

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210526

Docket: A-440-19

Citation: 2021 FCA 100

CORAM: NADON J.A.
LOCKE J.A.
LEBLANC J.A.

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

and

**CANADIAN INTERNET REGISTRATION AUTHORITY, THE
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY &
PUBLIC INTEREST CLINIC, FÉDÉRATION
INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS
DE FILMS-FIAPF, CANADIAN MUSIC PUBLISHERS
ASSOCIATION, INTERNATIONAL CONFEDERATION OF
MUSIC PUBLISHERS, MUSIC CANADA, INTERNATIONAL
FEDERATION OF THE PHONOGRAPHIC INDUSTRY,
INTERNATIONAL PUBLISHERS ASSOCIATION,**

**INTERNATIONAL ASSOCIATION OF SCIENTIFIC,
TECHNICAL AND MEDICAL PUBLISHERS, AMERICAN
ASSOCIATION OF PUBLISHERS, THE PUBLISHERS
ASSOCIATION LIMITED, CANADIAN PUBLISHERS'
COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, THE
FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED,
DAZN LIMITED and THE BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION**

Interveners

Heard by online video conference hosted by the registry on March 24 and 25, 2021.

Judgment delivered at Ottawa, Ontario, on May 26, 2021.

REASONS FOR JUDGMENT BY:

LOCKE J.A.

CONCURRED IN BY:

NADON J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] This appeal concerns an Order of the Federal Court that all parties agree is unprecedented in Canada. On November 15, 2019, Justice Patrick Gleeson (the Judge) issued an interlocutory Order (the Order) in a copyright infringement action (Federal Court File No. T-1169-19, the Action) requiring a number of Canadian Internet service providers (ISPs), including the appellant, Teksavvy Solutions Inc. (Teksavvy), to block access to certain websites by their customers. This is known as a site-blocking order. The ISP parties' customers make up a majority of Canadian Internet users. In addition to being unprecedented in Canada, the Order is notable because the ISPs to whom it applies are not defendants in the Action and are not accused of any wrongdoing.

[2] The defendants who are accused of copyright infringement in the Action are two unidentified persons responsible for businesses operating as goldtv.biz and goldtv.ca (the Target Websites), which operate unauthorized subscription services that provide access to programming content over the Internet (the GoldTV Services). The aim of the Order is to impede access to the GoldTV Services by the named ISPs' customers.

[3] The Action was commenced on July 18, 2019 by three of the respondents – Bell Media Inc., Groupe TVA Inc. and Rogers Media Inc. (the plaintiffs) – who are Canadian broadcasters. The statement of claim alleges that the infringing GoldTV Services began at least as early as July 2017. On the same day as the Action was commenced, the plaintiffs filed an *ex parte* motion for an interim injunction ordering that the GoldTV Services be immediately disabled. This motion was granted by Justice René LeBlanc (then of the Federal Court) and the interim injunction was issued on July 25, 2019 for a period of not more than 14 days. The plaintiffs' motion also sought an interlocutory injunction, to replace the interim injunction, with the aim of keeping the GoldTV Services disabled until final determination of the Action on the merits. The interlocutory injunction was granted by Justice Catherine M. Kane on August 8, 2019.

[4] The defendants have never filed a defence in the Action, nor have they participated otherwise in the Action, including in the proceedings brought before Justice Kane and the Judge.

II. Federal Court Order and Later Amendments

[5] On July 31, 2019, after the interim injunction had been issued and while the motion for interlocutory injunction was pending, the plaintiffs filed a separate motion requesting that the ISPs named in the motion be ordered to block access by at least their residential wireline Internet service customers to the Target Websites. The plaintiffs cited the failure of the defendants to comply with the interim injunction order despite service thereof on them on July 25, 2019 in the manner permitted by the Court. They also cited their inability to identify the defendants. This is the motion that led to the Order dated November 15, 2019 that is currently under appeal. It is set to terminate two years after its issuance.

[6] The Order lists the Target Websites' domains, subdomains and IP addresses in its Schedule 1, and contemplates that the list may be amended by subsequent order to add new domains, subdomains and IP addresses, and delete others, as necessary to reflect those actually used solely or predominantly to enable or facilitate access to the Target Websites. Schedule 1 has since been amended three times: by orders dated December 20, 2019, July 10, 2020 and November 13, 2020.

[7] The Order also provides that the plaintiffs shall indemnify and save harmless the ISPs for the reasonable marginal cost of implementing the Order (and any update thereof), and for any liability, expenses, etc. resulting from any complaint, demand, etc. by a third party as a result of the ISPs' compliance with the Order.

[8] Teksavvy opposed the motion on the basis that the subject matter of the order, site-blocking, should be addressed by the Canadian Radio-television and Telecommunications

Commission (CRTC), and not by the Federal Court. Teksavvy also argued that the legal test for issuance of the order sought was not met.

[9] The Judge issued the Order after considering the following issues:

- A. Does this Court have jurisdiction to issue a site-blocking order?
- B. Should the Court decline to exercise that jurisdiction?
- C. What is the test to be applied?
- D. Have the Plaintiffs met that test?
- E. On what terms should the order issue?

[10] The first four of these issues are addressed in these reasons. The last issue is not in dispute in this appeal.

III. Parties

[11] As indicated above, the appellant is Teksavvy.

[12] The respondents are the plaintiffs and the defendants in the underlying copyright infringement action, as well as the ISPs (other than Teksavvy) who are subject to the Order. Of the respondents, only the plaintiffs submitted a memorandum of fact and law and made oral submissions at the hearing of this appeal.

[13] By Order of Justice David Stratas dated June 24, 2020, 16 interveners were added to the appeal. They filed three memoranda in the following groups:

- A. On behalf of (i) Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), and (ii) the Canadian Internet Registration Authority (CIRA);
- B. On behalf of (i) Fédération Internationale des Associations de Producteurs de Films (FIAPF), (ii) Canadian Music Publishers Association, (iii) International Confederation of Music Publishers, (iv) Music Canada, (v) International Federation of the Phonographic Industry, (vi) International Publishers Association, (vii) International Association of Scientific, Technical and Medical Publishers, (viii) American Association of Publishers, (ix) The Publishers Association Limited, (x) Canadian Publishers' Council, (xi) Association of Canadian Publishers, (xii) The Football Association Premier League Limited, and (xiii) Dazn Limited; and
- C. On behalf of British Columbia Civil Liberties Association (BCCLA).

[14] At the hearing, oral submissions were received from the following six interveners or groups of interveners:

- A. CIPPIC;
- B. CIRA;
- C. BCCLA;

- D. 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;
- E. Canadian Music Publishers Association, International Confederation of Music Publishers, Music Canada, International Federation of the Phonographic Industry; and
- F. FIAPF.

[15] The first three interveners argued in favour of the appellant. The remaining interveners argued in favour of the plaintiffs.

IV. Issues

[16] There are three broad issues in this appeal:

- A. Whether the Federal Court had the power to grant a site-blocking order;
- B. If so, the relevance of freedom of expression; and
- C. Whether the Order was just and equitable.

V. Standard of Review

[17] The Judge’s decision to issue the Order was discretionary in nature. This Court should not interfere in such a decision absent an error on a question of law, or a palpable and overriding error on a question of fact or of mixed fact and law (unless the error is on an extricable question of law): *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, at paras 8, 10, 27; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 142 C.P.R. (4th) 187 at paras. 69, 74-79. A palpable error is one that is obvious, and an overriding error is one that goes to the very core of the outcome. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46.

VI. Analysis

A. *Whether the Federal Court had the power to grant a site-blocking order*

[18] In concluding that he was empowered to grant a site-blocking order, the Judge cited sections 4 and 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7:

Federal Court — Trial Division continued

4 The division of the Federal Court of Canada called the Federal Court — Trial Division is continued under the name “Federal Court” in English and “Cour fédérale” in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

Maintien : Section de première instance

4 La section de la Cour fédérale du Canada, appelée la Section de première instance de la Cour fédérale, est maintenue et dénommée « Cour fédérale » en français et « Federal Court » en anglais. Elle est maintenue à titre de tribunal additionnel de droit, d’équité et d’amirauté du Canada, propre à améliorer l’application du droit canadien, et continue d’être une cour supérieure d’archives ayant

compétence en matière civile et pénale.

[...]

Mandamus, injunction, specific performance or appointment of receiver

44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

[...]

Mandamus, injonction, exécution intégrale ou nomination d'un séquestre

44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[19] Section 4 provides that the Federal Court is a court of equity, and section 44 provides that the Federal Court may issue an injunction “in all cases in which it appears to the court to be just or convenient to do so.” As stated in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824, at para. 23 (*Equustek*), “[t]he powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited.”

[20] The Judge also cited subsection 34(1) of the *Copyright Act*, R.S.C. 1985, c. C-42:

Copyright

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

Droit d'auteur

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

conferred by law for the infringement of a right.	dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi accorde ou peut accorder pour la violation d'un droit.
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[21] Accordingly, injunction is one of the remedies contemplated to address copyright infringement.

[22] Teksavvy argues that subsection 34(1) of the *Copyright Act* is a general provision that applies “subject to this Act”, and does not contemplate the specific remedy of a site-blocking order. Teksavvy argues that several provisions of the *Copyright Act* and of the *Telecommunications Act*, S.C. 1993, c. 38, exclude site-blocking orders from the scope of injunctions that can be issued by the courts. Teksavvy also argues that *Equustek* is distinguishable. Moreover, Teksavvy argues that, even if the Federal Court had the power to grant a site-blocking order, it should have declined to exercise that power. These arguments are addressed in the following sections.

(1) The *Copyright Act*

[23] Teksavvy notes that copyright law in Canada is wholly statutory, and that the rights and remedies provided for in the *Copyright Act* are exhaustive: *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, 169 C.P.R. (4th) 1 at para. 40; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at para. 82 (*SOCAN*); *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5 (*Théberge*); *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 9 (*CCH*).

[24] Teksavvy argues that the rights and remedies provided for in the *Copyright Act* represent a careful balance by Parliament between promoting the dissemination of works and rewarding those who create them. Teksavvy focuses on Part IV of the *Copyright Act*, entitled “Remedies”, which it describes as the playbook for remedies. Though this Part IV contains a section entitled “Provisions Respecting Providers of Network Services or Information Location Tools” (covering sections 41.25 to 41.27), nothing therein (or elsewhere in the *Copyright Act*) provides explicitly for a site-blocking order.

[25] Section 41.25 provides that a copyright owner may send a notice claiming infringement to an ISP whose services are used by an infringer to infringe copyright via the Internet. Similar notices are also contemplated for “an information location tool” as defined in section 41.27 – a search engine like Google. Section 41.26 provides that an ISP who receives a notice under section 41.25, and who is paid the lawful fee, shall forward the notice to the alleged infringer and keep records concerning the alleged infringer’s identity. Section 41.26 also provides that the only remedy for failure by the ISP to comply therewith is statutory damages. Section 41.26 does not apply to search engines.

[26] Section 41.27 is specific to search engines. It provides that the owner of a copyright that is infringed by a search engine by reproduction of the work, or by communicating such reproduction to the public by telecommunication, is not entitled to any remedy against the search engine other than an injunction. Section 41.27 does not apply to ISPs. Subsection 41.27(4.1) provides a list of factors that should be considered when granting an injunction against a search engine under that section. The list of factors is as follows:

- | | |
|--|---|
| <p>(a) the harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement; and</p> | <p>a) l'ampleur des dommages que subirait vraisemblablement le titulaire du droit d'auteur si aucune mesure n'était prise pour prévenir ou restreindre la violation;</p> |
| <p>(b) the burden imposed on the provider and on the operation of the information location tool, including</p> | <p>b) le fardeau imposé au fournisseur de l'outil de repérage ainsi que sur l'exploitation de l'outil de repérage, notamment :</p> |
| <p>(i) the aggregate effect of the injunction and any injunctions from other proceedings,</p> | <p>(i) l'effet cumulatif de cette injonction eu égard aux injonctions déjà accordées dans d'autres instances,</p> |
| <p>(ii) whether implementing the injunction would be technically feasible and effective in addressing the infringement,</p> | <p>(ii) le fait que l'exécution de l'injonction constituerait une solution techniquement réalisable et efficace à l'encontre de la violation,</p> |
| <p>(iii) whether implementing the injunction would interfere with the use of the information location tool for non-infringing acts, and</p> | <p>(iii) la possibilité que l'exécution de l'injonction entrave l'utilisation licite de l'outil de repérage,</p> |
| <p>(iv) the availability of less burdensome and comparably effective means of preventing or restraining the infringement.</p> | <p>(iv) l'existence de moyens aussi efficaces et moins contraignants de prévenir ou restreindre la violation.</p> |

[27] This list of factors is unremarkable. These factors, or factors like them, would merit consideration in most motions seeking an injunction against a third party.

[28] Teksavvy notes that the “notice and notice regime” contemplated in sections 41.25 and 41.26 was selected instead of the “notice and takedown” regime that had been proposed by some, and which would have placed the balance of rights more in favour of copyright owners.

Teksavvy argues that Parliament's choice to so limit the remedies available against ISPs indicates that it did not wish to grant copyright owners the more powerful remedy of site-blocking orders against ISPs.

[29] In my view, however, nothing in sections 41.25 to 41.27 of the *Copyright Act* suggests an intention to deny copyright owners the benefit of a site-blocking order, and nothing in such an order conflicts with these provisions. The fact that Parliament has put in place a regime to notify an alleged copyright infringer that its activities have come to the attention of the copyright owner does not suggest that this represents a limit on the remedies to which the copyright owner is entitled. In fact, the Supreme Court of Canada in *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 S.C.R. 643, at para. 45 (*Voltage*) recognized the opposite, stating that "Parliament knew that the [notice and notice] regime was only a first step in deterring online copyright infringement, and that a copyright owner who wished to sue an alleged infringer would still be required to obtain a Norwich order to identify that person." A *Norwich* order, like a site-blocking order, is a mandatory interlocutory injunction that is imposed on an ISP. It also is not explicitly provided for in the *Copyright Act*.

[30] Subsection 34(1) of the *Copyright Act* intentionally provides broad discretionary powers to address copyright infringement, including injunction. It is important to bear in mind that there is no serious doubt that the GoldTV Services infringe the plaintiffs' copyright, or that the interim and interlocutory injunctions against the infringers directly were not respected. Accordingly, it is difficult to doubt that the remedies contemplated in subsection 34(1) of the *Copyright Act* are worthy of consideration.

[31] Moreover, there are examples in the jurisprudence of remedies for copyright infringement that are not specifically mentioned in the *Copyright Act* and that may be imposed on third parties not accused of infringement. Apart from the *Norwich* Order mentioned in *Voltage*, there is the *Mareva* injunction whereby the assets of a debtor that are in the hands of a third party may be frozen to prevent dissipation. Though not related to innocent parties, the Supreme Court of Canada has also recognized other remedies related to copyright infringement that are not specifically mentioned in the *Copyright Act*: punitive damages (*Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168) and declaratory judgment (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339).

[32] In my view, the possible remedies contemplated in subsection 34(1) of the *Copyright Act* include a site-blocking order. The real question is whether the site-blocking order granted in this case was appropriate in the circumstances.

(2) The *Telecommunications Act*

[33] Teksavvy argues that section 36 of the *Telecommunications Act* contemplates net neutrality by ISPs, and provides that exceptions thereto must be approved by the CRTC. This provision reads as follows:

Content of messages

36 Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

Neutralité quant au contenu

36 Il est interdit à l'entreprise canadienne, sauf avec l'approbation du Conseil, de régir le contenu ou d'influencer le sens ou l'objet des télécommunications qu'elle achemine pour le public.

[34] Teksavvy argues that this provision excludes the Federal Court from ordering an ISP to block a website. The plaintiffs do not doubt the general principle of net neutrality, but they argue that section 36 of the *Telecommunications Act* does not displace the Federal Court’s jurisdiction to issue a site-blocking order.

[35] The plaintiffs note that the CRTC has acknowledged that, though it may authorize site-blocking, it does not have the power to require an ISP to block a website: *Telecom Decision CRTC 2018-384* at para. 67. In response, Teksavvy argues that site-blocking is currently subject to a two-step process whereby the Federal Court would first issue an order that would empower the CRTC then to order that a website be blocked. Though the plaintiffs oppose this argument, it is interesting to note a passage in the Report of the House of Commons’ Standing Committee on Industry, Science and Technology dated June 2019. Page 94 thereof appears to indicate that three of the respondents in the present appeal (or affiliates thereof) – BCE, Shaw and TELUS – agreed in submissions before that Committee that such a two-step process was indeed necessary, and that the *Telecommunications Act* should be amended to address this “unnecessary duplication of processes.”

[36] In my view, the general wording of section 36 of the *Telecommunications Act* does not displace the Federal Court’s equitable powers of injunction, including the power to impose a site-blocking order. The wording of section 36 would have to be more explicit to have that effect, especially if it were to give rise to the awkward two-step process described in the previous paragraph. Section 36 prohibits a Canadian carrier, including an ISP, from “control[ing] the content or influenc[ing] the meaning or purpose of telecommunications carried by it for the

public.” I agree with the plaintiffs’ argument that complying with a Court-ordered injunction does not amount to controlling or influencing. On the contrary, it is the ISP that is being controlled or influenced by the Order.

[37] It is also notable that the majority of the Supreme Court in *Equustek* found that Google’s “content neutral character” was not an impediment to the de-indexing order granted in that case: *Equustek* at para. 49. Though Google was not subject to section 36 of the *Telecommunications Act*, neutrality was nevertheless considered and found not to be an obstacle.

(3) Whether *Equustek* can be distinguished

[38] Teksavvy argues several grounds on which the facts in the present case are distinguishable from those in *Equustek*. First, Teksavvy argues that *Equustek* involved trademarks and trade secrets rather than copyright. Unlike trademark and trade secrets, and as indicated above, legal rights in copyright exist only by statute. Where the common law may provide certain remedies regarding trademarks and trade secrets, Teksavvy argues, all remedies regarding copyright must be contemplated by statute.

[39] In my view, *Equustek* should not be distinguished on the basis that it involved trademarks and trade secrets rather than copyright. As indicated above, subsection 34(1) the *Copyright Act* does provide for “all remedies by way of injunction” where copyright has been infringed. This provision gives a court of equity like the Federal Court broad powers to impose injunctions to remedy copyright infringement. Moreover, though the Supreme Court in *Equustek* mentioned trademarks and trade secrets as the legal rights in issue, it is clear that copyright infringement

was also in issue in the action underlying that decision. The decision following trial in the underlying action, *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793, 325 A.C.W.S. (3d) 260, identified breaches of the *Copyright Act* as being among the wrongful acts alleged. Paragraphs 259 to 286 of that decision were devoted to that issue, which concerned reproduction of a product manual and application notes.

[40] A second ground that Teksavvy asserts to distinguish *Equustek* is that the site-blocking order at issue in the present appeal is more intrusive than the de-indexing order that was discussed in *Equustek*. I recognize that a site-blocking order denies access to a website, whereas a de-indexing order merely removes one tool for finding a website. However, I see no reason that *Equustek* should not be considered an authority for granting a mandatory injunction other than a de-indexing order against a third party not accused of wrongdoing. In my view, *Equustek* is good authority for the availability of a site-blocking order. The circumstances of each case must be considered to determine whether and what type of injunction may be appropriate. Though there are questions as to the effectiveness of a site-blocking order in the circumstances of this case, as well as whether less intrusive alternatives were available, those questions should be considered in determining whether such an order should be granted here, not to whether a court has the power to grant such an order at all.

[41] A third ground argued by Teksavvy to distinguish *Equustek* concerns the extent of previous unsuccessful efforts to address ongoing infringement in *Equustek* as compared to the present case. In *Equustek*, the Supreme Court discussed many such efforts over a couple of years before the motion for an injunction against Google. These efforts included injunctions against the

infringers and efforts to locate them. Teksavvy notes that the motion in question in the present appeal was filed just 13 days after the underlying action was commenced, and only six days after the interim injunction against the defendants was granted. Teksavvy argues that the plaintiffs did not adduce any evidence of meaningful efforts to identify, locate and engage directly with the defendants.

[42] As with the previous ground asserted by Teksavvy to distinguish *Equustek*, the issue of previous unsuccessful efforts to address infringement without a site-blocking order should be considered among the circumstances relevant to whether such an order should be granted in this case. It is not a basis to dismiss *Equustek* as an authority in this case or to find that the Federal Court did not have the power to make a site-blocking order at all. Where, in an action against an anonymous defendant, a court can be convinced that said defendant has and will maintain its anonymity and ignore an injunction against it, it would seem pointless and unfair to require that the plaintiff jump through certain hoops and wait a certain time to confirm what it already knows, and the court already accepts, before seeking an injunction against a third party.

[43] A final thought on *Equustek* concerns an argument by Teksavvy that a site-blocking order is inappropriate in this case because “it is essentially a final remedy more powerful than anything the [plaintiffs] could obtain at the end of trial.” Teksavvy argues that interlocutory relief will not normally be granted where there is no prospect for a specific remedy being granted at trial, and that the recognized list of exceptions to this rule should not be expanded without due consideration. I note that this argument was not sufficient to stop the de-indexing order in *Equustek*. As Teksavvy notes, the dissent in *Equustek* (see para. 63) was convinced that such an

order should not be granted because it gave the plaintiff more than it sought in its original claim, and eroded the plaintiff's remaining incentive to proceed with the underlying action. In my view, this argument, made before the Supreme Court and dismissed by the majority, must be likewise dismissed in this Court. It is also notable that the Order in the present appeal is subject to an additional provision that it terminates two years after its issuance.

(4) Should the Judge have declined to grant the Order

[44] Teksavvy argues various reasons that the Judge should have declined to grant the Order. These include questions concerning the effectiveness of a site-blocking order, the need for amendments, and the extent of the plaintiffs' efforts to address the infringement without a site-blocking order, including resort to the notice of claimed infringement remedy provided for in section 41.25 of the *Copyright Act*. For the reasons mentioned in the paragraphs above, these issues are more appropriately considered below in discussion of whether the Order was just and equitable.

(5) Conclusion

[45] On the basis of sections 4 and 44 of the Federal Courts Rules, as well as subsection 34(1) of the *Copyright Act*, and finding no legal obstacles, I conclude that the Federal Court was correct in finding that it had the power to grant the Order.

B. *Freedom of Expression*

[46] The *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (the Charter) includes section 2(b) which states that, among other fundamental freedoms, everyone has the right to freedom of expression. Section 1 of the Charter provides that the freedoms set out therein, including the freedom of expression, are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

[47] The issue of freedom of expression was argued on the basis of four sub-issues:

- A. Whether the freedom of expression defined in the Charter is engaged by the Order;
- B. If so, whether freedom of expression is infringed by the Order,
- C. If so, whether such infringement is justified under section 1 of the Charter, and
- D. Whether the Judge’s consideration of freedom of expression was adequate.

[48] Teksavvy argues that the scope of freedom of expression is very broad, and cites *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 25 C.P.R. (3d) 417 (*Irwin Toy*), in support. Indeed, the majority of the Supreme Court of Canada concluded at p. 968-970 that activity that conveys meaning is expressive regardless of the content or meaning being conveyed, and such activity *prima facie* falls within the guaranteed freedom. The content of protected expression can be conveyed through an infinite variety of forms of expression such as written or

spoken words or physical gestures or acts, though the majority in *Irwin Toy* excluded violent expression from protection. Commercial expression is not excluded: *Irwin Toy* at p. 971.

[49] Teksavvy argues that the Order affects the freedom of expression of two groups: the ISPs who are required to block certain websites, and their customers who would otherwise have access to those websites. Section 2(b) of the Charter protects listeners as well as speakers: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 41; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 90 N.R. 84 at 767.

[50] I have difficulty accepting that ISPs like Teksavvy engage in any expressive activity when they provide their customers with access to certain websites. As Teksavvy itself has argued, it acts as a common carrier subject to an obligation of net neutrality. As such, it should not, and presumably does not, show any preference for one website over another based on its content. In this sense, its everyday activities in question are not expressive and therefore do not engage freedom of expression. That said, I accept that Teksavvy's customers could have an expressive interest that is implicated by the Order.

[51] Teksavvy also argues that the Order infringes freedom of expression since it denies Teksavvy's customers access to the GoldTV Services, and such infringement is not justified under section 1 of the Charter.

[52] The plaintiffs argue that Charter rights are not engaged in this case because (i) the activities in question are unlawful, and (ii) the Order concerns a private dispute and not an act of government.

[53] In my view, it is not necessary to decide whether the Charter is engaged and, if so, whether freedom of expression is infringed. In considering the issue of freedom of expression in the context of a particular equitable remedy, it was not necessary for the Judge to engage in a detailed Charter rights analysis separate and distinct from the balance of convenience analysis that is already to be considered. This is clear from the decision in *Equustek* in which the majority engaged in no such separate Charter rights analysis.

[54] It is relevant here to note again Teksavvy's argument that the injunction in issue in *Equustek* (a de-indexing order) was less intrusive than the site-blocking order in issue here. This point is debatable since the former applied outside Canada's borders, whereas the latter is limited to Canada. In any case, the intrusiveness of the injunction was merely one of the circumstances to be considered by the Judge in determining whether to issue the Order. The role of this Court on appeal is to determine whether, in view of the applicable standard of review, the Judge made a reviewable error in his analysis. Most of the discussion on that issue is found in the next section concerning whether the Order was just and equitable. However, it is convenient to discuss here the issue of the adequacy of the judge's analysis of freedom of expression.

[55] Teksavvy argues that the Judge's consideration of the freedom of expression issue was inadequate. The Judge's analysis of this issue was indeed brief. At paragraph 69 of his reasons,

at the beginning of his balance of convenience analysis, he noted Teksavvy's argument that "site-blocking is an extreme measure that risks inadvertently stifling free expression by blocking legitimate content." At paragraph 95, he noted Teksavvy's argument that the Order would negatively impact the individual freedom of expression rights of ISP customers. Finally, at paragraph 97, the Judge concluded that:

[...] in the face of a strong *prima facie* case of ongoing infringement and a draft order that seeks to limit blocking to unlawful sites and incorporates processes to address inadvertent over-blocking that neither net neutrality nor freedom of expression concerns tip the balance against granting the relief sought. As has been previously noted by the Supreme Court of Canada, albeit in a different context, the jurisprudence has not, to date, accepted that freedom of expression requires the facilitation of unlawful conduct (*Equustek* at para 48)."

[56] Though Teksavvy might have wished for a different result, or at least a more fulsome analysis of freedom of expression, I cannot agree that the Judge's analysis on this issue was inadequate. That analysis noted Teksavvy's concerns for ISPs' customers' freedom of expression rights, and concluded that, in view of the undisputed, ongoing infringement and measures to limit over-blocking, those concerns did not tip the balance against the Order.

[57] I take additional comfort in this view from a comparison to the extent of the freedom of expression analysis by the majority in *Equustek*. There, freedom of expression was likewise considered briefly as part of the balance of convenience analysis. The majority bracketed its discussion of freedom of expression by stating at paragraph 45:

[...] I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case [...]

and at paragraph 49:

[...] Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating [the infringer's] breach of court orders.

[58] Analysis of freedom of expression was similarly brief in the courts below in *Equustek*.

[59] Though it remains to consider whether the Judge made any reviewable error in his balancing analysis overall (including the issue of freedom of expression), that is for discussion in the next section. I am not convinced that the Judge's analysis was inadequate.

C. *Whether the Order was just and equitable*

[60] The legal test applicable in a case like this was discussed in *Equustek* at paragraph 25:

RJR — MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

[61] It is relevant here to reproduce the following comments from the Supreme Court in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, at para. 13 (*CBC*), after it described the test in *RJR — MacDonald*:

This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for “an extensive review of the merits” at the first stage of the analysis.) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.* In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a “serious issue to be tried” needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply. By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[62] Just as in *Equustek*, Teksavvy did not argue before the Judge that the higher threshold of strong *prima facie* case should apply in this case. But they make that argument before this Court, and the plaintiffs agree that the higher threshold applies.

[63] I turn now to the elements of the analysis.

(1) Strong *prima facie* case

[64] As indicated, there is no dispute that, for the first prong of his analysis, the Judge should have considered the threshold of strong *prima facie* case rather than the lower threshold of serious issue to be tried. It is clear that the Judge would have found that this part of the test was met even at the higher threshold, since he stated explicitly at paragraph 57 of his decision that the evidence disclosed a strong *prima facie* case of copyright infringement by the defendants.

[65] CIPPIC argues that it was not sufficient for the Judge to merely state its conclusion that the plaintiffs have a strong *prima facie* case. I disagree. I see no basis on which there could be any doubt that the defendants have and continue to infringe the plaintiffs' rights in copyright. The plaintiffs have alleged that they have rights that are being infringed, and have provided evidence to that effect, which evidence was accepted by the Judge. No party, not even the defendants themselves, has raised any doubt that the plaintiffs have engaged in infringing activities. In my view, the Judge's finding that the plaintiffs have a strong *prima facie* case is sound.

[66] An issue arises from the fact that the Judge cited jurisprudence to the effect that a strong finding in respect of one of the prongs of the test may lower the threshold on the other two: see paragraphs 56 and 58 of the Judge's reasons, as well as *Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, 271 A.C.W.S. (3d) 831 at para. 30 (*iTVBox.net*); *Geophysical Service Incorporated v. Canada-Nova-Scotia Offshore Petroleum Board*, 2014 FC 450, 454 F.T.R. 206 at para. 35-36. Teksavvy argues that, since the threshold was higher than the Judge realized, it was an error for him to apply this jurisprudence.

[67] In my view, there is no error here. Firstly, it does not necessarily follow that the principle described in the previous paragraph ceases to apply in cases where the higher threshold of strong *prima facie* case is applicable. I do not propose to settle that issue here. Rather, it is my view that the principle should apply in this case either way because the evidence before the Federal Court established a case in favour of the plaintiffs that significantly exceeded even that higher threshold. In *CBC* at para. 18, the Supreme Court of Canada explained that this threshold "entails

showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.” (original emphasis)

[68] I indicated above that I see no basis to doubt the plaintiffs’ case for copyright infringement by the defendants. In the absence of any such doubt of infringement based on the record before this Court, it is my view that the plaintiffs’ case significantly exceeds the requirement to show a strong *prima facie* case, or a strong likelihood of success.

(2) Irreparable Harm

[69] Teksavvy argues that the Judge erred by relying on findings by other judges in the context of the motions for interim and interlocutory injunctions for his conclusion that irreparable harm had been shown. Teksavvy also argues that the Judge erroneously reversed the burden of proof by concentrating on its evidence against irreparable harm rather than on the plaintiffs’ evidence for irreparable harm. Moreover, Teksavvy argues that the Judge erred by basing his conclusion of irreparable harm on the difficulty of quantifying damages.

[70] I disagree with Teksavvy on all of these arguments. It is true that the Judge referred to the findings of irreparable harm in the motions for interim and interlocutory injunctions, but there was no error in doing so in the process of indicating his agreement with those findings after having considered the evidence before him. The only reference in the “irreparable harm” section of the Judge’s reasons to the decisions that led to the interim and interlocutory injunctions was the following concluding passage at paragraph 68: “As were my colleagues Justices LeBlanc and

Kane, I am satisfied that the Plaintiffs have established that irreparable harm will result if the injunction is not granted.” In my view, this indicates that, after having considered the evidence himself, the Judge found himself in agreement with Justices LeBlanc and Kane on the issue of irreparable harm.

[71] It is also true that the Judge discussed Teksavvy’s evidence and argument against irreparable harm. That was entirely appropriate. The Judge also noted evidence in favour of irreparable harm. For example, at paragraph 66 of his reasons, the Judge noted that the harm arose “in a context where there is a strong prima facie case of an ongoing infringement of the Plaintiffs’ copyright where the defendants are unknown.” Earlier in his reasons (paragraph 7), the Judge noted the defendants’ “obvious efforts to remain anonymous and avoid legal action by rights holders such as the Plaintiffs.” Having found harm to the plaintiffs from ongoing copyright infringement by defendants who are anonymous, and who are making clear efforts to remain so and avoid liability, it was entirely appropriate for the Judge to find irreparable harm.

[72] In my view, it is not necessary to reach a conclusion with regard to Teksavvy’s argument that difficulty in quantifying damages is an inappropriate basis for a finding of irreparable harm. This was discussed as an additional basis after noting the ongoing infringement by unknown defendants. The first basis was sufficient by itself to find irreparable harm, so any error on the additional basis would have no effect on the result.

(3) Balance of convenience

[73] It is wise to recall here that the Order is discretionary, and this Court should not interfere unless the Judge has made an error of law, or a palpable and overriding error on a question of fact or of mixed fact and law.

[74] Teksavvy argues that the Judge erred by fettering his discretion and distorting his analysis by relying on factors gleaned from a series of decisions in a U.K. case: *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch); *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658; *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28 (collectively, *Cartier*). The Judge listed these factors at paragraph 52 of his reasons:

- A. Necessity – a consideration of the extent to which the relief is necessary to protect the plaintiff’s rights. The relief need not be indispensable but the court may consider whether alternative and less onerous measures are available;
- B. Effectiveness – a consideration of whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
- C. Dissuasiveness – a consideration of whether others not currently accessing the infringing service will be dissuaded from doing so;
- D. Complexity and Cost – a consideration of the complexity and cost of implementing the relief sought;
- E. Barriers to legitimate use or trade – a consideration of whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;

- F. Fairness – a consideration of whether the relief strikes a fair balance between fundamental rights of the parties, the third parties and the general public;
- G. Substitution – a consideration of the extent to which blocked websites may be replaced or substituted and whether a blocked website may be substituted for another infringing website; and
- H. Safeguards – a consideration of whether the relief sought includes measures that safeguard against abuse.

[75] Teksavvy notes that these *Cartier* factors were grounded on an EU Enforcement Directive, which has no application in Canada. It also notes that the Judge decided that the first factor – necessity – should be assessed under “irreparable harm”, whereas the other factors would be assessed under “balance of convenience”. Teksavvy argues that this was a reviewable error in that it resulted in the Judge considering alternatives and less intrusive means (of addressing the ongoing infringement) under irreparable harm rather than balance of convenience.

[76] I see no indication that the Judge, in referring to these factors, fettered his discretion or felt compelled to follow them. The Judge indicated at paragraph 50 of his reasons that “it is appropriate to seek guidance from the UK jurisprudence,” but he recognized that the *Cartier* factors were grounded on foreign law. Moreover, he recognized correctly at paragraph 51 that “[t]he fundamental question to be asked where an injunction is sought is whether the granting of the injunction is just and equitable in all of the circumstances.”

[77] The Judge also noted at paragraph 47 that “Teksavvy has not disputed or taken issue with the test to be met or the factors that have been identified based on the UK jurisprudence.” I have heard no suggestion as to any particular one or more of the *Cartier* factors that were

inappropriate for the Canadian context for any reason. It is notable that *Cartier* was cited in *Equustek*. In my view, it was entirely appropriate for the Judge to look abroad for inspiration when faced with a motion for an order that was unprecedented in Canada.

[78] I also conclude that it was open to the Judge to consider necessity under irreparable harm rather than balance of convenience. I see no palpable and overriding error in addressing possible alternative measures under irreparable harm rather than balance of convenience.

[79] The Judge considered freedom of expression under the “fairness” factor from *Cartier* (see my comments at paragraphs 55 and following above). Teksavvy argues that the Judge failed to give serious weight to freedom of expression. I disagree. A key part of Teksavvy’s position is that concerns for freedom of expression relate to the possibility of over-blocking. However, the Judge considered this and was satisfied with the measures to limit over-blocking contained in the Order. I see no error here. Moreover, as I indicated above, the depth of the Judge’s analysis of freedom of expression was comparable to that in *Equustek*.

[80] The following issues were first mentioned above in discussion of whether the Federal Court has the power to grant a site-blocking order, but they are more appropriately addressed here:

- A. Whether a site-blocking order is effective in the circumstances of this case;
- B. Whether less intrusive alternatives were available; and

- C. Whether the plaintiffs showed meaningful efforts to identify, locate and engage directly with the defendants.

[81] With regard to the effectiveness of a site-blocking order, Teksavvy notes that the Order has had to be updated several times to meet the defendants' reactions to it. Teksavvy argues that the Judge should have considered the burden of regular updates and the compounding effect of the many requests for other site-blocking orders that will likely follow if the Order is allowed to stand. Tied in with this argument is the question of the ease with which the defendants (and others targeted by site-blocking orders) may circumvent such measures. Teksavvy also cites concerns about over-blocking since the GoldTV Services cover programming far beyond anything in which the plaintiffs have rights.

[82] These are interesting points but I am not convinced that the Judge made a palpable and overriding error in his analysis. Though it does appear that it is necessary to amend the Order from time to time to respond to the defendants' circumvention efforts, we have little information about the burden of doing so, or the likelihood of many other such orders (in other cases) compounding this burden. The Judge clearly considered this issue. Many paragraphs of his reasons discussed the possibility of circumvention, and the Order provides explicitly for consequent amendments. I have also noted above that the Judge considered concerns about over-blocking, and was satisfied with measures in the Order to address it. If the burden of making amendments to site-blocking orders (or issuing new site-blocking orders) ever becomes a concern because of a growing number of such orders, that concern can be addressed at the time.

[83] I turn now to the question of whether less intrusive alternatives were available. Teksavvy argues that the plaintiffs failed to exhaust less intrusive alternative remedies before seeking the Order. They point to the affidavit of Paul Stewart, which discusses alternatives to site blocking at paragraphs 39 to 49. The alternatives discussed include (i) finding the defendants (various approaches are suggested), (ii) seeking the assistance of the defendants' payment processing service to stop payments, (iii) seeking the assistance of app stores to remove GoldTV-related apps, (iv) seeking the assistance of CloudFlare, a service that protects and optimizes websites, to terminate GoldTV's account, and (v) seeking the assistance of CIRA to remove the defendants' ".ca" domains and subdomains.

[84] The Judge acknowledged Teksavvy's arguments concerning proposed alternatives, and specifically addressed points (ii) and (iii) at paragraphs 64 and 65 of his reasons. He found no basis to conclude that the alternative measures would be effective, characterizing them as speculative. The Judge favoured evidence from the plaintiffs' affiant Yves Rémillard to the effect that the alternative measures would not be effective. I see no palpable and overriding error in the Judge's treatment of the evidence in this respect.

[85] Finally, I consider Teksavvy's argument that the plaintiffs failed to adduce evidence of meaningful efforts to identify, locate and engage directly with the defendants. Teksavvy reads much into the word "meaningful". The plaintiffs clearly adduced evidence of efforts to find the defendants. These efforts are described in the affidavit of Yves Rémillard dated July 15, 2019 at paragraphs 59 to 69. Presumably, Teksavvy feels that these efforts were not meaningful. However, the question is whether the Judge made a palpable and overriding error in considering

the evidence of such efforts, and finding that they were sufficient to justify issuing the Order. I see no such error by the Judge in this regard. Teksavvy points to evidence of a Toronto address and a Canadian telephone number that are associated with the defendants, but my view is that it would be speculative to conclude that efforts to follow up on these, or to undertake any other additional efforts to find the defendants, would have been successful. In view of the undisputed finding that the defendants make efforts to remain anonymous, it seems more likely that additional efforts to find the defendants would have been fruitless. For the same reason, it is my view that requiring the plaintiffs, prior to seeking a site-blocking order, to seek from the ISP parties the issuance of a notice of claimed infringement to the defendants pursuant to section 41.25 of the *Copyright Act* would likely have proven to be wholly ineffective.

(4) Conclusion on whether the Order was just and equitable

[86] For the foregoing reasons, I would conclude that the Judge did not err in issuing the Order.

[87] I will add that my view in this regard is not altered by the recent decision of the Court of Queen's Bench of Alberta in *Allarco Entertainment 2008 Inc. v. Staples Canada ULC*, 2021 ABQB 340 (*Allarco*), which was brought to the Court's attention by Teksavvy's counsel. That case denied an interlocutory injunction against retailers who were selling set-top boxes that could be used to access allegedly copyright-infringing programming. The Court in *Allarco* found that the requirements of serious case and irreparable harm had not been met. However, the present appeal is distinguishable on both of these issues. There is no dispute in the present case with regard to serious case. The threshold is higher than the Judge recognized, but Teksavvy does not

dispute that the requirement is met. With regard to irreparable harm, my conclusion is based on the defendants' anonymity, and their efforts to remain that way and avoid any liability. That does not appear to have been an issue in *Allarco*.

D. *Conclusion*

[88] Having found no error in the Judge's conclusion that the Federal Court has the power to grant a site-blocking order, and having likewise found no error in his analysis of the applicable legal test, I conclude that this Court should not interfere with the Judge's decision.

[89] I would dismiss this appeal with costs.

"George R. Locke"

J.A.

"I agree
M. Nadon J.A."

"I agree
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

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CONCURRED IN BY: NADON J.A.
LEBLANC J.A.

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