

## Federal Court of Appeal Affirms Site-Blocking Order in Teksavvy Case

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Fast and anonymous distribution of content online has made site-blocking orders a well-liked tool worldwide to combat piracy on the Internet. Several foreign jurisdictions across the globe have availed such orders,<sup>1</sup> both judicially and administratively, to block sites which facilitate copyright infringement by distributing artistic copyrighted content as their predominant activity. In *Teksavvy Solutions Inc v. Bell Media Inc.*,<sup>2</sup> Canada's Federal Court of Appeal affirmed the first-ever site-blocking order granted by a motion judge, showing that these orders are no maverick in Canadian courts either.

This recent development in Canadian copyright law and the law of equitable remedies picked up on the groundwork laid by the Supreme Court of Canada in its landmark ruling in *Google Inc. v. Equustek Solutions Inc.*,<sup>3</sup> which made de-indexing orders available in Canada. The Court was also guided by UK jurisprudence which sets out a series of factors that UK courts have found appropriate to consider in order to determine whether site-blocking orders are warranted in any given circumstance.<sup>4</sup>

The Federal Court of Appeal released its much-awaited decision in *Teksavvy* on May 26, 2021, unanimously affirming the site-blocking order (the "Order") issued by Justice Gleeson of the Federal Court against Teksavvy and a number of other Canadian Internet Service Providers (ISPs). The Order required the ISPs to block their customers from accessing certain websites. Effectively, the Order prevented the ISPs' customers from accessing infringing content streamed through illicit websites at goldtv.biz and goldtv.ca.

In the underlying copyright infringement action, three Canadian broadcasting companies who either owned the Canadian rights to transmit the programming in question or were exclusive licensees of those rights sued two unidentified defendants for operating websites whose predominant activity was to provide their subscribers access to copyrighted programming content over the Internet.

On appeal, the panel of the Federal Court of Appeal addressed the issues of (i) the jurisdiction of the Federal Court to grant the Order; (ii) the relevance of freedom of expression with respect

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<sup>1</sup> Site-blocking orders are available in Argentina, Australia, Austria, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Malaysia, Mexico, Norway, Portugal, Russia, Singapore, South Korea, Sweden, Spain, Thailand, Turkey, and UK.

<sup>2</sup> *Teksavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100 [*Teksavvy*].

<sup>3</sup> *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.

<sup>4</sup> *Teksavvy*, *supra* note 2 at para. 74, citing *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch); *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658; *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28.

to that Order; and 3) the requirements for an injunction and whether the Order was just and equitable in the circumstances.

### 1. *The Jurisdiction of the Federal Court to Grant the Order*

In the motion below before Justice Gleeson, Teksavvy submitted that granting the site-blocking order was outside of the court's jurisdiction. Justice Gleeson disagreed and concluded that sections 4 and 44 of the *Federal Courts Act*<sup>5</sup> provide the Federal Court with unlimited power to grant equitable injunctive relief—save for any statutory restrictions prescribing otherwise. This conclusion followed the Supreme Court of Canada's landmark decision in *Google Inc v Equustek Solutions Inc.*,<sup>6</sup> where it was held that orders for de-indexing search results from Google on a global basis were likewise within the jurisdiction of the courts to grant. Justice Gleeson also referenced that sub-section 34(1) of the *Copyright Act*<sup>7</sup> entitles copyright owners to all remedies that may be conferred by law for an infringement of their rights, and the Order was one of the remedies available to address copyright infringement.

On appeal, Teksavvy argued that several provisions of the *Copyright Act* and the *Telecommunications Act*<sup>8</sup> exclude site-blocking orders from the scope of the injunctive remedies that can be issued by the courts. The *Copyright Act* does not provide for site-blocking orders, and so Parliament's intent was to avail only limited types of remedy to copyright owners against ISPs.<sup>9</sup> The *Telecommunications Act*, in turn, contemplates net neutrality, with section 36 prohibiting ISPs from restraining or unduly controlling content transmitted to their users. Teksavvy argued that the order sought would violate this provision, as any exceptions to net neutrality must be approved by the Canadian Radio-television and Telecommunications Commission (CRTC) according to a prescribed process.

The Federal Court of Appeal rejected both Teksavvy's arguments. First, the Court held that, in the common law, there are precedential examples of remedies having been awarded that are not specifically mentioned in the *Copyright Act*, such as Norwich Orders, Mareva injunctions, and punitive damages.<sup>10</sup> Second, the Court found that the purpose of section 36 is to prohibit Canadian carriers, which may include an ISP, from having influence or power over the meaning or purpose of telecommunications carried by it for the public. Consequently, complying with a court ordered injunction would not interfere with the legislative purpose, since it is the ISPs' ultimate activity that is being controlled or influenced by the Order, not the content of programming.<sup>11</sup>

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<sup>5</sup> RSC 1985, c F-7.

<sup>6</sup> *Teksavvy*, *supra* note 2 at para. 19, citing *Google Inc v Equustek Solutions Inc*, *supra* note 3 at para. 23.

<sup>7</sup> RSC 1985, c C-42.

<sup>8</sup> SC 1993, c 38.

<sup>9</sup> *Teksavvy*, *supra* note 2 at para. 28.

<sup>10</sup> *Ibid* at para. 31.

<sup>11</sup> *Ibid*.

## 2. *Freedom of Expression*

The argument on appeal that the site-blocking order impaired freedom of expression rights<sup>12</sup> was also rejected by the appellate court. The Court held that ISPs being required to block certain websites, and their customers being prevented from accessing those illegal websites do not amount to unduly curbing free speech rights. As an ISP, Teksavvy is a common carrier that does not engage in any expressive activity and presumably does not give any preference to one website over another based on their content.<sup>13</sup> While the ISPs' customers could have an expressive interest that is implicated by the Order, the balance of convenience exercise that is engaged as part of an injunction request sufficiently addresses this concern and no separate *Charter* rights analysis is required. The appellate court held that this is clear from the Supreme Court of Canada's decision in *Equustek*, where the majority of the Court did not engage in any separate *Charter* rights analysis.<sup>14</sup>

## 3. *Whether the Order was Just and Equitable*

The Court found no error in Justice Gleeson's conclusion that the requirements for an injunction had been met, and considered the Order was just and equitable in the circumstances. A strong *prima facie* case of copyright infringement had been made against the defendants, and the copyright owners would suffer irreparable harm, absent the Order, owing to the ongoing infringement carried out by unknown defendants.

With respect to the balance of convenience analysis, the Court concluded that Justice Gleeson did not fetter his discretion and did not err by relying on factors from UK jurisprudence. He correctly articulated the fundamental question to be addressed on the motion—whether the injunction was just and equitable in the circumstances—and, recognizing that the order sought was unprecedented in Canada, he appropriately gleaned and considered pertinent factors from the UK jurisprudence as “inspiration”. The UK jurisprudence offered specific guidance setting out a series of relevant factors to be considered when determining whether a site-blocking order is warranted in any given circumstance.

## 4. *Concluding Remarks*

There are several noteworthy aspects of this decision. It affirms the availability of site-blocking orders aimed at combating copyright infringement by illicit websites, servers, and services. Further, it shows that the courts may issue dynamic orders which can be updated to reflect the circumvention efforts used by defendants after the order has already been made, as well as the particular circumstances of the infringement such as to avoid over blocking. Additionally, this decision permits “live” orders that are operative during ongoing broadcasts.

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<sup>12</sup> *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>13</sup> *Teksavvy*, *supra* note 2 at para. 50.

<sup>14</sup> *Ibid* at para. 53.

While the order here applied to streamed TV programming, it appears that such orders could also be available in respect to other copyrighted works, as the decision was not content dependent.

This decision is also significant because it addresses arguments predicated on net neutrality and freedom of expression in relation to site-blocking orders. In this respect, the Canadian courts are joining the courts of other countries which have similarly rejected these arguments, including courts in Mexico, India, the European Union, and the United Kingdom.