission) v Canadian Liberty Net* [1998] 1 SCR 626 at paras. 47-8.

⁵⁴ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 878-880; *R v Mentuck*, 2001 SCC 76 at para 21 [*Mentuck*].

⁵⁵ *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 36-37 [*RWDSU*].

⁵⁶ *Mentuck* at para 27; see also *RWDSU* at paras 36-37.

site-blocking orders—if they are available as an exercise of equitable jurisdiction—are likewise subject to searching review. This is particularly important given the breadth of such orders, which by their very nature limit the expressive rights of a vast swath of Internet users, and given that these Internet users cannot participate in site-blocking proceedings that affect their expressive rights.

53. A robust justification analysis, with the justificatory burden falling on the party seeking a site-blocking order, is particularly necessary given the intrusive nature of such an order in a world increasingly inhabited electronically. Individuals and businesses transmit and access all manner of information online, and the ability to access the Internet in its unfragmented and uncensored form is an important aspect of freedom of expression in modern life. While site-blocking orders may protect the rights of copyright holders, the analytical framework governing their availability and use must consider the risk of over-blocking on the facts of each case. The framework must protect against any infringement of such rights that is not proven to be both necessary and minimally impairing. As such, this Court’s guidance is required to ensure that the analytical framework governing site-blocking orders, should they be available, does not allow site-blocking orders to be routinely available or overly broad.

(b) The allegedly unlawful character of the content does not obviate the need for robust *Charter* analysis

54. As discussed above, Canadian courts have demanded a higher threshold of justification before they will grant injunctions limiting freedom of expression. This is true even where the expression in question, such as hate speech, lies “at the outer margins of the values that are at the core of this fundamental freedom.”⁵⁷ This Court’s jurisprudence clearly holds that expression made unlawful through criminalization, e.g. deliberate falsehoods,⁵⁸ pornography,⁵⁹ hate speech⁶⁰ and communication for the purposes of prostitution,⁶¹ engages

⁵⁷ *Canada (Human Rights Commission) v Winnicki*, 20015 FC 1493 at para 28.

⁵⁸ *R v Zundel*, [1992] 2 SCR 731.

⁵⁹ *R v Butler*, [1992] 1 SCR 452; see also *Sharpe*.

⁶⁰ *R v Keegstra*, [1990] 3 SCR 697.

⁶¹ *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123 at 1182-1183.

section 2(b) of the *Charter*. Surely, content subject to copyright also *prima facie* engages section 2(b) of the *Charter*.

55. This Court’s decision in *Equustek* in no way purports to overrule this extensive line of authority. It was nonetheless effectively treated as such by both the Federal Court and Federal Court of Appeal. The courts below relied on *Equustek* for the proposition that the allegedly unlawful nature of the expression removed it from the scope of section 2(b).⁶² They did so despite the fact that the unlawfulness had only been established based on *prima facie*, untested evidence, and despite the Plaintiffs’ admission that they had not confirmed the infringing nature of all the content for which the site-blocking order was sought.⁶³

56. As a result, the courts below gave no meaningful consideration to the implications of the proposed site-blocking order for free expression, and applied the injunction test from *RJR-MacDonald* modified in light of *Cartier* without assessing the appropriateness of this framework. The Federal Court mentioned expression in passing in one paragraph but did not meaningfully weigh it.⁶⁴ The Federal Court of Appeal did not weigh expression either, but rather found that it “cannot agree that the Judge’s analysis on this issue was inadequate”,⁶⁵ taking “comfort” from the fact that the analysis in *Equustek* was “similarly brief”.⁶⁶

57. Any motion for a site-blocking order in copyright proceedings will undoubtedly involve allegedly infringing, and thus allegedly unlawful, communications. Given the impact of site-blocking on the expressive rights at play, the allegedly unlawful character of some of the content should not completely bar the weighing of expressive interests. If unlawful character is to be a significant or even determinative part of the *Charter* analysis—which would be a novel and narrow understanding of freedom of expression indeed—all site-blocking orders will effectively be immunized from *Charter* scrutiny. This creates a serious risk of over-blocking and, more fundamentally, enables a cavalier attitude toward a freedom this Court has described as “among the most fundamental rights” in Canadian society.⁶⁷ This Court’s

⁶² Motion Decision at para 97, AR, Tab 1A, pp 37-38; Appeal Decision at para 57, AR, Tab 1B, pp 78-79.

⁶³ Rémillard affidavit paras 20-22, AR, Tab 3F, p 340.

⁶⁴ Motion Decision at para 97, AR, Tab 1A, pp 37-38.

⁶⁵ Appeal Decision at para 56, AR, Tab 1B, p 78.

⁶⁶ Appeal Decision at paras 57-58, AR, Tab 1B, pp 78-79.

⁶⁷ *Sharpe* at para 21.

guidance is required to clarify what test governs site-blocking motions and what significance, if any, is to be given to allegations of unlawfulness in this analysis.

(c) The analysis required when a court order infringes *Charter* rights requires clarification

58. Court orders in private disputes do not normally attract *Charter* scrutiny.⁶⁸ The *Charter* does not apply to an injunction issued in a dispute between private parties governed entirely by the common law.⁶⁹ 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.”⁷⁰

59. This makes sense: where a legislature enacts a code restructuring the relationships of private citizens in accordance with a set of public policy preferences, litigation arising under such a regime is determined by governmental action. Thus, if site-blocking were based in statute, that statute would be subject to *Charter* review. But what analytical framework for *Charter* review applies where the same kind of order is grounded not in statute but in a court’s inherent jurisdiction?

60. The analytical path needs clarification. One approach is to find that the *Charter* applies to a discretionary court order made under a statutory proceeding.⁷¹ By the same logic, the *Charter* could apply to a site-blocking 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 *Dolphin Delivery*, which was grounded in pure tort law.⁷² Another approach is to integrate *Charter* considerations into the framework itself, as this Court has done several times with respect to injunction-type orders that engage expression.⁷³

61. One way or the other, as this Court noted in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, the *Charter* must “be viewed as one of the guiding instruments in the

⁶⁸ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 600.

⁶⁹ *Ibid*, at 602-603.

⁷⁰ Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007) (loose-leaf updated 2017, Release 1) [Hogg], at 30-23.

⁷¹ See *Nortel Networks Corp, Re*, 2017 ONSC 700 at paras 24-25, as applied to a proceeding under insolvency legislation.

⁷² Hogg at 37-22.

⁷³ See *infra* notes 53-56.

development of Canadian law,” including the common law and equity.⁷⁴ This case provides an opportunity for this Court to articulate how this principle applies to orders, such as a site-blocking order, founded on a court’s equitable jurisdiction.

PART IV – SUBMISSIONS CONCERNING COSTS

62. The Applicant request the costs of this application in any event of the cause.

PART V – ORDER SOUGHT

63. The Applicant respectfully requests that leave to appeal the decision of the Federal Court of Appeal, dated May 26, 2021, be granted with costs of the application in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2021.



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⁷⁴ *RWDSU* at para 18.

PART VI – TABLE OF AUTHORITIES

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11.	<i>Keatley Surveying Ltd v Teranet Inc</i> , 2019 SCC 43	37
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