

**APPLICATION PURSUANT TO  
SECTIONS 24, 24.1, 36, and 70(1)(a) OF THE *TELECOMMUNICATIONS*  
ACT, 1993  
TO DISABLE ON-LINE ACCESS TO  
PIRACY SITES**

**Academy of Canadian Cinema and Television, Alliance of Canadian  
Cinema, Television and Radio Artists (ACTRA), Association  
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(ADISQ), Asian Television Network (ATN), Association québécoise de  
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Cinémas Guzzo, Cineplex, Canadian Media Producers Association  
(CMPA), Cogeco Connexion, Corus, Directors Guild of Canada (DGC),  
DHX Media, Entertainment One, Ethnic Channels Group, Fairchild  
Media Group, International Alliance of Theatrical Stage Employees  
(IATSE), Landmark Cinemas, Maple Leaf Sports and Entertainment  
(MLSE), Movie Theatre Association of Canada (MTAC), Québecor  
Média Inc., Rogers Media, Television Broadcasts Limited (TVB), TIFF,  
and Union des artistes (UDA).**

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## Table of Contents

<b>A.</b>	<b>OVERVIEW .....</b>	<b>1</b>
<b>B.</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>2</b>
<b>C.</b>	<b>BACKGROUND AND RATIONALE.....</b>	<b>8</b>
	(a) The Widespread Problem of Internet Piracy .....	8
	(b) The Harm Caused by Internet Piracy .....	11
	(c) The Difficulty of Combating Internet Piracy .....	16
	(d) International Anti-Piracy Efforts .....	17
	(e) Effectiveness of the Proposed Regime .....	19
<b>D.</b>	<b>THE PROPOSAL .....</b>	<b>21</b>
	(a) The Role of IPRA .....	22
	(b) The Role of the ISP .....	22
	(c) Establishment of the IPRA .....	22
	(d) Evaluation Criteria .....	23
	(e) IPRA Timelines and Process .....	24
	(f) CRTC Decision & Review .....	25
<b>E.</b>	<b>TELECOMMUNICATIONS POLICY CONSIDERATIONS .....</b>	<b>26</b>
	(a) Respecting the Role of ISPs as Common Carriers .....	26
	(b) Fulfillment of Telecommunications Policy Objectives .....	27
<b>F.</b>	<b>IMPLEMENTATION .....</b>	<b>28</b>
<b>G.</b>	<b>CONCLUSION .....</b>	<b>28</b>

## A. OVERVIEW

1. This application is brought jointly by a broad coalition of more than 25 directly affected stakeholders including 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). The key points in the application are:

- Piracy is a large and growing problem that **threatens the massive employment, economic, and cultural contributions** of Canada's film, television, and music industries.
- To combat the piracy problem, the CRTC should create an independent agency to identify websites and services that are **blatantly, overwhelmingly, or structurally engaged in piracy**. Following due process and subject to judicial oversight, ISPs would ultimately be required to disable access to the identified piracy sites and services.
- The coalition **supports net neutrality and the free flow of legal content on the Internet**. The system we propose does not raise net neutrality issues. ISPs remain neutral and simply implement decisions of the CRTC that restrict the distribution of **content that is unlawful**. Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online.<sup>1</sup>
- This system would have **extensive checks and balances**, including notice requirements; rights for the website, ISPs, and interested parties to give evidence and participate in a hearing; review and oversight of all decisions by the CRTC; and additional oversight by the courts through potential appeals and judicial review in the Federal Court of Appeal.
- **More than 20 of Canada's international peers have established similar regimes**, including the UK, Australia, France, Belgium, Portugal, Spain, Italy, Ireland, Sweden, Norway, Finland, and Denmark. Some are administered by courts and others by administrative agencies like the CRTC.

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<sup>1</sup> For example, the Open Internet Order in the United States was only in relation to "lawful" content: see e.g., 76 FR 59191 ("The rule protects only transmissions of lawful content"). See also Article 3, paragraph 1 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

## B. EXECUTIVE SUMMARY

2. Canada's telecommunications system must respond to the economic and social requirements of Canadian citizens and businesses, and must safeguard, enrich, and strengthen our social and economic fabric.<sup>2</sup> In some cases, that requires telecommunications service providers to participate in the solution to a problem they do not cause but which they are well placed to address.<sup>3</sup>

3. Internet piracy is a significant and growing threat to Canadian artists and the broader Canadian creative sector, Canadian broadcasters and legal distributors, and the Canadian economy. Last year there were at least *1.88 billion visits* made to piracy sites from Canada<sup>4</sup> and Canadian productions were pirated globally hundreds of millions of times. This activity infringes the rights of Canadians who create, produce, invest in, and disseminate creative works, and makes it difficult if not impossible to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.

4. In 2016, the Department of Canadian Heritage initiated a substantial consultation process to assess the status of Canadian content creators in a digital world. As that consultation heard:

*There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels. Likewise there is a need to foster increased re-investments in order to promote the creation of Canadian digital cultural content. Doing so will help ensure the longer term financial viability of Canada's cultural content creators who may otherwise have to seek out other career paths in order to support themselves<sup>5</sup>*

5. Piracy undercuts all of these objectives – it robs Canadian creators of the financial and other intangible benefits of the creation of cultural content and guarantees that they do not share in the rewards from its increasing dissemination. Investing in programming is already risky, and becomes increasingly unviable if even the rare hit cannot be effectively monetized because it is pirated online. As a result, piracy undermines the creation of cultural content and threatens the viability of Canada's cultural sector and therefore the expression of uniquely Canadian perspectives and identities. It also puts at risk the economic contribution of a film and television production sector that, in 2015-

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<sup>2</sup> Telecommunications Act, sections 7(a) and 7(h).

<sup>3</sup> For example, 911, emergency alerting, and VRS.

<sup>4</sup> MUSO Report, attached as Exhibit 1.

<sup>5</sup> What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, "Key Themes" at page 8.

2016, generated \$8.5 billion for the Canadian economy and contributed over 140,000 jobs.<sup>6</sup>

6. The harm to legitimate distributors such as licensed BDUs or over-the-top (“OTT”) digital services is also significant and often felt first and most directly. The experience of the relevant members of the coalition with their own customers suggests that households that engage with piracy sites and services (such as the use of illegal set-top-boxes) are many times more likely to cancel legal distribution services or not sign up for them in the first place. This results in the loss of potentially hundreds of millions of dollars in revenue for distributors that would otherwise support investment in modern telecommunications infrastructure in Canada, in the Canadian economy, and in the Canadian creative sector.<sup>7</sup>

7. This economic harm caused by piracy also results in millions of dollars in lost tax revenues for the government.

8. Nor is piracy a benefit to consumers. Consumers may pay for a piracy subscription or device only to be left without recourse when it does not work as promised. More importantly, piracy sites expose consumers to privacy risks, hacking, identity theft, and malware. That directly harms consumers and undermines consumer confidence in the communications system and digital marketplace. Piracy also increases costs for consumers that choose legal ways of accessing content, and as a result end up subsidizing it for those who choose to access content through piracy sites.

9. For these same reasons piracy also undermines innovation and the digital economy. New business models in this economy depend on the integrity of digital markets, including the ability to rely on copyright to determine the sites and services on which creative content is made available. Piracy makes those business models exceedingly difficult; successful innovation in the digital economy will take place in markets that effectively mitigate the impact of copyright theft.

10. Piracy is illegal under the *Copyright Act* and the *Radiocommunication Act*. In this application we refer to a specific aspect of the piracy problem – namely, the availability on the Internet 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) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions. In this application “piracy” refers to this range of activities, “pirate operators” refers to those who operate the

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<sup>6</sup> CMPA, *Profile 2016* at page 4.

<sup>7</sup> Similarly, for the music industry piracy can result in cannibalizing of music purchases and also discourages subscription to legal streaming services particularly premium subscription services that allow users to store music they like for offline listening. These losses deprive the rightsholders of an important source of compensation.

websites, 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, services that are blatantly, overwhelmingly, or structurally engaged in piracy.<sup>8</sup>

11. While there is no debate that piracy is illegal, the problem is not easily addressed because its borderless nature renders the tools currently available in Canada largely ineffective. That is because piracy relies on the anonymous and global nature of the Internet, which allows pirate operators to disguise their true identities and piracy sites to be accessible in Canada while operating out of jurisdictions in which it is impossible or impractical to take the enforcement measures required to protect the Canadian market.

12. If the pirate operators behind a piracy site can be identified, they may reside in one jurisdiction, use servers or websites registered in one or more other jurisdictions, and cause damage throughout the world. And even if slow and expensive traditional legal efforts can be undertaken successfully against these individuals, new pirate operators quickly emerge to provide access to the same pirated works.

13. Thus, the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail. A multi-pronged approach is required, and the relief sought in this application is a central aspect of that approach. It is impossible to effectively combat piracy in Canada in the digital age by pursuing pre-digital remedies against pirate operators.

14. The harm caused by piracy combined with its resilience in the face of traditional legal remedies and law enforcement strategies has led most of Canada’s closest international partners to recognize that all players in the piracy ecosystem have a role to play in combating it. This includes intermediaries such as ISPs, hosts, payments processors, search engines, domain name registrars, and advertising networks, all of whom can be well placed to contribute to addressing this important issue. The appropriate role of intermediaries in combating IP infringement in the global Internet environment has also been recently recognized in Canada, both in a report commissioned by the Department of Canadian Heritage last year and by the Supreme Court of Canada in the *Equustek* case.<sup>9</sup>

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<sup>8</sup> Accordingly, piracy sites could include not just a traditional website but also, for example, a location on the Internet dedicated to the delivery of an illegal piracy subscription service accessed directly from a server through an illicit streaming device.

<sup>9</sup> See Examination of the “follow-the-money” approach to copyright piracy reduction, Final Report prepared by Circum Network Inc. for Canadian Heritage (14 April 2016) (describing a global piracy ecosystem that includes hosts, ISPs, search engines, advertising networks, and payment processors, and recommending that rules regarding each of them be examined) and *Google Inc. v. Equustek Solutions*

15. While there is no single solution to the piracy problem and countries around the world have adopted a variety of new measures to combat the emerging threat, one particularly common and effective approach has been the implementation of rules to require ISPs to disable access to specified piracy sites for their customers:

- In 2001, the European Union issued a directive requiring all member states to make it possible to obtain a mandatory order against intermediaries whose services are used to infringe copyright.<sup>10</sup>
- In 2003, the United Kingdom, despite determining that an injunction against ISPs was already available at common law, introduced a specific regime to make the process for obtaining such orders faster, more efficient, and more certain for all parties. The regime has been in place for more than a decade and orders disabling access to piracy sites have been successful in reducing rates of piracy and increasing the rate at which customers purchase creative content legally.<sup>11</sup>
- In 2006, France introduced a regime to require ISPs to disable access specified piracy sites and also require other intermediaries to remedy infringements to which they contribute.
- In all, more than 20 countries around the world including, in addition to the UK and France, Australia, South Korea, Norway, Denmark, Spain, and Portugal, have introduced specific regimes to make it possible for rightsholders to request that ISPs be required to disable access to specified piracy sites for their customers. These include both processes operated through the courts and administrative regimes.

16. Disabling access to specific piracy sites is a practical and effective tool in the fight against piracy because it engages the ISP networks that consumers must rely on to access piracy sites and because it can be effected entirely within the domestic legal and regulatory systems. At the same time, because the ISP's role is limited to disabling access to piracy sites as determined by the Commission, the system proposed does not offend any principles underpinning net neutrality.

17. In Canada, given its existing mandate and powers under the *Telecommunications Act*, the Commission is well-placed to address the need to engage ISPs in combating piracy in order to ensure that Canada's

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*Inc.*, 2017 SCC 34 (finding that Google, as an intermediary, could be required to take steps to combat the infringement of IP rights globally).

<sup>10</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

<sup>11</sup> Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, Danaher *et al.*

telecommunications system safeguards and enriches Canada's economic and social fabric and responds to its economic and social needs.

18. Accordingly, in light of the significant threat to Canada's cultural, digital, and innovation economy posed by piracy, the problems with conventional enforcement, and the success of regimes in comparable jurisdictions, the coalition is asking the Commission to require ISPs to disable access for their residential and mobile customers to certain specified piracy sites identified from time to time by the Commission.

19. The Commission would identify these piracy sites after receiving a recommendation from a new independent organization established by the Commission (the "**Independent Piracy Review Agency**" or "**IPRA**"). The role of the IPRA would be to consider applications by rightsholders and other interested parties ("**applicants**") seeking to add a site to the list of piracy sites to which access must be disabled. It would review evidence submitted by the applicant, the websites, ISPs, and other interested parties, including in an oral hearing if appropriate, and would make recommendations to the Commission. The Commission would consider the evidence and these recommendations and, if approved, would require and authorize ISPs to disable access to these piracy sites.

20. The system proposed seeks to maximize transparency and incorporates extensive safeguards and checks and balances, including notice and an opportunity for the website, ISPs, and other interested parties to review any application submitted to and provide evidence and argument and participate in a hearing before the IPRA; review of all IPRA decisions in a transparent Commission process; the potential for further review of all Commission decisions through the established review and vary procedure; and oversight of the entire system by the Federal Court of Appeal, including potential appeals on questions of law or jurisdiction including constitutional questions, and the right to seek judicial review of the process and merits of the decision.

21. The Commission is empowered to implement this system pursuant to the following provisions of the *Telecommunications Act*, S.C. 1993, c. 38 (the "**Act**"):

- Sections 24 and 24.1, which allow the Commission to make participation in this system a condition of offering service as an ISP in Canada;
- Section 36, which empowers the Commission to approve the disabling of access to websites by an ISP; and
- Section 70(1)(a), which empowers the Commission to appoint the IPRA to inquire into and report to the Commission on the matter of identifying piracy sites.

22. Exercising regulatory authority under these provisions to implement this system would support the telecommunications policy objectives in section 7 of the Act and is consistent with previous Commission decisions regarding its jurisdiction.<sup>12</sup>

23. The coalition recommends that the IPRA be established as an independent not for profit corporation with the mandate to consider applications from applicants seeking to identify piracy sites. The IPRA would hear evidence from both the applicant and the alleged piracy site, as well as any ISPs that choose to participate in that particular process, and would conduct an oral hearing if necessary. Once the IPRA has completed its consideration of an application, it would submit a recommendation to the CRTC for approval. The IPRA would be designed to ensure procedural fairness while its specialized mandate would allow for a significantly more timely and efficient process than would be possible through applications made at first instance directly to the Commission.

24. As set out in section F, below, the coalition recommends that the details of the IPRA's organization and process be determined by the Commission in a follow-up proceeding based on a proposal to be developed in consultation with rightsholders, ISPs, and consumer advocacy and citizen groups.

25. In conjunction with the establishment of the IPRA, the coalition requests that in its decision on the current application the Commission impose on all ISPs a condition under sections 24 and 24.1 of the Act requiring that the ISP disable access to the list of piracy sites identified from time to time by the Commission (after receiving recommendations from the IPRA). The decision would also provide Commission approval under section 36 of the Act for the actions taken by ISPs to disable access to those sites.

26. If an applicant, website owner, ISP, or relevant member of the public objects to a Commission decision identifying a piracy site, any of them could seek a review of the decision under section 62 of the Act or could seek an appeal or judicial review in the Federal Court of Appeal.

27. The coalition undertakes to assume a leadership role in any further work required to establish IPRA and allow it to begin operating.

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<sup>12</sup> In particular, the Commission has expressed the view that its approval is required in all instances prior to ISPs disabling access to content and that it would consider whether to approve based on the telecommunications policy objectives set out in its home statute, the *Telecommunications Act*. Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016), affirmed in Telecom Decision CRTC 2016-479.

## **C. BACKGROUND AND RATIONALE**

### **(a) The Widespread Problem of Internet Piracy**

28. Piracy is not a new problem but over time it has shifted from the bootlegging of physical media and theft of satellite signals to a decentralized network of anonymous and clandestine online operations, where piracy sites profit from charging users for unauthorized access to content and selling advertising associated with that content. The Internet has had a profoundly positive impact on Canadian society and individual Canadians but it also has exacerbated the piracy problem, making it easy for pirate operators to make their pirate sites available in Canadian homes.

29. The nature of online piracy itself is also changing, while the problem continues to grow overall. In particular, “peer-to-peer” file sharing (torrents, associated with sites such as The Pirate Bay) was until recently the most common means of accessing pirated content in Canada but has now been surpassed by streaming of pirated content. Today, up to 85% of Canadians’ engagements with online piracy are through such streaming sites.<sup>13</sup> Piracy is also evolving in different forms in the music sector. Stream ripping is the new leading form of music piracy.<sup>14</sup>

30. Content is accessed on piracy sites through web browsers and, increasingly, through applications that can also be loaded on phones, tablets, and set-top-boxes. These applications provide a more user-friendly interface that provides instant access to thousands of illegal streams available from a variety of piracy sites to find the “best” stream. This makes accessing piracy sites easy and effective for even the least technologically sophisticated user, and increases the importance of solutions that do not require protracted litigation against every one of the sites involved.

### **KODI – Select Live Canadian TV Channels**

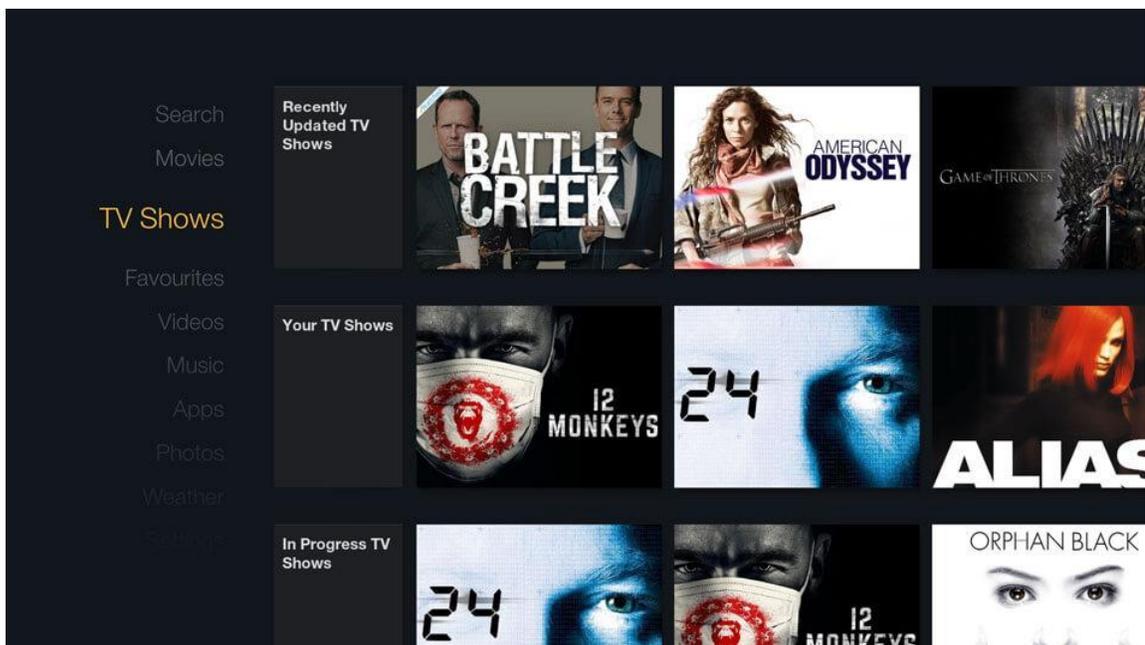
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<sup>13</sup> MUSO Report.

<sup>14</sup> IFPI, Global Music report 2017, p.37.



### KODI – On-Demand Library



31. The illicit and online nature of piracy means that it is difficult to track and quantify, but there is compelling evidence that the phenomenon is huge and growing:

- As reported in the MUSO study at Exhibit 1, Canadians made *1.88 billion visits to piracy sites* in 2016.

- As reported in a recent Sandvine study, approximately 7% of North American households (which would be approximately *1 million households in Canada*) use illegal piracy add-ons within the KODI media centre to access content from major piracy sites (which could be addressed through the regime proposed in this application).<sup>15</sup>
- As reported in another recent Sandvine study, approximately 7% of North American households (which would again be approximately *1 million households in Canada*) use illegal subscription piracy services.<sup>16</sup>
- As reported in a study by MovieLabs, *375 million pirated movies and TV shows were downloaded illegally in Canada* in 2016 using the BitTorrent P2P protocol. This excludes other P2P protocols, downloading directly from cyberlockers rather than peer-to-peer, and all piracy that took place through streaming sites (believed to be up to 85% of piracy engagements). In total, 99% of files available on BitTorrent have been found to be infringing.<sup>17</sup>
- Because of its illicit and underground character, it is impossible to determine the full extent of the financial harm from this volume of piracy, which impacts rightsholders,<sup>18</sup> distributors, exhibitors, and their legal partners and customers (let alone non-financial harms such as to licensing and windowing strategies, brand and reputational impacts from unauthorized uses, the destruction of legitimate commercial relationships, and the spread of malware and high-risk advertising). Nevertheless, even estimates that do not capture this full spectrum of harms suggest that globally piracy sites have generated approximately \$227 million in advertising revenue alone<sup>19</sup> and that piracy had an estimated commercial value (in this case of movie piracy alone, excluding television) in 2015 of \$160 billion.<sup>20</sup>

32. Canadian content is not immune from this trend. Canadian content is widely pirated. Certain coalition members track piracy of shows with which they are involved. Together, the Canadian productions of these coalition members were downloaded hundreds of millions of times last year and were streamed from millions of unique URLs:

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<sup>15</sup> 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).

<sup>16</sup> Sandvine, Global Internet Phenomena Spotlight: Subscription Television Piracy, November 2017.

<sup>17</sup> 2016 BitTorrent Movie and TV Downloads, MovieLabs P2P Monitoring; Felten, E., Census of Files Available via BitTorrent, Princeton Center for Information Technology Policy, January 2010.

<sup>18</sup> Rightsholders can include content creators, distributors and exporters, and broadcasters, among others.

<sup>19</sup> Media Link/Digital Citizens Alliance, Good Money Gone Bad: A Report on the Profitability of Ad-Supported Content Theft, February 2014.

<sup>20</sup> Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017.

**(b) The Harm Caused by Internet Piracy**

33. Piracy causes significant harm to Canada's social and economic fabric, including the broader Canadian economy, the telecommunications system, the cultural sector, the broadcasting system, and consumers.

34. Cultural industries employ 630,000 or ~4% of Canadians and contribute \$55B or ~3% to Canada's GDP.<sup>21</sup> Within this industry, according to the CMPA's 2016 Profile, film and television production accounted for 140,000 FTE jobs, \$8.5B in GDP, and \$3.3B in export value<sup>22</sup> – and that does not include the thousands of jobs and billions of dollars in economic value contributed by the other activities of broadcasters, broadcast distribution undertakings ("BDUs"), movie distributors, cinemas, retailers, and others impacted by piracy. Left unchecked, piracy will dramatically erode the contribution of these companies and their employees to Canada's digital and creative economies.

35. It does so by denying rightsholders the right to control the quality and integrity of their works, when and how they are viewed, and the compensation they are entitled to seek in the market for the hard work, creativity, expertise, and resources they have invested in their works. This negatively affects their earnings and profitability, leading to reduced employment and fewer opportunities for writers, producers, composers, performers, costume designers, and other content creators to make their living producing content. By denying content creators fair compensation for their work, piracy also reduces the ability of content creators and other rightsholders to develop, produce, and disseminate new content, undermining Canada's social fabric.

36. The effects on other legitimate participants in the ecosystem are the same. Rightsholders deal with partners operating all manner of legitimate distribution models, including theatres, conventional and speciality television stations and the BDUs that distribute them, over the top services like Netflix or CraveTV, and online and bricks-and-mortar retailers. Piracy diverts potential customers away from these legitimate channels in favour of illegal services that do not negotiate or pay to acquire rights nor comply with licensing rules. Indeed, in Australia the impact of piracy on Ten Network was described by its co-chief executive as being in the hundreds of millions of dollars and a direct cause of the potential bankruptcy of the network.<sup>23</sup>

37. Piracy also continues to erode the contribution of Canada's cultural sector to the country's social fabric and democratic life. The Canadian creative sector is already under pressure in its efforts to flourish in the digital age and can scarcely absorb increasing losses at the hands of those who seek to appropriate their

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<sup>21</sup> Canadian Heritage, *Creative Canada: Policy Framework* (2017), at page 7.

<sup>22</sup> This includes \$2.64B in foreign location and service production that contributes 54,900 jobs.

<sup>23</sup> <https://torrentfreak.com/pirates-cost-australias-ten-network-hundreds-of-millions-of-dollars-170616/>

works. As noted above, a consultation undertaken by the department of Canadian Heritage (the “**Heritage Consultation**”) heard that:

*There is a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels. Likewise, there is a need to foster increased re-investments in order to promote the creation of Canadian digital cultural content. Doing so will help ensure the longer term financial viability of Canada’s cultural content creators who may otherwise have to seek out other career paths in order to support themselves.*<sup>24</sup>

38. The importance of funding to Canadian content creators was further emphasized in the Heritage Consultation:

*There is a need for increased funding as well as the creation of funding models that are more adaptable. A level field for private sector competition was desired by participants, across platforms, production models, content types and different players within the cultural sector value chain, particularly within the discussion of new digital platforms (like Netflix, Facebook, Amazon and Spotify).*<sup>25</sup>

39. While adapting funding models to the digital age is a complicated challenge, an essential step will be to ensure rightsholders can appropriately monetize their content in a digital marketplace, which requires strong measures to stop the drain that piracy causes on an industry already under stress. Ensuring that Canadian content creators and distributors are actually paid for the work they produce and distribute (regardless of its distribution platform), rather than that work being appropriated by pirate operators and the pirate sites they operate, is an important and obvious step towards reinforcing the financial viability of the sector that can be achieved without requiring additional access to scarce government (or other) funding.<sup>26</sup> As the Heritage Consultation recognized, “*much of the needed change discussed involves collaboration between the Department of Canadian Heritage, other government departments, provinces and territories, as well as the public and private sectors*”.<sup>27</sup> The initiative we are proposing would be an excellent example of such broad-based collaboration.

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<sup>24</sup> What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, “Key Themes” pg 8.

<sup>25</sup> What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, “Key Themes” pg 9.

<sup>26</sup> This is particularly important because, as the study recognized: “*There is general recognition that increasing the tax burden on foreign and/or Canadian enterprises to fund creative development is likely to have a direct impact on Canadian consumer. They were worried this would result in limiting affordability and access to high-speed Internet connections.*” What we heard across Canada: Canadian Culture in a Digital World, Consultation Report February 21, 2017, (Heritage Consultation) “Key Themes” p 10.

<sup>27</sup> Heritage Study, p 10.

40. The harm caused by piracy is not just abstract but real, and it affects real projects. To take just one specific example, veteran Canadian film producer Don Carmody describes the piracy of his film *Goon* as like nothing he had experienced in four decades of filmmaking. He estimates that the film lost at least \$1 million of potential box-office sales in Canada to piracy and likely millions of more in subsequent DVD or download sales.<sup>28</sup>

41. As well as the creative sector, piracy directly harms the legitimate Canadian broadcasting system. Broadcasters make significant investments in their own programming and programming they develop jointly with independent producers. In exchange, broadcasters receive copyright in that programming, which they then monetize through a combination of traditional television channels and new OTT platforms in which they are also investing. These investments are extremely risky for both the producer and the broadcaster, as it is impossible to predict in advance what will be a hit or even which projects will break even. When a work is successful, it must pay for itself and for all the less successful productions in which investments had to be made to find that one hit. If hits can't be broadly monetized, broadcasters and producers will become increasingly reluctant to make the investments necessary to produce them.<sup>29</sup>

42. Legitimate BDUs face a similar impact as Canadians turn to piracy sites instead of legitimate subscriptions to obtain access to creative content. BDUs will not continue to invest in new telecommunications infrastructure, technologies, and distribution models if piracy, which relies on stolen content and existing Internet connections (often the result of investment by the same legitimate BDUs), continues to compete with them at no or little cost.

43. The impact on the broadcasting system is already being felt. Lawful television subscriptions are declining in Canada. According to CRTC data, cable, satellite, and IPTV BDUs in Canada collectively have lost subscribers every year since 2012, losing more than 400,000 total over that time despite the number of occupied private dwellings increasing by approximately 700,000 during the same period.<sup>30</sup> While it is impossible to determine precisely how many of these 1.1 million households are lost subscribers due to piracy, the experience of relevant members of the coalition with their customers confirms that consumers who engage with piracy sites are many times more likely to cancel legal services or never subscribe to them in the first place than are those that do not engage with piracy sites.

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<sup>28</sup> "Battling Bit Torrent: Can the movie studios beat online piracy?" (<http://www.canadianbusiness.com/technology-news/battling-bit-torrent>)

<sup>29</sup> A similar situation prevails in the music industry, which is also a risky business. The inability to generate adequate incomes will affect risk-taking and will result in a less diversified music offering.

<sup>30</sup> Statistics Canada, *Dwelling counts, for Canada, provinces and territories, 2016 and 2011 censuses – 100% data*, available at: <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=108&S=50&O=A>

44. The average television subscriber in Canada likely accounts for between \$50 and \$80 in monthly revenue to a legal BDU.<sup>31</sup> If even one third of the lost or never obtained subscriptions are in part attributable to piracy, the lost revenues for BDUs would be between \$220 million and \$350 million annually. There would be additional revenue losses from subscribers that do not cancel their subscriptions entirely but do reduce the size of their subscriptions by eliminating channels they can easily replace with piracy (such as those showing scripted programming and movies).

45. This estimate is broadly consistent with figures reported by Sandvine in a recent *Global Internet Phenomena* report in which it found that subscription piracy services alone result in an estimated annual financial loss to the industry in North America of US\$4.2 billion. If approximately one tenth of those losses are attributable to the Canadian market, the impact here would be approximately \$500 million.

46. This economic harm has an additional impact on government finances, resulting in millions of dollars in lost revenues from sales and corporate taxes that would be paid by legitimate participants in the cultural economy.

47. Moreover, because Canadian BDUs contribute 5% of their revenue directly to Canadian production funds this is a direct loss of between \$11 million and \$25 million or more every year. More importantly, hundreds of millions of dollars are no longer invested by BDUs, both in affiliation payments to Canadian broadcasters that are ultimately directed to programming and in Canada's telecommunications infrastructure.<sup>32</sup>

48. Piracy also harms consumers, exposing them to serious privacy, hacking, identify theft, and malware risks, all of which directly harm Canadians, their ability to use the communications system, and their confidence in the communications system and digital marketplace. These risks have been well-documented:

- 1 out of every 3 piracy sites contains malware.<sup>33</sup>

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<sup>31</sup> See Scotiabank, *Converging Networks* (2015), estimating that each television service subscriber represented approximately \$53.36 to \$77.67 in monthly revenues (\$640.32 to \$932.04 in yearly revenues) for Canadian BDUs; according to the CRTC's most recent financial reports the total revenue for all BDUs is approximately \$65 per subscriber per month.

<sup>32</sup> The 2017 Communications Monitoring Report reveals that Canadian BDUs paid \$3.034 billion in affiliation fees to Canadian discretionary services in the previous year, representing approximately 35% of all BDU revenues. Accordingly, a reduction in BDU revenues of between \$220 million and \$500 million would be associated with a reduction of affiliation payments to Canadian programmers of between \$77 million and \$175 million annually.

<sup>33</sup> Digital Citizens Alliance / Risk IQ, *Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet users' computers and personal data*.

- 45% of the malware on these sites is delivered through so-called “drive-by downloads” that invisibly download to the user’s computer, without requiring them to click on a link.<sup>34</sup>
- Consumers are 28 times more likely to get malware from a content theft site than on similarly visited mainstream websites or licensed content providers.<sup>35</sup>
- 7% of the websites distributing unauthorized content have associations with known cybercrime organizations.<sup>36</sup>
- 89% of ads targeting Canadians on rogue websites are high-risk advertisements, of which 44% were in the malware category, 18% were scams, and 30% were from the sex industry.<sup>37</sup>

49. Indeed, just this fall The Pirate Bay began hijacking users’ computers without notice to mine cryptocurrency. Also last year Exodus, one of the most widely used piracy add-ons for illicit streaming devices, introduced malware that turned its users’ computers into a botnet for a DDOS attack. Overall, it is believed that pirate sites earn more than \$70 million a year from the installation of malware on users’ devices.<sup>38</sup>

50. Piracy is manifestly unfair to Canadians who continue to access content by legal means. As some individuals stop paying for creative content, an ever shrinking base of legitimate subscribers is forced to pay for the development of content which is stolen by an ever increasing group of pirate operators and their customers. In this way, honest customers and broadcasters pay higher prices in order to subsidize the entire piracy ecosystem.

51. Piracy sites and the services they support also obviously do not comply with consumer protection rules or the Commission’s social policies (from closed captioning to emergency alerting), and frustrated consumers will find themselves without recourse when they rely on and even pay for a service that turns out not to work as expected.

52. Internet piracy represents a dramatic and growing threat to the Canadian creative and broadcasting sectors and the Canadian economy as a whole, impacting all industry players, and diluting the economic value produced by the sector. Piracy also means that less Canadian creative content will be made and

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<sup>34</sup> Ibid

<sup>35</sup> Ibid.

<sup>36</sup> McAfee, *Music and Movies: Entertainment Versus Online Risk: Avoiding the risks associated with online music, videos and movies.*

<sup>37</sup> Dr. Paul Watters, *The Prevalence of High- Risk and Mainstream Advertisements Targeting Canadians on Rogue Websites.*

<sup>38</sup> Digital Citizens Alliance / Risk IQ, *Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet users’ computers and personal data.*

enjoyed. Uniquely Canadian stories may never be told and content that reflects the diverse cultural identity of Canadians will be lost. As Canadians, we are all harmed by piracy.

**(c) The Difficulty of Combating Internet Piracy**

53. Piracy is, by its nature, often resistant to conventional domestic legal action.

54. The nature of online communication means that pirate operators can frequently conduct their activities with total anonymity. Pirate operators can communicate with one another, and with their customers, online using false names and providing no identifying information. Thus, identifying and obtaining relief against the real individuals operating piracy sites can be exceptionally difficult.

55. Even when these pirate operators can be identified, they are often located in jurisdictions where conventional legal action may not be a viable option, due to the limitations of the legal system or disproportionate costs. One of the salutary effects of the Internet has been to make the world smaller, allowing individuals to communicate and collaborate with friends and colleagues around the world. The corollary of that enormous potential is that an individual can appropriate Canadian content, sell access to that content to Canadians, and cause significant harm to all manner of Canadian artists and businesses without ever setting foot in the country. Even when pirate operators are located in jurisdictions with robust and fair legal systems, the cost to Canadians in the creative sector and broadcasting system of conducting international litigation is often disproportionate.

56. Even when pirate operators can be identified, and even when they are physically located in jurisdictions where legal action is a viable option, piracy operations demonstrate great resilience. When a website is shut down it can be recreated quickly by other members of the piracy community under a different name or in a different jurisdiction. This is because the cost of setting up a piracy operation is relatively low – all it requires is a computer, an internet connection, and a moderate level of technical skill – and such operations can be set up quickly. In conventional litigation, addressing the recreated site may require an entirely new investigation and litigation process, which is expensive, time-consuming, and inefficient. In the kind of system proposed here and in place in other countries, the recreated piracy site can be addressed efficiently through an appropriate variance of the original decision to specify the new location.

57. Finally, even when actions are successfully brought against pirate operators, the pirate operators typically lack the financial ability to compensate their victims, precisely because they sell access to stolen content at prices far below legitimate market rates. This is reflected in the fact that even though pirate operators earn an astonishing \$227 million in annual advertising revenue, the

commercial value of digital piracy of film alone (i.e., excluding television, which likely accounts for more than half of all piracy<sup>39</sup>) is well over 50 times that amount or approximately \$160 billion.<sup>40</sup> Therefore, victims of piracy can never obtain reasonable compensation for the damage they suffer, emphasizing the importance of preventative measures.

58. Thus, the nature of online piracy means that if the Canadian creative sector is left to rely solely on conventional domestic legal remedies, it will be doomed to fail. A multi-pronged approach is required, and the relief sought in this application is a central aspect of that approach.

**(d) International Anti-Piracy Efforts**

59. The challenges of combating piracy on the Internet are not unique to Canada, and many of Canada's closest international partners have adopted regimes that provide for the mandatory disabling of access to certain identified piracy sites.

60. A foundational component of this international effort is the European Union's copyright directive, which directs member states to have regimes allowing rightsholders to obtain mandatory relief against intermediaries, including requiring ISPs to disable access to piracy sites:

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightsholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5...

**Article 8 - Sanctions and remedies**

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightsholders whose interests are affected by an infringing activity carried

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<sup>39</sup> Based on the 2016 BitTorrent Movie and TV Downloads, MovieLabs P2P Monitoring, which found that the majority of P2P downloads in Canada were of TV shows.

<sup>40</sup> Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017.

out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.<sup>41</sup>

61. Significantly, the EU has also recognized that it is important that these injunctions be available in a timely fashion:

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.

(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States.<sup>42</sup> [emphasis added]

62. The EU Directive has been widely implemented into the laws of various EU member states. Since 2010, it has been relied upon in 17 countries across the EU and resulted in final orders issued against more than 2,000 copyright infringing sites.

63. Notably, the United Kingdom introduced its regime in 2003 and has disabled access to sites including The Pirate Bay and First Row Sports.<sup>43</sup> France implemented its own regime in 2006 and has disabled access to several notorious sites including Allostreaming and The Pirate Bay. Outside the EU, Australia implemented its regime in 2015 and in December 2016 required ISPs to

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<sup>41</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 8.

<sup>42</sup> European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, recitals 22-23.

<sup>43</sup> Copyright and Related Rights Regulations 2003, SI 2003é2498; see *Copyright, Designs and Patents Act 1988*, s 97A [United Kingdom]. *Twentieth Century Fox Film Corporation et al v British Telecommunications PLC*, [2011] EWHC 1981 (Ch); *Football Association Premier League Ltd. v British Telecommunications PLC*, [2017] EWHC 480 (Ch).

disable access to sites including The Pirate Bay, Torrentz, TorrentHound, and IsoHunt.<sup>44</sup>

64. In total at least 20 countries, including most of Canada's closest partners, have implemented regimes to disable access to piracy sites. These include both regimes that are operated through the courts (for example, the UK) and either alternative or additional administrative regimes (for example, Portugal, which in 2015 established a regime to provide for disabling of access to piracy sites that is overseen by the Inspeção Geral Das Actividades Culturais).

65. Unsurprisingly, all of these regimes have processes in place to ensure procedural fairness and include mechanisms to compel compliance by ISPs. Clearly such a regime cannot be effective if any ISP can simply choose not to participate, as in that case individuals wishing to access illegal pirated content could simply migrate to the non-compliant ISPs, who would be gaining an unfair competitive advantage. Therefore, the regime proposed in this application requires participation and compliance by all Canadian ISPs.

**(e) Effectiveness of the Proposed Regime**

66. While there is no single solution to the problem of piracy, a regime that can require ISPs to disable access to piracy sites is a particularly important tool because it addresses many of the difficulties associated with combating online piracy that were described above. This tool is more resilient to the nature of online piracy because it can be used when pirate sites are based in foreign jurisdictions and quickly move their online or physical infrastructure. That is because the regime operates entirely through the providers of the relevant telecommunications services here in Canada.

67. This application therefore presents a Canadian solution to a global problem causing direct and measurable harm in Canada, that is carefully tailored to the current Canadian legal and regulatory environment but based on an internationally recognized and widely-adopted approach. Rather than asking the Canadian creative industry to act as the global piracy enforcement authority by trying to shut down piracy sites that operate in, and transmit content to, all manner of jurisdictions, the proposed regime focuses on access to that illegal content in Canada. If Canada disables access to a piracy site, the harm that site causes to Canadians is greatly reduced and it becomes far less important to track down the pirate operators operating the site anonymously from elsewhere in the world. Disabling access to piracy sites helps address the source of online piracy's resilience to conventional legal action – its predominantly online presence.

68. Such regimes have been widely adopted internationally because they have been proven to work:

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<sup>44</sup> *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503.

- In November 2014 alone, the disabling of access to 53 piracy sites in the UK caused a 90% reduction in visits to the specified sites and a 22% decrease in total piracy for all users affected by the measure. It also resulted in an increase in visits to legal streaming services of between 6% and 10%.<sup>45</sup>
- Previously, in 2013, the UK disabled access to 19 piracy sites, resulting in an increase in traffic to legitimate streaming services of 12%.<sup>46</sup>
- In Portugal, disabling access to 66 of the 250 top piracy sites resulted in an approximately 70% reduction in usage of the blocked sites and a reduction of nearly 10% in usage in Portugal of the top 250 piracy sites overall, despite usage of those same 250 sites increasing approximately 31% globally during the same period.<sup>47</sup>
- In Korea, disabling access to 62 piracy sites in 2015 resulted in an approximately 79% reduction in usage of the blocked sites and a reduction of approximately 15% in total piracy in Korea.<sup>48</sup>
- A study released in August 2016 by the Information Technology & Innovation Foundation found that “where countries are using website blocking to fight digital piracy, the record shows it has been effective in driving users from illegal to legal sources of copyrighted material online.”<sup>49</sup>

69. Regimes requiring ISPs to disable access to certain piracy sites have been judged a policy-making success by governments, regulators, and courts. For example, the Courts in the UK have confirmed that the implementation of these kinds of “orders has proceeded relatively smoothly and... they have proved to be effective.”<sup>50</sup> More recently, a UK court has confirmed that such order are “very effective” and that there is “no evidence of overblocking.”<sup>51</sup>

70. The effectiveness of these regimes is illustrated by The Pirate Bay. Astonishingly, the Pirate Bay is the 22<sup>nd</sup> most popular site in Canada according to Alexa rankings – more popular than any newspaper and more popular than the CBC. It is precisely the kind of hardcore piracy site that these regimes were designed to address, and indeed access to The Pirate Bay has been widely

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<sup>45</sup> Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior, Danaher *et al.*, April 2016.

<sup>46</sup> The Effect of Piracy Website Blocking on Consumer Behaviour, Danaher *et al.*, November 2015.

<sup>47</sup> INCOPRO, Site blocking efficacy in Portugal September 2015 to October 2016 (May 2017).

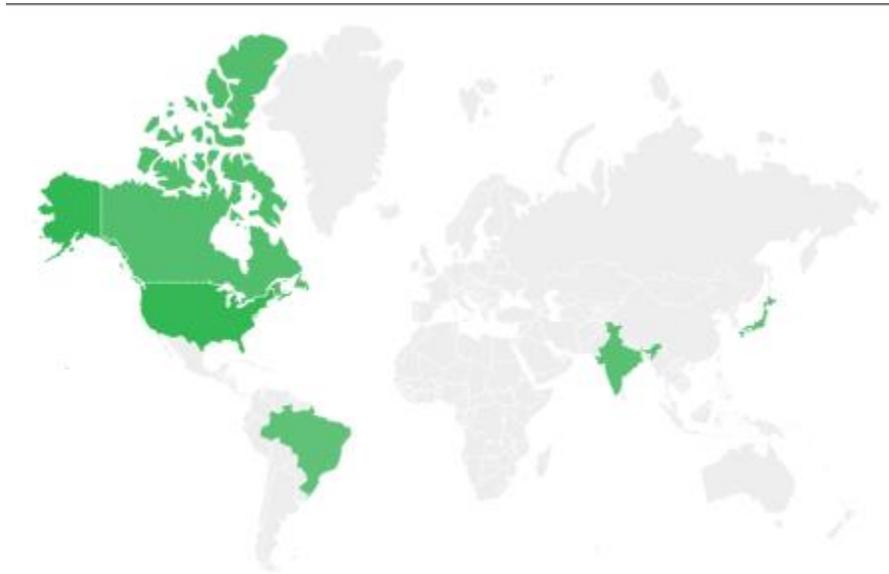
<sup>48</sup> Motion Picture Association, *Impact of Site Blocking in South Korea* (November 2017).

<sup>49</sup> ITIF, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet”* (August 2016).

<sup>50</sup> *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658 (06 July 2016) at para. 20. *Cartier* was cited with approval by both the majority and dissenting judgments of the Supreme Court in *Equustek*.

<sup>51</sup> *Union Des Associations Européennes De Football v British Telecommunications Plc & Ors* [2017] EWHC 3414 (Ch).

disabled in countries where such a regime is in place. As a result, visitors to the site come disproportionately from Canada and the United States. The figure below depicts the geographic distribution of traffic to The Pirate Bay:



Alexa visualization of traffic to The Pirate Bay

#### **D. THE PROPOSAL**

71. The Commission is best positioned to introduce such an effective regime in Canada. The Commission can impose a condition on offering service under sections 24 and 24.1 of the Act, and has already indicated that it has the exclusive mandate, under section 36 of the Act, to authorize activity such as disabling access to certain websites in support of the telecommunications policy objectives.<sup>52</sup> As a practical matter, the Commission is also well-positioned to evaluate the dramatic impact of piracy on the broadcasting system it oversees.

72. With its specialized expertise and mandate, the Commission has an opportunity to introduce in Canada a regime that can help ensure the telecommunications system continues to be used to contribute to the social and economic fabric of Canada, and provide rightsholders in Canada with a tool widely available in other parts of the world. By creating a process that relies on an application to the specialized IPRA body and ultimate decision by the Commission, as described below, it is possible to create an efficient, effective, transparent, and practical regime tailored to Canada's existing legal and regulatory framework.

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<sup>52</sup> Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016), affirmed in Telecom Decision CRTC 2016-479.

73. Attached as Appendix A to this application is an opinion prepared by McCarthy Tétrault LLP confirming the Commission's jurisdiction to implement the proposed regime and that the regime does not raise free speech issues under the Charter and complies with the Commission's common law duties of procedural fairness.

**(a) The Role of IPRA**

74. IPRA's role will be to consider applications from rightsholders and other applicants regarding the addition of a website to the list of piracy sites, receive and review evidence from the applicant, the alleged piracy site, and ISPs, hold an oral hearing by teleconference if required, and then submit a recommendation to the Commission on whether to add that site to the list of sites to which ISPs are required to disable access.

75. The IPRA would be independent and would consider applications based on the evidence presented. It would only recommend adding a website to the list of piracy sites if the evidence presented establishes that it is blatantly, overwhelmingly, or structurally engaged in piracy.

**(b) The Role of the ISP**

76. In accordance with the principles of net neutrality and in particular the principle that ISPs themselves function and will continue to function as common carriers, under the coalition's proposal ISPs would not be required to monitor piracy nor could they unilaterally determine which websites are added to the list of piracy sites. Instead, the role of ISPs would be restricted to implementing a legal requirement to prevent access to piracy sites, which are already unlawful, as directed by and identified by the Commission (on the recommendation of the IPRA).<sup>53</sup> Net neutrality does not prevent the legal and regulatory systems from taking steps to constrain the dissemination of unlawful content online.<sup>54</sup>

**(c) Establishment of the IPRA**

77. The coalition propose that the IPRA be formed as a not for profit corporation pursuant to the *Canada Not-for-profit Corporations Act* (the "**NFP Act**")<sup>55</sup> and be overseen by a Board of Directors. The corporate and

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<sup>53</sup> The Supreme Court of Canada has confirmed that such a regime has no impact on the neutrality of an intermediary such as an ISP: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 49.

<sup>54</sup> For example, the Open Internet Order in the United States was only in relation to "lawful" content: see e.g., 76 FR 59191 ("The rule protects only transmissions of lawful content"). See also Article 3, paragraph 1 of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

<sup>55</sup> S.C. 2009, c. 23.

organizational structure should be based to a large degree upon the structure of the Commissioner of Complaints for Telecommunications Services Inc. (“**CCTS**”).

78. The IPRA’s corporate structure would be similar to that of many not-for-profit corporations, and would consist of Members (under the NFP Act, not-for-profit corporations are required to have members), an unpaid Board of Directors, and a small number of part-time staff with relevant experience who would be responsible for receiving and reviewing applications and making recommendations.

79. The IPRA’s independence would be reflected in the fact that its Board of Directors would be nominated by its Members, rightsholders, ISPs, and consumer advocacy and citizen groups, with no single stakeholder group having a controlling position. The Board of Directors would be responsible for financial oversight and for ensuring that the IPRA has appropriate policies, procedures, and staff in place but would have no involvement whatsoever in evaluating applications to identify particular sites as piracy sites. Instead, acting pursuant to the policies and procedures, the staff would be responsible for all decisions regarding piracy sites and related recommendations to the Commission.

80. The IPRA’s Members would consist of its Directors in order to comply with the requirements of the NFP Act and at the same time ensure as efficient and streamlined a structure as possible. This is also consistent with the governance structures of the CCTS.

81. It is expected that the IPRA, which would not require significant resources, would become self-funding through a reasonable application fee charged to applicants that seek to have a site designated as a piracy site. The fee would effectively cover the costs to the IPRA of the staff time required to review the application and make the recommendation to the Commission.

82. The coalition recommends that, should the Commission adopt this proposal, the members of the coalition that are Canadian carriers be directed by the Commission to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop a proposed governance structure and constating documents for the IPRA to be considered in a follow-up proceeding held by the Commission.

83. While the IPRA is expected to be self-funding after it is established, members of the coalition have agreed to voluntarily provide reasonable seed funding to establish the IRPA and support its initial operations.

**(d) Evaluation Criteria**

84. The coalition also recommends that the Commission establish criteria against which both it and the IPRA could evaluate whether a particular site is blatantly, overwhelmingly, or structurally engaged in piracy. Should the Commission adopt this proposal, it could direct the members of the coalition that

are Canadian carriers to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop proposed criteria that would also be considered in the follow-up proceeding held by the Commission.

85. While there would be flexibility in developing criteria, both the experience in other jurisdictions and related factors in the *Copyright Act* provide a good template. Based in part on these precedents, the coalition believes the following criteria could be used in connection with determining whether a location on the internet is blatantly, overwhelmingly, or structurally engaged in piracy:

- a) The extent, impact, and flagrancy of the website's piracy activities;
- b) The disregard for copyright demonstrated by the website's owners, pirate operators, or users;
- c) Whether the website is expressly or implicitly marketed or promoted in connection with potential infringing uses;
- d) The significance of any non-infringing uses, compared to the infringing uses;
- e) The effectiveness of any measures taken by the website to prevent infringements;
- f) Any other relevant finding against the website, related websites, or the website's owners in Canada or any other jurisdiction by a court or administrative tribunal; and
- g) Any efforts by the website's owners or members to evade legal action.

**(e) IPRA Timelines and Process**

86. The IPRA's procedures would be designed to guarantee a fair process while remaining efficient, proportional, transparent, and expeditious. The coalition recommends that the Commission direct IPRA to establish a procedure consistent with the following principles:

- a) **Commencing an Application:** An applicant can commence the process by filing an application with IPRA, identifying a piracy site and including evidence regarding the site's activities and relevant to the evaluation criteria.
- b) **Service:** Service would be accomplished electronically by serving all ISPs using the email address currently on file with the Commission and by attempting to serve the website owner at the contact email address provided on the website (if any) as well as via a "WHOIS" lookup, and if necessary through any additional measures required by the IPRA. Accordingly, the website and ISPs would have notice of and access to the application and evidence.

- c) **Response:** If a website owner or ISP objects to the application she or he would have 15 days to serve a notice of intent to respond on the IPRA and the applicant. If such a notice is served, the person objecting would have 15 additional days to provide evidence in response. If no response is made to the application, the IPRA would still be required to consider whether the evidence in the application is sufficient to determine that the site is a piracy site.
- d) **Potential Oral Hearing:** If it considers it necessary, the IPRA would have the discretion to hold an oral hearing by teleconference within 15 days of receiving the response.
- e) **IPRA Recommendation:** The IPRA would consider the evidence and representations of the applicant, website owner, and ISPs, and, based on the criteria, decide whether to recommend to the Commission that it add the website to the list of piracy sites.

**(f) CRTC Decision & Review**

87. The IPRA would submit its recommended additions to the list of piracy sites to the Commission for consideration and approval, and the Commission would consider whether or not to follow the recommendation after conducting a review. If the Commission accepted an IPRA recommendation to identify an additional piracy site, it would provide reasons to the site operator and issue a decision 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.

88. The obligation and approval for ISPs to begin disabling access to the sites would only be triggered by the Commission's decision. The role and purpose of the IPRA would be to manage the workload imposed on the Commission and create a significantly more timely and efficient process for considering applications than would be possible for the Commission. The efficiency of the process is crucial, given the pace at which piracy can evolve online.

89. A person whose website has been identified as a piracy site or any other appropriate party that wishes to object to or amend the Commission's approval of additions to the list of piracy sites would do so by making an application under section 62 of the Act. Alternatively, that party could seek leave to appeal the Commission's decision or judicial review of the Commission's decision in the Federal Court of Appeal. It is anticipated that such instances would be rare, given that the IPRA would only recommend and the Commission would only add websites that are blatantly, overwhelmingly, or structurally operating for an illegal purpose. In practice this would mean almost exclusively hardcore piracy sites, the proprietors of which typically recognize the indefensible nature of their conduct and do not attempt to defend it in these types of forums.

90. If any party believed that a Commission decision raised legal, jurisdictional, or constitutional issues, or was otherwise unreasonable, it could raise them through an appeal or judicial review in the Federal Court of Appeal.

91. A Commission approval process based on IPRA recommendations and the record developed by the IPRA, combined with the possibility of a more expansive process open to the public pursuant to an application under section 62 of the Act or an appeal or judicial review in the Federal Court of Appeal, would appropriately balance the interests of affected parties by ensuring that the system is procedurally fair while at the same time ensuring that the system operates quickly enough to achieve its important objectives.

## **E. TELECOMMUNICATIONS POLICY CONSIDERATIONS**

92. Section 36 of the Act provides that “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 has considered the scope of section 36 in the 2009 internet traffic management practice (“ITMP”) proceeding and in a 2016 proceeding regarding section 12 of the Quebec *Budget Act*. In those proceedings two principles emerge. First, the Commission will consider whether to grant approval under section 36 based on whether the measure approved “would further the telecommunications policy objectives set out in section 7 of the Act”.<sup>56</sup> Second, the Commission considers that it has the primary mandate to consider whether a service provider can disable access to a site and that its approval is required regardless of other legal or juridical requirements.

93. Consistent with these principles, the coalition brings this application before the Commission. As described above, piracy is a major and urgent threat to Canada’s social and economic fabric, and its growing impact despite years and millions of dollars invested in traditional enforcements represents an exceptional circumstance that must be dealt with to protect the ability of Canada’s communications system to advance the objectives of the *Telecommunications Act*. In accordance with the Commission’s view of its mandate, the coalition believes the Commission is an appropriate, and certainly the most efficient, forum to deal with that threat.

### **(a) Respecting the Role of ISPs as Common Carriers**

94. The establishment of IPRA as an independent third party with a mandate to recommend to the CRTC the piracy sites to which ISPs should be required to disable access ensures that ISPs continue to operate as neutral intermediaries

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<sup>56</sup> *Telecom Regulatory Policy* 2009-657; Telecom Commission Letter Addressed to Distribution List and Attorneys General (1 September 2016); Telecom Decision CRTC 2016-479.

and never to exercise any control over or influence the purpose or meaning of the content they carry. Instead, the ISP simply implements a Commission determination. Thus, the important telecommunications policy principle of separation of carriage and content is maintained.<sup>57</sup> Legally requiring ISPs not to provide access to websites that are unlawful does not involve the issues of common carriage obligations or net neutrality and both principles would remain fully respected.

**(b) Fulfillment of Telecommunications Policy Objectives**

95. Granting the order sought in this application under sections 24, 24.1, and 36 of the Act will fulfill a number of the telecommunications policy objectives set out in section 7 of the Act, specifically:

- (i) **Section 7(a)** calls for a telecommunications system “that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions”. Internet piracy represents a threat to the social and economic fabric of Canada. It threatens the profitability, viability and employment generated by Canadian creative and broadcasting industries. Similarly, piracy represents a threat to the social fabric of Canada by undermining the creation and legitimate dissemination of Canadian works (and other socially important works). It also harms consumers and undermines Canadian’s trust in, and therefore the development of, the digital economy.
- (ii) **Section 7(h)** calls for a telecommunications system that “responds to the economic and social requirements of users of telecommunications services”. Clearly the Canadian telecommunications system should encourage compliance with Canada’s laws, including laws with respect to the intellectual property communicated by telecommunications. Those laws exist to foster social and economic objectives important to Canadian society, including encouraging the creation and dissemination of creative works through the creation of a rights system (under the *Copyright Act* and related statutes) that fairly compensates content creators.
- (iii) **Section 7(i)** calls for a telecommunications system “to contribute to the protection of the privacy of persons.” Piracy sites are among the leading sources of the dissemination of malware and the hacking and theft of the personal and private information of Canadian consumers. Disabling access to some of the most prominent ones will significantly contribute toward the protection of the privacy of Canadian Internet users.

96. This proposal allows relevant stakeholders to come together to address the increasingly serious threat to Canada’s economic and social fabric posed by Internet piracy which, given its online nature and the existing legislative and

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<sup>57</sup> As described in note 27, above, this has recently been confirmed by the Supreme Court.

regulatory framework in Canada, is most effectively dealt with by means of the Commission's telecommunications policies.

**F. Implementation**

97. The coalition requests that in its decision on the current application, the Commission impose a condition under sections 24 and 24.1 of the Act on all companies offering Internet access service in Canada requiring them to disable access to locations on the Internet identified as piracy sites by the Commission from time to time. The list of sites could be maintained as an appendix to the decision on the current application, with the Commission amending the appendix each time a new site is added to the list.

98. The coalition also requests that the decision on the current application approve under section 36 of the Act the actions required to be taken by ISPs to comply with the condition.

99. Finally, the coalition requests that the members of the coalition that are Canadian carriers be directed to work with rightsholders, other ISPs, and consumer advocacy and citizen groups to develop the proposed governance structure, constating documents, and evaluation criteria for the IPRA, as discussed above. These materials would form the basis of a further application to the Commission to consider and approve (with changes, if necessary) the detailed nature of the operations of the IPRA, similar to what was done in respect of the CCTS in Telecom Decision CRTC 2007-130.

100. As the proposed regime would not be operational until the follow-up proceeding is complete, the coalition recommends that the Commission direct the responsible carriers to file such a further application within three months of the Commission's decision on the current application.

**G. CONCLUSION**

101. This proposal advanced in this Application represents an effective, efficient, and moderate approach to advancing the economic and social objectives of the *Telecommunications Act*.

- It addresses the rapidly growing crisis of Internet piracy that threatens jobs and economic and cultural output in Canada's creative economy;
- It is carefully tailored to address only sites that are blatantly, overwhelmingly, or structurally engaged in piracy;
- It is a practical approach that reflects the modern realities of piracy, including the shift from downloading to streaming and the increasing ease with which content can be stolen, relocated and transmitted internationally;

- It ensures fairness and accountability through transparent decision-making following a robust evidentiary and hearing process, conducted by an independent administrative body with extensive experience making decisions in the public interest, and subject to judicial oversight.
- It preserves net neutrality in Canada by continuing to treat ISPs as common carriers who do not unilaterally disable access to piracy sites.

102. The coalition hopes that the Commission will approve this initiative and we look forward to working with the Commission and other stakeholders in implementing this important proposal.



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January 26, 2018

**Privileged & Confidential**

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**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**”)<sup>1</sup> 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**”)<sup>2</sup> or the CRTC’s common law duty of procedural fairness.

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<sup>1</sup> S.C. 1993, c. 38.

<sup>2</sup> Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act, 1982* (U.K.), 1983, c. 11.  
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**TABLE OF CONTENTS**

1. EXECUTIVE SUMMARY .....3

2. FACTS .....4

3. DISCUSSION.....7

    (a) Jurisdiction to Implement the Proposed Regime.....7

        (i) The *Telecommunications Act* .....7

            A. Introduction.....7

            B. Sections 24 and 24.1 .....10

            C. Section 36.....20

            D. The Section 7 Policy Objectives.....23

        (ii) The Broader Statutory Context .....27

            A. An Interrelated Scheme .....27

            B. The *Broadcasting Act*.....29

            C. The *Radiocommunication Act*.....36

            D. The *Copyright Act*.....38

    (b) Compliance With the *Canadian Charter of Rights and Freedoms*.....51

    (c) Common Law Requirements of Procedural Fairness.....56

## 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**”),<sup>3</sup> the *Radiocommunication Act* (the “**Radiocommunication Act**”)<sup>4</sup> and the *Copyright Act* (the “**Copyright Act**”).<sup>5</sup> 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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<sup>3</sup> S.C. 1991, c. 11.

<sup>4</sup> R.S.C. 1985, c. R-2.

<sup>5</sup> 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,<sup>6</sup> 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, identity 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

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<sup>6</sup> 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...<sup>7</sup>

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;<sup>8</sup> 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*.<sup>9</sup> 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

<sup>7</sup> *Sony Music Entertainment Ireland Ltd. v. UPC Communications Ireland Ltd.*, [2016] IECA 231, ¶7-8.

<sup>8</sup> This opinion assumes that the order will be directed at retail rather than wholesale Internet services offered by ISPs.

<sup>9</sup> 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.<sup>10</sup> 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.

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<sup>10</sup> 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. ...<sup>11</sup>

ISPs may provide retail Internet services directly to consumers, or wholesale Internet services to other ISPs. They fall into two main groups:<sup>12</sup>

- (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**”).<sup>13</sup>
- (2) ISPs that are not TCCs but are still “telecommunications service providers” (“**TSPs**”),<sup>14</sup> 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”).<sup>15</sup> Therefore, Primary

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<sup>11</sup> [2012] 1 S.C.R. 142, ¶2.

<sup>12</sup> *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.

<sup>13</sup> 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.

<sup>14</sup> 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”.

<sup>15</sup> *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*.<sup>16</sup> 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*.<sup>17</sup>

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”.<sup>18</sup> 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”),<sup>19</sup> 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”.<sup>20</sup>

The CRTC has concluded that the transmission of programs over the Internet constitutes a form of “broadcasting”,<sup>21</sup> 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”<sup>22</sup> 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*.<sup>23</sup> 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**”.<sup>24</sup>

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<sup>16</sup> *Ibid*, ¶8.

<sup>17</sup> *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.

<sup>18</sup> *Telecommunications Act*, s. 2(1), s.v. “telecommunications”.

<sup>19</sup> *Ibid*, s. 2(1), s.v. “intelligence”.

<sup>20</sup> *Broadcasting Act*, s. 2(1), s.v. “program”.

<sup>21</sup> *New Media – Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14*, 17 May 1999, ¶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.

<sup>22</sup> Section 2(1) of the *Broadcasting Act* defines a “broadcasting undertaking” to “include[e] a distribution undertaking, a programming undertaking and a network”.

<sup>23</sup> This follows from s. 4 of the *Telecommunications Act* and s. 4(4) of the *Broadcasting Act*, discussed at pages 30-31 below.

<sup>24</sup> *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**")<sup>25</sup> and *National Telecommunications Powers and Procedures Act* ("**NTPPA**")<sup>26</sup> (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).<sup>27</sup> 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".<sup>28</sup> 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.<sup>29</sup>

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<sup>25</sup> R.S.C. 1985, c. R-3.

<sup>26</sup> R.S.C. 1985, c. N-20.

<sup>27</sup> Formerly the Board of Transport Commissioners of Canada, formerly the Board of Railway Commissioners of Canada.

<sup>28</sup> *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶38.

<sup>29</sup> *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*.<sup>30</sup>

As the Supreme Court of Canada has observed, the *Telecommunications Act* grants the CRTC “broad” and “comprehensive regulatory powers”, including “numerous specific powers”.<sup>31</sup> 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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<sup>30</sup> *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.

<sup>31</sup> *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.<sup>32</sup>

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,<sup>33</sup> 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).<sup>34</sup> 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.<sup>35</sup> 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 has been recognized by the CRTC itself.<sup>36</sup> Further, s. 73(2)(b) of the *Telecommunications Act*

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<sup>32</sup> 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.

<sup>33</sup> 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.

<sup>34</sup> *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.

<sup>35</sup> *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.

<sup>36</sup> *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”.<sup>37</sup> 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*<sup>38</sup> 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. ...<sup>39</sup>

<sup>37</sup> *House of Commons Debates*, 34<sup>th</sup> Parl., 3<sup>rd</sup> Sess., No. 14 (19 April 1993) at 18070 (Hon. Perrin Beatty).

<sup>38</sup> [2009] 2 S.C.R. 764.

<sup>39</sup> *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.<sup>40</sup>

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*.<sup>41</sup> 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.

...

<sup>40</sup> *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.

<sup>41</sup> 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. ...<sup>42</sup>

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.<sup>43</sup> 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***

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<sup>42</sup> *Ibid.*, ¶¶49-50 and 55-57, *emphasis added*.

<sup>43</sup> *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.<sup>44</sup>

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”.<sup>45</sup> 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.**<sup>46</sup>

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.<sup>47</sup> Notably, several of the s. 24.1 illustrations are similar to

<sup>44</sup> *Ibid.*, ¶26-27, *emphasis added*.

<sup>45</sup> *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.

<sup>46</sup> *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.

<sup>47</sup> 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.<sup>48</sup>
- Security deposit policies, provision of telephone directories and the suspension or disconnection of service.<sup>49</sup>
- 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.<sup>50</sup>
- Requiring carriers to communicate certain information (e.g., in residential telephone directories, newspaper notices or communications plans for local forbearance) in alternative formats to visually impaired Canadians upon request.<sup>51</sup>
- Requiring carriers who serve multi-dwelling units to allow other carriers to access subscribers in the units using their facilities.<sup>52</sup>
- Requiring that cable carriers offering high-speed retail Internet service make that service available for resale by other ISPs at a discount.<sup>53</sup>

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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*, 6<sup>th</sup> ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), §13.4 (and §13.5 and 24.76-24.78).

<sup>48</sup> *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.

<sup>49</sup> *Forbearance from the regulation of retail local exchange services – Telecom Decision CRTC 2006-15*, 6 April 2006, ¶391.

<sup>50</sup> *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.

<sup>51</sup> *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.

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

<sup>53</sup> *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.<sup>54</sup>
- 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.<sup>55</sup>
- 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.<sup>56</sup>
- 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.<sup>57</sup>

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

<sup>55</sup> *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.

<sup>56</sup> *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.

<sup>57</sup> *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.**<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> 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**

<sup>58</sup> 2016 FCA 217, ¶53, *emphasis added*.

<sup>59</sup> *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.

<sup>60</sup> *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.**<sup>61</sup>

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*)<sup>62</sup> 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”.<sup>63</sup> Indeed, it has found that these provisions confer “ample authority” in their own right.<sup>64</sup>

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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<sup>61</sup> [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.

<sup>62</sup> 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*.

<sup>63</sup> *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.

<sup>64</sup> *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.<sup>65</sup> 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*,<sup>66</sup> 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.<sup>67</sup> Other examples of CRTC pre-approval powers are found in ss. 25(1)<sup>68</sup> and 29.<sup>69</sup>

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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<sup>65</sup> 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, ¶193 (“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.”).

<sup>66</sup> S.C. 1987, c. 19.

<sup>67</sup> *Telecommunications Act*, ss. 41.5, 46.3(2), 46.4(b) and 46.5(3)(b).

<sup>68</sup> *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.

<sup>69</sup> *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.<sup>70</sup> This has been recognized by the CRTC.<sup>71</sup>

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.<sup>72</sup> 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.*<sup>73</sup> 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*,<sup>74</sup> 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. ...<sup>75</sup>

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”.<sup>76</sup> While such approval will only be forthcoming in “exceptional circumstances”,<sup>77</sup> the CRTC

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<sup>70</sup> *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.

<sup>71</sup> *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”).

<sup>72</sup> *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 2011, ¶9; *Telecom Commission Letter Addressed to Distribution List and Attorneys General – 8663-P8-201607186*, 1 September 2016.

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

<sup>74</sup> S.C. 1916, c. 66.

<sup>75</sup> *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*.

<sup>76</sup> *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.<sup>78</sup> 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”.<sup>79</sup> 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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<sup>77</sup> *Review of the Internet traffic management practices of Internet service providers* – Telecom Regulatory Policy CRTC 2009-657, 21 October 2009, ¶122.

<sup>78</sup> *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.

<sup>79</sup> *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”.<sup>80</sup> 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.<sup>81</sup>

Further, s. 1 of Cabinet’s *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*<sup>82</sup> – 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:

...

<sup>80</sup> *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.

<sup>81</sup> *House of Commons Debates*, 34<sup>th</sup> Parl., 3<sup>rd</sup> 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).

<sup>82</sup> 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.<sup>83</sup>

Accordingly, the CRTC can be expected to strike a balance between public and private interests under s. 7.<sup>84</sup> 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).<sup>85</sup>

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<sup>83</sup> *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶45, 47, 72, 75 and 77, *emphasis added*.

<sup>84</sup> *Federation of Canadian Municipalities v. AT&T Canada Corp.*, 2002 FCA 500, ¶28, leave to appeal refused, [2003] S.C.C.A. No. 97.

<sup>85</sup> 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.*,<sup>86</sup> 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.*** ...<sup>87</sup>

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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<sup>86</sup> 2017 SCC 24.

<sup>87</sup> *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"**. ...<sup>88</sup>

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.**<sup>89</sup>

<sup>88</sup> [2002] 2 S.C.R. 559, ¶26-27, *emphasis added*.

<sup>89</sup> *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*.<sup>90</sup> 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.<sup>91</sup>

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".<sup>92</sup> 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***

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<sup>90</sup> *Ibid.*, ¶39 and 61.

<sup>91</sup> *Ibid.*, ¶44-45, *underlining in original*.

<sup>92</sup> [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.**<sup>93</sup>

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*.<sup>94</sup>

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,

---

<sup>93</sup> *Ibid*, ¶2-5 and 9, *emphasis added*. The Supreme Court's decision in the *ISP*

<sup>94</sup> 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. ...<sup>95</sup>

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".<sup>96</sup> 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.<sup>97</sup>

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*,<sup>98</sup> the Federal Court of Appeal recently recognized that the CRTC could assert

<sup>95</sup> *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 24, ¶49, *emphasis added*.

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

<sup>97</sup> 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").

<sup>98</sup> 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.***<sup>99</sup>

In concurring reasons that were agreed with by the majority,<sup>100</sup> 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).<sup>101</sup> Instead, the question had to turn on whether Bell was also broadcasting ***as a broadcasting undertaking.***<sup>102</sup> 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

<sup>99</sup> *Ibid*, ¶¶60-62 and 68-69, *emphasis added*.

<sup>100</sup> *Ibid*, ¶59.

<sup>101</sup> *Ibid*, ¶33.

<sup>102</sup> *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 paragraph 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 content, 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.***<sup>103</sup>

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.

---

<sup>103</sup> *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*”.<sup>104</sup>

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*,<sup>105</sup> 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 programming 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.<sup>106</sup>

While the *Telecommunication Act* – unlike the *Radiocommunication Act*<sup>107</sup> – 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

<sup>104</sup> *Ibid*, 2016 FCA 185, ¶39.

<sup>105</sup> [2002] 2 S.C.R. 559.

<sup>106</sup> *Ibid*, ¶49, *emphasis added*.

<sup>107</sup> *Ibid*, ¶44.

relevant”).<sup>108</sup> 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**.<sup>109</sup>

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*”.<sup>110</sup>

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:<sup>111</sup>

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;

...

<sup>108</sup> [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*.

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

<sup>110</sup> 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.

<sup>111</sup> 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),<sup>112</sup> and then “retransmit[s] [it] to the public”, will incur criminal and civil liability under the Act.<sup>113</sup> The activities of many pirate operators would fit comfortably within this prohibition.<sup>114</sup> By implementing the Proposed Regime, therefore, the CRTC will be acting in a manner that is consistent with the purposes of the *Radiocommunication Act*.

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

<sup>113</sup> 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.

<sup>114</sup> See: *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137, ¶32; *Echostar Satellite LLC v. Pelletier*, 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,<sup>115</sup> including rights to reproduce or to communicate works to the public by telecommunication,<sup>116</sup> 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,

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

<sup>116</sup> 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,<sup>117</sup> which includes the right of making the work or other subject matter available to the public.<sup>118</sup> 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*.<sup>119</sup> 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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<sup>117</sup> *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.

<sup>118</sup> *Copyright Act*, ss. 2.4(1.1), 15(1.1)(d), 18(1.1)(a).

<sup>119</sup> *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 download 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),<sup>120</sup> 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.<sup>121</sup>

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”.<sup>122</sup>

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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<sup>120</sup> 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.

<sup>121</sup> 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.

<sup>122</sup> *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”.<sup>123</sup> 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.<sup>124</sup>

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),<sup>125</sup> which provides:

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

<sup>123</sup> *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.

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

<sup>125</sup> 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.<sup>126</sup>

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”.<sup>127</sup>

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*.<sup>128</sup> 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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<sup>126</sup> [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).

<sup>127</sup> *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶7.

<sup>128</sup> 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*.<sup>129</sup>

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.**<sup>130</sup>

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.<sup>131</sup> 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”.<sup>132</sup> 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

<sup>129</sup> *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.

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

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

<sup>132</sup> *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".<sup>133</sup> 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",<sup>134</sup> 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"...<sup>135</sup>

**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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<sup>133</sup> Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 S.C.R. 489, ¶67 and 82.

<sup>134</sup> *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*").

<sup>135</sup> *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.***<sup>136</sup>

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:<sup>137</sup>

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

<sup>136</sup> *Ibid*, ¶¶69-70, *underlining in original, bolding and italics added*.

<sup>137</sup> 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 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.***<sup>138</sup>

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.<sup>139</sup> 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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<sup>138</sup> *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*]

<sup>139</sup> 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*.<sup>140</sup> 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”<sup>141</sup> – 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*<sup>142</sup> 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.**<sup>143</sup>

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.**<sup>144</sup>

<sup>140</sup> *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.

<sup>141</sup> *Ibid*, ¶72.

<sup>142</sup> S.C. 2012, c. 20.

<sup>143</sup> 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*.

<sup>144</sup> [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.<sup>145</sup> 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*.<sup>146</sup>

**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.<sup>147</sup> This created fundamental fairness concerns when the Rejected Regimes were being debated by Parliament,<sup>148</sup> which are not present in the Proposed Regime given the interposition of the IPRA and CRTC.<sup>149</sup> 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”.<sup>150</sup> 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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<sup>145</sup> 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).

<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> *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*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 005 (29 February 2012) (Robert D’Eith).

<sup>149</sup> 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.

<sup>150</sup> *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 Proposed Regime “restrict[s] the flow of information” on the Internet “and, as a result, freedom of expression”.<sup>151</sup> 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.)*.<sup>152</sup> 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”.<sup>153</sup> 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...<sup>154</sup>

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”<sup>155</sup>

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 &*

<sup>151</sup> *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.

<sup>152</sup> [2015] 1 S.C.R. 613.

<sup>153</sup> *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.

<sup>154</sup> *Loyola High School v. Quebec (A.G.)*, [2015] 1 S.C.R. 613, ¶39, *emphasis added*.

<sup>155</sup> [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.***<sup>156</sup>

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)*.<sup>157</sup> 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.***<sup>158</sup>

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.<sup>159</sup>

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

<sup>156</sup> [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).

<sup>157</sup> [1997] 2 F.C. 306 (T.D.), ¶78-117.

<sup>158</sup> *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.

<sup>159</sup> *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.

<sup>160</sup> 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.**<sup>161</sup>

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.<sup>162</sup> 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,<sup>163</sup> generally because of the countervailing interests that the CRTC is required to

<sup>161</sup> *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*.

<sup>162</sup> *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. (4<sup>th</sup>) 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).

<sup>163</sup> *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.*,<sup>164</sup> 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*.<sup>165</sup>

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.<sup>166</sup> In concluding that it did, the Court emphasized that the harm to the plaintiff's intellectual property rights would "far outweigh[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**

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<sup>164</sup> [1979] 1 S.C.R. 2.

<sup>165</sup> *Ibid.*, at 14-15, *emphasis added*.

<sup>166</sup> See *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2014 NLCA 46, ¶166 ("[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.**<sup>167</sup>

The proportionate nature of the Proposed Regime in relation to pirate operators<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup>

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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<sup>167</sup> *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**".

<sup>168</sup> 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.

<sup>169</sup> *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.

<sup>170</sup> *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.

<sup>171</sup> [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.***<sup>172</sup>

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.<sup>173</sup> The Proposed Regime does not authorize any greater interference with freedom of expression than 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.<sup>174</sup> 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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<sup>172</sup> *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*.

<sup>173</sup> 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. Pelletier*, 2010 ONSC 2282, ¶7-9 and 64.

<sup>174</sup> *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 communications 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.<sup>175</sup>

Applying these factors here:<sup>176</sup>

- (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.<sup>177</sup> If the pirate operator raises an issue that falls outside the scope of the s. 64(1)

<sup>175</sup> [2011] 2 S.C.R. 504, ¶58-42.

<sup>176</sup> 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.

<sup>177</sup> *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*.<sup>178</sup>

- (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,<sup>179</sup> 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.<sup>180</sup> Similar procedures have been found adequate to satisfy the duty of fairness in several other decisions involving the CRTC.<sup>181</sup>

This is illustrated by *Country Music Television, Inc. v. Canada (C.R.T.C.)*,<sup>182</sup> 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.

<sup>178</sup> 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.

<sup>179</sup> *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.

<sup>180</sup> *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.

<sup>181</sup> *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.

<sup>182</sup> [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.***<sup>183</sup>

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 requirements of procedural fairness are met.<sup>184</sup> Indeed, given that the IPRA will have the ability to hold oral

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<sup>183</sup> *Ibid*, ¶10-12, *emphasis added*.

<sup>184</sup> We acknowledge that there may be some cases in which the CRTC is unable to 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,<sup>185</sup> 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*,<sup>186</sup> 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.<sup>187</sup> 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,<sup>188</sup> 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.<sup>189</sup>

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.<sup>190</sup> In *Thomson v. Canada (Deputy Minister of Agriculture)*,<sup>191</sup> 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,<sup>192</sup> which had held a hearing before making a non-binding recommendation to the Deputy Minister to grant the clearance.<sup>193</sup> 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).

<sup>185</sup> *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.

<sup>186</sup> See footnote 179 above, in addition to ss. 55(e) and 57 of the *Telecommunications Act*.

<sup>187</sup> See, by analogy, *Canadian Union of Public Employees (Airline Division) v. Air Canada*, 2013 FC 184, ¶45-56.

<sup>188</sup> See *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at 401-403.

<sup>189</sup> 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.

<sup>190</sup> 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.

<sup>191</sup> [1992] 1 S.C.R. 385.

<sup>192</sup> *Ibid.*, at 401-402.

<sup>193</sup> *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.<sup>194</sup>

The Supreme Court reached a similar conclusion in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>195</sup> 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.<sup>196</sup> 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".<sup>197</sup>

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<sup>194</sup> *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.

<sup>195</sup> [1999] 2 S.C.R. 817.

<sup>196</sup> *Ibid*, ¶33-34.

<sup>197</sup> *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.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> 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,<sup>201</sup> 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 under 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.<sup>202</sup>

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**

<sup>198</sup> 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.

<sup>199</sup> *Telecommunications Act*, s. 55(d). See also *Penny v. Bell Canada*, 2010 ONSC 2801, ¶133.

<sup>200</sup> 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.

<sup>201</sup> The scope of this appeal right is discussed at pages 57-58 above.

<sup>202</sup> 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. ...**<sup>203</sup>

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

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<sup>203</sup> *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, ¶31, *emphasis added*.