Lemaire, France

From: Hulley-Craig, Crystal
Sent: 1 février 2018 09:22
To: Lemaire, France; Kachi, Nanao; Murray, Michel; Shortliffe, Scott
Cc: Processus-Process; *Telecom - Directors; *Telecom - Reports; Hutton, Scott
Subject: RE: New Part 1 application: Asian Television Network International Limited (2018-0046-7)

Eric Bowles and I will be the lawyers on the file.. It has yet to be determined what meeting this would go to. You can categorize it as "to be scheduled" for the time being.

Crystal Hulley-Craig
(819) 956.2095
crystal.hulley@crtc.gc.ca

From: Lemaire, France
Sent: January-31-18 7:29 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>
Cc: Processus-Process <processus-process@crtc.gc.ca>; *Telecom - Directors <*Telecom-Directors@crtc.gc.ca>; *Telecom - Reports <_TelecomReports@crtc.gc.ca>
Subject: New Part 1 application: Asian Television Network International Limited (2018-0046-7)

NOUVELLE DEMANDE DE LA PARTIE 1/
NEW PART 1 APPLICATION

8663-A182-201800467
Asian Television Network International Limited:
Application to disable on-line access to piracy sites

Pourriez-vous me donner le nom de la personne qui s'occupera de la demande ci-jointe? Pourriez-vous également me faire savoir à quelle RPC ou RCT la demande mentionnée ci-dessus sera présentée?

S'il n'y a pas de commentaire concernant cette demande, la date de fermeture du dossier ainsi que l'objectif de rendement sera :

Date de fermeture : 1er mars 2018
Objectif de rendement : 3 juillet 2018

S'il y a des commentaires concernant cette demande, la date de fermeture du dossier ainsi que l'objectif de rendement sera :
Date de fermeture : 12 mars 2018
Objectif de rendement : 12 juillet 2018

Could you please let me know who will be assigned to the attached application? Could you also let me know for which FCM or TCM the above-noted application will be scheduled?

If no comments are received on this file, the close of record date and service objective date would be:
Close of record: 1 March 2018
Service objective: 3 July 2018

If there are comments on this file, the close of record date and Service objective date would be:
Close of record: 12 March 2018
Service objective: 12 July 2018

Thanks / Merci!

France Lemaire
Coordonnatrice, planification et publications, Décisions | Coordinator, Decisions, Planning and Publications
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
1, Promenade du Portage, Les Terrasses de la Chaudière, Gatineau (QC) J8X 4B1
Gouvernement du Canada | Government of Canada
france.lemaire@crtc.gc.ca | crtc.gc.ca
☎ 819.997.4682 / ☎ Télécopieur/Facsimile : 819-994-0218

Guidotto, Nadia

From: Guidotto, Nadia
Sent: January-30-2018 11:32 AM
To: *C&E - Solutions & Intel; *C&E - ECom Enf
Subject: Anti-piracy group urges CRTC to create website-blocking system

Apologies for cross-postings...

https://www.theglobeandmail.com/report-on-business/anti-piracy-group-urges-crtc-to-create-website-blocking-system/article37766686/

Excerpt
A broad coalition, including Canada's biggest communications and media companies, a swath of creative and production organizations and unions, movie theatres and the CBC, is calling on the federal telecom regulator to create a website-blocking system to address online piracy.

Nadia Guidotto
Gestionnaire (p.i.) | A/Manager
Unité du renseignement stratégique et opérationnel | Strategic and Operational Intelligence Unit
Secteur de la conformité et des enquêtes | Compliance & Enforcement Sector
Canadian Radio-television and Telecommunications Commission (CRTC) | Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC)
nadia.guidotto@crtc.gc.ca
Tél: 819-934-4292

Lee, Tse Wae

From: Noakes, Bob
Sent: August-11-16 3:40 PM
To: Conrad, Jeff; Lee, Tse Wae; Taylor, Kathleen
Cc: Benocci, Renzo
Subject: section 36 public process further to section 12 of Bill 74 (Québec)
Attachments: Item 1_Draft_Sec__Gen__letter_re_Preliminary_Views (002).pdf

Just wanted to make you aware of a letter going to next TCM that deals with section 36 in relation to a part I filed by PIAC. It is about blocking access to websites (not numbers) but sets out a preliminary view that the Telecom Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. The letter is setting out a process for interested parties to file comments.

This was presented this afternoon at J-P's telecom sector meeting.

There could be some interesting arguments made worth following re your NOC.

Bob

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Ottawa, Canada
K1A 0N2

By Email & Facsimile

CRTC Telecom File Number: 8663-P8-201607186

xx August 2016

To: Distribution List; Attorneys General

Re: Application by Public Interest Advocacy Centre (PIAC) regarding section 12 of *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015*, L.Q. 2016, ch. 7 (Bill 74)—Call for comments on the Commission's preliminary views related to (1) suspension of the application, and (2) interpretation of section 36 of the *Telecommunications Act*, S.C. 1993, c. 38

By application dated 8 July 2016, PIAC requested that the Commission provide certain declaratory and other relief regarding section 12 of Bill 74, relying on arguments that challenged the constitutionality of section 12.

On 27 July 2016, the Canadian Wireless Telecommunications Association (CWTA) filed an application with the Superior Court of Québec, challenging section 12 of Bill 74 on constitutional grounds.

On 5 August 2016, Commission staff issued a letter suspending all deadlines related to PIAC's application, subject to further procedural guidance from the Commission.

The purpose of this letter is to seek comment from interested persons on the Commission's preliminary views regarding the issues set out below. The Commission intends to carefully consider all submissions filed in response to this letter before pronouncing on these issues.

1. Suspension of PIAC's application

The relief PIAC is seeking in its application is integrally connected to the constitutionality of section 12 of Bill 74. This is a matter now squarely before the Superior Court of Québec. The issue thus arises as to whether the Commission ought to suspend consideration of PIAC's application.

There are circumstances in which is it appropriate that a court and the Commission are seized of the same subject matter. However, the Commission is of **the preliminary view** that, in the particular circumstances of this case, it would be appropriate to suspend consideration of PIAC's application while the constitutional issues are before the courts, given the significance of the constitutional issues with respect to the relief sought and the fact that the Superior Court of Québec is a court of inherent jurisdiction.

Interested persons may file comments on this preliminary view within xx days of the present letter. As the applicant, PIAC may file comments that include a reply to any comments filed by interested persons within yy days of the filing date for interested persons.

2. The Commission's interpretation of section 36 of the *Telecommunications Act* (the Act)

Irrespective of whether PIAC's application is suspended, it would be useful for the Commission to address the legal issue as to whether section 36 of the Act applies to the blocking of end-users' access to specific websites on the Internet. Among other things, this would provide greater clarity and certainty as to whether Canadian carriers are prohibited from blocking access to specific websites in the absence of Commission approval, and could be of assistance in the particular circumstances of any future applications seeking relief under section 36.

Section 36 of the Act states:

> 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.

The Commission is exclusively responsible for the administration of this provision and will remain so, regardless of any finding with respect to the constitutionality of section 12 of Bill 74.

Further, as a matter of law, the Act binds Her Majesty, both in right of Canada and in right of any province.[1]

---

[1] See: section 3 of the Act.

The Commission has previously provided some guidance with respect to section 36. In Telecom Regulatory Policy 2009-657[2] the Commission reviewed the Internet traffic management practices (ITMPs) of Internet service providers. In that decision, the Commission found that an ITMP that led to the blocking of the delivery of content to an end-user would engage section 36 of the Act and, consequently, would require the prior approval of the Commission in order to be implemented.

The Commission also found that such an application would only be granted where it would further the telecommunications policy objectives set out in section 7 of the Act. At the time, the Commission considered that this would require exceptional circumstances.

Consistent with the above, the Commission is of **the preliminary view** that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP. Consequently, any such blocking is unlawful without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.

Interested persons may file comments on this preliminary view within xx days of the present letter.

Yours sincerely,

Danielle May-Cuconato
Secretary General

cc:

Adam Balkovec, CRTC, adam.balkovec@crtc.gc.ca
Laurie Ventura, CRTC, laurie.ventura@crtc.gc.ca
Geoff White, PIAC, gwhite@piac.ca

[2] *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy 2009-657, 21 October 2009.

Attorneys General (by facsimile):[3]

Attorney General of Canada, 613-954-1920
Attorney General of Alberta, 780-425-0307
Attorney General of British Columbia, 250-356-9154
Attorney General of Manitoba, 204-945-0053
Attorney General of New Brunswick, 506-453-3275
Attorney General of Newfoundland, 709-729-2129
Attorney General of Nova Scotia, 902-424-4556
Attorney General of Northwest Territories, 867-873-0234
Attorney General of Nunavut, 867-975-5128
Attorney General of Ontario, 416-326-4015
Attorney General of Prince Edward Island, 902-368-4910
Attorney General of Quebec, 514-873-7074
Attorney General of Saskatchewan, 306-787-9111
Attorney General of Yukon, 867-667-5790

Distribution List (by email):

jstix@295.ca;
sales@acanac.com;
regulatory@distributel.ca;
joel@aei.ca;
jeff@auracom.com;
info@axess.com;
cedric.tardif@axion.ca;
sbrousseau@b2b2c.ca;
info@beaucesansfil.com;
bell.regulatory@bell.ca;
admin@bravotelecom.com;
reglementa@telebec.com;
sales@logix.ca;
stephane.arseneau@ccap.coop;

[3] Certain attorneys general have provided notice that they do not intend to participate in the proceeding initiated by PIAC's application. These notices are available on the public record of that proceeding, accessible through the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

rma@cintek.com;
support@citenet.net;
caroline.dignard@cogeco.com
nathalie.dorval@cogeco.com;
admin@comtem.ca;
ybarzakay@comwave.net;
info@connectmoi.ca;
gestion@coopcscf.com;
pallard@cooptel.coop;
support@copper.net;
munther@cronomagic.com;
jeanvincent.dorais@derytelecom.ca;
serviceportneuf@derytelecom.ca
gboily@digicom.ca;
regulatory@distributel.ca;
Regulatory.Matters@corp.eastlink.ca;
sales1@fusion-telecom.com;
dharvey@galaxybroadband.ca;
regulatory@gozoom.ca;
aaron@access.com;
igsadmin@hawkigs.net;
info@heronet.ca;
info@internet-haut-richelieu.com;
regulatory@icewireless.ca;
angeo@innsys.ca;
support@mazagantelecom.com;
abmekkaoui@gmail.com;
info@montreal-dsl.com;
regulatory@mts.ca;
michel@mustangtechno.com;
techelp@mysignal.ca;
borromee@navigue.com;
dave@netfox.ca;
bstevens@netwest.ca;
help@ody.ca;
davidmckeen@northwindwireless.com;
Richard@ondenet.com;
cynthia@openmedia.org;
regulatory@openmedia.org;

bilodeau.mikael@oricom.ca;
Support@pioneerwireless.ca;
kmithcell@primustel.ca;
dennis.beland@quebecor.com;
info@rig.qc.ca;
David.Watt@rci.rogers.com;
Jacob.Glick@rci.rogers.com;
Simon-Pierre.Olivier@fidomobile.ca;
sales@rutexnet.com;
document.control@sasktel.com;
jeanmarc@securenet.net;
shannonvision@shannon.ca;
regulatory@sjrb.ca;
support@slamhang.com;
paul.frappier@sogetel.com;
creinkeluers@storm.ca;
mike.manvell@switchworks.com;
info@tamcotec.com;
louispaul@tartgointernet.com;
regulatory@teksavvy.com;
reglementa@telebec.com;
regulatory.affairs@telus.com;
celinelaporte@maskatel.qc.ca;
Mohamed-reda.khomisi@unitelecom.ca;
rob@velcom.com;
info@vertlavenir.info;
regaffairs@quebecor.com;
asoly@vif.com;
max@vodalink.com;
info@VybeNetworks.com;
info@wime.ca;
EAntecol@WindMobile.ca;
william.chen@wubim.com;
pbrochu@xittel.net;
Xplornet.Legal@corp.xplornet.com;
sales@zeuter.com;
robertm@zid.com

Ormerod, Thomas

From: Ormerod, Thomas
Sent: February-01-18 10:21 AM
To: Harroun, Steven
Subject: FW: Nouvelles / News Flash

Hi Steven,

I just wanted to follow up with you regarding the regulatory program for spoofing. Did your conversation with Telecom take place and do you have any further direction for me?

Also, I was planning on bringing up the website blocking proceeding that is referenced in the news flash below. Is this something that you would like us to have an analyst participate in? There are implications here to our enforcement efforts and it may we worthwhile to be a part of the analysis team.

Thank you,

Thomas Ormerod, M.A.Sc, CISSP
Directeur (p.i.), Solutions et renseignements, Conformité et des enquêtes
A/ Director, Solutions and Intelligence, Compliance and Enforcement
Téléphone | Telephone 819-953-9439
Conseil de la radiodiffusion et des télécommunications canadiennes
Canadian Radio-television and Telecommunications Commission
www.crtc.gc.ca

From: Communications
Sent: January-31-18 5:42 PM
To: Communications <communications@crtc.gc.ca>; *Communications <*Communications@crtc.gc.ca>; *Direct Reports <_DirectReports@crtc.gc.ca>; *Commissioners <*Commissioners@crtc.gc.ca>; *Broadcast <_Broadcast@crtc.gc.ca>; *Telecom <*Telecom@crtc.gc.ca>; *CASP <_CASP@crtc.gc.ca>; *C&E <_C&E@crtc.gc.ca>; *Legal <*Legal@crtc.gc.ca>; *Commissioners Assistants <CommissionersAssistants@crtc.gc.ca>; *Direct Reports Assistant <_DirectReportsAssistant@crtc.gc.ca>; *Public Hearings Section <*PublicHearingsSection@crtc.gc.ca>; Moore, Dale <Dale.Moore@crtc.gc.ca>; Lusikila, Nicole (PCH <nicole.lusikila@canada.ca>
Subject: Nouvelles / News Flash

Betakit.com
NAVDEEP BAINS REAFFIRMS COMMITMENT TO NET NEUTRALITY IN RESPONSE TO ANTI-PIRACY GROUP
anada's federal government has issued a formal response to an application filing from FairPlay Canada, an anti-piracy coalition comprised of organizations like Bell and Rogers Media. In an email to MobileSyrup, Innovation, Science and Economic Development (ISED) minister Navdeep Bains reaffirmed the federal government's commitment to net neutrality, while also highlighting the fact that Canada's legal copyright framework already enumerates provisions designed to protect owners of intellectual property. "Our government supports an open internet where Canadians have the ability to access the content of their choice in accordance to Canadian laws," said Bains, in an emailed statement to MobileSyrup. "In other words, our Government believes that all legal content must be treated equally by internet service providers (ISPs). That's why our government has a strong net neutrality framework in place through the Canadian Radio-television and Telecommunications Commission (CRTC)." Bains further clarified that the CRTC functions as an independent regulator, continuing to maintain his department's commitment to protecting copyright.

The Wire Report
Interventions due March 1 in website-blocking proceeding

BRIEFS | 01/31/2018 5:16 PM EST

The CRTC has officially launched the Part 1 process for an application asking the regulator to set up an anti-piracy website-blocking system. The Part 1 was posted on the CRTC's website Tuesday with a March 1 deadline for interventions. The FairPlay coalition, whose membership includes telecoms, broadcasters and creative groups, is arguing that piracy is a growing threat to the industry and wants the CRTC to create an agency that would identify websites hosting pirated content, which would then be blocked. Internet advocacy group OpenMedia has begun a public campaign against the proposal, asking Canadians to oppose the suggestion at the CRTC. The CRTC's call for interventions had attracted more than 400 comments as of Wednesday afternoon.

OpenMedia campaign

Tell the CRTC: No Censorship in Canada

Bell is desperate to censor Canada's Internet. First they tried through NAFTA.1 Now they're at it again through the Canadian Radio-television and Telecommunications Commission (CRTC),2 and they have some help.

A coalition of organizations — spearheaded by Bell — calling themselves "FairPlay Canada" is asking the CRTC to implement a website-blocking system to curb piracy.

This radical proposal will lead to legitimate content and speech being censored, violating our right to free expression and the principles of Net Neutrality, which the federal government has consistently pledged support for.3

They want to create an official Internet censorship committee within the federal government, which opens the door for overreaching censorship in Canada. We can't let this happen.

Tell the CRTC that you do not want Canada to build an agency to block and censor our Internet.

Huffington Post

Ottawa Must Stop Internet Pirates From Killing Canadian Jobs

Canada's $8.5-billion cultural industry is poised to shrink if someone doesn't plug the leak allowing foreign digital pirates to steal content.

01/31/2018 10:17 EST | Updated 2 hours ago

If foreign pirates were capturing Canadian fishing trawlers and stealing their catch everyday, you can bet the government would step in.

If train robbers were draining western grain cars, Canada would set up a police task force to stop such wide-scale commercial theft.

Indeed, when pirates on the high seas threaten our supply ships off the coast of Africa, Canadian frigates patrol to protect them.

So, why is Ottawa sitting by as another kind of international piracy skims an estimated $500 million from Canadian companies, putting hundreds of jobs at risk?

Theft is theft. Only in this case, the loot is digital content and the crooks are illegal piracy websites operating outside of Canada's jurisdiction. The victims are the content creators in the media sector, which employs 140,000 Canadians.

lapresse.ca

Un prochain film entièrement québécois pour Xavier Dolan

Ayant mis la touche finale à The Death and Life of John F. Donovan, son premier film anglophone, Xavier Dolan compte tourner l'automne prochain Matt et Max, un film entièrement produit au Québec et mettant en vedette des acteurs québécois. Le Hollywood Reporter a en effet révélé hier la teneur du nouveau projet du réalisateur de Juste la fin du monde. Matt et Max, son huitième long métrage, est une histoire d'amitié construite autour d'un groupe de six hommes à l'aube de la trentaine, dont le rapprochement plus intime entre deux d'entre eux sèmera un certain trouble au sein du clan.Le cinéaste campera lui-même le rôle de Max et il y a de très fortes chances qu'Anne Dorval tienne le rôle de sa mère.

infopresse.com

Le Fonds des médias canadiens dévoile son rapport de tendances annuel

L'étude Le choc du présent publiée par le Fonds des médias du Canada (FMC) fait état de récentes données sur la place des technologies dans la vie des Canadiens. L'étude Le choc du présent publiée par le Fonds des médias du Canada (FMC) fait état de récentes données sur la place des technologies dans la vie des Canadiens. Le taux de pénétration du téléphone intelligent au pays a atteint 79% en 2017 (2016: 75%). Celui de la tablette a été de 56% pour la même année (2016: 54%); le téléviseur connecté, lui, est à 45% (2016: 40%). Les Canadiens passent environ 21,8 heures chaque semaine en ligne, dont 6,9 à y regarder la télévision.

Hanley, Amy

From: Hanley, Amy
Sent: February-12-18 3:40 PM
To: Burke, Joe
Cc: Mukhedkar, Soniya; Shortliffe, Scott
Subject: RE: FOR APPROVAL - US - Piracy: Stop Online Piracy Act (SOPA).

Joe,

Thank you very much for this information – the Chair said it answered his questions and that it was very much appreciated.

Thanks,
Amy

From: Burke, Joe
Sent: February-06-18 12:57 PM
To: Hanley, Amy <amy.hanley@crtc.gc.ca>
Cc: Mukhedkar, Soniya <soniya.mukhedkar@crtc.gc.ca>; Burke, Joe <Joe.Burke@crtc.gc.ca>
Subject: FW: FOR APPROVAL - US - Piracy: Stop Online Piracy Act (SOPA).

Hi Amy,

As requested, I have prepared a brief summary of the *Stop Online Piracy Act* (SOPA). Please note, that points below are based on information gathered by me through online research and the contents of this email have not been reviewed by Legal. Please don't hesitate to contact us if the Chair has any questions or requires additional information.

- The *Stop Online Piracy Act* (SOPA) of 2011, was a bill introduced in the US House of Representatives on 26 October 2011, by US Representative Lamar Smith (R-TX). Although the bill initially had bipartisan support from 31 co-sponsors, it was not sent to vote in Congress and ultimately failed due to a lack of consensus from legislators following widespread protests from tech industry giants, who rallied concerned citizens to speak out against the bill.

- Among other things, the bill aimed to crack down on copyright infringement by restricting access to sites that host or facilitate the trading of pirated content. SOPA's main targets were "rogue" overseas sites like torrent hub The Pirate Bay, which are a trove for illegal downloads, and others who distribute copyrighted works through streaming. Since the servers for many potentially offending sites are physically located in jurisdictions outside the United States, SOPA's goal was to cut off pirate sites' oxygen by requiring U.S. payment facilities, search engines, advertising networks and other providers to withhold their services.

- If passed, SOPA would have required every payment or advertising network operator to set up a process through which outside parties could notify the company that one of its customers is an "Internet site dedicated to the theft of US. Property", and once a network received a notification, it would have been required to cut off services to the target site within five days.

- When the bill was sent to the House Judiciary Committee for markup, following consultations with industry groups, the bill's sponsor (Rep. Smith) announced a plan to soften the bill by removing a provision that would have required Internet service providers to block access to certain foreign websites. While this proposed

amendment was welcomed by most parties, the bill did not move forward as there still not enough support for the bill to be voted on by Congress.

- Related legislation, the *Protect IP Act* (PIPA) of 2011, was introduced in the Senate on 12 May 2011, by Senator Patrick Leahy (D-VT). PIPA had a stated goal of giving the US government and copyright holders additional tools to curb access to "rogue websites dedicated to the sale of infringing or counterfeit goods", especially those registered outside the U.S. PIPA also failed for the same reasons as SOPA.

- **Supporters:**
  - SOPA had broad support from organizations that rely on copyright, including the **Motion Picture Association of America**, the **Recording Industry Association of America**, Entertainment Software Association, **Viacom**, and various other companies and unions in the cable, movie, and music industries.

- **Opponents:**
  - Opponents of the bill, including **CNET** and the **Consumer Electronics Association**, noted that the bill's supporters and legislative decision-makers lacked necessary technical knowledge relating to Domain Name System Security Extensions (DNSSEC), and did not understand the potential damage that SOPA would cause to Internet security.
  - Other opponents included **eBay**, **Google**, **Yahoo** and **Facebook**, who said SOPA would stifle innovation and censor free speech.
  - The White House opposed the bill, as written, stating that "while we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet". Championing the principles of Net Neutrality, the White house further stated that "any effort to combat online piracy must guard against the risk of online censorship of lawful activity and must not inhibit innovation by our dynamic businesses large and small". President Obama's advisers said "the administration opposed a controversial provision that would require Internet service providers to block infringing websites through a process known as Domain Name System filtering".

- **Protests:**
  - On 18 January 2012, as part of an online protest, site blackouts were organized by tech companies Wikipedia and Reddit, whose sites went 'dark' for 24 hours and 8 hours, respectively, to draw attention to the cause. Demonstrators also took to the streets of major cities across the US, and Google gathered 7 million signatures on a petition linked from its homepage (see timeline of SOPA strike).

Thanks,

Joe Burke
Analyste principal, Politique stratégique et affaires internationales | Senior Analyst, Strategic Policy and International Affairs
Consommation et politique stratégique | Consumer Affairs and Strategic Policy
Conseil de la Radiodiffusion et des Télécommunications Canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, Ontario K1A 0N2

courriel | email: joe.burke@crtc.gc.ca
téléphone | telephone: (819)953-5192
télécopieur | facsimile: (819)994-0218
Gouvernement du Canada | Government of Canada
http://www.crtc.gc.ca
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From: Mukhedkar, Soniya
Sent: February-05-2018 10:43 AM
To: Burke, Joe <Joe.Burke@crtc.gc.ca>
Subject: FW: US - Piracy

Thank you!

From: Hanley, Amy
Sent: February-05-2018 10:06 AM
To: Mukhedkar, Soniya <soniya.mukhedkar@crtc.gc.ca>
Subject: US - Piracy

Hi Soniya,

The Chair is looking for some information on a US proposal called the Stop Online Piracy Act. I believe it was a legislative initiative that was never pursued. An email with some bullet points would suffice. Deadline would be in the next few days, so not urgent.

If you are not the right person to answer, please let me know!

Thanks,
Amy

Amy Hanley
Chef de Cabinet, Bureau du président |
Chief of Staff, Chairman's Office
Conseil de la radiodiffusion et des télécommunications canadiennes |
Canadian Radio-television and Telecommunications Commission
1, prom. du Portage, Édifice central, Les Terrasses de la Chaudière, Gatineau QC J8X 4B1
amy.hanley@crtc.gc.ca
Téléphone | Telephone 819.953.7912
Céllulaire | Mobile 819.994.0195
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca
Suivez-nous sur Twitter | Follow us on Twitter

Provost, Marie-Soleil

From: Rancourt, Eric
Sent: December-04-17 4:04 PM
To: Scott, Ian; Macri, John; Doucet, Claude; Hanley, Amy
Subject: Inside Bell's Push To End Net Neutrality In Canada

FYI – Canadaland claims to have seen Bell's draft proposal regarding the blocking of piracy websites. The article includes quotes from Michael Geist and a spokesperson for Minister Bains.

http://www.canadalandshow.com/bell-pushing-end-to-net-neutrality-in-canada/

Eric Rancourt
Director, Sector Services, Media Relations and Outreach | Directeur, services aux secteurs, relations avec les médias et sensibilisation
Communications Sector | Secteur des Communications
Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
Telephone | Téléphone 819-997-4228
Government of Canada | Gouvernement du Canada
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Pages 17 to / à 23

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68(a)

of the Access to Information Act

de la Loi sur l'accès à l'information

Lefebvre, Jean-Pierre

From: Hill, Sydney
Sent: May-30-17 11:54 AM
To: Lefebvre, Jean-Pierre; Craig, Michael
Subject: RE: For review: Web content about online content

Does this work as a clarification?

[redacted]

From: Lefebvre, Jean-Pierre
Sent: May-25-17 11:42 AM
To: Craig, Michael <michael.craig@crtc.gc.ca>; Hill, Sydney <sydney.hill@crtc.gc.ca>
Subject: RE: For review: Web content about online content

Fair enough. [redacted]

JP

From: Craig, Michael
Sent: May-25-17 11:08 AM
To: Lefebvre, Jean-Pierre <jean-pierre.lefebvre@crtc.gc.ca>; Hill, Sydney <sydney.hill@crtc.gc.ca>
Subject: RE: For review: Web content about online content

Hi,

Thanks for doing that Jean-Pierre.

On the last point, [redacted]

From: Lefebvre, Jean-Pierre
Sent: May-25-17 10:05 AM
To: Hill, Sydney <sydney.hill@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>
Subject: RE: For review: Web content about online content

It looks good overall.

[redacted]

My two cents.

JP

From: Hill, Sydney
Sent: May-24-17 4:33 PM
To: Lefebvre, Jean-Pierre <jean-pierre.lefebvre@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>
Subject: RE: For review: Web content about online content

Access given to you!

(And you probably thought you were done after "program blackouts"! Thanks for taking this on too.)

From: Lefebvre, Jean-Pierre
Sent: May-24-17 3:43 PM
To: Craig, Michael <michael.craig@crtc.gc.ca>
Cc: Hill, Sydney <sydney.hill@crtc.gc.ca>
Subject: RE: For review: Web content about online content

I could potentially do it, but I don't have the necessary access right to open the document.

JP

From: Craig, Michael
Sent: May-24-17 3:42 PM
To: Lefebvre, Jean-Pierre <jean-pierre.lefebvre@crtc.gc.ca>
Cc: Hill, Sydney <sydney.hill@crtc.gc.ca>
Subject: FW: For review: Web content about online content

Hi JP – Most of the content referenced below and noted in the attached document seems to deal with distribution issues. Would you be able to assign this to someone on your end?

From: Hill, Sydney
Sent: May-24-17 10:30 AM
To: Craig, Michael <michael.craig@crtc.gc.ca>; Castonguay, Guillaume <guillaume.castonguay@crtc.gc.ca>; Wilson,

James <james.wilson@crtc.gc.ca>; Legault, Céline <Celine.Legault@crtc.gc.ca>; Tremblay, Céline <Celine.Tremblay@crtc.gc.ca>
Subject: For review: Web content about online content

Hi all,

Attached is a DM reference to proposed web content about TV and music online. It is an update to this page: http://crtc.gc.ca/eng/internet/musi.htm.

I need help to finalize this content so I'm asking you – as reps from Client Services, Comms Sector Services and Broadcasting SME – to review it to make sure it is clear, accurate and in line with what we communicate publicly on this topic in other areas (eg. email replies to clients). I'd be grateful for input by Tuesday May 30th. You all have access to the document in DM but let me know if I should give access to anyone else as part of this review.

Many thanks in advance!

Sydney

Sydney Hill
Communications et relations externes | Communications and External Relations
Gestionnaire, Services Web et créatifs | Manager, Web and Creative Services
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
1, promenade du Portage, Gatineau (QC) J8X 4B1 | 1 Promenade du Portage, Gatineau, QC J8X 4B1
sydney.hill@crtc.gc.ca
Téléphone | Telephone 819-994-2467
Télécopieur | Facsimile 819-997-4245
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca
Suivez-nous sur Twitter (@CRTCfra) | Follows us on Twitter (@CRTC eng)
Aimez-nous sur Facebook | Like us on Facebook

FACT SHEET
Piracy

Issue

In recent years, piracy of audio-visual content has come to be regarded as a key challenge for audio-visual rights holders. This section touches upon some of the key issues and concerns related to the piracy of audio-visual content.

Background

Piracy as a key challenge

The Commission specifically addressed the issue of piracy in broadcasting in 2010. In *Navigating Convergence: Charting Canadian Communication Change and Regulatory Implications*, the Commission stated that piracy was a key challenge. Piracy has fundamentally changed the music industry, forcing artists to seek ways of monetizing their work outside of traditional copyright structures. The same forces are at work with respect to audio-visual works as increasing broadband speeds make peer-to-peer file sharing of television programs and movies feasible for mainstream users.

In a letter to shareholders in late January 2015, Netflix said that "Piracy continues to be one of our biggest competitors", and singled out Popcorn Time, a service offering a free selection of pirated movies and television shows larger than Netflix. In an article from the Financial Post dated 20 March 2015, Claire Brownell noted that the "labour-of-love ethos that power Popcorn Time is at the heart of the problem for services like Netflix, HBO, or Canadian video-on-demand services like Bell Media's CraveTV and Shomi, from Shaw and Rogers (...). Fair play is one thing. But how do you compete with a limitless army of utopian computer nerds eager to work as pirates around the clock for free just for the satisfaction of it?".

Direct-to-home (DTH) satellite distribution piracy, whether grey- or black-market, is also a significant problem in the broadcasting industry.

Considerations

What makes piracy such a challenging issue is that there are conflicting attitudes towards it. The Government however considers it to be a serious offence. With respect to satellite piracy, Innovation, Science and Economic Development Canada notes that this practice undermines the integrity, competitiveness and viability of the Canadian broadcasting system and places Canadian jobs and investment at risk.

With respect to online piracy, one recent example of how prevalent that is becoming is detailed in a June 2015 article by Variety writer Todd Spangler, in which he noted that the new Netflix series Sense8 was pirated more than half a million times in less than three days after its release.

The Commission does not generally intervene on piracy issues. Both the *Copyright Act* and the *Radiocommunication Act* contain provisions relating to piracy. Piracy cases may also be dealt with in court. For example, on 6 March 2015, a Quebec appeals court ordered Bell ExpressVu LP to pay nearly $83-million to Videotron Ltd. and TVA Group Inc. for failing to prevent the piracy of its satellite signal

Prepared by: Sylvie Julien, Television Policy and Applications, Broadcasting, 813-953-0588, 2016-09-13
DM: 2420647

between 1999 and 2005 (http://courdappelduquebec.ca/en/judgments/details/article/videotron-senc-et-groupe-tva-inc-c-bell-expressvu-limited-partnership/cont/News/action/detail/).

Grey areas

With respect to the DTH grey market in Canada, Innovation, Science and Economic Development Canada notes that this refers to the sale and marketing of American DTH satellite receivers and subscriptions to American services in Canada.

Section 9(1)(*c*) of the *Radiocommunication Act* states: "No person shall...decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed." This section of the *Radiocommunication Act* has been the subject of court challenges involving retailers who sell American DTH satellite receivers and services in Canada. This resulted in confusion due to differing judgements rendered regarding the interpretation of section 9(1)(*c*). A Supreme Court of Canada decision in the case of Bell ExpressVu v. Richard Rex, made on 26 April 2002, confirms that provisions in the *Radiocommunication Act* forbid the illegal decoding of satellite television programming.

Some grey areas have also emerged with respect to the issue of online piracy, particularly where consumers pay to access legal distribution technology to gain access to content that is not intended for distribution in their country. For example, a fall 2014 study from MTM found that nearly one third of respondents in a Canadian media survey admitted to using a U.S. IP to access Netflix. Among those who self-identified as Netflix users, 40 percent said they were spoofing their IP to access other, non-Netflix U.S. media content online. So, although they may still be paying for the Netflix service, they are gaining access to content to which they are arguably not entitled.

Bell Media president, Mary Anne Turcke addressed this issue at the 2015 Canadian Telecom Summit in Toronto. In her speech, she noted that using a virtual private network (VPN) to view the U.S. Netflix stream from Canada is illegal and that companies must work together to make sure people understand the value of content. However, in response to her comment, University of Ottawa law professor Michael Geist explained in an article published in The Hill Times on 8 June 2015 that the problem is primarily a competitive issue, not a legal one and that, although subscribers may be breaching the Netflix terms and conditions, they are not breaking the law.

In an article published on 29 May 2016, the CBC reported on a Netflix crackdown on cross-border watchers that started in mid-January of 2016. Canadians are now blocked from "hopping virtual borders" to watch shows on Netflix that are restricted to other countries. Although some Canadians are upset, others believe the cross-border watchers should respect the rules (e.g., one CBC reader noted: "So tired of people expecting the world for $9.99 a month").

While Netflix had publicly stated in January 2015 that it was difficult to detect cross-border watchers, they have been successful with this crackdown. Netflix's company blog does not explain the method used to block the service but it does state that its technology continues to evolve. The article notes that many tech experts have speculated that Netflix was pressured by rights holders to respect its territorial licensing agreements.

Copyright-infringing set-top boxes

On 20 June 2016, Rogers, Quebecor and Bell (the companies) presented information to the Commission staff on copyright-infringing set-top boxes. These are devices that are pre-loaded with KODI and other

piracy applications[1] and are sold to facilitate piracy. The retailer/distributor obtains blocks of usernames and passwords and charges $15 per month on average for access to Canadian and foreign channels on a private "IPTV" server, without authorization.

The companies consider that pre-loaded boxes pose a serious threat to those involved in the legitimate Canadian television industry. In an effort to address their issues with the sellers of these boxes, the companies took joint legal action. Contrary to what was argued by one of the defendents, the Federal Court found that the sellers do not act as a mere conduit, and granted an interlocutory injunction that applies to additional defendants without a further hearing. However, the pre-loaded boxes are still widely available and sold, either without applications but with instructions on how to load the applications, or online from other countries. Although the industry is working together on this issue, the ability to address future developments through the courts remains uncertain and may require a different approach. It was suggested that an update to the *Copyright Act* may be required to address this type of piracy (e.g., with respect to downloading versus streaming and to devices and inducement).

The companies have made it clear that they intend to vigorously pursue sellers of illegal set-top boxes, using the approach set out in the Federal Court's decision, i.e., by shutting down as many sellers as possible and educating consumers. They also intend to work proactively with all stakeholders, including the CRTC, to address the negative effects of piracy on creators, broadcasters, distributors, and consumers.

Content protection

There have been efforts to combat the issue of piracy in Canada, although it is unclear how effective they are. Canada's copyright notice-and-notice provisions of the *Copyright Modernization Act* came into force on 2 January 2015. The notice-and-notice regime formalizes a voluntary system that legally requires Internet intermediaries to notify a subscriber when it receives a notice of alleged infringement from a copyright holder.

According to CEG TEK International, which describes itself as a "copyright monetization firm", piracy rates have dropped by 69.6 per cent on Bell's Internet network; by 54 per cent on Telus' network; and by 52.1 per cent on Shaw's network as a result of this notice-and-notice system. There was less impact among Rogers Internet subscribers, with piracy down by 14.9 per cent, and among TekSavvy users (down 38.3 per cent).

A report issued in February 2015 by the International Intellectual Property Alliance (IIPA) notes, however, that Canada hosts a number of the world's most popular Internet sources dedicated to online theft of copyrighted material, including Torrentz.eu and Kickass.to (73rd most visited site on the entire Internet). Consequently, it recommended that Canada remain on the Special 301 Watch List in 2015. The IIPA also indicated that the notice-and-notice system should be supplemented with a stronger notice and takedown system, under which Internet hosts found in violation of copyright could be ordered to remove their sites (http://www.iipa.com/rbc/2015/2015SPEC301CANADA.pdf).

The industry itself is working to reduce piracy in Canada. The Motion Picture Association – Canada's Content Protection Operations, for instance, works with Crown counsel, law enforcement and

[1] For example, KODI, an open-source media centre to which add-ons can be added, and Showbox, a stand-alone application similar to Popcorm Time, give users access to individual programs and live channels from publicly available sources on the Internet.

community partners to combat illegal reproduction, distribution and sale of films and television programs in Canada.

There are also various independent companies offering anti-piracy services. For example, Deluxe Canada tracks digital copies of copyrighted content. Deluxe has leveraged this process into a business in copyright monitoring, helping content producers and distributors to monitor illegal or unauthorized uses of intellectual property. Operating from their technology hub in Montreal, Quebec, Canipre also provides service in all aspects of Internet based anti-piracy.

Digital anti-piracy tool

Digital Rights Management (DRM) is a controversial anti-piracy technology. Digital copyright owners use this technology to protect ownership/copyright of their electronic content by remotely controlling and restricting how authorized users download, open, install and copy digital files. DRM always involves digital locks. Purchasers must unlock codes to use their files but the locks usually prevent them from sharing these files with others.

Advertising on piracy sites

"[C]ontent theft remains a multi-hundred million dollar business. Ad revenue is the oxygen that allows content theft to breathe" – Good Money Still Going Bad: Digital thieves and the hijacking of the online ad business

Buying and selling ads has largely become an automated process. Although advertisers may be reaching a greater number of potential consumers, it has also become harder for them to verify where their ads are being placed. According to the American Association of Advertising Agencies (the 4As), it is estimated that, in the U.S., "roughly $7-million in advertising revenue is flowing to piracy sites every month". Eric Baptiste, CEO of SOCAN, explained that consumers who go [to sites where they can get unlicensed access to music] see brands that they recognize, and it adds legitimacy to the services.

In Canada, the Association of Canadian Advertisers (the ACA) has noted that, with 25 to 50% of digital ad spend going to bot fraud (tricking advertisers into placing ads on sites with few visitors), malware, and ad-supported piracy, among other things, digital media transparency has become a top-of-mind issue for many marketers in 2015. Consequently, the ACA is establishing guidelines and safe trading, and it is working with the Canadian Media Directors' Council and the Interactive Advertising Bureau to address digital media fraud and transparency issues.

Importance of fighting piracy for Canadian Rights Holders

In an article published on 8 August 2016, Michael Geist reported that Canadian Heritage had commissioned a major study, conducted by Circum Network Inc. in 2015, in response to a "follow-the-money" strategy that attempts to stop piracy sites by disabling access to payment intermediaries, demoting the sites in search results and reducing ad revenues. The study was obtained under the *Access to Information Act*.

Geist noted that a letter was sent by Canadian Heritage to various stakeholders encouraging them to participate, explaining that it would help them identify practices that aim to reduce or discourage copyright infringement. The final report, however, includes few recommendations and shows that there is little enthusiasm among stakeholders for investigating anti-piracy activities. Most were generally of the view that resources are better invested in other battles. While some rights holders wanted law enforcement to escalate the piracy issue, others preferred focusing on education efforts.

The Circum study does provide evidence that obscurity is still a bigger threat than piracy for content creators. Although the Canadian government plans to review the state of copyright law in 2017, the

message from Canadian Heritage Minister, Mélanie Joly, and Innovation, Science and Economic Development Minister, Navdeep Bains, is that, with choice and competition, success would not likely come from more anti-piracy legal reforms. The study suggests instead that creators would prefer convenient and well-priced legal services.

Key Messages / Points for Discussion

- Prevalence of piracy of audio-visual content
- What Canada is doing to combat piracy
- What are other countries/regulators doing to combat piracy

Rancourt, Mélanie

From: Hutton, Scott
Sent: February-15-18 11:20 AM
To: Macri, John; Seidl, Chris; Hulley-Craig, Crystal; Shortliffe, Scott
Cc: Millington, Stephen; Kachi, Nanao; Craig, Michael; Bowles, Eric; Abbott, William; Roy, Jade; Rancourt, Eric
Subject: RE: For you Sign Off - Procedural Letter to Parties Extending Deadlines in the FairPlay Canada Piracy Blocking Application

Hi I agree with the changes to date. I also understand the new date for comments will by the 28th of March. Thx S

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

From: Macri, John
Sent: 15 février 2018 9:25
To: Seidl, Chris <chris.seidl@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>; Bowles, Eric <eric.bowles@crtc.gc.ca>; Abbott, William <William.Abbott@crtc.gc.ca>; Roy, Jade <jade.roy@crtc.gc.ca>; Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Subject: RE: For you Sign Off - Procedural Letter to Parties Extending Deadlines in the FairPlay Canada Piracy Blocking Application

[redacted]

John

From: Seidl, Chris
Sent: February-15-18 8:56 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>; Bowles, Eric <eric.bowles@crtc.gc.ca>; Abbott, William <William.Abbott@crtc.gc.ca>; Roy, Jade <jade.roy@crtc.gc.ca>; Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Subject: RE: For you Sign Off - Procedural Letter to Parties Extending Deadlines in the FairPlay Canada Piracy Blocking Application

Looks good, one suggested change. [redacted]

Current wording is "[redacted]"

Suggest we use "[redacted]."

Chris

From: Hulley-Craig, Crystal
Sent: February-14-18 6:01 PM
To: Seidl, Chris <chris.seidl@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>; Bowles, Eric <eric.bowles@crtc.gc.ca>; Abbott, William <William.Abbott@crtc.gc.ca>; Roy, Jade <jade.roy@crtc.gc.ca>; Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Subject: For you Sign Off - Procedural Letter to Parties Extending Deadlines in the FairPlay Canada Piracy Blocking Application

Hello,

Please find attached for your sign-off the English version of the staff letter reflecting the outcome of today's meeting and as signed off by Steve. The translation will be finalized by tomorrow.

Any comments you have would be greatly appreciated.

Thanks

Crystal Hulley-Craig
Conseiller juridique Principal/PI | A/Senior Legal Counsel
Tel: (819) 956-2095 | crystal.hulley@crtc.gc.ca | Fax (819) 953-0589
Legal Sector/Secteur juridique
Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes
Government of Canada | Gouvernement du Canada
Ottawa, Ontario K1A 0N2

Rancourt, Mélanie

From: Hutton, Scott
Sent: February-14-18 12:43 PM
To: Craig, Michael
Subject: Current debate ongoing in Australia

Seems quite a propos for the case in front of us. S

https://www.communications.gov.au/have-your-say/review-copyright-online-infringement-amendment

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

Pages 35 to / à 38

are public-denied pursuant to section

est public-refusé en vertu de l'article

68(a)

of the Access to Information Act

de la Loi sur l'accès à l'information

Rancourt, Mélanie

From: Hutton, Scott
Sent: February-06-18 12:11 PM
To: Craig, Michael
Subject: FW: FairPlay Canada - re: application by ATN
Attachments: The horse has left the barn.doc

fyi

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

From: Allison, Cathy
Sent: 1 février 2018 7:03
To: Hutton, Scott <scott.hutton@crtc.gc.ca>
Subject: FairPlay Canada - re: application by ATN

Hi Scott,

Today I reviewed the application submitted by ATN (not Bell, though Bell seems to be leading the "FairPlay Canada" coalition) for blocking pirate websites, etc., and the attached document contains some initial thoughts, as you requested.

-- Cathy

Cathy Allison
Gestionnaire, politiques et surveillance de la radio | Manager, Radio Policy and Monitoring
Radiodiffusion | Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canada Radio-television and Telecommunications Commission
Ottawa, Ontario K1A 0N2
Tel. 819-997-4689 | Fax. 819-997-9351
cathy.allison@crtc.gc.ca
Government du Canada | Government of Canada
http://www.crtc.gc.ca
Suivez-nous sur Twitter @CRTCfra | Follow us on Twitter @CRTCeng

The Horse has left the Barn (2018 version*)

Who: FairPlay Canada (https://www.fairplaycanada.com/) is a Coalition[1] of content creators and unions including the CMPA, L'ADISQ, Entertainment One, Cineplex, Corus, CBC, TIFF, Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), IATSE, Unifor, Maple Leaf Sports and Entertainment (partially owned by Rogers and Bell), and three of Canada's largest media/communications companies: BCE Inc., Rogers Communications Inc. and Quebecor Inc., and others.

What: The application ("to disable on-line access to piracy sites" – 2019-0046-7), submitted 29 January 2018, asks the CRTC to take action against pirated content by blocking websites that provide access to pirated content to "thousands of Canadians". The Coalition wants the CRTC to create an Independent Piracy Review Agency (IPRA) that would (a) identify websites used to "blatantly steal content" (i.e., to access content without paying royalties to content owners) and (b) require that all Canadian ISPs block these websites. If a website owner disputed being added to the mandatory blocking list, they could take it up with the Federal Court of Appeal. In addition, the CRTC would be responsible for (c) issuing warnings to operators of websites that are suspected of providing access to illegally downloaded or streamed content.

Why: The application is in response to the growing number of consumers accessing programming online, whether through legal or illegal means. The Coalition claims that thousands of Canadians are using websites, software plug-ins and pre-programmed intermediary devices that provide the means to "illegally" stream content -- movies, live sports, television shows, music and movies -- that rights holders are not being compensated for. The application claims this activity is eroding Canada's $55-billion cultural industry, and impacting 630,000 jobs.

How: Although legal access to online programming is increasing (e.g., Canadian Netflix subscriptions are growing -- see chart from CMR 2017, below), a 2017 study from Sandvine[2] estimates that over 1 million Canadian households use Android boxes loaded with applications (one of the most popular being Kodi) that permit access to pirated TV for free or very inexpensively (boxes cost $60 - $250).

Previous unsuccessful attempts to stop the sale of "fully-loaded" Android set-top boxes that provide an uncomplicated way to access a wide variety of content made available illegally have frustrated the large television providers[3], since even after a court injunction, it is still easy to purchase these devices.[4]

Some initial problems with this proposal:

- Many of the infringing websites originate outside Canada. While an ISP could be ordered to block a Canadian-based Internet user's access to a website, access can be enabled through the use of VPN (Virtual Private Network) technology that anonymizes or re-routes the user's IP

[1] Curiously, the application was submitted by Asian Television Network International Limited (ATN), but appears to be spear-headed by Bell (who has reportedly financed the cost of establishing the website and likely paid for McCarthy Tetrault's legal opinion), probably to mitigate the fact that Bell is a hypocritical actor – on one side, reaping the rewards from growth in ISP revenue, but on the other, suffering from declines in revenue from its BellFibe TV service (and stagnant growth in production revenue on its media side) due to cord-cutters.
[2] Sandvine, Global Internet Phenomena Spotlight: The "Fully-Loaded" Kodi Ecosystem, May 2017 (approximately 10% of Canadian households have an active KODI device and at least 71% of those actively use a piracy add-on).
[3] See: https://www.theglobeandmail.com/report-on-business/digital-set-top-box-sellers-appeal-temporary-sales-block-in-case-launched-by-bell-rogers-videotron/article30429204/
[4] See: http://www.cbc.ca/news/business/piracy-android-box-free-tv-1.4098249

address by "geo-spoofing" their location. If access to a website is blocked in Canada, users can mask their true geographic location using a VPN, making them appear to be located in a different country (one which allows access to the offending website).

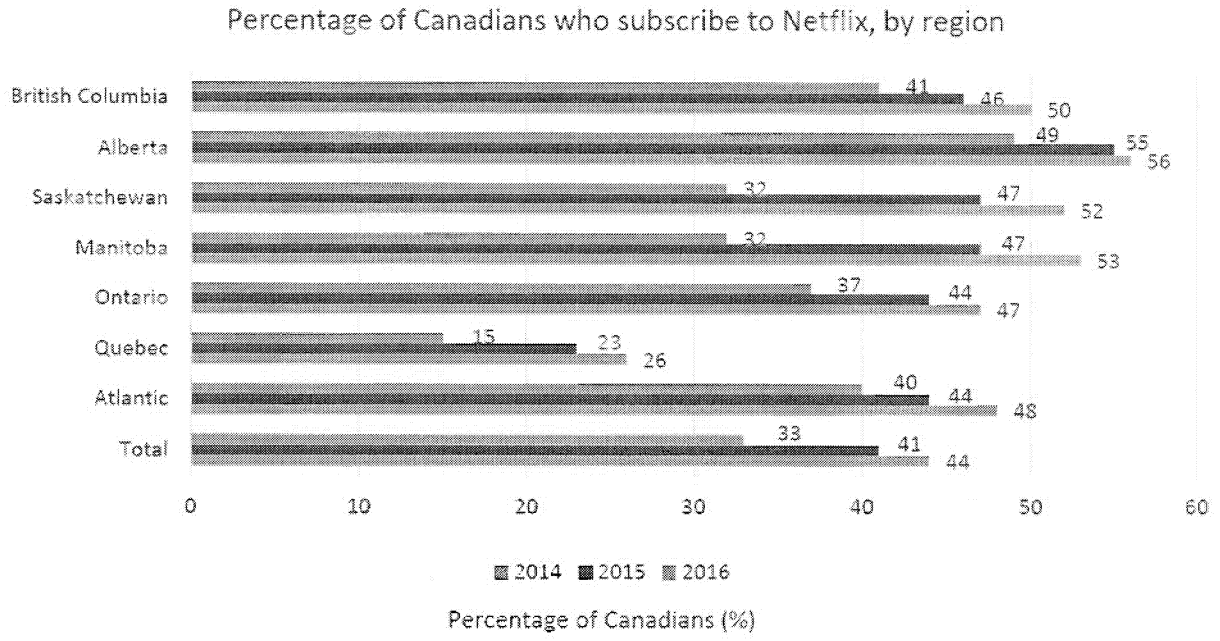
- Just because the website exists doesn't mean that a consumer has to use it. The Coalition's real problem is that there are no defined laws against the users of these services. (Twenty years ago, record labels in the U.S. tried to sue consumers who were downloading pirated digital music from Napster and other torrent sites, but the Labels were unsuccessful at containing the damage – the practice of downloading from free sites became ubiquitous in a short period of time, and with so many ~~pirates~~ sorry, users, it was impossible to sustain widespread legal action – the cost was prohibitive and moreover, the courts would have been tied up for decades. – a.k.a "***The Horse has left the Barn (1998 version)**")
- Fairplay Canada's application to have the CRTC blacklist certain websites has led to a rapid counter-attack by groups such as US-based Open Media[5] (https://act.openmedia.org/StopCanadaCensorship) who warn that allowing such a proposal could lead to the censorship of legitimate content and speech, challenging the government's support of Net Neutrality principles, and violating Canadians' right to free expression.
- These opponents are concerned about net neutrality violations, such that other types of content could easily be added to the blacklist. They argue that making an agency (one that currently has no judicial oversight), responsible for what Canadians can and can't access is nothing short of censorship.
    - Arguments surfacing against this application cite concerns that ISPs could become overzealous in blocking sites, especially given that providers such as Bell, Rogers and Quebecor own both content and the distribution channels. However, this is a misnomer: the application clearly explains that this is not how IPRA would work. In fact, an ISP would be required to take down a site only on orders from the CRTC, and only after exercising due diligence.
- Today, rights holders can fight online piracy through legal means, via the Copyright Act, which includes a notice-and-notice regime. What this means is that the content owner can request the ISP to notify the infringer of an alleged violation on the owner's behalf. If a copyright owner decides to take legal action, the ISP is required to release the subscriber's information, and the owner could proceed to go to court to obtain a takedown order.[6] However, this process is expensive and time-consuming.
- Most people working in the creative industries support the idea of taking down websites that enable pirated content, encouraging consumers to instead access online programming via low-cost subscription (or ad-supported) services. Piracy has lessened since newer, affordable

[5] There are nearly 3,000 interventions posted on the CRTC website as of 1 Feb 2018. Many may have been generated or prompted by OpenMedia's or other public interest online campaign websites.

[6] When a copyright owner thinks that an Internet user might be infringing their copyright, they can send a notice of alleged infringement to the user's ISP. Notice and Notice requires that the ISP forward (e.g. via email) the notice of alleged infringement to the user, then inform the copyright owner once this has been done. Under the Notice and Notice regime, ISPs must retain records of the identity of the subscribers who have been forwarded notices for a period of six months, or longer (up to one year) in cases where a copyright owner decides to take legal action. If ordered to do so by a court, the ISP would release the subscriber information to the copyright owner as part of a copyright infringement lawsuit. Source: https://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html

content models have become available, making it easy and inexpensive for everyone to access the content they want.

- **Which begs the question**: *why the application, and why now?* Perhaps because the television companies see their subscribers and revenues dwindling faster than anticipated, and are seeking ways to stem their losses. There is also value in garnering public support by shining the spotlight on the content creator community, which represents hundreds of thousands of Canadians that could potentially be impacted if (as the Coalition states) the government doesn't soon take some form of protective action. **Why now**? Perhaps because up until now, the government has been adamant in stating there will be no "Netflix tax" or any other tax on offshore streaming services that could be re-directed to boost production revenues. Also, the current notice-and-notice copyright infringement regime is, arguably, toothless when it comes to enforcement. Therefore, stakeholders who are most adversely affected by their (relatively sudden) reversal of fortune are trying every angle they can think of to mitigate their losses; this application appears to be their next strategy.



Source: MTM, 2014-2016 (Respondents: Canadians 18+)

CMR 2017, p. 203 – "Figure 4.3.7 Percentage of Canadians who subscribe to Netflix, by region"

Rancourt, Mélanie

From: Hutton, Scott
Sent: January-31-18 3:43 PM
To: Matthew.Oppenheimer@international.gc.ca
Subject: thank you

Hi Matthew,

Re. the piracy application. You can click on the following link: https://services.crtc.gc.ca/pub/instances-proceedings/Default-Defaut.aspx?S=O&PA=A&PT=A&PST=A&_ga=2.142557938.112052734.1517345111-489665895.1504635623 and then proceed to click on the following application number (8663-A182-201800467 Application to disable on-line access to piracy sites) and it will open a zip file with all of the relevant documents filed with the application. Happy reading. Thank you again for your help.

S

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

Rancourt, Mélanie

From: Yull, Tandy
Sent: February-01-18 10:55 AM
To: Foster, Peter; Hutton, Scott; Montigny, Bernard
Cc: Love, James
Subject: Piracy - some additional background/thoughts

Three thoughts to share:
1 – Signal theft ("white hat") effort
2 – Piracy report included with FairPlay application
3 – Public Relations – "Anti-Piracy Champion"

1 – Signal theft ("white hat") effort

[redacted]

[redacted] By the way, Claude (Doucet) was also direct involved in the project.

2 – Piracy report included with FairPlay application

[redacted]

3 – Public Relations

[redacted]

[redacted]

Just a thought.

Tandy

o 819 997 4381
c 613-410-6805

Rancourt, Mélanie

From: Rancourt, Eric
Sent: January-31-18 11:52 AM
To: Hutton, Scott
Cc: Yull, Tandy; Valladao, Patricia
Subject: RE: The Wire Report | Media News - January 31, 2018

Hi Scott,

There is currently an issue with our access to The Wire Report. We've alerted the CRTC Library (which manages the CRTC's account) and after looking into it, the problem is with Wire Report's system. The Wire Report has provided us with a temporary login to use while they work to fix the problem.

[redacted]

Feel free to share this login information with other team members.

Eric

From: Hutton, Scott
Sent: January-31-18 11:42 AM
To: Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Cc: Yull, Tandy <tandy.yull@crtc.gc.ca>
Subject: FW: The Wire Report | Media News - January 31, 2018

Hi Eric, do we have access to this. Thx S

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

From: Yull, Tandy
Sent: 31 janvier 2018 9:58
To: Hutton, Scott <scott.hutton@crtc.gc.ca>; Montigny, Bernard <bernard.montigny@crtc.gc.ca>
Subject: FW: The Wire Report | Media News - January 31, 2018

[redacted] (I'm trying to get a copy of the article for us).

From: The Wire Report [mailto:circulation=hilltimes.com@mail22.suw15.mcsv.net] **On Behalf Of** The Wire Report
Sent: January-30-18 10:01 PM

To: Yull, Tandy <tandy.yull@crtc.gc.ca>
Subject: The Wire Report | Media News - January 31, 2018

Gov't points to open internet for 'legal content' in FairPlay response

Innovation Minister Navdeep Bains has released a statement on a call by a coalition of broadcasters, telecoms and creative groups to begin blocking websites hosting pirated content, in which he emphasized the efficacy of the current copyright protection system.

Rancourt, Mélanie

From: Hutton, Scott
Sent: January-31-18 11:29 AM
To: Seidl, Chris
Cc: Foster, Peter; Macri, John
Subject: RE: New Part 1 application: Asian Television Network International Limited (2018-0046-7)

[redacted] S

Scott Hutton
Directeur exécutif, Radiodiffusion / Executive Director, Broadcasting
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, ON K1A 0N2
Scott.Hutton@crtc.gc.ca
Téléphone | Telephone 819-997-4573
Télécopieur | Facsimile 819-994-0218
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

From: Seidl, Chris
Sent: 31 janvier 2018 9:01
To: Hutton, Scott <scott.hutton@crtc.gc.ca>
Cc: Foster, Peter <peter.foster@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>
Subject: FW: New Part 1 application: Asian Television Network International Limited (2018-0046-7)

Hi Scott,

My plan is to assign this to John's team, staff still to be determined. I would assume we would need someone from your content side to assess the impact of piracy on the content market. If you agree, can you provide a name to help on this file.

Thanks

Chris

From: Lemaire, France
Sent: January-31-18 7:29 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>
Cc: Processus-Process <processus-process@crtc.gc.ca>; *Telecom - Directors <*Telecom-Directors@crtc.gc.ca>; *Telecom - Reports <_TelecomReports@crtc.gc.ca>
Subject: New Part 1 application: Asian Television Network International Limited (2018-0046-7)

NOUVELLE DEMANDE DE LA PARTIE 1/
NEW PART 1 APPLICATION

8663-A182-201800467

Asian Television Network International Limited:
Application to disable on-line access to piracy sites

Pourriez-vous me donner le nom de la personne qui s'occupera de la demande ci-jointe? Pourriez-vous également me faire savoir à quelle RPC ou RCT la demande mentionnée ci-dessus sera présentée?

S'il n'y a pas de commentaire concernant cette demande, la date de fermeture du dossier ainsi que l'objectif de rendement sera :

Date de fermeture : 1er mars 2018
Objectif de rendement : 3 juillet 2018

S'il y a des commentaires concernant cette demande, la date de fermeture du dossier ainsi que l'objectif de rendement sera :
Date de fermeture : 12 mars 2018
Objectif de rendement : 12 juillet 2018

Could you please let me know who will be assigned to the attached application? Could you also let me know for which FCM or TCM the above-noted application will be scheduled?

If no comments are received on this file, the close of record date and service objective date would be:
Close of record: 1 March 2018
Service objective: 3 July 2018

If there are comments on this file, the close of record date and Service objective date would be:
Close of record: 12 March 2018
Service objective: 12 July 2018

Thanks / Merci!

France Lemaire
Coordonnatrice, planification et publications, Décisions | Coordinator, Decisions, Planning and Publications
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
1, Promenade du Portage, Les Terrasses de la Chaudière, Gatineau (QC) J8X 4B1
Gouvernement du Canada | Government of Canada
france.lemaire@crtc.gc.ca | crtc.gc.ca
☎ 819-997-4682 / ☎ Télécopieur|Facsimile : 819-994-0218

Misellati, Enas

From: Lehoux, Véronique
Sent: February-06-18 12:51 PM
To: Burke, Joe
Cc: Mukhedkar, Soniya
Subject: RE: FOR APPROVAL - US - Piracy: Stop Online Piracy Act (SOPA).

Approved. Please inform Amy that legal has ne reviewed so that she can determine if necessary.

thanks!

From: Burke, Joe
Sent: February-06-18 10:47 AM
To: Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>
Cc: Mukhedkar, Soniya <soniya.mukhedkar@crtc.gc.ca>
Subject: FOR APPROVAL - US - Piracy: Stop Online Piracy Act (SOPA).

Hi Véro,

As requested by Amy for the Chair, see below for a brief summary of the *Stop Online Piracy Act* (SOPA). Soniya has already reviewed this email – upon your approval, I will forward it back to Amy.

- The *Stop Online Piracy Act* (SOPA) of 2011, was a bill introduced in the US House of Representatives on 26 October 2011, by US Representative Lamar Smith (R-TX). Although the bill initially had bipartisan support from 31 co-sponsors, it was not sent to vote in Congress and **ultimately failed** due to a lack of consensus from legislators following widespread protests from tech industry giants, who rallied concerned citizens to speak out against the bill.

- Among other things, the bill aimed to crack down on copyright infringement by restricting access to sites that host or facilitate the trading of pirated content. SOPA's main targets were "rogue" overseas sites like torrent hub The Pirate Bay, which are a trove for illegal downloads, and others who distribute copyrighted works through streaming. Since the servers for many potentially offending sites are physically located in jurisdictions outside the United States, SOPA's goal was to cut off pirate sites' oxygen by requiring U.S. payment facilities, search engines, advertising networks and other providers to withhold their services.

- If passed, SOPA would have required every payment or advertising network operator to set up a process through which outside parties could notify the company that one of its customers is an "Internet site dedicated to the theft of US. Property", and once a network received a notification, it would have been required to cut off services to the target site within five days.

- When the bill was sent to the House Judiciary Committee for markup, following consultations with industry groups, the bill's sponsor (Rep. Smith) announced a plan to soften the bill by removing a provision that would have required Internet service providers to block access to certain foreign websites. While this proposed amendment was welcomed by most parties, the bill did not move forward as there still not enough support for the bill to be voted on by Congress.

- Related legislation, the *Protect IP Act* (PIPA) of 2011, was introduced in the Senate on 12 May 2011, by Senator Patrick Leahy (D-VT). PIPA had a stated goal of giving the US government and copyright holders additional tools to curb access to "rogue websites dedicated to the sale of infringing or counterfeit goods", especially those registered outside the U.S. PIPA also failed for the same reasons as SOPA.

- **Supporters:**
  - SOPA had broad support from organizations that rely on copyright, including the **Motion Picture Association of America**, the **Recording Industry Association of America**, Entertainment Software Association, **Viacom**, and various other companies and unions in the cable, movie, and music industries.

- **Opponents:**
  - Opponents of the bill, including **CNET** and the **Consumer Electronics Association**, noted that the bill's supporters and legislative decision-makers lacked necessary technical knowledge relating to Domain Name System Security Extensions (DNSSEC), and did not understand the potential damage that SOPA would cause to Internet security.
  - Other opponents included **eBay**, **Google**, **Yahoo** and **Facebook**, who said SOPA would stifle innovation and censor free speech.
  - The White House opposed the bill, as written, stating that "while we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet". Championing the principles of Net Neutrality, the White house further stated that "any effort to combat online piracy must guard against the risk of online censorship of lawful activity and must not inhibit innovation by our dynamic businesses large and small". President Obama's advisers said "the administration opposed a controversial provision that would require Internet service providers to block infringing websites through a process known as Domain Name System filtering".

- **Protests:**
  - On 18 January 2012, as part of an online protest, site blackouts were organized by tech companies Wikipedia and Reddit, whose sites went 'dark' for 24 hours and 8 hours, respectively, to draw attention to the cause. Demonstrators also took to the streets of major cities across the US, and Google gathered 7 million signatures on a petition linked from its homepage (see timeline of SOPA strike).

From: Mukhedkar, Soniya
Sent: February-05-2018 10:43 AM
To: Burke, Joe <Joe.Burke@crtc.gc.ca>
Subject: FW: US - Piracy

Thank you!

From: Hanley, Amy
Sent: February-05-2018 10:06 AM
To: Mukhedkar, Soniya <soniya.mukhedkar@crtc.gc.ca>
Subject: US - Piracy

Hi Soniya,

The Chair is looking for some information on a US proposal called the Stop Online Piracy Act. I believe it was a legislative initiative that was never pursued. An email with some bullet points would suffice. Deadline would be in the next few days, so not urgent.

If you are not the right person to answer, please let me know!

Thanks,
Amy

Amy Hanley
Chef de Cabinet, Bureau du président |
Chief of Staff, Chairman's Office
Conseil de la radiodiffusion et des télécommunications canadiennes |
Canadian Radio-television and Telecommunications Commission
1, prom. du Portage, Édifice central, Les Terrasses de la Chaudière, Gatineau QC J8X 4B1
amy.hanley@crtc.gc.ca
Téléphone | Telephone 819.953.7912
Cellulaire | Mobile 819.994.0195
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca
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Misellati, Enas

From: Lehoux, Véronique
Sent: February-02-18 9:48 AM
To: Millington, Stephen
Subject: tu as les notes en matière de Piracy

Pourrais-tu me revenir dès que tu peux? Elles ont été signées par Rachelle.

Merci!

Véronique Lehoux LL.L, LL.M
Directrice générale, Politique stratégique et affaires internationales | Director General, Strategic Policy and International Affairs
Secteur de la consommation et politique stratégique | Consumer Affairs and Strategic Policy
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
1, promenade du Portage, Les Terrasses de la Chaudière, Gatineau (QC) J8X 4B1
veronique.lehoux@crtc.gc.ca
Téléphone | Telephone 8-819-934-1266
Blackberry | 8-613-298-1615
Télécopieur | Facsimile 819.953.8908
Gouvernement du Canada | Government of Canada
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Aimez-nous sur Facebook

Moser, Noah

From: Lehoux, Véronique
Sent: July-26-17 4:45 PM
To: Shortliffe, Scott; Tousignant, Philippe; Pye, Daniel; Kachi, Nanao; Moser, Noah
Subject: RE: Presentation at the September FCM

I agree. Very interesting for staff and Commissioners.

From: Shortliffe, Scott
Sent: July-26-17 1:13 PM
To: Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>; Tousignant, Philippe <Philippe.Tousignant@crtc.gc.ca>; Pye, Daniel <daniel.pye@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Moser, Noah <noah.moser@crtc.gc.ca>
Subject: FW: Presentation at the September FCM
Importance: High

Fyi, and views?

Phillipe, this would take care of the "info session" for September.

Thanks!

From: Lelièvre, Cédrick
Sent: July-26-17 11:22 AM
To: May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>; Foster, Peter <peter.foster@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Subject: FW: Presentation at the September FCM
Importance: High

Good morning,

Below is an email from Commissioner MacDonald regarding the possibility of having a presentation from a joint-group of industry players regarding the industry wide plan to fight Content piracy and protect the rights of the creators.

They would like to present to Commissioners and Commission staff at the next FCM, in September.

We are wondering if this is a topic/information that would be relevant currently and would be of interest to Commission staff?

Also, perhaps some of your staff have already been approached with a similar offer. Please do not hesitate to let us know if this is already in the hopper.

Once I get your feedback we will contact M. Malcolmson to provide feedback.

Thanks,

Cédrick

From: MacDonald, Christopher
Sent: July-11-2017 10:46 AM

To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>
Cc: LaRocque, Judith <Judith.LaRocque@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>
Subject: Presentation at the September FCM

Hello Cédrick,

[redacted]

Either way, once a decision is made, can you please circle back with me to let me know if this request is approved or denied?

Thanks,
Chris

Christopher MacDonald
Commissioner | Atlantic Canada & Nunavut
Conseiller | Atlantique Canada et Nunavut

Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
99 Wyse Road, Suite 1410, Dartmouth, NS B3A 4S5
Christopher.MacDonald@crtc.gc.ca
Téléphone | Telephone 902-426-2644 - Télécopieur | Facsimile 902-426-2721
Gouvernement du Canada | Gouvernment of Canada

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Moser, Noah

From: Foster, Peter
Sent: July-26-17 2:38 PM
To: Lelièvre, Cédrick
Cc: Lehoux, Véronique; Tousignant, Philippe; Pye, Daniel; Moser, Noah; Kachi, Nanao; Shortliffe, Scott; May-Cuconato, Danielle; Hutton, Scott
Subject: RE: Presentation at the September FCM

Hello Cédrick –

Peter

From: Shortliffe, Scott
Sent: July-26-17 2:11 PM
To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>; Foster, Peter <peter.foster@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Cc: Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>; Tousignant, Philippe <Philippe.Tousignant@crtc.gc.ca>; Pye, Daniel <daniel.pye@crtc.gc.ca>; Moser, Noah <noah.moser@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>
Subject: RE: Presentation at the September FCM

Generally, we in CASP think this would be a great topic to present to the Commissioners. We've had this presentation before, and it is very useful.

By the way, Phillipe is working on a plan for presentations pre-FCM on a forward-going basis, which we'll bring forward to the Commission to see what they think.

Could we discuss at the next DR meeting on Monday?

Thanks!

Scott Shortliffe

From: Lelièvre, Cédrick
Sent: July-26-17 11:22 AM
To: May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>; Foster, Peter <peter.foster@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Subject: FW: Presentation at the September FCM
Importance: High

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Also, perhaps some of your staff have already been approached with a similar offer. Please do not hesitate to let us know if this is already in the hopper.

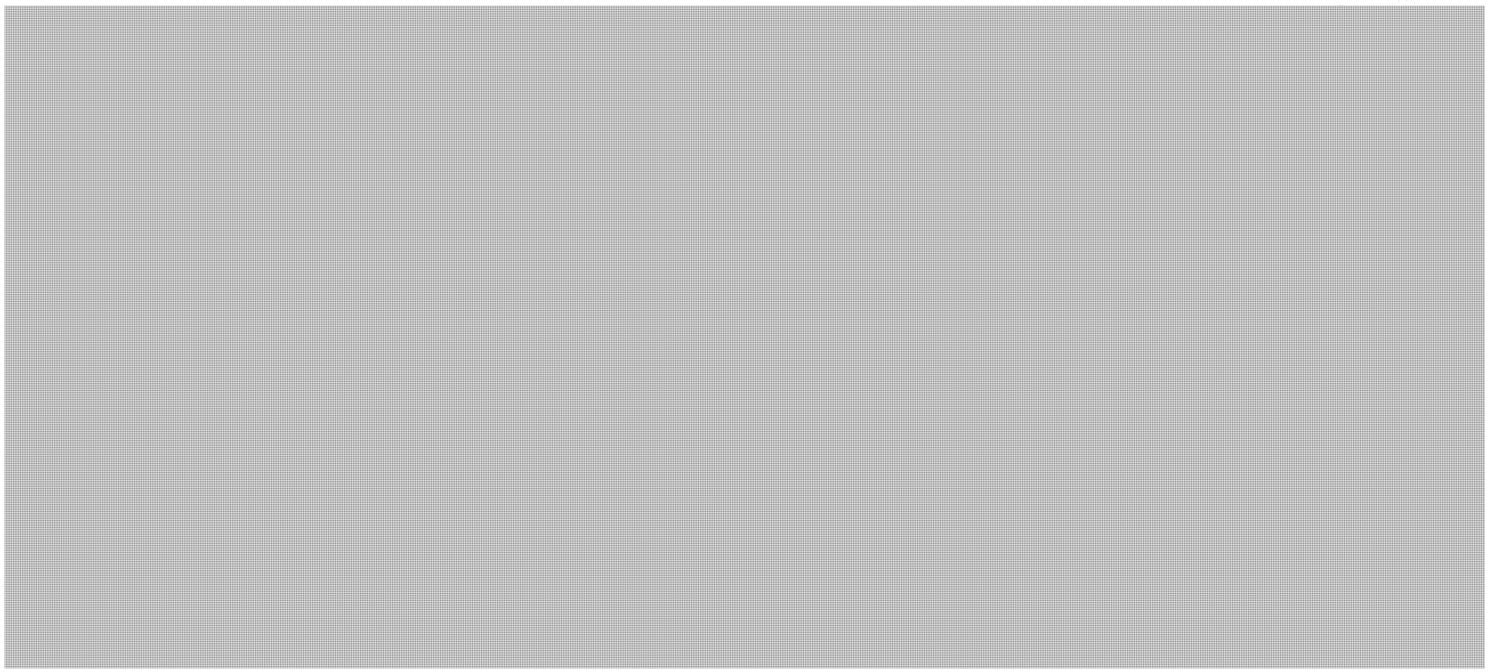
Once I get your feedback we will contact M. Malcolmson to provide feedback.

Thanks,

Cédrick

From: MacDonald, Christopher
Sent: July-11-2017 10:46 AM
To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>
Cc: LaRocque, Judith <Judith.LaRocque@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>
Subject: Presentation at the September FCM

Hello Cédrick,



Either way, once a decision is made, can you please circle back with me to let me know if this request is approved or denied?

Thanks,
Chris

Christopher MacDonald
Commissioner | Atlantic Canada & Nunavut
Conseiller | Atlantique Canada et Nunavut

Canadian Radio-television and Telecommunications Commission |
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99 Wyse Road, Suite 1410, Dartmouth, NS B3A 4S5
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Moser, Noah

From: Pye, Daniel
Sent: July-26-17 1:44 PM
To: Shortliffe, Scott; Lehoux, Véronique; Tousignant, Philippe; Kachi, Nanao; Moser, Noah
Subject: RE: Presentation at the September FCM

[redacted]

From: Shortliffe, Scott
Sent: July-26-17 1:13 PM
To: Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>; Tousignant, Philippe <Philippe.Tousignant@crtc.gc.ca>; Pye, Daniel <daniel.pye@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Moser, Noah <noah.moser@crtc.gc.ca>
Subject: FW: Presentation at the September FCM
Importance: High

Fyi, and views?

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Thanks!

From: Lelièvre, Cédrick
Sent: July-26-17 11:22 AM
To: May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>; Foster, Peter <peter.foster@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>
Subject: FW: Presentation at the September FCM
Importance: High

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They would like to present to Commissioners and Commission staff at the next FCM, in September.

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Also, perhaps some of your staff have already been approached with a similar offer. Please do not hesitate to let us know if this is already in the hopper.

Once I get your feedback we will contact M. Malcolmson to provide feedback.

Thanks,

s.19(1)
s.21(1)(b)

Cédrick

From: MacDonald, Christopher
Sent: July-11-2017 10:46 AM
To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>
Cc: LaRocque, Judith <Judith.LaRocque@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>
Subject: Presentation at the September FCM

Hello Cédrick,

[redacted]

Either way, once a decision is made, can you please circle back with me to let me know if this request is approved or denied?

Thanks,
Chris

Christopher MacDonald
Commissioner | Atlantic Canada & Nunavut
Conseiller | Atlantique Canada et Nunavut

Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
99 Wyse Road, Suite 1410, Dartmouth, NS B3A 4S5
Christopher.MacDonald@crtc.gc.ca
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Moser, Noah

From: Tousignant, Philippe
Sent: July-26-17 1:35 PM
To: Moser, Noah; Shortliffe, Scott; Lehoux, Véronique; Pye, Daniel; Kachi, Nanao
Subject: RE: Presentation at the September FCM

I salute Commissioner's MacDonald initiative and leadership.

I agree with Noah wrt the benefit.

[redacted]

I also have other concerns if you wish to discuss. I would include Legal & Comms in the consult: May want to discuss at DR meeting.

I am, however, happy to oblige.

Cheers,

Philippe

From: Moser, Noah
Sent: July-26-2017 1:18 PM
To: Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>; Tousignant, Philippe <Philippe.Tousignant@crtc.gc.ca>; Pye, Daniel <daniel.pye@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>
Subject: Re: Presentation at the September FCM

I agree. [redacted] I'm certain the commissioners would benefit.

N.

From: Shortliffe, Scott
Sent: Wednesday, July 26, 2017 1:13 PM
To: Lehoux, Véronique; Tousignant, Philippe; Pye, Daniel; Kachi, Nanao; Moser, Noah
Subject: FW: Presentation at the September FCM

Fyi, and views?

Phillipe, this would take care of the "info session" for September.

Thanks!

From: Lelièvre, Cédrick
Sent: July-26-17 11:22 AM
To: May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>; Foster, Peter <peter.foster@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>

Subject: FW: Presentation at the September FCM
Importance: High

Good morning,

Below is an email from Commissioner MacDonald regarding the possibility of having a presentation from a joint-group of industry players regarding the industry wide plan to fight Content piracy and protect the rights of the creators.

They would like to present to Commissioners and Commission staff at the next FCM, in September.

We are wondering if this is a topic/information that would be relevant currently and would be of interest to Commission staff?

Also, perhaps some of your staff have already been approached with a similar offer. Please do not hesitate to let us know if this is already in the hopper.

Once I get your feedback we will contact M. Malcolmson to provide feedback.

Thanks,

Cédrick

From: MacDonald, Christopher
Sent: July-11-2017 10:46 AM
To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>
Cc: LaRocque, Judith <Judith.LaRocque@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>
Subject: Presentation at the September FCM

Hello Cédrick,

Either way, once a decision is made, can you please circle back with me to let me know if this request is approved or denied?

Thanks,
Chris

Christopher MacDonald
Commissioner | Atlantic Canada & Nunavut
Conseiller | Atlantique Canada et Nunavut

Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
99 Wyse Road, Suite 1410, Dartmouth, NS B3A 4S5
Christopher.MacDonald@crtc.gc.ca
Téléphone | Telephone 902-426-2644 - Télécopieur | Facsimile 902-426-2721
Gouvernement du Canada | Gouvernment of Canada

Learn more about your CRTC https://youtu.be/PweJmI9ZHFk

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Mukhedkar, Soniya

From: Burke, Joe
Sent: February-12-2018 9:39 AM
To: Morin, Marie-Claude
Cc: Burke, Joe
Subject: Combating Content Piracy in the United Kingdom (UK)

Hi Marie-Claude,

As requested last week, I've prepared a few points below to answer the Chair's question of "***who in the UK is responsible for their regime to combat content piracy***".

I should note, that as part of the Chair's visit to the UK in March, he will be meeting with **Mr. Matthew Gould, Director General for Digital and Media at the Department for Digital, Culture, Media and Sport (DCMS)**. DCMS is most comparable to Canadian Heritage, and is the sponsoring department for the anti-piracy initiative "Creative Content UK", which is outlined below. Mr. Gould would be well-positioned to speak more about this topic, and we would be pleased to ensure it is on the agenda for discussion.

Quick Answer – the regime to combat content piracy is a collective effort in the UK. The Intellectual Property Office is the government entity with responsibility over the relevant legislation (Acts), however day-to-day management of copyright is conducted through a number of bodies. Government and industry have joined forces to deter, detect and enforce copyright infringement through a variety of initiatives. Ultimately, rights holders may seek action from the High Court to have piracy sites and servers blocked.

Copyright Oversight:

- There is no centralised copyright agency but there are a large number of licensing bodies that collect royalties or license a range of rights for various industries and categories of rights holders (these include the Phonographic Performance Limited (PPL), the Performing Rights Society (PRS), the Newspaper Licensing Agency and the Copyright Licensing Agency).
- A digital copyright exchange called the Copyright Hub has also recently been set up, which enables copyright owners to offer their rights for licence. In addition, the Copyright Tribunal has powers to resolve certain commercial licensing disputes.
- Rights holders have the ability to take legal action against the originator and/or ISPs to block sites that stream content piracy. Legal actions are fairly commonplace in the UK, for example, disputes over copyright at the UK High Court were dominated by music and soccer rights (the top 5 copyright claimants filed 210 claims in the High Court in the 12 months ended March 2017). In March 2017, the Premier League (soccer) engaged with police forces in a major fight against illegal streaming services (particularly through the use of Android boxes), which resulted in raids of premises and fines of up to £250,000.
- The Intellectual Property Office (IPO) is the official UK government body responsible for intellectual property (IP) rights including patents, designs, trademarks and copyright. Key responsibilities of the IPO include:
    - IP policy
    - educating businesses and consumers about IP rights and responsibilities
    - supporting IP enforcement

- granting UK patents, trademarks and design rights

- The IPO regulates licensing bodies and is responsible for monitoring and enforcing compliance with the EU's Collective Management of Copyright (EU Directive) Regulations 2016.
- In July 2017, the IPO published an independent report Online Copyright Infringement Tracker, which outlines, among other things, the levels of infringement, demographic profile of infringers, volumes of consumption, services used for consuming content online, reasons for infringing and reasons that would deter infringement.
- The government, through the Department for Digital, Culture, Media and Sport (DCMS), is supporting efforts to educate consumers on the benefits of copyright, curtail piracy, and promote the use of legal digital content. Notably, it is investing £3.5 million over three years in a program jointly **run by the creative industry and the ISPs**.
    - Representatives from the UK's creative industries and major internet service providers (ISPs) have come together with the support of the to launch Creative Content UK. The Creative Content UK programme consists of two elements, a major multi-media public education campaign and a programme of email alerts sent by ISPs to residential broadband subscribers when their account is used to infringe copyright. The education campaign aims to inform customers about the wide range of legal sources of content available to them and promote awareness of the value and benefits of creative content and the copyright which underpins it. The campaign involves different parts of the creative industry, including music, television, film, publishing, photography, sport and games.
    - Creative Content UK is also planning a piracy alert program, where major ISPs would notify offenders that their illegal activity has been noticed and the measures that will be taken if they continue.

Applicable Legislation:

- Section 20 of *the Copyright, Designs and Patents Act* 1988 (CDPA), establishes that "Making copyright works available over the internet will infringe UK law which provides for a communication right for all categories of copyright-protected work which includes the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them (sometimes referred to as the on-demand right (section 20, CDPA))".
- In its *Digital Economy Act* of 2010, the UK government had introduced provisions to terminate the internet service of repeat copyright infringers. The provision was quickly repealed following opposition from ISPs who objected to policing users, and internet-rights groups who were concerned that access to the internet should be a basic human right.
- In its updated *Digital Economy Act* of 2017, the government instead raised the gravity of digital piracy to the same level as offline intellectual property crimes. As a result, offenders could face up to 10 years imprisonment – it is not expected that this provision would be enforced against users who 'merely' watch pirated content; rather, it is aimed towards those who make pirated content available to others, and more importantly, those who profit from piracy.

Application of UK Laws to deal with Foreign-owned or Foreign-operated websites that infringe copyright:

- UK courts have generally taken the view that foreign-owned or foreign-operated websites that are at least partially targeted to the UK can infringe UK copyright laws, either directly or as a joint tortfeasor. Enforcement of UK laws against foreign-owned and foreign-operated websites can be challenging but the UK courts do have powers to grant website blocking orders that require internet service providers to take steps to block access to the website through its internet access services. To obtain a website blocking order, the rights holder will need to show that the users and/or the operators of the websites will infringe. The High Court will consider various factors before relief will be granted such as whether an injunction would (i) be necessary, (ii) be effective, (iii) be dissuasive, (iv) be not unnecessarily complicated or costly, (v) avoid barriers to legitimate trade, (vi) be fair and equitable and strike a 'fair balance' between the applicable fundamental rights, and (vii) be proportionate.

EU and BREXIT Considerations:

- On 8 February 2018, the UK's Intellectual Property Office (IPO) issued an update to its bulletin IP and BREXIT: The Facts. With respect to copyright, the IPO has stated that "While the UK remains in the EU, our copyright laws will continue to comply with the EU copyright directives, and we will continue to participate in EUnegotiations. The continued effect of EU Directives and Regulations following our exit from the EU will depend on the terms of our future relationship".

Joe Burke
Analyste principal, Politique stratégique et affaires internationales | Senior Analyst, Strategic Policy and International Affairs
Consommation et politique stratégique | Consumer Affairs and Strategic Policy
Conseil de la Radiodiffusion et des Télécommunications Canadiennes | Canadian Radio-television and Telecommunications Commission
Ottawa, Ontario K1A 0N2

courriel | email: joe.burke@crtc.gc.ca
téléphone | telephone: (819)953-5192
télécopieur | facsimile: (819)994-0218
Gouvernement du Canada | Government of Canada
http://www.crtc.gc.ca
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FACT SHEET
PIRACY: AN INTERNATIONAL PERSPECTIVE

Issue

- To provide an international perspective on the issue of piracy.

Background

- Piracy is defined as the unauthorized use of a copyrighted work by someone else. Piracy is simply another way to describe copyright infringement. The most notable and recent examples of piracy involve the unauthorised reproduction and/or communication of visual or musical works over the Internet.
- Piracy is a major issue encountered by many industries and is present in most countries around the world. Indeed, the advent of the internet, which allows people to communicate like never before, has made it easier than ever to share and access materials such as music, movies, books, and games. Unfortunately, this means that getting access to pirated content has also never been this easy; in fact, pirated content can easily be found through simple online searches, whether via peer-to-peer, torrents, or streaming websites.
    - Even Facebook's platform is being used to propagate pirated content, with reports that pirates make use of Facebook Live to illegally stream live sports airing on pay-per-view, such as boxing matches and soccer games. Despite efforts from Facebook and broadcasters to block streams, pirates are able to generate illegal feeds faster than any effort to shut these feeds down.
- It is difficult to quantify the level of piracy due to its illegal nature. Nonetheless, Irdeto, a global security company headquartered in the Netherlands, ran the largest consumer piracy survey in early 2017 by polling more than 25,000 adults on their viewing habits[1]. The *Irdeto Global Consumer Piracy Survey*[2] highlighted the following findings:
    - 70% of consumers in Latin American countries and 61% in the Asia-Pacific region admitted to watching pirated content, against 45% in Europe and 32% in the US.
    - Worldwide, 70% of consumers know that it is illegal to produce or share pirated content.
    - 48% of those who watch pirated content indicated that being informed of the harm piracy causes to the creative industries would make them stop or watch less pirated content. However, 39% said that knowing about these damages would not change their habit.
    - While laptops and computers remain the preferred method to watch pirated content (54% globally), the trend towards the use of streaming devices[3] appears to be picking up, especially among the youngest generation (18-24 years old). Notably, the highest percentage of consumers (of all ages) streaming pirated content was in India (20%). Interestingly, the Android TV set-top-box, which can run third-party streaming software such as Kodi, was only listed as the top streaming device for pirated content in the UK (11%), with most users aged between 35-44 and 55+.

[1] The survey did not include consumers from Canada.

[2] https://resources.irdeto.com/irdeto-global-consumer-piracy-survey

[3] A streaming device is different than a computer in that it connects directly to the television to allow the streaming of video or music services from the internet. The two most popular devices are AppleTV and RokuPlayer.

Prepared by: Joëlle Bernier, CASP, 819-994-0551 (20 December 2017)

DM# 3033926

Considerations

- With piracy being such a widespread problem globally, many countries are attempting to address the issue in different ways.

Mexico

- Mexico is often identified as the country with the most producers and consumers of pirated goods (across all industries). There are serious concerns related to the widespread availability of pirated and counterfeit goods sold at popular markets.
- Between 2013-2016, the government made progress on tackling the issue through the implementation of the Madrid Protocol trademark treaty[4], the removal of proof of profit for criminal liability, and amendments to copyright legislation.
- However, efforts have been mostly targeted at physical goods, leaving digital piracy largely unchecked. And while some agencies are attempting to address internet piracy, the lack of resources does not allow for effective enforcement.
- In June 2017, a court ruling banned streaming device Roku from being sold in Mexico following a suit by Televisa, who alleged the device was being used by hackers to provide access to pirated channels. Roku has been unsuccessful in overturning the ruling through numerous appeals.

Australia

- Australia is facing increasing internal and international pressure to suppress piracy amid concerns that pirated content is being accessed on a mass scale throughout the country.
    - For example, Australia topped the list for most downloads of the sixth season of Game of Thrones, accounting for 12.5% of global illegal downloads.
- The government attempted to respond to the issue in February 2015 through a "three-strike" policy that would have required Internet Service Providers (ISPs) to identify repeat offenders and contact them three times before launching legal action against them. However, as the various stakeholders involved could not reach an agreement on their respective enforcement responsibilities, the draft policy was abolished before coming into force.
- Also in 2015, the Australian parliament amended the Copyright Act to allow rights holders to force ISPs to block piracy websites. As a result, in March 2017, a consortium of film giants led by Village Roadshow obtained a Federal Court ruling that ordered ISPs to block access to some 50 pirate websites within three weeks. Unfortunately, by the time the ruling was announced, some sites had already shutdown and relocated under different domains. Nonetheless, the Australian creative industry is committed to continuing the fight against piracy.
- In addition, Creative Content Australia[5] launched its biggest anti-piracy campaign in August 2017. Called "The Price of Piracy", the campaign seeks to educate consumers about the risks of using pirate websites to download or stream content, citing the propagation of malware and ransomware that can steal users' personal data.

[4] The Madrid Protocol trademark treaty provides for an international trademark management system whereby trademark holders can register once to apply for protection in 116 countries.

[5] Creative Content Australia is a not-for-profit organisation with broad membership from the creative industries. It works to raise awareness about the value of screen content, the role of copyright, and the impact of piracy.

France

- An estimated 13 million people – equivalent to 27% of all French internet users – accessed pirated content in 2016, resulting in an estimated €1.35 billion in lost tax revenue and earnings. As such, the French government has been attempting to impose tough anti-piracy measures for years, with mitigated success.
- In 2010, it introduced Hadopi, a system of graduated actions based on a "three strikes" policy whereby a first offence would be met with a warning, a second offence would receive a fine of up to €1,500, and a third offence would result in temporary internet service disconnection. However, Hadopi lost its enforcement power when the subsequent government repealed the internet service disconnection provision in 2013.
    - This sanction was viewed as disproportionate to the offence, even though the 15-day internet service disconnection of a user was only ordered once by a judge.
    - In general, Hadopi has been criticized for being slow, ineffective, and not having enough impact. In addition, it can only act against peer-to-peer torrents, meaning it is ineffective against pirate websites.
- In November 2016, the French police took down pirate website Zone Téléchargement, which enabled users to illegally download music, movies, TV shows, and video games. The site accounted for 3.7 million downloads per month, resulting in damages to the industry estimated at €75 million.

United Kingdom (UK)

- In its *Digital Economy Act* of 2010, the UK government had introduced provisions to terminate the internet service of repeat copyright infringers. The provision was quickly repealed following opposition from ISPs who objected to policing users, and internet-rights groups who were concerned that access to the internet should be a basic human right.
- In its updated Digital Economy Act of 2017, the government instead raised the gravity of digital piracy to the same level as offline intellectual property crimes. As a result, offenders could face up to 10 years imprisonment – it is not expected that this provision would be enforced against users who 'merely' watch pirated content; rather, it is aimed towards those who make pirated content available to others, and more importantly, those who profit from piracy.
- In parallel to its legislation, the government is also supporting efforts to educate consumers on the benefits of copyright, curtail piracy, and promote the use of legal digital content. Notably, it is investing £3.5 million over three years in a program jointly run by the creative industry and the ISPs.
    - The program, called "Creative Content UK", operates on two fronts. First, it reaches out directly to those whose internet connection has been used to illegally share content to inform them of legal alternatives. Second, it develops educational awareness campaigns on the value of copyright, encouraging the public to use #genuine to promote the initiative.
    - Creative Content UK is also planning a piracy alert program, where major ISPs would notify offenders that their illegal activity has been noticed and the measures that will be taken if they continue.

United States (US)

- The US Copyright Act was updated in 1998 with the *Digital Millennium Copyright Act of 1998* (DMCA) in order to account for the online dissemination of copyrighted works.
- The DMCA provides for a "notice and takedown" regime. This regime requires online service providers (OSPs) - such as ISPs and network service providers such as YouTube or Google - to take down infringing content once they receive a notice from rights holders or reporting agencies. The notice must satisfy a number of requirements under the DMCA in order to constitute a proper notice.

- DMCA also provides for certain limitations of liabilities, known as the "safe harbour" provisions. For example, safe harbour provisions protect OSPs from liability for the activities of their subscribers provided that the OSPs :
    - Abide by their "notice and takedown" obligations,
    - Have no knowledge of the infringing activity,
    - Have proper copyright policies in place vis-à-vis their subscribers, and
    - Have a designated person/entity to deal with copyright complaints.
- Moreover, OSPs will not be liable to their subscribers for the erroneous removal of content when such content was removed in good faith as a result of having received a DMCA-compliant notice.
- If matters are pursued before the courts, the penalty for copyright infringement is between $750 and $30,000 per violation. This amount is paid to the copyright owner by the party who posted the copyright-infringing content, which could include the service provider or subscriber. If the party was neither aware nor had reason to suspect that there was copyright infringement, the court has discretion to reduce the penalty to $200 per incident. However, if the copyright infringement is willful, the maximum penalty increases to $150,000 per violation.
- The magnitude of the takedown requests is demonstrated by Google in its most recent Transparency Report, where the company reports receiving (cumulative since July 2011) approximately 3.2 billion URL takedown requests from 129,458 rights holders and 115,309 reporting agencies, as of February 1, 2018.

Next Steps

- On January 30, 2018, the Commission received a Part 1 application to disable online access to piracy sites from the Asian Television Network International Limited, on behalf of a Coalition (FairPlay Canada). FairPlay Canada is coalition of more than 25 stakeholders comprised of Canadian artists, content creators, unions, guilds, producers, performers, broadcasters, distributors and exhibitors.
- The application calls for the Commission to establish an Independent Piracy Review Agency (IPRA) through which the CRTC would require authorized ISPs to disable access to piracy sites.
- Staff is currently reviewing this application.

Information Request from Vice Chair Caroline Simard

Request:

- Details on the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing.
  - Timeline
  - Next steps for Canadian implementation
- Relevant activities in foreign jurisdictions with respect to taxation of digital services (e.g. "Netflix Tax")

1. OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing (MLI)

The OECD has published a brochure, outlining the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting – a timeline is included in the brochure.

On June 7, 2017, in Paris, Canadian officials signed the MLI. This is an opportunity for Canada and the other 67 signing countries to close gaps in existing international tax rules by implementing the recommendations of the OECD's Base Erosion and Profit Shifting (BEPS) Action Plan that require modifications to bilateral tax treaties. Nine other countries have indicated that they intend to sign the MLI in the near future. As expected, the U.S. has not signed the MLI and will not use it to modify their bilateral tax treaties.

The OECD's BEPS project aimed to help countries secure their tax base by adopting rules that ensure the tax burden on multinational businesses aligns with where the profit-generating economic activities take place.

The final reports of the BEPS project were issued by the OECD on October 5, 2015, including "Addressing the Tax Challenges of the Digital Economy, Action 1". The Action 1 report examined issues related to the effective collection of sales tax on cross-border digital supplies and services and recommended that where countries decide to institute a regime for taxing foreign suppliers of digital content, the regime should follow the principles of the OECD's international value-added tax/GST guidelines for these supplies.

Canadian Implementation

Canada has listed 75 of its 93 tax treaties as Covered Tax Agreements, which will be affected by the MLI if Canada and the relevant Covered Tax Agreement partner ratify the MLI under their respective domestic laws. A list of Canada's Covered Tax Agreements is available here. In some cases, Canada may continue to seek to amend tax treaties through bilateral negotiations, rather than through the MLI.[1] As the U.S. has indicated that they will not use the MLI, Canada would likely need to undertake separate negotiations where cross-border tax polies are concerned.

Canada's office of primary interest is the Department of Finance Canada, which issued a backgrounder on the MLI impact. Further details on Canada's next steps should be sought from subject matter experts, such as Department of Finance staff.

[1] https://www.osler.com/en/resources/regulations/2017/canada-signs-multilateral-tax-agreement

Information Request from Vice Chair Caroline Simard

2. Taxation and other actions relating to Digital Services in Foreign Jurisdictions

eBay Canada Limited[2]

- It was estimated in 2009 that $5 billion in revenues from the sharing economy was going undeclared in Canada.[3] Following a series of legal proceedings, the Canada Revenue Agency (CRA) obtained a court order to collect information from eBay International AG, on all of its sellers with a registered Canadian address who had sales exceeding $20,000 and at least 24 annual transactions, or those with sales exceeding $100,000, regardless of the number of transactions.[4]

- eBay announced, that on 1 July 2017, it would be changing the contracting party that Canadian businesses and residents use, from eBay International AG to eBay Canada Limited, a Canadian Corporation.[5] As a result, eBay Canada Limited, is subject to Canadian tax law and sales tax (GST/HST/QST) will be applied to all eBay fees. Taxes on goods sold remains an obligation of individual Canadian sellers to report income, pursuant to Canadian tax laws.

- eBay has also established country-dedicated contracting parties in the United States, European Union, United Kingdom, and India, whereas for the rest of the world, transactions are conducted through eBay International AG, based out of Switzerland.

- CRA's Regulation 105 – *Rendering Services in Canada*, states that every payer, including a non-resident payer, who makes a payment of fees, commissions, or other amounts paid or allocated to a non-resident person in respect of **services provided** in Canada must withhold and remit an amount in accordance with the requirements under the Canadian *Income Tax Act.*
    - It is important to note that the withholding tax only applies to the services performed and not the goods sold through the services (i.e. eBay transaction fees vs. sales revenue earned by the individual seller).

- A non-resident person who has a permanent establishment in Canada is treated as a resident of Canada, and has the same GST/HST obligations. CRA interpretation is provided in the following example:[6]
    - *You are a non-resident ISP in the business of hosting your customers' websites. The server on which the websites are hosted is permanently located in Canada. You own the server, but no employee is required at its the location.*
    - *You have a permanent establishment in Canada. Your server is tangible property and has a physical location in Canada. The functions carried out through the server are considered to be a significant and essential in an ISP's business.*

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[2] Note – Staff has not yet ascertained what compelled eBay to incorporate in Canada and follow Canadian tax laws, however there are indications that its website hosting servers and/or the payment processing services associated with eBay transactions may could have been the impetus.

[3] http://www.moneysense.ca/save/taxes/tax-tips-sharing-economy/

[4] https://pics.ebaystatic.com/aw/pics/ca/crainfo/CRAorder09.pdf

[5] http://pages.ebay.ca/seller-centre/news/seller-updates/2017summer/ebay-canada-limited.html

[6] https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/e-commerce/gst-hst-e-commerce.html

Information Request from Vice Chair Caroline Simard

European Union (EU)

- In May 2016, the European Commission issued a proposal to update its *Audiovisual Media Services Directive* (AVMSD), which regulates the provision of online content across EU member states. The overarching goal of the proposal is to find a balance between the industry's competitiveness and consumer protection. Notably, the proposal seeks to provide flexibility to BDUs when restrictions only applicable to traditional television are no longer justified, promote European films by requiring OTT services' libraries to include at least 20% European content, protect minors, and tackle hate speech more efficiently. At this time, the proposal is still being debated and negotiated within the European Parliament.

- Since 1 January 2015, EU member states must charge their respective VAT to digital sellers. As such, all telecommunications, broadcasting and electronic services are taxed in the country where the customer resides.

France

- In September 2017, the French legislature passed a bill to approve a 2% tax on the advertising revenues of online video platforms, including those that are paid for or free, such as YouTube (the namesake of the bill which has been commonly referred to as the "*YouTube tax*"). The bill, which is part of a budget law, still requires approval by the Senate and European Commission. The ultimate goal of the bill is to extend the tax more broadly to content distributors such as Google, Apple, Facebook and Amazon (GAFA), which have been distributing their content without being subject to investment quotas in local content, as French companies are.[7]

United States (U.S.)

- As tax law in the U.S. falls within each state's jurisdiction, digital products (movies, books and music) are not consistently subject to GST throughout the country. Some states (e.g., Arizona, Colorado, Hawaii) apply their regular GST on digital products, others (e.g., California, Florida, Georgia) exempt these products from GST, and a few apply a different tax rate (e.g., Connecticut applies a reduced rate of 1% to digital products considered as "intangible personal property", while Idaho only taxes "digital purchases" as opposed to "digital renting").

- At the municipal level, Chicago has levied a 9% "amusement tax" on streaming media services, including Netflix, Spotify, etc. Now Illinois is considering an additional tax in the state to increase its revenues.

- Other American jurisdictions are exploring or adopting similar taxes.

Australia

- The *Australian Tax on Digital Products and Other Services* came into effect on 1 July 2017. As such, all providers of digital services to Australians (whether domestic or foreign) must now charge GST for the streaming or downloading of movies, music, apps, games, and e-books.

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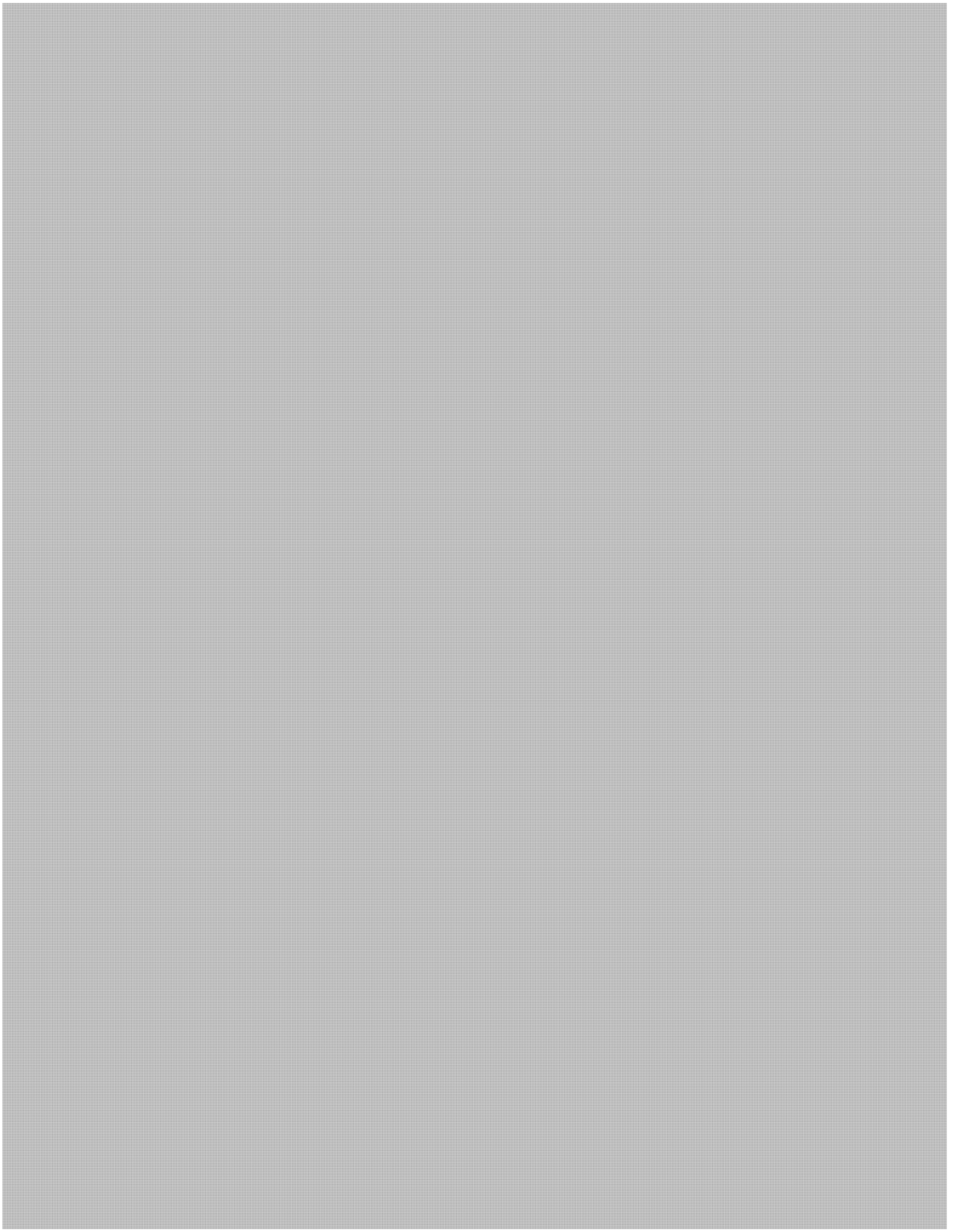
[7] http://variety.com/2016/digital/news/french-lawmakers-give-preliminary-approval-to-tax-on-youtubes-ad-revenue-1201889128/

Information Request from Vice Chair Caroline Simard



29 September 2017 – Joe Burke, Strategic Policy & International Affairs, 819-953-5192
DM: 2968382

Conseil de la radiodiffusion et des télécommunications canadiennes
Canadian Radio-television and Telecommunications Commission

Ottawa, Canada
K1A 0N2

Date:	DM5#: 3033194	Classification:	Protected A

FOR INFORMATION

COPYRIGHT AND REQUESTS TO BLOCK END-USER'S ACCESS TO CERTAIN WEBSITES

ISSUE / PURPOSE:

Most of Canada's communications companies are vertically integrated and own both Internet access services and media content. During NAFTA negotiations, Bell proposed that certain issues related to enforcing the *Copyright Act* be addressed via the *Telecommunications Act*.[1] A coalition of unions, guilds and associations representing Canadians that work in the film, television, and music industries, independent production and media companies, broadcasters, distributors, exhibitors, and Internet service providers (ISPs) filed an application on 29 January 2018 asking the Commission to require ISPs to disable access for their residential and mobile customers to certain specified piracy sites and to establish an Independent Piracy Review Agency.

BACKGROUND:

Previous requests to CRTC about blocking end-users' access to specific websites

- Quebec introduced a provincial law (Bill 74) to force internet providers to block users' access to online gambling sites not approved by the government.
- The Canadian Wireless Telecommunications Association — of which Bell is a member — is challenging the legislation in court. The legal challenge to Bill 74, originally to be heard in the Superior Court of Quebec last April, has been postponed until March 2018.[2]
- In Decision 2016-479, the Commission confirmed its preliminary view "that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP [internet traffic management practice]. Consequently, any such blocking is unlawful without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act."[3]

Net neutrality and undue preference

- The CRTC recently updated its net neutrality framework. Net neutrality is the concept that all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given. The CRTC's recent Differential pricing decision, together with the Internet traffic management practices framework, the Mobile TV decision, and the decision regarding Videotron's Unlimited Music program, effectively comprise the Commission's policy framework for net neutrality.
- These policies address subsection 27(2) of the Act, which states: "No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or

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[1] CBC: Radical and overreaching': Bell wants Canadians blocked from piracy websites - Company says a federal agency like the CRTC should create a blacklist of sites, Sophia Harris, Sept 27 2017.

[2] TVA : Québec incapable de bloquer les sites illégaux de jeux de hasard, 22 September 2017.

[3] Telecom Commission Letter Addressed to Distribution List and Attorneys General, 1 September 2016.

Prepared by: Celia Millay, CASP, 613-240-4698

NEXT STEPS:

- The application was posted as a Telecom Part 1 on the Commission website on 30 January 2018
  - The intervention period closes on 1 March 2018. As of 1 February 2018, over 1,500 interventions have been received.
  - The reply period closes on 12 March 2018.

Scott Shortliffe
Chief Consumer Officer and
Executive Director

☑ I have read the memorandum

☐ I would like an oral briefing

☑ No briefing required

Ian Scott
Chairperson and CEO

3 Feb 18
Date

Gauthier, Nancy

From: Gauthier, Nancy
Sent: March 5, 2018 2:39 PM
To: Gauthier, Nancy
Subject: FW: ILLEGAL DOWNLOADS

From: Desjardins, Patrick
Sent: April 27, 2016 11:35 AM
To: Gauthier, Nancy <nancy.gauthier@crtc.gc.ca>
Subject: ILLEGAL DOWNLOADS

in relations the copyright infringement.

Recently changes to the Copyright Modernization Act administered by the Canadian Intellectual Property Office of Innovation, Science and Economic Development Canada were made. Learn more in Office of Consumer Affairs "Notice and Notice Regime": http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html

Questions and concerns about the legislation may be directed to Innovation, Science and Economic Development Canada at 1-866-997-1936.

Maiorino, Paolo

From: Valladao, Patricia
Sent: January-29-18 2:50 PM
To: Carvalho, Sergio
Cc: Desaulniers, Marie-Ève; Legault, Céline; Paquette, Julie; Peterson, Kim; Tremblay, Céline; Valladao, Patricia; Zabchuk, Natasha
Subject: FW: FairPlay Canada

And more....

From: [redacted] [mailto: [redacted]@mobilesyrup.com]
Sent: January-29-18 2:46 PM
To: Valladao, Patricia <patricia.valladao@crtc.gc.ca>
Subject: FairPlay Canada

Hi Patricia,

[redacted]

https://www.theglobeandmail.com/report-on-business/anti-piracy-group-urges-crtc-to-create-website-blocking-system/article37766686/?cmpid=rss <https://www.theglobeandmail.com/report-on-business/anti-piracy-group-urges-crtc-to-create-website-blocking-system/article37766686/?cmpid=rss&click=sf_globe> &click=sf_globe

Best,

[redacted]

--

[redacted]

[redacted] MobileSyrup

Mobile: [redacted]

Office: 46 Spadina Ave, Toronto, ON

Carvalho, Sergio

From: Carvalho, Sergio
Sent: December-05-17 2:43 PM
To: Peterson, Kim
Cc: Tremblay, Céline
Subject: RE: Reddit: Bell Piracy Blocking

Salut Kim,

Je n'en ai pas parlé encore.

[redacted]

From: Peterson, Kim
Sent: December-05-17 2:40 PM
To: Carvalho, Sergio <Sergio.Carvalho@crtc.gc.ca>
Cc: Tremblay, Céline <Celine.Tremblay@crtc.gc.ca>
Subject: FW: Reddit: Bell Piracy Blocking

Sergio,

Est-ce que tu en as jaser avec Natasha et autres? Vois-tu qq chose sur les médias sociaux? Stp voir la réponse de Patricia ci-dessous. Un journaliste lui a posé une question dans la même veine. Juste s'assurer que l'on a tous le même message.

From: Valladao, Patricia
Sent: December-05-17 2:36 PM
To: Peterson, Kim <Kim.Peterson@crtc.gc.ca>
Subject: RE: Reddit: Bell Piracy Blocking

Hi Kim,

I had no comments on the issue.

[redacted]

From: Peterson, Kim
Sent: December-05-17 2:10 PM
To: Valladao, Patricia <patricia.valladao@crtc.gc.ca>
Subject: FW: Reddit: Bell Piracy Blocking

Hi Patricia,

Are you working with Natasha on this one? J'ai vu que tu avais un sujet similaire avec un média [redacted]

Kim

From: Zabchuk, Natasha
Sent: December-05-17 2:02 PM
To: *SQRT <*SQRT@crtc.gc.ca>
Subject: Reddit: Bell Piracy Blocking

Hey

We're getting questions on reddit about the upcoming Bell submission and [redacted]

[redacted]

https://www.reddit.com/r/canada/comments/7hq9t5/isps_and_movie_industry_prepare_canadian_pirate/
https://www.reddit.com/r/canada/comments/7hj1v2/inside_bells_push_to_end_net_neutrality_in_canada/
https://www.reddit.com/r/canada/comments/7hl3sv/net_neutrality_is_reportedly_under_fire_in_canada/

Natasha Zabchuk
Communications et relations externes | Communications and External Relations
Conseillère en projets Web | Web Project Advisor
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
1, promenade du Portage, Gatineau (QC) J8X 4B1 | 1 Promenade du Portage, Gatineau, QC J8X 4B1

Natasha.Zabchuk@crtc.gc.ca
Téléphone | Telephone **819-639-4863**
Télécopieur | Facsimile 819-997-4245
Gouvernement du Canada | Government of Canada
www.crtc.gc.ca

Martel, Sylvie

From: Shortliffe, Scott
Sent: February-08-18 12:35 PM
To: Seidl, Chris; Hulley-Craig, Crystal; Hutton, Scott; Macri, John; Kachi, Nanao; Craig, Michael; Roy, Jade; Bowles, Eric; Abbott, William
Cc: Millington, Stephen
Subject: RE: For your sign off - Procedural Options re FairPlay Canada's Piracy Blocking Application

[redacted]

Scott S.

From: Seidl, Chris
Sent: February-08-18 9:55 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>; Roy, Jade <jade.roy@crtc.gc.ca>; Bowles, Eric <eric.bowles@crtc.gc.ca>; Abbott, William <William.Abbott@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>
Subject: RE: For your sign off - Procedural Options re FairPlay Canada's Piracy Blocking Application

[redacted]

Happy to discuss.

Chris

From: Hulley-Craig, Crystal
Sent: February-07-18 5:03 PM
To: Hutton, Scott <scott.hutton@crtc.gc.ca>; Shortliffe, Scott <Scott.Shortliffe@crtc.gc.ca>; Seidl, Chris <chris.seidl@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Kachi, Nanao <Nanao.Kachi@crtc.gc.ca>; Craig, Michael <michael.craig@crtc.gc.ca>; Roy, Jade <jade.roy@crtc.gc.ca>; Bowles, Eric <eric.bowles@crtc.gc.ca>; Abbott, William <William.Abbott@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>
Subject: FW: For your sign off - Procedural Options re FairPlay Canada's Piracy Blocking Application

FYI. See response from Steve below.

Crystal Hulley-Craig
(819) 956.2095
crystal.hulley@crtc.gc.ca

-----Original Appointment-----
From: Millington, Stephen
Sent: February-07-18 4:56 PM
To: Hulley-Craig, Crystal
Subject: Accepted: For your sign off - Procedural Options re FairPlay Canada's Piracy Blocking Application
When: February-12-18 10:00 AM-10:30 AM (UTC-05:00) Eastern Time (US & Canada).
Where: +Room 708 Sauvé - Masse (occupancy 25/videoconference)

I am fine with meeting but I agree with the recommended approach so if everyone else agrees then we may not need the meeting

Pages 83 to / à 84

are withheld pursuant to section

sont retenues en vertu de l'article

21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Ly, Alexander

From: Hulley-Craig, Crystal
Sent: February-15-2018 3:56 PM
To: *Legal
Subject: Legal Opinion filed by FairPlay Canada in the Piracy Blocking File/l'avis juridique qui a été déposé par la coalition FrancJeu Canada avec leur demande concernant le désactivation des sites web de piratage
Attachments: DM#3055834 - APP - ATN - FairPlay Canada 2018-01-29 Appendix A.PDF

Bonjour,

Comme j'ai promis aujourd'hui à la réunion des avocates, veuillez trouver ci-jointe l'avis juridique déposé par la coalition FrancJeu Canada dans leur demande concernant le désactivation des sites web de piratage. Ça vaut la peine de le lire – ils ont fait des arguments sur une panoplie des enjeux, y incluant les pouvoirs du Conseils sous les articles 24, 36 et 72 de la loi de télécommunications, un conflit potentielle avec la loi sur le droit d'auteur, et la liberté d'expression. Bien qu'ils ont déposé leur demande en anglais et français, malheureusement, ils ont déposé l'avis seulement en anglais.

Hi,
As promised at today's lawyers meetings, I've attached the legal opinion filed by FairPlay Canada with their application concerning the blocking of piracy sites. It's worth a read. The opinion covers a panoply of issues – everything from the Commission's powers under sections 24, 36 and 70 of the Telecom Act and the potential conflict with the Copyright Act, to freedom of expression.

Crystal Hulley-Craig
Conseiller juridique Principal/PI | A/Senior Legal Counsel
Tel: (819) 956-2095 | crystal.hulley@crtc.gc.ca | Fax (819) 953-0589
Legal Sector/Secteur juridique
Canadian Radio-television and Telecommunications Commission | Conseil de la radiodiffusion et des télécommunications canadiennes
Government of Canada | Gouvernement du Canada
Ottawa, Ontario K1A 0N2

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Brandon Kain
Partner
Direct Line: 416-601-7821
Direct Fax: 416-868-0763
Email: bkain@mccarthy.ca

Assistant: Ingrid Tomala
Direct Line: 416-601-8200 (2272)
Email: itomala@mccarthy.ca

January 26, 2018

Privileged & Confidential

BCE Inc.
5025 Creekbank Rd.
Floor 5
Mississauga, ON L4W 0B6

Attention: Mr. Robert Malcolmson
Senior Vice-President, Regulatory Affairs

Dear Sir:

Re: CRTC Jurisdiction to Impose a Piracy Blocking Regime

You have asked for our opinion about whether the *Telecommunications Act* (the "***Telecommunications Act***")[1] grants the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") jurisdiction to implement a regime (the "**Proposed Regime**") under which all Canadian Internet service providers ("**ISPs**") would be required to disable access for residential and mobile customers to sites that have been determined – upon review by an independent agency – to be blatantly, overwhelmingly or structurally engaged in the infringement of copyright, or the enablement or facilitation of the same. In addition, you have asked whether the Proposed Regime would violate the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")[2] or the CRTC's common law duty of procedural fairness.

[1] S.C. 1993, c. 38.
[2] Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act, 1982* (U.K.), 1983, c. 11.

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY

In our view, the CRTC has jurisdiction to implement the Proposed Regime. Section 24 of the *Telecommunications Act* permits the CRTC to impose "any condition" upon the offering and provision of telecommunication services by ISPs that are Canadian carriers, and s. 24.1 enables it to do the same even for non-carrier ISPs. Section 24 has consistently been given a broad interpretation by the courts – particularly when read alongside the residual powers in ss. 32(g), 51 and 67(1)(d) – and the CRTC has issued several orders under it which, like the Proposed Regime itself, require carriers to take measures to assist innocent parties with problems the carriers did not create but which they are well-positioned to address. The ability to issue such third party assistance orders is also directly contemplated by ss. 24.1(b)-(d). While ISPs are prohibited from controlling the content they transmit, this should not apply when they do so pursuant to a mandatory CRTC order, and in any case s. 36 of the *Telecommunications Act* allows the CRTC to approve exceptions to this. Further, the Proposed Regime will advance several of the Canadian telecommunications policy objectives in s. 7 of the *Telecommunications Act* (specifically, ss. 7(a), 7(g), 7(h) and 7(i)). Accordingly, the CRTC has the authority to promulgate the Proposed Regime.

This conclusion is confirmed when the *Telecommunications Act* is read within the larger statutory scheme of which it forms a part, consisting of the *Broadcasting Act* (the "***Broadcasting Act***"),[3] the *Radiocommunication Act* (the "***Radiocommunication Act***")[4] and the *Copyright Act* (the "***Copyright Act***").[5] The Proposed Regime involves the regulation of ISPs acting as such rather than broadcasting undertakings, so the *Broadcasting Act* is not directly engaged. Nevertheless, the Proposed Regime will further the policy objectives of the *Broadcasting Act* no less than those of the *Telecommunications Act* itself. A similar synergy exists with the *Radiocommunication Act*, which expressly prohibits the decoding and retransmission of encrypted subscription programming signals without the lawful distributor's authorization. Such activities are common on many piracy sites. And there is no operational or purpose conflict with the *Copyright Act*. The Proposed Regime does not alter any of the rights or remedies granted under the *Copyright Act*, as would be the case, for instance, if it created a new or broadened form of relief directly against pirate operators. Instead, the Proposed Regime contemplates an administrative order by the CRTC against ISPs, who are intermediaries to the copyright holder-infringer relationship, and its primary purpose is to advance Canadian telecommunications policy objectives. While one of the Regime's effects will be to strengthen copyright, this is no different from other anti-piracy mechanisms that exist outside the *Copyright Act*, such as those contained in the *Radiocommunication Act*. The focus of the Proposed Regime, coupled with its requirement for CRTC oversight, also makes it different from other anti-piracy measures that Parliament has rejected in *Copyright Act* amendments to date.

The Proposed Regime will not violate s. 2(b) of the *Charter*. Freedom of expression does not authorize the use of private telecommunications facilities to blatantly, overwhelmingly or structurally engage in piracy, and even if it did, the Proposed Regime is a proportionate exercise of discretion.

Finally, the Proposed Regime adequately discharges the CRTC's common law duty of procedural fairness. Before any site blocking order takes effect, the CRTC will attempt to give piracy operators notice of the application, an opportunity to make submissions to an independent administrative agency, and reasons for its decision. They can also ask the CRTC to review, rescind or vary its decision, and seek leave to appeal it or move for judicial review in the Federal Court of Appeal.

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[3] S.C. 1991, c. 11.
[4] R.S.C. 1985, c. R-2.
[5] R.S.C. 1985, c. C-42.

2. FACTS

A coalition (the "**Coalition**") of more than 20 broadcasting distribution undertakings ("**BDUs**"), ISPs, broadcasters and other stakeholders in the Canadian broadcasting and creative industries intends to make an application to the CRTC in support of the Proposed Regime. The application is a response to the growing problem of Internet piracy, i.e., the presence of websites, applications and services that make available, reproduce, communicate, distribute, decrypt or decode copyrighted material (e.g., TV shows, movies, music and video games) – or enable, induce or facilitate such actions – without the authorization of the copyright holder. In this opinion, "**piracy**" refers to this range of activities, "**pirate operators**" refers to those who operate the websites,[6] applications and services (not the individuals that use them), and "**piracy sites**" refers to locations on the Internet at which one accesses the websites, applications and services that are blatantly, overwhelmingly or structurally engaged in piracy.

Over the last several years, piracy has emerged as a significant issue in Canada, with at least 1.88 billion visits being made by Canadians to piracy sites in 2016 alone. The consequences of piracy for Canada's social and economic fabric are profound, and affect many different segments of the population:

(a) **The Cultural Sector:** Content creators and rightsholders are denied the financial and other intangible benefits that flow from their work, and lose the ability to control the quality and integrity of their creations and the time and manner of their viewing. This reduces economic opportunities for cultural sector participants, and undermines the development of new Canadian content.

(b) **The Broadcasting and Telecommunications System:** Broadcasters are unable to fully monetize their programming investments, and become reluctant to make additional investments in new programming, thus causing further harm to the cultural sector in addition to the broadcasting sector itself. Additionally, legitimate BDUs cannot fairly compete with pirate operators, resulting in fewer television subscriptions or cancellations and less BDU investment in critical new telecommunications infrastructure, technologies and distribution models, together with lower BDU contributions to Canadian cultural production funds.

(c) **Consumers:** Consumers who lawfully access copyrighted material are penalized by effectively subsidizing the creation of content for those who choose to access piracy sites. Further, consumers who pay for piracy sites will have no recourse if they do not work as promised, and expose themselves to significant privacy issues given the well-documented hacking, identify theft and malware risks that attend such activities. This in turn also diminishes confidence in the Canadian telecommunications system.

Legal mechanisms for combatting piracy currently exist under both the *Copyright Act* and the *Radiocommunication Act*. As discussed more fully at pages 36-42 below, these statutes enable copyright holders and BDUs to sue pirate operators for damages and to seek injunctions against them from a court in certain circumstances. However, there are numerous difficulties in combatting piracy through these conventional methods. Because pirate operators are frequently anonymous and located abroad, they are difficult to identify, and judicial orders to combat piracy are not readily available in many foreign jurisdictions nor – if obtained in Canada – are they practically enforceable

[6] The term "websites" is used here to describe websites and other locations on the Internet, including servers and Internet Protocol (IP) addresses.

there. Further, even where a judicial response is possible, pirate operators may quickly shut down their piracy sites and recreate them under different names, or in different jurisdictions, leading to expensive, time-consuming and inefficient litigation that often fails to provide rightsholders with any real remedy or compensation including because of the lack of assets of most piracy operations. This problem has been emphasized by the courts. As the Irish Court of Appeal recently observed:

> …[A]dvances in digital technology and the increasing use of the internet have led to such widespread, anonymous infringement by computer users to the point where it is almost pointless for copyright holders to pursue such individuals who engage in online peer-to-peer file sharing. …[F]rom time to time the copyright holders had pursued such consumer infringers in the past in this jurisdiction by means of civil action in the High Court. This proved to be a futile exercise which consumed great amounts of time and effort and at considerable cost, because as often as not the infringer proved to be a teenager or young adult who had used a home computer for such file sharing and against whom an award of damages (which might in any event have been small or even negligible) would have been a wholly empty exercise.
>
> The basic ineffectiveness of these remedies are not disputed by either party to this appeal and, in any event, graphic accounts of the futility of the traditional remedies for copyright infringement in this context were given in evidence… This is doubtless why in recent times the copyright holders have focused on seeking remedies against ISPs…[7]

As a result of these concerns, the Coalition recommends that the CRTC follow the lead of at least 20 other countries, many of whom are major trading partners of Canada with similar legal and political traditions (e.g., the United Kingdom, Australia and France), by implementing a regime which would require ISPs to disable access to piracy sites for their consumers. Such regimes have proven highly effective in these other jurisdictions, where they also contain processes to ensure procedural fairness for alleged pirate operators and mechanisms to compel ISP compliance.

Building on these international models, the Proposed Regime involves the following characteristics:

(a) The CRTC will issue an order: (i) imposing a condition under ss. 24 and 24.1 of the *Telecommunications Act* on all Canadian ISPs requiring them to disable access to locations on the Internet identified as piracy sites by the CRTC from time to time;[8] and (ii) approving under s. 36 of the *Telecommunications Act* the actions required to be taken by ISPs to comply with this condition.

(b) A specialized new independent organization (the "**Internet Piracy Review Agency**", or "**IPRA"**) will be established under the *Canada Not-for-Profit Corporations Act*.[9] The CRTC will appoint the IPRA under s. 70(1)(a) of the *Telecommunications Act* to inquire into applications from rightsholders and other parties to identify websites as piracy sites, and report to the CRTC about whether to add the websites to the list of piracy sites identified by the CRTC. The IPRA will be overseen by a board of unpaid directors comprised of rightsholders, ISPs and consumer and citizen groups, with no single stakeholder group having a controlling position, and those directors (who would also constitute its members) would be responsible for financial and policy oversight but have no involvement whatsoever in evaluating applications regarding particular websites. Instead, responsibility for receiving and reviewing applications and making recommendations to the CRTC would lie with a

[7] *Sony Music Entertainment Ireland Ltd. v. UPC Communications Ireland Ltd.*, [2016] IECA 231, ¶7-8.
[8] This opinion assumes that the order will be directed at retail rather than wholesale Internet services offered by ISPs.
[9] S.C. 2009, c. 23.

small number of part-time IPRA staff with relevant experience. The CRTC will direct the members of the Coalition who are Canadian carriers to work with rightsholders, ISPs and consumer and citizen groups to develop a proposed governance structure for the IPRA that will be considered in a follow-up proceeding held by the CRTC.

(c) The IPRA's determination of such applications will be guided by criteria it develops in conjunction with content creators, broadcasters, BDUs, ISPs and community stakeholders, that is approved by the CRTC in the follow-up proceeding, for evaluating whether a particular website blatantly, overwhelmingly or structurally engages in piracy (e.g., the extent, impact and flagrancy of the website's piracy activities, the disregard for copyright demonstrated by its owners, whether the website is expressly or implicitly marketed or promoted in connection with potential infringing uses, etc.).

(d) The CRTC will direct the IPRA to establish an application procedure that is consistent with the following principles: (i) the commencement of a proceeding by filing an application with the IPRA which identifies a proposed piracy site and contains summary evidence about it; (ii) the attempted service of the application upon the website owner at the contact email address provided on the website (if any) as well as via a "WHOIS" lookup (and possibly additional measures if no address can be found), and upon all ISPs using the email addresses currently on file with the CRTC; (iii) a right by the website owner to serve a notice of intent to respond on the IPRA and the applicant within 15 days, followed by an additional 15 days for the website owner to provide summary evidence in response – if no response is made by the website owner, the IPRA would still be required to consider whether the evidence before it is sufficient to determine that the site is a piracy site; (iv) an oral hearing by teleconference within 15 days of the response when the IPRA deems it necessary; and (v) after the IPRA considers the evidence and representations of the applicant and website owner, and based on its criteria, a decision about whether to recommend to the CRTC that it add the website to the piracy site list.

(e) The IPRA would submit its recommended additions to the list of piracy sites to the CRTC for consideration and approval, and the CRTC will determine whether or not to accept them after conducting a review. If the CRTC accepts the recommendation, it will provide reasons to the site operator, and issue an order varying the list of piracy sites. The CRTC could then quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same piracy site is located in order to prevent pirate operators from undermining its decision.[10] The obligation and approval for ISPs to begin disabling access to the newly-added site will only be triggered upon the CRTC's decision. The pirate operator or any other appropriate party that wishes to object can make an application to the CRTC to review, rescind or vary its decision under s. 62 of the *Telecommunications Act*, seek leave to appeal from it to the Federal Court of Appeal under s. 64, or seek to judicially review the decision in the Federal Court of Appeal.

[10] A similar extension procedure has been adopted in site-blocking orders granted by English courts: see, e.g., *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 2714 (Ch), ¶10-12.

3. DISCUSSION

(a) Jurisdiction to Implement the Proposed Regime

(i) The *Telecommunications Act*

A. Introduction

The jurisdiction of the CRTC in relation to ISPs derives from the *Telecommunications Act*. In *Reference re Broadcasting Act* (the "***ISP Reference***"), the Supreme Court of Canada described the role of ISPs as follows:

> ISPs provide routers and other infrastructure that enable their subscribers to access content and services made available on the Internet. This includes access to audio and audiovisual programs developed by content providers. Content providers depend on the ISPs' services for Internet delivery of their content to end-users. The ISPs, acting solely in that capacity, do not select or originate programming or package programming services. …[11]

ISPs may provide retail Internet services directly to consumers, or wholesale Internet services to other ISPs. They fall into two main groups:[12]

(1) ISPs that are "telecommunications common carriers" ("**TCCs**") under s. 2 of the *Telecommunications Act*, i.e. "a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation" ("**Primary ISPs**").[13]

(2) ISPs that are not TCCs but are still "telecommunications service providers" ("**TSPs**"),[14] such as resellers who lease rather than own or operate the transmission facilities used to provide Internet services on a wholesale basis ("**Secondary ISPs**").

The CRTC views the provision of retail Internet services as a "telecommunications service" within the meaning of s. 2 of the *Telecommunications Act* (i.e., "a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise").[15] Therefore, Primary

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[11] [2012] 1 S.C.R. 142, ¶2.

[12] *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶8; *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶6 and footnotes 1-2. *cf. Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶10.

[13] Since 1999, the CRTC has forborne from exercising its powers under ss. 25, 27(1), 27(5), 27(6), 29 and 31 of the *Telecommunications Act* in relation to Primary ISPs offering retail Internet services, pursuant to s. 34(1). However, the CRTC retained the power under s. 24 of the *Telecommunications Act* to "to impose conditions on the offering and provision of retail IS as may be necessary in the future": *Forbearance from Retail Internet Services* – Telecom Order CRTC 99-592, 25 June 1999, ¶40-42; *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶8; *Modifications to forbearance framework for mobile wireless data services* – Telecom Decision CRTC 2010-445, 30 June 2010, ¶8. Accordingly, the CRTC's forbearance decisions with respect to Primary ISPs do not prevent it from relying on s. 24 of the *Telecommunications Act* to implement the Proposed Regime.

[14] Section 2 of the *Telecommunications Act* defines a "telecommunications service provider" to mean "a person who provides basic telecommunications services, including by exempt transmission apparatus".

[15] *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶9.

ISPs that provide retail Internet services are subject to direct regulation under the *Telecommunications Act*.[16] Further, since the introduction of s. 24.1 of the *Telecommunications Act* on December 16, 2014 – discussed at page 11 below – Secondary ISPs have also been subject to regulation under the *Telecommunications Act*.[17]

As TCCs and TSPs, ISPs are involved in the activity of "telecommunications", i.e., "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system".[18] However, some of the content which ISPs transmit – such as TV shows, movies, music, and video games – is not simply "intelligence" ("signs, signals, writing, images sounds or intelligence of any nature"),[19] but also falls within the definition of "programs" in the *Broadcasting Act* as "sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but… not… visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text".[20]

The CRTC has concluded that the transmission of programs over the Internet constitutes a form of "broadcasting",[21] a term defined in s. 2(1) of the *Broadcasting Act* to mean "any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but… not…any such transmission of programs that is made solely for performance or display in a public place". Despite this, the Supreme Court of Canada held in the *ISP Reference* that ISPs do not qualify as "broadcasting undertakings"[22] subject to regulation under the *Broadcasting Act* when acting solely in their capacity as ISPs, since ISPs only provide the mode of transmission and have no control over the content of the programming. This aspect of the *ISP Reference* is discussed in more detail at pages 29-30 below.

As a result of the *ISP Reference*, ISPs continue to be regulated under the *Telecommunications Act* rather than the *Broadcasting Act*.[23] In this regard, ISPs may be contrasted with certain website operators, including pirate site operators, who transmit programs to the public over the Internet. Such website operators fall within the non-exhaustive definition of "broadcasting undertakings" in the *Broadcasting Act*, though the CRTC has exempted them from Part II of *Broadcasting Act* pursuant to s. 9(4) by means of the "**Digital Media Exemption Order**".[24]

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[16] *Ibid*, ¶8.
[17] *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services* – Telecom Regulatory Policy CRTC 2017-11, 17 January 2017, ¶2, 4, 16, 29 and 32-36.
[18] *Telecommunications Act*, s. 2(1), *s.v.* "telecommunications".
[19] *Ibid*, s. 2(1), *s.v.* "intelligence".
[20] *Broadcasting Act*, s. 2(1), *s.v.* "program".
[21] *New Media* – Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14, 17 May 199, ¶33-46; *Review of broadcasting in new media* – Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009, ¶27 and 31-33; *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶1, 9, 16-18.
[22] Section 2(1) of the *Broadcasting Act* defines a "broadcasting undertaking" to "include[e] a distribution undertaking, a programming undertaking and a network".
[23] This follows from s. 4 of the *Telecommunications Act* and s. 4(4) of the *Broadcasting Act*, discussed at pages 30-31 below.
[24] *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, 26 July 2012, Appendix. The Digital Media Exemption Order extends to, *inter alia*, any "undertaking [that] provides broadcasting services… delivered and accessed over the Internet". See also *Regulatory framework for mobile television broadcasting services* – Broadcasting Public Notice CRTC 2006-47, 12 April 2006, ¶29 and footnote 2.

Accordingly, given that the Proposed Regime contemplates an order against ISPs, not the pirate operators themselves, the CRTC's jurisdiction must be found within the *Telecommunications Act*. This statute, enacted in 1993, revised and consolidated a variety of provisions in the now-repealed *Railway Act* (the "***Railway Act***")[25] and *National Telecommunications Powers and Procedures Act* ("***NTPPA***")[26] (formerly the *National Transportation Act*) which until then had governed the telecommunications jurisdiction of the CRTC (and before its acquisition of those powers in 1976, that of the Canadian Transport Commission).[27] The Supreme Court of Canada has stated that "the purpose of the *Telecommunications Act* is to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada".[28] One of its principal innovations was the introduction of the Canadian telecommunications policy objectives in s. 7:

> 7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
>
> (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
>
> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
>
> (d) to promote the ownership and control of Canadian carriers by Canadians;
>
> (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
>
> (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
>
> (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
>
> (h) to respond to the economic and social requirements of users of telecommunications services; and
>
> (i) to contribute to the protection of the privacy of persons.

Pursuant to s. 47 of the *Telecommunications Act*, the CRTC is required to consider and implement these objectives in the exercise of all its powers under the statute.[29]

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[25] R.S.C. 1985, c. R-3.
[26] R.S.C. 1985, c. N-20.
[27] Formerly the Board of Transport Commissioners of Canada, formerly the Board of Railway Commissioners of Canada.
[28] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶38.
[29] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶1-2 and 28.

> 47 The Commission shall exercise its powers and perform its duties under this Act and any special Act
>
> (a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and
>
> (b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

Nevertheless, the telecommunications policy objectives in s. 7 cannot themselves empower the CRTC to implement the Proposed Regime. Instead, its authority to do so must be grounded in one of the jurisdiction-conferring provisions in the *Telecommunications Act*.[30]

As the Supreme Court of Canada has observed, the *Telecommunications Act* grants the CRTC "broad" and "comprehensive regulatory powers", including "numerous specific powers".[31] The primary jurisdiction-conferring provisions of relevance here are those in ss. 24, 24.1 and 36.

B. Sections 24 and 24.1

Sections 24 and 24.1 provide as follows:

> 24 The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.
>
> 24.1 The offering and provision of any telecommunications service by any person other than a Canadian carrier are subject to any conditions imposed by the Commission, including those relating to
>
> (a) service terms and conditions in contracts with users of telecommunications services;
>
> (b) protection of the privacy of those users;
>
> (c) access to emergency services; and
>
> (d) access to telecommunications services by persons with disabilities.

While these two provisions are intimately related, they have different historical origins and concern separate groups of ISPs.

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[30] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶42; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶49-50; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶21-23; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶48-49.

[31] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶28 and 32. See also: *Telus Communications Inc. v. Canada (C.R.T.C.)*, 2004 FCA 365, ¶49, leave to appeal refused, [2004] S.C.C.A. No. 573; *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 29, ¶10-13; *Reference re: User Fees Act*, 2009 FCA 224, ¶34 and 50; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶50; *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶15, 17, 20 and 31, leave to appeal refused, [2010] S.C.C.A. No. 28.

Section 24 has existed in the *Telecommunications Act* since its inception, and is the successor to s. 341(3) of the *Railway Act*, which provided that:

> [341](3) The Commission may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.[32]

The conditions that the CRTC may impose under s. 24 are directed towards the offering and provision of any telecommunications service by a "Canadian carrier", defined in s. 2(1) of the *Telecommunications Act* to mean "a telecommunications common carrier that is subject to the legislative authority of Parliament". Accordingly, s. 24 does not authorize the CRTC to impose conditions upon a Secondary ISP, only a Primary ISP. However, this gap is filled by s. 24.1, a provision that came into force in 2014 and that permits the CRTC to impose conditions upon the offering and provision of "any telecommunications service by any person other than a Canadian carrier". Therefore, the CRTC may impose conditions upon Secondary ISPs under s. 24.1.

Even before s. 24 was enacted, s. 341(3) was given a broad interpretation,[33] which enabled the CRTC to determine the substantive terms and conditions of carriage that would be binding as a matter of law upon any parties to an agreement of service designated by the CRTC (whether they agreed to those terms as a matter of contract or not).[34] With the coming into force of *Telecommunications Act* in 1993, the CRTC's power under s. 24 was expanded even further. This was due largely to the introduction of the Canadian telecommunications policy objectives in s. 7, coupled with the requirement in s. 47 that the CRTC exercise the s. 24 power with a view to implementing them. As the Supreme Court of Canada has said of the analogous policy objectives in s. 3(1) of the *Broadcasting Act*, "[w]hile such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act", since "Parliament must be presumed to have empowered the CRTC to work towards implementing" them.[35] As a result of the s. 7 policy objectives, the types of conditions which s. 24 may authorize are much broader than those available under s. 341(3) of the *Railway Act*, a fact that that has been recognized by the CRTC itself.[36] Further, s. 73(2)(b) of the *Telecommunications Act*

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[32] This provision appears to have existed in various forms since *The Railway Act*, 1903, 3 Edw. VII, c 58, and underwent several numbering changes during its successive consolidations: see *Telecommunications Workers' Union v. Canada*, [1989] 2 F.C. 280 (C.A.), ¶2 and footnote 2, leave to appeal refused, [1988] S.C.C.A. No. 530; *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1157, ¶2.

[33] This was consistent with the more general tendency to characterize the powers accorded to the CRTC under the *Railway Act* and *NTPPA* as "broad" ones: *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at 1740, 1756 and 1762-1763.

[34] *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*, [1975] 2 S.C.R. 678 at 686-691. See also: *Grand Trunk Railway Co. of Canada v. Robinson*, [1915] A.C. 740 at 744 (P.C. (Canada)); *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195 at 201-204 (P.C. (Canada)); and *Sherlock v. Grand Trunk Railway Co. of Canada* (1921), 62 S.C.R. 328 at 332-337.

[35] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶32. See also: *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶37; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶49.

[36] *Provision of telecommunications services to customers in multi-dwelling units* – Telecom Decision CRTC 2003-45, 30 June 2003, ¶1:

> In 1993, Parliament enacted the *Telecommunications Act* (the Act), replacing the telecommunications-related provisions of the *Railway Act*. The Act affirmed many of the policy objectives that the Commission had been giving effect to under the *Railway Act* since the 1970's, including the introduction of competition in various telecommunications markets. Section 7 of the Act declares… Canadian telecommunications policy… ***The Act provides the Commission with new powers to impose conditions of service on Canadian carriers under section 24***… [*emphasis added*]

makes the contravention of a s. 24 condition a punishable offence, and s. 27(3) states that "[t]he Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with… any decision made under section 24".

The increased authority conferred by s. 24 is consistent with Parliament's objective in enacting the *Telecommunications Act*. As the Minister of Communications stated when Bill C-62 (ultimately enacted as the *Telecommunications Act*) was introduced on second reading, the legislation was designed to implement "a simplified and more flexible regulatory system".[37] This is illustrated by the fact that s. 341(3) of the *Railway Act* was preceded by two provisions – ss. 341(1) and (2) – which focused on the narrow issue of CRTC approval for limitation of liability clauses in service agreements. In the *Telecommunications Act*, Parliament separated s. 24 from the limitation of liability provision (s. 31), thereby confirming the generality of the conditions that the CRTC can impose under s. 24.

The Supreme Court of Canada's decision in *Bell Canada v. Bell Aliant Regional Communications*[38] is instructive here. The Court in that case found that the CRTC's power to determine just and reasonable rates under s. 27 of the *Telecommunications Act*, together with its power to order any carrier to adopt an accounting method under s. 37, could – when read together with the telecommunications policy objectives in s. 7, pursuant to s. 47 – reasonably authorize it to require that excess rates from residential telephone services (which it had previously ordered be maintained in deferral accounts by certain carriers) be used, *inter alia*, to fund broadband expansion, with any remaining amounts being credited to current subscribers. While the Court's analysis focused primarily upon the power-conferring provisions in ss. 27 and 37, it also referred to s. 24 (alongside s. 32(g), discussed at pages 18-20 below), and emphasized that the provision permits the CRTC to impose "any" condition on the provision of a service:

> The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:
>
> > ***24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission*** or included in a tariff approved by the Commission.
> >
> > 25. (1) [quotation omitted]
> > …
> > 32. The Commission may, for the purposes of this Part,
> > …
> > (g) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.
>
> …
> … Together with its rate-setting power, ***the CRTC has the ability to impose any condition on the provision of a service***, adopt any method to determine whether a rate is just and reasonable and require a carrier to adopt any accounting method. …[39]

[37] *House of Commons Debates*, 34th Parl., 3rd Sess., No. 14 (19 April 1993) at 18070 (Hon. Perrin Beatty).
[38] [2009] 2 S.C.R. 764.
[39] *Ibid*, ¶29 and 36, *underlining in original, bolding and italics added*.

These comments suggest that s. 24 is to be viewed as a broad, jurisdiction-conferring provision which permits the CRTC to impose such conditions upon the provision of a service as reasonably further the policy objectives in s. 7 of the Act. This is underscored by the Supreme Court's comments about s. 27 of the *Telecommunications Act*, which – like s. 24 – had antecedents in the *Railway Act*. In finding the CRTC could reasonably conclude that s. 27 authorized its order, the *Bell Aliant* Court observed that the scope of s. 27 was greatly enlarged from that in the *Railway Act* by virtue of s. 47 of the *Telecommunications Act* and the inclusion of the policy objectives in s. 7:

> …[S]ignificantly, ***the Railway Act contained nothing analogous to the statutory direction under s. 47 that the CRTC must exercise its rate-setting powers with a view to implementing the Canadian telecommunications objectives set out in s. 7. These statutory additions are significant***. Coupled with its rate-setting power, and its ability to use any method for arriving at a just and reasonable rate, ***these provisions contradict the restrictive interpretation of the CRTC's authority proposed by various parties in these appeals.***
>
> This was highlighted by Sharlow J.A. when she stated:
>
> > Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* ..., ***the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant*** to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. ***Section 47 of the Telecommunications Act expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the Telecommunications Act. What that means, in my view, is that in rating decisions under the Telecommunications Act, the CRTC is entitled to consider any or all of the policy objectives listed in section 7***…
>
> …
>
> …[T]he CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests referred to in s. 7, ***not simply those it had previously considered when it was operating under the more restrictive provisions of the Railway Act***. …
>
> …
>
> … ***The CRTC… is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in ATCO. The Telecommunications Act displaces many of the traditional restrictions on rate-setting described in ATCO,*** thereby granting the CRTC the ability to balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry…
>
> …
>
> I therefore agree with the following observation by Sharlow J.A.:
>
> > The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that ***the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the***

> ***expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act.*** …
>
> …
>
> It would, with respect, be an oversimplification to consider that *Bell Canada (1989)* applies to bar the provision of credits to consumers in this case. ***Bell Canada (1989) was decided under the Railway Act, a statutory scheme that, significantly, did not include any of the considerations or mandates set out in ss. 7, 27(5) and 47 of the Telecommunications Act***…
>
> …
>
> In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, ***it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do*** in setting just and reasonable rates.[40]

As with s. 27, the scope of the authority conferred upon the CRTC by s. 24 was greatly increased with the introduction of the Canadian telecommunications policy objectives in the *Telecommunications Act*.

This is confirmed by the Federal Court of Appeal's recent decision in *Bell Canada v. Amtelecom Limited Partnership*.[41] At issue there was whether the CRTC had jurisdiction to impose a mandatory code of conduct for providers of retail wireless and voice data services (the "**Wireless Code**") which applied retrospectively to contracts entered into before the Wireless Code came into effect (thereby depriving wireless carriers of certain cancellation fees and the recovery of financial inducements to customers). The CRTC grounded its retrospective authority to promulgate the Wireless Code upon s. 24 of the *Telecommunications Act*, coupled with the telecommunications policy objectives in, *inter alia*, ss. 7(a) and (h), with the Wireless Code specifically directing wireless providers to offer services to subscribers according to its terms as a condition under s. 24. In holding that the CRTC did not act unreasonably in finding that s. 24 gave it the necessary authority to make the Wireless Code retrospective, the Federal Court of Appeal held such a power could be inferred from s. 24 by implication, even though it was not explicit. This was in large part because the CRTC was acting in the legitimate pursuit of the s. 7 telecommunications policy objectives:

> … Since it is conceded by all that ***section 24 does not explicitly authorize the CRTC to make rules with retrospective application, it can only do so if that power must arise by necessary implication*** because without such a power, it could not fulfill its statutory mandate…
>
> ***The Code implements several of the policy objective[s] of the Act, particularly*** paragraph 7(f) -- fostering increased reliance on market forces for the provision of services – and paragraph 7(h) -- responding to the social and economic requirements of users. ***To that extent, the CRTC's objectives are grounded in the Act and in the Canadian telecommunications policy. This is an important factor in ensuring that the CRTC's position is not simply "saying it's so makes it so."*** As a result, the promulgation of the Code as a whole is a matter squarely within the CRTC's mandate and within the Act's policy objectives.
>
> …

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[40] *Ibid*, ¶42-43, 48, 53, 57, 62 and 74, *underlining in original, bolding and italics added*. See also: *MTS Allstream Inc. v. Edmonton (City of)*, 2007 FCA 106, ¶44-52, 64 and 66; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶56 and 60; *Bell Mobility Inc. v. Anderson*, 2012 NWTCA 4, ¶22.

[41] 2015 FCA 126. See also: *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 29, ¶10-11; *Penny v. Bell Canada*, 2010 ONSC 2801, ¶129; *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶17, leave to appeal refused, [2010] S.C.C.A. No. 28.

> When one considers the Code as a whole, one can see that one of its effects will be to put more information in the hands of consumers. To the extent that the functioning of any market is dependent on the quality of the information available to market participants, the coming into force of the Code should make the market for wireless services more dynamic as consumers make better informed choices at more frequent intervals. It is not unreasonable to conclude that achieving this state of affairs is indeed in the best interests of consumers.
>
> Does it follow from this that the Code should therefore be implemented as soon as practicable? At paragraph 365 of the Code, the CRTC noted that if the Code only applies to new contracts, "many Canadians with pre-existing wireless contracts will not fully benefit from the Wireless Code until these pre-existing contracts expire or are amended." ***Given the CRTC's intention to put more information into the hands of consumers so as to increase the dynamism of the market, it is reasonable to have all consumers on the same footing as soon as possible.*** It is perhaps this limited non-technical view of "undue discrimination" which the CRTC had in mind. From the point of view of the regulation of the retail market in voice and data wireless services, ***the CRTC could reasonably consider that section 24, by necessary implication, gives it the power to impose the Code retrospectively.***
>
> As a result, on the basis of the record before this Court, I am of the view that the CRTC's implicit interpretation of section 24 to the effect that it [the CRTC] has the right to make the Wireless Code applicable to contracts concluded before the Code came into effect is reasonable. …[42]

We acknowledge that s. 24 is framed in broad terms ("subject to any conditions imposed by the Commission"), and that the Supreme Court of Canada in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* ("***Cogeco***") held that general "basket clause" provisions (in that case, ss. 9(1)(b)(i), 9(1)(h) and 10(1)(k) of the *Broadcasting Act*, which permit the CRTC to issue make such licensing conditions "as the Commission deems appropriate" and such regulations "respecting such other matters as it deems necessary for the furtherance of its objects") do not empower the CRTC to take measures solely because they are linked to one of its statutory policy objectives.[43] In doing so however, the *Cogeco* Court distinguished such basket clauses from true jurisdiction-conferring provisions, giving as an example the CRTC's authority to require "just and reasonable" rates under s. 27 of the *Telecommunications Act* at issue in *Bell Aliant*:

> ***The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with Bell Canada v. Bell Aliant Regional Communications***, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to determine whether rates set by telecommunication companies are just and reasonable. ***The CRTC's jurisdiction over the setting of rates under s. 27 of the Telecommunications Act,*** S.C. 1993, c. 38, provides that rates must be just and reasonable. ***Under that section, the CRTC is specifically empowered*** to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).
>
> ***This broad, express grant of jurisdiction*** authorized the CRTC to create and use the deferral accounts at issue in that case. This ***stands in marked contrast to the provisions on which***

[42] *Ibid*, ¶49-50 and 55-57, *emphasis added*.
[43] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶24-25.

> ***the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(k) and a broad licensing power under s. 9(1)(b)(i).*** Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because ***the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion*** not contemplated by the jurisdiction-granting provisions of the legislation.[44]

As in *Bell Aliant*, the power to impose conditions of service in s. 24 is not a basket clause, but instead an express grant of specific authority that is "fully supported by unambiguous statutory language".[45] The fact that it is framed in broad terms, like s. 27, is simply a necessary corollary to the scope of the power which it confers upon the CRTC.

Further, it is important to consider s. 24 alongside s. 24.1. That provision is similar to s. 24 in stating that "[t]he offering and provision of ***any*** telecommunications service" is "subject to ***any*** conditions imposed by the Commission". Importantly, s. 24.1 then goes on to provide four specific – but non-exhaustive – illustrations of this power in subsections (a)-(d):

> (a) service terms and conditions in contracts with users of telecommunications services;
>
> (b) protection of the privacy of those users;
>
> (c) access to emergency services; and
>
> (d) access to telecommunications services by persons with disabilities.

The significance of these subsections is evident from the Supreme Court's comments in *Cogeco*:

> ***A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" (s. 9(1)(h)) cannot be read in isolation.... Rather, "[t]he content of a provision 'is enriched by the rest of the section in which it is found*** ..."" … In my opinion, ***none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights*** for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.[46]

In other words, the specific fields for regulation set out in ss. 24.1(a)-(d) can be used to interpret the types of "conditions" that may be imposed by the CRTC upon the "offering and provision of telecommunications services" in s. 24.[47] Notably, several of the s. 24.1 illustrations are similar to

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[44] *Ibid*, ¶26-27, *emphasis added*.

[45] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶50. See also *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶56 and 60.

[46] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶29. See also *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, ¶7, 41, 46, 50 and 74-75.

[47] While s. 24.1 was enacted after s. 24, the provision may still be referred to when construing the scope of s. 24. See s. 42(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21 ("An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends"). As noted in *G. T. Campbell & Associates Ltd. v. Hugh Carson Co. Ltd.*, [1979] O.J. No. 4248 (C.A.), ¶21, "amendments to a statute are to be construed together with the original Act to which they relate as constituting one law and as part of a coherent system of legislation; the provisions of the amendatory and amended Acts are to be harmonized, if possible, so as to give effect to each and to leave no clause of either inoperative". Therefore, for the purposes of interpreting s. 24 of the *Telecommunications Act* within the entire context of the entire Act, "[t]he Act as a whole includes any amendments that have come into force before the relevant

the Proposed Regime in requiring ISPs to take measures to assist innocent parties with problems the TSP did not itself create but which they are well-positioned to address (i.e., protecting their privacy, providing access to emergency services and providing access to services for disabled persons). Therefore, unlike the basket clauses in *Cogeco*, the statutory context of s. 24 suggests that both it and s. 24.1 permit the CRTC to impose conditions upon ISPs which protect the intellectual property rights of third parties.

This interpretation is consistent with the way in which the CRTC has used ss. 24 and 24.1 in practice. In addition to the Wireless Code, the provisions have been relied upon to impose a variety of conditions that further the Canadian telecommunications policy objectives, including:

- Consumer safeguards, such as coinless and cardless payphone access to 9-1-1, prominently displaying payphone rates, increasing accessibility for customers with disabilities, protecting customer privacy and confidential customer information, supporting customer transfers to other carriers, disclosure of Internet traffic management practices, acceptance of service cancellations and the National Do Not Call List.[48]

- Security deposit policies, provision of telephone directories and the suspension or disconnection of service.[49]

- Requiring certain TSPs to provide teletypewriter relay service to enable people with hearing or speech disabilities to communicate with voice telephone users using text, and to provide bridge funding for a national video relay service for Deaf, Hard of Hearing or speech impaired individuals.[50]

- Requiring carriers to communicate certain information (e.g., in residential telephone directors, newspaper notices or communications plans for local forbearance) in alternative formats to visually impaired Canadians upon request.[51]

- Requiring carriers who serve multi-dwelling units to allow other carriers to access subscribers in the units using their facilities.[52]

- Requiring that cable carriers offering high-speed retail Internet service make that service available for resale by other ISPs at a discount.[53]

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facts arose" (i.e., those, like s. 24.1, enacted before the Proposed Regime is implemented): R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), §13.4 (and §13.5 and 24.76-24.78).

[48] *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services* – Telecom Regulatory Policy CRTC 2017-17, 17 January 2017, ¶3, 16, 29, 34-36 and Appendix.

[49] *Forbearance from the regulation of retail local exchange services* – Telecom Decision CRTC 2006-15, 6 April 6006, ¶391.

[50] *Video Relay Service* – Telecom Regulatory Policy CRTC 2014-187, 22 April 2014, ¶2 and 45; *Structure and mandate of the video relay service administrator* – Telecom Regulatory Policy CRTC 2014-659, 18 December 2014, ¶58.

[51] *Follow-up to Broadcasting and Telecom Regulatory Policy 2009-430 – Requirements for telecommunications service providers to communicate certain information in alternative formats* – Telecom Regulatory Policy CRTC 2010-132, 4 March 2010, ¶11, 14 and 17.

[52] *Provision of telecommunications services to customers in multi-dwelling units* – Telecom Decision CRTC 2003-45, 30 June 2003, ¶141.

[53] *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities* – Telecom Decision CRTC 99-11, 14 September 1999, ¶20.

- Requiring all carriers that are 9-1-1 network providers to take reasonable measures to ensure their 9-1-1 networks are reliable and resilient to the maximum extent feasible.[54]

- Requiring all TCCs to be members of the Commissioner for Complaints for Telecommunications Services if they have annual revenues exceeding $10 million or provide telecommunications services that are within the scope of its mandate.[55]

- Prohibiting wholesale roaming providers from preventing wireless carriers from disclosing their identities to customers, prohibiting wholesale roaming providers from applying exclusivity provisions in wholesale roaming agreements with other mobile wireless carriers, and mandating subscriber access to certain roaming networks.[56]

- Prohibiting TCCs that provide retail services to individuals or small-business customers from imposing 30-day cancellation policies on customers, and requiring TCCs to accept customer cancellation requests from a prospective new service provider on behalf of a customer.[57]

Finally, it should be emphasized that ss. 24 and 24.1 appear alongside several other, more general provisions in the *Telecommunications Act* that confer residual powers upon the CRTC. These include ss. 32(6), 51 and 61(d):

> 32 The Commission may, for the purposes of this Part,
>
> …
>
> (g) in the absence of any applicable provision in this Part, determine any matter and ***make any order relating to*** the rates, tariffs or ***telecommunications services of Canadian carriers.***
>
> …
>
> 51 The Commission may ***order a person,*** at or within any time and subject to any conditions that it determines, ***to do anything the person is required to do under this Act*** or any special Act, and may forbid a person to do anything that the person is prohibited from doing under this Act or any special Act.
>
> …
>
> 67 (1) The Commission may ***make regulations***
>
> …
>
> (d) ***generally for carrying out the purposes and provisions of this Act*** or any special Act. [*emphasis added*]

As noted at pages 15-17 above, the Supreme Court's decision in *Cogeco* means that these basket clauses cannot be interpreted to confer an unlimited discretion upon the CRTC. Nevertheless, this does not mean the foregoing provisions are denuded of any meaningful content. The Federal Court

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[54] *Matters related to the reliability and resiliency of the 9-1-1 networks* – Telecom Regulatory Policy CRTC 2016-165, 2 May 2016, ¶30.

[55] *Non-compliance with the Commissioner for Complaints for Telecommunications Services participation requirement* – Telecom Decision CRTC 2013-495 and Telecom Orders CRTC 2013-496, 2013-497, and 2013-498, 18 September 2013, ¶4-5.

[56] *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference* – Telecom Decision 2014-398, 31 July 2014, ¶39; *Regulatory framework for wholesale mobile wireless services* – Telecom Regulatory Policy CRTC 2015-177, 5 May 2015, ¶148 and 167.

[57] *The customer transfer process and related competitive issues* – Broadcasting and Telecom Regulatory Policy CRTC 2011-191, 18 March 2011, ¶27 *Prohibition of 30-day cancellation policies* – Broadcasting and Telecom Regulatory Policy CRTC 2014-576, 6 November 2014, ¶40.

of Appeal recently emphasized this point with reference to the basket clause at issue in *Coegco* (s. 10(1)(k) of the *Broadcasting Act*) in *Bell Canada v. Canada (Attorney General)*:

> …***I agree with Bell that a broadly drafted basket clause such as paragraph 10(1)(k), cannot be read in isolation***, but rather must be taken in context with the rest of the section in which it is found, as stated by the Supreme Court in *Reference re Broadcasting* at paragraph 29. ***However,*** the case at bar may be distinguished from that decision of the Supreme Court in that a number of the specific fields for regulation set out in subsection 10(1) do pertain to simultaneous substitution and the creation of an afferent enforcement regime. In my view, ***the Supreme Court's statement in Reference re Broadcasting should not be read as voiding of any meaning all open-ended provisions such as paragraph 10(1)(k).*** It simply stood for the proposition that a provision "is enriched by the rest of the section in which it is found", which is a simple restatement of the modern interpretive approach. In a case such as the present, ***where other sections can be read as supporting an administrative decision-maker's authority to enact envisaged measures, a basket clause should only reinforce such authority.***[58]

Accordingly, while ss. 32(g), 51 and 61(d) do not themselves confer authority upon the CRTC to implement the Proposed Regime, they "reinforce" its jurisdiction to do so under ss. 24 and 24.1.

As to ***s. 32(g)*** (which applies to TCCs, and would thus reinforce the CRTC's authority over Primary ISPs under s. 24), the Supreme Court in *Bell Aliant* relied on s. 32(g) alongside s. 24 in finding the CRTC had the authority to make the deferral account orders at issue there: see page 12 above. In addition, the Federal Court of Appeal has found s. 32(g) supported the CRTC's authority to make other determinations.[59] And prior to the enactment of the *Telecommunications Act*, the Supreme Court of Canada and the Federal Court of Appeal repeatedly relied upon the predecessor to s. 32(g) – s. 340(5) of the *Railway Act* – for the same purpose.[60] In *Bell Canada v. Canada (C.R.T.C.)*, for instance, the Supreme Court of Canada held that s. 340(5) should receive a broad interpretation which gave the CRTC authority to make remedial orders (in that case, requiring a one-time credit to certain consumers upon revisiting interim rates and finding they were not just and reasonable as required by s. 340(1), the predecessor to s. 27(1) of the *Telecommunications Act*):

> Finally, s. 340(5) of the Railway Act gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:
>
> > 340. ... (5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.
>
> ***Although the power granted by s. 340(5) could be construed restrictively by the application of the ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the***

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[58] 2016 FCA 217, ¶53, *emphasis added*.

[59] *Telus Communications Inc. v. Canada (C.R.T.C.)*, 2004 FCA 365, ¶49-50, leave to appeal refused, [2004] S.C.C.A. No. 573; *Englander v. Telus Communications Inc.*, 2004 FCA 387, ¶73-75. See also: *Sprint Canada Inc. v. Bell Canada*, [1997] O.J. No. 4772 (Gen. Div.), ¶31, aff'd, [1999] O.J. No. 63 (C.A.); *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶20, leave to appeal refused, [2010] S.C.C.A. No. 28.

[60] *Bell Canada v. Challenge Communications Ltd.*, [1979] 1 F.C. 857 (C.A.), ¶12 and 21 (QL); *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Assn.*, [1985] 1 F.C. 623 (C.A.), ¶26 (WLeC), leave to appeal refused, [1985] S.C.C.A. No. 501; *AGT Ltd. v. Canada (C.R.T.C.)*, [1994] F.C.J. No. 1959 (C.A.), ¶11-14.

> ***appellant all the powers necessary*** to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.
>
> …
>
> Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that ***s. 340(5) of the Railway Act provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers.***[61]

As to ***ss. 51 and 67(1)(d)*** of the *Telecommunications Act*, the Federal Court of Appeal has pointed to their predecessors (in ss. 45(2) and 46(1) of the *National Transportation Act*)[62] as "strengthening" the CRTC's other, more specific heads of jurisdiction, and as "indicat[ing] a legislative intention to confer a great breadth of power on the CRTC".[63] Indeed, it has found that these provisions confer "ample authority" in their own right.[64]

In light of the foregoing, it is our view that – provided the Proposed Regime reasonably implements the Canadian telecommunications policy objectives in s. 7 – the CRTC is clothed with the authority under ss. 24 and 24.1 of the *Telecommunications Act* to make a mandatory order against all Canadian ISPs which requires, as a condition of offering and providing retail Internet services, that they disable access to locations on the Internet which the CRTC has identified as piracy sites on the recommendation of the IPRA from time to time. The degree to which the Proposed Regime does, in fact, implement the telecommunications policy objectives is discussed at pages 23-27 below.

C. Section 36

In addition to ss. 24 and 24.1, it is also important to consider s. 36 of the *Telecommunications Act*, which provides:

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[61] [1989] 1 S.C.R. 1722 at 1738-1739 and 1762, *emphasis added*. See also *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, ¶36 (and ¶1, 6, 67-68, 78 and 82), where s. 340(5) was one of the provisions the Court pointed to in finding the CRTC had authority to regulate the terms of agreements governing cable company use of telephone company support structures.

[62] R.S.C. 1970, c. N-17. These sections provided

> [45] (2) The Commission may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Commission, so far as is not inconsistent with the *Railway Act*, any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, or the Special Act, and may forbid the doing or continuing of any act, matter or thing that is contrary to the *Railway Act*, or the Special Act; and for the purposes of this Part and the *Railway Act* has full jurisdiction to hear and determine all matters whether of law or of fact.
>
> …
>
> 46. (1) The Commission may make orders or regulations
>
> > (a) with respect to any matter, act or thing that by the *Railway Act* or the Special Act is sanctioned, required to be done or prohibited;
> >
> > (b) generally for carrying the *Railway Act i*nto effect; …

These provisions were later renumbered as ss. 49(2) and 50(1) of the *NTPPA*.

[63] *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Assn.*, [1985] 1 F.C. 623 (C.A.), ¶17 and 22 (and ¶26) (WLeC), leave to appeal refused, [1985] S.C.C.A. No. 501.

[64] *Bell Canada v. Challenge Communications Ltd.*, [1979] 1 F.C. 857 (C.A.), ¶21 (QL). See also: *Canadian National Railway Co. v. Moffatt*, 2001 FCA 327, ¶45; *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 297, ¶11.

> 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.

Section 36 thus imposes a prohibition upon TCCs controlling or influence the content they transmit without CRTC approval.[65] Notably, the provision does not apply to TSPs, and therefore would only capture Primary ISPs rather than Secondary ISPs (though a Secondary ISP which voluntarily controls the content it transmits in the absence of a mandatory CRTC order under ss. 24 and 24.1 may, depending on the circumstances, be treated as a broadcasting undertaking that is excluded from the *Telecommunications Act* by virtue of s. 4, pursuant to the *ISP Reference* discussed at pages 29-31 below).

Section 36 is based upon s. 8 of the *Bell Canada Act*,[66] a provision that was repealed upon the coming-into-force of the *Telecommunications Act*. Unlike s. 36, the old s. 8 did not permit the CRTC to approve the control or influence of telecommunications by the carrier:

> 8. Where the Company provides services or facilities for the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic systems, it shall act solely as a telecommunications common carrier and shall not control the contents or influence the meaning or purpose of messages transmitted, emitted or received.

Given the addition of the CRTC approval requirement in s. 36, the provision has granted the CRTC a new power, as is evidenced by several sections of the *Telecommunications Act* which refer to CRTC "pre-approval" as a method through which the CRTC can "regulate" matters.[67] Other examples of CRTC pre-approval powers are found in ss. 25(1)[68] and 29.[69]

While s. 36 would thus appear to provide the CRTC with the authority to approve content control by Primary ISPs, it does not confer the authority to make a mandatory order against Primary ISPs requiring them to engage in such an activity. The provision is drafted in permissive terms ("[e]xcept where the Commission approves otherwise"), and thus seems to confer only a power of approval,

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[65] See *Empowering Canadians to protect themselves from unwanted unsolicited and illegitimate telecommunications* – Compliance and Enforcement and Telecom Regulatory Policy CRTC 2016-442, 7 November 2016, ¶93 ("In accordance with section 36 of the Act, any conduct by a Canadian carrier that involves the exercise of some power or authority over the content, or has an impact on the purpose or meaning, of the telecommunications carried by it for the public would require Commission approval.").

[66] S.C. 1987, c. 19.

[67] *Telecommunications Act*, ss. 41.5, 46.3(2), 46.4(b) and 46.5(3)(b).

[68] *Telecommunications Act*, s. 25(1):

> 25 (1) No Canadian carrier shall provide a telecommunications service ***except in accordance with a tariff filed with and approved by the Commission*** that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

[69] *Telecommunications Act*, s. 29:

> 29 No Canadian carrier shall, ***without the prior approval of the Commission***, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting
>
> (a) the interchange of telecommunications by means of their telecommunications facilities;
>
> (b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or
>
> (c) the apportionment of rates or revenues between the carriers.

subject to any conditions necessary to implement the Canadian telecommunications policy in s. 7.[70] This has been recognized by the CRTC.[71]

That said, a CRTC order under s. 36 may be important, because the CRTC takes the view that the provision makes it illegal for an ISP to block access to a website unless such blocking is approved by the Commission, even if another statute or judicial order requires it.[72] In our view, an ISP that is required to block access to a site pursuant to a CRTC or court order is not itself "control[ling] the content or influenc[ing] the meaning or purpose telecommunications" contrary to s. 36, but is merely carrying a mechanical process ordered by the CRTC or the court, which is the true controlling party: see pages 29-31 below. Accordingly, if the CRTC were to make a site blocking order under ss. 24 and 24.1, its approval to the ISP controlling the content under s. 36 should be unnecessary. Nevertheless, given the CRTC's position on this issue, it may be prudent to include a s. 36 approval alongside the ss. 24 and 24.1 order when implementing the Proposed Regime.

The Commission possesses a broad authority under s. 36 to approve TCC activities which involve the control of content. This is illustrated by *Consumers' Association of Canada v. British Columbia Telephone Co.*[73] In that case, the Federal Court of Appeal considered the scope of a CRTC approval requirement in s. 9A of the *British Columbia Telephone Company Special Act*,[74] which permitted the company to acquire shares in other companies having similar objects to itself "[p]rovided that no agreement therefor shall take effect until it has been submitted to and ***approved*** by the Board of Transport Commissioners for Canada [now the CRTC]". The Court concluded that the approval power was not subject to any particular restrictions, and that the CRTC had a broad discretion to determine the circumstances in which it would be applied in the public interest:

> … The section itself sets out no criteria which the Commission is required to consider when exercising its power of approval or disapproval of an agreement of this kind. ***The Commission is, in my opinion, free to formulate and apply its own guidelines.*** It is the master of its own procedure. …[75]

Consistent with this jurisprudence, the CRTC has not imposed a litany of technical requirements upon its exercise of the s. 36 approval power. Instead, it takes the view that website blocking may be approved "where it would further the telecommunications policy objectives set out in section 7 of the Act".[76] While such approval will only be forthcoming in "exceptional circumstances",[77] the CRTC

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[70] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, ¶41, 43, 72 and 77-78; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶52-53.

[71] *Telecom Commission Letter* - 8622-P49-200610510, 24 August 2006 ("The Commission notes that section 36 of the Act would not allow it to require Canadian carriers to block the web sites; rather, under section 36 of the Act, the Commission has the power to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public").

[72] *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act* – Telecom Decision CRTC 2016-479, ¶6-7 and 18-21. See also: *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶121-122; *Internet traffic management practices – Guidelines for responding to complaints and enforcing framework compliance by Internet service providers* – Telecom Information Bulletin CRTC 2011-609, 22 September 2001, ¶9; *Telecom Commission Letter Addressed to Distribution List and Attorneys General* – 8663-P8-201607186, 1 September 2016.

[73] [1981] 2 F.C. 461 (C.A.), leave to appeal refused, [1981] S.C.C.A. No. 382.

[74] S.C. 1916, c. 66.

[75] *Consumers' Association of Canada v. British Columbia Telephone Co.*, [1981] 2 F.C. 461 (C.A.), ¶15 (and ¶5 and 16), leave to appeal refused, [1981] S.C.C.A. No. 382, *emphasis added*.

[76] *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act* – Telecom Decision CRTC 2016-479, ¶7 (and ¶21).

has previously indicated its intention to exercise the s. 36 power in order to implement a universal blocking regime that permits TCCs to prevent nuisance calls with blatantly illegitimate caller ID from reaching Canadians.[78] For the reasons below, the Proposed Regime is similarly in furtherance of the s. 7 policy objectives, and therefore satisfies the threshold for s. 36 relief established by the Commission.

D. The Section 7 Policy Objectives

The Supreme Court of Canada has observed that the Canadian telecommunications policy objectives in s. 7 of Act are "broad".[79] Based on the facts set out at pages 4-5 above, the Proposed Regime will implement several of these objectives, in particular those in ss. 7(a), (g), (h) and (i):

(1) **Section 7(a)** ("*to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions*") – Piracy weakens Canada's economic fabric by denying creators the financial benefits of their work, reducing creator employment opportunities, preventing broadcasters from fully monetizing their programming investments, discouraging broadcasters from investing in new programming, inhibiting fair competition between BDUs and pirate operators, and reducing BDU contributions to Canadian cultural production funds. This also weakens Canada's social fabric by undermining the development of new cultural content, and contributes to an environment in which creators lose the ability to control the quality and integrity of their creations and the time and manner of their viewing. Finally, piracy harms consumers and undermines Canadians' trust in, and thus the development of, the digital economy.

(2) **Section 7(g)** ("*to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services*") – Piracy results in fewer television subscriptions for BDUs and more cancellations, thus dissuading BDUs from investing in critical new telecommunications infrastructure, technologies and distribution models.

(3) **Section 7(h)** ("*to respond to the economic and social requirements of users of telecommunications services*") – Piracy imposes unfair economic requirements upon consumers who lawfully access copyrighted material over the Internet or through traditional broadcasting distribution systems, since it requires them to effectively subsidize the creation of content for those who choose to access piracy sites. In doing so, it also reduces the amount of investment in new content available to users of telecommunications services, thereby frustrating their social requirements. The Canadian telecommunications system should encourage compliance with Canada's laws, including intellectual property laws that ensure the creation and dissemination of creative works through a rights system that fairly compensates content creators and distributors of creative content.

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[77] *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶122.
[78] *Empowering Canadians to protect themselves from unwanted unsolicited and illegitimate telecommunications* – Compliance and Enforcement and Telecom Regulatory Policy CRTC 2016-442, 7 November 2016, ¶95.
[79] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶1. See also *Penney v. Bell Canada*, 2010 ONSC 2801, ¶142.

(4) **Section 7(i)** ("*to contribute to the protection of the privacy of persons*") – Piracy exposes users of piracy sites to significant privacy issues given the hacking, identify theft and malware risks such activities create. This also imposes further economic and social requirements upon these users pursuant to s. 7(h) above.

It is true that several of these policy objectives involve a cultural component that transcends the immediate relationship between ISPs and their subscribers, but the courts have recognized that the CRTC need not restrict its decisions under the *Telecommunications Act* to policies which are "purely economic", and may instead consider their social impact as well in light of "the Commission's wide mandate under section 7".[80] This is reflected in the preamble to s. 7 (which affirms that "telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty") as well as ss. 7(a), (h) and (i) (which include "a telecommunications system that serves to safeguard, enrich and strengthen the social… fabric of Canada and its regions", "respond[ing] to the… social requirements of users of telecommunications services" and "contribut[ing] to the protection of the privacy of persons" among the Canadian telecommunications policy objectives). As the Minister of Communications stated during the House of Commons debates about Bill C-62, ultimately enacted as the *Telecommunications Act*:

> ***The specific reference to culture is not essential because the bill clearly recognizes in other ways the increasingly important role of telecommunications as a carrier of cultural products and services.*** The policy objectives state that telecommunications "***perform an essential role in the maintenance of Canada's identity and sovereignty***" and that the telecommunications system should serve to "***enrich and strengthen the social and economic fabric of Canada***".
>
> ***Surely our culture is fundamental to our identity and just as surely cultural products and services are an important part of the social and economic fabric of Canada. Telecommunications serve to link this country together through a whole range of activities from personal conversations to data and information transfers, to business transactions and increasingly to the enjoyment of cultural products and services.*** On this the policy statement is quite clear.[81]

Further, s. 1 of Cabinet's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*[82] – which s. 47(b) of the *Telecommunications Act* requires the CRTC to exercise all its powers under the Act in accordance with – explicitly contemplates that the CRTC may make use of non-economic measures:

> 1 In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission (the "Commission") shall implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:
>
> …

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[80] *Allstream Corp. v. Bell Canada*, 2005 FCA 247, ¶34. See also *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74, ¶27, leave to appeal refused, [2006] S.C.C.A. No. 376.

[81] *House of Commons Debates*, 34th Parl., 3rd Sess., No. 16 (1 June 1993) at 20181 (Hon. Perrin Beatty), *emphasis added*. See also: *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture*, 3rd Sess., 34th Parl., Issue No. 1 (April 21, 1993), at 9-10 (Hon. Perrin Beatty); House of Commons, *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture*, 3rd Sess., 34th Parl., Issue No. 8 (May 11, 1993), at 6 (Hon. Perrin Beatty).

[82] S.O.R./2006-355.

> (b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that
>
> …
>
> (ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,
>
> (iii) ***if they are not of an economic nature***, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner, … [*emphasis added*]

These broad dimensions of the Canadian telecommunications policy objectives are evidenced by the *Bell Aliant* case discussed at pages 12-14 above, where the Supreme Court found that the CRTC acted in furtherance of s. 7 by ordering that excess residential telephone service rates maintained in deferral accounts be used to fund future broadband expansion, and that any excess be credited to subscribers. In doing so, the Court noted that with the inclusion of s. 7, the CRTC is no longer required to follow a "rate of return" model in rate setting, which focuses on achieving a balance between a fair rate for the consumer and a fair return on the carrier's investment. Instead, the CRTC can now turn its attention to a wider array of interests beyond the responsible carrier and its subscriber. Stating that s. 7 led to the creation of a "comprehensive national telecommunications framework" in which the CRTC was not obliged to "limit itself to considering solely the service at issue", the Supreme Court specifically cited the policy objectives in ss. 7(a) and (h):

> …[T]hese expansive provisions mean that the rate base rate of return approach is not necessarily the only basis for setting a just and reasonable rate. Furthermore, ***based on ss. 7,*** 27(5) ***and 47, the CRTC is not required to confine itself to balancing only the interests of subscribers and carriers with respect to a particular service***. In the Price Caps Decision, for example, the CRTC chose to focus on maximum prices for services, rather than on the rate base rate of return approach. ***It did so, in part, to foster competition in certain markets, a goal untethered to the direct relationship between the carrier and subscriber*** in the traditional rate base rate of return approach.
>
> …
>
> In *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007], 3 S.C.R. vii, the Federal Court of Appeal drew similar conclusions, observing that ***the Telecommunications Act should be interpreted by reference to the policy objectives***, and that ***s. 7 justified in part the view that the "Act should be interpreted as creating a comprehensive regulatory scheme"*** (at para. 46). ***A duty to take a more comprehensive approach*** was also noted by Ryan, who observed:
>
> > Because of the importance of the telecommunications industry to the country as a whole, rate-making issues may sometimes assume a dimension that gives them a significance that ***extends beyond the immediate interests of the carrier, its shareholders and its customers, and engages the interests of the public at large. It is also part of the duty of the regulator to take these more far-reaching interests into account.***
>
> …
>
> …***[T]he policy objectives in s. 7, which the CRTC is always obliged to consider, demonstrate that the CRTC need not limit itself to considering solely the service at issue*** in determining whether rates are just and reasonable. ***The statute contemplates a comprehensive national telecommunications framework***. It does not require the CRTC to atomize individual services.
>
> …

> In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, ***the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to ... strengthen the social and economic fabric of Canada" under s. 7(a)***; rendering "reliable and affordable telecommunications services ... to Canadians in both urban and rural areas" under s. 7(b); ***and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(h).***
> …
> I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. ***It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests.*** It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.[83]

Accordingly, the CRTC can be expected to strike a balance between public and private interests under s. 7.[84] This is evident from the many examples of such orders made under ss. 24 and 24.1 at pages 17-18 above. As the Federal Court of Appeal recognized in *Reference re: User Fees Act*:

> The exercise of the CRTC's powers related to telecommunications services, licences, and regulatory processes may provide benefits or advantages to non-fee-payers [non-TCCs]. In the past, the CRTC has exercised its powers to:
>
> - establish a 50% discount for Telecommunications Devices for the Deaf (TDD) users on long-distance calls for hearing or speech-impaired sub-scribers (Order CRTC 2000-17 (19 January 2000));
>
> - require telephone companies to, on request, provide billing statements and bill inserts in alternative format to subscribers who are blind ("Extending the availability of alternative formats to consumers who are blind" (8 March 2002), Telecom Decision CRTC 2002-13);
>
> - require access to pay telephones, including implementing an upgrade pro-gram for certain pay telephones to grant access to persons with disabilities ("Access to pay telephone service" (15 July 2004), Telecom Decision CRTC 2004-47);
>
> - allow public authorities to use the numbers and addresses in 9-1-1 data-bases to improve the effectiveness of telephone-based emergency public alerting systems ("Use of E9-1-1 information for the purpose of providing an enhanced community notification service" (28 February 2007), Tele-com Decision CRTC 2007-13); and
>
> - establish a National "Do Not Call" List ("Unsolicited Telecommunications Rules framework and the National Do Not Call List" (3 July 2007), Telecom Decision CRTC 2007-48).[85]

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[83] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶45, 47, 72, 75 and 77, *emphasis added*.
[84] *Federation of Canadian Municipalities v. AT&T Canada Corp.*, 2002 FCA 500, ¶28, leave to appeal refused, [2003] S.C.C.A. No. 97.
[85] 2009 FCA 224, ¶31.

Further, and consistent with the Cabinet Direction to the CRTC discussed at pages 24-25 above, the Proposed Regime would apply equally to all ISPs, including both Primary and Secondary ISPs, and would therefore be implemented in a symmetrical and competitively neutral manner.

Finally, the Proposed Regime is consistent with the anti-piracy objectives of the Canadian legal system. Recently, in *Google Inc. v. Equustek Solutions Inc.*,[86] the Supreme Court of Canada upheld an interlocutory injunction requiring Google to de-index the defendant's websites from all of its search results worldwide, as the defendant was selling goods on those websites that the plaintiff claimed violated its intellectual property rights. Although Google argued that it should be immune from the injunction, since it was a third party to the litigation between the plaintiff and the defendant, the Supreme Court rejected this position, finding that injunctions against third parties were often necessary to prevent the violation of legal rights. As support for this, the Court pointed to cases in England where ISPs had been made the subject of blocking orders in the exercise of the judiciary's equitable protective jurisdiction, similar to those contemplated under the Proposed Regime:

> … *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator… *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017], 1 All E.R. 700 (C.A.), at para. 53). *Norwich* supplies ***a principled rationale for granting injunctions against non-parties who facilitate wrongdoing*** (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).
>
> This approach was applied in *Cartier*, where the Court of Appeal of England and Wales held that ***injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks.*** …[87]

For these reasons, it is our view that the Proposed Regime would further the Canadian telecommunications policy objectives, and that it therefore falls within the scope of the CRTC's authority under ss. 24, 24.1 and 36 of the *Telecommunications Act*.

(ii) The Broader Statutory Context

A. An Interrelated Scheme

In addition to the *Telecommunications Act* itself, the broader statutory context provides considerable support for the view that ss. 24, 24.1 and 36 authorize the CRTC to implement the Proposed Regime. The Supreme Court of Canada recognized the importance of this context in *Bell ExpressVu Limited Partnership v. Rex*, a case that also involved the interpretation of several communications statutes:

> In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes*…:

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[86] 2017 SCC 24.
[87] *Ibid*, ¶31-32, *emphasis added*.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings… I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*… which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute… "[W]ords, like people, take their colour from their surroundings". This being the case, ***where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.*** In ***such an instance***, the application of Driedger's principle ***gives rise to… "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".*** …[88]

In *Cogeco*, the Supreme Court held that the *Telecommunications Act* forms part of a "larger statutory scheme" with the *Broadcasting Act*, the *Radiocommunication Act* and the *Copyright Act*, such that a harmonious interpretation of this legislation should be pursued:

> …***[T]he Broadcasting Act is part of a larger statutory scheme that includes the Copyright Act and the Telecommunications Act.*** …***[T]he Telecommunications Act and the Radiocommunication Act… are the main statutes governing carriage, and the Broadcasting Act deals with content, which is "the object of 'carriage'"***… In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act,* saying that "there is a connection between these two statutes". Considering that ***the Broadcasting Act and the Radiocommunication Act are clearly part of the same interconnected statutory scheme***, it follows, in my view, that ***there is a connection between the Broadcasting Act and the Copyright Act as well. The three Acts (plus the Telecommunications Act) are part of an interrelated scheme.***
> …
> ***Although the Acts have different aims, their subject matters will clearly overlap in places***. As Parliament is ***presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter"***… two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.
>
> Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:
>
> > There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that ***interpretations favouring harmony among those statutes should prevail over discordant ones.***[89]

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[88] [2002] 2 S.C.R. 559, ¶26-27, *emphasis added*.
[89] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶34 and 37-38, *emphasis added*.

Because of the harmony principle – and the associated principle that statutes prevail over subordinate legislation – the *Cogeco* Court concluded that the CRTC does not have the authority to make orders or regulations that conflict with statutes outside its enabling one, whether the *Telecommunications Act*, the *Broadcasting Act*, the *Radiocommunication Act* or the *Copyright Act*.[90] For this purpose, the *Cogeco* Court defined conflict as including both (i) operational conflict and (ii) purpose conflict:

> … For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an impossibility of compliance with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the purpose intended by Parliament in another. …
>
> … These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.[91]

For the reasons below, there is no conflict between the Proposed Regime and the *Broadcasting Act*, *Radiocommunication Act* or *Copyright Act*. Instead, a harmonious reading of these statutes with the *Telecommunications Act* confirms the CRTC's jurisdiction to implement it.

B. The *Broadcasting Act*

The *Broadcasting Act* will not be directly engaged by the Proposed Regime. This follows logically from the Supreme Court of Canada's decision in the *ISP Reference*.

The *ISP Reference* holds that "ISPs do not carry on 'broadcasting undertakings' under the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to 'broadcasting' requested by end-users".[92] The reason the Court gave for this was that ISPs, in providing such access, have no control over the content of the programs transmitted to the end-user, and thus do not engage any of the policy objectives of the *Broadcasting Act*:

> … ***The ISPs, acting solely in that capacity, do not select or originate programming or package programming services***. Noël J.A. held that ***ISPs, acting solely in that capacity, do not carry on "broadcasting undertakings".***
>
> ***We agree*** with Noël J.A., for the reasons he gave, that ***the terms "broadcasting" and "broadcasting undertaking",*** interpreted in the context of the language and purposes of the Broadcasting Act, ***are not meant to capture entities which merely provide the mode of transmission.***
>
> Section 2 of the *Broadcasting Act* defines "broadcasting" as "any transmission of programs ... by radio waves or other means of telecommunication for reception by the public". ***The Act makes it***

[90] *Ibid*, ¶39 and 61.
[91] *Ibid*, ¶44-45, *underlining in original*.
[92] [2012] 1 S.C.R. 142, ¶11.

> ***clear that "broadcasting undertakings" are assumed to have some measure of control over programming***. Section 2(3) states that the Act "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". ***Further, the policy objectives listed under s. 3(1) of the Act focus on content***, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.
>
> ***An ISP does not engage with these policy objectives when it is merely providing the mode of transmission.*** ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, ***they take no part in the selection, origination, or packaging of content***. We agree with Noël J.A. that ***the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Broadcasting Act's policy objectives***.
> …
> Like Noël J.A., ***we are not convinced that Capital Cities assists*** the appellants. The case concerned Rogers Cable's ability to delete and substitute advertising from American television signals. ***There was no questioning in Capital Cities of the fact that the cable television companies had control over content. ISPs have no such ability to control the content of programming over the Internet.***[93]

In light of the *ISP Reference*, the Proposed Regime will not involve the regulation of broadcasting undertakings. While the CRTC will order that ISPs disable access to Internet locations identified by it as piracy sites – and to that limited extent grant its approval to the ISPs' "control" over content under s. 36 – the ISPs will take no part in selecting, originating or packaging the content they transmit. Under the Proposed Regime, ISPs are not required to monitor websites for piracy and cannot unilaterally determine which websites are added to the list of piracy sites. Instead, their role is restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, and the decision as to which sites the ISPs should block will be made by the CRTC itself, on the recommendation of the IPRA. An ISP acting pursuant to the CRTC's order, which otherwise acts solely in its capacity as an ISP, will merely serve as a passive transmitter that plays no independent role in contributing to the policy objectives of the *Broadcasting Act*. Accordingly, the *Broadcasting Act* will be inapplicable pursuant to the *ISP Reference*.[94]

This is underscored by the Supreme Court of Canada's decision in the *Google*, discussed at page 27 above. There, in issuing a worldwide de-indexing injunction against Google to prevent the alleged violation of intellectual property rights by a third party website, the Supreme Court rejected Google's argument that the injunction would alter its "content neutral" character:

> …***I have trouble seeing how this interferes with what Google refers to as its content neutral character.*** The injunction does not require Google to monitor content on the Internet,

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[93] *Ibid*, ¶2-5 and 9, *emphasis added*. The Supreme Court's decision in the *ISP*

[94] We note in this regard that s. 4(4) of the *Broadcasting Act* states that "[f]or greater certainty, this Act does not apply to any telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity". While this provision would only exclude a Primary ISP (acting solely as such) from the *Broadcasting Act*, it is only enacted for "greater certainty" and is not exhaustive of the circumstances in which entities may be excluded from the statute. The *ISP Reference* holds that the Act does not apply to any entity which is not acting as a broadcasting undertaking. Therefore, Secondary ISPs (acting solely as such) would also be excluded from the *Broadcasting Act* pursuant to the *ISP Reference*.

> nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. …[95]

As in *Google*, therefore, where altering the public's accessibility to Internet content pursuant to a court order did not interfere with Google's content neutral character, ISPs acting pursuant to a CRTC site blocking order will remain neutral as to the content they transmit.

In addition, such measures would not undermine the concept of "net neutrality", i.e., "the absence of restrictions or priorities placed on the type of content carried over the Internet by the carriers and ISPs", pursuant to which "all traffic should be treated equally" and "[d]ata packets on the Internet should be moved impartially, without regard to content, destination or source".[96] Any restrictions that the Proposed Regime places upon the ability of ISPs to transmit piracy site content would be imposed by the CRTC rather than ISPs themselves, and would represent impartial conditions that protect existing legal rights, not evaluative judgments about the content, destination or source of the piracy sites involved. Further, net neutrality is an evolving principle, not a specifically defined set of rules. While certain rules have been established to be consistent with the principle by regulators like the U.S. Federal Communications Commission (at various times) and CRTC, these rules do not encompass the whole principle, which is a freedom, but one that is not absolute. It would be unreasonable, for instance, to suggest that prohibiting or blocking hate speech or the dissemination of child pornography on the Internet is an unacceptable breach of net neutrality. Net neutrality may prevent ISPs from unilaterally interfering with legal online content, but does not restrict the CRTC from making orders to prevent the dissemination of unlawful content.[97]

Additional support for the conclusion that the Proposed Regime will not engage the *Broadcasting Act* exists in the broader scheme of the *Telecommunications Act* itself. Pursuant to s. 4:

> 4 This Act does not apply in respect of broadcasting by a broadcasting undertaking.

Despite this provision, s. 36 of the *Telecommunications Act* expressly permits the CRTC to approve the control of content by a TCC. Therefore, it must be possible for the CRTC to make an order authorizing content control by a TCC without thereby converting the TCC into a broadcasting undertaking. Otherwise, s. 4 would prevent s. 36 from ever applying, causing the latter provision to effectively be read out of the statute.

Moreover, even if it could be concluded that an ISP acts as a broadcasting undertaking when blocking access to piracy sites on the orders of the CRTC, it would still not deprive the CRTC of the jurisdiction to issue the order under the *Telecommunications Act*. This is because the activity of transmitting content by the ISP would continue to be solely a telecommunications function. In *Bell Mobility Inc. v. Klass*,[98] the Federal Court of Appeal recently recognized that the CRTC could assert

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[95] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24, ¶49, *emphasis added*.

[96] CRTC Glossary, *s.v.* "net neutrality", online: <http://www.crtc.gc.ca/multites/mtwdk.exe?k=glossary-glossaire&l=60&w=322&n=1&s=5&t=2>.

[97] See, Hugh Stephens "Why the Time has Come to block Offshore Pirate Websites in Canada", Macdonald Laurier Institute, January 10, 2018, online at <https://www.macdonaldlaurier.ca/time-come-block-offshore-pirate-websites-canada-hugh-stephens-inside-policy/#.WmJWH7-HknQ.twitter> ("Net neutrality, as defined by the CRTC, is a policy requiring that 'all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given.' At the same time, under the *Telecommunications Act*, the CRTC has authority to implement (or approve) the blocking of websites. Blocking illegal content is fully consistent with requiring ISPs to follow the rules of net neutrality (i.e., not to favour or disadvantage some content at the expense of others). By the same token, blocking offshore content theft websites in violation of Canadian law has no impact on net neutrality").

[98] 2016 FCA 185.

jurisdiction under the *Telecommunications Act* over the transmission functions of TCCs even if they are engaged in selecting, originating or packaging the content they transmit.

The facts in *Klass* concerned a mobile TV service through which Bell (a TCC) live streamed television programs to its wireless voice and data customers using the same network it relied on to provide them with the latter telecommunications services. The Court accepted the CRTC's finding that Bell was involved in broadcasting when acquiring, aggregating and packaging the programming content. At the same time, the Court held that this finding could reasonably stand alongside the CRTC's further finding that Bell acted as a TCC when providing the transport and data connectivity services required for the delivery of the mobile TV service. Justice Dawson for the majority stated:

> ***The nub of Bell Mobility's argument is that there is no concept of "concurrency" between the Broadcasting Act and the Telecommunications Act.*** It follows, in Bell Mobility's view, that an entity engaged in telecommunications is either:
>
> i. Broadcasting as a broadcasting undertaking governed exclusively by the *Broadcasting Act* (notwithstanding that it retransmits through telecommunications technology); or,
>
> ii. Governed exclusively by the *Telecommunications Act*.
>
> ***I reject this submission.***
>
> In my view, paragraph 9(1)(f) of the *Broadcasting Act* and section 28 of the *Telecommunications Act* demonstrate that ***the two Acts may apply to different activities carried on in the same chain of program delivery.***
> …
> …[T}he transmission of programs through a telecommunications common carrier's infrastructure… does not mean that the telecommunications common carrier becomes a broadcasting undertaking and therefore exempt from the application of the *Telecommunications Act* as argued by Bell Mobility.
>
> In light of these provisions, in my view the CRTC reasonably concluded on the evidence before it that ***customers accessed Bell Mobile TV through data conductivity and transport services governed by the Telecommunications Act. At the same time, the acquisition, aggregation, packaging and marketing of Bell Mobile TV involved a separate broadcasting function governed by the Broadcasting Act.***[99]

In concurring reasons that were agreed with by the majority,[100] Webb J.A. observed that – in light of s. 4 of the *Telecommunications Act* – the applicability of the *Telecommunications Act* could not turn only upon whether Bell was "broadcasting" when transmitting the mobile TV service (since all telecommunication includes but is broader than broadcasting insofar as it extends to any intelligence of a programming or non-programming nature).[101] Instead, the question had to turn on whether Bell was also broadcasting ***as a broadcasting undertaking***.[102] It was only if Bell was doing the latter that the *Telecommunications Act* would not apply. Justice Webb took a functional approach to this question, and concluded that Bell was not engaged in broadcasting as a broadcasting undertaking in relation to the particular ***activity*** at issue in the appeal – i.e., its

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[99] *Ibid*, ¶60-62 and 68-69, *emphasis added*.
[100] *Ibid*, ¶59.
[101] *Ibid*, ¶33.
[102] *Ibid*, ¶28, 34, 43 and 48.

transmission of the mobile TV service – since regardless of its broadcasting activities when acquiring, aggregating and packaging programs, it transmitted those programs over a voice and data network that was agnostic as to the particular content being carried:

> ***Bell Mobility submitted that once the CRTC concluded***, as it did in paragraph 15 of its reasons, ***that Bell Mobility was "involved in broadcasting"*** and that "mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order", ***this should have been the end of the matter. According to Bell Mobility, the CRTC should then have determined that the Broadcasting Act, and not the Telecommunications Act, applied to the transmission of programs*** to its customers as part of its mobile TV services.
>
> ***I do not agree*** that these findings would end the matter. The finding that Bell Mobility was "involved in broadcasting" appears to be based on ***the functions identified by the CRTC*** in para-graph 15 of its reasons. These functions ***are acquiring rights, aggregating content, and packaging and marketing of services. None of these functions would be the "transmission of programs". Therefore, the conclusion that Bell Mobility was "involved in broadcasting" in carrying on these functions would not necessarily lead to a conclusion that it was "broadcasting" as a "broadcasting undertaking" when it was delivering its mobile TV services to its customers.***
> ***…***
> In my view, the answer to the question of whether the particular carrier who is transmitting programs for a broadcaster will then be broadcasting as a broadcasting undertaking, can be found in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 (ISP). …
>
> …***[A] person who has no control over the content of programs and is only transmitting programs for another person, would not be transmitting such programs as a broadcasting undertaking.***
> …
> The relevant question is whether the CRTC's determination that, ***even though Bell Mobility was involved in broadcasting in carrying out certain activities, it was not broadcasting as a broadcasting undertaking in transmitting its programs***, is reasonable. It is important to note that section ***4 of the Telecommunications Act exempts an activity (broadcasting by a broadcasting undertaking), not a person or an entire undertaking.***
> …
> In my view it was reasonable for the CRTC to determine that ***Bell Mobility, when it was transmitting programs as part of a network that simultaneously transmits voice and other data con-tent, was merely providing the mode of transmission thereof - regardless of the type of content - and, in carrying on this function, was not engaging the policy objectives of the Broadcasting Act. The activity in question in this case related to the delivery of the programs - not the content of the programs - and therefore, the policy objectives of the Telecommunications Act related to the delivery of the "intelligence" were engaged.***[103]

The instant case is even stronger than *Klass*. Whereas *Klass* involved a vertically integrated entity that itself acquired, aggregated and packaged the programs it transmitted, the ISPs under the Proposed Regime will have no independent role in selecting, originating or packaging the content transmitted to end-users. Instead, they will simply be acting at the behest of the CRTC. Accordingly, the *Broadcasting Act* should not apply to their transmission function, and the CRTC should retain the authority under the *Telecommunications Act* to regulate their delivery of programs.

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[103] *Ibid*, ¶35-36, 45-46, 50 and 53, *underlining in original, bolding and italics added*.

Finally, in addition to not conflicting with the *Broadcasting Act*, the Proposed Regime would greatly advance the underlying purposes of that statute. Absent the Proposed Regime, several of the broadcasting policy objectives in s. 3(1) of the *Broadcasting Act* will continue to be undermined due to the negative impact that Piracy sites have upon the creation of original Canadian programming:

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
>
> …
>
> (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the ***maintenance and enhancement of national identity and cultural sovereignty***;
>
> …
>
> (d) the Canadian broadcasting system should
>
> (i) serve to ***safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada***,
>
> (ii) ***encourage the development of Canadian expression*** by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
>
> (iii) through its programming and the ***employment opportunities arising out of its operations***, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, …
>
> …
>
> (e) each element of the Canadian broadcasting system shall ***contribute in an appropriate manner to the creation and presentation of Canadian programming***;
>
> (f) each broadcasting undertaking shall ***make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming***, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
>
> …
>
> (i) the programming provided by the Canadian broadcasting system should
>
> …
>
> (v) ***include a significant contribution from the Canadian independent production sector***;
>
> …
>
> (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
>
> (i) ***contribute significantly to the creation and presentation of Canadian programming***…
>
> …

(t) distribution undertakings

> (i) should ***give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations***,
> …
> (iv) may, where the Commission considers it appropriate, ***originate programming, including local programming***, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities. [*emphasis added*]

This harmony between the Proposed Regime and the *Broadcasting Act* is important when construing the scope of the CRTC's authority under the *Telecommunications Act* itself. Indeed, courts have repeatedly emphasized that "there is a significant interrelationship between the *Telecommunications Act* and the *Broadcasting Act*".[104]

Further, the Supreme Court of Canada has recognized that the broadcasting policy objectives in s. 3 of the *Broadcasting Act* may be looked to in interpreting other legislation within the same "larger statutory scheme" as the *Telecommunications Act*. In *Bell ExpressVu Limited Partnership v. Rex*,[105] the Court relied on s. 3 of the *Broadcasting Act* when construing the *Radiocommunication Act*. It found that, given the focus on a unitary broadcasting system in the s. 3 policy objectives, s. 9(1)(c) of the *Radiocommunication Act* – which prohibits a person from decoding an encrypted subscription programing signal without authorization – should be read as imposing an absolute prohibition on Canadian residents decoding such signals, even when they originate in the United States:

> On the other hand, ***the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the Broadcasting Act.*** The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually ***assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system***. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.[106]

While the *Telecommunication Act* – unlike the *Radiocommunication Act*[107] – does have its own statement of purpose in s. 7, this should not preclude the CRTC from having regard to s. 3 of the *Broadcasting Act* where the objectives it sets out can be achieved in a manner that is consistent with the telecommunications ones. Indeed, s. 28(1) of the *Telecommunications Act* expressly requires the CRTC to consider the *Broadcasting Act* objectives when determining undue preference issues relating to the transmission of programs, and the Supreme Court of Canada did not object to the fact that the CRTC considered broadcasting objectives when interpreting the *Telecommunications Act* in *Barrie Public Utilities v. Canadian Cable Television Assn.* (stating instead that "[t]he *Broadcasting Act* is not directly applicable to this appeal but is nevertheless

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[104] *Ibid*, 2016 FCA 185, ¶39.
[105] [2002] 2 S.C.R. 559.
[106] *Ibid*, ¶49, *emphasis added*.
[107] *Ibid*, ¶44.

relevant").[108] Accordingly, the symmetry between the Proposed Regime and s. 3 of the *Broadcasting Act* supports the CRTC's jurisdiction under ss. 24, 24.1 and 36 of the *Telecommunications Act*.

C. The *Radiocommunication Act*

The Proposed Regime also finds further support when the *Telecommunications Act* is read alongside the *Radiocommunication Act*. In *Bell ExpressVu*, the Supreme Court accepted that the *Radiocommunication Act* is connected to the *Telecommunications Act* itself, not simply to the *Broadcasting Act*:

> … S. Handa et al., *Communications Law in Canada* (loose-leaf), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:
>
> > ***The Radiocommunication Act*** embraces all private and public use of the radio spectrum. The ***close relationship between this and the telecommunications*** and broadcasting ***Acts*** is determined by the fact that ***telecommunications*** and broadcasting are the two ***principal users of the radioelectric spectrum.***[109]

A similar point was made in *Cogeco*, quoted at page 28 above. The connection between the two statutes is underscored by s. 5(1.1) of the *Radiocommunication Act*. It provides that, in exercising the powers under s. 5(1) – which enable the Minister of Industry to, *inter alia*, "do any other thing necessary for the effective administration of this Act" – the Minister "may have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the *Telecommunications Act*".[110]

The significance of the *Radiocommunication Act* lies in the fact that it makes the pirating of subscription television signals an offence that gives rise to both penal sanctions and civil liability:[111]

> 2 In this Act,
>
> …
>
> subscription programming signal means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;
>
> …
>
> 9 (1) ***No person shall***
>
> …
>
> (c) ***decode an encrypted subscription programming signal*** or encrypted network feed ***otherwise than under and in accordance with an authorization from the lawful distributor of the signal*** or feed;
>
> …

---

[108] [2003] 1 S.C.R. 476, ¶39 (and ¶37-38). The Court did find the CRTC erred by using the purpose clauses of both statutes to create jurisdiction under the *Telecommunications Act*, but that was not because of its reliance on the *Broadcasting Act* objectives in a telecommunications context. See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2001 FCA 236, ¶46-54, aff'd, [2003] 1 S.C.R. 476, where Rothstein J.A. did not object to the CRTC's consideration of broadcasting objectives in interpreting the *Telecommunications Act*.

[109] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶44, *emphasis added*.

[110] See also *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1, ¶86, 88, 94-97, 101 and 109; *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1157, ¶44-49.

[111] Criminal liability for telecommunications piracy also exists in ss. 326-327 of the *Criminal Code*, R.S.C. 1985, c. C-46.

> (e) ***retransmit to the public an encrypted subscription programming signal*** or encrypted network feed ***that has been decoded in contravention of paragraph (c)***.
>
> …
>
> [10](2.1) ***Every person who contravenes paragraph 9(1)(c)*** or (d) ***is guilty of an offence*** punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.
>
> (2.2) ***Every person who contravenes paragraph 9(1)(e) is guilty of an offence*** punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding two hundred thousand dollars.
>
> …
>
> 18 (1) ***Any person who***
>
> (a) ***holds an interest in the content of a subscription programming signal*** or network feed, ***by virtue of copyright ownership or a licence granted by a copyright owner,***
>
> (b) ***is authorized by the lawful distributor of a subscription programming signal*** or network feed to communicate the signal or feed to the public,
>
> (c) ***holds a licence to carry on a broadcasting undertaking*** issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act,* …
>
> …
>
> ***may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)***, (d) ***or (e)*** or 10(1)(b), in any court of competent jurisdiction, ***sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction,*** accounting or otherwise, ***as the court considers appropriate.***
>
> …
>
> (6) ***Nothing in this section affects any right or remedy that an aggrieved person may have under the Copyright Act.*** [*emphasis added*]

Accordingly, by virtue of s. 9(1)(e), a person who decodes a "subscription programming signal" (or radiocommunication intended for reception by the Canadian public on payment), without the authorization of the signal's "lawful distributor" (i.e., the person with a CRTC broadcasting licence that has the contractual and copyrights necessary to transmit the program and authorize its decoding in Canada),[112] and then "retransmit[s] [it] to the public", will incur criminal and civil liability under the Act.[113] The activities of many pirate operators would fit comfortably within this prohibition.[114] By implementing the Proposed Regime, therefore, the CRTC will be acting in a manner that is consistent with the purposes of the *Radiocommunication Act*.

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[112] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶42 and 50.

[113] See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶38, noting that s. 9(1)(e) "prohibit[s] the broadcasting of subscription programming signals" without authorization.

[114] See: *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶32; *Echostar Satellite LLC v. Pellettier*, 2010 ONSC 2282, ¶7 and 47; *Bell Canada v. 1326030 Ontario Inc. (c.o.b. iTVBox.net),* 2016 FC 612, ¶27, aff'd, 2017 FCA 55.

D. The *Copyright Act*

There is no conflict between the Proposed Regime and the *Copyright Act*. Instead, the Proposed Regime creates a valuable new administrative mechanism that supports and reinforces several of the rights already granted under the *Copyright Act* itself.

Pursuant to ss. 2.4, 3, 15, 18 and 21 of the *Copyright Act*, rightsholders possess a variety of discrete entitlements,[115] including rights to reproduce or to communicate works to the public by telecommunication,[116] and to reproduce unauthorized fixations of the communication signals they broadcast:

> [2.4](1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.
>
> 3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
>
> (a) to produce, reproduce, perform or publish any translation of the work,
> …
> (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
>
> (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
>
> (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
> …
> and to authorize any such acts.
> …
> 15 (1) Subject to subsection (2), a performer has a copyright in the performer's performance, consisting of the sole right to do the following in relation to the performer's performance or any substantial part thereof:
> …
> (b) if it is fixed,
>
> (i) to reproduce any fixation that was made without the performer's authorization,

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[115] See, e.g., *Bell Canada v. 1326030 Ontario Inc. (c.o.b. iTVBox.net),* 2016 FC 612, ¶21, aff'd, 2017 FCA 55.

[116] See *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 S.C.R. 615, ¶7 ("Production and broadcasting may implicate both reproduction and the telecommunication rights in a work"). These dramatic works may include pre-recorded "programs" or compilations of "programs" within the meaning of the *Broadcasting Act* that are carried in communication signals, and the copyright in such works may be held by broadcasters: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶36 and 51. See also *2251723 Ontario Inc. (c.o.b. VMedia) v. Bell Canada*, 2016 ONSC 7273.

(ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII…

(1.1) Subject to subsections (2.1) and (2.2), a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts:

…

(d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way; …

…

18 (1) Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or any substantial part thereof:

(b) to reproduce it in any material form; …

…

[18](1.1) Subject to subsections (2.1) and (2.2), a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it and to authorize any of those acts:

(a) to make it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public and to communicate it to the public by telecommunication in that way; …

…

21 (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(a) to fix it,

(b) to reproduce any fixation of it that was made without the broadcaster's consent,

…

and to authorize any act described in paragraph (a), (b) or (d).

Section 27 stipulates when an infringement of these rights may occur:

27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(a) sell or rent out,

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), …

…

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

…

(2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;

(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

(c) whether the service has significant uses other than to enable acts of copyright infringement;

(d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

(e) any benefits the person received as a result of enabling the acts of copyright infringement; and

(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

Finally, ss. 34-35 and 39.1 grant the copyright holder civil remedies against infringers, and s. 42 creates penal liability for infringement:

34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

…

35 (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

…

39.1 (1) When granting an injunction in respect of an infringement of copyright in a work or other subject-matter, the court may further enjoin the defendant from infringing the copyright in any other work or subject-matter if

> (a) the plaintiff is the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; and
>
> (b) the plaintiff satisfies the court that the defendant will likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so.
>
> …
>
> 42 (1) Every person commits an offence who knowingly
>
> (a) makes for sale or rental an infringing copy of a work or other subject-matter in which copyright subsists;
>
> (b) sells or rents out, or by way of trade exposes or offers for sale or rental, an infringing copy of a work or other subject-matter in which copyright subsists;
>
> (c) distributes infringing copies of a work or other subject-matter in which copyright subsists, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright;
>
> (d) by way of trade exhibits in public an infringing copy of a work or other subject-matter in which copyright subsists;
>
> (e) possesses, for sale, rental, distribution for the purpose of trade or exhibition in public by way of trade, an infringing copy of a work or other subject-matter in which copyright subsists;
>
> …
>
> (2.1) Every person who commits an offence under subsection (1) or (2) is liable
>
> (a) on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than five years or to both; or
>
> (b) on summary conviction, to a fine of not more than $25,000 or to imprisonment for a term of not more than six months or to both.

Piracy sites can infringe copyrights in several ways. Where a piracy site repeatedly streams copyrighted works to numerous different users or otherwise makes such streams available to the public, it violates the copyright holder's sole right in s. 3(1)(f) to communicate works to the public by telecommunication,[117] which includes the right of making the work or other subject matter available to the public.[118] Further, a piracy site that induces, procures or authorizes users to permanently download – rather than stream – copyrighted material violates the reproduction and authorization rights in the *Copyright Act*.[119] Piracy site downloads may also violate the s. 21(1)(b) right to authorize the reproduction of fixations of communication signals containing works that were fixed by the site without the broadcaster's consent. Finally, piracy sites may engage in secondary

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[117] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶1-2, 5, 21-40 and 52-57.

[118] *Copyright Act*, ss. 2.4(1.1), 15(1.1)(d), 18(1.1)(a).

[119] *Copyright Act*, ss. 3(1), 15(1)(b), 18(1). See also *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, ¶1-5, 9-10, 12, 19, 25, 27-39 and 42. Piracy sites that enable users to downloaded copyrighted material may potentially also violate s. 3(1)(f) by "making available" the works to them under s. 2.4(1.1): see *Re Collective Administration of Performing and of Communication Rights*, [2017] C.B.D. No. 11 (Canada Copyright Board), ¶12. See also *The Football Association Premier League Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 2058 (Ch), ¶26-50.

infringement pursuant to s. 27(2),[120] and violate s. 27(2.3) by providing a service primarily for the purpose of enabling one or more the foregoing acts of copyright infringement.[121]

In providing a regulatory mechanism that supports these rights, the Proposed Regime compliments rather than conflicts with the *Copyright Act*. This is evident when the Proposed Regime is considered in light of *Cogeco*, where the Supreme Court held that CRTC orders are prohibited from conflicting with the *Copyright Act* in two ways: (1) operational conflict, where "there is an ***impossibility of compliance*** with both provisions"; and (2) purpose conflict, where "applying one provision would frustrate the ***purpose*** intended by Parliament in another".[122]

As to ***operational conflict***, the only provisions of the *Copyright Act* that could arguably conflict with the Proposed Regime are ss. 31.1 and 89.

Section 31.1 provides ISPs with a series of exceptions to infringement liability for Internet activities:

> 31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.
>
> (2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.
>
> (3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter,
>
> (a) does not modify it, other than for technical reasons;
>
> (b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and
>
> (c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject-matter.
>
> (4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

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[120] While it has not been thoroughly resolved whether s. 27(2) applies to digital copies in addition to tangible ones, we are of the view that there are good arguments that it does.

[121] In addition to these violations, some piracy sites may also incur civil or criminal infringement liability under ss. 41.1(2) 42(3.1) by violating ss. 41 and 41.1 if they circumvent or facilitate the circumvention of "technological protection measures" that the copyright holder used to control access to their work or to restrict infringement, such as encryption.

[122] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶44, *emphasis in original*.

> (5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.
>
> (6) Subsections (1), (2) and (4) do not apply in relation to an act that constitutes an infringement of copyright under subsection 27(2.3).

The argument could be made that s. 31.1 already creates a regime for ISPs in relation to Internet copyright, and that the Proposed Regime upsets this regime by imposing additional obligations upon the ISP.

However, it is important to emphasize that s. 31.1 provides ISPs with exceptions to ***infringement liability***. Unlike the Proposed Regime, therefore, s. 31.1 is premised upon the potential infringement liability of the ISP, and would not apply to innocent ISPs. Further, the Proposed Regime will not create an optional exception to infringement liability, but will instead impose a mandatory obligation upon ISPs to take third party protection measures in favour of rightsholders when directed to do so by the CRTC as a condition of the offering or provision of telecommunications services. This does not undermine the exceptions from liability in s.31.1.

With respect to s. 89, it prohibits the creation of any copyright except under a federal statute:

> 89 No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

In reflection of this provision, the Supreme Court has held that "copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are exhaustive".[123] Therefore, if the Proposed Regime involves the creation of a functional copyright equivalent to the rights and remedies under the Act by the CRTC, there could be an operational conflict with s. 89.[124]

The Proposed Regime does not, however, create a new copyright. Of particular importance is that the Proposed Regime contemplates an order by the CRTC against ***ISPs***, not against the ***infringing pirate operators themselves***. This is significant, because ISPs are generally exempt from infringement liability under the *Copyright Act* pursuant to s. 31.1 quoted above, in addition to s. 2.4(1),[125] which provides:

> 2.4 (1) For the purposes of communication to the public by telecommunication,

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[123] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶82. See also: *Théberge v. Galerie d'Art du Petit Champlain inc.* , [2002] 2 S.C.R. 336, ¶5; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, ¶9; *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20, ¶3 and 8.

[124] See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶80-82.

[125] See also s. 31.1(1) of the *Copyright Act*:

> 31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

> …
> (b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public; …

In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* ("***SOCAN***"), the Supreme Court of Canada described the operation of this provision as follows:

> … So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within s. 2.4(1)(b). …
> …
> While lack of knowledge of the infringing nature of a work is not a defence to copyright actions generally… nevertheless the presence of such knowledge would be a factor in the evaluation of the "conduit" status of an Internet Service Provider…
> …
> I conclude that the Copyright Act, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a "conduit", as found by the Board, include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious. We are told that a large on-line service provider like America Online delivers in the order of 11 million transmissions a day.[126]

The Supreme Court reaffirmed this approach in the *ISP Reference*, where it stated that "since ISPs merely act as a conduit for information provided by others, they could not themselves be held to communicate the information".[127]

In light of the foregoing, ISPs that do not engage in any independent content control and who do not act with knowledge that they are facilitating infringements are exempt from infringement liability under ss. 2.4(1) and 31.1 of the *Copyright Act*.[128] In effect, Parliament has confirmed that ISPs acting as passive carriers are not liable for the telecommunications they transmit. Therefore, in making a site blocking order against ISPs, the CRTC is not creating any new copyright, as would be the case if it awarded relief against the infringing pirate operator itself. Instead, the CRTC is imposing a regulatory measure whose primary purpose is to advance Canadian telecommunications policy objectives.

It is true that the Proposed Regime will have the secondary effect of supporting copyright, but this is not inconsistent with the Supreme Court's observation that "the rights and remedies provided by the *Copyright Act* are exhaustive". Indeed, other mechanisms also exist in the Canadian legal system that advance copyright in an ancillary fashion. An important illustration is provided by the *Radiocommunication Act*, which as discussed at pages 36-37 above creates civil and criminal

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[126] [2004] 2 S.C.R. 427, ¶92, 99 and 101 (and ¶5 and 85-91, 93-98, 100, 102-103, 114, 123-124, 127 and 131-132).
[127] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶7.
[128] While the Supreme Court has left open whether ISPs may be liable for copyright infringement where they have notice that their Internet service is being used for infringing conduct and refused to take it down, it has also stated its preference for a response that is similar to the Proposed Regime rather than an infringement action: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶127.

liability for piracy of subscription programming signals. Section 18(1)(a) of the Act specifically permits "any person who… holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership" to bring a damages claim against a party who contravenes ss. 9(1)(c)-(e), and s. 18(6) makes clear that this right is in addition to any right or remedy that exists under the *Copyright Act* itself (providing that "[n]othing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*"). Thus, the Federal Court of Appeal has recognized that acts contrary to s. 9(1) of the *Radiocommunication Act* can simultaneously infringe copyright under the *Copyright Act*.[129]

There is accordingly no operational conflict between the Proposed Regime and the *Copyright Act*. If anything, the *Copyright Act* supports the Proposed Regime, since it augers for an interpretation of the *Telecommunications Act* which would advance the interests of copyright holders. This is reflected in *Bell ExpressVu*, where one of the reasons why the Supreme Court gave s. 9(1)(c) of the *Radiocommunication Act* a broad scope is because it would simultaneously further Canada's copyright regime:

> I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(c) and 21(1)(d) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. ***By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself***, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs… Finally, I note that ***the civil remedies provided for in ss. 18(1)(a) and 18(6) of the Radiocommunication Act both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.***[130]

As to ***purpose conflict***, it is useful to contrast the Proposed Regime with the one at issue in *Cogeco*. The CRTC in *Cogeco* proposed to create a value-for-signal regime (the "**VFS Regime**") that would give local television stations the right to prohibit BDUs from retransmitting their programs if they failed to negotiate direct compensation for retransmission. The VFS Regime enabled the television stations to enforce the program deletion right directly against the BDUs themselves, with no intervention by the CRTC.[131] Indeed, the CRTC stated that "[t]he Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request".[132] The Supreme Court characterized this program deletion right as "a functionally equivalent right" to a copyright, which – as with the rights granted to broadcasters under the *Copyright Act* itself – "empowers broadcasters to prohibit the

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[129] *NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)*, [1998] F.C.J. No. 1063 (C.A.), ¶7-9. See also *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶32. *cf. Columbia Pictures Industries, Inc. v. Gaudreault*, 2006 FCA 29, ¶28-32.

[130] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶52, *emphasis added*.

[131] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶7.

[132] *A group-based approach to the licensing of private television services* – Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010, ¶164.

retransmission of their signals if certain conditions are met".[133] The Court found that this conflicted with the purpose of the *Copyright Act*, which it described as a "balance between authors' and users' rights" or between the rights of "broadcasters and users",[134] in two ways.

First, the Court held the VFS Regime undermined s. 21 of the *Copyright Act*, since that provision grants broadcasters a limited copyright in communication signals only against other broadcasters, not against BDUs themselves as the VFS Regime would do:

> …[T]he value for signal regime conflicts with s. 21(1) of the *Copyright Act* because ***it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the Copyright Act.***
> …
> In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. ***It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the Copyright Act, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime.*** The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator"…[135]

Second, the Court found the VFS Regime would remove the retransmission user right which s. 31 of the *Copyright Act* had given to BDUs as an exception to the broadcasters' s. 3(1)(f) copyright in programs:

> As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a work carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the *Copyright Act*. ***The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the Copyright Act specifically excludes it from the control of copyright owners, including broadcasters.***
>
> Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. ***The value for signal regime would effectively overturn the s. 31***

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[133] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶67 and 82.
[134] *Ibid*, ¶64. See also ¶76 ("The value for signal regime ***would rewrite the balance between the owners' and users' interests as set out by Parliament in the Copyright Act.*** Because the CRTC's value for signal regime is ***inconsistent with the purpose of the Copyright Act***, it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*").
[135] *Ibid*, ¶62 and 67, *underlining in original, bolding and italics added*.

> ***exception to the copyright owners' s. 3(1)(f) communication right. It would disrupt the balance established by Parliament***.[136]

Accordingly, the fundamental problem with the VFS Regime in *Cogeco* was that it broadened copyrights which the *Copyright Act* itself had intentionally drawn in more narrow terms. By contrast, the Proposed Regime does not grant any new or expanded rights against pirate operators at all. It merely creates a regulatory mechanism which allows rightsholders to seek an administrative order against ISPs, who are intermediaries to the copyright holder-infringer relationship. These ISPs are already excluded from the *Copyright Act* infringement regime by ss. 2.4(1)(b) and 31.1, and are prohibited from having any interest in the content they transmit (absent an order of the CRTC) by s. 36 of the *Telecommunications Act* and the *ISP Reference*.

Further, the *Copyright Act* itself recognizes that ISPs may be required to take actions in order to assist in preventing copyright infringement. Pursuant to ss. 41.25-41.26, ISPs are required to maintain records about infringing activities upon receiving notice from copyright holders, and to then notify the infringing party of their obligation to do the same:[137]

> 41.25 (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides
>
> > (a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network; …
> >
> > …
>
> (2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall
>
> > (a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;
> >
> > (b) identify the work or other subject-matter to which the claimed infringement relates;
> >
> > …
>
> 41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,
>
> > (a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
> >
> > (b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those

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[136] *Ibid*, ¶69-70, *underlining in original, bolding and italics added*.

[137] At the present time, the ISP is not permitted to charge any costs for performing this record retention obligation, though it could charge a fee for the actual, reasonable and necessary costs of disclosure: *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, ¶42-64 and 69-71, leave to appeal filed, [2017] S.C.C.A. No. 278.

> six months, for one year after the day on which the person receives the notice of claimed infringement.

Recently, in *Voltage Pictures, LLC v. John Doe*, the Federal Court of Appeal described the purpose of these provisions in terms in that will be significantly advanced by the Proposed Regime:

> The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. ***The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others' dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament's objectives would crumble. All the laudable aims of the Copyright Act***--protecting creators' and makers' rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment--***would be nullified.***
>
> Thus, to the extent it can, ***the legislative regime must be interpreted to allow copyright owners to protect and vindicate their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all.***[138]

We acknowledge that the ss. 41.25-41.27 amendments were made against the backdrop of prior legislative proposals for "notice and takedown" and "graduated response" regimes (the "**Rejected Regimes**") in the *Copyright Act* which were ultimately rejected by Parliament in favour of the "notice and notice" regime reflected in ss. 41.25-41.27 themselves.[139] In *Cogeco*, the Supreme Court pointed to Parliament's earlier rejection of the broadened copyright granted by the VFS Regime in

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[138] *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, ¶26-27, leave to appeal filed, [2017] S.C.C.A. No. 278, *emphasis added*. See also *BMG Canada Inc. v. John Doe*, 2005 FCA 193, a decision that predated the ss. 41.25-41.27 amendments where the Federal Court of Appeal recognized the ability of copyright holders to obtain *Norwich* orders against ISPs regarding information about users who file-shared their works without authorization. In the course of its reasons, the Court observed that the privacy rights of file-sharers must yield to the copyright holders' intellectual property rights:

> … Intellectual property laws originated in order to protect the promulgation of ideas. ***Copyright law provides incentives for innovators*** - artists, musicians, inventors, writers, performers and marketers - ***to create.*** It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.
>
> Modern technology such as ***the Internet*** has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. ***This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.*** [*emphasis added*]

[139] House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (May 2004) at 10-11 (Chair: Sarmite D. Bulte); Bill C-60, *An Act to Amend the Copyright Act*, 38th Sess, 1st Parl, 2005 (first reading June 6, 2005); Canada, Law and Government Division, "Legislative Summary of Bill C-60: An Act to Amend the Copyright Act", by Sam Banks & Andrew Kitching (Ottawa: LGD, 2005) at 11; Bill C-32, *An Act to Amend the Copyright Act*, 40th Sess, 3rd Parl, 2011 (second reading November 5, 2011); Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-32: An Act to Amend the Copyright Act", by Dara Lithwick (Ottawa: LLAD, 2011) at 23-24; Bill C-11, *An Act to Amend the Copyright Act*, 41st Sess, 1st Parl, 2012 (assented to June 29, 2012), 2012, c. 20; Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27.

finding it to conflict with the purpose of the *Copyright Act*.[140] Accordingly, the argument could be made here that the Proposed Regime similarly conflicts with the *Copyright Act* by creating rights which Parliament deliberately chose not to adopt.

Nevertheless, unlike in *Cogeco*, where broadcasters had "contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs"[141] – which was the very ***same*** right granted in the VFS Regime by the CRTC – the Rejected Regimes proposed in lieu of ss. 41.25-41.27 were ***different*** from the Proposed Regime at issue now. As noted in the legislative summary to Bill C-11 (ultimately enacted as the *Copyright Modernization Act*[142] which introduced ss. 41.25-41.27):

> As described above, the proposed "notice-and-notice" regime requires ISPs to forward any notice of infringement they receive from copyright owners to the subscriber in question. On the other hand, ***a "notice-and-takedown" regime typically requires an ISP to block access to material upon receipt of a notice from a rights holder that alleges such material to be infringing***. ***The obligation to block access lies with the ISP whose facilities are being used to host the allegedly infringing material***. Under Canadian law, the courts already have the ability to order the takedown of infringing material in appropriate cases. ***In a "notice-and-takedown" regime, no court order is required. A "graduated response" approach, on the other hand, would involve consumers being disconnected from the Internet after a number of notification letters warning that they are violating copyright***.[143]

Three points should be noted here.

First, the Rejected Regimes each contemplated a different mechanism for preventing piracy than the Proposed Regime. In the case of the notice and takedown regime, a request would be made to "the ISP whose facilities are being used to ***host*** the allegedly infringing material" to block access to the infringing content. In other words, it was the specific ISP whose facilities were being used to upload the piracy site that would be asked to disable access to the infringing content. This contrasts with the Proposed Regime, in which all Canadian ISPs will be asked to block access to the piracy site ***by their users***, so the CRTC's order will apply to network service providers rather than hosting providers. The same distinction was recognized in *Cartier International AG v. British Sky Broadcasting Ltd.*, where the English Court of Appeal upheld a site-blocking injunction against a website engaged in trademark infringement partly because it would be more effective than a notice and takedown order:

> … The judge's conclusion was amply supported by the evidence before him and he was in my judgment entitled to find as he did that ***notice and takedown would be unlikely to achieve anything more than short-term disruption of the target websites***. He recognised that website blocking orders impose compliance costs on the ISPs whereas notice and take down requests do not but rightly found that, for the rightholders, ***website blocking had advantages***.[144] …

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[140] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶71-73, 76, 78 and 81.
[141] *Ibid*, ¶72.
[142] S.C. 2012, c. 20.
[143] Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27, *emphasis added*.
[144] [2017] 1 All E.R. 700 (Eng. C.A.), ¶177, *emphasis added*.

As for the graduated response regime, it "would involve consumers being disconnected from the Internet" after notification letters. Once again, therefore, the mechanism would not take the form of all ISPs blocking access by ***all their users*** to a ***particular piracy site***, as under the Proposed Regime. Instead, the graduated response regime contemplated that ***particular users*** identified as repeat infringers would be denied access to the ***Internet at large*** by a particular ISP.

Second, the Rejected Regimes were suggested in the context of proposed exemptions from copyright infringement liability for ISPs, who would only be eligible if they complied with the notice and takedown or graduated response requests.[145] They therefore would not have imposed any obligation upon ISPs to remove infringing content. Instead, the Rejected Regimes would have simply given ISPs the option to remove such content, failing which they would be disentitled to rely upon the infringement exemptions. This contrasts with the Proposed Regime, which will impose a free-standing obligation upon ISPs to disable access to piracy sites. That obligation will not exist as part of an exemption to infringement liability, but instead as a condition of the ISPs' right to offer and provide telecommunications services under ss. 24 and 24.1 of the *Telecommunications Act*.[146]

Third, the Proposed Regime will be more effective and procedurally fair than either of the Rejected Regimes. Of particular note is that the Rejected Regimes did not require an evidence-based review by an independent regulatory agency – let alone by two (the IPRA and CRTC) – before they could be engaged. Instead, the Rejected Regimes would apply upon the receipt of notice from the copyright holder.[147] This created fundamental fairness concerns when the Rejected Regimes were being debated by Parliament,[148] which are not present in the Proposed Regime given the interposition of the IPRA and CRTC.[149] Further, the Rejected Regimes were both premised upon action by a specific ISP in relation to either specific uses or the hosting of a specific site, as noted above. This made them less efficient than the Proposed Regime, in which the CRTC will issue an order against ***all*** Canadian ISPs requiring that they disable access to the piracy site by ***all*** users.

As the Federal Court has observed, "[p]iracy of copyrighted materials on the Internet is a serious issue in North America. The Court's general policy therefore, should be to support measures that reasonably deter such illegal conduct".[150] Against this backdrop, it is unlikely a court would conclude the Proposed Regime is invalid based on a purpose conflict with the *Copyright Act*. While Parliament has previously declined to add notice and takedown and graduated response mechanisms to the *Copyright Act*, the Proposed Regime is different in kind, purpose and effect than these Rejected Regimes. Therefore, the Proposed Regime will not conflict with the purpose of the *Copyright Act* on the basis that it has been previously rejected as an amendment to that statute.

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[145] The notice and takedown regime, for instance, was predicated upon the host ISP being potentially liable for copyright infringement (hence why it was advanced as an exemption).

[146] The Proposed Regime is therefore more similar to Art. 8(3) of the European Union's *Information Society Directive*, which permits blocking orders against innocent intermediaries that are not premised upon infringement.

[147] For an example of a graduated response order, see the decision of the Irish Court of Appeal in *Sony Music Entertainment Ireland Ltd. v. UPC Communications Ireland Ltd.*, [2016] IECA 231, ¶1.

[148] *Legislative Committee Evidence on Bill C-32*, 40th Parl, 3rd Sess, No 012 (10 February 2011) (Danielle Simpson; Mike Lake); *House of Commons Debates: Official Hansard*, 40th Parl, 3rd Sess, Vol 145 No 092 (2 November 2010) at 1150 (Hon James Moore); *Legislative Committee Evidence on Bill C-11*, 41st Parl, 1st Sess, No 005 (29 February 2012) (Robert D'Eith).

[149] We acknowledge that some parties may argue the Proposed Regime is unfair. However, for the reasons given at pages 56-63 below, we do not believe the Proposed Regime can be successfully challenged on this basis.

[150] *Voltage Pictures LLC v. John Doe*, 2015 FC 1364, ¶52.

(b) Compliance With the *Canadian Charter of Rights and Freedoms*

It is possible that arguments will be made the Propose Regime "restrict[s] the flow of information" on the Internet "and, as a result, freedom of expression".[151] Pursuant to s. 2 of the *Charter*:

> 2. Everyone has the following fundamental freedoms:
> …
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> …

In our view however, the Proposed Regime will not infringe s. 2(b) of the *Charter*.

The analytical framework for this issue was recently reviewed by the Supreme Court of Canada in *Loyola High School v. Quebec (A.G.)*.[152] As the Court recognized there, in cases where the allegation is not that legislation infringes the Charter, but that a "discretionary administrative decision" (such as the Proposed Regime) fails to respect its values or guarantees, the relevant question is "whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate".[153] The Court explained:

> ***The preliminary issue is whether the decision engages the Charter by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play"***… A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review…[154]

This framework was first articulated by the Supreme Court in *Doré v. Barreau du Québec*, where the issue was whether the Disciplinary Council of the Barreau du Québec appropriately balanced the statutory objective of civility with the *Charter* value of freedom of expression in reprimanding a lawyer who wrote a highly critical letter to a judge. The Court concluded that, "[i]n light of the excessive degree of vituperation in the letter's context and tone", the reprimand could not "be said to represent an unreasonable balance of [the lawyer's] expressive rights with the statutory objectives"[155]

As in *Doré*, the Proposed Regime is not contrary to the *Charter*, for two reasons.

First, the Proposed Regime does not engage the *Charter* by limiting its guarantee of freedom of expression. This is because it only contemplates site blocking orders by the CRTC in relation to websites that have been found, after an independent evidence-based review, to blatantly, overwhelmingly or structurally engage in piracy. Over 30 years ago, in *Canada v. James Lorimer &*

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[151] *Crookes v. Newton*, [2011] 3 S.C.R. 269, ¶36. See also S. Handa *et al*, *Communications Law in Canada*, looseleaf (Toronto: LexisNexis Butterworths, 2000+), §2.5.
[152] [2015] 1 S.C.R. 613.
[153] *Loyola High School v. Quebec (A.G.)*, [2015] 1 S.C.R. 613, ¶4 and 37 (and ¶3, 35, 38 and 40-42). See also: *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, ¶3-7, 34-42 and 55-58; *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, ¶49; *R. v. Clarke*, [2014] 1 S.C.R. 612, ¶16.
[154] *Loyola High School v. Quebec (A.G.)*, [2015] 1 S.C.R. 613, ¶39, *emphasis added*.
[155] [2012] 1 S.C.R. 395, ¶71.

Co., the Federal Court of Appeal effectively dismissed the notion that the *Charter* right to freedom of expression creates a right to piracy:

> The third defence was based on [s. 2(b) of] the *Canadian Charter of Rights and Freedoms*... [T]here is no merit in this defence. If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them. ***So little of its own thought, belief, opinion and expression is contained in the respondent's infringing work that it is properly to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work***.[156]

The same point was made in more categorical terms by the Federal Court in *Compagnie Générale des Établissements Michelin--Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*.[157] Justice Teitelbaum engaged in an extensive analysis of the jurisprudence on this issue, and drew the following conclusions:

> ... ***The Charter does not confer the right to use private property - the Plaintiff's copyright - in the service of freedom of expression.*** ...
> ...
> I agree with the Defendants that the threshold for prohibiting forms of expression is high. Violent forms are certainly at the extreme end but a form need not be violent in order to be prohibited. In *Irwin Toy* at page 970, Chief Justice Dickson did not "delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee." ***The threshold for prohibiting forms of expression is not so high that use of another's private property is a permissible form of expression.*** Chief Justice Lamer in Commonwealth (supra), stated that ***the necessary balancing of the parties' interests*** in cases of a party asserting the right to use public property ***occurs before the Section 1 analysis***. I have expanded this principle to conclude that a similar but stricter balancing of interests is to occur ***if the party, like the Defendants in the case at bar, asserts the right to use private property. In the balance of interests and rights, if the Defendants have no right to use the Plaintiff's "Bibendum", they have a multitude of other means for expressing their views. However, if the Plaintiff loses its right to control the use of its copyright, there is little left to the Plaintiff's right of private property. The Defendants seek to extend the scope of their right of free expression to include the use of another's property.***[158]

A similar conclusion has been reached in several English decisions where site blocking injunctions were granted against ISPs to protect third party intellectual property rights.[159]

While the matter has yet to be definitively resolved in the *Charter* context by the Supreme Court of Canada,[160] its recent decision in the *Google* case discussed at pages 27 and 30-31 above strongly

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[156] [1984] 1 F.C. 1065 (C.A.), ¶29 (WLeC), *emphasis added*. *cf. Canadian Tire Corp. v. Retail Clerks Union, Local 1518* (1995), 7 C.P.R. (3d) 415 (F.C.T.D.), ¶13 (WLeC).
[157] [1997] 2 F.C. 306 (T.D.), ¶78-117.
[158] *Ibid*, ¶81 and 108, *emphasis added*. See also: *Drolet v. Stiftung Gralsbotschaft*, 2009 FC 17, ¶187; *Dish Network L.L.C. v. Rex*, 2012 BCCA 161, ¶28 and 52, leave to appeal refused, [2012] S.C.C.A. No. 269.
[159] *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 1981 (Ch), ¶77, 164 and 200; *Paramount Home Entertainment v. British Sky Broadcasting*, [2014] EWHC 937 (Ch), ¶42; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), ¶31 and 75-79*The Football Association Premier League Ltd. v. British Communications Plc*, [2017] EWHC 480 (Ch), ¶47.
[160] In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶67, the Supreme Court left open whether the piracy prohibitions in the *Radiocommunication Act* infringed the *Charter* right to freedom of expression.

suggests that s. 2(b) of the *Charter* does not create the right to transmit infringing copyrighted material over the Internet. There, in rejecting the argument that a worldwide de-indexing injunction against Google to prevent the violation of intellectual property rights by a third party website would interfere with freedom of expression, the Supreme Court stated:

> …[W]hile it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. …
> …
> This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. ***We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.***[161]

Further, in addition to the fact that the Proposed Regime is limited to websites that are blatantly, overwhelmingly or structurally engaged in piracy, it only applies to the transmission of that content through private telecommunications facilities which are owned (or leased) by ISPs and regulated by the CRTC. The *Charter* does not give pirate operators any right to the use of private telecommunications facilities.[162] This is reflected in s. 41(1) of the *Telecommunications Act*, which permits the CRTC to prohibit a person's use of private telecommunications facilities for certain purposes even in the face of freedom of expression:

> 41 (1) The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

Moreover, as discussed at pages 20-23 above, s. 36 of the *Telecommunications Act* expressly allows the CRTC to authorize the control of content by TCCs. In doing so, it says nothing about the freedom of expression, unlike s. 41(1).

Second, assuming *arguendo* that the Proposed Regime will limit freedom of expression, it still represents a proportionate balancing of the s. 2(b) protection and the CRTC's statutory mandate. Indeed, allegations that the CRTC has acted contrary to freedom of expression have frequently been unsuccessful,[163] generally because of the countervailing interests that the CRTC is required to

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[161] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24, ¶45 and 48, *emphasis added*. It is noteworthy here that numerous CRTC regulations under the *Broadcasting Act* already exist which prohibit programming undertakings from broadcasting, and BDUs from distributing, programs that violate any law or other statute, including therefore the *Copyright Act* and *Radiocommunication Act*: see the *Broadcasting Distribution Regulations*, S.O.R/97-555, s. 8(1)(a); *Discretionary Services Regulations*, S.O.R./2017-159, s. 3(a); *Radio Regulations, 1986*, S.O.R./86-982, s. 3(a); *Television Broadcasting Regulations, 1987*, S.O.R./87-49, s. 5(1)(a). To accept the freedom of expression argument would mean that all of this legislation also violates the *Charter*.

[162] *New Brunswick Broadcasting Co., Ltd. v. C.R.T.C.*, [1984] 2 F.C. 410 (C.A.), ¶26 (WLeC), leave to appeal refused (1984), 13 D.L.R. (4th) 77n (S.C.C.); *May v. CBC/Radio Canada*, 2011 FCA 130 (Chambers), ¶25-26. *cf. Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1100-1104 (recognizing that s. 2(b) protects the right to place posters on ***public*** – not ***private*** – property).

[163] *Canada (C.R.T.C.) v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530 at 540; *CJMF-FM Ltée v. Canada*, [1984] F.C.J. No. 244 (C.A.); *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶4-6, 39-41, 55-60, 106, 109, 144-145, 182 and 214-224, leave to appeal refused, [2005] C.S.C.R. No. 485, *emphasis added*. *cf. Assn. of Canadian Distillers v. Canada (C.R.T.C.)*, [1995] 2 F.C. 778 (T.D.), ¶17-23 (QL).

balance under its enabling legislation. In *R. v. CKOY Ltd.*,[164] the Supreme Court of Canada held that a CRTC regulation, which prohibited radio stations from broadcasting interviews without the interviewee's consent, did not abridge the broadcaster's freedom of expression, in large part because of the important interest which the ***interviewee*** (the party analogous to the rightsholder in the Proposed Regime) had in the content of their speech:

> The appellant also urges s. 2 of the *Canadian Bill of Rights*… It is urged that to interpret Regulation 5(k) as being intra vires of the Canadian *Broadcasting Act* would infringe the provisions of s. 2 as it would result in the abridging of freedom of speech recited in s. 1(f) of the said statute. I am ready to assume that the broadcasting media may be presumed to be defined within the word "press". However, as has been stated on many occasions, ***the freedom of the press is not absolute and the press, as all citizens, is subject to the ordinary law and has no more freedom of expression than the ordinary citizen***. … The limitation is referred to in s. 3 of the Canadian *Broadcasting Act* which makes the "freedom of expression" subject to "the generally applicable statutes and regulations". ***I am unable to understand how Regulation 5(k) in any way abridges the freedom of the press. It does not hinder or prevent either the broadcaster or an interviewed person from making any comment whatever. It simply prevents the interview being broadcast without the consent of the interviewed person. Indeed the regulation protects and confirms another fundamental freedom*** set out in the same s. 1 of the Canadian Bill of Rights in para. (a), ***that of freedom of speech, for the interviewed person may grant or withhold his consent to the broadcasting of his comments.*** Therefore, I am of the opinion that the *Canadian Bill of Rights* does not prevent the said Regulation 5(k) being found to be *intra vires*.[165]

In the contest between the interests of copyright holders and the Canadian telecommunications system on the one hand, and those of pirate operators, ISPs and piracy site users on the other, the Proposed Regime strikes a proportionate balance which gives effect as fully as possible to the freedom of expression while still permitting the CRTC to realize its statutory mandate. As discussed at pages 4-5 above, conventional methods of preventing piracy are ineffective in the Internet age, so there is a need for site blocking orders that are made directly against ISPs. Such orders will not be made as a matter of course. Instead, the Proposed Regime requires rightsholders and other applicants to come forward with sufficient evidence to satisfy two independent administrative agencies that the website blatantly, overwhelmingly or structurally engages in piracy. In cases where this threshold is satisfied, the resulting CRTC order will provide timely and comprehensive protection to rights holders in a way that advances Canadian telecommunications policy objectives, with further opportunities for review by appropriate parties.

This is again supported by *Google*, where the Supreme Court engaged in a form of proportionality analysis when considering whether the balance of convenience favoured the issuance of a worldwide de-indexing injunction against Google.[166] In concluding that it did, the Court emphasized that the harm to the plaintiff's intellectual property rights would "far outweig[h]" any impacts on freedom of expression:

> … As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily". ***Even if it***

[164] [1979] 1 S.C.R. 2.
[165] *Ibid*, at 14-15, *emphasis added*.
[166] See *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2014 NLCA 46, ¶66 ("[B]alancing of competing interests (proportionality) is vital when considering the appropriateness of an interlocutory injunction").

> ***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 Datalink's breach of court orders.***[167]

The proportionate nature of the Proposed Regime in relation to pirate operators[168] is also supported by case law from the United Kingdom, where a statutory mechanism exists permitting rights holders to seek court orders against ISPs disabling access to piracy sites.[169] Courts applying this U.K. regime are required to consider whether such orders are a proportionate response to online piracy, and have repeatedly concluded that they are.[170] In *The Football Association Premier League Ltd. v. British Communications Plc*, for instance, Arnold J. made the following comments when granting a blocking injunction against ISPs in relation to servers that streamed the claimant's copyrighted programs without authorization:

> FAPL contends that… ***the Order is proportionate.*** It does not impair the rights of the defendants to carry on business. ***To the limited extent that it interferes with the rights of internet users to impart or receive information, the interference is justified by a legitimate aim, namely preventing infringement of FAPL's copyrights on a large scale, and it is proportionate to that aim: it will be effective and dissuasive, no equally effective but less onerous measures are available to FAPL, it avoids creating barriers to legitimate trade, it is not unduly complicated or costly and it contains safeguards against misuse.*** I accept this contention.[171]

Indeed, in *SOCAN*, the Supreme Court of Canada suggested that even the more aggressive notice and takedown regime would be an "effective" way of preventing ISPs from facilitating online copyright violations:

> The knowledge that someone might be using neutral technology to violate copyright… is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did "(g)ive approval to; sanction, permit; favour, encourage"… the infringing conduct. I

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[167] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, ¶49, *emphasis added*. See also *Directv, Inc. v. Sandhu*, 2006 BCSC 1970, ¶76, where in granting an injunction to prevent signal piracy in contravention of the *Radiocommunication Act*, the Court stated "***the balance of convenience clearly favours the plaintiff and not the defendants, whose interests at stake appear on the materials before me to be proscribed by statute and in violation of the copyright of others, in other words, to be unlawful***".

[168] with respect to ISPs, it is difficult to see what "impact" the Proposed Regime will have upon them given that the *ISP Reference* and s. 36 of the *Telecommunications Act* already prohibit ISPs from having any control over – and therefore any interest in – the content they transmit. As willing participants in a regulated industry, ISPs are also under a social duty to implement measures designed to eliminate unlawful activity through the use of their regulated services by third parties: see *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, ¶50-51, 55 and 60.

[169] *Copyright, Designs and Patents Act 1988* (U.K.), c. 48, s. 97A(1):

> 97A(1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

[170] *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 1981 (Ch), ¶199-200; *Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.*, [2012] EWHC 1152 (Ch), ¶9-12; *EMI Records Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 379 (Ch), ¶90-107; *The Football Association Premier League Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 2058 (Ch), ¶53-59; *Paramount Home Entertainment v. British Sky Broadcasting*, [2014] EWHC 937 (Ch), ¶40-44; *1967 Ltd. v. British Sky Broadcasting Ltd.*, [2014] EWHC 3444 (Ch), ¶26-27; *Twentieth Century Fox Film Corp. v. Sky UK Ltd.*, [2015] EWHC 1082 (Ch), ¶61. See also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), ¶125-183 and 212-214, where the English Court of Appeal found a blocking order against ISP in relation to sites that infringed trade-marks to be proportionate.

[171] [2017] EWHC 480 (Ch), ¶69 (and ¶43-68), *emphasis added*.

> agree that notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization". However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of "authorization" would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. ***A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States***.[172]

Finally, it should be noted that existing laws already create remedies for Internet piracy that intrude upon freedom of expression. Under s. 34(1) of the *Copyright Act* and s. 18(1) of the *Radiocommunication Act*, discussed at pages 36-42 above, a copyright holder or licensed broadcasting undertaking may obtain an injunction from a court forcing a piracy site to be taken down.[173] The Proposed Regime does not authorize any greater interference with freedom of expression that these existing statutory provisions.

Accordingly, the Proposed Regime is not contrary to the s. 2(b) *Charter* right to freedom of expression.

(c) Common Law Requirements of Procedural Fairness

In applying the Proposed Regime, the CRTC will likely owe a common law duty of procedural fairness to the pirate operator, since the addition of a site to the piracy list is an administrative decision that will affect the pirate operator's interests.[174] The Supreme Court of Canada recently explained the nature of this duty in *Canada (A.G.) v. Mavi*:

> The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson*… [T]his principle was affirmed by a unanimous Court, per Le Dain J.: "…there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual"… The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context"…
>
> Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies. …[B]ut the general rule will yield to clear statutory language or necessary implication to the contrary…

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[172] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶127, *underlining in original, bolding and italics added*.

[173] See, e.g.: *Directv, Inc. v. Boudreau*, [2004] O.J. No. 1219 (S.C.J.), ¶3, 14 and 55; *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶31-33; *Echostar Satellite LLC v. Pellettier*, 2010 ONSC 2282, ¶7-9 and 64.

[174] *Green v. Law Society of Manitoba*, 2017 SCC 20, ¶53-54. It is unlikely that the CRTC would owe a duty of procedural fairness to ISPs, as the *ISP Reference* and s. 36 of the *Telecommunications Act* preclude them from having any control or influence over – and thus any independent interest in – the content they transmit. As the Supreme Court observed in *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶6, an ISP has "no knowledge or control over the nature of the communicatoins being passed over its wires". Out of an abundance of caution, however, we recommend that ISPs be given notice of the application by the rights holder, as is contemplated by the Proposed Regime.

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion"…
>
> Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content. …
>
> A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. … The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list… to include (i) "the nature of the decision being made and the process followed in making it"…; (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"…; (iii) "the importance of the decision to the individual or individuals affected"…; (iv) "the legitimate expectations of the person challenging the decision"…; and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances"…. Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive.[175]

Applying these factors here:[176]

(1) The nature of the decision being made lies somewhere between the judicial and legislative ends of the spectrum. The Proposed Regime contemplates an evidence-based hearing by independent administrative agencies, but the end-result is simply to add the site to a list of designated piracy sites.

(2) The nature of the statutory scheme is such that the decision is not final, but can be made the subject of an application to review, vary or rescind before the CRTC under s. 62 of the *Telecommunications Act*. Further, the pirate operator would have a right to seek leave to appeal to the Federal Court of Appeal from the CRTC's decision under s. 64(1) on questions of law and jurisdiction, and this provision and its analogue in s. 31(2) of the *Broadcasting Act* have received a broad interpretation that allows for appeals on questions of natural justice, lack of evidence and extricable legal issues arising from decisions of mixed fact and law.[177] If the pirate operator raises an issue that falls outside the scope of the s. 64(1)

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[175] [2011] 2 S.C.R. 504, ¶58-42.

[176] See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶23-27; *Canada (A.G.) v. Mavi*, [2011] 2 S.C.R. 504, ¶43-44.

[177] *Canadian Broadcasting League v. C.R.T.C.*, [1980] 1 F.C. 393 (C.A.), ¶6-7 (QL); *Cathay International Television Inc. v. C.R.T.C.* (1987), 80 N.R. 117 (F.C.A.), ¶10-11 and 20-21 (WLeC); *Cathay International Television Inc. v. Canada (C.R.T.C.)* (1987), [1987] F.C.J. No. 350 (C.A.); *Arthur v. Canada (A.G.)* (1999), 254 N.R. 136 (F.C.A.), ¶20 and 28 (QL), leave to appeal to S.C.C. refused, [2000] C.S.C.R. No. 85; *Canadian Broadcasting Corp. v. C.R.T.C.*, [1999] F.C.J. No. 1288 (C.A.), ¶1-2; *Pachul v. Canada (C.R.T.C.)*, 2002 FCA 165, ¶14; *Genex Communications v. Canada (C.R.T.C.)* (2004), 329 N.R. 53 (F.C.A.), ¶1; *MTS Allstream Inc. v. Toronto (City of)*, 2006 FCA 385, ¶11, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 47; *MTS Allstream Inc. v. Edmonton (City of)*, [2007] 4 F.C.R. 747 (C.A.), ¶57, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 286; *CKLN Radio Inc. v. Canada (A.G.)*, 2011 FCA 135, ¶1 and 7-8; *Pritchard Broadcasting Inc. v. Canada (C.R.T.C)*, 2012 FCA 127 (Chambers), ¶2 and 6. See also *R. v. Biniaris*, [2000] 1 S.C.R. 381, ¶21-23. *cf. Telecommunications Act*, s. 52(1); *Canadian National Railway v. Bell Telephone Co.,* [1939]

appeal right, it may be able to seek judicial review in the Federal Court of Appeal under s. 28(1)(c) of the *Federal Courts Act*.[178]

(3) The decision is not significantly important to the lives of pirate operators in a way that, e.g., decisions relating to one's profession or liberty are.

(4) A pirate operator who is not doing business with Canadian rightsholders or even attempting to comply with the Canadian legal regime has no legitimate expectations with respect to process, particularly when the Proposed Regime accords greater procedural protections to it than other potential solutions, such as a notice and takedown regime.

(5) The *Telecommunications Act* gives the CRTC significant discretion to determine its own procedures,[179] and CRTC will have made its own choices regarding the procedure to be followed in the Proposed Regime.

Accordingly, the CRTC likely owes the pirate operator only a minimal duty of procedural fairness. This should not require it to hold an oral hearing. Instead, the duty of procedural fairness should be met so long as the CRTC accords the pirate operator: (a) notice of the proposed piracy designation; (b) a chance to make submissions on the same; (c) the right to have those submissions considered by an unbiased decision-maker; and (d) basic reasons for the decision.[180] Similar procedures have been found adequate to satisfy the duty of fairness in several other decisions involving the CRTC.[181]

This is illustrated by *Country Music Television, Inc. v. Canada (C.R.T.C.)*,[182] where the CRTC made an order removing an American country music television station from the eligibility list of programming stations that Canadian BDUs were authorized to distribute, upon granting a Canadian company the licence to offer its own country music station to the public. Like the Proposed Regime, *Country Music Television* involved a CRTC order which prohibited the retransmission by telecommunications of particular programming service. The only difference was that the programming service was a ***television service*** rather than Internet one, and it was retransmitted by ***BDUs*** rather than ISPs. In finding that the U.S. station owner was accorded sufficient natural

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S.C.R. 308 at 316-317; *Canadian National Railway Co. v. York (Regional Municipality)*, 2004 FCA 419, ¶6; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶32.

[178] R.S.C. 1985, c. F-7. See: *T.W.U. v. C.R.T.C.*, [1993] 1 F.C. 231 (C.A.), ¶5 (QL); *Arthur v. Canada (A.G.)* (1999), 254 N.R. 136 (F.C.A.), ¶23-29; and *Telus Communications Co. v. Canada (C.R.T.C.)*, 2010 FCA 191, ¶38 and 40.

[179] *Telecommunications Act*, s. 67(1)(b). See also the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, S.O.R./2010-277 (the "***CRTC Rules***"). The CRTC's ability to establish its own procedures has been emphasized in several cases involving the duty of fairness: *Lipkovits v. C.R.T.C.*, [1983] 2 F.C. 321 (C.A.), ¶18 (WLeC), leave to appeal refused (1983), 51 N.R. 238n (S.C.C.); *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶165, leave to appeal refused, [2005] C.S.C.R. No. 485; *Telus Communications Co. v. Canada (C.R.T.C.)*, 2010 FCA 191, ¶24.

[180] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶30-44; *Canada (A.G.) v. Mavi*, [2011] 2 S.C.R. 504, ¶45.

[181] *Confederation Broadcasting (Ottawa) Ltd. v. Canada (C.R.T.C.)*, [1971] S.C.R. 906 at 925-927, per Spence J.; *Newfoundland (A.G.) v. Norcable Ltd.*, [1981] 2 F.C. 221 (C.A.), ¶1 (QL); *Canadian Family Radio Ltd. v. Canada (C.R.T.C.)*, [1981] F.C.J. No. 929 (C.A.), ¶2-3, leave to appeal refused, [1982] S.C.C.A. No. 211; *Canada (C.R.T.C.) v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530 at 545-546; *Lipkovits v. C.R.T.C.*, [1983] 2 F.C. 321 (C.A.), ¶15-18 (WLeC), leave to appeal refused (1983), 51 N.R. 238n (S.C.C.); *Newfoundland Telephone Co. v. Canada*, [1995] F.C.J. No. 372 (C.A.), ¶2-10; *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada*, [1996] F.C.J. No. 894 (C.A.), ¶5; *Canadian Broadcasting Corp. v. Métromédia CMR Montréal Inc.*, [1999] F.C.J. No. 1637 (C.A.), ¶19-20; *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶38, 44-45 and 149-175, leave to appeal refused, [2005] C.S.C.R. No. 485; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶37-38.

[182] [1994] F.C.J. No. 1957 (C.A.), leave to appeal refused, [1995] S.C.C.A. No. 1.

justice by the CRTC, the Federal Court of Appeal held that the owner was not entitled to participate in the public oral hearing which preceded the decision – as it had requested – during which the CRTC considered whether to license the competing Canadian station. Instead, it was sufficient that the U.S. station owner received notice of that proceeding and was given the right to make written submissions about it:

> As I already said, the only complaint of the appellant is that it was not given the opportunity to participate in the public oral hearing that culminated in the removal of its programming service from the eligibility lists. The appellant does not found its grievance on any statutory requirement. It is common ground that if the *Broadcasting Act* contains provisions requiring that oral public hearings be held in certain circumstances, ***one cannot find in the Act or the Regulations any provision requiring the CRTC to hold an oral hearing before making changes to the eligibility lists. The appellant's appeal, therefore, is entirely based on the rules of fairness and natural justice which, according to its counsel, required, in the circumstances, that it be given the right to participate in the public hearing*** so as to be able to explain, contradict or comment on the statements made at that hearing which could be prejudicial to its case.
>
> ***I do not see any merit in that contention. The Commission, in my opinion, gave the appellant a reasonable opportunity to be heard before making its decision.***
>
> ***The appellant knew,*** since 1984, that its service could be removed from the eligibility lists if it became competitive with a similar Canadian service. It also knew, in December, 1993, that five applications were pending before the Commission, ***that three of these applications contained a request that the appellant's programming service be removed from the eligibility lists***, that those written applications were available for inspection by interested parties who were invited to intervene in the proceedings before the Commission by sending their written representations and, if they wished to participate in the public hearing to be held on February 14, 1994, to make that request in their written intervention and indicate why their written comments were not sufficient. Indeed, ***within the prescribed time, the appellant filed a written intervention opposing the request that its service be deleted from the eligibility lists. Clearly, the appellant was given an opportunity to contest the request that CMT be removed from the lists. Not only was it given that opportunity but it took advantage of it***.[183]

Accordingly, having reviewed the procedure for the Proposed Regime described at pages 5-6 above – in which the CRTC, through the IPRA, provides the site operator with notice of the site blocking application, an opportunity to make written representations to an independent administrative agency, and reasons for the decision – it is our view that the the requirements of procedural fairness are met.[184] Indeed, given that the IPRA will have the ability to hold oral

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[183] *Ibid*, ¶10-12, *emphasis added*.

[184] We acknowledge that there may be some cases in which the CRTC is unable to give actually serve the pirate operator with notice of the application due to practical difficulties in locating them. However, this should not preclude the CRTC from satisfying its duty of procedural fairness if it makes a reasonable attempt to effect actual service based on the contact email address provided on the website (if any) as well as a "WHOIS" lookup. See s. 18(b) of the *CRTC Rules*, which permit service "by sending a copy of the document by mail to the last known address of the person or their designated representative". In difficult cases where no address can be located, the CRTC could also provide notice of the application generally, by posting it on its website. See, by analogy, s. 21 of the *CRTC Rules*, in addition to Rule 136 of the *Federal Courts Rules*, S.O.R./98-106 (which permits a Court to make an order for substitutional service "[w]here service of a document that is required to be served personally cannot practicably be effected"). Section 5(2) of the *Federal Courts Rules* permits the CRTC to "provide for any matter of practice and procedure not provided for in these Rules by analogy to these Rules or by reference to the *Federal Courts Rules*". See also: *R v Kensington and Chelsea Rent Tribunal, ex parte*

hearings where it deems them necessary, the Proposed Regime goes beyond the minimal duty of fairness required here.

We acknowledge that the Proposed Regime contemplates that the incidents of procedural fairness will be observed by the IPRA rather than the CRTC itself, resulting in an IPRA recommendation which is then adopted or rejected by the CRTC. As the CRTC is the statutory decision-maker under ss. 24. 24.1 and 36 of the *Telecommunications Act*, and thus the entity with primary responsibility for the duty of procedural fairness,[185] it could be argued that the CRTC must itself hold a hearing before making the site blocking order.

However, the CRTC has the power to establish its own procedures under the *Telecommunications Act*,[186] and s. 70(1)(a) expressly permits it to appoint "any person" – including therefore the IPRA – to inquire into and report to it on "any matter" that is within its jurisdiction under the Act.[187] Therefore, provided that it appoints the IPRA under s. 70(1)(a), there should be no jurisdictional restriction upon its ability to rely upon IPRA recommendations, so long as in doing so the CRTC conducts its own review,[188] and does not delegate or fetter its ss. 24, 24.1 and 36 discretion by simply deferring to IPRA recommendations instead of making an independent decision in its own right.[189]

Further, the courts have recognized that an administrative decision-maker may rely upon the procedures followed by a subordinate body in discharging its duty of fairness so long as those procedures were themselves adequate.[190] In *Thomson v. Canada (Deputy Minister of Agriculture)*,[191] the Supreme Court of Canada held that the Deputy Minister accorded the respondent sufficient natural justice in denying him a security clearance for a public service position. While the Deputy Minister himself did not hold a hearing or receive any submissions from the applicant, he acted on evidence compiled by the Security Intelligence Review Committee,[192] which had held a hearing before making a non-binding recommendation to the Deputy Minister to grant the clearance.[193] The process in *Thomson* was thus similar to the Proposed Regime, in that it contemplated an initial hearing by a body with the power to make a non-binding recommendation to

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MacFarlane, [1974] 3 All E.R. 390(Q.B.D.) at 396; *Okanagan Helicopters Ltd. v. Canadian Helicopter Pilots' Assn.*, [1986] 2 F.C. 56 (C.A.), ¶32, footnote 7 (QL).

[185] *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 400 and 402. The IPRA may itself, however, owe a duty of procedural fairness even though its recommendation to the CRTC is not binding: see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at 221-222 and 229-232; *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, ¶55.

[186] See footnote 179 above, in addition to ss. 55(e) and 57 of the *Telecommunications Act*.

[187] See, by analogy, *Canadian Union of Public Employees (Airline Division) v. Air Canada*, 2013 FC 184, ¶45-56.

[188] See *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 401-403.

[189] It would seem that the CRTC does not have the authority to delegate its authority to actually make decisions under 24, 24.1 and 36 to the IPRA, since ss. 41.3 and 46.2 expressly permit the CRTC to delegate other decision-making powers to subordinate bodies, and no similar provision exists for ss. 24, 24.1 and 36 themselves. Instead, the CRTC could only authorize the IPRA to make recommendations to it, following which the CRTC itself exercises its jurisdiction under ss. 24, 24.1 and 36 to issue a site blocking order. See: *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781 at para. 37; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, ¶65. *cf. Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141 at 171; *Association for Public Broadcasting in British Columbia v. C.R.T.C.*, [1981] 1 F.C. 524 (C.A.), ¶21-23.

[190] The Supreme Court recently recognized a similar principle in relation to the analogous duty of consultation that the Crown owes to Aboriginal peoples: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶30-34; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, ¶32-34.

[191] [1992] 1 S.C.R. 385.

[192] *Ibid*, at 401-402.

[193] *Ibid*, at 397 and 400.

the ultimate decision-maker, before whom no further hearing would be held. The Supreme Court concluded that the Deputy Minister discharged the duty of procedural fairness ***through*** the Committee's hearing, stating:

> …[T]he Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. ***Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position.*** When all the surrounding circumstances are taken into account it is clear that ***the Deputy Minister fully satisfied these requirements.***
>
> ***Prior to the Review Committee hearing, Mr. Thomson had been apprised of the objections of the Deputy Minister*** in a document titled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". This document listed the objections considered by the Deputy Minister in his clearance denial. ***Mr. Thomson was given a full opportunity to respond to the allegations against him at his hearing before the Review Committee.*** Despite his own explanations and the submissions made on his behalf, the Review Committee accepted that three of the five reasons for refusal in the above document were in fact well founded. It is thus apparent that Mr. Thomson was given proper notice and a full hearing in regard to the allegations which formed the basis of the Deputy Minister's decision. The requirements of natural justice have been satisfied.[194]

The Supreme Court reached a similar conclusion in *Baker v. Canada (Minister of Citizenship and Immigration)*,[195] where the appellant applied for a deportation exemption based on humanitarian and compassionate grounds. The procedure involved a written application by the appellant to a junior immigration officer, who summarized the material and made a recommendation to a senior immigration officer. The senior officer then made the decision to deny the appellant's application in the name of the Minister after considering the summary, recommendation and material from the junior officer. The Supreme Court found the duty of procedural fairness was met, even though the appellant did not have a further opportunity to make representations to the senior officer after the junior officer's recommendation.[196] In addition, the Court held that while the senior officer was required to provide the appellant with reasons for his decision as part of the duty of procedural fairness, and failed to do so, he could rely upon the notes of the junior officer (which were given to the appellant on request) as satisfying this obligation, noting that "because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision".[197]

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[194] *Ibid*, at 402, *emphasis added*. *cf. Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at 659-661, where the Supreme Court held that the warden of a prison breached his duty of procedural fairness to inmates by refusing to follow a non-binding recommendation by the Segregation Review Board that they be released from administrative segregation, without giving them reasons for this or holding a hearing on whether he should act in accordance with the recommendation. This decision is distinguishable since the Proposed Regime only contemplates that the IPRA will make recommendations to the CRTC to ***add*** sites to the piracy list, not recommendations to ***exclude*** sites from the list, and there is no suggestion that the CRTC would unilaterally add sites to the piracy list without first receiving a recommendation by the IPRA. Therefore, the CRTC will not have the opportunity to reject a recommendation by the IPRA, or make its own decision independent of an IPRA recommendation, that prejudices the interests of the site operator. Instead, any rejection of the IPRA's recommendation by the CRTC will only be to the ***benefit*** of the site operator, such that no allegation of a breach of procedural fairness will be made. For this reason, the requirement for a second-level hearing in *Cardinal* does not undermine the procedural fairness of the Proposed Regime.

[195] [1999] 2 S.C.R. 817.

[196] *Ibid*, ¶33-34.

[197] *Ibid*, ¶44 (and 35 and 43).

Accordingly, the CRTC should be able to satisfy its duty of procedural fairness through the procedures followed by the IPRA, provided that the IPRA accords site operators notice, a chance to make submissions, consideration of those submissions by an unbiased decision-maker and reasons for the result.

As a final matter, we observe that the Proposed Regime is not deficient by reason of the fact that it does not require a court decision before a site blocking order may issue, which was a criticism that some parties had made of the Rejected Regimes when they were before Parliament.[198] Unlike the Rejected Regimes, the Proposed Regime requires a decision by the CRTC, and the *Telecommunications Act* grants it powers of a superior court with respect to the doing of anything that is necessary for the exercise of its powers and the performance of its duties.[199] If, as is our view, the CRTC possesses the jurisdiction to implement the Proposed Regime under ss. 24, 24.1 and 36 of the *Telecommunications Act*, then there is no basis to argue that the factual decision as to whether a given site is a piracy one must be made by a judge.[200] If the CRTC were to make an error as defined by s. 64(1) of the *Telecommunications Act* in issuing an order against a site operator,[201] then the site operator could seek leave to appeal. Otherwise, the CRTC's decision should be immune from review. As the Federal Court of Appeal observed in *Wheatland County v. Shaw Cablesystems Ltd.*:

> ***The CRTC is explicitly granted power to decide questions of law and fact, and its decisions on questions of fact are "binding and conclusive". On questions of law and jurisdiction, its decisions are subject to appeal to this Court***, with leave of the Court.
>
> > 52. (1) The Commission may, in exercising its powers and performing its duties un-der this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.
> > ...
> > 64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.[202]

This scheme is sufficient to meet any constitutional requirement for judicial oversight. As the Supreme Court of Canada explained in *Dunsmuir*, the constitutional requirement for judicial oversight of administrative action exists to ensure that tribunals do not exceed their statutory ***jurisdiction***, not to prevent them from making decisions which involve errors of fact:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect… The inherent power of superior courts to review administrative action and ***ensure that it does not exceed its jurisdiction*** stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. … In short, ***judicial***

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[198] Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27.
[199] *Telecommunications Act*, s. 55(d). See also *Penny v. Bell Canada*, 2010 ONSC 2801, ¶133.
[200] Issuing a site blocking order is not analogous to other contexts in which a requirement for prior judicial authorization exists, such as a search or seizure that triggers s. 8 of the *Charter*. Even in the latter context, courts have recognized that "[t]he person performing this function need not be a judge", provided they are "capable of acting judicially": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 162.
[201] The scope of this appeal right is discussed at pages 57-58 above.
[202] 2009 FCA 291, ¶32, *emphasis added*.

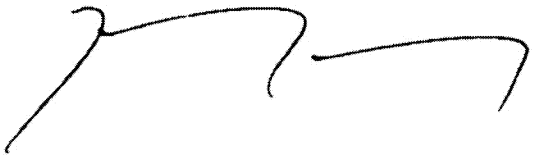
> ***review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits***. As Laskin C.J. explained in *Crevier*:
>
> > ***Where… questions of law have been specifically covered in a privative enactment, this Court… has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction***. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the British North America Act and s. 96 thereof. ***The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.*** …[203]

Therefore, because s. 64(1) of the *Telecommunications Act* preserves the possibility of a jurisdictional appeal in the case of CRTC decisions under the Proposed Regime, it cannot be constitutionally deficient by reason of not requiring a prior order from a court.

If you have any further questions or wish to discuss this opinion, please feel free to contact me.

Yours very truly,

McCarthy Tétrault LLP



Brandon Kain

[203] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, ¶31, *emphasis added*.

Ly, Alexander

From: Stewart, Alastair
Sent: July-28-2016 10:32 AM
To: McCallum, Peter
Cc: Pinsky, Carolyn; Ly, Alexander; Roussy, Daniel
Subject: RE: Daily News Update: Second challenge to Bill 74 begins as CWTA goes to court - July 27, 2016

I can only assume it's a reference to PIAC's application.

From: McCallum, Peter
Sent: July-28-16 9:05 AM
To: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Cc: Pinsky, Carolyn <carolyn.pinsky@crtc.gc.ca>; Ly, Alexander <Alexander.Ly@crtc.gc.ca>; Roussy, Daniel <Daniel.Roussy@crtc.gc.ca>
Subject: FW: Daily News Update: Second challenge to Bill 74 begins as CWTA goes to court - July 27, 2016

Any idea why this says second challenge? --PMcC---

From: The Wire Report Newsletter [mailto:newsdirect@thewirereport.ca]
Sent: July-27-16 5:45 PM
To: McCallum, Peter <peter.mccallum@crtc.gc.ca>
Subject: Daily News Update: Second challenge to Bill 74 begins as CWTA goes to court - July 27, 2016

Wednesday, July 27, 2016 www.thewirereport.ca

NEWS

- ## Second challenge to Bill 74 begins as CWTA goes to court

The Canadian Wireless Telecommunications Association (CWTA) has filed a court challenge to a Quebec law that would force telecoms to block some illegal gambling websites, telling the court the legislation puts companies in an "untenable position."

In a French-language document filed Wednesday, the industry group asked Quebec's Superior Court to determine the law is unconstitutional, given that it contravenes federal jurisdiction of both telecommunications and criminal law.

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Pages 150 to / à 153
are withheld pursuant to sections
sont retenues en vertu des articles

21(1)(b), 23

of the Access to Information Act
de la Loi sur l'accès à l'information

Ly, Alexander

From: McCallum, Peter
Sent: June-14-2016 2:52 PM
To: *Legal
Subject: FW: Pre-loaded set-top boxes piracy, BDUs say as court orders temporary ban | The Wire Report

If anyone wants to read the full text of the Federal Court decision, Megan found it at the link set out below. --PMcC--

-----Original Message-----
From: Maloney, Megan
Sent: June-14-16 12:41 PM
To: McCallum, Peter <peter.mccallum@crtc.gc.ca>
Subject: RE: Pre-loaded set-top boxes piracy, BDUs say as court orders temporary ban | The Wire Report

Hi Peter,

The decision does not appear to be available online yet via the Federal Court website or other legal data bases. However, I was able to find a link to a scanned pdf copy of the order via a law firm's website:

http://www.smart-biggar.ca/files/Order%20%28June%201%202016%29.pdf

Best,

Megan

-----Original Message-----
From: McCallum, Peter
Sent: June-13-16 5:11 PM
To: *Legal <*Legal@crtc.gc.ca>
Subject: Pre-loaded set-top boxes piracy, BDUs say as court orders temporary ban | The Wire Report

Link to an article that says that the Federal Court on June 1, 2016 ordered a temporary ban on pre-loaded set top boxes that allow persons to circumvent payment for certain services to broadcasting distribution undertakings.

http://www.thewirereport.ca/news/2016/06/13/pre-loaded-set-top-boxes-piracy-bdus-say-as-court-orders-temporary-ban/30984

--PMcC--

Ly, Alexander

From: McCallum, Peter
Sent: September-20-2017 1:12 PM
To: *Legal
Subject: Recent Copyright case

FYI—

For those interested in recent developments in copyright law, here is a summary from the Fasken Martineau website of the recent copyright case of *Cedrom-SNI inc v Dose Pro inc*, which decision is linked and in French only. There is also a French-language summary of the Court case on the Fasken Martineau website.

--PMcC--

Quebec Superior Court Rules on the Concept of Fair Dealing in Relation to the Substantial Reproduction of Journalistic Works

- SHARE
-

Intellectual Property & Litigation Bulletin

September 20, 2017

On July 24, 2017, the Superior Court granted an interlocutory injunction against two media-monitoring websites, ordering them to cease the use and reproduction of the copyright-protected works of employees of three major Quebec newspaper publishers: La Presse, Le Devoir, and Le Soleil.

This decision has numerous implications for the recognition and scope of copyright in Quebec.

Fasken Martineau (Julie Desrosiers and Chris Semerjian) represented CEDROM-SNi, La Presse, Le Devoir, and Le Soleil, the applicants in this important case.

Background

LaDose.pro and LaDose.ca are media-monitoring websites. The former, LaDose.pro, offers a paid service. Subscribers receive emails informing them of the latest news, three times a day, five days a week, and once on Sundays. The emails generally include, for each of the press articles listed, the newspaper from which the individual articles originate, the title, and the "lead" of the article, which generally corresponds to the first paragraph. The emails also provide a link to the full text on the newspaper's website.

LaDose.ca is a free service, but it displays third-party advertising. This website provides daily coverage of important news and headlines of the day from various media. Users are provided with the title of the individual articles and a link to the website of the newspaper from which each article originates. LaDose.ca also displays a link to the paid services of LaDose.pro.

Because they began operating over 18 months before the injunction was granted, LaDose.pro and LaDose.ca never had any agreement with the applicants that would allow them to use excerpts of articles from La Presse, Le Devoir, and Le Soleil. In fact, CEDROM-SNi, the fourth applicant in this case, is responsible for granting licences for the electronic use of any journalistic content published by the three newspapers for media-monitoring purposes. CEDROM-SNi even approached LaDose.pro and LaDose.ca to offer them the appropriate licences, which they refused.

La Presse, Le Devoir, Le Soleil and CEDROM-SNi applied for an injunction against LaDose.pro and LaDose.ca. In *Cedrom-SNI inc v Dose Pro inc*,[1] Justice François P. Duprat, writing for the Superior Court, found for the applicants. In his decision, Justice Duprat clarified several principles of copyright law and how they may apply in a journalistic context.

The title and the lead constitute a substantial part of the work.

After finding that La Presse, Le Devoir, and Le Soleil were the owners of copyright in the articles written by their employees, and that CEDROM-SNi held an exclusive licence to manage the electronic reproduction of those articles, the Superior Court had to determine whether the use of the excerpts by LaDose.pro and LaDose.ca infringed the applicants' copyright.

Courts will find that copyright has been infringed when a substantial part of the work is reproduced without the consent of the copyright owner. The Court in *Cedrom* thus had to determine whether reproducing the title and/or the lead of an article was sufficient to constitute substantial reproduction of that article.

This question is particularly significant in the digital era, as publications circulate more quickly and more easily than ever, and the ability to make reproductions is easy and virtually unlimited.

In a 38-page judgment, Justice Duprat thoroughly analyzed the applicable case law and confirmed that, on the evidence before him, reproduction of the title and lead of an article constituted reproduction of a substantial part of the work.

The decision first quotes the principle stated by the Supreme Court in *Cinar*, that whether a reproduction is substantial must be decided by its quality rather than its quantity.[2] Based on the evidence before him, Justice Duprat concluded that the title and the lead generally are a fundamental part of an article.

Justice Duprat then examined the skill and judgment exercised when a title and lead are written.[3] He found:

[Our translation] The publishers' testimony confirms that, if a given title and lead find their way into the published newspaper, they have been thought out and worked on by their authors, and are not random choices. There is creative work involved in the way the news is presented. Skill and judgment come into play [...].[4]

Justice Duprat ruled that the title and lead of an article are works protected by the *Copyright Act*, and that each of them, individually, may constitute a substantial part of the work.

The activities carried on by LaDose.pro and LaDose.ca – the former of which reproduced the title and lead while the latter of which reproduced only the title – infringed the applicants' copyright.

The activities carried on by LaDose.ca and LaDose.pro do not constitute fair dealing with the applicants' works.

Reproduction of a substantial part of a copyrighted work is permitted under the *Copyright Act* in certain specific circumstances, even without the consent of the copyright owner. The Act does indeed provide for certain exceptions, the purpose of which is to ensure a balance between the public's right to information and the protection of copyright. These exceptions will apply only if the user of the work is able to prove that the use falls within the precise framework of one of said exceptions, and that the dealing is fair within the meaning of the *Act*.

The Superior Court therefore had to determine whether the activities of LaDose.pro and LaDose.ca were covered by one of those exceptions, and, if so, whether they constituted fair dealing with the applicants' articles.

The *Copyright Act* (section 29) provides for three exceptions:

1. private study, research, education, parody or satire;
2. criticism or review; and
3. news reporting.

Only if a court finds that the use of the works follows one of those objectives will it consider whether the dealing is fair, having regard to the following criteria:

1. the purpose of the dealing;
2. the character of the dealing;
3. the amount of the dealing;
4. alternatives to the dealing;
5. the nature of the work; and
6. the effect of the dealing on the work.[5]

The two above steps constitute the test for fair dealing.

Justice Duprat then conducted the analysis and rejected the respondents' position. He concluded that their activities did not fall within the exceptions provided for in the *Copyright Act*. He analyzed the exception relating to news reporting in greater detail, and determined that it did not apply. *Cedrom* is an important decision, since it is the first decision in Canada to discuss this exception in connection with a media-monitoring service.

Relying on several cases decided in other Canadian provinces and by the Federal Court, the Superior Court ruled that LaDose.pro and LaDose.ca were not reproducing the title and lead in the representation of a news story[6] or on an online forum in order to disseminate facts and generate discussion on a particular political subject.[7] As summarized by Justice Duprat:

[Our translation] No news, as such, is being reported, nor is there any comment or discussion. In short, the purpose is not to promulgate the facts reported in the article.[8]

The purpose of LaDose.pro and LaDose.ca in reproducing the applicants' articles was, rather, to generate revenue.

The Superior Court therefore concluded that media-monitoring activities such as those of LaDose.pro and LaDose.ca do not constitute news reporting within the meaning of the *Copyright Act*.

This conclusion would have been sufficient for the application to be granted, but Justice Duprat went further in his analysis and reviewed the six factors listed above in order to determine whether the dealing was fair. He concluded:

[Our translation] In the Court's mind, accepting the respondents' position that they were free to use the titles and/or leads and to generate revenues for themselves, without creating any for the applicants, is not fair. The respondents' true motive is to use a business model in which they can obtain the work free of charge and then reproduce it to generate a profit.[9]

Justice Duprat found that LaDose.pro and LaDose.ca were infringing the applicants' copyright and could not benefit from the fair dealing exception for the purpose of news reporting. He confirmed that La Presse, Le Devoir, Le Soleil, and CEDROM-SNi had successfully shown a clear, *prima facie* case. He also concluded that the activities of LaDose.ca and LaDose.pro violated the terms of use of the publishers' websites, which clearly stated that any use of the content of the websites must be for private purposes only and prohibited any commercial use.

Since the other criteria for issuing an interlocutory injunction were also met, the Court issued the injunction requested and ordered LaDose.pro and LaDose.ca to cease reproduction of all or part of the articles prepared by the employees of La Presse, Le Devoir, and Le Soleil.

Lessons

There are three key takeaways from *Cedrom*:

- First, following *Cedrom*, both the lead and the title of an article may be the subject of copyright, and their reproduction may constitute substantial reproduction of the article.
- *Cedrom* also clarifies the law on subsection 29(2) of the *Copyright Act*, particularly as to what is meant by "dealing for the purpose of news reporting", which does not include media-monitoring services such as those of the respondents.
- In light of this decision, it will be more difficult to claim fair dealing within the meaning of the *Act* when the dealing is for purely commercial purposes and competes with the activities of the copyright owners and their authorized licensees.

For these reasons, and most probably others that may become apparent in the future, *Cedrom* will leave its mark on copyright law in Quebec and in the rest of Canada.

[1] 2017 QCCS 3383 [*Cedrom*].

[2] *Cinar Corporation v Robinson*, 2013 SCC 73.

[3] Following the decision of the Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

[4] *Cedrom*, *supra* note 1 at para 58.

[5] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36.

[6] *Allen v Toronto Star Newspapers Ltd*, 36 OR (3d) 201.

[7] *Warman v Fournier*, 2012 FC 803; *395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2016 FC 1255.

[8] *Cedrom*, *supra* note 1 at para 76.

[9] *Cedrom*, *supra* note 1 at para 93.

Ikejiani, Chigbo

From: Hulley-Craig, Crystal
Sent: January-22-16 4:05 PM
To: *Legal
Subject: Interesting Case from FCA on How to Introduce Documents on Judicial Review

For those who enjoy procedural minutia, Paul Daly has written an interesting blog on the legal principles behind the court's procedures for developing the record on judicial review. It cites the case *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, in which Justice Stratus gives a very clear and comprehensive review of the law about how documents are to be introduced (i.e. by Rule 317 or by affidavit).

What will be interesting to the non-procedure-geeks in the crowd are Status' comments about how to deal with honest mistakes during litigation:

> *[34] This motion was about a minor, fixable mistake. As long as humans are involved in litigating cases, no matter how much they try to prevent mistakes, mistakes like this will sometimes happen, even by excellent counsel. Happily, most procedural mistakes, like the one in this case, do not seriously implicate clients' rights. Mistakes of this sort should be nothing more than a minor inconvenience during the drive to the ultimate destination—a judicial determination on the merits that to all is proper and fair.*
>
> *[35] But here, the parties pulled over to the side of the road and stopped to fight, forgetting the destination. After Access Copyright made its mistake, the respondents wrote, pointing out the mistake. Despite the clarity of the relevant rules, Access Copyright dug in its heels, maintaining its position rather than reassessing it. In reaction to that, the respondents brought their motion. But they too showed inflexibility, forcefully asserting their position that Access Copyright should be prevented in the judicial review from using any of the material it improperly included in its application record, whether or not it was needed by the Court. In counter-reaction to that, Access Copyright brought a counter-motion—one that in the end is unnecessary for this Court to determine—proposing a lesser, more practical remedy. In that counter-motion, it laudably advanced submissions showing an awareness of its mistake. But that changed nothing: everyone has remained stuck on the side of the road.*
>
> *[36] All have acted in good faith, representing their clients' interests vigorously, advocating their positions with characteristic excellence. But here initial intransigence begat a motion with remedial overreach, and remedial overreach begat a counter-motion. Forgotten was the destination: this Court, as a practical problem-solver, simply wants to determine the judicial review properly and fairly on the merits, using a proper and fair evidentiary record. The focus should have been on a fix, not a fight.*

Crystal Hulley
(819) 956.2095
crystal.hulley@crtc.gc.ca

Ikejiani, Chigbo

From: Frenette, Rachelle
Sent: February-08-18 3:20 PM
To: Hulley-Craig, Crystal
Cc: Bowles, Eric; Abbott, William
Subject: McCarthy Tétrault Opinion on CRTC Jurisdiction to Impose a Privacy Blocking Regime
Attachments: DM#3055834 - APP - ATN - FairPlay Canada (Rachelle's noted up comments).pdf

Hi Crystal:

I have finally had the chance to read the legal opinion submitted by McCarthy in relation to the Fair Play application. My comments are reflected in a noted-up version of the opinion, attached.

Happy to discuss.

Rachelle Frenette
Avocate générale / Sous-directrice exécutive pi/
A/General Counsel / Deputy Executive Director
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
Les Terrasses de la Chaudière
1 Promenade du Portage, Gatineau, QC J8X 4B1
rachelle.frenette@crtc.gc.ca
Téléphone | Telephone 613-286-1699
Télécopieur | Fax 819-953-0589
www.crtc.gc.ca

McCarthy Tétrault LLP
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

Brandon Kain
Partner
Direct Line: 416-601-7821
Direct Fax: 416-868-0763
Email: bkain@mccarthy.ca

Assistant: Ingrid Tomala
Direct Line: 416-601-8200 (2272)
Email: itomala@mccarthy.ca

mccarthy tetrault

January 26, 2018

Privileged & Confidential

BCE Inc.
5025 Creekbank Rd.
Floor 5
Mississauga, ON L4W 0B6

Attention: Mr. Robert Malcolmson
Senior Vice-President, Regulatory Affairs

Dear Sir:

Re: CRTC Jurisdiction to Impose a Piracy Blocking Regime

You have asked for our opinion about whether the *Telecommunications Act* (the "***Telecommunications Act***")[1] grants the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") jurisdiction to implement a regime (the "**Proposed Regime**") under which all Canadian Internet service providers ("**ISPs**") would be required to disable access for residential and mobile customers to sites that have been determined – upon review by an independent agency – to be blatantly, overwhelmingly or structurally engaged in the infringement of copyright, or the enablement or facilitation of the same. In addition, you have asked whether the Proposed Regime would violate the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")[2] or the CRTC's common law duty of procedural fairness.

[1] S.C. 1993, c. 38.
[2] Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act, 1982* (U.K.), 1983, c. 11.

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY

In our view, the CRTC has jurisdiction to implement the Proposed Regime. Section 24 of the *Telecommunications Act* permits the CRTC to impose "any condition" upon the offering and provision of telecommunication services by ISPs that are Canadian carriers, and s. 24.1 enables it to do the same even for non-carrier ISPs. Section 24 has consistently been given a broad interpretation by the courts – particularly when read alongside the residual powers in ss. 32(g), 51 and 67(1)(d) – and the CRTC has issued several orders under it which, like the Proposed Regime itself, require carriers to take measures to assist innocent parties with problems the carriers did not create but which they are well-positioned to address. The ability to issue such third party assistance orders is also directly contemplated by ss. 24.1(b)-(d). While ISPs are prohibited from controlling the content they transmit, this should not apply when they do so pursuant to a mandatory CRTC order, and in any case s. 36 of the *Telecommunications Act* allows the CRTC to approve exceptions to this. Further, the Proposed Regime will advance several of the Canadian telecommunications policy objectives in s. 7 of the *Telecommunications Act* (specifically, ss. 7(a), 7(g), 7(h) and 7(i)). Accordingly, the CRTC has the authority to promulgate the Proposed Regime.

This conclusion is confirmed when the *Telecommunications Act* is read within the larger statutory scheme of which it forms a part, consisting of the *Broadcasting Act* (the "***Broadcasting Act***"),[3] the *Radiocommunication Act* (the "***Radiocommunication Act***")[4] and the *Copyright Act* (the "***Copyright Act***").[5] The Proposed Regime involves the regulation of ISPs acting as such rather than broadcasting undertakings, so the *Broadcasting Act* is not directly engaged. Nevertheless, the Proposed Regime will further the policy objectives of the *Broadcasting Act* no less than those of the *Telecommunications Act* itself. A similar synergy exists with the *Radiocommunication Act*, which expressly prohibits the decoding and retransmission of encrypted subscription programming signals without the lawful distributor's authorization. Such activities are common on many piracy sites. And there is no operational or purpose conflict with the *Copyright Act*. The Proposed Regime does not alter any of the rights or remedies granted under the *Copyright Act*, as would be the case, for instance, if it created a new or broadened form of relief directly against pirate operators. Instead, the Proposed Regime contemplates an administrative order by the CRTC against ISPs, who are intermediaries to the copyright holder-infringer relationship, and its primary purpose is to advance Canadian telecommunications policy objectives. While one of the Regime's effects will be to strengthen copyright, this is no different from other anti-piracy mechanisms that exist outside the *Copyright Act*, such as those contained in the *Radiocommunication Act*. The focus of the Proposed Regime, coupled with its requirement for CRTC oversight, also makes it different from other anti-piracy measures that Parliament has rejected in *Copyright Act* amendments to date.

The Proposed Regime will not violate s. 2(b) of the *Charter*. Freedom of expression does not authorize the use of private telecommunications facilities to blatantly, overwhelmingly or structurally engage in piracy, and even if it did, the Proposed Regime is a proportionate exercise of discretion.

Finally, the Proposed Regime adequately discharges the CRTC's common law duty of procedural fairness. Before any site blocking order takes effect, the CRTC will attempt to give piracy operators notice of the application, an opportunity to make submissions to an independent administrative agency, and reasons for its decision. They can also ask the CRTC to review, rescind or vary its decision, and seek leave to appeal it or move for judicial review in the Federal Court of Appeal.

[3] S.C. 1991, c. 11.
[4] R.S.C. 1985, c. R-2.
[5] R.S.C. 1985, c. C-42.

2. FACTS

A coalition (the "**Coalition**") of more than 20 broadcasting distribution undertakings ("**BDUs**"), ISPs, broadcasters and other stakeholders in the Canadian broadcasting and creative industries intends to make an application to the CRTC in support of the Proposed Regime. The application is a response to the growing problem of Internet piracy, i.e., the presence of websites, applications and services that make available, reproduce, communicate, distribute, decrypt or decode copyrighted material (e.g., TV shows, movies, music and video games) – or enable, induce or facilitate such actions – without the authorization of the copyright holder. In this opinion, "**piracy**" refers to this range of activities, "**pirate operators**" refers to those who operate the websites,[6] applications and services (not the individuals that use them), and "**piracy sites**" refers to locations on the Internet at which one accesses the websites, applications and services that are blatantly, overwhelmingly or structurally engaged in piracy.

Over the last several years, piracy has emerged as a significant issue in Canada, with at least 1.88 billion visits being made by Canadians to piracy sites in 2016 alone. The consequences of piracy for Canada's social and economic fabric are profound, and affect many different segments of the population:

(a) **The Cultural Sector:** Content creators and rightsholders are denied the financial and other intangible benefits that flow from their work, and lose the ability to control the quality and integrity of their creations and the time and manner of their viewing. This reduces economic opportunities for cultural sector participants, and undermines the development of new Canadian content.

(b) **The Broadcasting and Telecommunications System:** Broadcasters are unable to fully monetize their programming investments, and become reluctant to make additional investments in new programming, thus causing further harm to the cultural sector in addition to the broadcasting sector itself. Additionally, legitimate BDUs cannot fairly compete with pirate operators, resulting in fewer television subscriptions or cancellations and less BDU investment in critical new telecommunications infrastructure, technologies and distribution models, together with lower BDU contributions to Canadian cultural production funds.

(c) **Consumers:** Consumers who lawfully access copyrighted material are penalized by effectively subsidizing the creation of content for those who choose to access piracy sites. Further, consumers who pay for piracy sites will have no recourse if they do not work as promised, and expose themselves to significant privacy issues given the well-documented hacking, identify theft and malware risks that attend such activities. This in turn also diminishes confidence in the Canadian telecommunications system.

Legal mechanisms for combatting piracy currently exist under both the *Copyright Act* and the *Radiocommunication Act*. As discussed more fully at pages 36-42 below, these statutes enable copyright holders and BDUs to sue pirate operators for damages and to seek injunctions against them from a court in certain circumstances. However, there are numerous difficulties in combatting piracy through these conventional methods. Because pirate operators are frequently anonymous and located abroad, they are difficult to identify, and judicial orders to combat piracy are not readily available in many foreign jurisdictions nor – if obtained in Canada – are they practically enforceable

[6] The term "websites" is used here to describe websites and other locations on the Internet, including servers and Internet Protocol (IP) addresses.

there. Further, even where a judicial response is possible, pirate operators may quickly shut down their piracy sites and recreate them under different names, or in different jurisdictions, leading to expensive, time-consuming and inefficient litigation that often fails to provide rightsholders with any real remedy or compensation including because of the lack of assets of most piracy operations. This problem has been emphasized by the courts. As the Irish Court of Appeal recently observed:

> ...[A]dvances in digital technology and the increasing use of the internet have led to such widespread, anonymous infringement by computer users to the point where it is almost pointless for copyright holders to pursue such individuals who engage in online peer-to-peer file sharing. ...[F]rom time to time the copyright holders had pursued such consumer infringers in the past in this jurisdiction by means of civil action in the High Court. This proved to be a futile exercise which consumed great amounts of time and effort and at considerable cost, because as often as not the infringer proved to be a teenager or young adult who had used a home computer for such file sharing and against whom an award of damages (which might in any event have been small or even negligible) would have been a wholly empty exercise.
>
> The basic ineffectiveness of these remedies are not disputed by either party to this appeal and, in any event, graphic accounts of the futility of the traditional remedies for copyright infringement in this context were given in evidence... This is doubtless why in recent times the copyright holders have focused on seeking remedies against ISPs...[7]

As a result of these concerns, the Coalition recommends that the CRTC follow the lead of at least 20 other countries, many of whom are major trading partners of Canada with similar legal and political traditions (e.g., the United Kingdom, Australia and France), by implementing a regime which would require ISPs to disable access to piracy sites for their consumers. Such regimes have proven highly effective in these other jurisdictions, where they also contain processes to ensure procedural fairness for alleged pirate operators and mechanisms to compel ISP compliance.

Building on these international models, the Proposed Regime involves the following characteristics:

(a) The CRTC will issue an order: (i) imposing a condition under ss. 24 and 24.1 of the *Telecommunications Act* on all Canadian ISPs requiring them to disable access to locations on the Internet identified as piracy sites by the CRTC from time to time;[8] and (ii) approving under s. 36 of the *Telecommunications Act* the actions required to be taken by ISPs to comply with this condition.

(b) A specialized new independent organization (the "**Internet Piracy Review Agency**", or "**IPRA**") will be established under the *Canada Not-for-Profit Corporations Act*.[9] The CRTC will appoint the IPRA under s. 70(1)(a) of the *Telecommunications Act* to inquire into applications from rightsholders and other parties to identify websites as piracy sites, and report to the CRTC about whether to add the websites to the list of piracy sites identified by the CRTC. The IPRA will be overseen by a board of unpaid directors comprised of rightsholders, ISPs and consumer and citizen groups, with no single stakeholder group having a controlling position, and those directors (who would also constitute its members) would be responsible for financial and policy oversight but have no involvement whatsoever in evaluating applications regarding particular websites. Instead, responsibility for receiving and reviewing applications and making recommendations to the CRTC would lie with a

[7] *Sony Music Entertainment Ireland Ltd. v. UPC Communications Ireland Ltd.*, [2016] IECA 231, ¶7-8.
[8] This opinion assumes that the order will be directed at retail rather than wholesale Internet services offered by ISPs.
[9] S.C. 2009, c. 23.

Summary of Comments on DM#3055834 - APP - ATN - FairPlay Canada (Rachelle's noted up comments) (002).pdf

Page: 5

Number: 1 Author: frenettr Subject: Sticky Note Date: 08/02/2018 2:21:21 PM -05'00'

[redacted]

Number: 2 Author: frenettr Subject: Highlight Date: 08/02/2018 2:32:55 PM -05'00'

Number: 3 Author: frenettr Subject: Sticky Note Date: 08/02/2018 2:25:55 PM -05'00'

[redacted]

Number: 4 Author: frenettr Subject: Highlight Date: 08/02/2018 2:33:10 PM -05'00'

Number: 5 Author: frenettr Subject: Highlight Date: 08/02/2018 2:33:17 PM -05'00'

Number: 6 Author: frenettr Subject: Highlight Date: 08/02/2018 2:33:27 PM -05'00'

small number of part-time IPRA staff with relevant experience. The CRTC will direct the members of the Coalition who are Canadian carriers to work with rightsholders, ISPs and consumer and citizen groups to develop a proposed governance structure for the IPRA that will be considered in a follow-up proceeding held by the CRTC.

(c) The IPRA's determination of such applications will be guided by criteria it develops in conjunction with content creators, broadcasters, BDUs, ISPs and community stakeholders, that is approved by the CRTC in the follow-up proceeding, [2]br evaluating whether a particular website blatantly, overwhelmingly or structurally engages in piracy (e.g., the extent, impact and flagrancy of the website's piracy activities, the disregard for copyright demonstrated by its owners, whether the website is expressly or implicitly marketed or promoted in connection with potential infringing uses, etc.).

(d) The CRTC will direct the IPRA to establish an application procedure that is consistent with the following principles: (i) the commencement of a proceeding by filing an application with the IPRA which identifies a proposed piracy site and contains summary evidence about it; (ii) the attempted service of the application upon the website owner at the contact email address provided on the website (if any) as well as via a "WHOIS" lookup (and possibly additional measures if no address can be found), and upon all ISPs using the email addresses currently on file with the CRTC; (iii) a right by the website owner to serve a notice of intent to respond on the IPRA and the applicant within 15 days, followed by an additional 15 days for the website owner to provide summary evidence in response – if no response is made by the website owner, the IPRA would still be required to consider whether the evidence before it is sufficient to determine that the site is a piracy site; (iv) an oral hearing by teleconference within 15 days of the response when the IPRA deems it necessary; and (v) after the IPRA considers the evidence and representations of the applicant and website owner, and based on its criteria, a decision about whether to recommend to the CRTC that it add the website to the piracy site list.

(e) The IPRA would submit its recommended additions to the list of piracy sites to the CRTC for consideration and approval, and the CRTC will determine whether or not to accept them after conducting a review. If the CRTC accepts the recommendation, it will provide reasons to the site operator, and issue an order varying the list of piracy sites. The CRTC could then quickly or automatically extend the site blocking requirement to additional locations on the Internet to which the same piracy site is located in order to prevent pirate operators from undermining its decision.[10] The obligation and approval for ISPs to begin disabling access to the newly-added site will only be triggered upon the CRTC's decision. The pirate operator or any other appropriate party that wishes to object can make an application to the CRTC to review, rescind or vary its decision under s. 62 of the *Telecommunications Act*, seek leave to appeal from it to the Federal Court of Appeal under s. 64, or seek to judicially review the decision in the Federal Court of Appeal.

[10] A similar extension procedure has been adopted in site-blocking orders granted by English courts: see, e.g., *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 2714 (Ch), ¶10-12.

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Number: 1 Author: frenettr Subject: Sticky Note Date: 08/02/2018 2:28:22 PM -05'00'

Number: 2 Author: frenettr Subject: Highlight Date: 08/02/2018 2:33:50 PM -05'00'

3. DISCUSSION

(a) Jurisdiction to Implement the Proposed Regime

(i) The *Telecommunications Act*

A. Introduction

The jurisdiction of the CRTC in relation to ISPs derives from the *Telecommunications Act*. In *Reference re Broadcasting Act* (the "***ISP Reference***"), the Supreme Court of Canada described the role of ISPs as follows:

> ISPs provide routers and other infrastructure that enable their subscribers to access content and services made available on the Internet. This includes access to audio and audiovisual programs developed by content providers. Content providers depend on the ISPs' services for Internet delivery of their content to end-users. The ISPs, acting solely in that capacity, do not select or originate programming or package programming services. ...[11]

ISPs may provide retail Internet services directly to consumers, or wholesale Internet services to other ISPs. They fall into two main groups:[12]

(1) ISPs that are "telecommunications common carriers" ("**TCCs**") under s. 2 of the *Telecommunications Act*, i.e. "a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation" ("**Primary ISPs**").[13]

(2) ISPs that are not TCCs but are still "telecommunications service providers" ("**TSPs**"),[14] such as resellers who lease rather than own or operate the transmission facilities used to provide Internet services on a wholesale basis ("**Secondary ISPs**").

The CRTC views the provision of retail Internet services as a "telecommunications service" within the meaning of s. 2 of the *Telecommunications Act* (i.e., "a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise").[15] Therefore, Primary

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[11] [2012] 1 S.C.R. 142, ¶2.

[12] *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶8; *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶6 and footnotes 1-2. *cf. Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶10.

[13] Since 1999, the CRTC has forborne from exercising its powers under ss. 25, 27(1), 27(5), 27(6), 29 and 31 of the *Telecommunications Act* in relation to Primary ISPs offering retail Internet services, pursuant to s. 34(1). However, the CRTC retained the power under s. 24 of the *Telecommunications Act* to "to impose conditions on the offering and provision of retail IS as may be necessary in the future": *Forbearance from Retail Internet Services* – Telecom Order CRTC 99-592, 25 June 1999, ¶40-42; *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶8; *Modifications to forbearance framework for mobile wireless data services* – Telecom Decision CRTC 2010-445, 30 June 2010, ¶8. Accordingly, the CRTC's forbearance decisions with respect to Primary ISPs do not prevent it from relying on s. 24 of the *Telecommunications Act* to implement the Proposed Regime.

[14] Section 2 of the *Telecommunications Act* defines a "telecommunications service provider" to mean "a person who provides basic telecommunications services, including by exempt transmission apparatus".

[15] *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶9.

ISPs that provide retail Internet services are subject to direct regulation under the *Telecommunications Act*.[16] Further, since the introduction of s. 24.1 of the *Telecommunications Act* on December 16, 2014 – discussed at page 11 below – Secondary ISPs have also been subject to regulation under the *Telecommunications Act*.[17]

As TCCs and TSPs, ISPs are involved in the activity of "telecommunications", i.e., "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system".[18] However, some of the content which ISPs transmit – such as TV shows, movies, music, and video games – is not simply "intelligence" ("signs, signals, writing, images sounds or intelligence of any nature"),[19] but also falls within the definition of "programs" in the *Broadcasting Act* as "sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but... not... visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text".[20]

The CRTC has concluded that the transmission of programs over the Internet constitutes a form of "broadcasting",[21] a term defined in s. 2(1) of the *Broadcasting Act* to mean "any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but... not...any such transmission of programs that is made solely for performance or display in a public place". Despite this, the Supreme Court of Canada held in the *ISP Reference* that ISPs do not qualify as "broadcasting undertakings"[22] subject to regulation under the *Broadcasting Act* when acting solely in their capacity as ISPs, since ISPs only provide the mode of transmission and have no control over the content of the programming. This aspect of the *ISP Reference* is discussed in more detail at pages 29-30 below.

As a result of the *ISP Reference*, ISPs continue to be regulated under the *Telecommunications Act* rather than the *Broadcasting Act*.[23] In this regard, ISPs may be contrasted with certain website operators, including pirate site operators, who transmit programs to the public over the Internet. Such website operators fall within the non-exhaustive definition of "broadcasting undertakings" in the *Broadcasting Act*, though the CRTC has exempted them from Part II of *Broadcasting Act* pursuant to s. 9(4) by means of the "**Digital Media Exemption Order**".[24]

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[16] *Ibid*, ¶8.
[17] *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services* – Telecom Regulatory Policy CRTC 2017-11, 17 January 2017, ¶2, 4, 16, 29 and 32-36.
[18] *Telecommunications Act*, s. 2(1), *s.v.* "telecommunications".
[19] *Ibid*, s. 2(1), *s.v.* "intelligence".
[20] *Broadcasting Act*, s. 2(1), *s.v.* "program".
[21] *New Media* – Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14, 17 May 199, ¶33-46; *Review of broadcasting in new media* – Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009, ¶27 and 31-33; *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers* – Broadcasting Order CRTC 2009-452, 28 July 2009, ¶1, 9, 16-18.
[22] Section 2(1) of the *Broadcasting Act* defines a "broadcasting undertaking" to "include[e] a distribution undertaking, a programming undertaking and a network".
[23] This follows from s. 4 of the *Telecommunications Act* and s. 4(4) of the *Broadcasting Act*, discussed at pages 30-31 below.
[24] *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, 26 July 2012, Appendix. The Digital Media Exemption Order extends to, *inter alia*, any "undertaking [that] provides broadcasting services... delivered and accessed over the Internet". See also *Regulatory framework for mobile television broadcasting services* – Broadcasting Public Notice CRTC 2006-47, 12 April 2006, ¶29 and footnote 2.

Accordingly, given that the Proposed Regime contemplates an order against ISPs, not the pirate operators themselves, the CRTC's jurisdiction must be found within the *Telecommunications Act*. This statute, enacted in 1993, revised and consolidated a variety of provisions in the now-repealed *Railway Act* (the "***Railway Act***")[25] and *National Telecommunications Powers and Procedures Act* ("***NTPPA***")[26] (formerly the *National Transportation Act*) which until then had governed the telecommunications jurisdiction of the CRTC (and before its acquisition of those powers in 1976, that of the Canadian Transport Commission).[27] The Supreme Court of Canada has stated that "the purpose of the *Telecommunications Act* is to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada".[28] One of its principal innovations was the introduction of the Canadian telecommunications policy objectives in s. 7:

> 7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives
>
> (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
>
> (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
>
> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
>
> (d) to promote the ownership and control of Canadian carriers by Canadians;
>
> (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
>
> (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
>
> (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
>
> (h) to respond to the economic and social requirements of users of telecommunications services; and
>
> (i) to contribute to the protection of the privacy of persons.

Pursuant to s. 47 of the *Telecommunications Act*, the CRTC is required to consider and implement these objectives in the exercise of all its powers under the statute.[29]

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[25] R.S.C. 1985, c. R-3.
[26] R.S.C. 1985, c. N-20.
[27] Formerly the Board of Transport Commissioners of Canada, formerly the Board of Railway Commissioners of Canada.
[28] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶38.
[29] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶1-2 and 28.

> 47 The Commission shall exercise its powers and perform its duties under this Act and any special Act
>
> (a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and
>
> (b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

Nevertheless, the telecommunications policy objectives in s. 7 cannot themselves empower the CRTC to implement the Proposed Regime. Instead, its authority to do so must be grounded in one of the jurisdiction-conferring provisions in the *Telecommunications Act*.[30]

As the Supreme Court of Canada has observed, the *Telecommunications Act* grants the CRTC "broad" and "comprehensive regulatory powers", including "numerous specific powers".[31] The primary jurisdiction-conferring provisions of relevance here are those in ss. 24, 24.1 and 36.

B. Sections 24 and 24.1

Sections 24 and 24.1 provide as follows:

> 24 The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.
>
> 24.1 The offering and provision of any telecommunications service by any person other than a Canadian carrier are subject to any conditions imposed by the Commission, including those relating to
>
> (a) service terms and conditions in contracts with users of telecommunications services;
>
> (b) protection of the privacy of those users;
>
> (c) access to emergency services; and
>
> (d) access to telecommunications services by persons with disabilities.

While these two provisions are intimately related, they have different historical origins and concern separate groups of ISPs.

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[30] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶42; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶49-50; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶21-23; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶48-49.

[31] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶28 and 32. See also: *Telus Communications Inc. v. Canada (C.R.T.C.)*, 2004 FCA 365, ¶49, leave to appeal refused, [2004] S.C.C.A. No. 573; *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 29, ¶10-13; *Reference re: User Fees Act*, 2009 FCA 224, ¶34 and 50; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶50; *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶15, 17, 20 and 31, leave to appeal refused, [2010] S.C.C.A. No. 28.

Section 24 has existed in the *Telecommunications Act* since its inception, and is the successor to s. 341(3) of the *Railway Act*, which provided that:

> [341](3) The Commission may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.[32]

The conditions that the CRTC may impose under s. 24 are directed towards the offering and provision of any telecommunications service by a "Canadian carrier", defined in s. 2(1) of the *Telecommunications Act* to mean "a telecommunications common carrier that is subject to the legislative authority of Parliament". Accordingly, s. 24 does not authorize the CRTC to impose conditions upon a Secondary ISP, only a Primary ISP. However, this gap is filled by s. 24.1, a provision that came into force in 2014 and that permits the CRTC to impose conditions upon the offering and provision of "any telecommunications service by any person other than a Canadian carrier". Therefore, the CRTC may impose conditions upon Secondary ISPs under s. 24.1.

Even before s. 24 was enacted, s. 341(3) was given a broad interpretation,[33] which enabled the CRTC to determine the substantive terms and conditions of carriage that would be binding as a matter of law upon any parties to an agreement of service designated by the CRTC (whether they agreed to those terms as a matter of contract or not).[34] With the coming into force of *Telecommunications Act* in 1993, the CRTC's power under s. 24 was expanded even further. This was due largely to the introduction of the Canadian telecommunications policy objectives in s. 7, coupled with the requirement in s. 47 that the CRTC exercise the s. 24 power with a view to implementing them. As the Supreme Court of Canada has said of the analogous policy objectives in s. 3(1) of the *Broadcasting Act*, "[w]hile such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act", since "Parliament must be presumed to have empowered the CRTC to work towards implementing" them.[35] As a result of the s. 7 policy objectives, the types of conditions which s. 24 may authorize are much broader than those available under s. 341(3) of the *Railway Act*, a fact that that has been recognized by the CRTC itself.[36] Further, s. 73(2)(b) of the *Telecommunications Act*

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[32] This provision appears to have existed in various forms since *The Railway Act*, 1903, 3 Edw. VII, c 58, and underwent several numbering changes during its successive consolidations: see *Telecommunications Workers' Union v. Canada*, [1989] 2 F.C. 280 (C.A.), ¶2 and footnote 2, leave to appeal refused, [1988] S.C.C.A. No. 530; *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1157, ¶2.

[33] This was consistent with the more general tendency to characterize the powers accorded to the CRTC under the *Railway Act* and *NTPPA* as "broad" ones: *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at 1740, 1756 and 1762-1763.

[34] *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*, [1975] 2 S.C.R. 678 at 686-691. See also: *Grand Trunk Railway Co. of Canada v. Robinson*, [1915] A.C. 740 at 744 (P.C. (Canada)); *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195 at 201-204 (P.C. (Canada)); and *Sherlock v. Grand Trunk Railway Co. of Canada* (1921), 62 S.C.R. 328 at 332-337.

[35] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶32. See also: *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶37; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶49.

[36] *Provision of telecommunications services to customers in multi-dwelling units* – Telecom Decision CRTC 2003-45, 30 June 2003, ¶1:

> In 1993, Parliament enacted the *Telecommunications Act* (the Act), replacing the telecommunications-related provisions of the *Railway Act*. The Act affirmed many of the policy objectives that the Commission had been giving effect to under the *Railway Act* since the 1970's, including the introduction of competition in various telecommunications markets. Section 7 of the Act declares... Canadian telecommunications policy... ***The Act provides the Commission with new powers to impose conditions of service on Canadian carriers under section 24***... [*emphasis added*]

makes the contravention of a s. 24 condition a punishable offence, and s. 27(3) states that "[t]he Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with... any decision made under section 24".

The increased authority conferred by s. 24 is consistent with Parliament's objective in enacting the *Telecommunications Act*. As the Minister of Communications stated when Bill C-62 (ultimately enacted as the *Telecommunications Act*) was introduced on second reading, the legislation was designed to implement "a simplified and more flexible regulatory system".[37] This is illustrated by the fact that s. 341(3) of the *Railway Act* was preceded by two provisions – ss. 341(1) and (2) – which focused on the narrow issue of CRTC approval for limitation of liability clauses in service agreements. In the *Telecommunications Act*, Parliament separated s. 24 from the limitation of liability provision (s. 31), thereby confirming the generality of the conditions that the CRTC can impose under s. 24.

The Supreme Court of Canada's decision in *Bell Canada v. Bell Aliant Regional Communications*[38] is instructive here. The Court in that case found that the CRTC's power to determine just and reasonable rates under s. 27 of the *Telecommunications Act*, together with its power to order any carrier to adopt an accounting method under s. 37, could – when read together with the telecommunications policy objectives in s. 7, pursuant to s. 47 – reasonably authorize it to require that excess rates from residential telephone services (which it had previously ordered be maintained in deferral accounts by certain carriers) be used, *inter alia*, to fund broadband expansion, with any remaining amounts being credited to current subscribers. While the Court's analysis focused primarily upon the power-conferring provisions in ss. 27 and 37, it also referred to s. 24 (alongside s. 32(g), discussed at pages 18-20 below), and emphasized that the provision permits the CRTC to impose "any" condition on the provision of a service:

> The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry, as the following provisions show:
>
> > ***24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission*** or included in a tariff approved by the Commission.
> >
> > 25. (1) [quotation omitted]
> >
> > ...
> >
> > 32. The Commission may, for the purposes of this Part,
> >
> > > ...
> > >
> > > (g) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.
>
> ...
>
> ... Together with its rate-setting power, ***the CRTC has the ability to impose any condition on the provision of a service***, adopt any method to determine whether a rate is just and reasonable and require a carrier to adopt any accounting method. ...[39]

[37] *House of Commons Debates*, 34th Parl., 3rd Sess., No. 14 (19 April 1993) at 18070 (Hon. Perrin Beatty).
[38] [2009] 2 S.C.R. 764.
[39] *Ibid*, ¶29 and 36, *underlining in original, bolding and italics added.*

These comments suggest that s. 24 is to be viewed as a broad, jurisdiction-conferring provision which permits the CRTC to impose such conditions upon the provision of a service as reasonably further the policy objectives in s. 7 of the Act. This is underscored by the Supreme Court's comments about s. 27 of the *Telecommunications Act*, which – like s. 24 – had antecedents in the *Railway Act*. In finding the CRTC could reasonably conclude that s. 27 authorized its order, the *Bell Aliant* Court observed that the scope of s. 27 was greatly enlarged from that in the *Railway Act* by virtue of s. 47 of the *Telecommunications Act* and the inclusion of the policy objectives in s. 7:

> ...[S]ignificantly, ***the Railway Act contained nothing analogous to the statutory direction under s. 47 that the CRTC must exercise its rate-setting powers with a view to implementing the Canadian telecommunications objectives set out in s. 7. These statutory additions are significant***. Coupled with its rate-setting power, and its ability to use any method for arriving at a just and reasonable rate, ***these provisions contradict the restrictive interpretation of the CRTC's authority proposed by various parties in these appeals.***
>
> This was highlighted by Sharlow J.A. when she stated:
>
> > Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* ..., ***the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant*** to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. ***Section 47 of the Telecommunications Act expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the Telecommunications Act. What that means, in my view, is that in rating decisions under the Telecommunications Act, the CRTC is entitled to consider any or all of the policy objectives listed in section 7***...
>
> ...
>
> ...[T]he CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests referred to in s. 7, ***not simply those it had previously considered when it was operating under the more restrictive provisions of the Railway Act***. ...
>
> ...
>
> ... ***The CRTC... is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in ATCO. The Telecommunications Act displaces many of the traditional restrictions on rate-setting described in ATCO,*** thereby granting the CRTC the ability to balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry...
>
> ...
>
> I therefore agree with the following observation by Sharlow J.A.:
>
> > The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that ***the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the***

> ***expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act.*** ...
>
> ...
>
> It would, with respect, be an oversimplification to consider that *Bell Canada (1989)* applies to bar the provision of credits to consumers in this case. ***Bell Canada (1989) was decided under the Railway Act, a statutory scheme that, significantly, did not include any of the considerations or mandates set out in ss. 7, 27(5) and 47 of the Telecommunications Act***...
>
> ...
>
> In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, ***it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do*** in setting just and reasonable rates.[40]

As with s. 27, the scope of the authority conferred upon the CRTC by s. 24 was greatly increased with the introduction of the Canadian telecommunications policy objectives in the *Telecommunications Act*.

This is confirmed by the Federal Court of Appeal's recent decision in *Bell Canada v. Amtelecom Limited Partnership*.[41] At issue there was whether the CRTC had jurisdiction to impose a mandatory code of conduct for providers of retail wireless and voice data services (the "**Wireless Code**") which applied retrospectively to contracts entered into before the Wireless Code came into effect (thereby depriving wireless carriers of certain cancellation fees and the recovery of financial inducements to customers). The CRTC grounded its retrospective authority to promulgate the Wireless Code upon s. 24 of the *Telecommunications Act*, coupled with the telecommunications policy objectives in, *inter alia*, ss. 7(a) and (h), with the Wireless Code specifically directing wireless providers to offer services to subscribers according to its terms as a condition under s. 24. In holding that the CRTC did not act unreasonably in finding that s. 24 gave it the necessary authority to make the Wireless Code retrospective, the Federal Court of Appeal held such a power could be inferred from s. 24 by implication, even though it was not explicit. This was in large part because the CRTC was acting in the legitimate pursuit of the s. 7 telecommunications policy objectives:

> ... Since it is conceded by all that ***section 24 does not explicitly authorize the CRTC to make rules with retrospective application, it can only do so if that power must arise by necessary implication*** because without such a power, it could not fulfill its statutory mandate...
>
> ***The Code implements several of the policy objective[s] of the Act, particularly*** paragraph 7(f) -- fostering increased reliance on market forces for the provision of services -- and paragraph 7(h) -- responding to the social and economic requirements of users. ***To that extent, the CRTC's objectives are grounded in the Act and in the Canadian telecommunications policy. This is an important factor in ensuring that the CRTC's position is not simply "saying it's so makes it so."*** As a result, the promulgation of the Code as a whole is a matter squarely within the CRTC's mandate and within the Act's policy objectives.
>
> ...

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[40] *Ibid*, ¶42-43, 48, 53, 57, 62 and 74, *underlining in original, bolding and italics added*. See also: *MTS Allstream Inc. v. Edmonton (City of)*, 2007 FCA 106, ¶44-52, 64 and 66; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶56 and 60; *Bell Mobility Inc. v. Anderson*, 2012 NWTCA 4, ¶22.

[41] 2015 FCA 126. See also: *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 29, ¶10-11; *Penny v. Bell Canada*, 2010 ONSC 2801, ¶129; *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶17, leave to appeal refused, [2010] S.C.C.A. No. 28.

> When one considers the Code as a whole, one can see that one of its effects will be to put more information in the hands of consumers. To the extent that the functioning of any market is dependent on the quality of the information available to market participants, the coming into force of the Code should make the market for wireless services more dynamic as consumers make better informed choices at more frequent intervals. It is not unreasonable to conclude that achieving this state of affairs is indeed in the best interests of consumers.
>
> Does it follow from this that the Code should therefore be implemented as soon as practicable? At paragraph 365 of the Code, the CRTC noted that if the Code only applies to new contracts, "many Canadians with pre-existing wireless contracts will not fully benefit from the Wireless Code until these pre-existing contracts expire or are amended." ***Given the CRTC's intention to put more information into the hands of consumers so as to increase the dynamism of the market, it is reasonable to have all consumers on the same footing as soon as possible.*** It is perhaps this limited non-technical view of "undue discrimination" which the CRTC had in mind. From the point of view of the regulation of the retail market in voice and data wireless services, ***the CRTC could reasonably consider that section 24, by necessary implication, gives it the power to impose the Code retrospectively.***
>
> As a result, on the basis of the record before this Court, I am of the view that the CRTC's implicit interpretation of section 24 to the effect that it [the CRTC] has the right to make the Wireless Code applicable to contracts concluded before the Code came into effect is reasonable. ...[42]

We acknowledge that s. 24 is framed in broad terms ("subject to any conditions imposed by the Commission"), and that the Supreme Court of Canada in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* ("***Cogeco***") held that general "basket clause" provisions (in that case, ss. 9(1)(b)(i), 9(1)(h) and 10(1)(k) of the *Broadcasting Act*, which permit the CRTC to issue make such licensing conditions "as the Commission deems appropriate" and such regulations "respecting such other matters as it deems necessary for the furtherance of its objects") do not empower the CRTC to take measures solely because they are linked to one of its statutory policy objectives.[43] In doing so however, the *Cogeco* Court distinguished such basket clauses from true jurisdiction-conferring provisions, giving as an example the CRTC's authority to require "just and reasonable" rates under s. 27 of the *Telecommunications Act* at issue in *Bell Aliant*:

> ***The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with Bell Canada v. Bell Aliant Regional Communications***, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to determine whether rates set by telecommunication companies are just and reasonable. ***The CRTC's jurisdiction over the setting of rates under s. 27 of the Telecommunications Act,*** S.C. 1993, c. 38, provides that rates must be just and reasonable. ***Under that section, the CRTC is specifically empowered*** to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).
>
> ***This broad, express grant of jurisdiction*** authorized the CRTC to create and use the deferral accounts at issue in that case. This ***stands in marked contrast to the provisions on which***

[42] *Ibid*, ¶49-50 and 55-57, *emphasis added*.
[43] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶24-25.

> ***the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(k) and a broad licensing power under s. 9(1)(b)(i).*** Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because ***the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion*** not contemplated by the jurisdiction-granting provisions of the legislation.[44]

As in *Bell Aliant*, the power to impose conditions of service in s. 24 is not a basket clause, but instead an express grant of specific authority that is "fully supported by unambiguous statutory language".[45] The fact that it is framed in broad terms, like s. 27, is simply a necessary corollary to the scope of the power which it confers upon the CRTC.

Further, it is important to consider s. 24 alongside s. 24.1. That provision is similar to s. 24 in stating that "[t]he offering and provision of ***any*** telecommunications service" is "subject to ***any*** conditions imposed by the Commission". Importantly, s. 24.1 then goes on to provide four specific – but non-exhaustive – illustrations of this power in subsections (a)-(d):

> (a) service terms and conditions in contracts with users of telecommunications services;
>
> (b) protection of the privacy of those users;
>
> (c) access to emergency services; and
>
> (d) access to telecommunications services by persons with disabilities.

The significance of these subsections is evident from the Supreme Court's comments in *Cogeco*:

> ***A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" (s. 9(1)(h)) cannot be read in isolation.... Rather, "[t]he content of a provision 'is enriched by the rest of the section in which it is found*** ...'" ... In my opinion, ***none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights*** for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.[46]

In other words, the specific fields for regulation set out in ss. 24.1(a)-(d) can be used to interpret the types of "conditions" that may be imposed by the CRTC upon the "offering and provision of telecommunications services" in s. 24.[47] Notably, several of the s. 24.1 illustrations are similar to

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[44] *Ibid*, ¶26-27, *emphasis added.*

[45] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶50. See also *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶56 and 60.

[46] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶29. See also *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, ¶7, 41, 46, 50 and 74-75.

[47] While s. 24.1 was enacted after s. 24, the provision may still be referred to when construing the scope of s. 24. See s. 42(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21 ("An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends"). As noted in *G. T. Campbell & Associates Ltd. v. Hugh Carson Co. Ltd.*, [1979] O.J. No. 4248 (C.A.), ¶21, "amendments to a statute are to be construed together with the original Act to which they relate as constituting one law and as part of a coherent system of legislation; the provisions of the amendatory and amended Acts are to be harmonized, if possible, so as to give effect to each and to leave no clause of either inoperative". Therefore, for the purposes of interpreting s. 24 of the *Telecommunications Act* within the entire context of the entire Act, "[t]he Act as a whole includes any amendments that have come into force before the relevant

the Proposed Regime in requiring ISPs to take measures to assist innocent parties with problems the TSP did not itself create but which they are well-positioned to address (i.e., protecting their privacy, providing access to emergency services and providing access to services for disabled persons). Therefore, unlike the basket clauses in *Cogeco*, the statutory context of s. 24 suggests that both it and s. 24.1 permit the CRTC to impose conditions upon ISPs which protect the intellectual property rights of third parties.

This interpretation is consistent with the way in which the CRTC has used ss. 24 and 24.1 in practice. In addition to the Wireless Code, the provisions have been relied upon to impose a variety of conditions that further the Canadian telecommunications policy objectives, including:

- Consumer safeguards, such as coinless and cardless payphone access to 9-1-1, prominently displaying payphone rates, increasing accessibility for customers with disabilities, protecting customer privacy and confidential customer information, supporting customer transfers to other carriers, disclosure of Internet traffic management practices, acceptance of service cancellations and the National Do Not Call List.[48]

- Security deposit policies, provision of telephone directories and the suspension or disconnection of service.[49]

- Requiring certain TSPs to provide teletypewriter relay service to enable people with hearing or speech disabilities to communicate with voice telephone users using text, and to provide bridge funding for a national video relay service for Deaf, Hard of Hearing or speech impaired individuals.[50]

- Requiring carriers to communicate certain information (e.g., in residential telephone directors, newspaper notices or communications plans for local forbearance) in alternative formats to visually impaired Canadians upon request.[51]

- Requiring carriers who serve multi-dwelling units to allow other carriers to access subscribers in the units using their facilities.[52]

- Requiring that cable carriers offering high-speed retail Internet service make that service available for resale by other ISPs at a discount.[53]

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facts arose" (i.e., those, like s. 24.1, enacted before the Proposed Regime is implemented): R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), §13.4 (and §13.5 and 24.76-24.78).

[48] *Application of regulatory obligations directly to non-carriers offering and providing telecommunications services* – Telecom Regulatory Policy CRTC 2017-17, 17 January 2017, ¶3, 16, 29, 34-36 and Appendix.

[49] *Forbearance from the regulation of retail local exchange services* – Telecom Decision CRTC 2006-15, 6 April 6006, ¶391.

[50] *Video Relay Service* – Telecom Regulatory Policy CRTC 2014-187, 22 April 2014, ¶2 and 45; *Structure and mandate of the video relay service administrator* – Telecom Regulatory Policy CRTC 2014-659, 18 December 2014, ¶58.

[51] *Follow-up to Broadcasting and Telecom Regulatory Policy 2009-430 – Requirements for telecommunications service providers to communicate certain information in alternative formats* – Telecom Regulatory Policy CRTC 2010-132, 4 March 2010, ¶11, 14 and 17.

[52] *Provision of telecommunications services to customers in multi-dwelling units* – Telecom Decision CRTC 2003-45, 30 June 2003, ¶141.

[53] *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities* – Telecom Decision CRTC 99-11, 14 September 1999, ¶20.

- Requiring all carriers that are 9-1-1 network providers to take reasonable measures to ensure their 9-1-1 networks are reliable and resilient to the maximum extent feasible.[54]

- Requiring all TCCs to be members of the Commissioner for Complaints for Telecommunications Services if they have annual revenues exceeding $10 million or provide telecommunications services that are within the scope of its mandate.[55]

- Prohibiting wholesale roaming providers from preventing wireless carriers from disclosing their identities to customers, prohibiting wholesale roaming providers from applying exclusivity provisions in wholesale roaming agreements with other mobile wireless carriers, and mandating subscriber access to certain roaming networks.[56]

- Prohibiting TCCs that provide retail services to individuals or small-business customers from imposing 30-day cancellation policies on customers, and requiring TCCs to accept customer cancellation requests from a prospective new service provider on behalf of a customer.[57]

Finally, it should be emphasized that ss. 24 and 24.1 appear alongside several other, more general provisions in the *Telecommunications Act* that confer residual powers upon the CRTC. These include ss. 32(6), 51 and 61(d):

> 32 The Commission may, for the purposes of this Part,
>
> ...
>
> (g) in the absence of any applicable provision in this Part, determine any matter and ***make any order relating to*** the rates, tariffs or ***telecommunications services of Canadian carriers.***
>
> ...
>
> 51 The Commission may ***order a person,*** at or within any time and subject to any conditions that it determines, ***to do anything the person is required to do under this Act*** or any special Act, and may forbid a person to do anything that the person is prohibited from doing under this Act or any special Act.
>
> ...
>
> 67 (1) The Commission may ***make regulations***
>
> ...
>
> (d) ***generally for carrying out the purposes and provisions of this Act*** or any special Act. [*emphasis added*]

As noted at pages 15-17 above, the Supreme Court's decision in *Cogeco* means that these basket clauses cannot be interpreted to confer an unlimited discretion upon the CRTC. Nevertheless, this does not mean the foregoing provisions are denuded of any meaningful content. The Federal Court

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[54] *Matters related to the reliability and resiliency of the 9-1-1 networks* – Telecom Regulatory Policy CRTC 2016-165, 2 May 2016, ¶30.

[55] *Non-compliance with the Commissioner for Complaints for Telecommunications Services participation requirement* – Telecom Decision CRTC 2013-495 and Telecom Orders CRTC 2013-496, 2013-497, and 2013-498, 18 September 2013, ¶4-5.

[56] *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference* – Telecom Decision 2014-398, 31 July 2014, ¶39; *Regulatory framework for wholesale mobile wireless services* – Telecom Regulatory Policy CRTC 2015-177, 5 May 2015, ¶148 and 167.

[57] *The customer transfer process and related competitive issues* – Broadcasting and Telecom Regulatory Policy CRTC 2011-191, 18 March 2011, ¶27 *Prohibition of 30-day cancellation policies* – Broadcasting and Telecom Regulatory Policy CRTC 2014-576, 6 November 2014, ¶40.

of Appeal recently emphasized this point with reference to the basket clause at issue in *Coegco* (s. 10(1)(k) of the *Broadcasting Act*) in *Bell Canada v. Canada (Attorney General)*:

> ...***I agree with Bell that a broadly drafted basket clause such as paragraph 10(1)(k), cannot be read in isolation***, but rather must be taken in context with the rest of the section in which it is found, as stated by the Supreme Court in *Reference re Broadcasting* at paragraph 29. ***However,*** the case at bar may be distinguished from that decision of the Supreme Court in that a number of the specific fields for regulation set out in subsection 10(1) do pertain to simultaneous substitution and the creation of an afferent enforcement regime. In my view, ***the Supreme Court's statement in Reference re Broadcasting should not be read as voiding of any meaning all open-ended provisions such as paragraph 10(1)(k).*** It simply stood for the proposition that a provision "is enriched by the rest of the section in which it is found", which is a simple restatement of the modern interpretive approach. In a case such as the present, ***where other sections can be read as supporting an administrative decision-maker's authority to enact envisaged measures, a basket clause should only reinforce such authority.***[58]

Accordingly, while ss. 32(g), 51 and 61(d) do not themselves confer authority upon the CRTC to implement the Proposed Regime, they "reinforce" its jurisdiction to do so under ss. 24 and 24.1.

As to ***s. 32(g)*** (which applies to TCCs, and would thus reinforce the CRTC's authority over Primary ISPs under s. 24), the Supreme Court in *Bell Aliant* relied on s. 32(g) alongside s. 24 in finding the CRTC had the authority to make the deferral account orders at issue there: see page 12 above. In addition, the Federal Court of Appeal has found s. 32(g) supported the CRTC's authority to make other determinations.[59] And prior to the enactment of the *Telecommunications Act*, the Supreme Court of Canada and the Federal Court of Appeal repeatedly relied upon the predecessor to s. 32(g) – s. 340(5) of the *Railway Act* – for the same purpose.[60] In *Bell Canada v. Canada (C.R.T.C.)*, for instance, the Supreme Court of Canada held that s. 340(5) should receive a broad interpretation which gave the CRTC authority to make remedial orders (in that case, requiring a one-time credit to certain consumers upon revisiting interim rates and finding they were not just and reasonable as required by s. 340(1), the predecessor to s. 27(1) of the *Telecommunications Act*):

> Finally, s. 340(5) of the Railway Act gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:
>
> > 340. ... (5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.
>
> ***Although the power granted by s. 340(5) could be construed restrictively by the application of the ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the***

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[58] 2016 FCA 217, ¶53, *emphasis added*.

[59] *Telus Communications Inc. v. Canada (C.R.T.C.)*, 2004 FCA 365, ¶49-50, leave to appeal refused, [2004] S.C.C.A. No. 573; *Englander v. Telus Communications Inc.*, 2004 FCA 387, ¶73-75. See also: *Sprint Canada Inc. v. Bell Canada*, [1997] O.J. No. 4772 (Gen. Div.), ¶31, aff'd, [1999] O.J. No. 63 (C.A.); *MTS Allstream Inc. v. TELUS Communications Co.*, 2009 ABCA 372, ¶20, leave to appeal refused, [2010] S.C.C.A. No. 28.

[60] *Bell Canada v. Challenge Communications Ltd.*, [1979] 1 F.C. 857 (C.A.), ¶12 and 21 (QL); *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Assn.*, [1985] 1 F.C. 623 (C.A.), ¶26 (WLeC), leave to appeal refused, [1985] S.C.C.A. No. 501; *AGT Ltd. v. Canada (C.R.T.C.)*, [1994] F.C.J. No. 1959 (C.A.), ¶11-14.

> ***appellant all the powers necessary*** to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.
>
> ...
>
> Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that ***s. 340(5) of the Railway Act provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers.***[61]

As to ***ss. 51 and 67(1)(d)*** of the *Telecommunications Act*, the Federal Court of Appeal has pointed to their predecessors (in ss. 45(2) and 46(1) of the *National Transportation Act*)[62] as "strengthening" the CRTC's other, more specific heads of jurisdiction, and as "indicat[ing] a legislative intention to confer a great breadth of power on the CRTC".[63] Indeed, it has found that these provisions confer "ample authority" in their own right.[64]

In light of the foregoing, it is our view that – provided the Proposed Regime reasonably implements the Canadian telecommunications policy objectives in s. 7 – the CRTC is clothed with the authority under ss. 24 and 24.1 of the *Telecommunications Act* to make a mandatory order against all Canadian ISPs which requires, as a condition of offering and providing retail Internet services, that they disable access to locations on the Internet which the CRTC has identified as piracy sites on the recommendation of the IPRA from time to time. The degree to which the Proposed Regime does, in fact, implement the telecommunications policy objectives is discussed at pages 23-27 below.

C. Section 36

In addition to ss. 24 and 24.1, it is also important to consider s. 36 of the *Telecommunications Act*, which provides:

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[61] [1989] 1 S.C.R. 1722 at 1738-1739 and 1762, *emphasis added*. See also *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, ¶36 (and ¶1, 6, 67-68, 78 and 82), where s. 340(5) was one of the provisions the Court pointed to in finding the CRTC had authority to regulate the terms of agreements governing cable company use of telephone company support structures.

[62] R.S.C. 1970, c. N-17. These sections provided

> [45] (2) The Commission may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Commission, so far as is not inconsistent with the *Railway Act*, any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, or the Special Act, and may forbid the doing or continuing of any act, matter or thing that is contrary to the *Railway Act*, or the Special Act; and for the purposes of this Part and the *Railway Act* has full jurisdiction to hear and determine all matters whether of law or of fact.
>
> ...
>
> 46. (1) The Commission may make orders or regulations
>
> > (a) with respect to any matter, act or thing that by the *Railway Act* or the Special Act is sanctioned, required to be done or prohibited;
> >
> > (b) generally for carrying the *Railway Act* into effect; ...

These provisions were later renumbered as ss. 49(2) and 50(1) of the *NTPPA*.

[63] *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Assn.*, [1985] 1 F.C. 623 (C.A.), ¶17 and 22 (and ¶26) (WLeC), leave to appeal refused, [1985] S.C.C.A. No. 501.

[64] *Bell Canada v. Challenge Communications Ltd.*, [1979] 1 F.C. 857 (C.A.), ¶21 (QL). See also: *Canadian National Railway Co. v. Moffatt*, 2001 FCA 327, ¶45; *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*, 2006 MBCA 297, ¶11.

> 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.

Section 36 thus imposes a prohibition upon TCCs controlling or influence the content they transmit without CRTC approval.[65] Notably, the provision does not apply to TSPs, and therefore would only capture Primary ISPs rather than Secondary ISPs (though a Secondary ISP which voluntarily controls the content it transmits in the absence of a mandatory CRTC order under ss. 24 and 24.1 may, depending on the circumstances, be treated as a broadcasting undertaking that is excluded from the *Telecommunications Act* by virtue of s. 4, pursuant to the *ISP Reference* discussed at pages 29-31 below).

Section 36 is based upon s. 8 of the *Bell Canada Act*,[66] a provision that was repealed upon the coming-into-force of the *Telecommunications Act*. Unlike s. 36, the old s. 8 did not permit the CRTC to approve the control or influence of telecommunications by the carrier:

> 8. Where the Company provides services or facilities for the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic systems, it shall act solely as a telecommunications common carrier and shall not control the contents or influence the meaning or purpose of messages transmitted, emitted or received.

Given the addition of the CRTC approval requirement in s. 36, the provision has granted the CRTC a new power, as is evidenced by several sections of the *Telecommunications Act* which refer to CRTC "pre-approval" as a method through which the CRTC can "regulate" matters.[67] Other examples of CRTC pre-approval powers are found in ss. 25(1)[68] and 29.[69]

While s. 36 would thus appear to provide the CRTC with the authority to approve content control by Primary ISPs, it does not confer the authority to make a mandatory order against Primary ISPs requiring them to engage in such an activity. The provision is drafted in permissive terms ("[e]xcept where the Commission approves otherwise"), and thus seems to confer only a power of approval,

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[65] See *Empowering Canadians to protect themselves from unwanted unsolicited and illegitimate telecommunications* – Compliance and Enforcement and Telecom Regulatory Policy CRTC 2016-442, 7 November 2016, ¶93 ("In accordance with section 36 of the Act, any conduct by a Canadian carrier that involves the exercise of some power or authority over the content, or has an impact on the purpose or meaning, of the telecommunications carried by it for the public would require Commission approval.").

[66] S.C. 1987, c. 19.

[67] *Telecommunications Act*, ss. 41.5, 46.3(2), 46.4(b) and 46.5(3)(b).

[68] *Telecommunications Act*, s. 25(1):

> 25 (1) No Canadian carrier shall provide a telecommunications service ***except in accordance with a tariff filed with and approved by the Commission*** that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

[69] *Telecommunications Act*, s. 29:

> 29 No Canadian carrier shall, ***without the prior approval of the Commission***, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting
>
> (a) the interchange of telecommunications by means of their telecommunications facilities;
>
> (b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or
>
> (c) the apportionment of rates or revenues between the carriers.

subject to any conditions necessary to implement the Canadian telecommunications policy in s. 7.[70] This has been recognized by the CRTC.[71]

That said, a CRTC order under s. 36 may be important, because the CRTC takes the view that the provision makes it illegal for an ISP to block access to a website unless such blocking is approved by the Commission, even if another statute or judicial order requires it.[72] In our view, an ISP that is required to block access to a site pursuant to a CRTC or court order is not itself "control[ling] the content or influenc[ing] the meaning or purpose telecommunications" contrary to s. 36, but is merely carrying a mechanical process ordered by the CRTC or the court, which is the true controlling party: see pages 29-31 below. Accordingly, if the CRTC were to make a site blocking order under ss. 24 and 24.1, its approval to the ISP controlling the content under s. 36 should be unnecessary. Nevertheless, given the CRTC's position on this issue, it may be prudent to include a s. 36 approval alongside the ss. 24 and 24.1 order when implementing the Proposed Regime.

The Commission possesses a broad authority under s. 36 to approve TCC activities which involve the control of content. This is illustrated by *Consumers' Association of Canada v. British Columbia Telephone Co.*[73] In that case, the Federal Court of Appeal considered the scope of a CRTC approval requirement in s. 9A of the *British Columbia Telephone Company Special Act*,[74] which permitted the company to acquire shares in other companies having similar objects to itself "[p]rovided that no agreement therefor shall take effect until it has been submitted to and ***approved*** by the Board of Transport Commissioners for Canada [now the CRTC]". The Court concluded that the approval power was not subject to any particular restrictions, and that the CRTC had a broad discretion to determine the circumstances in which it would be applied in the public interest:

> ... The section itself sets out no criteria which the Commission is required to consider when exercising its power of approval or disapproval of an agreement of this kind. ***The Commission is, in my opinion, free to formulate and apply its own guidelines.*** It is the master of its own procedure. ...[75]

Consistent with this jurisprudence, the CRTC has not imposed a litany of technical requirements upon its exercise of the s. 36 approval power. Instead, it takes the view that website blocking may be approved "where it would further the telecommunications policy objectives set out in section 7 of the Act".[76] While such approval will only be forthcoming in "exceptional circumstances",[77] the CRTC

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[70] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, ¶41, 43, 72 and 77-78; *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶52-53.

[71] *Telecom Commission Letter* - 8622-P49-200610510, 24 August 2006 ("The Commission notes that section 36 of the Act would not allow it to require Canadian carriers to block the web sites; rather, under section 36 of the Act, the Commission has the power to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public").

[72] *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act* – Telecom Decision CRTC 2016-479, ¶6-7 and 18-21. See also: *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶121-122; *Internet traffic management practices – Guidelines for responding to complaints and enforcing framework compliance by Internet service providers* – Telecom Information Bulletin CRTC 2011-609, 22 September 2001, ¶9; *Telecom Commission Letter Addressed to Distribution List and Attorneys General* – 8663-P8-201607186, 1 September 2016.

[73] [1981] 2 F.C. 461 (C.A.), leave to appeal refused, [1981] S.C.C.A. No. 382.

[74] S.C. 1916, c. 66.

[75] *Consumers' Association of Canada v. British Columbia Telephone Co.*, [1981] 2 F.C. 461 (C.A.), ¶15 (and ¶5 and 16), leave to appeal refused, [1981] S.C.C.A. No. 382, *emphasis added.*

[76] *Public Interest Advocacy Centre – Application for relief regarding section 12 of the Quebec Budget Act* – Telecom Decision CRTC 2016-479, ¶7 (and ¶21).

has previously indicated its intention to exercise the s. 36 power in order to implement a universal blocking regime that permits TCCs to prevent nuisance calls with blatantly illegitimate caller ID from reaching Canadians.[78] For the reasons below, the Proposed Regime is similarly in furtherance of the s. 7 policy objectives, and therefore satisfies the threshold for s. 36 relief established by the Commission.

D. The Section 7 Policy Objectives

The Supreme Court of Canada has observed that the Canadian telecommunications policy objectives in s. 7 of Act are "broad".[79] Based on the facts set out at pages 4-5 above, the Proposed Regime will implement several of these objectives, in particular those in ss. 7(a), (g), (h) and (i):

(1) **Section 7(a)** (*"to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions"*) – Piracy weakens Canada's economic fabric by denying creators the financial benefits of their work, reducing creator employment opportunities, preventing broadcasters from fully monetizing their programming investments, discouraging broadcasters from investing in new programming, inhibiting fair competition between BDUs and pirate operators, and reducing BDU contributions to Canadian cultural production funds. This also weakens Canada's social fabric by undermining the development of new cultural content, and contributes to an environment in which creators lose the ability to control the quality and integrity of their creations and the time and manner of their viewing. Finally, piracy harms consumers and undermines Canadians' trust in, and thus the development of, the digital economy.

(2) **Section 7(g)** (*"to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services"*) – Piracy results in fewer television subscriptions for BDUs and more cancellations, thus dissuading BDUs from investing in critical new telecommunications infrastructure, technologies and distribution models.

(3) **Section 7(h)** (*"to respond to the economic and social requirements of users of telecommunications services"*) – Piracy imposes unfair economic requirements upon consumers who lawfully access copyrighted material over the Internet or through traditional broadcasting distribution systems, since it requires them to effectively subsidize the creation of content for those who choose to access piracy sites. In doing so, it also reduces the amount of investment in new content available to users of telecommunications services, thereby frustrating their social requirements. The Canadian telecommunications system should encourage compliance with Canada's laws, including intellectual property laws that ensure the creation and dissemination of creative works through a rights system that fairly compensates content creators and distributors of creative content.

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[77] *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶122.
[78] *Empowering Canadians to protect themselves from unwanted unsolicited and illegitimate telecommunications* – Compliance and Enforcement and Telecom Regulatory Policy CRTC 2016-442, 7 November 2016, ¶95.
[79] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶1. See also *Penney v. Bell Canada*, 2010 ONSC 2801, ¶142.

(4) **Section 7(i)** (*"to contribute to the protection of the privacy of persons"*) – Piracy exposes users of piracy sites to significant privacy issues given the hacking, identify theft and malware risks such activities create. This also imposes further economic and social requirements upon these users pursuant to s. 7(h) above.

It is true that several of these policy objectives involve a cultural component that transcends the immediate relationship between ISPs and their subscribers, but the courts have recognized that the CRTC need not restrict its decisions under the *Telecommunications Act* to policies which are "purely economic", and may instead consider their social impact as well in light of "the Commission's wide mandate under section 7".[80] This is reflected in the preamble to s. 7 (which affirms that "telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty") as well as ss. 7(a), (h) and (i) (which include "a telecommunications system that serves to safeguard, enrich and strengthen the social... fabric of Canada and its regions", "respond[ing] to the... social requirements of users of telecommunications services" and "contribut[ing] to the protection of the privacy of persons" among the Canadian telecommunications policy objectives). As the Minister of Communications stated during the House of Commons debates about Bill C-62, ultimately enacted as the *Telecommunications Act*:

> ***The specific reference to culture is not essential because the bill clearly recognizes in other ways the increasingly important role of telecommunications as a carrier of cultural products and services.*** The policy objectives state that telecommunications "***perform an essential role in the maintenance of Canada's identity and sovereignty***" and that the telecommunications system should serve to "***enrich and strengthen the social and economic fabric of Canada***".
>
> ***Surely our culture is fundamental to our identity and just as surely cultural products and services are an important part of the social and economic fabric of Canada. Telecommunications serve to link this country together through a whole range of activities from personal conversations to data and information transfers, to business transactions and increasingly to the enjoyment of cultural products and services.*** On this the policy statement is quite clear.[81]

Further, s. 1 of Cabinet's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*[82] – which s. 47(b) of the *Telecommunications Act* requires the CRTC to exercise all its powers under the Act in accordance with – explicitly contemplates that the CRTC may make use of non-economic measures:

> 1 In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission (the "Commission") shall implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:
>
> ...

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[80] *Allstream Corp. v. Bell Canada*, 2005 FCA 247, ¶34. See also *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74, ¶27, leave to appeal refused, [2006] S.C.C.A. No. 376.

[81] *House of Commons Debates*, 34th Parl., 3rd Sess., No. 16 (1 June 1993) at 20181 (Hon. Perrin Beatty), *emphasis added*. See also: *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture*, 3rd Sess., 34th Parl., Issue No. 1 (April 21, 1993), at 9-10 (Hon. Perrin Beatty); House of Commons, *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture*, 3rd Sess., 34th Parl., Issue No. 8 (May 11, 1993), at 6 (Hon. Perrin Beatty).

[82] S.O.R./2006-355.

> (b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that
>
> ...
>
> (ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry,
>
> (iii) ***if they are not of an economic nature***, to the greatest extent possible, are implemented in a symmetrical and competitively neutral manner, ... [*emphasis added*]

These broad dimensions of the Canadian telecommunications policy objectives are evidenced by the *Bell Aliant* case discussed at pages 12-14 above, where the Supreme Court found that the CRTC acted in furtherance of s. 7 by ordering that excess residential telephone service rates maintained in deferral accounts be used to fund future broadband expansion, and that any excess be credited to subscribers. In doing so, the Court noted that with the inclusion of s. 7, the CRTC is no longer required to follow a "rate of return" model in rate setting, which focuses on achieving a balance between a fair rate for the consumer and a fair return on the carrier's investment. Instead, the CRTC can now turn its attention to a wider array of interests beyond the responsible carrier and its subscriber. Stating that s. 7 led to the creation of a "comprehensive national telecommunications framework" in which the CRTC was not obliged to "limit itself to considering solely the service at issue", the Supreme Court specifically cited the policy objectives in ss. 7(a) and (h):

> ...[T]hese expansive provisions mean that the rate base rate of return approach is not necessarily the only basis for setting a just and reasonable rate. Furthermore, ***based on ss. 7,*** 27(5) ***and 47, the CRTC is not required to confine itself to balancing only the interests of subscribers and carriers with respect to a particular service***. In the Price Caps Decision, for example, the CRTC chose to focus on maximum prices for services, rather than on the rate base rate of return approach. ***It did so, in part, to foster competition in certain markets, a goal untethered to the direct relationship between the carrier and subscriber*** in the traditional rate base rate of return approach.
>
> ...
>
> In *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C.R. 747, leave to appeal refused, [2007], 3 S.C.R. vii, the Federal Court of Appeal drew similar conclusions, observing that ***the Telecommunications Act should be interpreted by reference to the policy objectives***, and that ***s. 7 justified in part the view that the "Act should be interpreted as creating a comprehensive regulatory scheme"*** (at para. 46). ***A duty to take a more comprehensive approach*** was also noted by Ryan, who observed:
>
> > Because of the importance of the telecommunications industry to the country as a whole, rate-making issues may sometimes assume a dimension that gives them a significance that ***extends beyond the immediate interests of the carrier, its shareholders and its customers, and engages the interests of the public at large. It is also part of the duty of the regulator to take these more far-reaching interests into account.***
>
> ...
>
> ***...[T]he policy objectives in s. 7, which the CRTC is always obliged to consider, demonstrate that the CRTC need not limit itself to considering solely the service at issue*** in determining whether rates are just and reasonable. ***The statute contemplates a comprehensive national telecommunications framework***. It does not require the CRTC to atomize individual services.
>
> ...

> In deciding to allocate the deferral account funds to improving accessibility services and broadband expansion in rural and remote areas, ***the CRTC had in mind its statutorily mandated objectives of facilitating "the orderly development throughout Canada of a telecommunications system that serves to ... strengthen the social and economic fabric of Canada" under s. 7(a)***; rendering "reliable and affordable telecommunications services ... to Canadians in both urban and rural areas" under s. 7(b); ***and responding "to the economic and social requirements of users of telecommunications services" pursuant to s. 7(h).***
> ...
> I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. It had the statutory authority to set just and reasonable rates, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. ***It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests.*** It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.[83]

Accordingly, the CRTC can be expected to strike a balance between public and private interests under s. 7.[84] This is evident from the many examples of such orders made under ss. 24 and 24.1 at pages 17-18 above. As the Federal Court of Appeal recognized in *Reference re: User Fees Act*:

> The exercise of the CRTC's powers related to telecommunications services, licences, and regulatory processes may provide benefits or advantages to non-fee-payers [non-TCCs]. In the past, the CRTC has exercised its powers to:
>
> - establish a 50% discount for Telecommunications Devices for the Deaf (TDD) users on long-distance calls for hearing or speech-impaired sub-scribers (Order CRTC 2000-17 (19 January 2000));
>
> - require telephone companies to, on request, provide billing statements and bill inserts in alternative format to subscribers who are blind ("Extending the availability of alternative formats to consumers who are blind" (8 March 2002), Telecom Decision CRTC 2002-13);
>
> - require access to pay telephones, including implementing an upgrade pro-gram for certain pay telephones to grant access to persons with disabilities ("Access to pay telephone service" (15 July 2004), Telecom Decision CRTC 2004-47);
>
> - allow public authorities to use the numbers and addresses in 9-1-1 data-bases to improve the effectiveness of telephone-based emergency public alerting systems ("Use of E9-1-1 information for the purpose of providing an enhanced community notification service" (28 February 2007), Tele-com Decision CRTC 2007-13); and
>
> - establish a National "Do Not Call" List ("Unsolicited Telecommunications Rules framework and the National Do Not Call List" (3 July 2007), Telecom Decision CRTC 2007-48).[85]

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[83] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶45, 47, 72, 75 and 77, *emphasis added*.
[84] *Federation of Canadian Municipalities v. AT&T Canada Corp.*, 2002 FCA 500, ¶28, leave to appeal refused, [2003] S.C.C.A. No. 97.
[85] 2009 FCA 224, ¶31.

Further, and consistent with the Cabinet Direction to the CRTC discussed at pages 24-25 above, the Proposed Regime would apply equally to all ISPs, including both Primary and Secondary ISPs, and would therefore be implemented in a symmetrical and competitively neutral manner.

Finally, the Proposed Regime is consistent with the anti-piracy objectives of the Canadian legal system. Recently, in *Google Inc. v. Equustek Solutions Inc.*,[86] the Supreme Court of Canada upheld an interlocutory injunction requiring Google to de-index the defendant's websites from all of its search results worldwide, as the defendant was selling goods on those websites that the plaintiff claimed violated its intellectual property rights. Although Google argued that it should be immune from the injunction, since it was a third party to the litigation between the plaintiff and the defendant, the Supreme Court rejected this position, finding that injunctions against third parties were often necessary to prevent the violation of legal rights. As support for this, the Court pointed to cases in England where ISPs had been made the subject of blocking orders in the exercise of the judiciary's equitable protective jurisdiction, similar to those contemplated under the Proposed Regime:

> ... *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator... *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017], 1 All E.R. 700 (C.A.), at para. 53). *Norwich* supplies ***a principled rationale for granting injunctions against non-parties who facilitate wrongdoing*** (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).
>
> This approach was applied in *Cartier*, where the Court of Appeal of England and Wales held that ***injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks.*** ...[87]

For these reasons, it is our view that the Proposed Regime would further the Canadian telecommunications policy objectives, and that it therefore falls within the scope of the CRTC's authority under ss. 24, 24.1 and 36 of the *Telecommunications Act*.

(ii) The Broader Statutory Context

A. An Interrelated Scheme

In addition to the *Telecommunications Act* itself, the broader statutory context provides considerable support for the view that ss. 24, 24.1 and 36 authorize the CRTC to implement the Proposed Regime. The Supreme Court of Canada recognized the importance of this context in *Bell ExpressVu Limited Partnership v. Rex*, a case that also involved the interpretation of several communications statutes:

> In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes*...:

[86] 2017 SCC 24.
[87] *Ibid*, ¶31-32, *emphasis added*.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings... I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*... which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute... "[W]ords, like people, take their colour from their surroundings". This being the case, ***where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.*** In ***such an instance***, the application of Driedger's principle ***gives rise to... "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".*** ...[88]

In *Cogeco*, the Supreme Court held that the *Telecommunications Act* forms part of a "larger statutory scheme" with the *Broadcasting Act*, the *Radiocommunication Act* and the *Copyright Act*, such that a harmonious interpretation of this legislation should be pursued:

> ***...[T]he Broadcasting Act is part of a larger statutory scheme that includes the Copyright Act and the Telecommunications Act. ...[T]he Telecommunications Act and the Radiocommunication Act... are the main statutes governing carriage, and the Broadcasting Act deals with content, which is "the object of 'carriage'"***... In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act,* saying that "there is a connection between these two statutes". Considering that ***the Broadcasting Act and the Radiocommunication Act are clearly part of the same interconnected statutory scheme***, it follows, in my view, that ***there is a connection between the Broadcasting Act and the Copyright Act as well. The three Acts (plus the Telecommunications Act) are part of an interrelated scheme.***
>
> ...
>
> ***Although the Acts have different aims, their subject matters will clearly overlap in places***. As Parliament is ***presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter"***... two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that ***interpretations favouring harmony among those statutes should prevail over discordant ones.***[89]

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[88] [2002] 2 S.C.R. 559, ¶26-27, *emphasis added.*

[89] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶34 and 37-38, *emphasis added.*

Because of the harmony principle – and the associated principle that statutes prevail over subordinate legislation – the *Cogeco* Court concluded that the CRTC does not have the authority to make orders or regulations that conflict with statutes outside its enabling one, whether the *Telecommunications Act*, the *Broadcasting Act*, the *Radiocommunication Act* or the *Copyright Act*.[90] For this purpose, the *Cogeco* Court defined conflict as including both (i) operational conflict and (ii) purpose conflict:

> ... For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an impossibility of compliance with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the purpose intended by Parliament in another. ...
>
> ... These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.[91]

For the reasons below, there is no conflict between the Proposed Regime and the *Broadcasting Act*, *Radiocommunication Act* or *Copyright Act*. Instead, a harmonious reading of these statutes with the *Telecommunications Act* confirms the CRTC's jurisdiction to implement it.

B. The *Broadcasting Act*

The *Broadcasting Act* will not be directly engaged by the Proposed Regime. This follows logically from the Supreme Court of Canada's decision in the *ISP Reference*.

The *ISP Reference* holds that "ISPs do not carry on 'broadcasting undertakings' under the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to 'broadcasting' requested by end-users".[92] The reason the Court gave for this was that ISPs, in providing such access, have no control over the content of the programs transmitted to the end-user, and thus do not engage any of the policy objectives of the *Broadcasting Act*:

> ... ***The ISPs, acting solely in that capacity, do not select or originate programming or package programming services***. Noël J.A. held that ***ISPs, acting solely in that capacity, do not carry on "broadcasting undertakings".***
>
> ***We agree*** with Noël J.A., for the reasons he gave, that ***the terms "broadcasting" and "broadcasting undertaking",*** interpreted in the context of the language and purposes of the Broadcasting Act, ***are not meant to capture entities which merely provide the mode of transmission.***
>
> Section 2 of the *Broadcasting Act* defines "broadcasting" as "any transmission of programs ... by radio waves or other means of telecommunication for reception by the public". ***The Act makes it***

[90] *Ibid*, ¶39 and 61.
[91] *Ibid*, ¶44-45, *underlining in original*.
[92] [2012] 1 S.C.R. 142, ¶11.

> ***clear that "broadcasting undertakings" are assumed to have some measure of control over programming***. Section 2(3) states that the Act "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". ***Further, the policy objectives listed under s. 3(1) of the Act focus on content***, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.
>
> ***An ISP does not engage with these policy objectives when it is merely providing the mode of transmission.*** ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, ***they take no part in the selection, origination, or packaging of content.*** We agree with Noël J.A. that ***the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the Broadcasting Act's policy objectives***.
>
> ...
>
> Like Noël J.A., ***we are not convinced that Capital Cities assists*** the appellants. The case concerned Rogers Cable's ability to delete and substitute advertising from American television signals. ***There was no questioning in Capital Cities of the fact that the cable television companies had control over content. ISPs have no such ability to control the content of programming over the Internet.***[93]

In light of the *ISP Reference*, the Proposed Regime will not involve the regulation of broadcasting undertakings. While the CRTC will order that ISPs disable access to Internet locations identified by it as piracy sites – and to that limited extent grant its approval to the ISPs' "control" over content under s. 36 – the ISPs will take no part in selecting, originating or packaging the content they transmit. Under the Proposed Regime, ISPs are not required to monitor websites for piracy and cannot unilaterally determine which websites are added to the list of piracy sites. Instead, their role is restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, and the decision as to which sites the ISPs should block will be made by the CRTC itself, on the recommendation of the IPRA. An ISP acting pursuant to the CRTC's order, which otherwise acts solely in its capacity as an ISP, will merely serve as a passive transmitter that plays no independent role in contributing to the policy objectives of the *Broadcasting Act*. Accordingly, the *Broadcasting Act* will be inapplicable pursuant to the *ISP Reference*.[94]

This is underscored by the Supreme Court of Canada's decision in the *Google*, discussed at page 27 above. There, in issuing a worldwide de-indexing injunction against Google to prevent the alleged violation of intellectual property rights by a third party website, the Supreme Court rejected Google's argument that the injunction would alter its "content neutral" character:

> ***...I have trouble seeing how this interferes with what Google refers to as its content neutral character.*** The injunction does not require Google to monitor content on the Internet,

[93] *Ibid*, ¶2-5 and 9, *emphasis added*. The Supreme Court's decision in the *ISP*

[94] We note in this regard that s. 4(4) of the *Broadcasting Act* states that "[f]or greater certainty, this Act does not apply to any telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity". While this provision would only exclude a Primary ISP (acting solely as such) from the *Broadcasting Act*, it is only enacted for "greater certainty" and is not exhaustive of the circumstances in which entities may be excluded from the statute. The *ISP Reference* holds that the Act does not apply to any entity which is not acting as a broadcasting undertaking. Therefore, Secondary ISPs (acting solely as such) would also be excluded from the *Broadcasting Act* pursuant to the *ISP Reference*.

> nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. ...[95]

As in *Google*, therefore, where altering the public's accessibility to Internet content pursuant to a court order did not interfere with Google's content neutral character, ISPs acting pursuant to a CRTC site blocking order will remain neutral as to the content they transmit.

In addition, such measures would not undermine the concept of "net neutrality", i.e., "the absence of restrictions or priorities placed on the type of content carried over the Internet by the carriers and ISPs", pursuant to which "all traffic should be treated equally" and "[d]ata packets on the Internet should be moved impartially, without regard to content, destination or source".[96] Any restrictions that the Proposed Regime places upon the ability of ISPs to transmit piracy site content would be imposed by the CRTC rather than ISPs themselves, and would represent impartial conditions that protect existing legal rights, not evaluative judgments about the content, destination or source of the piracy sites involved. Further, net neutrality is an evolving principle, not a specifically defined set of rules. While certain rules have been established to be consistent with the principle by regulators like the U.S. Federal Communications Commission (at various times) and CRTC, these rules do not encompass the whole principle, which is a freedom, but one that is not absolute. It would be unreasonable, for instance, to suggest that prohibiting or blocking hate speech or the dissemination of child pornography on the Internet is an unacceptable breach of net neutrality. Net neutrality may prevent ISPs from unilaterally interfering with legal online content, but does not restrict the CRTC from making orders to prevent the dissemination of unlawful content.[97]

Additional support for the conclusion that the Proposed Regime will not engage the *Broadcasting Act* exists in the broader scheme of the *Telecommunications Act* itself. Pursuant to s. 4:

> 4 This Act does not apply in respect of broadcasting by a broadcasting undertaking.

Despite this provision, s. 36 of the *Telecommunications Act* expressly permits the CRTC to approve the control of content by a TCC. Therefore, it must be possible for the CRTC to make an order authorizing content control by a TCC without thereby converting the TCC into a broadcasting undertaking. Otherwise, s. 4 would prevent s. 36 from ever applying, causing the latter provision to effectively be read out of the statute.

Moreover, even if it could be concluded that an ISP acts as a broadcasting undertaking when blocking access to piracy sites on the orders of the CRTC, it would still not deprive the CRTC of the jurisdiction to issue the order under the *Telecommunications Act*. This is because the activity of transmitting content by the ISP would continue to be solely a telecommunications function. In *Bell Mobility Inc. v. Klass*,[98] the Federal Court of Appeal recently recognized that the CRTC could assert

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[95] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24, ¶49, *emphasis added*.

[96] CRTC Glossary, *s.v.* "net neutrality", online: <http://www.crtc.gc.ca/multites/mtwdk.exe?k=glossary-glossaire&l=60&w=322&n=1&s=5&t=2>.

[97] See, Hugh Stephens "Why the Time has Come to block Offshore Pirate Websites in Canada", Macdonald Laurier Institute, January 10, 2018, online at <https://www.macdonaldlaurier.ca/time-come-block-offshore-pirate-websites-canada-hugh-stephens-inside-policy/#.WmJWH7-HknQ.twitter> ("Net neutrality, as defined by the CRTC, is a policy requiring that 'all traffic on the Internet should be given equal treatment by Internet providers with little to no manipulation, interference, prioritization, discrimination or preference given.' At the same time, under the *Telecommunications Act*, the CRTC has authority to implement (or approve) the blocking of websites. Blocking illegal content is fully consistent with requiring ISPs to follow the rules of net neutrality (i.e., not to favour or disadvantage some content at the expense of others). By the same token, blocking offshore content theft websites in violation of Canadian law has no impact on net neutrality").

[98] 2016 FCA 185.

jurisdiction under the *Telecommunications Act* over the transmission functions of TCCs even if they are engaged in selecting, originating or packaging the content they transmit.

The facts in *Klass* concerned a mobile TV service through which Bell (a TCC) live streamed television programs to its wireless voice and data customers using the same network it relied on to provide them with the latter telecommunications services. The Court accepted the CRTC's finding that Bell was involved in broadcasting when acquiring, aggregating and packaging the programming content. At the same time, the Court held that this finding could reasonably stand alongside the CRTC's further finding that Bell acted as a TCC when providing the transport and data connectivity services required for the delivery of the mobile TV service. Justice Dawson for the majority stated:

> ***The nub of Bell Mobility's argument is that there is no concept of "concurrency" between the Broadcasting Act and the Telecommunications Act.*** It follows, in Bell Mobility's view, that an entity engaged in telecommunications is either:
>
> i. Broadcasting as a broadcasting undertaking governed exclusively by the *Broadcasting Act* (notwithstanding that it retransmits through telecommunications technology); or,
>
> ii. Governed exclusively by the *Telecommunications Act*.
>
> ***I reject this submission.***
>
> In my view, paragraph 9(1)(f) of the *Broadcasting Act* and section 28 of the *Telecommunications Act* demonstrate that ***the two Acts may apply to different activities carried on in the same chain of program delivery.***
>
> ...
>
> ...[T}he transmission of programs through a telecommunications common carrier's infrastructure... does not mean that the telecommunications common carrier becomes a broadcasting undertaking and therefore exempt from the application of the *Telecommunications Act* as argued by Bell Mobility.
>
> In light of these provisions, in my view the CRTC reasonably concluded on the evidence before it that ***customers accessed Bell Mobile TV through data conductivity and transport services governed by the Telecommunications Act. At the same time, the acquisition, aggregation, packaging and marketing of Bell Mobile TV involved a separate broadcasting function governed by the Broadcasting Act.***[99]

In concurring reasons that were agreed with by the majority,[100] Webb J.A. observed that – in light of s. 4 of the *Telecommunications Act* – the applicability of the *Telecommunications Act* could not turn only upon whether Bell was "broadcasting" when transmitting the mobile TV service (since all telecommunication includes but is broader than broadcasting insofar as it extends to any intelligence of a programming or non-programming nature).[101] Instead, the question had to turn on whether Bell was also broadcasting ***as a broadcasting undertaking***.[102] It was only if Bell was doing the latter that the *Telecommunications Act* would not apply. Justice Webb took a functional approach to this question, and concluded that Bell was not engaged in broadcasting as a broadcasting undertaking in relation to the particular ***activity*** at issue in the appeal – i.e., its

[99] *Ibid*, ¶60-62 and 68-69, *emphasis added*.
[100] *Ibid*, ¶59.
[101] *Ibid*, ¶33.
[102] *Ibid*, ¶28, 34, 43 and 48.

transmission of the mobile TV service – since regardless of its broadcasting activities when acquiring, aggregating and packaging programs, it transmitted those programs over a voice and data network that was agnostic as to the particular content being carried:

> ***Bell Mobility submitted that once the CRTC concluded***, as it did in paragraph 15 of its reasons, ***that Bell Mobility was "involved in broadcasting"*** and that "mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order", ***this should have been the end of the matter. According to Bell Mobility, the CRTC should then have determined that the Broadcasting Act, and not the Telecommunications Act, applied to the transmission of programs*** to its customers as part of its mobile TV services.
>
> ***I do not agree*** that these findings would end the matter. The finding that Bell Mobility was "involved in broadcasting" appears to be based on ***the functions identified by the CRTC*** in para-graph 15 of its reasons. These functions ***are acquiring rights, aggregating content, and packaging and marketing of services. None of these functions would be the "transmission of programs". Therefore, the conclusion that Bell Mobility was "involved in broadcasting" in carrying on these functions would not necessarily lead to a conclusion that it was "broadcasting" as a "broadcasting undertaking" when it was delivering its mobile TV services to its customers.***
> ...
> In my view, the answer to the question of whether the particular carrier who is transmitting programs for a broadcaster will then be broadcasting as a broadcasting undertaking, can be found in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 (ISP). ...
>
> ...***[A] person who has no control over the content of programs and is only transmitting programs for another person, would not be transmitting such programs as a broadcasting undertaking.***
> ...
> The relevant question is whether the CRTC's determination that, ***even though Bell Mobility was involved in broadcasting in carrying out certain activities, it was not broadcasting as a broadcasting undertaking in transmitting its programs***, is reasonable. It is important to note that section ***4 of the Telecommunications Act exempts an activity (broadcasting by a broadcasting undertaking), not a person or an entire undertaking.***
> ...
> In my view it was reasonable for the CRTC to determine that ***Bell Mobility, when it was transmitting programs as part of a network that simultaneously transmits voice and other data con-tent, was merely providing the mode of transmission thereof - regardless of the type of content - and, in carrying on this function, was not engaging the policy objectives of the Broadcasting Act. The activity in question in this case related to the delivery of the programs - not the content of the programs - and therefore, the policy objectives of the Telecommunications Act related to the delivery of the "intelligence" were engaged.***[103]

The instant case is even stronger than *Klass*. Whereas *Klass* involved a vertically integrated entity that itself acquired, aggregated and packaged the programs it transmitted, the ISPs under the Proposed Regime will have no independent role in selecting, originating or packaging the content transmitted to end-users. Instead, they will simply be acting at the behest of the CRTC. Accordingly, the *Broadcasting Act* should not apply to their transmission function, and the CRTC should retain the authority under the *Telecommunications Act* to regulate their delivery of programs.

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[103] *Ibid*, ¶35-36, 45-46, 50 and 53, *underlining in original, bolding and italics added.*

Finally, in addition to not conflicting with the *Broadcasting Act*, the Proposed Regime would greatly advance the underlying purposes of that statute. Absent the Proposed Regime, several of the broadcasting policy objectives in s. 3(1) of the *Broadcasting Act* will continue to be undermined due to the negative impact that Piracy sites have upon the creation of original Canadian programming:

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
>
> ...
>
> (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the ***maintenance and enhancement of national identity and cultural sovereignty***;
>
> ...
>
> (d) the Canadian broadcasting system should
>
> (i) serve to ***safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada***,
>
> (ii) ***encourage the development of Canadian expression*** by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
>
> (iii) through its programming and the ***employment opportunities arising out of its operations***, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, ...
>
> ...
>
> (e) each element of the Canadian broadcasting system shall ***contribute in an appropriate manner to the creation and presentation of Canadian programming***;
>
> (f) each broadcasting undertaking shall ***make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming***, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
>
> ...
>
> (i) the programming provided by the Canadian broadcasting system should
>
> ...
>
> (v) ***include a significant contribution from the Canadian independent production sector***;
>
> ...
>
> (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
>
> (i) ***contribute significantly to the creation and presentation of Canadian programming***...
>
> ...

(t) distribution undertakings

> (i) should ***give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations***,
>
> ...
>
> (iv) may, where the Commission considers it appropriate, ***originate programming, including local programming***, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities. [*emphasis added*]

This harmony between the Proposed Regime and the *Broadcasting Act* is important when construing the scope of the CRTC's authority under the *Telecommunications Act* itself. Indeed, courts have repeatedly emphasized that "there is a significant interrelationship between the *Telecommunications Act* and the *Broadcasting Act*".[104]

Further, the Supreme Court of Canada has recognized that the broadcasting policy objectives in s. 3 of the *Broadcasting Act* may be looked to in interpreting other legislation within the same "larger statutory scheme" as the *Telecommunications Act*. In *Bell ExpressVu Limited Partnership v. Rex*,[105] the Court relied on s. 3 of the *Broadcasting Act* when construing the *Radiocommunication Act*. It found that, given the focus on a unitary broadcasting system in the s. 3 policy objectives, s. 9(1)(c) of the *Radiocommunication Act* – which prohibits a person from decoding an encrypted subscription programing signal without authorization – should be read as imposing an absolute prohibition on Canadian residents decoding such signals, even when they originate in the United States:

> On the other hand, ***the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the Broadcasting Act.*** The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually ***assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system***. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.[106]

While the *Telecommunication Act* – unlike the *Radiocommunication Act*[107] – does have its own statement of purpose in s. 7, this should not preclude the CRTC from having regard to s. 3 of the *Broadcasting Act* where the objectives it sets out can be achieved in a manner that is consistent with the telecommunications ones. Indeed, s. 28(1) of the *Telecommunications Act* expressly requires the CRTC to consider the *Broadcasting Act* objectives when determining undue preference issues relating to the transmission of programs, and the Supreme Court of Canada did not object to the fact that the CRTC considered broadcasting objectives when interpreting the *Telecommunications Act* in *Barrie Public Utilities v. Canadian Cable Television Assn.* (stating instead that "[t]he *Broadcasting Act* is not directly applicable to this appeal but is nevertheless

---

[104] *Ibid*, 2016 FCA 185, ¶39.
[105] [2002] 2 S.C.R. 559.
[106] *Ibid*, ¶49, *emphasis added*.
[107] *Ibid*, ¶44.

relevant").[108] Accordingly, the symmetry between the Proposed Regime and s. 3 of the *Broadcasting Act* supports the CRTC's jurisdiction under ss. 24, 24.1 and 36 of the *Telecommunications Act*.

C. The *Radiocommunication Act*

The Proposed Regime also finds further support when the *Telecommunications Act* is read alongside the *Radiocommunication Act*. In *Bell ExpressVu*, the Supreme Court accepted that the *Radiocommunication Act* is connected to the *Telecommunications Act* itself, not simply to the *Broadcasting Act*:

> ... S. Handa et al., *Communications Law in Canada* (loose-leaf), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:
>
> > ***The Radiocommunication Act*** embraces all private and public use of the radio spectrum. The ***close relationship between this and the telecommunications*** and broadcasting ***Acts*** is determined by the fact that ***telecommunications*** and broadcasting are the two ***principal users of the radioelectric spectrum.***[109]

A similar point was made in *Cogeco*, quoted at page 28 above. The connection between the two statutes is underscored by s. 5(1.1) of the *Radiocommunication Act*. It provides that, in exercising the powers under s. 5(1) – which enable the Minister of Industry to, *inter alia*, "do any other thing necessary for the effective administration of this Act" – the Minister "may have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the *Telecommunications Act*".[110]

The significance of the *Radiocommunication Act* lies in the fact that it makes the pirating of subscription television signals an offence that gives rise to both penal sanctions and civil liability:[111]

> 2 In this Act,
>
> ...
>
> subscription programming signal means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;
>
> ...
>
> 9 (1) ***No person shall***
>
> ...
>
> (c) ***decode an encrypted subscription programming signal*** or encrypted network feed ***otherwise than under and in accordance with an authorization from the lawful distributor of the signal*** or feed;
>
> ...

---

[108] [2003] 1 S.C.R. 476, ¶39 (and ¶37-38). The Court did find the CRTC erred by using the purpose clauses of both statutes to create jurisdiction under the *Telecommunications Act*, but that was not because of its reliance on the *Broadcasting Act* objectives in a telecommunications context. See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2001 FCA 236, ¶46-54, aff'd, [2003] 1 S.C.R. 476, where Rothstein J.A. did not object to the CRTC's consideration of broadcasting objectives in interpreting the *Telecommunications Act*.

[109] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶44, *emphasis added*.

[110] See also *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1, ¶86, 88, 94-97, 101 and 109; *Telus Communications Co. v. Canada (A.G.)*, 2014 FC 1157, ¶44-49.

[111] Criminal liability for telecommunications piracy also exists in ss. 326-327 of the *Criminal Code*, R.S.C. 1985, c. C-46.

> (e) ***retransmit to the public an encrypted subscription programming signal*** or encrypted network feed ***that has been decoded in contravention of paragraph (c)***.
>
> ...
>
> [10](2.1) ***Every person who contravenes paragraph 9(1)(c)*** or (d) ***is guilty of an offence*** punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.
>
> (2.2) ***Every person who contravenes paragraph 9(1)(e) is guilty of an offence*** punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding two hundred thousand dollars.
>
> ...
>
> 18 (1) ***Any person who***
>
> (a) ***holds an interest in the content of a subscription programming signal*** or network feed, ***by virtue of copyright ownership or a licence granted by a copyright owner,***
>
> (b) ***is authorized by the lawful distributor of a subscription programming signal*** or network feed to communicate the signal or feed to the public,
>
> (c) ***holds a licence to carry on a broadcasting undertaking*** issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act, ...*
>
> ...
>
> ***may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)***, (d) ***or (e)*** or 10(1)(b), in any court of competent jurisdiction, ***sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction,*** accounting or otherwise, ***as the court considers appropriate.***
>
> ...
>
> (6) ***Nothing in this section affects any right or remedy that an aggrieved person may have under the Copyright Act.*** [*emphasis added*]

Accordingly, by virtue of s. 9(1)(e), a person who decodes a "subscription programming signal" (or radiocommunication intended for reception by the Canadian public on payment), without the authorization of the signal's "lawful distributor" (i.e., the person with a CRTC broadcasting licence that has the contractual and copyrights necessary to transmit the program and authorize its decoding in Canada),[112] and then "retransmit[s] [it] to the public", will incur criminal and civil liability under the Act.[113] The activities of many pirate operators would fit comfortably within this prohibition.[114] By implementing the Proposed Regime, therefore, the CRTC will be acting in a manner that is consistent with the purposes of the *Radiocommunication Act*.

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[112] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶42 and 50.

[113] See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶38, noting that s. 9(1)(e) "prohibit[s] the broadcasting of subscription programming signals" without authorization.

[114] See: *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶32; *Echostar Satellite LLC v. Pellettier*, 2010 ONSC 2282, ¶7 and 47; *Bell Canada v. 1326030 Ontario Inc. (c.o.b. iTVBox.net)*, 2016 FC 612, ¶27, aff'd, 2017 FCA 55.

D. The *Copyright Act*

There is no conflict between the Proposed Regime and the *Copyright Act*. Instead, the Proposed Regime creates a valuable new administrative mechanism that supports and reinforces several of the rights already granted under the *Copyright Act* itself.

Pursuant to ss. 2.4, 3, 15, 18 and 21 of the *Copyright Act*, rightsholders possess a variety of discrete entitlements,[115] including rights to reproduce or to communicate works to the public by telecommunication,[116] and to reproduce unauthorized fixations of the communication signals they broadcast:

> [2.4](1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.
>
> 3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
>
> (a) to produce, reproduce, perform or publish any translation of the work,
>
> ...
>
> (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
>
> (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
>
> (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> ...
>
> and to authorize any such acts.
>
> ...
>
> 15 (1) Subject to subsection (2), a performer has a copyright in the performer's performance, consisting of the sole right to do the following in relation to the performer's performance or any substantial part thereof:
>
> ...
>
> (b) if it is fixed,
>
> (i) to reproduce any fixation that was made without the performer's authorization,

---

[115] See, e.g., *Bell Canada v. 1326030 Ontario Inc. (c.o.b. iTVBox.net)*, 2016 FC 612, ¶21, aff'd, 2017 FCA 55.

[116] See *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 S.C.R. 615, ¶7 ("Production and broadcasting may implicate both reproduction and the telecommunication rights in a work"). These dramatic works may include pre-recorded "programs" or compilations of "programs" within the meaning of the *Broadcasting Act* that are carried in communication signals, and the copyright in such works may be held by broadcasters: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶36 and 51. See also *2251723 Ontario Inc. (c.o.b. VMedia) v. Bell Canada*, 2016 ONSC 7273.

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(ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII...

(1.1) Subject to subsections (2.1) and (2.2), a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts:

...

(d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way; ...

...

18 (1) Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or any substantial part thereof:

(b) to reproduce it in any material form; ...

...

[18](1.1) Subject to subsections (2.1) and (2.2), a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it and to authorize any of those acts:

(a) to make it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public and to communicate it to the public by telecommunication in that way; ...

...

21 (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(a) to fix it,

(b) to reproduce any fixation of it that was made without the broadcaster's consent,

...

and to authorize any act described in paragraph (a), (b) or (d).

Section 27 stipulates when an infringement of these rights may occur:

27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(a) sell or rent out,

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), ...

...

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

...

(2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;

(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

(c) whether the service has significant uses other than to enable acts of copyright infringement;

(d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

(e) any benefits the person received as a result of enabling the acts of copyright infringement; and

(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

Finally, ss. 34-35 and 39.1 grant the copyright holder civil remedies against infringers, and s. 42 creates penal liability for infringement:

34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

...

35 (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

...

39.1 (1) When granting an injunction in respect of an infringement of copyright in a work or other subject-matter, the court may further enjoin the defendant from infringing the copyright in any other work or subject-matter if

(a) the plaintiff is the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; and

(b) the plaintiff satisfies the court that the defendant will likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so.

...

42 (1) Every person commits an offence who knowingly

(a) makes for sale or rental an infringing copy of a work or other subject-matter in which copyright subsists;

(b) sells or rents out, or by way of trade exposes or offers for sale or rental, an infringing copy of a work or other subject-matter in which copyright subsists;

(c) distributes infringing copies of a work or other subject-matter in which copyright subsists, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright;

(d) by way of trade exhibits in public an infringing copy of a work or other subject-matter in which copyright subsists;

(e) possesses, for sale, rental, distribution for the purpose of trade or exhibition in public by way of trade, an infringing copy of a work or other subject-matter in which copyright subsists;

...

(2.1) Every person who commits an offence under subsection (1) or (2) is liable

(a) on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than five years or to both; or

(b) on summary conviction, to a fine of not more than $25,000 or to imprisonment for a term of not more than six months or to both.

Piracy sites can infringe copyrights in several ways. Where a piracy site repeatedly streams copyrighted works to numerous different users or otherwise makes such streams available to the public, it violates the copyright holder's sole right in s. 3(1)(f) to communicate works to the public by telecommunication,[117] which includes the right of making the work or other subject matter available to the public.[118] Further, a piracy site that induces, procures or authorizes users to permanently download – rather than stream – copyrighted material violates the reproduction and authorization rights in the *Copyright Act*.[119] Piracy site downloads may also violate the s. 21(1)(b) right to authorize the reproduction of fixations of communication signals containing works that were fixed by the site without the broadcaster's consent. Finally, piracy sites may engage in secondary

[117] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶1-2, 5, 21-40 and 52-57.

[118] *Copyright Act*, ss. 2.4(1.1), 15(1.1)(d), 18(1.1)(a).

[119] *Copyright Act*, ss. 3(1), 15(1)(b), 18(1). See also *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, ¶1-5, 9-10, 12, 19, 25, 27-39 and 42. Piracy sites that enable users to downloaded copyrighted material may potentially also violate s. 3(1)(f) by "making available" the works to them under s. 2.4(1.1): see *Re Collective Administration of Performing and of Communication Rights*, [2017] C.B.D. No. 11 (Canada Copyright Board), ¶12. See also *The Football Association Premier League Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 2058 (Ch), ¶26-50.

infringement pursuant to s. 27(2),[120] and violate s. 27(2.3) by providing a service primarily for the purpose of enabling one or more the foregoing acts of copyright infringement.[121]

In providing a regulatory mechanism that supports these rights, the Proposed Regime compliments rather than conflicts with the *Copyright Act*. This is evident when the Proposed Regime is considered in light of *Cogeco*, where the Supreme Court held that CRTC orders are prohibited from conflicting with the *Copyright Act* in two ways: (1) operational conflict, where "there is an ***impossibility of compliance*** with both provisions"; and (2) purpose conflict, where "applying one provision would frustrate the ***purpose*** intended by Parliament in another".[122]

As to ***operational conflict***, the only provisions of the *Copyright Act* that could arguably conflict with the Proposed Regime are ss. 31.1 and 89.

Section 31.1 provides ISPs with a series of exceptions to infringement liability for Internet activities:

> 31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.
>
> (2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.
>
> (3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter,
>
> (a) does not modify it, other than for technical reasons;
>
> (b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and
>
> (c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject-matter.
>
> (4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

---

[120] While it has not been thoroughly resolved whether s. 27(2) applies to digital copies in addition to tangible ones, we are of the view that there are good arguments that it does.

[121] In addition to these violations, some piracy sites may also incur civil or criminal infringement liability under ss. 41.1(2) 42(3.1) by violating ss. 41 and 41.1 if they circumvent or facilitate the circumvention of "technological protection measures" that the copyright holder used to control access to their work or to restrict infringement, such as encryption.

[122] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶44, *emphasis in original.*

> (5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.
>
> (6) Subsections (1), (2) and (4) do not apply in relation to an act that constitutes an infringement of copyright under subsection 27(2.3).

The argument could be made that s. 31.1 already creates a regime for ISPs in relation to Internet copyright, and that the Proposed Regime upsets this regime by imposing additional obligations upon the ISP.

However, it is important to emphasize that s. 31.1 provides ISPs with exceptions to ***infringement liability***. Unlike the Proposed Regime, therefore, s. 31.1 is premised upon the potential infringement liability of the ISP, and would not apply to innocent ISPs. Further, the Proposed Regime will not create an optional exception to infringement liability, but will instead impose a mandatory obligation upon ISPs to take third party protection measures in favour of rightsholders when directed to do so by the CRTC as a condition of the offering or provision of telecommunications services. This does not undermine the exceptions from liability in s.31.1.

With respect to s. 89, it prohibits the creation of any copyright except under a federal statute:

> 89 No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

In reflection of this provision, the Supreme Court has held that "copyright is a creature of statute, and the rights and remedies provided by the *Copyright Act* are exhaustive".[123] Therefore, if the Proposed Regime involves the creation of a functional copyright equivalent to the rights and remedies under the Act by the CRTC, there could be an operational conflict with s. 89.[124]

The Proposed Regime does not, however, create a new copyright. Of particular importance is that the Proposed Regime contemplates an order by the CRTC against ***ISPs***, not against the ***infringing pirate operators themselves***. This is significant, because ISPs are generally exempt from infringement liability under the *Copyright Act* pursuant to s. 31.1 quoted above, in addition to s. 2.4(1),[125] which provides:

> 2.4 (1) For the purposes of communication to the public by telecommunication,

---

[123] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶82. See also: *Théberge v. Galerie d'Art du Petit Champlain inc.* , [2002] 2 S.C.R. 336, ¶5; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, ¶9; *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20, ¶3 and 8.

[124] See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶80-82.

[125] See also s. 31.1(1) of the *Copyright Act*.

> 31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

s.21(1)(b)

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Number: 2 Author: frenettr Subject: Sticky Note Date: 08/02/2018 2:53:28 PM -05'00'

[redacted]

Number: 3 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:45:48 PM -05'00'

[redacted]

Author: frenettr Subject: Sticky Note Date: 08/02/2018 4:17:24 PM -05'00'

Number: 4 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:44:46 PM -05'00'

[redacted]

Number: 5 Author: frenettr Subject: Highlight Date: 08/02/2018 3:38:28 PM -05'00'

Number: 6 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:38:18 PM -05'00'

[redacted]

Author: frenettr Subject: Sticky Note Date: 08/02/2018 4:16:55 PM -05'00'

> ...
> (b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public; ...

In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* ("***SOCAN***"), the Supreme Court of Canada described the operation of this provision as follows:

> ... So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within s. 2.4(1)(b). ...
> ...
> While lack of knowledge of the infringing nature of a work is not a defence to copyright actions generally... nevertheless the presence of such knowledge would be a factor in the evaluation of the "conduit" status of an Internet Service Provider...
> ...
> I conclude that the Copyright Act, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a "conduit", as found by the Board, include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious. We are told that a large on-line service provider like America Online delivers in the order of 11 million transmissions a day.[126]

The Supreme Court reaffirmed this approach in the *ISP Reference*, where it stated that "since ISPs merely act as a conduit for information provided by others, they could not themselves be held to communicate the information".[127]

In light of the foregoing, ISPs that do not engage in any independent content control and who do not act with knowledge that they are facilitating infringements are exempt from infringement liability under ss. 2.4(1) and 31.1 of the *Copyright Act*.[128] In effect, Parliament has confirmed that ISPs acting as passive carriers are not liable for the telecommunications they transmit. Therefore, in making a site blocking order against ISPs, the CRTC is not creating any new copyright, as would be the case if it awarded relief against the infringing pirate operator itself. Instead, the CRTC is imposing a regulatory measure whose primary purpose is to advance Canadian telecommunications policy objectives.

It is true that the Proposed Regime will have the secondary effect of supporting copyright, but this is not inconsistent with the Supreme Court's observation that "the rights and remedies provided by the *Copyright Act* are exhaustive". Indeed, other mechanisms also exist in the Canadian legal system that advance copyright in an ancillary fashion. An important illustration is provided by the *Radiocommunication Act*, which as discussed at pages 36-37 above creates civil and criminal

[126] [2004] 2 S.C.R. 427, ¶92, 99 and 101 (and ¶5 and 85-91, 93-98, 100, 102-103, 114, 123-124, 127 and 131-132).
[127] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶7.
[128] While the Supreme Court has left open whether ISPs may be liable for copyright infringement where they have notice that their Internet service is being used for infringing conduct and refused to take it down, it has also stated its preference for a response that is similar to the Proposed Regime rather than an infringement action: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶127.

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Number: 1 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:48:26 PM -05'00'

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Number: 3 Author: frenettr Subject: Highlight Date: 08/02/2018 3:48:13 PM -05'00'

Number: 4 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:48:04 PM -05'00'

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Number: 5 Author: frenettr Subject: Highlight Date: 08/02/2018 3:51:32 PM -05'00'

Number: 6 Author: frenettr Subject: Sticky Note Date: 08/02/2018 3:51:36 PM -05'00'

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liability for piracy of subscription programming signals. Section 18(1)(a) of the Act specifically permits "any person who… holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership" to bring a damages claim against a party who contravenes ss. 9(1)(c)-(e), and s. 18(6) makes clear that this right is in addition to any right or remedy that exists under the *Copyright Act* itself (providing that "[n]othing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*"). Thus, the Federal Court of Appeal has recognized that acts contrary to s. 9(1) of the *Radiocommunication Act* can simultaneously infringe copyright under the *Copyright Act*.[129]

There is accordingly no operational conflict between the Proposed Regime and the *Copyright Act*. If anything, the *Copyright Act* supports the Proposed Regime, since it augers for an interpretation of the *Telecommunications Act* which would advance the interests of copyright holders. This is reflected in *Bell ExpressVu*, where one of the reasons why the Supreme Court gave s. 9(1)(c) of the *Radiocommunication Act* a broad scope is because it would simultaneously further Canada's copyright regime:

> I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(c) and 21(1)(d) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. ***By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself***, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs… Finally, I note that ***the civil remedies provided for in ss. 18(1)(a) and 18(6) of the Radiocommunication Act both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.***[130]

As to ***purpose conflict***, it is useful to contrast the Proposed Regime with the one at issue in *Cogeco*. The CRTC in *Cogeco* proposed to create a value-for-signal regime (the "**VFS Regime**") that would give local television stations the right to prohibit BDUs from retransmitting their programs if they failed to negotiate direct compensation for retransmission. The VFS Regime enabled the television stations to enforce the program deletion right directly against the BDUs themselves, with no intervention by the CRTC.[131] Indeed, the CRTC stated that "[t]he Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request".[132] The Supreme Court characterized this program deletion right as "a functionally equivalent right" to a copyright, which – as with the rights granted to broadcasters under the *Copyright Act* itself – "empowers broadcasters to prohibit the

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[129] *NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)*, [1998] F.C.J. No. 1063 (C.A.), ¶7-9. See also *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶32. *cf. Columbia Pictures Industries, Inc. v. Gaudreault*, 2006 FCA 29, ¶28-32.

[130] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶52, *emphasis added.*

[131] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶7.

[132] *A group-based approach to the licensing of private television services* – Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010, ¶164.

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retransmission of their signals if certain conditions are met".[133] The Court found that this conflicted with the purpose of the *Copyright Act*, which it described as a "balance between authors' and users' rights" or between the rights of "broadcasters and users",[134] in two ways.

First, the Court held the VFS Regime undermined s. 21 of the *Copyright Act*, since that provision grants broadcasters a limited copyright in communication signals only against other broadcasters, not against BDUs themselves as the VFS Regime would do:

> ...[T]he value for signal regime conflicts with s. 21(1) of the *Copyright Act* because ***it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the Copyright Act.***
>
> ...
>
> In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. ***It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the Copyright Act, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime.*** The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator"...[135]

Second, the Court found the VFS Regime would remove the retransmission user right which s. 31 of the *Copyright Act* had given to BDUs as an exception to the broadcasters' s. 3(1)(f) copyright in programs:

> As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a work carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the *Copyright Act*. ***The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the Copyright Act specifically excludes it from the control of copyright owners, including broadcasters.***
>
> Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. ***The value for signal regime would effectively overturn the s. 31***

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[133] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶67 and 82.

[134] *Ibid*, ¶64. See also ¶76 ("The value for signal regime ***would rewrite the balance between the owners' and users' interests as set out by Parliament in the Copyright Act.*** Because the CRTC's value for signal regime is ***inconsistent with the purpose of the Copyright Act***, it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*").

[135] *Ibid*, ¶62 and 67, *underlining in original, bolding and italics added.*

> ***exception to the copyright owners' s. 3(1)(f) communication right. It would disrupt the balance established by Parliament.***[136]

Accordingly, the fundamental problem with the VFS Regime in *Cogeco* was that it broadened copyrights which the *Copyright Act* itself had intentionally drawn in more narrow terms. By contrast, the Proposed Regime does not grant any new or expanded rights against pirate operators at all. It merely creates a regulatory mechanism which allows rightsholders to seek an administrative order against ISPs, who are intermediaries to the copyright holder-infringer relationship. These ISPs are already excluded from the *Copyright Act* infringement regime by ss. 2.4(1)(b) and 31.1, and are prohibited from having any interest in the content they transmit (absent an order of the CRTC) by s. 36 of the *Telecommunications Act* and the *ISP Reference*.

Further, the *Copyright Act* itself recognizes that ISPs may be required to take actions in order to assist in preventing copyright infringement. Pursuant to ss. 41.25-41.26, ISPs are required to maintain records about infringing activities upon receiving notice from copyright holders, and to then notify the infringing party of their obligation to do the same:[137]

> 41.25 (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides
>
> > (a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network; ...
> >
> > ...
>
> (2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall
>
> > (a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;
> >
> > (b) identify the work or other subject-matter to which the claimed infringement relates;
> >
> > ...
>
> 41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,
>
> > (a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
> >
> > (b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those

[136] *Ibid*, ¶69-70, *underlining in original, bolding and italics added*.

[137] At the present time, the ISP is not permitted to charge any costs for performing this record retention obligation, though it could charge a fee for the actual, reasonable and necessary costs of disclosure: *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, ¶42-64 and 69-71, leave to appeal filed, [2017] S.C.C.A. No. 278.

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> six months, for one year after the day on which the person receives the notice of claimed infringement.

Recently, in *Voltage Pictures, LLC v. John Doe*, the Federal Court of Appeal described the purpose of these provisions in terms in that will be significantly advanced by the Proposed Regime:

> The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. ***The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others' dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament's objectives would crumble. All the laudable aims of the Copyright Act***--protecting creators' and makers' rights, fostering the fair dissemination of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment--***would be nullified.***
>
> Thus, to the extent it can, ***the legislative regime must be interpreted to allow copyright owners to protect and vindicate their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all.***[138]

We acknowledge that the ss. 41.25-41.27 amendments were made against the backdrop of prior legislative proposals for "notice and takedown" and "graduated response" regimes (the "**Rejected Regimes**") in the *Copyright Act* which were ultimately rejected by Parliament in favour of the "notice and notice" regime reflected in ss. 41.25-41.27 themselves.[139] In *Cogeco*, the Supreme Court pointed to Parliament's earlier rejection of the broadened copyright granted by the VFS Regime in

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[138] *Voltage Pictures, LLC v. John Doe*, 2017 FCA 97, ¶26-27, leave to appeal filed, [2017] S.C.C.A. No. 278, *emphasis added*. See also *BMG Canada Inc. v. John Doe*, 2005 FCA 193, a decision that predated the ss. 41.25-41.27 amendments where the Federal Court of Appeal recognized the ability of copyright holders to obtain *Norwich* orders against ISPs regarding information about users who file-shared their works without authorization. In the course of its reasons, the Court observed that the privacy rights of file-sharers must yield to the copyright holders' intellectual property rights:

> ... Intellectual property laws originated in order to protect the promulgation of ideas. ***Copyright law provides incentives for innovators*** - artists, musicians, inventors, writers, performers and marketers - ***to create.*** It is designed to ensure that ideas are expressed and developed instead of remaining dormant. Individuals need to be encouraged to develop their own talents and personal expression of artistic ideas, including music. If they are robbed of the fruits of their efforts, their incentive to express their ideas in tangible form is diminished.
>
> Modern technology such as ***the Internet*** has provided extraordinary benefits for society, which include faster and more efficient means of communication to wider audiences. ***This technology must not be allowed to obliterate those personal property rights which society has deemed important. Although privacy concerns must also be considered, it seems to me that they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights.*** [*emphasis added*]

[139] House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (May 2004) at 10-11 (Chair: Sarmite D. Bulte); Bill C-60, *An Act to Amend the Copyright Act*, 38th Sess, 1st Parl, 2005 (first reading June 6, 2005); Canada, Law and Government Division, "Legislative Summary of Bill C-60: An Act to Amend the Copyright Act", by Sam Banks & Andrew Kitching (Ottawa: LGD, 2005) at 11; Bill C-32, *An Act to Amend the Copyright Act*, 40th Sess, 3rd Parl, 2011 (second reading November 5, 2011); Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-32: An Act to Amend the Copyright Act", by Dara Lithwick (Ottawa: LLAD, 2011) at 23-24; Bill C-11, *An Act to Amend the Copyright Act*, 41st Sess, 1st Parl, 2012 (assented to June 29, 2012), 2012, c. 20; Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27.

finding it to conflict with the purpose of the *Copyright Act*.[140] Accordingly, the argument could be made here that the Proposed Regime similarly conflicts with the *Copyright Act* by creating rights which Parliament deliberately chose not to adopt.

Nevertheless, unlike in *Cogeco*, where broadcasters had "contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs"[141] – which was the very ***same*** right granted in the VFS Regime by the CRTC – the Rejected Regimes proposed in lieu of ss. 41.25-41.27 were ***different*** from the Proposed Regime at issue now. As noted in the legislative summary to Bill C-11 (ultimately enacted as the *Copyright Modernization Act*[142] which introduced ss. 41.25-41.27):

> As described above, the proposed "notice-and-notice" regime requires ISPs to forward any notice of infringement they receive from copyright owners to the subscriber in question. On the other hand, ***a "notice-and-takedown" regime typically requires an ISP to block access to material upon receipt of a notice from a rights holder that alleges such material to be infringing. The obligation to block access lies with the ISP whose facilities are being used to host the allegedly infringing material***. Under Canadian law, the courts already have the ability to order the takedown of infringing material in appropriate cases. ***In a "notice-and-takedown" regime, no court order is required. A "graduated response" approach, on the other hand, would involve consumers being disconnected from the Internet after a number of notification letters warning that they are violating copyright.***[143]

Three points should be noted here.

First, the Rejected Regimes each contemplated a different mechanism for preventing piracy than the Proposed Regime. In the case of the notice and takedown regime, a request would be made to "the ISP whose facilities are being used to ***host*** the allegedly infringing material" to block access to the infringing content. In other words, it was the specific ISP whose facilities were being used to upload the piracy site that would be asked to disable access to the infringing content. This contrasts with the Proposed Regime, in which all Canadian ISPs will be asked to block access to the piracy site ***by their users***, so the CRTC's order will apply to network service providers rather than hosting providers. The same distinction was recognized in *Cartier International AG v. British Sky Broadcasting Ltd.*, where the English Court of Appeal upheld a site-blocking injunction against a website engaged in trademark infringement partly because it would be more effective than a notice and takedown order:

> ... The judge's conclusion was amply supported by the evidence before him and he was in my judgment entitled to find as he did that ***notice and takedown would be unlikely to achieve anything more than short-term disruption of the target websites***. He recognised that website blocking orders impose compliance costs on the ISPs whereas notice and take down requests do not but rightly found that, for the rightholders, ***website blocking had advantages***.[144]
> ...

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[140] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶71-73, 76, 78 and 81.
[141] *Ibid*, ¶72.
[142] S.C. 2012, c. 20.
[143] Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27, *emphasis added*.
[144] [2017] 1 All E.R. 700 (Eng. C.A.), ¶177, *emphasis added*.

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Number: 1 Author: frenettr Subject: Sticky Note Date: 08/02/2018 4:06:38 PM -05'00'

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As for the graduated response regime, it "would involve consumers being disconnected from the Internet" after notification letters. Once again, therefore, the mechanism would not take the form of all ISPs blocking access by ***all their users*** to a ***particular piracy site***, as under the Proposed Regime. Instead, the graduated response regime contemplated that ***particular users*** identified as repeat infringers would be denied access to the ***Internet at large*** by a particular ISP.

Second, the Rejected Regimes were suggested in the context of proposed exemptions from copyright infringement liability for ISPs, who would only be eligible if they complied with the notice and takedown or graduated response requests.[145] They therefore would not have imposed any obligation upon ISPs to remove infringing content. Instead, the Rejected Regimes would have simply given ISPs the option to remove such content, failing which they would be disentitled to rely upon the infringement exemptions. This contrasts with the Proposed Regime, which will impose a free-standing obligation upon ISPs to disable access to piracy sites. That obligation will not exist as part of an exemption to infringement liability, but instead as a condition of the ISPs' right to offer and provide telecommunications services under ss. 24 and 24.1 of the *Telecommunications Act*.[146]

Third, the Proposed Regime will be more effective and procedurally fair than either of the Rejected Regimes. Of particular note is that the Rejected Regimes did not require an evidence-based review by an independent regulatory agency – let alone by two (the IPRA and CRTC) – before they could be engaged. Instead, the Rejected Regimes would apply upon the receipt of notice from the copyright holder.[147] This created fundamental fairness concerns when the Rejected Regimes were being debated by Parliament,[148] which are not present in the Proposed Regime given the interposition of the IPRA and CRTC.[149] Further, the Rejected Regimes were both premised upon action by a specific ISP in relation to either specific uses or the hosting of a specific site, as noted above. This made them less efficient than the Proposed Regime, in which the CRTC will issue an order against ***all*** Canadian ISPs requiring that they disable access to the piracy site by ***all*** users.

As the Federal Court has observed, "[p]iracy of copyrighted materials on the Internet is a serious issue in North America. The Court's general policy therefore, should be to support measures that reasonably deter such illegal conduct".[150] Against this backdrop, it is unlikely a court would conclude the Proposed Regime is invalid based on a purpose conflict with the *Copyright Act*. While Parliament has previously declined to add notice and takedown and graduated response mechanisms to the *Copyright Act*, the Proposed Regime is different in kind, purpose and effect than these Rejected Regimes. Therefore, the Proposed Regime will not conflict with the purpose of the *Copyright Act* on the basis that it has been previously rejected as an amendment to that statute.

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[145] The notice and takedown regime, for instance, was predicated upon the host ISP being potentially liable for copyright infringement (hence why it was advanced as an exemption).

[146] The Proposed Regime is therefore more similar to Art. 8(3) of the European Union's *Information Society Directive*, which permits blocking orders against innocent intermediaries that are not premised upon infringement.

[147] For an example of a graduated response order, see the decision of the Irish Court of Appeal in *Sony Music Entertainment Ireland Ltd. v. UPC Communications Ireland Ltd.*, [2016] IECA 231, ¶1.

[148] *Legislative Committee Evidence on Bill C-32*, 40th Parl, 3rd Sess, No 012 (10 February 2011) (Danielle Simpson; Mike Lake); *House of Commons Debates: Official Hansard*, 40th Parl, 3rd Sess, Vol 145 No 092 (2 November 2010) at 1150 (Hon James Moore); *Legislative Committee Evidence on Bill C-11*, 41st Parl, 1st Sess, No 005 (29 February 2012) (Robert D'Eith).

[149] We acknowledge that some parties may argue the Proposed Regime is unfair. However, for the reasons given at pages 56-63 below, we do not believe the Proposed Regime can be successfully challenged on this basis.

[150] *Voltage Pictures LLC v. John Doe*, 2015 FC 1364, ¶52.

s.21(1)(b)

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(b) Compliance With the *Canadian Charter of Rights and Freedoms*

It is possible that arguments will be made the Propose Regime "restrict[s] the flow of information" on the Internet "and, as a result, freedom of expression".[151] Pursuant to s. 2 of the *Charter*:

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> ...

In our view however, the Proposed Regime will not infringe s. 2(b) of the *Charter*.

The analytical framework for this issue was recently reviewed by the Supreme Court of Canada in *Loyola High School v. Quebec (A.G.)*.[152] As the Court recognized there, in cases where the allegation is not that legislation infringes the Charter, but that a "discretionary administrative decision" (such as the Proposed Regime) fails to respect its values or guarantees, the relevant question is "whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate".[153] The Court explained:

> ***The preliminary issue is whether the decision engages the Charter by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play"***... A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review...[154]

This framework was first articulated by the Supreme Court in *Doré v. Barreau du Québec*, where the issue was whether the Disciplinary Council of the Barreau du Québec appropriately balanced the statutory objective of civility with the *Charter* value of freedom of expression in reprimanding a lawyer who wrote a highly critical letter to a judge. The Court concluded that, "[i]n light of the excessive degree of vituperation in the letter's context and tone", the reprimand could not "be said to represent an unreasonable balance of [the lawyer's] expressive rights with the statutory objectives"[155]

As in *Doré*, the Proposed Regime is not contrary to the *Charter*, for two reasons.

First, the Proposed Regime does not engage the *Charter* by limiting its guarantee of freedom of expression. This is because it only contemplates site blocking orders by the CRTC in relation to websites that have been found, after an independent evidence-based review, to blatantly, overwhelmingly or structurally engage in piracy. Over 30 years ago, in *Canada v. James Lorimer &*

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[151] *Crookes v. Newton*, [2011] 3 S.C.R. 269, ¶36. See also S. Handa *et al*, *Communications Law in Canada*, looseleaf (Toronto: LexisNexis Butterworths, 2000+), §2.5.
[152] [2015] 1 S.C.R. 613.
[153] *Loyola High School v. Quebec (A.G.)*, [2015] 1 S.C.R. 613, ¶4 and 37 (and ¶3, 35, 38 and 40-42). See also: *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, ¶3-7, 34-42 and 55-58; *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, ¶49; *R. v. Clarke*, [2014] 1 S.C.R. 612, ¶16.
[154] *Loyola High School v. Quebec (A.G.)*, [2015] 1 S.C.R. 613, ¶39, *emphasis added*.
[155] [2012] 1 S.C.R. 395, ¶71.

Co., the Federal Court of Appeal effectively dismissed the notion that the *Charter* right to freedom of expression creates a right to piracy:

> The third defence was based on [s. 2(b) of] the *Canadian Charter of Rights and Freedoms*... [T]here is no merit in this defence. If, indeed, the constraints on infringement of copyright could be construed as an unjustified limitation on an infringer's freedom of expression in some circumstances, this is not among them. ***So little of its own thought, belief, opinion and expression is contained in the respondent's infringing work that it is properly to be regarded as entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work.***[156]

The same point was made in more categorical terms by the Federal Court in *Compagnie Générale des Établissements Michelin--Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada).*[157] Justice Teitelbaum engaged in an extensive analysis of the jurisprudence on this issue, and drew the following conclusions:

> ... ***The Charter does not confer the right to use private property - the Plaintiff's copyright - in the service of freedom of expression.*** ...
>
> ...
>
> I agree with the Defendants that the threshold for prohibiting forms of expression is high. Violent forms are certainly at the extreme end but a form need not be violent in order to be prohibited. In *Irwin Toy* at page 970, Chief Justice Dickson did not "delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee." ***The threshold for prohibiting forms of expression is not so high that use of another's private property is a permissible form of expression.*** Chief Justice Lamer in Commonwealth (supra), stated that ***the necessary balancing of the parties' interests*** in cases of a party asserting the right to use public property ***occurs before the Section 1 analysis***. I have expanded this principle to conclude that a similar but stricter balancing of interests is to occur ***if the party, like the Defendants in the case at bar, asserts the right to use private property. In the balance of interests and rights, if the Defendants have no right to use the Plaintiff's "Bibendum", they have a multitude of other means for expressing their views. However, if the Plaintiff loses its right to control the use of its copyright, there is little left to the Plaintiff's right of private property. The Defendants seek to extend the scope of their right of free expression to include the use of another's property.***[158]

A similar conclusion has been reached in several English decisions where site blocking injunctions were granted against ISPs to protect third party intellectual property rights.[159]

While the matter has yet to be definitively resolved in the *Charter* context by the Supreme Court of Canada,[160] its recent decision in the *Google* case discussed at pages 27 and 30-31 above strongly

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[156] [1984] 1 F.C. 1065 (C.A.), ¶29 (WLeC), *emphasis added. cf. Canadian Tire Corp. v. Retail Clerks Union, Local 1518* (1995), 7 C.P.R. (3d) 415 (F.C.T.D.), ¶13 (WLeC).

[157] [1997] 2 F.C. 306 (T.D.), ¶78-117.

[158] *Ibid*, ¶81 and 108, *emphasis added.* See also: *Drolet v. Stiftung Gralsbotschaft*, 2009 FC 17, ¶187; *Dish Network L.L.C. v. Rex*, 2012 BCCA 161, ¶28 and 52, leave to appeal refused, [2012] S.C.C.A. No. 269.

[159] *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 1981 (Ch), ¶77, 164 and 200; *Paramount Home Entertainment v. British Sky Broadcasting*, [2014] EWHC 937 (Ch), ¶42; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), ¶31 and 75-79 *The Football Association Premier League Ltd. v. British Communications Plc*, [2017] EWHC 480 (Ch), ¶47.

[160] In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, ¶67, the Supreme Court left open whether the piracy prohibitions in the *Radiocommunication Act* infringed the *Charter* right to freedom of expression.

suggests that s. 2(b) of the *Charter* does not create the right to transmit infringing copyrighted material over the Internet. There, in rejecting the argument that a worldwide de-indexing injunction against Google to prevent the violation of intellectual property rights by a third party website would interfere with freedom of expression, the Supreme Court stated:

> ...[W]hile it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. ...
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> ...
>
> This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. ***We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.***[161]

Further, in addition to the fact that the Proposed Regime is limited to websites that are blatantly, overwhelmingly or structurally engaged in piracy, it only applies to the transmission of that content through private telecommunications facilities which are owned (or leased) by ISPs and regulated by the CRTC. The *Charter* does not give pirate operators any right to the use of private telecommunications facilities.[162] This is reflected in s. 41(1) of the *Telecommunications Act*, which permits the CRTC to prohibit a person's use of private telecommunications facilities for certain purposes even in the face of freedom of expression:

> 41 (1) The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression.

Moreover, as discussed at pages 20-23 above, s. 36 of the *Telecommunications Act* expressly allows the CRTC to authorize the control of content by TCCs. In doing so, it says nothing about the freedom of expression, unlike s. 41(1).

Second, assuming *arguendo* that the Proposed Regime will limit freedom of expression, it still represents a proportionate balancing of the s. 2(b) protection and the CRTC's statutory mandate. Indeed, allegations that the CRTC has acted contrary to freedom of expression have frequently been unsuccessful,[163] generally because of the countervailing interests that the CRTC is required to

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[161] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24, ¶45 and 48, *emphasis added*. It is noteworthy here that numerous CRTC regulations under the *Broadcasting Act* already exist which prohibit programming undertakings from broadcasting, and BDUs from distributing, programs that violate any law or other statute, including therefore the *Copyright Act* and *Radiocommunication Act*: see the *Broadcasting Distribution Regulations*, S.O.R/97-555, s. 8(1)(a); *Discretionary Services Regulations*, S.O.R./2017-159, s. 3(a); *Radio Regulations, 1986*, S.O.R./86-982, s. 3(a); *Television Broadcasting Regulations, 1987*, S.O.R./87-49, s. 5(1)(a). To accept the freedom of expression argument would mean that all of this legislation also violates the *Charter*.

[162] *New Brunswick Broadcasting Co., Ltd. v. C.R.T.C.*, [1984] 2 F.C. 410 (C.A.), ¶26 (WLeC), leave to appeal refused (1984), 13 D.L.R. (4th) 77n (S.C.C.); *May v. CBC/Radio Canada*, 2011 FCA 130 (Chambers), ¶25-26. *cf. Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 at 1100-1104 (recognizing that s. 2(b) protects the right to place posters on ***public*** – not ***private*** – property).

[163] *Canada (C.R.T.C.) v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530 at 540; *CJMF-FM Ltée v. Canada*, [1984] F.C.J. No. 244 (C.A.); *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶4-6, 39-41, 55-60, 106, 109, 144-145, 182 and 214-224, leave to appeal refused, [2005] C.S.C.R. No. 485, *emphasis added*. *cf. Assn. of Canadian Distillers v. Canada (C.R.T.C.)*, [1995] 2 F.C. 778 (T.D.), ¶17-23 (QL).

balance under its enabling legislation. In *R. v. CKOY Ltd.*,[164] the Supreme Court of Canada held that a CRTC regulation, which prohibited radio stations from broadcasting interviews without the interviewee's consent, did not abridge the broadcaster's freedom of expression, in large part because of the important interest which the ***interviewee*** (the party analogous to the rightsholder in the Proposed Regime) had in the content of their speech:

> The appellant also urges s. 2 of the *Canadian Bill of Rights*... It is urged that to interpret Regulation 5(k) as being intra vires of the Canadian *Broadcasting Act* would infringe the provisions of s. 2 as it would result in the abridging of freedom of speech recited in s. 1(f) of the said statute. I am ready to assume that the broadcasting media may be presumed to be defined within the word "press". However, as has been stated on many occasions, ***the freedom of the press is not absolute and the press, as all citizens, is subject to the ordinary law and has no more freedom of expression than the ordinary citizen.*** ... The limitation is referred to in s. 3 of the Canadian *Broadcasting Act* which makes the "freedom of expression" subject to "the generally applicable statutes and regulations". ***I am unable to understand how Regulation 5(k) in any way abridges the freedom of the press. It does not hinder or prevent either the broadcaster or an interviewed person from making any comment whatever. It simply prevents the interview being broadcast without the consent of the interviewed person. Indeed the regulation protects and confirms another fundamental freedom*** set out in the same s. 1 of the Canadian Bill of Rights in para. (a), ***that of freedom of speech, for the interviewed person may grant or withhold his consent to the broadcasting of his comments.*** Therefore, I am of the opinion that the *Canadian Bill of Rights* does not prevent the said Regulation 5(k) being found to be *intra vires*.[165]

In the contest between the interests of copyright holders and the Canadian telecommunications system on the one hand, and those of pirate operators, ISPs and piracy site users on the other, the Proposed Regime strikes a proportionate balance which gives effect as fully as possible to the freedom of expression while still permitting the CRTC to realize its statutory mandate. As discussed at pages 4-5 above, conventional methods of preventing piracy are ineffective in the Internet age, so there is a need for site blocking orders that are made directly against ISPs. Such orders will not be made as a matter of course. Instead, the Proposed Regime requires rightsholders and other applicants to come forward with sufficient evidence to satisfy two independent administrative agencies that the website blatantly, overwhelmingly or structurally engages in piracy. In cases where this threshold is satisfied, the resulting CRTC order will provide timely and comprehensive protection to rights holders in a way that advances Canadian telecommunications policy objectives, with further opportunities for review by appropriate parties.

This is again supported by *Google*, where the Supreme Court engaged in a form of proportionality analysis when considering whether the balance of convenience favoured the issuance of a worldwide de-indexing injunction against Google.[166] In concluding that it did, the Court emphasized that the harm to the plaintiff's intellectual property rights would "far outweig[h]" any impacts on freedom of expression:

> ... As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily". ***Even if it***

[164] [1979] 1 S.C.R. 2.
[165] *Ibid*, at 14-15, *emphasis added*.
[166] See *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2014 NLCA 46, ¶66 ("[B]alancing of competing interests (proportionality) is vital when considering the appropriateness of an interlocutory injunction").

> ***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 Datalink's breach of court orders.***[167]

The proportionate nature of the Proposed Regime in relation to pirate operators[168] is also supported by case law from the United Kingdom, where a statutory mechanism exists permitting rights holders to seek court orders against ISPs disabling access to piracy sites.[169] Courts applying this U.K. regime are required to consider whether such orders are a proportionate response to online piracy, and have repeatedly concluded that they are.[170] In *The Football Association Premier League Ltd. v. British Communications Plc*, for instance, Arnold J. made the following comments when granting a blocking injunction against ISPs in relation to servers that streamed the claimant's copyrighted programs without authorization:

> FAPL contends that... ***the Order is proportionate.*** It does not impair the rights of the defendants to carry on business. ***To the limited extent that it interferes with the rights of internet users to impart or receive information, the interference is justified by a legitimate aim, namely preventing infringement of FAPL's copyrights on a large scale, and it is proportionate to that aim: it will be effective and dissuasive, no equally effective but less onerous measures are available to FAPL, it avoids creating barriers to legitimate trade, it is not unduly complicated or costly and it contains safeguards against misuse.*** I accept this contention.[171]

Indeed, in *SOCAN*, the Supreme Court of Canada suggested that even the more aggressive notice and takedown regime would be an "effective" way of preventing ISPs from facilitating online copyright violations:

> The knowledge that someone might be using neutral technology to violate copyright... is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did "(g)ive approval to; sanction, permit; favour, encourage"... the infringing conduct. I

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[167] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, ¶49, *emphasis added.* See also *Directv, Inc. v. Sandhu*, 2006 BCSC 1970, ¶76, where in granting an injunction to prevent signal piracy in contravention of the *Radiocommunication Act*, the Court stated "***the balance of convenience clearly favours the plaintiff and not the defendants, whose interests at stake appear on the materials before me to be proscribed by statute and in violation of the copyright of others, in other words, to be unlawful***".

[168] with respect to ISPs, it is difficult to see what "impact" the Proposed Regime will have upon them given that the *ISP Reference* and s. 36 of the *Telecommunications Act* already prohibit ISPs from having any control over – and therefore any interest in – the content they transmit. As willing participants in a regulated industry, ISPs are also under a social duty to implement measures designed to eliminate unlawful activity through the use of their regulated services by third parties: see *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, ¶50-51, 55 and 60.

[169] *Copyright, Designs and Patents Act 1988* (U.K.), c. 48, s. 97A(1):

> 97A(1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

[170] *Twentieth Century Fox Film Corp. v. British Telecommunications Plc*, [2011] EWHC 1981 (Ch), ¶199-200; *Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.*, [2012] EWHC 1152 (Ch), ¶9-12; *EMI Records Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 379 (Ch), ¶90-107; *The Football Association Premier League Ltd. v. British Sky Broadcasting Ltd.*, [2013] EWHC 2058 (Ch), ¶53-59; *Paramount Home Entertainment v. British Sky Broadcasting*, [2014] EWHC 937 (Ch), ¶40-44; *1967 Ltd. v. British Sky Broadcasting Ltd.*, [2014] EWHC 3444 (Ch), ¶26-27; *Twentieth Century Fox Film Corp. v. Sky UK Ltd.*, [2015] EWHC 1082 (Ch), ¶61. See also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), ¶125-183 and 212-214, where the English Court of Appeal found a blocking order against ISP in relation to sites that infringed trade-marks to be proportionate.

[171] [2017] EWHC 480 (Ch), ¶69 (and ¶43-68), *emphasis added.*

> agree that notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization". However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of "authorization" would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. ***A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States***.[172]

Finally, it should be noted that existing laws already create remedies for Internet piracy that intrude upon freedom of expression. Under s. 34(1) of the *Copyright Act* and s. 18(1) of the *Radiocommunication Act*, discussed at pages 36-42 above, a copyright holder or licensed broadcasting undertaking may obtain an injunction from a court forcing a piracy site to be taken down.[173] The Proposed Regime does not authorize any greater interference with freedom of expression that these existing statutory provisions.

Accordingly, the Proposed Regime is not contrary to the s. 2(b) *Charter* right to freedom of expression.

(c) Common Law Requirements of Procedural Fairness

In applying the Proposed Regime, the CRTC will likely owe a common law duty of procedural fairness to the pirate operator, since the addition of a site to the piracy list is an administrative decision that will affect the pirate operator's interests.[174] The Supreme Court of Canada recently explained the nature of this duty in *Canada (A.G.) v. Mavi*:

> The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson*... [T]his principle was affirmed by a unanimous Court, per Le Dain J.: "...there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual"... The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context"...
>
> Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies. ...[B]ut the general rule will yield to clear statutory language or necessary implication to the contrary...

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[172] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, ¶127, *underlining in original, bolding and italics added.*

[173] See, e.g.: *Directv, Inc. v. Boudreau*, [2004] O.J. No. 1219 (S.C.J.), ¶3, 14 and 55; *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶31-33; *Echostar Satellite LLC v. Pellettier*, 2010 ONSC 2282, ¶7-9 and 64.

[174] *Green v. Law Society of Manitoba*, 2017 SCC 20, ¶53-54. It is unlikely that the CRTC would owe a duty of procedural fairness to ISPs, as the *ISP Reference* and s. 36 of the *Telecommunications Act* preclude them from having any control or influence over – and thus any independent interest in – the content they transmit. As the Supreme Court observed in *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶6, an ISP has "no knowledge or control over the nature of the communicatoins being passed over its wires". Out of an abundance of caution, however, we recommend that ISPs be given notice of the application by the rights holder, as is contemplated by the Proposed Regime.

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion"...
>
> Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content. ...
>
> A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. ... The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list... to include (i) "the nature of the decision being made and the process followed in making it"...; (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"...; (iii) "the importance of the decision to the individual or individuals affected"...; (iv) "the legitimate expectations of the person challenging the decision"...; and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances".... Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive.[175]

Applying these factors here:[176]

(1) The nature of the decision being made lies somewhere between the judicial and legislative ends of the spectrum. The Proposed Regime contemplates an evidence-based hearing by independent administrative agencies, but the end-result is simply to add the site to a list of designated piracy sites.

(2) The nature of the statutory scheme is such that the decision is not final, but can be made the subject of an application to review, vary or rescind before the CRTC under s. 62 of the *Telecommunications Act*. Further, the pirate operator would have a right to seek leave to appeal to the Federal Court of Appeal from the CRTC's decision under s. 64(1) on questions of law and jurisdiction, and this provision and its analogue in s. 31(2) of the *Broadcasting Act* have received a broad interpretation that allows for appeals on questions of natural justice, lack of evidence and extricable legal issues arising from decisions of mixed fact and law.[177] If the pirate operator raises an issue that falls outside the scope of the s. 64(1)

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[175] [2011] 2 S.C.R. 504, ¶58-42.

[176] See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶23-27; *Canada (A.G.) v. Mavi*, [2011] 2 S.C.R. 504, ¶43-44.

[177] *Canadian Broadcasting League v. C.R.T.C.*, [1980] 1 F.C. 393 (C.A.), ¶6-7 (QL); *Cathay International Television Inc. v. C.R.T.C.* (1987), 80 N.R. 117 (F.C.A.), ¶10-11 and 20-21 (WLeC); *Cathay International Television Inc. v. Canada (C.R.T.C.)* (1987), [1987] F.C.J. No. 350 (C.A.); *Arthur v. Canada (A.G.)* (1999), 254 N.R. 136 (F.C.A.), ¶20 and 28 (QL), leave to appeal to S.C.C. refused, [2000] C.S.C.R. No. 85; *Canadian Broadcasting Corp. v. C.R.T.C.*, [1999] F.C.J. No. 1288 (C.A.), ¶1-2; *Pachul v. Canada (C.R.T.C.)*, 2002 FCA 165, ¶14; *Genex Communications v. Canada (C.R.T.C.)* (2004), 329 N.R. 53 (F.C.A.), ¶1; *MTS Allstream Inc. v. Toronto (City of)*, 2006 FCA 385, ¶11, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 47; *MTS Allstream Inc. v. Edmonton (City of)*, [2007] 4 F.C.R. 747 (C.A.), ¶57, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 286; *CKLN Radio Inc. v. Canada (A.G.)*, 2011 FCA 135, ¶1 and 7-8; *Pritchard Broadcasting Inc. v. Canada (C.R.T.C)*, 2012 FCA 127 (Chambers), ¶2 and 6. See also *R. v. Biniaris*, [2000] 1 S.C.R. 381, ¶21-23. *cf. Telecommunications Act*, s. 52(1); *Canadian National Railway v. Bell Telephone Co.*, [1939]

appeal right, it may be able to seek judicial review in the Federal Court of Appeal under s. 28(1)(c) of the *Federal Courts Act*.[178]

(3) The decision is not significantly important to the lives of pirate operators in a way that, e.g., decisions relating to one's profession or liberty are.

(4) A pirate operator who is not doing business with Canadian rightsholders or even attempting to comply with the Canadian legal regime has no legitimate expectations with respect to process, particularly when the Proposed Regime accords greater procedural protections to it than other potential solutions, such as a notice and takedown regime.

(5) The *Telecommunications Act* gives the CRTC significant discretion to determine its own procedures,[179] and CRTC will have made its own choices regarding the procedure to be followed in the Proposed Regime.

Accordingly, the CRTC likely owes the pirate operator only a minimal duty of procedural fairness. This should not require it to hold an oral hearing. Instead, the duty of procedural fairness should be met so long as the CRTC accords the pirate operator: (a) notice of the proposed piracy designation; (b) a chance to make submissions on the same; (c) the right to have those submissions considered by an unbiased decision-maker; and (d) basic reasons for the decision.[180] Similar procedures have been found adequate to satisfy the duty of fairness in several other decisions involving the CRTC.[181]

This is illustrated by *Country Music Television, Inc. v. Canada (C.R.T.C.)*,[182] where the CRTC made an order removing an American country music television station from the eligibility list of programming stations that Canadian BDUs were authorized to distribute, upon granting a Canadian company the licence to offer its own country music station to the public. Like the Proposed Regime, *Country Music Television* involved a CRTC order which prohibited the retransmission by telecommunications of particular programming service. The only difference was that the programming service was a ***television service*** rather than Internet one, and it was retransmitted by ***BDUs*** rather than ISPs. In finding that the U.S. station owner was accorded sufficient natural

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S.C.R. 308 at 316-317; *Canadian National Railway Co. v. York (Regional Municipality)*, 2004 FCA 419, ¶6; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶32.

[178] R.S.C. 1985, c. F-7. See: *T.W.U. v. C.R.T.C.*, [1993] 1 F.C. 231 (C.A.), ¶5 (QL); *Arthur v. Canada (A.G.)* (1999), 254 N.R. 136 (F.C.A.), ¶23-29; and *Telus Communications Co. v. Canada (C.R.T.C.)*, 2010 FCA 191, ¶38 and 40.

[179] *Telecommunications Act*, s. 67(1)(b). See also the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, S.O.R./2010-277 (the "***CRTC Rules***"). The CRTC's ability to establish its own procedures has been emphasized in several cases involving the duty of fairness: *Lipkovits v. C.R.T.C.*, [1983] 2 F.C. 321 (C.A.), ¶18 (WLeC), leave to appeal refused (1983), 51 N.R. 238n (S.C.C.); *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶165, leave to appeal refused, [2005] C.S.C.R. No. 485; *Telus Communications Co. v. Canada (C.R.T.C.)*, 2010 FCA 191, ¶24.

[180] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶30-44; *Canada (A.G.) v. Mavi*, [2011] 2 S.C.R. 504, ¶45.

[181] *Confederation Broadcasting (Ottawa) Ltd. v. Canada (C.R.T.C.)*, [1971] S.C.R. 906 at 925-927, per Spence J.; *Newfoundland (A.G.) v. Norcable Ltd.*, [1981] 2 F.C. 221 (C.A.), ¶1 (QL); *Canadian Family Radio Ltd. v. Canada (C.R.T.C.)*, [1981] F.C.J. No. 929 (C.A.), ¶2-3, leave to appeal refused, [1982] S.C.C.A. No. 211; *Canada (C.R.T.C.) v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530 at 545-546; *Lipkovits v. C.R.T.C.*, [1983] 2 F.C. 321 (C.A.), ¶15-18 (WLeC), leave to appeal refused (1983), 51 N.R. 238n (S.C.C.); *Newfoundland Telephone Co. v. Canada*, [1995] F.C.J. No. 372 (C.A.), ¶2-10; *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada*, [1996] F.C.J. No. 894 (C.A.), ¶5; *Canadian Broadcasting Corp. v. Métromédia CMR Montréal Inc.*, [1999] F.C.J. No. 1637 (C.A.), ¶19-20; *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283, ¶38, 44-45 and 149-175, leave to appeal refused, [2005] C.S.C.R. No. 485; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, ¶37-38.

[182] [1994] F.C.J. No. 1957 (C.A.), leave to appeal refused, [1995] S.C.C.A. No. 1.

justice by the CRTC, the Federal Court of Appeal held that the owner was not entitled to participate in the public oral hearing which preceded the decision – as it had requested – during which the CRTC considered whether to license the competing Canadian station. Instead, it was sufficient that the U.S. station owner received notice of that proceeding and was given the right to make written submissions about it:

> As I already said, the only complaint of the appellant is that it was not given the opportunity to participate in the public oral hearing that culminated in the removal of its programming service from the eligibility lists. The appellant does not found its grievance on any statutory requirement. It is common ground that if the *Broadcasting Act* contains provisions requiring that oral public hearings be held in certain circumstances, ***one cannot find in the Act or the Regulations any provision requiring the CRTC to hold an oral hearing before making changes to the eligibility lists. The appellant's appeal, therefore, is entirely based on the rules of fairness and natural justice which, according to its counsel, required, in the circumstances, that it be given the right to participate in the public hearing*** so as to be able to explain, contradict or comment on the statements made at that hearing which could be prejudicial to its case.
>
> ***I do not see any merit in that contention. The Commission, in my opinion, gave the appellant a reasonable opportunity to be heard before making its decision.***
>
> ***The appellant knew,*** since 1984, that its service could be removed from the eligibility lists if it became competitive with a similar Canadian service. It also knew, in December, 1993, that five applications were pending before the Commission, ***that three of these applications contained a request that the appellant's programming service be removed from the eligibility lists***, that those written applications were available for inspection by interested parties who were invited to intervene in the proceedings before the Commission by sending their written representations and, if they wished to participate in the public hearing to be held on February 14, 1994, to make that request in their written intervention and indicate why their written comments were not sufficient. Indeed, ***within the prescribed time, the appellant filed a written intervention opposing the request that its service be deleted from the eligibility lists. Clearly, the appellant was given an opportunity to contest the request that CMT be removed from the lists. Not only was it given that opportunity but it took advantage of it.***[183]

Accordingly, having reviewed the procedure for the Proposed Regime described at pages 5-6 above – in which the CRTC, through the IPRA, provides the site operator with notice of the site blocking application, an opportunity to make written representations to an independent administrative agency, and reasons for the decision – it is our view that the the requirements of procedural fairness are met.[184] Indeed, given that the IPRA will have the ability to hold oral

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[183] *Ibid*, ¶10-12, *emphasis added*.

[184] We acknowledge that there may be some cases in which the CRTC is unable to give actually serve the pirate operator with notice of the application due to practical difficulties in locating them. However, this should not preclude the CRTC from satisfying its duty of procedural fairness if it makes a reasonable attempt to effect actual service based on the contact email address provided on the website (if any) as well as a "WHOIS" lookup. See s. 18(b) of the *CRTC Rules*, which permit service "by sending a copy of the document by mail to the last known address of the person or their designated representative". In difficult cases where no address can be located, the CRTC could also provide notice of the application generally, by posting it on its website. See, by analogy, s. 21 of the *CRTC Rules*, in addition to Rule 136 of the *Federal Courts Rules*, S.O.R./98-106 (which permits a Court to make an order for substitutional service "[w]here service of a document that is required to be served personally cannot practicably be effected"). Section 5(2) of the *Federal Courts Rules* permits the CRTC to "provide for any matter of practice and procedure not provided for in these Rules by analogy to these Rules or by reference to the *Federal Courts Rules*". See also: *R v Kensington and Chelsea Rent Tribunal, ex parte*

hearings where it deems them necessary, the Proposed Regime goes beyond the minimal duty of fairness required here.

We acknowledge that the Proposed Regime contemplates that the incidents of procedural fairness will be observed by the IPRA rather than the CRTC itself, resulting in an IPRA recommendation which is then adopted or rejected by the CRTC. As the CRTC is the statutory decision-maker under ss. 24. 24.1 and 36 of the *Telecommunications Act*, and thus the entity with primary responsibility for the duty of procedural fairness,[185] it could be argued that the CRTC must itself hold a hearing before making the site blocking order.

However, the CRTC has the power to establish its own procedures under the *Telecommunications Act*,[186] and s. 70(1)(a) expressly permits it to appoint "any person" – including therefore the IPRA – to inquire into and report to it on "any matter" that is within its jurisdiction under the Act.[187] Therefore, provided that it appoints the IPRA under s. 70(1)(a), there should be no jurisdictional restriction upon its ability to rely upon IPRA recommendations, so long as in doing so the CRTC conducts its own review,[188] and does not delegate or fetter its ss. 24, 24.1 and 36 discretion by simply deferring to IPRA recommendations instead of making an independent decision in its own right.[189]

Further, the courts have recognized that an administrative decision-maker may rely upon the procedures followed by a subordinate body in discharging its duty of fairness so long as those procedures were themselves adequate.[190] In *Thomson v. Canada (Deputy Minister of Agriculture)*,[191] the Supreme Court of Canada held that the Deputy Minister accorded the respondent sufficient natural justice in denying him a security clearance for a public service position. While the Deputy Minister himself did not hold a hearing or receive any submissions from the applicant, he acted on evidence compiled by the Security Intelligence Review Committee,[192] which had held a hearing before making a non-binding recommendation to the Deputy Minister to grant the clearance.[193] The process in *Thomson* was thus similar to the Proposed Regime, in that it contemplated an initial hearing by a body with the power to make a non-binding recommendation to

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MacFarlane, [1974] 3 All E.R. 390(Q.B.D.) at 396; *Okanagan Helicopters Ltd. v. Canadian Helicopter Pilots' Assn.*, [1986] 2 F.C. 56 (C.A.), ¶32, footnote 7 (QL).

[185] *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 400 and 402. The IPRA may itself, however, owe a duty of procedural fairness even though its recommendation to the CRTC is not binding: see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at 221-222 and 229-232; *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, ¶55.

[186] See footnote 179 above, in addition to ss. 55(e) and 57 of the *Telecommunications Act*.

[187] See, by analogy, *Canadian Union of Public Employees (Airline Division) v. Air Canada*, 2013 FC 184, ¶45-56.

[188] See *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 401-403.

[189] It would seem that the CRTC does not have the authority to delegate its authority to actually make decisions under 24, 24.1 and 36 to the IPRA, since ss. 41.3 and 46.2 expressly permit the CRTC to delegate other decision-making powers to subordinate bodies, and no similar provision exists for ss. 24, 24.1 and 36 themselves. Instead, the CRTC could only authorize the IPRA to make recommendations to it, following which the CRTC itself exercises its jurisdiction under ss. 24, 24.1 and 36 to issue a site blocking order. See: *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781 at para. 37; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, ¶65. *cf. Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141 at 171; *Association for Public Broadcasting in British Columbia v. C.R.T.C.*, [1981] 1 F.C. 524 (C.A.), ¶21-23.

[190] The Supreme Court recently recognized a similar principle in relation to the analogous duty of consultation that the Crown owes to Aboriginal peoples: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶30-34; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, ¶32-34.

[191] [1992] 1 S.C.R. 385.

[192] *Ibid*, at 401-402.

[193] *Ibid*, at 397 and 400.

the ultimate decision-maker, before whom no further hearing would be held. The Supreme Court concluded that the Deputy Minister discharged the duty of procedural fairness ***through*** the Committee's hearing, stating:

> ...[T]he Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. ***Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position.*** When all the surrounding circumstances are taken into account it is clear that ***the Deputy Minister fully satisfied these requirements.***
>
> ***Prior to the Review Committee hearing, Mr. Thomson had been apprised of the objections of the Deputy Minister*** in a document titled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". This document listed the objections considered by the Deputy Minister in his clearance denial. ***Mr. Thomson was given a full opportunity to respond to the allegations against him at his hearing before the Review Committee.*** Despite his own explanations and the submissions made on his behalf, the Review Committee accepted that three of the five reasons for refusal in the above document were in fact well founded. It is thus apparent that Mr. Thomson was given proper notice and a full hearing in regard to the allegations which formed the basis of the Deputy Minister's decision. The requirements of natural justice have been satisfied.[194]

The Supreme Court reached a similar conclusion in *Baker v. Canada (Minister of Citizenship and Immigration)*,[195] where the appellant applied for a deportation exemption based on humanitarian and compassionate grounds. The procedure involved a written application by the appellant to a junior immigration officer, who summarized the material and made a recommendation to a senior immigration officer. The senior officer then made the decision to deny the appellant's application in the name of the Minister after considering the summary, recommendation and material from the junior officer. The Supreme Court found the duty of procedural fairness was met, even though the appellant did not have a further opportunity to make representations to the senior officer after the junior officer's recommendation.[196] In addition, the Court held that while the senior officer was required to provide the appellant with reasons for his decision as part of the duty of procedural fairness, and failed to do so, he could rely upon the notes of the junior officer (which were given to the appellant on request) as satisfying this obligation, noting that "because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision".[197]

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[194] *Ibid*, at 402, *emphasis added. cf. Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at 659-661, where the Supreme Court held that the warden of a prison breached his duty of procedural fairness to inmates by refusing to follow a non-binding recommendation by the Segregation Review Board that they be released from administrative segregation, without giving them reasons for this or holding a hearing on whether he should act in accordance with the recommendation. This decision is distinguishable since the Proposed Regime only contemplates that the IPRA will make recommendations to the CRTC to ***add*** sites to the piracy list, not recommendations to ***exclude*** sites from the list, and there is no suggestion that the CRTC would unilaterally add sites to the piracy list without first receiving a recommendation by the IPRA. Therefore, the CRTC will not have the opportunity to reject a recommendation by the IPRA, or make its own decision independent of an IPRA recommendation, that prejudices the interests of the site operator. Instead, any rejection of the IPRA's recommendation by the CRTC will only be to the ***benefit*** of the site operator, such that no allegation of a breach of procedural fairness will be made. For this reason, the requirement for a second-level hearing in *Cardinal* does not undermine the procedural fairness of the Proposed Regime.

[195] [1999] 2 S.C.R. 817.

[196] *Ibid*, ¶33-34.

[197] *Ibid*, ¶44 (and 35 and 43).

Accordingly, the CRTC should be able to satisfy its duty of procedural fairness through the procedures followed by the IPRA, provided that the IPRA accords site operators notice, a chance to make submissions, consideration of those submissions by an unbiased decision-maker and reasons for the result.

As a final matter, we observe that the Proposed Regime is not deficient by reason of the fact that it does not require a court decision before a site blocking order may issue, which was a criticism that some parties had made of the Rejected Regimes when they were before Parliament.[198] Unlike the Rejected Regimes, the Proposed Regime requires a decision by the CRTC, and the *Telecommunications Act* grants it powers of a superior court with respect to the doing of anything that is necessary for the exercise of its powers and the performance of its duties.[199] If, as is our view, the CRTC possesses the jurisdiction to implement the Proposed Regime under ss. 24, 24.1 and 36 of the *Telecommunications Act*, then there is no basis to argue that the factual decision as to whether a given site is a piracy one must be made by a judge.[200] If the CRTC were to make an error as defined by s. 64(1) of the *Telecommunications Act* in issuing an order against a site operator,[201] then the site operator could seek leave to appeal. Otherwise, the CRTC's decision should be immune from review. As the Federal Court of Appeal observed in *Wheatland County v. Shaw Cablesystems Ltd.*:

> ***The CRTC is explicitly granted power to decide questions of law and fact, and its decisions on questions of fact are "binding and conclusive". On questions of law and jurisdiction, its decisions are subject to appeal to this Court***, with leave of the Court.
>
> > 52. (1) The Commission may, in exercising its powers and performing its duties un-der this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.
> >
> > ...
> >
> > 64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.[202]

This scheme is sufficient to meet any constitutional requirement for judicial oversight. As the Supreme Court of Canada explained in *Dunsmuir*, the constitutional requirement for judicial oversight of administrative action exists to ensure that tribunals do not exceed their statutory ***jurisdiction***, not to prevent them from making decisions which involve errors of fact:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect... The inherent power of superior courts to review administrative action and ***ensure that it does not exceed its jurisdiction*** stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. ... In short, ***judicial***

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[198] Canada, Legal and Legislative Affairs Division, "Legislative Summary of Bill C-11: An Act to Amend the Copyright Act", by Dara Lithwick & Maxime-Olivier Thibodeau (Ottawa: LLAD, 2012) at 27.
[199] *Telecommunications Act*, s. 55(d). See also *Penny v. Bell Canada*, 2010 ONSC 2801, ¶133.
[200] Issuing a site blocking order is not analogous to other contexts in which a requirement for prior judicial authorization exists, such as a search or seizure that triggers s. 8 of the *Charter*. Even in the latter context, courts have recognized that "[t]he person performing this function need not be a judge", provided they are "capable of acting judicially": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 162.
[201] The scope of this appeal right is discussed at pages 57-58 above.
[202] 2009 FCA 291, ¶32, *emphasis added*.

> ***review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits***. As Laskin C.J. explained in *Crevier*:
>
> > ***Where... questions of law have been specifically covered in a privative enactment, this Court... has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction***. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the British North America Act and s. 96 thereof. ***The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.*** ...[203]

Therefore, because s. 64(1) of the *Telecommunications Act* preserves the possibility of a jurisdictional appeal in the case of CRTC decisions under the Proposed Regime, it cannot be constitutionally deficient by reason of not requiring a prior order from a court.

If you have any further questions or wish to discuss this opinion, please feel free to contact me.

Yours very truly,

McCarthy Tétrault LLP

Brandon Kain

[203] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, ¶31, *emphasis added*.

Wilson, James

From: Frenette, Rachelle
Sent: June-19-17 9:03 AM
To: Seidl, Chris; Wilson, James; Blais, Marianne; Stewart, Alastair; Hutton, Scott; Foster, Peter
Subject: RE: Request for meeting

Ok, let me see what everyone's availabilities are and propose a meeting.

Rachelle

From: Seidl, Chris
Sent: June-15-17 8:37 AM
To: Wilson, James <james.wilson@crtc.gc.ca>; Blais, Marianne <marianne.blais@crtc.gc.ca>; Stewart, Alastair <alastair.stewart@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Request for meeting

[redacted]

Chris

From: Wilson, James
Sent: June-15-17 8:15 AM
To: Blais, Marianne <marianne.blais@crtc.gc.ca>; Seidl, Chris <chris.seidl@crtc.gc.ca>; Stewart, Alastair <alastair.stewart@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Request for meeting

[redacted]

From: Blais, Marianne
Sent: June-15-17 8:08 AM
To: Seidl, Chris <chris.seidl@crtc.gc.ca>; Stewart, Alastair <alastair.stewart@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>; Wilson, James <james.wilson@crtc.gc.ca>
Subject: Re: Request for meeting

[redacted]

[redacted]

Rachelle and James - you were there as well.. [redacted]

Marianne

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Seidl, Chris
Sent: Wednesday, June 14, 2017 8:10 PM
To: Stewart, Alastair; Frenette, Rachelle; Wilson, James
Cc: Blais, Marianne
Subject: Re: Request for meeting

[redacted] Marianne, did you attend the meeting with broadcasting concerning copyright?

Chris

From: Stewart, Alastair
Sent: Wednesday, June 14, 2017 12:15 PM
To: Frenette, Rachelle; Wilson, James; Seidl, Chris
Subject: RE: Request for meeting

[redacted]

From: Frenette, Rachelle
Sent: June-14-17 11:43 AM
To: Wilson, James <james.wilson@crtc.gc.ca>; Stewart, Alastair <alastair.stewart@crtc.gc.ca>; Seidl, Chris <chris.seidl@crtc.gc.ca>
Subject: FW: Request for meeting

Should we discuss to see if and when such a meeting would be possible?

Rachelle

[redacted]

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is withheld pursuant to sections

est retenue en vertu des articles

19(1), 20(1)(b)

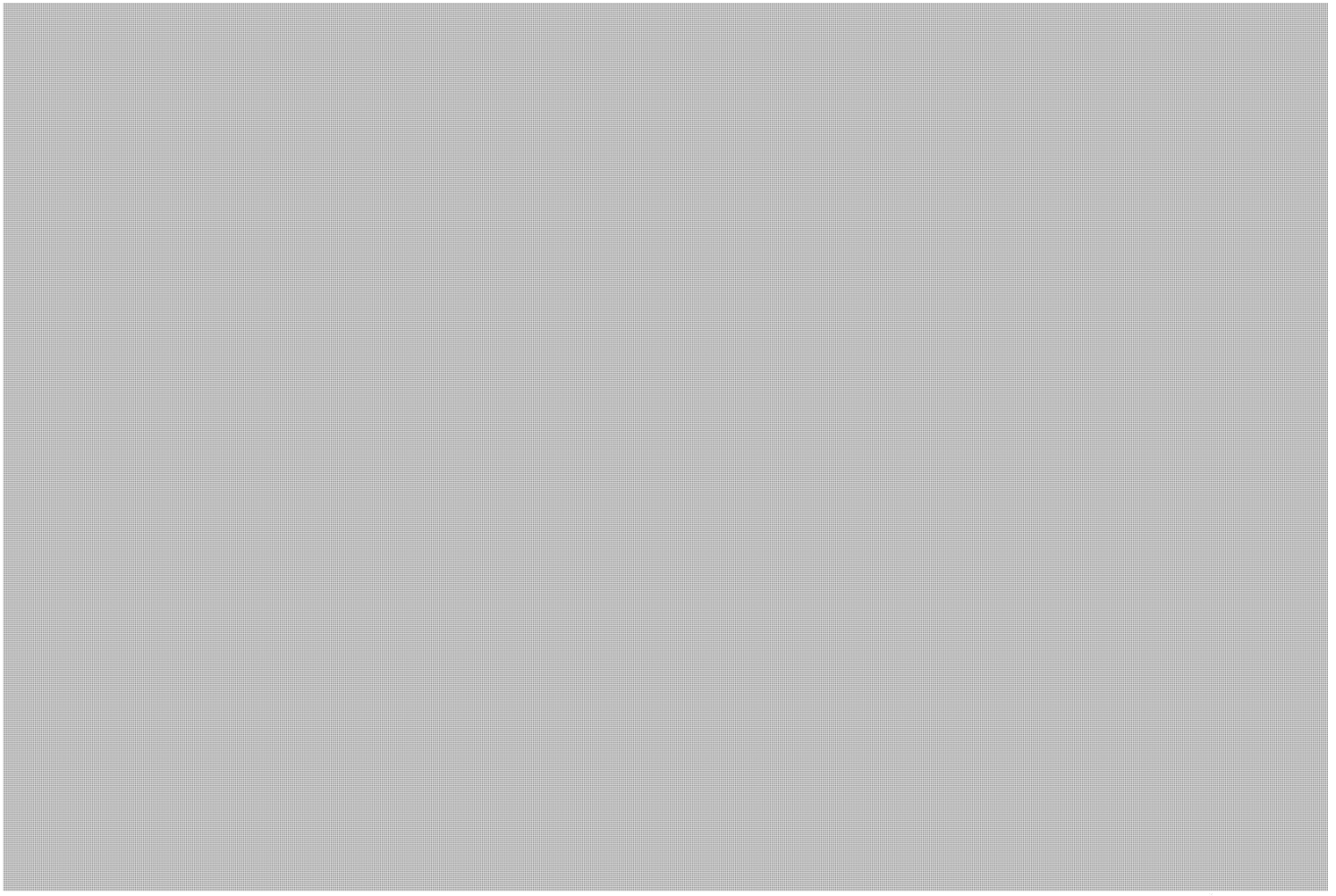
of the Access to Information Act

de la Loi sur l'accès à l'information

Balkovec, Adam

From: Balkovec, Adam
Sent: September-20-2016 9:29 AM
To: Pinsky, Carolyn; Stewart, Alastair
Subject: RE: FYI comments to date on Prelim View

Carolyn,



Perhaps we can set up a discussion later in the week once the record is ultimately closed.

Thanks,
Adam

Adam Balkovec

Legal Counsel | Conseiller juridique
Legal Sector | Secteur juridique
Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes
adam.balkovec@crtc.gc.ca
Céllulaire: 613-854-6182 | Fax: 819-953-0589

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From: Pinsky, Carolyn
Sent: September-16-2016 2:13 PM
To: Stewart, Alastair <alastair.stewart@crtc.gc.ca>; Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: FYI comments to date on Prelim View

[redacted]

Balkovec, Adam

From: Balkovec, Adam
Sent: August-11-2016 7:17 PM
To: Pinsky, Carolyn
Cc: de Somma, Emilia
Subject: Re: TCM v. FCM

Hi Carolyn,

I discussed it briefly with Emilia,who is filling in for Eric, filling in for Alastair.

Our conclusions were, essentially,

We can discuss further tomorrow if you'd like.

Thanks,
Adam

From: Pinsky, Carolyn
Sent: Thursday, August 11, 2016 5:05 PM
To: Balkovec, Adam
Subject: TCM v. FCM

Hi Adam,
Was there any discussion of this issue with Alastair prior to the telecom sector meeting?

Could you pls give me a call to discuss? Thanks!

Balkovec, Adam

From: Balkovec, Adam
Sent: August-05-2016 11:05 AM
To: Pinsky, Carolyn; Stewart, Alastair
Subject: Draft Sec. Gen. letter
Attachments: DOCS-2673178.DOC.DRF

Carolyn and Alastair,

Following the discussion with the Chair yesterday, attached please find for review a draft version of a Secretary General letter that would be presented to Commissioners on an ad hoc basis next week.

Carolyn, I would appreciate your views even without having been present yesterday.

[redacted]

As the Chair intends for this to be presented to Commissioners next week, your comments by no later than **3 p.m. ET/noon PT** would be appreciated.

Many thanks,
Adam

Adam Balkovec

Legal Counsel | Conseiller juridique
Legal Sector | Secteur juridique
Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes
adam.balkovec@crtc.gc.ca
Céllulaire: 613-854-6182 | Fax: 819-953-0589

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Ottawa, Canada
K1A 0N2

By Email & Facsimile

CRTC Telecom File Number: 8663-P8-201607186

xx September 2016

To: Distribution List; Attorneys General

Re: Application by Public Interest Advocacy Centre regarding section 12 of *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015*, L.Q. 2016, c. 7 (Bill 74)—Call for comments on the Commission's preliminary views related to (1) suspension of the application, and (2) interpretation of section 36 of the *Telecommunications Act*, S.C. 1993, c. 38

By application dated 8 July 2016, the Public Interest Advocacy Centre (PIAC) requested that the Commission provide certain declaratory and other relief regarding section 12 of Bill 74, relying on arguments that challenged the constitutionality of section 12.

On 27 July 2016, the Canadian Wireless Telecommunications Association filed an application with the Superior Court of Québec, challenging section 12 of Bill 74 on constitutional grounds.

On 5 August 2016, Commission staff issued a letter suspending all deadlines related to PIAC's application, subject to further procedural guidance from the Commission.

The purpose of this letter is to seek comment from interested persons on the Commission's preliminary views regarding the issues set out below. The Commission intends to carefully consider all submissions filed in response to this letter before pronouncing on these issues.

1. Suspension of PIAC's application

The relief PIAC is seeking in its application is integrally connected to the constitutionality of section 12 of Bill 74. This is a matter now squarely before the Superior Court of Québec. The issue thus arises as to whether the Commission ought to suspend consideration of PIAC's application.

There are circumstances in which it is appropriate that a court and the Commission be seized of the same subject matter. However, the Commission is of **the preliminary view** that, in the particular circumstances of this case, it would be appropriate to suspend consideration of PIAC's application while the constitutional issues are before the courts, given the significance of the constitutional issues with respect to the relief sought and the fact that the Superior Court of Québec is a court of inherent jurisdiction.

Interested persons may file comments on this preliminary view within 15 days of the present letter. As the applicant, PIAC may file comments that include a reply to any comments filed by interested persons within 5 days of the filing date for interested persons.

2. The Commission's interpretation of section 36 of the *Telecommunications Act*

Irrespective of whether PIAC's application is suspended, it would be useful for the Commission to address the legal issue as to whether section 36 of the *Telecommunications Act* (the Act) applies to the blocking of end-users' access to specific websites on the Internet. Among other things, this would provide greater clarity and certainty as to whether Canadian carriers are prohibited from blocking access to specific websites in the absence of Commission approval, and could be of assistance in the particular circumstances of any future applications seeking relief under section 36.

Section 36 of the Act states:

> 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.

The Commission is exclusively responsible for the administration of this provision and will remain so, regardless of any finding with respect to the constitutionality of section 12 of Bill 74.

Further, as a matter of law, the Act binds Her Majesty, both in right of Canada and in right of any province.[1]

The Commission has previously provided some guidance with respect to section 36. In Telecom Regulatory Policy 2009-657[2] the Commission reviewed the Internet traffic

[1] See: section 3 of the Act.

management practices (ITMPs) of Internet service providers. In that decision, the Commission found that an ITMP that led to the blocking of the delivery of content to an end-user would engage section 36 of the Act and, consequently, would require the prior approval of the Commission in order to be implemented.

The Commission also found that such an application would only be granted where it would further the telecommunications policy objectives set out in section 7 of the Act. At the time, the Commission considered that this would require exceptional circumstances.

Consistent with the above, the Commission is of **the preliminary view** that the Act prohibits the blocking by Canadian carriers of access by end-users to specific websites on the Internet, whether or not this blocking is the result of an ITMP. Consequently, any such blocking is unlawful without prior Commission approval, which would only be given where it would further the telecommunications policy objectives. Accordingly, compliance with other legal or juridical requirements—whether municipal, provincial, or foreign—does not in and of itself justify the blocking of specific websites by Canadian carriers, in the absence of Commission approval under the Act.

Interested persons may file comments on this preliminary view within 15 days of the present letter.

Yours sincerely,

Danielle May-Cuconato
Secretary General

cc:

Adam Balkovec, CRTC, adam.balkovec@crtc.gc.ca
Laurie Ventura, CRTC, laurie.ventura@crtc.gc.ca
Geoff White, PIAC, gwhite@piac.ca

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[2] *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy 2009-657, 21 October 2009.

Attorneys General (by facsimile):[3]

Attorney General of Canada, 613-954-1920
Attorney General of Alberta, 780-425-0307
Attorney General of British Columbia, 250-356-9154
Attorney General of Manitoba, 204-945-0053
Attorney General of New Brunswick, 506-453-3275
Attorney General of Newfoundland and Labrador, 709-729-2129
Attorney General of Northwest Territories, 867-873-0234
Attorney General of Nova Scotia, 902-424-4556
Attorney General of Nunavut, 867-975-5128
Attorney General of Ontario, 416-326-4015
Attorney General of Prince Edward Island, 902-368-4910
Attorney General of Quebec, 514-873-7074
Attorney General of Saskatchewan, 306-787-9111
Attorney General of Yukon, 867-667-5790

Distribution List (by email):

jstix@295.ca;
sales@acanac.com;
regulatory@distributel.ca;
joel@aei.ca;
jeff@auracom.com;
info@axess.com;
cedric.tardif@axion.ca;
sbrousseau@b2b2c.ca;
info@beaucesansfil.com;
bell.regulatory@bell.ca;
admin@bravotelecom.com;
reglementa@telebec.com;
sales@logix.ca;
stephane.arseneau@ccap.coop;
rma@cintek.com;

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[3] Certain attorneys general have provided notice that they do not intend to participate in the proceeding initiated by PIAC's application. These notices are available on the public record of that proceeding, accessible through the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

support@citenet.net;
caroline.dignard@cogeco.com
nathalie.dorval@cogeco.com;
admin@comtem.ca;
ybarzakay@comwave.net;
info@connectmoi.ca;
gestion@coopcscf.com;
pallard@cooptel.coop;
support@copper.net;
munther@cronomagic.com;
regulatory@derytelecom.ca
serviceportneuf@derytelecom.ca
gboily@digicom.ca;
regulatory@distributel.ca;
Regulatory.Matters@corp.eastlink.ca;
sales1@fusion-telecom.com;
dharvey@galaxybroadband.ca;
regulatory@gozoom.ca;
aaron@access.com;
igsadmin@hawkigs.net;
info@heronet.ca;
info@internet-haut-richelieu.com;
regulatory@icewireless.ca;
angeo@innsys.ca;
support@mazagantelecom.com;
abmekkaoui@gmail.com;
info@montreal-dsl.com;
regulatory@mts.ca;
michel@mustangtechno.com;
techelp@mysignal.ca;
borromee@navigue.com;
dave@netfox.ca;
bstevens@netwest.ca;
help@ody.ca;
davidmckeen@northwindwireless.com;
Richard@ondenet.com;
cynthia@openmedia.org;
regulatory@openmedia.org;
bilodeau.mikael@oricom.ca;

Support@pioneerwireless.ca;
kmithcell@primustel.ca;
dennis.beland@quebecor.com;
info@rig.qc.ca;
David.Watt@rci.rogers.com;
Jacob.Glick@rci.rogers.com;
Simon-Pierre.Olivier@fidomobile.ca;
sales@rutexnet.com;
document.control@sasktel.com;
jeanmarc@securenet.net;
shannonvision@shannon.ca;
regulatory@sjrb.ca;
support@slamhang.com;
paul.frappier@sogetel.com;
creinkeluers@storm.ca;
mike.manvell@switchworks.com;
info@tamcotec.com;
louispaul@tartgointernet.com;
regulatory@teksavvy.com;
reglementa@telebec.com;
regulatory.affairs@telus.com;
celinelaporte@maskatel.qc.ca;
Mohamed-reda.khomisi@unitelecom.ca;
rob@velcom.com;
info@vertlavenir.info;
regaffairs@quebecor.com;
asoly@vif.com;
max@vodalink.com;
info@VybeNetworks.com;
info@wime.ca;
EAntecol@WindMobile.ca;
william.chen@wubim.com
pbrochu@xittel.net;
Xplornet.Legal@corp.xplornet.com;
sales@zeuter.com;
robertm@zid.com

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21(1)(a), 21(1)(b), 23

of the Access to Information Act

de la Loi sur l'accès à l'information

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21(1)(b), 23

of the Access to Information Act

de la Loi sur l'accès à l'information

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21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Balkovec, Adam

From: Balkovec, Adam
Sent: October-24-2016 12:14 PM
To: Stewart, Alastair; Pinsky, Carolyn
Subject: RE: Draft PIAC Bill 74 Memo

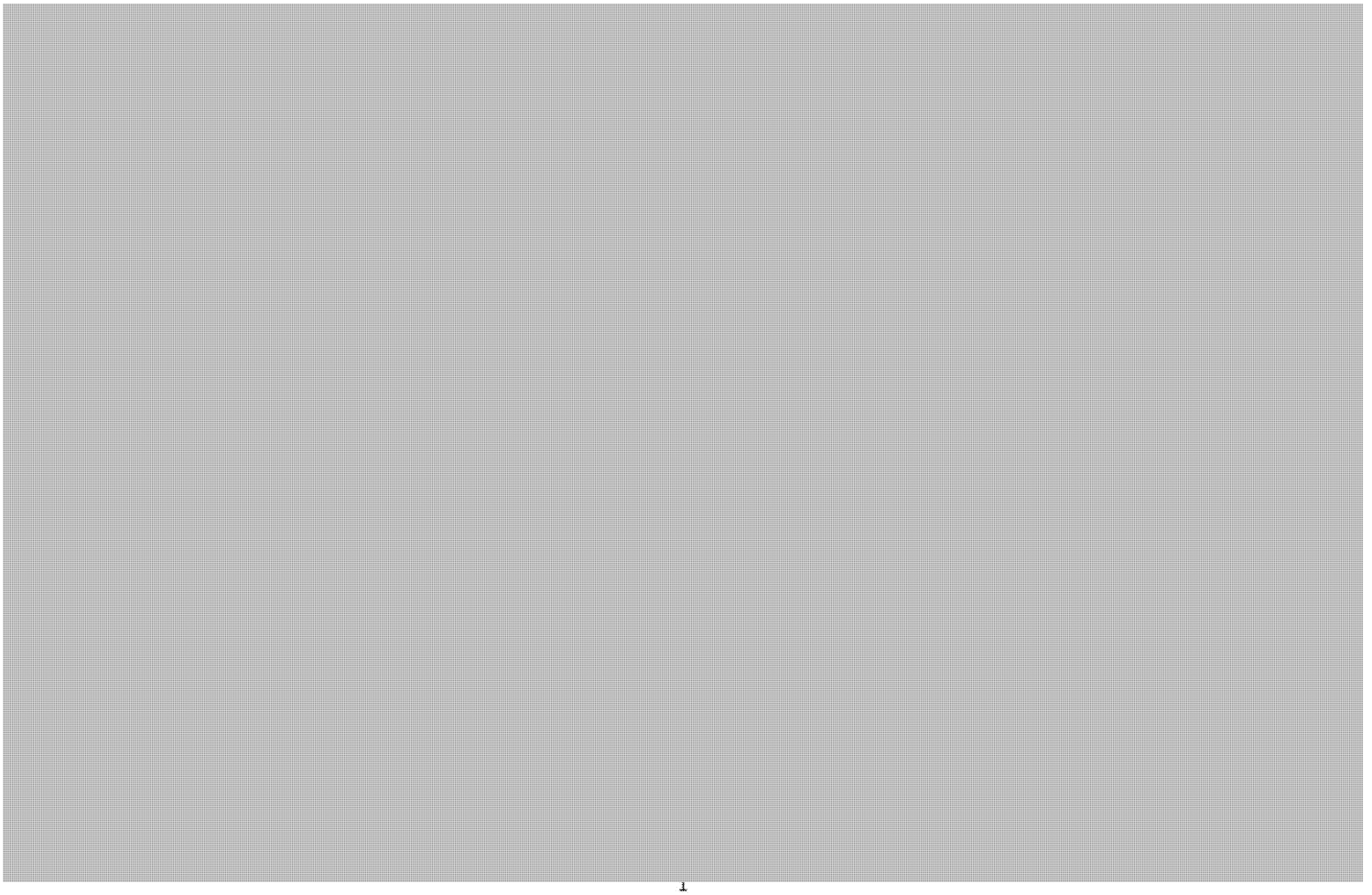
Thanks very much Alastair.

From: Stewart, Alastair
Sent: October-24-2016 11:32 AM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>; Pinsky, Carolyn <carolyn.pinsky@crtc.gc.ca>
Subject: RE: Draft PIAC Bill 74 Memo

Many thanks Adam; here are my suggestions.

From: Balkovec, Adam
Sent: October-24-16 10:36 AM
To: Pinsky, Carolyn <carolyn.pinsky@crtc.gc.ca>
Cc: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Subject: RE: Draft PIAC Bill 74 Memo

Good morning to you both.



Thanks,

Adam Balkovec
613-854-6182

From: Pinsky, Carolyn
Sent: October-21-2016 12:27 PM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Cc: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Subject: RE: Draft PIAC Bill 74 Memo

Thx, then I would suggest the following changes

[redacted]

From: Balkovec, Adam
Sent: October-21-2016 9:21 AM
To: Pinsky, Carolyn
Cc: Stewart, Alastair
Subject: RE: Draft PIAC Bill 74 Memo

Yes, I agree that this is a situation to be avoided.

However, [redacted]

From: Pinsky, Carolyn
Sent: October-21-2016 11:58 AM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Cc: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Subject: RE: Draft PIAC Bill 74 Memo

Thanks very much, Adam. [redacted]

[redacted]

From: Balkovec, Adam
Sent: October-21-2016 6:15 AM
To: Pinsky, Carolyn
Cc: Stewart, Alastair
Subject: RE: Draft PIAC Bill 74 Memo

Carolyn,

Thanks for this. I've made some changes, which are in the revised version, attached. Given the timelines, I'm going to forward it to Alastair for his comment in the meantime. However if you have further extensive comments before the strategy session next week, I will take those into account as well.

[redacted]

Alastair,

For your comment, please see the attached draft.

From: Pinsky, Carolyn
Sent: October-20-2016 1:23 PM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Cc: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Subject: RE: Draft PIAC Bill 74 Memo

Thanks very much, Adam. Unfortunately, I'm now fully occupied by the hearing, so I won't have a chance to review your memo carefully until next week. I did, however, look briefly at your section 36 analysis. So here are a few comments:

[redacted]

From: Balkovec, Adam
Sent: October-20-2016 7:03 AM
To: Pinsky, Carolyn
Cc: Stewart, Alastair
Subject: Draft PIAC Bill 74 Memo

Hi Carolyn,

Attached please find my draft memo regarding the preliminary views expressed by the Commission in the PIAC Bill 74 file.

The plan is to discuss these at a strategy session next Friday, but before then it needs to be reviewed by you, Alastair and Telecom (Rizwana and John).

I realize that timelines for Differential Pricing are likely pressing right now, so if it is not feasible for you to review this by the end of this week, please let me know what would be more realistic.

Many thanks,

Adam Balkovec
613-854-6182

Balkovec, Adam

From: Balkovec, Adam
Sent: December-02-2016 2:18 PM
To: Stewart, Alastair; Pinsky, Carolyn
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

I am as well. I'll pass that along to Jessica.

Thanks,
Adam

From: Stewart, Alastair
Sent: December-02-2016 1:44 PM
To: Pinsky, Carolyn <carolyn.pinsky@crtc.gc.ca>
Cc: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

Thanks Carolyn.

From: Pinsky, Carolyn
Sent: December-02-16 1:43 PM
To: Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Cc: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

I'm good with that!

From: Stewart, Alastair
Sent: December-02-2016 10:42 AM
To: Pinsky, Carolyn
Cc: Balkovec, Adam
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

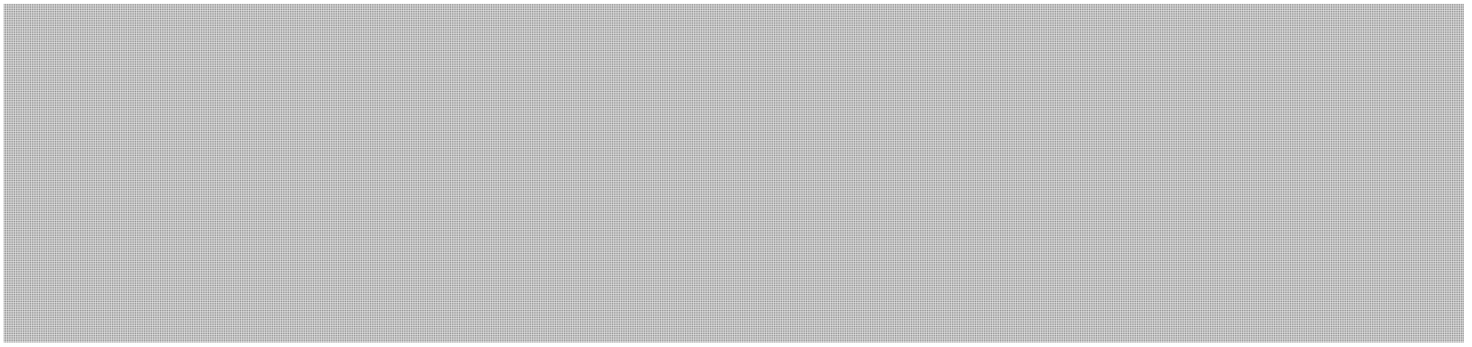
At first, [redacted]

What do you guys think?

From: Pinsky, Carolyn
Sent: December-02-16 1:11 PM
To: Stewart, Alastair <alastair.stewart@crtc.gc.ca>

Cc: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

Hi Alastair,



From: Stewart, Alastair
Sent: December-02-2016 8:33 AM
To: Dare, Jessica; Macri, John
Cc: Balkovec, Adam; Alamgir-Arif, Rizwana; Pinsky, Carolyn; Desrochers-Lanthier, Yolaine; Lemaire, France; Lehoux, Véronique; Danis, Lucie
Subject: RE: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

Approved with track-changes.

I'm available to discuss.

From: Dare, Jessica
Sent: December-02-16 8:54 AM
To: Macri, John <john.macri@crtc.gc.ca>; Stewart, Alastair <alastair.stewart@crtc.gc.ca>
Cc: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>; Alamgir-Arif, Rizwana <Rizwana.Alamgir-Arif@crtc.gc.ca>; Pinsky, Carolyn <carolyn.pinsky@crtc.gc.ca>; Desrochers-Lanthier, Yolaine <Yolaine.Desrochers-Lanthier@crtc.gc.ca>; Lemaire, France <france.lemaire@crtc.gc.ca>; Lehoux, Véronique <veronique.lehoux@crtc.gc.ca>; Danis, Lucie <lucie.danis@crtc.gc.ca>
Subject: Telecom decision for approval: PIAC request for relief re. Quebec Budget Act (confirmation of preliminary views)

Good morning,

Attached is a draft Telecom decision for your review, comments, and approval. It has already been reviewed by the team members in cc and by John M. wearing his Director hat (he is acting for Chris today). I would appreciate receiving any comments by end of day Monday, Dec. 5. Thanks!

Jessica

"PIRACY" WEBSITE BLOCKING APPLICATION

DRAFT PROPOSED OUTLINE

A. Summary of Application
B. Issues Raised
C. Conclusions
D. Discussion
   1. Issue:
   2. Issue:
   3. Issue:
   4. Issue:

[redacted]

Piracy Site Blocking Application

Notes

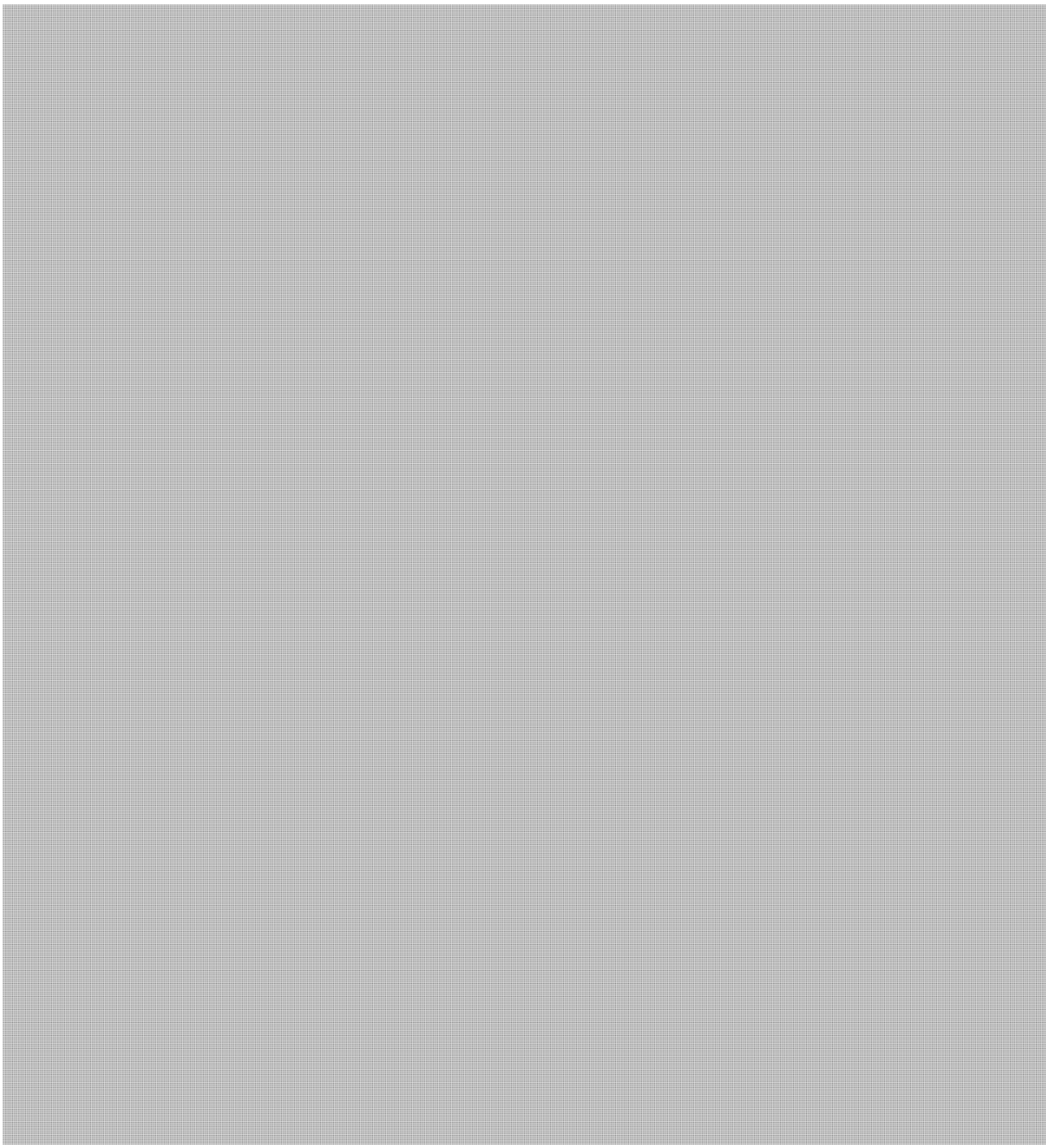
Outline - elements

- Summary of application
  - [redacted]
- Statutory interpretation approach

[redacted]

s.21(1)(b)

Notes



[redacted]

Cases of note:

[redacted]

Clément, Sylvie

From: Dionne, Valérie
Sent: March-14-18 10:14 AM
To: Clément, Sylvie
Subject: FW: E-mail [redacted]

From: Dionne, Valérie
Sent: September-28-17 3:32 PM
To: Wilson, James <james.wilson@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: E-mail [redacted]

Super Rachelle, merci ☺

From: Wilson, James
Sent: September-28-17 3:30 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: Re: E-mail [redacted]

I also note that since this would be a telecom matter - please keep Shari in the loop

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Dionne, Valérie
Sent: Thursday, September 28, 2017 3:27 PM
To: Frenette, Rachelle; Wilson, James
Subject: RE: E-mail [redacted]

[redacted]

From: Frenette, Rachelle
Sent: September-28-17 3:13 PM
To: Wilson, James <james.wilson@crtc.gc.ca>; Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: FW: E-mail [redacted]

James and Val:

Are you comfortable with my response?

Salut Marianne:

I suggest a phone call explaining the following:

[redacted]

Rachelle

From: Blais, Marianne
Sent: September-28-17 3:02 PM
To: Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: E-mail [redacted]

Rachelle
Voici un ébauche de courriel pour Chris sur la base de notre discussion... si tu pouvais y jeter un coup d'oeil lorsque tu auras quelques minutes, svp! Et aussi... si tu as gardé le courriel de Jay (tu étais en cc), peux-tu me l'envoyer svp? Chris ne m'a donné qu'une copie papier.

Merci de ton aide – c'est grandement apprécié!

*****
Chris
After talking to Rachelle, here is a draft answer [redacted] e-mail:

**

[redacted]

[redacted]

Marianne Blais
Gestionnaire - Planification stratégique et recherche, Télécommunications
Manager - Strategic Planning & Research, Telecommunications
Téléphone | Telephone: 819-997-4836
Courriel | E-Mail: marianne.blais@crtc.gc.ca

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Canadian Radio-television and Telecommunications Commission, Ottawa, Ontario K1A 0N2
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Clément, Sylvie

From: Dionne, Valérie
Sent: March-14-18 10:16 AM
To: Clément, Sylvie
Subject: FW: [redacted]

From: Pinsky, Carolyn
Sent: September-26-17 1:28 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

Sure

From: Dionne, Valérie
Sent: September-26-2017 10:27 AM
To: Pinsky, Carolyn
Subject: RE: [redacted]

Indeed. I'll likely contact you to discuss once I have my ideas aligned.

From: Pinsky, Carolyn
Sent: September-26-17 1:26 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

Interesting!

From: Dionne, Valérie
Sent: September-26-2017 10:11 AM
To: Pinsky, Carolyn
Subject: RE: [redacted]

[redacted]

From: Pinsky, Carolyn
Sent: September-26-17 12:52 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

[redacted]

[redacted]

From: Dionne, Valérie
Sent: September-26-2017 9:28 AM
To: Pinsky, Carolyn
Subject: RE: [redacted]

Thanks Carolyn. Your emails are really helpful ☺

[redacted]

I will look at all this and will certainly contact you in the next week or so.

I hope all is well in your part of the country ;)

Thanks again!

From: Pinsky, Carolyn
Sent: September-26-17 12:08 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

Bonjour Val,
How are you doing? I hope your family is well.

I will email you everything I have. Also, I"d be happy to discuss with you.

From: Dionne, Valérie
Sent: September-26-2017 6:10 AM
To: Pinsky, Carolyn
Subject: [redacted]

Bonjour Carolyn!

[redacted]

Thanks

Val

Valérie Dionne
Conseillère juridique | Legal Counsel

Secteur juridique | Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
valerie.dionne@crtc.gc.ca | Tel: 819-639-0764

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Clément, Sylvie

From: Dionne, Valérie
Sent: March-14-18 10:18 AM
To: Clément, Sylvie
Subject: FW: [redacted]

From: Dionne, Valérie
Sent: September-22-17 2:13 PM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: RE: [redacted]

super

From: Balkovec, Adam
Sent: September-22-17 2:12 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

[redacted]

From: Dionne, Valérie
Sent: September-22-2017 1:21 PM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: RE: [redacted]

[redacted]

From: Balkovec, Adam
Sent: September-22-17 12:59 PM
To: Dionne, Valérie <valerie.dionne@crtc.gc.ca>
Subject: RE: [redacted]

Yes I can meet on Monday, no problem. I'll try to have Laure pull that file from the library. [redacted]

[redacted]

Adam Balkovec
613-854-6182

From: Dionne, Valérie
Sent: September-22-2017 11:15 AM
To: Balkovec, Adam <Adam.Balkovec@crtc.gc.ca>
Subject: [redacted]

Hi Adam,

[redacted]

Valérie Dionne
Conseillère juridique | Legal Counsel
Secteur juridique | Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
valerie.dionne@crtc.gc.ca | Tel: 819-639-0764

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Dionne, Valérie

From: Dionne, Valérie
Sent: December-05-17 4:12 PM
To: Millington, Stephen (stephen.millington@crtc.gc.ca)
Cc: Shari.Fisher@crtc.gc.ca
Subject: Legal Opinion - Piracy Website Blocking
Attachments: DOCS-#2975426-v2-[redacted].doc

Good afternoon Steve,

Here is the legal opinion you asked me to write.

Thanks Shari for your comments.

I am available to discuss at your convenience.

Valérie

Pages 275 to / à 284

are withheld pursuant to sections

sont retenues en vertu des articles

21(1)(b), 23

of the Access to Information Act

de la Loi sur l'accès à l'information

Pages 285 to / à 303

are withheld pursuant to section

sont retenues en vertu de l'article

21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Page 304

is withheld pursuant to sections

est retenue en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act

de la Loi sur l'accès à l'information

Toniolo, Pamela

From: LaRocque, Judith
Sent: July-25-17 4:03 PM
To: Lelièvre, Cédrick
Subject: Re: Presentation at the September FCM

Could you canvas a few people (Danielle, Peter for Scott etc... to determine the level of Interest? En principe we spoke about the Commissioners coming in a day early to receive presentations - I believe o e that was being considered on the telecom side was the pricing model. I am not sure it has to at the FCM per se but the day before if the FCM agenda is full.

Judith

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Lelièvre, Cédrick
Sent: Tuesday, July 25, 2017 3:50 PM
To: MacDonald, Christopher
Cc: LaRocque, Judith; May-Cuconato, Danielle
Subject: RE: Presentation at the September FCM

Good afternoon M. MacDonald,

Sorry for my late reply.

I will discuss with Mme. LaRocque and staff and will get back to you promptly.

Thanks!

Cédrick

Cédrick Lelièvre
Chef de cabinet de la présidente, par intérim | Acting Chief of Staff to the Chairperson
Bureau de la présidente | Chairpersons Office
Conseil de la radiodiffusion et des télécommunications canadiennes | Canadian Radio-television and Telecommunications Commission
E-mail: cedrick.lelievre@crtc.gc.ca
Tel: 819-639-3641
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www.crtc.gc.ca
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From: MacDonald, Christopher
Sent: July-11-2017 10:46 AM
To: Lelièvre, Cédrick <Cedrick.Lelievre@crtc.gc.ca>
Cc: LaRocque, Judith <Judith.LaRocque@crtc.gc.ca>; May-Cuconato, Danielle <Danielle.May-Cuconato@crtc.gc.ca>
Subject: Presentation at the September FCM

Hello Cédrick,

[redacted]

Either way, once a decision is made, can you please circle back with me to let me know if this request is approved or denied?

Thanks,
Chris

Christopher MacDonald
Commissioner | Atlantic Canada & Nunavut
Conseiller | Atlantique Canada et Nunavut

Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
99 Wyse Road, Suite 1410, Dartmouth, NS B3A 4S5
Christopher.MacDonald@crtc.gc.ca
Téléphone | Telephone 902-426-2644 - Télécopieur | Facsimile 902-426-2721
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Frenette, Rachelle

From: Frenette, Rachelle
Sent: September-28-17 3:34 PM
To: Blais, Marianne
Cc: Fisher, Shari (Shari.Fisher@crtc.gc.ca)
Subject: RE: E-mail
Attachments:

Salut Marianne:

I suggest a **phone call** explaining the following:

Rachelle

From: Blais, Marianne
Sent: September-28-17 3:02 PM
To: Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: E-mail

Rachelle
Voici un ébauche de courriel pour Chris sur la base de notre discussion... si tu pouvais y jeter un coup d'oeil lorsque tu auras quelques minutes, svp! Et aussi... peux-tu me l'envoyer svp? Chris ne m'a donné qu'une copie papier.

Merci de ton aide – c'est grandement apprécié!

*****
Chris
After talking to Rachelle,

**

[redacted]

Marianne Blais
Gestionnaire - Planification stratégique et recherche, Télécommunications
Manager - Strategic Planning & Research, Telecommunications
Téléphone | Telephone: 819-997-4836
Courriel | E-Mail: marianne.blais@crtc.gc.ca

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Page 309
is withheld pursuant to sections
est retenue en vertu des articles

19(1), 20(1)(b)

of the Access to Information Act
de la Loi sur l'accès à l'information

Ikejiani, Chigbo

From: Rancourt, Eric
Sent: February-02-18 11:22 AM
To: Hulley-Craig, Crystal
Cc: Millington, Stephen; Hines, Shannon; Frenette, Rachelle
Subject: RE: Speech - ETHI Committee

Hi Crystal,

[redacted]

Eric

From: Hulley-Craig, Crystal
Sent: February-02-18 10:32 AM
To: Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

I'm ok without referencing specific policy objectives.

[redacted]

Crystal Hulley-Craig
(819) 956.2095
crystal.hulley@crtc.gc.ca

From: Rancourt, Eric
Sent: February-02-18 10:19 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

Thanks!

[redacted] Let me know if this is a deal breaker for you. Here is how the intro now reads.

As you may be aware, the CRTC is an independent administrative tribunal responsible for regulating the activities of telecommunications service providers further to the *Telecommunications Act*. As such, the CRTC is required to make every decision with the goal of ensuring the fulfillment of the policy objectives set out in the Act.

Net neutrality is the concept that all traffic on the Internet should be given equal treatment by Internet providers, with little to no manipulation, interference, prioritization, discrimination or preference given. This concept is enshrined in the *Telecommunications Act* through section 27(2), which prohibits unjust discrimination or undue preference, as well as section 36, which prohibits telecommunications companies from influencing the content they transmit unless they have received express authorization to do so from the CRTC.

These sections of the Act provide the CRTC with the tools and the flexibility to establish and enforce a net neutrality framework that is entirely appropriate and reasonable for Canada. [redacted]

From: Hulley-Craig, Crystal
Sent: February-02-18 9:22 AM
To: Rancourt, Eric <eric.rancourt@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

Please find our comments attached. The speech has been reviewed by myself, Rachelle Frennete and Steve Millington.

Happy to discuss.

Thanks,

Crystal Hulley-Craig
(819) 956.2095
crystal.hulley@crtc.gc.ca

From: Rancourt, Eric
Sent: February-02-18 9:06 AM
To: Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

Hi Crystal,

If you have any comments on the draft, I would need them ASAP.

Should Ian decide to appear, we will need to provide him with the French version by end of day. I currently have a translator on stand-by

The draft also needs to be reviewed by Chris Seidl before this afternoon's meeting.

Thanks,
Eric

From: Rancourt, Eric
Sent: February-01-18 11:22 AM
To: Macri, John <john.macri@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Valladao, Patricia <patricia.valladao@crtc.gc.ca>; Johnston, Cherie <Cherie.Johnston@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

The meeting has been scheduled for Friday afternoon, so comments would be appreciated by 3 p.m. today. Thanks.

From: Rancourt, Eric
Sent: February-01-18 10:44 AM
To: Macri, John <john.macri@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Valladao, Patricia <patricia.valladao@crtc.gc.ca>; Johnston, Cherie <Cherie.Johnston@crtc.gc.ca>
Subject: Speech - ETHI Committee

Good morning,

You will find attached the speech for the appearance before the Standing Committee on Access to Information, Privacy and Ethics.

Your comments on this draft would be appreciated by 1 p.m. today. Apologies for the short delay, but a meeting is being scheduled with the Chair this afternoon.

Thanks,
Eric

Eric Rancourt
Director, Sector Services, Media Relations and Outreach | Directeur, services aux secteurs, relations avec les médias et sensibilisation
Communications Sector | Secteur des Communications
Canadian Radio-television and Telecommunications Commission |
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Ikejiani, Chigbo

From: Millington, Stephen
Sent: February-02-18 4:24 PM
To: Seidl, Chris; Rancourt, Eric; Hines, Shannon; Scott, Ian
Cc: Danis, Lucie; Sirois, Martine; Macri, John; Hulley-Craig, Crystal; Frenette, Rachelle; Hanley, Amy; Valladao, Patricia
Subject: RE: Speech - ETHI Committee

I will attend with Chris on Tuesday

Stephen Millington
Avocat général principal / Directeur exécutif par intérim
A/Senior General Counsel / Executive Director
Secteur juridique / Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes /
Canadian Radio-television and Telecommunications Commission
CRTC, Ottawa, Ontario K1A 0N2
Tel: 819-953-0632
BB: 613-878-6789
Fax: 819-953-0589
stephen.millington@crtc.gc.ca

From: Seidl, Chris
Sent: February-02-18 11:25 AM
To: Rancourt, Eric <eric.rancourt@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Millington, Stephen <stephen.millington@crtc.gc.ca>
Cc: Danis, Lucie <lucie.danis@crtc.gc.ca>; Sirois, Martine <Martine.Sirois@crtc.gc.ca>; Gauthier, Louise <Louise.Gauthier@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: RE: Speech - ETHI Committee

Looks good. Here are a few comments.

Chris

From: Rancourt, Eric
Sent: February-02-18 10:22 AM
To: Seidl, Chris <chris.seidl@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Millington, Stephen <stephen.millington@crtc.gc.ca>
Cc: Danis, Lucie <lucie.danis@crtc.gc.ca>; Sirois, Martine <Martine.Sirois@crtc.gc.ca>; Gauthier, Louise <Louise.Gauthier@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: Speech - ETHI Committee

Good morning,

You will find attached the draft speech for next Tuesday's Parliamentary appearance, which has been reviewed by John, Michel, Crystal and Rachelle.

Your comments would be appreciated by 1 p.m. today.

Thanks,
Eric

Eric Rancourt
Director, Sector Services, Media Relations and Outreach | Directeur, services aux secteurs, relations avec les médias et sensibilisation
Communications Sector | Secteur des Communications
Canadian Radio-television and Telecommunications Commission |
Conseil de la radiodiffusion et des télécommunications canadiennes
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Ikejiani, Chigbo

From: Seidl, Chris
Sent: February-02-18 11:25 AM
To: Rancourt, Eric; Hines, Shannon; Millington, Stephen
Cc: Danis, Lucie; Sirois, Martine; Gauthier, Louise; Macri, John; Murray, Michel; Hulley-Craig, Crystal; Frenette, Rachelle
Subject: RE: Speech - ETHI Committee
Attachments: Speech ETHI Committee 6 February 2018.DOCX

Looks good. Here are a few comments.

Chris

From: Rancourt, Eric
Sent: February-02-18 10:22 AM
To: Seidl, Chris <chris.seidl@crtc.gc.ca>; Hines, Shannon <shannon.hines@crtc.gc.ca>; Millington, Stephen <stephen.millington@crtc.gc.ca>
Cc: Danis, Lucie <lucie.danis@crtc.gc.ca>; Sirois, Martine <Martine.Sirois@crtc.gc.ca>; Gauthier, Louise <Louise.Gauthier@crtc.gc.ca>; Macri, John <john.macri@crtc.gc.ca>; Murray, Michel <michel.murray@crtc.gc.ca>; Hulley-Craig, Crystal <crystal.hulley-craig@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: Speech - ETHI Committee

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Eric Rancourt
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Speech

Notes for an address

by **TBC**

TITLE
Canadian Radio-television and Telecommunications Commission

to the Standing Committee on Access to Information, Privacy and Ethics

Ottawa, Ontario

February 6, 2018

(CHECK AGAINST DELIVERY)

Good morning, Mister Chairman and honourable committee members.

My name is NAME + TITLE at the Canadian Radio-television and Telecommunications Commission. Thank you for giving me the opportunity to appear before you to speak about net neutrality.

As you may be aware, the CRTC is an independent administrative tribunal responsible for regulating the activities of telecommunications service providers further to the *Telecommunications Act*. As such, the CRTC is required to make every decision with the goal of ensuring the fulfillment of the policy objectives set out in the Act.

Net neutrality is the concept that all traffic on the Internet should be given equal treatment by Internet providers, with little to no manipulation, interference, prioritization, discrimination or preference given. This concept is enshrined in the *Telecommunications Act* through section 27(2), which prohibits unjust discrimination or undue preference, as well as section 36, which prohibits telecommunications companies from influencing the content they transmit unless they have received express authorization to do so from the CRTC.

These sections of the Act provide the CRTC with the tools and the flexibility to establish and enforce a net neutrality framework that is entirely appropriate and reasonable for Canada.

Net neutrality in Canada

The CRTC was one of the first regulators in the world to implement an approach to uphold net neutrality. Let me share with you three key

The first, in 2009, created a framework against which Internet traffic management practices

may be evaluated for compliance with the *Telecommunications Act*. Honourable members, the CRTC clearly stated that when congestion occurs, an ISP's first response should always be to invest in more network capacity.

However, we recognized that expanding and upgrading a network is not always the most practical solution. Internet service providers will [redacted] when necessary adopt economic or technical measures to better manage the flow of traffic on their networks. They could, for example, charge extra fees to customers whose Internet usage exceeds a predefined limit or slow traffic on their networks.

It may be of interest to the Committee to note that although the CRTC permits ISPs to use technical measures to manage Internet traffic, we recognize that these measures may allow ISPs to view and collect consumers' personal information and data. In the interest of protecting Canadians' privacy, we have therefore put measures in place to limit ISPs' use of that personal information or data for traffic-management purposes only. They may not use or disclose such information for any other purposes.

We have required ISPs to be transparent about their use of Internet traffic management practices. Customers must be told how the practice will affect their service, including the specific impact on speeds. Should a consumer believe that their ISP is not being transparent, they may ask the CRTC to intervene. Our most recent statistics show that the CRTC received 19 complaints relating to Internet traffic management practices [redacted] ast year.

Commented [SC1]: [redacted]

We have been proactive in ensuring transparency and follow up on each of the complaints that we receive. ~~and w~~We firmly believe that our approach is effective. For instance, when we receive complaints alleging practices or approaches that are of significant concern, we hold public consultations and deal with them in a definitive way.

Let me explain. A few years ago, it came to our attention that certain companies were offering mobile wireless services that exempted their own mobile television services from their customers' standard monthly data allowance. Content from other websites or apps, on the other hand, counted against the customers' monthly data allowance.

The CRTC issued a decision in 2015 in which we directed these providers to stop giving their own mobile television services an unfair advantage in the marketplace. We also required the companies in question to amend their practices. The CRTC stated that while it supportive of the development of new means by which Canadians can access both Canadian-made and foreign audiovisual content, mobile service providers cannot do so in a discriminatory manner. This decision was the second step we took to uphold the principle of net neutrality by ensuring that audiovisual content is made available to Canadians in a fair and open manner.

The third and most recent step we took was in regard to differential pricing. This is a practice by which providers offer the same or similar products and services to consumers at different rates. Differential pricing can occur when an Internet service provider exempts a particular application from a user's monthly mobile data plan, or when an application provider enters into an agreement with a service provider to exempt or discount the rate paid for data associated with that application.

In April 2017, we declared that ISPs should treat all data that flows across their networks equally. By enacting differential pricing practices, service providers are, in effect, influencing consumers' choices of which data to consume. The result being that these practices restrict access to content over the Internet—something that the CRTC found was contrary to the *Telecommunications Act*. Our framework supports a fair marketplace in which ISPs compete on price, quality of service, data allowance and [redacted] innovative service offerings.

Net neutrality in other regions of the world

[redacted]

[redacted]

The members of this Committee may be wondering what impact this decision will have on the CRTC's policies, Canadian ISPs or Canadians [redacted] The FCC's vote will not affect the way in which Internet traffic is treated in Canada. The CRTC has set out its approach to net neutrality, consistent with its powers and duties under the *Telecommunications Act*, and we will continue to enforce it within Canada.

By the same token, the CRTC has no jurisdiction over the way in which Internet traffic is managed outside our country. We therefore cannot comment or speculate on the effects of such a practice, nor the ways in which data will be treated by service providers in other jurisdictions.

Conclusion

[redacted] Chairman, I hope that this overview helps you understand the concrete steps taken by the CRTC to address the issue of net neutrality in Canada. The [redacted] decisions taken by the CRTC based on the powers currently in the Act combine to create an effective [redacted] approach to the net neutrality [redacted] and ensure that Canadians always have access to the free movement of ideas.

Before concluding my remarks, [redacted] want to [redacted] that I may not be able to answer all the questions that you would like to ask me today. For instance, you may have read that a coalition called FairPlay recently submitted an application asking the CRTC to establish a regime that would enable ISPs to block access to websites that host pirated content. Mr. Chairman, I trust you will understand that I cannot comment on this application or any other that is currently before the CRTC.

I would be happy to answer any questions you may have about our approach to net neutrality.

Thank you.

Warsalee, Rehana s.21(1)(b)

From: Toniolo, Pamela
Sent: February-01-18 9:23 AM
To: Doucet, Claude
Subject: Re: Head's up

Claude, do you want anyone besides me to be part of the discussion?

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Doucet, Claude
Sent: Wednesday, January 31, 2018 11:34 PM
To: Moore, Dale
Cc: Toniolo, Pamela
Subject: RE: Head's up

Ok Pam - Can we discuss next week. I'd like a discussion on Part 1 in general.

Sent with BlackBerry Work (www.blackberry.com)

From: "Moore, Dale" <Dale.Moore@crtc.gc.ca>
Sent: Jan 31, 2018 2:43 PM
To: "Doucet, Claude" <Claude.Doucet@crtc.gc.ca>
Cc: "Toniolo, Pamela" <Pamela.Toniolo@crtc.gc.ca>
Subject: Head's up

Hi Claude,

The CRTC received an Application to disable on-line access to piracy sites from Asian Television Network International Limited. It was posted on the website as a Part 1 yesterday – public process number: 2018-0046-7. Today we have received 2500 comments and we are expecting more.

We will proceed when advised on the next steps.

Thanks
dale

Warsalee, Rehana

From: Toniolo, Pamela
Sent: February-20-18 11:41 AM
To: Warsalee, Rehana
Subject: FW: Introductions ----Request for Info

FYI

From: Gauthier, Louise
Sent: February-20-18 11:20 AM
To: Toniolo, Pamela <Pamela.Toniolo@crtc.gc.ca>
Cc: Millington, Stephen <stephen.millington@crtc.gc.ca>; Frenette, Rachelle <rachelle.frenette@crtc.gc.ca>
Subject: FW: Introductions ----Request for Info

Bonjour Pamela, voici nos réponses du secteur juridique:

-
-

Louise Gauthier
Adjointe exécutive/Executive Assistant
Secteur juridique / Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes / Canadian Radio-television and Telecommunications Commission
1 Promenade du Portage, 6ième étage / 6th floor
Gatineau, Quebec J8X 4B1
louise.gauthier@crtc.gc.ca
Téléphone/Telephone 819-953-3989/819-997-5533
Télécopieur/Facsmile 819-953-0589
Gouvernement du Canada / Government of Canada
www.crtc.gc.ca

From: Toniolo, Pamela
Sent: February-13-18 4:23 PM
To: Millington, Stephen <stephen.millington@crtc.gc.ca>; Hutton, Scott <scott.hutton@crtc.gc.ca>; Rancourt, Eric <eric.rancourt@crtc.gc.ca>

s.19(1)

s.20(1)(b)

Cc: Warsalee, Rehana <Rehana.Warsalee@crtc.gc.ca>
Subject: FW: Introductions

Request for a meeting with [redacted] from Monique... Any issues?

Thanks,
Pam

From: Lafontaine, Monique
Sent: February-13-18 4:13 PM
To: Doucet, Claude <Claude.Doucet@crtc.gc.ca>
Cc: Toniolo, Pamela <Pamela.Toniolo@crtc.gc.ca>; Warsalee, Rehana <Rehana.Warsalee@crtc.gc.ca>
Subject: FW: Introductions

Bonjour Claude,

Please see attached meeting request from [redacted]

Kindly advise whether I may proceed with the meeting.

Best regards and many thanks,

Monique

[redacted]

Warsalee, Rehana

From: McCallum, Peter
Sent: July-25-16 2:56 PM
To: Blais, Jean-Pierre
Cc: Laizner, Christianne; Roussy, Daniel; Charron, Phil; May-Cuconato, Danielle; Stewart, Alastair
Subject:

Hi Jean-Pierre—

[redacted]

I trust you will find this information helpful. Regards, --PMcC--

Peter D. McCallum
Avocat général / General Counsel
Droit des communications / Communications Law
Secteur juridique / Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes /
Canadian Radio-television and Telecommunications Commission
Ottawa, Ontario K1A 0N2
peter.mccallum@crtc.gc.ca
Téléphone / Telephone 819-953-2197
Télécopieur / Fascimile 819-953-0589
www.crtc.gc.ca

From: McCallum, Peter
Sent: October-29-2015 12:01 PM

To: Pinsky, Carolyn
Cc: Stewart, Alastair; Ly, Alexander
Subject: Further call with [redacted]

[redacted]

--PMcC—

Peter D. McCallum
Avocat général / General Counsel
Droit des communications / Communications Law
Secteur juridique / Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes /
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Ottawa, Ontario K1A 0N2
peter.mccallum@crtc.gc.ca
Téléphone / Telephone 819-953-2197
Télécopieur / Fascimile 819-953-0589
www.crtc.gc.ca

From: Stewart, Alastair
Sent: October-19-2015 3:13 AM
To: McCallum, Peter
Cc: Renaud, Lise; Pinsky, Carolyn; Laizner, Christianne
Subject: RE: appel reçu

Sure Peter [redacted]

From: McCallum, Peter
Sent: Friday, October 16, 2015 5:33 PM
To: Stewart, Alastair
Cc: Renaud, Lise; Pinsky, Carolyn; Laizner, Christianne
Subject: FW: appel reçu

Alastair—

Can we discuss this matter next week? I returned a telephone call, at Lise's request, and had an interesting conversation with [redacted]

Thanks in advance for a future discussion, --PMcC--

Peter D. McCallum
Avocat général / General Counsel
Droit des communications / Communications Law
Secteur juridique / Legal Sector
Conseil de la radiodiffusion et des télécommunications canadiennes /
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Ottawa, Ontario K1A 0N2
peter.mccallum@crtc.gc.ca
Téléphone / Telephone 819-953-2197
Télécopieur / Fascimile 819-953-0589
www.crtc.gc.ca

From: Blais, Jean-Pierre
Sent: July-13-16 5:46 PM
To: Laizner, Christianne <christianne.laizner@crtc.gc.ca>; Seidl, Chris <chris.seidl@crtc.gc.ca>
Subject: Re: Today's clippings

[redacted]

Jean-Pierre Blais
Président et premier dirigeant / Chairperson & Chief Executive Officer
CRTC
819.997.3430

De: Laizner, Christianne
Envoyé: Wednesday, July 13, 2016 5:11 PM
À: Blais, Jean-Pierre; Seidl, Chris
Objet: Re: Today's clippings

[redacted]

Christianne

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Blais, Jean-Pierre
Sent: Wednesday, July 13, 2016 4:55 PM
To: Seidl, Chris; Laizner, Christianne
Subject: Today's clippings

[redacted]

Jean-Pierre Blais
Président et premier dirigeant | Chairman and Chief Executive Officer

Conseil de la radiodiffusion et des télécommunications canadiennes |
Canadian Radio-television and Telecommunications Commission
1, prom. du Portage, Édifice central, Les Terrasses de la Chaudière, Gatineau QC J8X 4B1
Jean-Pierre.Blais@crtc.gc.ca
Téléphone | Telephone 819-997-3430 - Télécopieur | Facsimile 819-953-1555
Gouvernement du Canada | Government of Canada
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