Court File No. A-440-19

FEDERAL COURT OF APPEAL

BETWEEN:

TEKSAVVY SOLUTIONS INC.

APPELLANT

- and -

BELL MEDIA INC. AND OTHERS

RESPONDENTS

MOTION RECORD OF THE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
306 – 268 Keefer Street
Vancouver, BC V6A 1X5

Emily Lapper
Tel: 778-370-5655
Fax: 604-687-3045
emily@bccla.org
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

GIB VAN ERT LAW
148 Third Ave
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
gib@gibvanertlaw.com
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N :

TEKSAVVY SOLUTIONS INC.

APPELLANT

- and -

BELL MEDIA INC. AND OTHERS

RESPONDENTS

MOTION RECORD OF THE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
306 – 268 Keefer Street
Vancouver, BC V6A 1X5

Emily Lapper
Tel: 778-370-5655
Fax: 604-687-3045
emily@bccla.org
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

GIB VAN ERT LAW
148 Third Ave
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
gib@gibvanertlaw.com
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

TO: **THE REGISTRAR**
Federal Court of Appeal

AND TO:

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin Baxter (cbaxter@conway.pro)
Marion Sandilands (msandilands@conway.pro)
Tel: 613-780-2012
Fax: 613-688-0271

Counsel for the Appellant, Teksavvy Solutions Inc.

AND TO:

SMART & BIGGAR LLP
1000 De La Gauchetière Street West, Suite 3300,
Montréal, QC H3B 4W5

François Guay (fguay@smart-biggar.ca)
Guillaume Lavoie Ste-Marie (glavoisstemarie@smart-biggar.ca)
Joshua Neubarth (jneubarth@smart-biggar.ca)
Olivier Jean-Lévesque (ojean-leveseque@smart-biggar.ca)
Tel: 514-954-1500
Fax: 524-954-1396

Counsel for the Respondents, Bell Media Inc., Groupe TVA Inc., Rogers Media Inc., Bell Canada, Fido Solutions Inc., Rogers Communications Canada Inc., and Videotron Ltd.

TABLE OF CONTENTS

TAB 1

Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N :

TEKSAVVY SOLUTIONS INC.

APPELLANT

- and -

BELL MEDIA INC. AND OTHERS

RESPONDENTS

NOTICE OF MOTION OF THE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

TAKE NOTICE THAT the British Columbia Civil Liberties Association ("BCCLA") will make a motion to the Court in writing pursuant to Rules 109 and 369 of the *Federal Court Rules*.

THIS MOTION IS FOR an Order that:

1. The BCCLA be granted leave to intervene, pursuant to Rule 109 of the *Federal Court Rules*, in this Appeal of the decision of Justice Gleeson, dated November 15, 2019, on the following terms:

    (a) The BCCLA may file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;

(b) The BCCLA may appear and make oral submissions at the hearing of this proceeding not exceeding 15 minutes, or such other duration as this Court may direct;

(c) The BCCLA shall accept the record as adduced by the parties, and shall not seek to file any additional evidence;

(d) The BCCLA may participate in any future case conferences in this proceeding;

(e) Any documents served on any party in this proceedings must also be served on the BCCLA;

(f) The BCCLA shall have no right to appeal from any final order made in this proceeding; and

(g) The BCCLA may not seek costs or have costs awarded against it.

2. The style of cause of these proceedings be amended to add the British Columbia Civil Liberties Association as an intervener, and hereinafter all documents shall be filed under the amended style of cause.

3. No costs of this motion are awarded to any party.

THE GROUNDS FOR THE MOTION ARE:

1. This appeal raises questions that have attained a public dimension, and engage serious issues of public interest related to freedom of expression in the context of internet regulation;

2. The BCCLA has a long-standing interest in issues of freedom of expression and has significant experience dealing with situations where free expression rights are in tension with other important societal interests and values;

3. The BCCLA has the necessary knowledge, skills and resources to contribute to this Appeal and will dedicate these to the matter before the Court;

4. The BCCLA will make submissions on the application of the principles of freedom of expression to the exercise of the court's discretion to grant a site-blocking order that are useful and different from the parties, and will not duplicate the submissions of any party;

5. The BCCLA's intervention will not cause prejudice to the parties or cause delay in the proceedings;

6. The BCCLA's intervention is in the interests of justice and is consistent with the imperatives in *Federal Courts Rule* 3, to secure the "just, most expeditious and least expensive determination of every proceeding on its merits".

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of this motion:

1. The Affidavit of Grace Pastine, affirmed February 11, 2020;
2. The Written Representations of the BCCLA, dated February 11, 2020; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITED this 11th day of February, 2020

Emily Lapper

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
306 – 268 Keefer Street
Vancouver, BC V6A 1X5

Emily Lapper
Tel: 778-370-5655
Fax: 604-687-3045
emily@bccla.org
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

"Gib van Ert"

GIB VAN ERT LAW
148 Third Ave
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
gib@gibvanertlaw.com
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

TAB 2

Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N :

TEKSAVVY SOLUTIONS INC.

APPELLANT

- and -

BELL MEDIA INC. AND OTHERS

RESPONDENTS

AFFIDAVIT OF GRACE PASTINE
(Affirmed February 11, 2020)

I, GRACE PASTINE, lawyer, of 306 – 268 Keefer Street, Vancouver, British Columbia, SOLEMNLY AFFIRM THAT:

1. I am the Litigation Director at the British Columbia Civil Liberties Association ("BCCLA") and as such, I have personal knowledge of the facts deposed to in this affidavit, except where stated to be on information and belief, in which case I believe them to be true.

2. I affirm this affidavit in support of the BCCLA's motion for leave to intervene in the above noted proceeding and I am authorized to affirm this affidavit on its behalf.

3. The BCCLA believes this proceeding involves important and novel civil liberties issues related to freedom of expression and access to justice interests in the context of internet regulation. These issues fall directly within the BCCLA's mandate to promote and protect freedom of

expression on the internet, while also ensuring that Canadians who have been wronged are able to seek effective remedies through Canadian courts.

I. The British Columbia Civil Liberties Association

A. Background

4. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the British Columbia *Society Act* and continued under the current *Societies Act*. The BCCLA's objectives include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

5. The BCCLA has approximately 2,700 members and donors from across Canada who are involved in various professions, trades, or callings. The BCCLA currently has 15 employees, including an Executive Director, a Litigation Director, and an acting Policy Director, who are responsible for the day-to-day work of the organization. This gives the BCCLA a unique status in this country as a grassroots citizens' organization with the resources of a full-time staff devoted exclusively to civil liberties and human rights.

6. The BCCLA is further distinguished by having a committed volunteer board of directors that directs its policy and agenda. Through its board, the BCCLA taps the skills, expertise, and energies of a wide range of academics, professionals and lay persons with expertise and experience in the fields of civil liberties and human rights. This gives the BCCLA the benefit of their collective expertise in considering the difficult questions raised by civil liberties related concerns.

7. The BCCLA has demonstrated a long-standing, genuine, and continuing concern for the rights of the citizens in British Columbia and Canada to liberty, democracy, and freedom. In various fora, the BCCLA speaks out on the principles that promote individual rights and freedoms,

including freedom of thought, belief, conscience, religion, opinion and expression, equality, privacy and autonomy generally.

8. The BCCLA works in furtherance of its objectives in a variety of ways:

(a) The BCCLA prepares position papers and makes submissions to governmental bodies at the federal, provincial, and municipal levels concerning the advancement of civil liberties and human rights and the implications for civil liberties and human rights of proposed legislative and policy initiatives;

(b) The BCCLA engages in public education by commenting on current civil liberties and human rights issues in various news media, by participating in conferences and other public events at which civil liberties and human rights are discussed, by publishing newsletters and producing books and other publications regarding civil liberties and human rights issues, and by maintaining a website containing many of the BCCLA's position papers and other public documents;

(c) The BCCLA provides assistance to individuals who are experiencing violations of their civil liberties or human rights, including assistance in pursuing administrative and informal remedies; and,

(d) The BCCLA takes action in its own right when it perceives violations of civil liberties or human rights, either by launching complaints with the government or other administrative agencies, or by appearing in court, sometimes as a plaintiff or applicant, but most often as an intervener in legal proceedings that raise civil liberties issues.

B. BCCLA's Experience as an Intervener

9. The BCCLA frequently appears in proceedings before Canadian courts. The general goal of the BCCLA when undertaking litigation is to encourage, support, and defend the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*, the Canadian Bill of Rights, and federal, provincial and territorial human rights legislation, as well as international treaties to which Canada is a party.

10. The BCCLA has made submissions in the Federal Court and Federal Court of Appeal, both as an intervener and as a party, in numerous cases involving civil liberties and human rights. Examples include:

(a) *British Columbia Civil Liberties Association v. The Attorney General of Canada*, Federal Court File No. T-2210-14 (active litigation);

(b) *Lindsay M. Lyster and John Doe v. The Attorney General of Canada*, Federal Court File No. T-796-14 (active litigation);

(c) *Right to Life Association, et al. v Canada,* Federal Court File No. T-8-18 (active litigation);

(d) *The Attorney General of Canada v. The British Columbia Civil Liberties Association*, Federal Court File No. DES-1-16;

(e) *Schmidt v. Attorney General of Canada*, 2018 FCA 55;

(f) *Revell v. Minister of Public Safety and Emergency Preparedness,* 2017 FC 905;

(g) *British Columbia Civil Liberties Association, Canadian Association of Refugee Lawyers, and Asad Ansari v. The Attorney General of Canada,* 2016 FC 1223;

(h) *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162;

(i) *Garrick v. Amnesty International Canada*, 2011 FC 1099;

(j) *Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 918;

(k) *Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 426;

(l) *British Columbia Civil Liberties Association v. Royal Canadian Mounted Police*, 2008 FC 49;

(m) *Amnesty International Canada v. Canadian Forces*, 2008 FC 162;

(n) *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FC 336;

(o) *Amnesty International Canada et al v. Attorney General of Canada et al*, 2008 FCA 401;

(p) *Amnesty International Canada v. Canadian Forces*, 2007 FC 1147

(q) *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2007 FC 901

(r) *Singh v. Canada (Attorney General)*, [2000] F.C.J. No. 1007; and

(s) *Adriaanse v. Malmo Levine*, [1998] F.C.J. No. 1912.

11. The BCCLA is also a frequent intervener in cases before the Supreme Court of Canada. To date, the Supreme Court has granted the BCCLA leave to intervene in over 90 cases involving civil liberties, human rights, and/or international law. Some recent examples include:

(a) *Attorney General of Quebec, et al. v. 9147-0732 Québec inc*., SCC File No. 38613;

(b) *Chaycen Michael Zora v. Her Majesty the Queen*, SCC File No. 38540;

(c) *1704604 Ontario Limited v. Pointes Protection Association, et al*, SCC File No. 38376;

(d) *Maia Bent, et al. v. Howard Platnick, et al.*; SCC File No. 38374;

(e) *Landon Williams v. Her Majesty the Queen*, SCC File No. 38304;

(f) *Javid Ahmad v. Her Majesty the Queen*, SCC File No. 38165;

(g) *R. v. Rafilovich*, 2019 SCC 51;

(h) *Minister of Public Safety and Emergency Preparedness, et al. v. Tusif Ur Rehman Chhina*, 2019 SCC 29 ;

(i) *Frank v. Canada*, 2019 SCC 1;

(j) *R. v. Boudreault*, 2018 SCC 58;

(k) *R. v. Vice Media Inc.*, 2018 SCC 53

(l) *Ewert v. Canada*, 2018 SCC 30;

(m) *Groia v. Law Society of Upper Canada*, 2018 SCC 27;

(n) *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26;

(o) *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54;

(p) *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50;

(q) *R. v. Bradshaw*, 2017 SCC 35;

(r) *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34;

(s) *R. v. Paterson*, 2017 SCC 15;

(t) *R. v. Peers*, 2017 SCC 13;

(u) *BC Freedom of Information and Privacy Association v. Attorney General of British Columbia*, 2017 SCC 6; and

(v) *Ernst v. Alberta Energy Regulator*, 2017 SCC 1.

12. In all of these cases, the BCCLA has acted as a knowledgeable and responsible litigant seeking to advance workable frameworks within which the Court can balance individual rights against broader societal concerns. We seek to do the same in this case.

C. The BCCLA's Expertise in the Issues Raised in this Proceeding

13. In our view, this proceeding raises important and novel civil liberties issues related to freedom of expression in the context of internet regulation. The BCCLA has experience and expertise in these areas.

14. The BCCLA has a long history of making submissions to governments, administrative bodies and courts regarding the proper scope of civil liberties and human rights, including cases that deal with free expression and section 2(b) of the *Charter*. Through its legal and policy reform work, the BCCLA has gained extensive experience dealing with situations where free speech rights are in tension with other important societal interests and values. A sample of our litigation on such issues includes:

(a) *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1, regarding whether the imposition of security fees by universities on student groups constitutes an infringement of their freedom of expression;

(b) *1704604 Ontario Ltd. v. Pointes Protection Association* and *Bent v. Platnick* (SCC File No. 38376), concerning freedom of expression on matters of public interest and lawsuits that aim to stifle that expression;

(c) *Joseph Peter Paul Groia v. Law Society of Upper Canada*, 2018 SCC 27, regarding the framework for evaluating claims of incivility arising from counsel's in-court submissions and behaviour, and the scope of free expression in this context;

(d) *R. v. Marakah*, 2017 SCC 59, regarding the privacy and expressive freedom interests that inhere within text-based electronic communications;

(e) *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, regarding the freedom of expression implications of an injunctive order restraining Google from listing a certain company's websites in its search results anywhere in the world;

(f) *BC Freedom of Information and Privacy Association v. Attorney General of British Columbia*, 2017 SCC 6, regarding the freedom of expression and privacy rights implications of requiring sponsors of election advertising to register with the government;

(g) *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, regarding the ability of legislation to block an individual from seeking a remedy for breach of her *Charter* rights pursuant to section 24(1) of the *Charter*, including remedies for breaches of s. 2(b);

(h) *Zhang v. Vancouver (City)*, 2014 BCSC 2288, regarding portions of Vancouver's *Street and Traffic Bylaw* unjustifiably infringing on the free expression rights of Falun Gong protestors outside the Chinese consulate of Vancouver;

(i) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, regarding a provision of the *Personal Information Protection Act* being inconsistent with freedom of expression;

(j) *Sriskandarajah v. United States of America*, 2012 SCC 70, regarding the broad definition of "terrorist activity" and its operation throughout the terrorism provisions of the *Criminal Code* unjustifiably infringing s. 2(b) of the *Charter* by criminalizing an overly broad range of expressive conduct;

(k) *R. v. Khawaja*, 2012 SCC 69, regarding provisions under the terrorism offenses in the *Criminal Code* violating freedom of expression;

(l) *Breeden v. Black*, 2012 SCC 19, regarding the interplay between constitutionally protected values of freedom of expression, access to justice and democratic governance in relation to a transnational defamation case;

(m) *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, regarding the interplay between freedom of expression, access to justice, and democratic governance in relation to an interprovincial defamation case;

(n) *Crookes v. Newton*, 2011 SCC 47, regarding freedom of expression in the context of defamation law, and in particular, whether hyperlinking to defamatory material on the internet should result in liability for defamation;

(o) *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, regarding the principles for determining the right of access by the press and public to a video recording made an exhibit in criminal proceedings;

(p) *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, regarding the principles for determining the right of access by the press and public to video recordings of court proceedings and matters within court buildings;

(q) *R. v. National Post*, 2010 SCC 16, regarding journalistic source privilege;

(r) *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, regarding government regulation of access to advertising space;

(s) *Dixon v. Powell River (City)*, 2009 BCSC 406, regarding the free expression rights of citizens to criticize government, in which the BCCLA won a declaration that government and public bodies lack the legal status and right to bring action against any person for defamation;

(t) *WIC Radio Ltd. v. Simpson,* 2008 SCC 40, regarding the defence of fair comment in defamation and the defence of "honest belief" when publishing comments by others;

(u) *R. v. Spratt,* 2008 BCCA 340, regarding protest "bubble zones" around abortion clinics;

(v) *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4),* 2008 BCHRT 378, regarding the proper scope of the hate speech provisions in the *Human Rights Code,* in light of freedom of expression, with respect to a publication in a national news magazine;

(w) *Kempling v. The British Columbia College of Teachers,* 2005 BCCA 327, regarding freedom of expression versus the responsibilities of high school teachers;

(x) *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86, regarding the exclusion of certain LGBTQ-positive books and materials in the school libraries and among teaching materials in the Surrey School District;

(y) *Vancouver (City) v. Maurice, et al.*, 2002 BCSC 1421, regarding freedom of expression and court injunctions against protest;

(z) *R. v. O.N.E.*, 2001 SCC 77, regarding the appropriate scope of publication bans relating to the details of the controversial "Mr. Big" undercover scenario in light of ss. 2(b) and 11(d) of the *Charter*;

(aa) *R. v. Sharpe*, 2001 SCC 2, regarding the definition of "child pornography" in s. 163 of the *Criminal Code*;

(bb) *Dutton v. British Columbia (Human Rights Tribunal)*, 2001 BCSC 1256, regarding the use of a "sexualized environment test" resulting in an overly broad definition of sexual harassment that improperly impinges on free expression;

(cc) *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69, in which the BCCLA acted as a co-plaintiff in a 10 year battle against Canada Customs regarding the censorship of gay and lesbian literature;

(dd) *Pacific Press v. AGBC,* 2000 BCSC 248, regarding limits on third party advertising during an election;

(ee) *Canadian Jewish Congress v. North Shore News and Collins,* 1997 BCHRT 35, regarding the constitutionality of the hate speech provisions in the BC *Human Rights Code*;

(ff) *Newson v. Kexco Publishing and Martinoff,* 17 B.C.L.R. (3d) 176, regarding whether s. 2(b) of the *Charter* protects those who criticize public officials for the performance of their duties; and,

(gg) *R. v. Butler,* [1992] 1 S.C.R. 452, regarding the constitutionality of the obscenity provisions in the *Criminal Code* under s. 2(b) of the *Charter*.

15. Of these cases, *Equustek, Breeden,* and *Crookes* are particularly relevant, as they engage freedom of expression issues in the context of the internet – just as the present appeal does.

16. In addition, the BCCLA has engaged in significant public education and advocacy initiatives addressing freedom of expression in the context of internet regulation, including:

(a) advocating for a free and open internet as part of our Don't Spy on Me! Campaign;

(b) advocating against the enactment of Bill C-30, a proposed amendment to the *Criminal Code* which would have granted authorities new powers to monitor and track the digital activities of Canadians on the internet;

(c) publishing blogs and other opinion pieces advocating for limited access to de-indexing search results in appropriate cases;

(d) publishing educational materials related to the right to free expression on social media platforms;

(e) advocating not to extend the hate speech provisions in the *Canadian Human Rights Act* to the internet;

(f) speaking as a part of the 2013 RightsWatch Conference in a panel about the liberatory or oppressive potential of the internet;

(g) and publishing position papers on freedom of expression in the internet.

II. BCCLA's Proposed Role in this Case

A. BCCLA's Interest in this Proceeding

17. The BCCLA is interested in this appeal. This decision will have significant ramifications, both for the protection of free expression on the internet, and for the ability of those who have been wronged to seek effective remedies.

18. The "site-blocking" order issued by the court below is an expression-limiting injunction. As such, it directly implicates freedom of expression. Preserving freedom of expression is a central objective of the BCCLA, as demonstrated by its frequent interventions and public education initiatives on matters dealing with this issue. However, to focus on this freedom in a vacuum, to the exclusion of all other interests, does a disservice to the analysis and is contrary to existing Canadian jurisprudence. The plaintiffs in the court below, and the public at large, also have an interest in protecting access to justice and the ability to obtain a meaningful remedy. Both sets of interests should be weighed in the analysis of whether a court should exercise its remedial discretion to grant a site-blocking order, *i.e.*, an injunctive order compelling third-party internet service providers to take steps to block their customers from accessing certain websites.

19. Given the prevalent nature of e-commerce, internet connectivity and technology more generally, situations such as that presented by this appeal are going to become increasingly commonplace. The BCCLA views this appeal as an opportunity to establish a framework for the consideration and reconciliation of the right to free expression with the right of injured parties to justice and relief in the nature of a site-blocking order. The BCCLA proposes to intervene in this appeal to provide the Court with assistance in this regard.

20. The BCCLA believes that the expression-limiting nature of the remedy obtained in the court below should be expressly considered by this Court on appeal. If granted leave to intervene, BCCLA will urge the Court to make clear that judicial consideration of site-blocking motions in future cases must feature freedom of expression as a factor in the court's exercise of its discretion to grant such orders.

21. The BCCLA is well positioned to provide a measured and balanced approach that can be of assistance to this Court. The BCCLA seeks to provide the Court with a substantive, impartial, and useful analysis on the legal issues before the Court, taking into account the importance of protecting freedom of expression.

22. The BCCLA arrives at its position by its own reasoning, and will not duplicate the parties' arguments. In addition, the BCCLA can provide the Court with a perspective on a broader set of interests than the parties. The BCCLA will provide a unique civil liberties perspective on the competing interests engaged in this appeal– one that values the critical role of free expression in our democratic society, while also recognizing the importance of access to justice and meaningful remedies.

B. The BCCLA's Proposed Submissions

23. The BCCLA seeks leave to intervene in this appeal in order to offer this Court a different and valuable perspective on the issues raised by this appeal.

24. If granted leave, the BCCLA's intervention would involve urging the Court to make clear that judicial consideration of site-blocking motions in future cases must feature freedom of expression as a factor in the court's exercise of its discretion to grant such orders. Whether such relief is appropriate, and the terms upon which it may be granted, should be informed in significant part by freedom of expression considerations.

25. Drawing upon the Canadian jurisprudence dealing with extraordinary remedies in other contexts, the BCCLA's submissions will seek to balance concerns about the potential free expression implications of site-blocking orders, with concerns about ensuring that Canadian courts can grant Canadian litigants meaningful remedies where necessary and appropriate.

26. More specifically, if granted leave, the BCCLA plans to make submissions along the following lines.

(i) Equitable Relief Limiting Free Expression is Extraordinary and Should Rarely Be Granted

27. The starting point should be to recognize that – just as with other forms of equitable relief such as *Norwich* orders,[1] *Mareva* injunctions,[2] *Anton Piller* orders,[3] and other orders limiting expressive content[4] (such as orders preventing defendants from posting online material in

[1] *GEA Group AG v Flex-N-Gate Corporation*, 2009 ONCA 619 [*"GEA*"].
[2] *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 ["*Aetna*"].
[3] *Celanese Canada Inc. v Murray Demolition Corp.*, [2006] 2 SCR 189 at para. 35 [*"Celanese*"].
[4] See *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626, at para. 49.

defamation cases,[5] or orders prohibiting the publication of court proceedings[6]) – site-blocking orders are an extraordinary, expression-limiting remedy to be granted sparingly. The protection of freedom of expression enshrined in the *Charter* and elsewhere in Canadian law counsels caution in the granting of such relief. Whether such relief is appropriate, and the terms upon which it may be granted, should be informed in significant part by freedom of expression considerations.

(ii) The Granting of a Site-Blocking Order Must Consider the Impact on Free Expression

28. As an exercise of the court's equitable, remedial discretion, the granting of a site-blocking order must take account of the *Charter*'s protection of free expression. Any site-blocking order will offend free expression to some degree – indeed, this is one of the key reasons they are to be considered rare and extraordinary – but not all orders will be equally offensive. The impact of the order sought on free expression will depend on, *inter alia*:

(a) the scope of the order sought;

(b) the potential for capturing legitimate, non-offending content;

(c) the potential for a significant or disproportionate chilling effect on the defendant's dissemination of material that is legitimate or lawful; and

(d) the degree of connection between the expression at issue and the core values underlying the right to free expression: seeking and attaining the truth, fostering participation in social and political decision-making, and promoting self-fulfillment.[7] This consideration is particularly relevant in cases where a final determination on the alleged impropriety of the impugned expressive material has

[5] See, for example, *Warman v Fournier*, 2015 ONCA 873.
[6] See *Dagenais v. Canadian Broadcasting Corporation,* [1994] 3 SCR 835.
[7] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 SCR 927 at 976.

yet to occur. Thus, for example, courts should be less ready to grant interlocutory orders concerning political speech that is alleged to be defamatory, as compared to an order targeting material found to be in violation of intellectual property rights.

(iii) Necessity Must Be Established Before Limiting Free Expression

29. The applicant seeking a site-blocking order must establish that such an order is necessary to provide a meaningful remedy in light of the nature and extent of the harm suffered. A necessity requirement gives due respect to freedom of expression's status as a constitutionally protected right in Canada, and is consistent with how Canadian courts have approached requests for other extraordinary relief, such as *Norwich* orders,[8] *Mareva* injunctions,[9] *Anton Piller* orders,[10] and the order made in *Google Inc. v. Equustek Solutions Inc.,* 2017 SCC 34.[11] Necessity requires demonstrating that:

(a) reasonable alternative means of restraining the defendant, or targeting the defendant's conduct, will not, on their own, provide a meaningful remedy;

(b) the order is properly targeted as against innocent third parties; and

(c) the order will provide a meaningful and effective remedy if enforced.

30. In other words, site-blocking orders should not be granted where the plaintiff has failed to exhaust other avenues of traditional relief (or otherwise explain why they are not reasonable or practical alternatives in the circumstances), or where there is good reason to doubt the effectiveness

[8] *GEA,* at paras. 70, 75-77.
[9] *Aetna, supra.*
[10] *Celanese,* at para. 35 [*"Celanese*"].
[11] *Google,* at para. 35.

of the site-blocking order, with a view to ensuring that a site-blocking order is the least intrusive means of achieving the desired result.

31. As part of the necessity inquiry, it is important that the court determine exactly *what* order is being sought. Here, a court must be vigilant to ensure that such orders are no more expansive than what is required to grant the plaintiffs effective relief. The court should specifically enquire as to whether there is a risk that that innocent, non-offending expressive content will be covered by the order. This approach is consistent with the jurisprudence governing extraordinary remedies,[12] with the guarantee to freedom of expression under the *Charter*, and with Canada's obligations under Article 19 of the *International Covenant on Civil and Political Rights*. It also ensures that any impairment to free expression pursuant to a site-blocking order is limited and proportionate.

C. General Considerations

32. If granted leave to intervene, the BCCLA will work with counsel for the parties and counsel for any other interveners, to ensure our submissions are not duplicative.

33. I am informed by Emily Lapper, Senior Counsel (Litigation) for the BCCLA, and co-counsel for the BCCLA on this motion, that she has reviewed the motion records filed by the proposed interveners, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) and the Canadian Internet Registration Authority (CIRA). I am further advised by Ms. Lapper that in CIPPIC's motion record, they affirm that, if CIPPIC and BCCLA are granted leave to intervene, CIPPIC will not extensively address freedom of expression and will otherwise not

[12] For example, in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, the Supreme Court held that *Anton Pillar* orders must be "closely controlled" at para. 5. In *Celanese, supra,* the Supreme Court similarly held they should be "no wider than necessary" (at para. 40).

duplicate BCCLA's submissions. I confirm that that BCCLA will work with counsel for CIPPIC to ensure that there is no overlap between the submissions made by the BCCLA and CIPPIC.

34. If granted leave to intervene, the BCCLA will abide by any limitation this Court puts on its participation in this case as an intervener and will abide by any schedule set by the Court for further steps in the appeal.

35. The BCCLA does not seek leave to file any new evidence and would rely entirely on the record as it has been created by the parties.

36. If granted leave to intervene, the BCCLA requests permission to file a memorandum of fact and law not to exceed 15 pages, or such other length as the Court will direct. It also seeks the right to make up to 15 minutes of oral argument on the hearing of this appeal, or such other time as the Court will direct.

37. As the BCCLA is a non-profit organization with limited resources, the BCCLA seeks no costs and respectfully requests that no costs be awarded against it.

38. I make this affidavit in support of the BCCLA's motion for leave to intervene in the herein appeal, and for no improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver in the Province of British Columbia, this 11th day of February, 2020

emily lapper

A Commissioner for taking Affidavits for British Columbia

Emily Lapper
Barrister + Solicitor
306-268 Keefer St.
Vancouver, BC

GRACE PASTINE

TAB 3

Court File No. A-440-19

FEDERAL COURT OF APPEAL

B E T W E E N :

TEKSAVVY SOLUTIONS INC.

APPELLANT

- and –

BELL MEDIA INC. AND OTHERS

RESPONDENTS

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PART I – FACTS

A. Overview

1. The British Columbia Civil Liberties Association ("BCCLA") seeks leave to intervene in this proceeding pursuant to Rule 109 of the *Federal Court Rules*.[1]

2. The impact of "site-blocking" orders on freedom of expression appears to have been given little consideration in the decision now under appeal. The BCCLA seeks to intervene to remedy that. Site-blocking orders have the potential to significantly impact freedom of expression—a core human right that the BCCLA has sought to advance and protect in its court interventions and other work for decades.

---

[1] *Federal Court Rules*, SOR/98-106.

3. This appeal engages two important, and potentially conflicting, interests: the protection of freedom of expression and the need for meaningful relief from expression-related harms such as copyright infringement. The site-blocking order issued by the Federal Court is, by its very nature, an expression-limiting injunction. The order limits the constitutional freedom of its target to disseminate expressive material and of the public at large to receive that material. As such, it directly implicates freedom of expression – a point of significant concern to the BCCLA. However, to focus on this freedom in a vacuum, to the exclusion of all other interests, does a disservice to the analysis and is contrary to existing Canadian jurisprudence. The plaintiffs in the court below, and the public at large, also have an interest in protecting access to justice and the ability to obtain a meaningful remedy. Both sets of interests should be weighed in the analysis of whether a court should exercise its remedial discretion to grant a site-blocking order, *i.e.*, an injunctive order compelling third-party internet service providers to take steps to block their customers from accessing certain websites.

4. Given the prevalent nature of internet connectivity, online communication, and technology more generally, situations such as the one presented by this appeal are likely to become increasingly commonplace. Indeed, in *Cartier International AG v. British Telecommunications Plc*, [2018] UKSC 28, Lord Sumption observed that in the United Kingdom, "website blocking injunctions have become a familiar weapon in the continuing battle between the holders of intellectual property rights and infringers" and that "their use seems likely to increase".[2]

5. The BCCLA believes that the expression-limiting nature of the remedy obtained in the court below should be expressly considered by this Court on appeal. If granted leave to intervene, the BCCLA will urge the Court to make clear that judicial consideration of site-blocking motions

[2] *Cartier International AG v British Telecommunications Plc*, [2018] UKSC 28 at para. 4.

in future cases must feature freedom of expression as a factor in the court's exercise of its discretion to grant such orders.

6. The BCCLA proposes to intervene in this appeal to provide the Court with assistance in this regard. The BCCLA does not intend to intervene in direct support of any of the parties, but instead will seek to assist this Court by articulating considerations for granting site-blocking orders in the Canadian context.

7. The BCCLA seeks traditional intervener status. It does not seek any role in the development of the record or testing of evidence. It does not seek any appeal rights. It asks only to make written and oral submissions as a friend of the Court on considerations relevant to the exercise of its discretion in future site-blocking cases.

B. The BCCLA

8. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the British Columbia *Society Act* and continued under the current *Societies Act*, SBC 2015, c. 18. The BCCLA's objectives include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

Affidavit of Grace Pastine, made 11 February 2020 ("Pastine Affidavit"), at para. 4

7. In furtherance of these objectives, BCCLA's activities include submissions to governmental bodies, public human rights education, direct assistance to victims of human rights violations, and litigation as a party, but more often as an intervener, before Canadian courts.

Pastine Affidavit, at para. 8

9. The BCCLA frequently appears in proceedings before all levels of court across Canada. The general goal of the BCCLA when undertaking litigation is to encourage, support, and defend

the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*, the Canadian Bill of Rights, and federal, provincial and territorial human rights legislation, as well as international treaties to which Canada is a party.

Pastine Affidavit, at para. 9

10. The BCCLA is well-known to Canadian courts as an intervener in cases raising important and difficult issues engaging civil liberties and human rights. The BCCLA has made submissions in the Federal Court and Federal Court of Appeal, both as an intervener and as a party, in numerous cases involving civil liberties and human rights, and has intervened before the Supreme Court of Canada over 90 times.

Pastine Affidavit, at paras. 10 and 11

C. The BCCLA's Interest in this Appeal

11. Preserving and promoting freedom of expression are central objectives of the BCCLA. The BCCLA also has a long track record of advocating for measures to enhance and protect access to justice.

Pastine Affidavit, at paras. 13-16

12. The order under appeal represents the first site-blocking order ever to be issued in Canada. This appeal will therefore have significant ramifications, both for the protection of free expression on the internet, and for the ability of those who have been wronged to obtain effective remedies.

13. As noted, a site-blocking order is a judicial limitation of expressive content. The order limits the defendants' speech by preventing it from communicating to the public through certain websites, with the practical result being that the public (or a large percentage of the public) will be denied access to this information.

14. The BCCLA acknowledges that such a remedy may be appropriate in proper cases, despite its expression-limiting nature. The question, in BCCLA's view, is not whether such orders can ever be granted, but when and on what terms? In particular, how should courts balance plaintiffs' legitimate claims to injunctive relief from injurious internet conduct with the rights of defendants, and the public at large, to publish and receive expressive content online?

15. If this Court upholds the order of the Federal Court, site-blocking orders will become part of the arsenal of available remedies in Canada. Consistent with its objectives of protecting civil liberties and facilitating access to justice, the BCCLA seeks to intervene in this matter to assist the Court by articulating considerations that should guide the exercise of such relief.

D. The BCCLA's Proposed Submissions

16. The BCCLA proposes to make submissions along the following lines.

(i) Equitable Relief Limiting Free Expression is Extraordinary and Should Rarely Be Granted

17. The starting point should be to recognize that – just as with other forms of equitable relief such as *Norwich* orders,[3] *Mareva* injunctions,[4] *Anton Piller* orders,[5] and other orders limiting expressive content[6] (such as orders preventing defendants from posting online material in defamation cases,[7] or orders prohibiting the publication of court proceedings[8]) – site-blocking orders are an extraordinary, expression-limiting remedy to be granted sparingly. The protection of freedom of expression enshrined in the *Charter* and elsewhere in Canadian law counsels caution

[3] *GEA Group AG v Flex-N-Gate Corporation*, 2009 ONCA 619 [*"GEA"*].
[4] *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 ["*Aetna*"].
[5] *Celanese Canada Inc. v Murray Demolition Corp.*, [2006] 2 SCR 189 at para. 35 [*"Celanese"*].
[6] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 47-49.
[7] See, for example, *Warman v Fournier*, 2015 ONCA 873.
[8] *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835.

in the granting of such relief. Whether such relief is appropriate, and the terms upon which it may be granted, should be informed in significant part by freedom of expression considerations.

(ii) The Granting of a Site-Blocking Order Must Consider the Impact on Free Expression

18. As an exercise of the court's equitable, remedial discretion, the granting of a site-blocking order must take account of the *Charter*'s protection of free expression. Any site-blocking order will offend free expression to some degree – indeed, this is one of the key reasons they are to be considered rare and extraordinary – but not all orders will be equally offensive. The impact of the order sought on free expression will depend on, *inter alia*:

(a) the scope of the order sought;

(b) the potential for capturing legitimate, non-offending content;

(c) the potential for a significant or disproportionate chilling effect on the defendant's dissemination of material that is legitimate or lawful; and

(d) the degree of connection between the expression at issue and the core values underlying the right to free expression: seeking and attaining the truth, fostering participation in social and political decision-making, and promoting self-fulfillment.[9] This consideration is particularly relevant in cases where a final determination on the alleged impropriety of the impugned expressive material has yet to occur. Thus, for example, courts should be less ready to grant interlocutory orders concerning political speech that is alleged to be defamatory, as compared to an order targeting material found to be in violation of intellectual property rights.

[9] *Irwin Toy Ltd. v Quebec (Attorney General),* [1989] 1 SCR 927 at 976.

(iii) Necessity Must Be Established Before Limiting Free Expression

19. The applicant seeking a site-blocking order must establish that such an order is necessary to provide a meaningful remedy in light of the nature and extent of the harm suffered. A necessity requirement gives due respect to freedom of expression's status as a constitutionally protected right in Canada, and is consistent with how Canadian courts have approached requests for other extraordinary relief, such as *Norwich* orders,[10] *Mareva* injunctions,[11] *Anton Piller* orders,[12] and the order made in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.[13] Necessity requires demonstrating that:

(a) reasonable alternative means of restraining the defendant, or targeting the defendant's conduct, will not, on their own, provide a meaningful remedy;

(b) the order is properly targeted as against innocent third parties; and

(c) the order will provide a meaningful and effective remedy if enforced.

20. In other words, site-blocking orders should not be granted where the plaintiff has failed to exhaust other avenues of traditional relief (or otherwise explain why they are not reasonable or practical alternatives in the circumstances), or where there is good reason to doubt the effectiveness of the site-blocking order, with a view to ensuring that a site-blocking order is the least intrusive means of achieving the desired result.

---

[10] *GEA* at paras.70, 75-77.
[11] *Aetna*, *supra*.
[12] *Celanese* at para. 35.
[13] *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para. 35.

21. As part of the necessity inquiry, it is important that the court determine exactly *what* order is being sought. Here, a court must be vigilant to ensure that such orders are no more expansive than what is required to grant the plaintiffs effective relief. The court should specifically enquire as to whether there is a risk that that innocent, non-offending expressive content will be covered by the order. This approach is consistent with the jurisprudence governing extraordinary remedies[14], with the guarantee to freedom of expression under the *Charter,* and with Canada's obligations under Article 19 of the *International Covenant on Civil and Political Rights*. It also ensures that any impairment to free expression pursuant to a site-blocking order is limited and proportionate.

PART II – POINTS IN ISSUE

22. The sole issue to be determined on this motion is whether to grant the BCCLA leave to intervene.

PART III – SUBMISSIONS

A. The Applicable Legal Framework

23. Interventions are governed by Rule 109 of the *Federal Court Rules.* The requirements of Rule 109, and the leading cases interpreting it, are well known.

24. The governing case is *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* [1990] 1 FC 90, as recently affirmed in *Sport Maska Inc. v. Bauer Hockey Corp*. 2016 FCA 44. In *Rothmans*, this Court affirmed there are six factors a court should take into account in determining whether or not a third party intervention should be permitted:

[14] For example, in *British Columbia (Attorney General) v Malik*, 2011 SCC 18, the Supreme Court held that *Anton Pillar* orders must be "closely controlled" at para. 5. In *Celanese*, *supra,* the Supreme Court similarly held they should be "no wider than necessary" (at para. 40).

(a) Is the proposed intervener directly affected?

(b) Does there exist a justiciable issue or a veritable public interest?

(c) Is there an apparent lack of any other reasonable means or efficient means to submit the questions to the Court?

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention? And

(f) Can the court hear and decide the case on the merits without the help of the proposed intervener?[15]

25. These criteria are to be applied flexibly with a view to determining "if, in a given case, the interests of justice require that we grant or refuse intervention".[16] The "salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter".[17]

B. The BCCLA's Proposed Intervention is in the Interests of Justice

26. Several of the factors identified in *Rothmans* are inapplicable to the BCCLA's proposed intervention. Applied flexibly, however, the relevant factors identified in *Rothmans* support the view that the BCCLA's proposed intervention is in the interests of justice.

---

[15] *Rothmans* at para. 3, affirming *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74 at para. 12.
[16] *Sport Maska* at para. 42.
[17] *Sport Maska* at para. 40, quoting *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 at para. 9.

27. Although the BCCLA will not be directly affected by the outcome of this proceeding, this appeal engages the protection of freedom of expression, an issue in which the BCCLA has demonstrated a longstanding interest and expertise.

28. Further, as this proceeding addresses the first ever site-blocking order to issue in Canada, this Court's articulation of the considerations relevant to how and when a court may exercise its discretion to issue such an order engages a dimension of public interest and importance, particularly as the use of internet connectivity, online communication, and technology more generally continues to expand.

29. If granted leave to intervene, the BCCLA will aim to provide a different and valuable perspective to the Court as it decides the important issues of first impression raised on this appeal. The BCCLA's proposed submissions emphasize, in a way not done in the court below, the freedom of expression concerns engaged by a site-blocking order. The BCCLA seeks to provide this Court with a substantive, impartial, and useful analysis on the legal issues before the Court, taking into account both the importance of preserving freedom of expression *and* the need for effective injunctive remedies in appropriate cases.

30. The BCCLA arrives at its position by its own reasoning, and will not duplicate the parties' arguments. The considerations proposed by the BCCLA are distinct from the legal tests adopted by the parties, the court below, and (as far as the BCCLA is aware) any other proposed intervener.

31. In particular, the BCCLA has reviewed the materials filed by the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) in support of its motion for leave to intervene in this proceeding. Counsel for CIPPIC and the BCCLA have discussed their respective proposed submissions and have each agreed that, if granted leave to intervene, they will work

together to ensure that there is no overlap between the submissions made by the BCCLA and CIPPIC.

32. In addition, the BCCLA can provide the Court with a perspective on a broader set of interests than the parties. The BCCLA will provide a civil liberties perspective on the competing interests engaged in this appeal– one that values the critical role of free expression in our democratic society, while also recognizing the importance of access to justice and meaningful remedies.

33. The interests of justice also favour granting leave to the BCCLA to intervene because its intervention will not cause any prejudice to the parties or to the Court. The BCCLA has filed its motion well in advance of the deadline for the Appellant's Memorandum of Fact and Law and prior to any hearing date being set. The BCCLA has agreed to abide by any direction this Court may have with respect to the process and timing for next steps in the appeal. Further, the BCCLA has complied with the requirements of Rule 109(2) – in setting out its proposed submissions above, the BCCLA has demonstrated how its "participation will assist the determination of a factual or legal issue related to the proceeding" by setting out distinct considerations to be applied to the novel issue before the Court in this appeal.

34. In all of the circumstances, the BCCLA submits that the interests of justice favour granting leave to intervene.

PART IV – ORDER SOUGHT

35. The BCCLA seeks an order that it be granted leave to intervene in this Appeal of the decision of Justice Gleeson, dated November 15, 2019, on the following terms:

(a) The BCCLA may file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;

(b) The BCCLA may appear and make oral submissions at the hearing of this proceeding not exceeding 15 minutes, or such other duration as this Court may direct;

(c) The BCCLA shall accept the record as adduced by the parties, and shall not seek to file any additional evidence;

(d) The BCCLA may participate in any future case conferences in this proceeding;

(e) Any documents served on any party in this proceedings must also be served on the BCCLA;

(f) The BCCLA shall have no right to appeal from any final order made in this proceeding; and

(g) The BCCLA may not seek costs or have costs awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2020.

emily lapper

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
306 – 268 Keefer Street
Vancouver, BC V6A 1X5

Emily Lapper
Tel: 778-370-5655
Fax: 604-687-3045
emily@bccla.org
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

"Gib van Ert"

GIB VAN ERT LAW
148 Third Ave
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613-408-4297
Fax: 613-651-0304
gib@gibvanertlaw.com
Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

PART V – AUTHORITIES CITED

	Case Law
1	*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2
2	*British Columbia (Attorney General) v Malik*, 2011 SCC 18
3	*Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21
4	*Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626
5	*Cartier International AG v British Telecommunications Plc*, [2018] UKSC 28
6	*Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835
7	*Celanese Canada Inc. v Murray Demolition Corp*., [2006] 2 SCR 189
8	*GEA Group AG v Flex-N-Gate Corporation*, 2009 ONCA 619
9	*Google Inc. v Equustek Solutions Inc*., 2017 SCC 34
10	*Irwin Toy Ltd. v Quebec (Attorney General),*[1989] 1 SCR 927
11	*Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 90; *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74
12	*Sport Maska Inc. v Bauer Hockey Corp*., 2016 FCA 44
13	*Warman v Fournier*, 2015 ONCA 873

	Legislation
14	*Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
15	*Federal Court Rules*, SOR/98-106.

Note: Copies of authorities for which no hyperlink was available can be found in Appendix ‘A’.

APPENDIX 'A'

Most Negative Treatment: Reversed in part
Most Recent Reversed in part: Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) | 1989 CarswellNat 600, 1989 CarswellNat 600F, 31 F.T.R. 239 (note), 17 A.C.W.S. (3d) 28, 45 C.R.R. 382, 103 N.R. 391, [1989] F.C.J. No. 707, [1990] 1 F.C. 90 | (Fed. C.A., Aug 17, 1989)

1989 CarswellNat 594
Federal Court of Canada — Trial Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 594, 1989 CarswellNat 663, [1989] F.C.J. No. 446,
[1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323, 29 F.T.R. 267, 41 Admin. L.R. 102

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Rouleau J.

Heard: April 7, 1989
Judgment: May 19, 1989
Docket: No. T-1416-88

Counsel: *E. Belobaba*, for plaintiff.
P. Evraire, for defendant.
C.R. Thomson, for proposed intervenor.
R. Staley, for Institute of Canadian Advertising.
D. McDuff, agent for the Canadian Cancer Society.

Subject: Public; Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles
Constitutional law
XIV Procedure in constitutional challenges
XIV.2 Standing
Headnote
Constitutional Law --- Procedure in constitutional challenges — Standing
Practice — Intervention — Constitutional validity of legislation — Intervention allowed to public interest group despite lack of direct interest where good chance that expertise would add different dimension to arguments being advanced in defence of legislation by Attorney General — Potential extra length of proceedings worth it.
R, B & H Inc. commenced an action in the Federal Court, Trial Division seeking a declaration that the *Tobacco Products Control Act*, was constitutionally invalid. The Canadian Cancer Society (the "Society") applied for leave to be added as an intervenor. The Society was the largest charitable organization devoted to public health in Canada with approximately 350,000 active members and was involved in fundraising of $50,000,000 annually. Among its activities were research into the links between cigarette smoking and cancer and the dissemination of information with respect to that research.
Held:
The application was granted.

As the *Federal Court Rules* did not make specific provision with respect to intervention, the appropriate principles to be applied were those of r. 13.01 of the *Ontario Rules of Civil Procedure*, since r. 5 of the *Federal Court Rules* allowed the Court to determine its practice in relation to matters on which the Rules were silent by reference to the Rules of Court of "that province to which the subject matter of the proceedings most particularly relates."

To the extent that r. 13.01 required that the Society have an "interest" in the subject matter of the proceedings, that interest did not have to be a direct interest. Particularly with respect to public interest litigation in which *Canadian Charter of Rights and Freedoms* issues were raised for the first time, it was sufficient that the applicant for intervenor status have, as here, a genuine interest in the issues and special knowledge and expertise in relation to those issues.

Even though the Attorney General of Canada would support the same interests as those represented by Society, it was sufficient in litigation such as this that the Society appeared to be in a position to put certain aspects of the action into a different or new perspective. Not only did the Attorney General not have a monopoly on all aspects of the public interest but according intervenor status to the Society would offset any concern that lobbying by the tobacco industry might be having an effect on the government.

Allowing the Society to intervene would not, in terms of r. 13.01, "unduly delay or prejudice the determination of the rights of the parties." While the intervention might lead to more evidence and a lengthier trial, that new evidence could be of invaluable assistance.

Table of Authorities

Cases considered:

R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.) — *applied*

Schofield and Minister of Consumer & Commercial Relations, Re (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) — *applied*

Service de limousine Murray Hill Ltée c. Québec (P.G.), 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 — *applied*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 11(d)

Criminal Code, R.S.C. 1970, c. C-34 —

s. 246.6 [now R.S.C. 1985, c. C-46, s. 276]

s. 246.7 [now R.S.C. 1985, c. C-46, s. 277]

Tobacco Products Control Act, S.C. 1988, c. 20 [now R.S.C. 1985 (4th Supp.), c. 14].

Rules considered:

Federal Court Rules —

r. 5

Ontario, Rules of Civil Procedure —

r. 13.01

r. 13.02

APPLICATION for leave to be added as an intervenor in an action for a declaration.

***Rouleau J.*:**

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 Rule 13.01 of the *Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." Rule 13.02 permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter*. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)*, 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146, the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subss. 246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter*. LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further

and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In *Re Schofield and Minister of Consumer & Commercial Relations* (l980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sens', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.
>
> The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue

of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted.

1989 CarswellNat 600
Federal Court of Canada — Appeal Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 600F, 1989 CarswellNat 600, [1989] F.C.J. No. 707, [1990] 1 F.C. 90, 103 N.R. 391, 17 A.C.W.S. (3d) 28, 31 F.T.R. 239 (note), 45 C.R.R. 382

Rothmans, Benson & Hedges Inc. (Plaintiff) (Appellant) v. Attorney General of Canada (Defendant) (Respondent) and Canadian Cancer Society (Intervenor)

Rothmans, Benson & Hedges Inc. (Plaintiff) v. Attorney General of Canada (Defendant)

Hugessen, MacGuigan and Desjardins JJ.A.

Judgment: August 17, 1989
Docket: A-277-89; A-301-89

Counsel: *Edward P. Belobaba* and *Barbara L. Rutherford* for appellant.
Gerry N. Sparrow for respondent.
Karl Delwaide and *Andre T. Mecs* for intervenor.
Claude R. Thomson, Q.C. for Institute of Canadian Advertising.

Subject: Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles
Constitutional law
XIV Procedure in constitutional challenges
XIV.2 Standing
Headnote
Constitutional Law --- Procedure in constitutional challenges — Standing
Practice --- Parties — Intervenors
Practice — Parties — Intervention — Appeals from orders granting Canadian Cancer Society (CCS), and denying Institute of Canadian Advertising (ICA), leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not to be unduly restricted where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene in public interest litigation recognized by courts in organization genuinely interested in, and possessing special knowledge and expertise related to, issues — No error in finding CCS meeting test, but intervention should be restricted to s. 1 issues — ICA's application granted — Position extending beyond question of advertising of tobacco products to more general questions relating to commercial free speech — May contribute to balancing process in s. 1 assessment of justification of limits imposed upon Charter-guaranteed freedom.
Constitutional law — Charter of Rights — Limitation clause — Appeals from orders granting one organization and denying another leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not subject to traditional restrictions where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene recognized in organization genu inely interested in, and possessing special knowledge and expertise related to, issues.
Table of Authorities
CASES JUDICIALLY CONSIDERED
REFERRED TO:

Re Canadian Labour Congress and Bhindi et al. (1985), 17 D.L.R. (4th) 193 (B.C.C.A.).

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), ss. 1, 2(*b*).

Tobacco Products Control Act, S.C. 1988, c. 20.

The following are the reasons for judgment of the Court delivered orally in English by *Hugessen J.A.*:

1 These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS) [[1990] 1 F.C. 74], and denying, in the case of the Institute of Canadian Advertising (ICA) [[1990] 1 F.C. 84], leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the *Tobacco Products Control Act* (TPCA) (S.C. 1988, c. 20).

2 It is common ground that the plaintiff's attack is primarily Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] based, invoking the guarantee of freedom of expression in paragraph 2(*b*). There can also be no doubt, given the prohibitions contained in the TPCA, that such attack is best met by a section 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a section 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A section 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see *Re Canadian Labour Congress and Bhindi et al.* (1985), 17 D.L.R. (4th) 193 (B.C.C.A.)). Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said [at page 79] "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised".

4 As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to section 1 issues, that it be required to deliver a pleading or statement of intervention within ten days and permitted to call evidence and to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the order as aforesaid.

5 As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a section 1 assessment of the justification and reasonableness of limits imposed upon a Charter-guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

6 In our view this is not a case for costs in either Division.

Solicitors of record:

Gowling, Strathy & Henderson, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

Martineau, Walker, Montréal, for intervenor.

Campbell, Godfrey & Lewtas, Toronto, for Institute of Canadian Advertising.