

FEDERAL COURT OF APPEAL

Between

TEKSAVVY SOLUTIONS INC.

Appellant

and

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

Respondents

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 and DAZN
LIMITED

Interveners

**MEMORANDUM OF FACT AND LAW OF THE INTEVENER,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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PART I: STATEMENT OF FACT

1 By order made 24 June 2020 this court granted the British Columbia Civil Liberties Association (BCCLA) leave to intervene in this appeal on terms including the right to file a memorandum of fact and law not exceeding 10 pages.

2 The court ordered that interveners be clear as to what issue they are addressing. BCCLA is addressing the role of freedom of expression in the determination of applications for so-called site-blocking orders.

PART II: POINTS IN ISSUE

3 What role should freedom of expression have in determining whether, and on what terms, an injunction blocking access to web sites should be made?

PART III: SUBMISSIONS

4 The order issued by the Federal Court is an expression-limiting injunction. It constrains the constitutionally-protected freedom of the GoldTV parties to disseminate expressive material over the internet.¹ It likewise restricts the constitutionally-protected freedom of the public at large to receive that material.² The question is whether that limitation is justified.

5 Canadian courts have the power to enjoin speech. But when asked to exercise that power, courts do not proceed by rote application of the familiar *RJR-MacDonald*³ test. Instead, courts scrutinize proposed expression-limiting injunctions to more demanding standards, consistently with the historic

¹ Expression protected by section 2(b) of the *Charter* is “any activity or communication that conveys or attempts to convey meaning”: *Thomson Newspapers Co. v Canada* (AG) [1998] 1 SCR 877 at para. 81. The “type of meaning conveyed is irrelevant to the question of whether s. 2(b) is infringed”: *R v Keegstra* [1990] 3 SCR 697 at 730.

² Section 2(a) protects both speakers and listeners: *Ford v. Quebec (Attorney General)* [1988] 2 SSR 712 at 766-67; *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 at 1339.

³ *RJR-MacDonald Inc. v Canada (Attorney-General)* [1994] 1 SCR 311.

protection of free speech accorded by Anglo-Canadian law and the entrenchment of expressive freedom in the *Charter*. While the right to freedom of expression is not absolute, “any attempt to restrict the right must be subjected to the most careful scrutiny”.⁴

6 The appellant contends that site-blocking injunctions are not available in law at all. This court may agree, in which case the question BCCLA addresses here will not fall to be decided. If, however, this court concludes that blocking injunctions are an available remedy, it will then have to determine the test for obtaining such relief. In doing so, this court should be guided by Canadian precedents seeking to reconcile injunctive relief with the historic and constitutional protection of expressive freedom in our law.

7 The court below applied the *RJR-MacDonald* test modified in light of *Cartier*,⁵ a decision arising from a UK statutory blocking scheme founded on a EU directive. The court gave hardly any consideration to the implications of the motion for freedom of expression, observing briefly that “the jurisprudence has not, to date, accepted that freedom of expression requires the facilitation of unlawful conduct”, i.e., copyright infringement.⁶ The jurisprudence has more to say about injunctions and freedom of expression than this observation allows. The case law shows that *RJR-MacDonald* is not the right test.

Case law on expression-limiting injunctions

8 The prevailing test for injunctive relief today is the three-part test set out in *RJR-MacDonald*, adopting the methodology applied in *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396 (HL). Importantly, the *Cyanamid* approach lowered the standard for obtaining interlocutory injunctive relief from a “strong *prima facie* case” to only a “serious question to be tried”. This made injunctive

⁴ *R v Sharpe* [2001 SCC 2](#) at para. 22.

⁵ *Cartier International AG v British Sky Broadcasting Ltd.* [\[2016\] EWCA Civ 658](#).

⁶ Reasons of Gleeson J at para. 97.

relief easier to obtain. Yet Canadian courts have repeatedly departed from or declined to apply *RJR-Macdonald* when asked to enjoin speech.

9 Defamation cases are one example. Prior to *Cyanamid*, injunctions to restrain libels were very difficult to obtain, precisely because they threatened freedom of speech. As Stark J explained in *Canada Metal Co. Ltd. v Canadian Broadcasting Corp.* [\(1975\) 7 OR \(2d\) 261](#) (Ont Div Ct) at 261-2:

The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance of publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. The exceptions to this rule are extremely rare.

For at least one hundred years...it has been universally and consistently held by British and Canadian Courts that such an interim injunction will never be granted where the defendant expresses his intention to justify unless the words in question are so clearly defamatory and so obviously impossible to justify that the verdict of a jury accepting a plea of justification as a defence would of necessity have to be set aside as a perverse finding on appeal.

10 That approach has been maintained even after *Cyanamid* and *RJR-MacDonald*. The reason is the inadequacy of the new approach for protecting free expression.⁷ Instead, Canadian courts continue to apply the higher standard enunciated in pre-*Cyanamid/RJR-MacDonald* case law.⁸

⁷ *Canada (Human Rights Commission) v Canadian Liberty Net* [\[1998\] 1 SCR 626](#) at paras. 47-8. See also *Canada (Human Rights Commission) v Winnicki* [2005 FC 1493](#) at para. 24.

⁸ E.g., *Rapp v McClelland & Stewart Ltd.* [\(1981\) 34 OR \(2d\) 452](#) (Ont HCJ) at 455-6; *Champagne v GEGEP de Jonquière* [\[1997\] RJQ 2395](#) (Que CA); *Compass Group Canada (Health Services) Ltd. v Hospital Employees' Union* [2004 BCSC 51](#) at para. 62; *Kent v. Martin* [2012 ABQB 507](#) at paras. 12-3.

11 Another area of injunction law in which expressive freedom has imposed a higher standard on applicants is publication bans. In *Dagenais v Canadian Broadcasting Corp.* [\[1994\] 3 SCR 835](#), the Supreme Court of Canada rejected the common law rule giving judges a discretion to order publication bans on trial fairness grounds, because such bans infringe the right to freedom of expression protected by s. 2(b) of the *Charter*. The court (at 878) found it “necessary to reformulate the common law rule...in a manner that reflects the principles of the *Charter*”, particularly freedom of expression. The new formulation required that publication bans only be ordered when (a) they are necessary to prevent trial unfairness, and (b) the salutary effects of the publication ban outweigh the deleterious effects to free expression. The necessity inquiry involves “a consideration of whether reasonable alternative measures were available that would have guarded against the risk of the trial being unfair without circumscribing the expressive rights of third parties” (*Dagenais* at 880).

12 *Dagenais* was expanded in *R v Mentuck* [2001 SCC 76](#) to encompass the administration of justice generally. But the necessity for injunctive relief, in the sense of there being no reasonable alternative, remains the first step of the test. The court explained (at para. 27) that the *Dagenais* approach “incorporates the essence of s. 1 of the *Charter* and the *Oakes* test”, thereby “ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment.”

13 Another area of injunction law revised by the Supreme Court of Canada as a consequence of constitutionally-enshrined freedom of expression is secondary picketing. The common law of secondary picketing was unsettled and inconsistent across Canada, with some jurisdictions treating it as unlawful *per se*. In *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.* [2002 SCC 8](#), the court settled the law by invoking (at para. 20) the “fundamental Canadian value” of freedom of expression. Picketing was expressive activity protected by s. 2(b), and precedents treating secondary picketing as unlawful *per se* were inconsistent with this. The common law therefore needed reform.

The court explained (at para. 67), “If we are to be true to the values expressed in the *Charter* our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified.” The restated common law of secondary picketing was founded on the principle that injunctions limiting free expression must be shown to be reasonable and demonstrably necessary in a free and democratic society (at paras. 36-7).

14 Another example of courts departing from *RJR-MacDonald* in freedom of expression cases comes from the former statutory prohibition of hate speech under s. 13(1) of the *Canadian Human Rights Act* (CHRA). In *Canadian Liberty Net*, the Supreme Court of Canada rejected *RJR-MacDonald* (particularly its initial step of determining whether there is a serious question to be tried) as inapplicable in cases involving non-commercial expression. Bastarache J concluded (at para. 49) that the defamation law rule rejecting injunctions of speech except in the “rarest and clearest of cases” should also apply in cases of restraint of potential hate-speech, “subject to modification which may prove necessary given the particular nature of bigotry”.

15 Justice de Montigny (then of the Federal Court) had occasion to apply this guidance in another s. 13 case, *Canada (Human Rights Commission) v Winnicki* [2005 FC 1493](#). The Human Rights Commission sought to restrain Winnicki from communicating hateful messages over the internet pending a final order of the Canadian Human Rights Tribunal on a complaint against him. The learned judge granted the injunction “despite the cardinal importance to be accorded to freedom of expression in our democracy” (para. 44), but did so in application of the more demanding *Liberty Net*/defamation test for injunctive relief. The *RJR-MacDonald* test, said de Montigny J (at para. 24), was “manifestly ill suited in the context of a dispute involving fundamental rights and freedoms”. He explained that both defamation actions and hate speech complaints “seek to limit the right to freedom of expression and therefore injunctions should only be granted in the clearest of cases” (at para. 28). Yet he also noted that hate speech, while protected under s. 2(b), remained “at the

outer margins of the values that are at the core of this fundamental freedom”. Modifying the approach applicable in defamation cases, de Montigny J held that an interim injunction in proceedings under CHRA s. 13

should only issue where the words complained of are so manifestly contrary to section 13 of the CHRA that any finding to the contrary would be considered highly suspect by a reviewing court. In other words...where it is impossible to say that reasonable members of the Tribunal will most likely find the words to be in breach of section 13, the injunction should not issue.

16 In *Romana v Canadian Broadcasting Corporation* [2017 MBQB 163](#), Grammond J applied the more demanding *Liberty Net* test to a plaintiff’s injunction motion on the basis that his claim sought, by various causes of action, to restrain the defendants’ speech. Grammond J observed (at paras. 22-3):

It is apparent, on the basis of the jurisprudence, that the driving factor underlying the *Liberty Net* principles is a reluctance to restrain expression in all but the clearest of cases. This approach is grounded in the *Charter*, and in my view, the specific cause of action upon which the moving party relies in the substantive claim is not material to determining the test that should apply on a motion for an injunction to restrain expression.

In that context, I accept that the *Liberty Net* test should be adapted to apply on the motion, not only to the allegations of defamation but to all of the causes of action upon which Mr. Romana relies. In each instance, I must consider whether he has established a rare and clear case in which an injunction restraining expression should issue, on the basis that his action would almost certainly succeed. In other words...it must be beyond doubt that there are no defences. If the CBC Defendants have shown a sustainable defence, an interim injunction will not be granted.

17 There may be more scope for *RJR-MacDonald* where the expression can be characterized as commercial. In *Liberty Net* at para. 47, Bastarache J observed:

...the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above [*RJR MacDonald* and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* [1987] 1 SCR 11], involved the commercial context in which the criteria of “balance of convenience” and “irreparable harm” had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity, it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in 2(b) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

This passage distinguishes *RJR-MacDonald* as involving “the commercial context”. Outside that context, free expression will be “grievously undermin[ed]” if scrutinized according to balance of convenience and irreparable harm.

18 McEwen J applied this reasoning in *Cardinal v Cleveland Indians Baseball Company Limited Partnership* [2016 ONSC 6929](#). The applicant sought injunctive relief against the baseball team to prohibit them from using team’s name and logo in Canada. The applicant relied on *RJR-MacDonald*, while the baseball team relied on the “clearest of cases” standard enunciated in defamation cases and *Liberty Net*. The court held that the latter test applied to

non-commercial speech, and that the speech at issue was commercial. The injunction application nevertheless failed.

19 The distinction between commercial and non-commercial speech may not always be easy to draw. Both are protected by s. 2(b),⁹ and the same expression may have commercial and extra-commercial aspects. Whether the speech is commercial or not, an attempt to enjoin it involves its limitation, and therefore engages freedom of expression concerns.

The Federal Court's test neglects freedom of expression

20 In stark contrast to the cases reviewed above, the decision below gave effectively no consideration to the expression-limiting nature of the injunction sought. In the case at bar, this relief was sought by commercial applicants in respect of web sites engaged in large-scale copyright infringement.¹⁰ In the next case, however, the remedy could be sought by applicants seeking to suppress other kinds of expression. While Gleeson J was only required to decide the case before him, he was also setting—for the first time in Canadian law—the test to be employed whenever a complainant seeks to force a third-party ISP to block its own customers' access to third-party web sites.

21 This court must set its sights higher. If internet-blocking injunctions are a remedy available in Canadian law, that remedy cannot be granted without anxious judicial consideration of the impact of that remedy on the freedom of expression rights of the order's target, the ISP's customers, and the public.

What should the site-blocking test be?

22 *RJR-MacDonald* is an inadequate foundation for a novel, judge-made site-blocking remedy. If this court is to enter this new domain of judicial speech

⁹ *Ford v Quebec* [1988] 2 SCR 712 at 766-7; *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 SCR 927 at 971.

¹⁰ Reasons of Gleeson J at para. 57.

suppression at all, it must apply a demanding test in keeping with our law's historic protection of freedom of expression and s. 2(b) of the *Charter*.

23 Instead of founding this relief on *RJR MacDonald*, this court should found it on *Oakes*.¹¹ That is what the Supreme Court of Canada did in *RWDSU*, *Dagenais* and *Mentuck*—three cases in which the judicial discretion to grant injunctive relief conflicted with the constitutional right to freedom of expression. Recognizing in each of those cases that the proposed injunction would infringe s. 2(b), the Supreme Court invoked *Oakes* not *RJR-MacDonald*. It did so according to the principle (to paraphrase *Mentuck* at para. 27) that judicial discretion to order a third party to block access to a web site by other third parties ought to be subject to no lower a standard of compliance with the *Charter* than would apply to a legislative enactment providing for the same relief.

24 Following *Dagenais/Mentuck*, BCCLA's *Oakes*-based test for site-blocking injunctions would permit such orders only where necessary and proportionate. *Necessity* means necessary to prevent a serious risk to some important interest of the applicant because reasonable alternative measures will not prevent the risk. The applicant must show that the proposed order "relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure" (*Dagenais* at 891). The "serious risk" standard should be read not as the low hurdle from the first step of *RJR-MacDonald* but as the higher bar approved in *Liberty Net*. *Proportionality* requires that the salutary effects of the order for the applicant outweigh the deleterious effects on expression for the target of the order, the ISP's customers and the public.

25 The weighing of salutary and deleterious effects must include consideration of:

¹¹ *R v Oakes* [1986] 1 SCR 103.

- (a) the character of the expression at issue,¹² including its commercial or non-commercial nature;
- (b) the nature and importance of the interest or objective sought to be safeguarded by the application¹³ (e.g., protection of copyright, protection from defamatory libel or hate speech, protection of privacy);
- (c) the availability of any defences to the underlying action (e.g., justification in defamation cases, fair dealing in copyright cases); and
- (d) minimal impairment of the right to freedom of expression, including whether the proposed order is as limited in scope, time and content as possible, and whether it would involve overblocking (i.e., blocking both objectionable and unobjectionable content).

PART IV: ORDER SOUGHT

26 BCCLA seeks no costs or other relief and asks that none be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated 3 August 2020



Gib van Ert
Counsel for the intervener, BCCLA

¹² “The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified”: *Sharpe* at para. 181.

¹³ “[T]he fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied”: *Dagenais* at 891.

PART V: LIST OF AUTHORITIES

- Canada (Human Rights Commission) v Canadian Liberty Net* [\[1998\] 1 SCR 626](#)
- Canada (Human Rights Commission) v Winnicki* [2005 FC 1493](#)
- Canada (Human Rights Commission) v Winnicki* [2005 FC 1493](#)
- Canada Metal Co. Ltd. v Canadian Broadcasting Corp.* [\(1975\) 7 OR \(2d\) 261](#) (Ont Div Ct)
- Cardinal v Cleveland Indians Baseball Company Limited Partnership* [2016 ONSC 6929](#)
- Cartier International AG v British Sky Broadcasting Ltd.* [\[2016\] EWCA Civ 658](#)
- Champagne v GEGEP de Jonquière* [\[1997\] RJQ 2395](#) (Que CA)
- Compass Group Canada (Health Services) Ltd. v Hospital Employees' Union* [2004 BCSC 51](#)
- Dagenais v Canadian Broadcasting Corp.* [\[1994\] 3 SCR 835](#)
- Edmonton Journal v Alberta (Attorney General)* [\[1989\] 2 SCR 1326](#)
- Ford v Quebec* [\[1988\] 2 SCR 712](#)
- Irwin Toy Ltd. v Quebec (Attorney General)* [\[1989\] 1 SCR 927](#)
- Kent v. Martin* [2012 ABQB 507](#)
- R v Keegstra* [\[1990\] 3 SCR 697](#)
- R v Mentuck* [2001 SCC 76](#)
- R v Oakes* [\[1986\] 1 SCR 103](#)
- R v Sharpe* [2001 SCC 2](#)
- Rapp v McClelland & Stewart Ltd.* [\(1981\) 34 OR \(2d\) 452](#) (Ont HCJ)
- RJR-MacDonald Inc. v Canada (Attorney-General)* [\[1994\] 1 SCR 311](#)
- Romana v Canadian Broadcasting Corporation* [2017 MBQB 163](#)
- RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.* [2002 SCC 8](#)
- Thomson Newspapers Co. v Canada (AG)* [\[1998\] 1 SCR 877](#)