

Internet and E-Commerce Law in Canada

VOLUME 19, NUMBER 6

Cited as (2017-18), 19 I.E.C.L.C.

OCTOBER 2018

• CASINOS, CARDS AND COUNTER-STRIKE: A BRIEF OVERVIEW OF SKIN GAMBLING IN CANADA AND ABROAD •

Andrew Alleyne, Partner, Jonathan Raizenne, Associate, Michael Shortt, Lawyer and
Trademark Agent, Fasken Martineau DuMoulin LLP
© Fasken Martineau DuMoulin LLP, Montreal



Andrew Alleyne



Jonathan Raizenne



Michael Shortt

• In This Issue •

CASINOS, CARDS AND COUNTER-STRIKE: A BRIEF OVERVIEW OF SKIN GAMBLING IN CANADA AND ABROAD

*Andrew Alleyne, Jonathan Raizenne and
Michael Shortt*41

AIDING BY OMISSION IN CASL? GOOD ENOUGH, CRTC SAYS

Nathan Schissel and Kristél Kriel.....44

CAN YOU ENHANCE THAT?: COPYRIGHT IN FACTS AND RETOUCHEDED IMAGES

Catherine Lovrics and Max Rothschild47

QUÉBEC APPEALS SUPERIOR COURT RULING THAT BILL 74 IS UNCONSTITUTIONAL

*Michael D. Lipton Q.C., Kevin J. Weber and
Chantal Cipriano*49



In recent years, the gaming industry has seen the rise of so-called “skin gambling” websites. Critics have been quick to raise red flags, citing the need for profound regulation and protective measures shielding children from such platforms. This bulletin explores the practice of skin gambling, including regulatory responses in Quebec and the rest of the world.

WHAT IS SKIN GAMBLING?

In the video game industry, skin gambling refers to the use of virtual items, known as “skins”, to bet on the outcome of professional eSports matches, jackpot-style games, as well as simpler forms of gambling such as roulette, blackjack and coin flip games. This market was estimated to be US\$7.4 billion in 2016.

The term “skin” results from the practical function of these virtual items, which consists of modifying

INTERNET AND E-COMMERCE LAW IN CANADA

Internet and E-Commerce Law in Canada is published six times per year by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*. © LexisNexis Canada Inc. 2018

ISBN 0-433-42472-9 (print) ISSN 1494-4146

ISBN 0-433-44674-9 (PDF)

ISBN 0-433-44385-5 (print & PDF)

Subscription rates: \$275.00 per year (print or PDF)

\$400.00 per year (print & PDF)

General Editor

Professor Michael A. Geist
Canada Research Chair in Internet and E-Commerce Law
University of Ottawa, Faculty of Law
E-mail: mgeist@uottawa.ca

Please address all editorial inquiries to:

LexisNexis Canada Inc.

Tel. (905) 479-2665

Fax (905) 479-2826

E-mail: ielc@lexisnexis.ca

Web site: www.lexisnexis.ca

EDITORIAL BOARD

• Peter Ferguson, Industry Canada, Ottawa • Bradley J. Freedman, Borden Ladner Gervais, Vancouver • John D. Gregory, Ministry of the Attorney General, Toronto • Dr. Sunny Handa, Blake Cassels & Graydon, Montreal • Mark S. Hayes, Hayes eLaw LLP, Toronto • Ian R. Kerr, University of Ottawa, Faculty of Law • Cindy McGann, Ottawa • Suzanne Morin, Sun Life, Montreal • Roger Tassé, Gowling Lafleur Henderson, Ottawa

Note: This newsletter solicits manuscripts for consideration by the Editors, who reserves the right to reject any manuscript or to publish it in revised form. The articles included in the *Internet and E-Commerce Law in Canada* reflect the views of the individual authors and do not necessarily reflect the views of the editorial board members. This newsletter is not intended to provide legal or other professional advice and readers should not act on the information contained in this newsletter without seeking specific independent advice on the particular matters with which they are concerned.



the player's in-game appearance, whether through such player's weapons, equipment or costumes. Players can alternate between the standard designs of their in-game items and the "skins" of those items that they've acquired through gameplay, trading with other players or online purchases. These "skins" do not have any effect on the usefulness of the weapon or piece of equipment; they are merely a cosmetic addition. There are many "skins" and there is a wide variety among them. Depending on the game played, certain "skins" may be rare and therefore more valuable to those who use/trade them.

"Skins" are created by game developers and made available to players (i) through the completion of in-game achievements, or (ii) for purchase through a marketplace managed by the game developer or publisher.

ISSUES WITH SKIN GAMBLING

Because of the variety and relative rarity of certain skins, they have become an attractive alternative to cash or virtual currencies in the online gambling community. For example, the practice is popular within Valve Corporation's ("Valve") multiplayer first-person shooter game *Counter-Strike: Global Offensive*, but has also been seen in other games, such as *Dota 2* and *League of Legends*. Illicit online gambling platforms have appeared which make use of Valve's Steam marketplace to facilitate buying, selling and trading of skins between players of such games for *non-virtual* money. The use of the Steam marketplace to enable skin trading as a form of currency for gambling violates the Steam marketplace's own terms of service¹.

Responses to the phenomenon of skin gambling have emerged from various sectors from a commercial and government perspective. One of the key mobilizing issues appears to be the impact of skin gambling on youth. Given the interest in video games among youth, there is fear that children and teens may be exposed to the practice of gambling. This in turn generates fears that it will lead to a higher potential for addiction and abuse

among youth. Although it is difficult to measure the worldwide prevalence of skin gambling among youth, one British study has found that 11% of 11–16 year olds in Great Britain have placed bets using in-game items².

INTERNATIONAL RESPONSE AND CRITICISM TO SKIN GAMBLING

Officials at the Washington State Gambling Commission (the lead gambling regulator in Valve's home state), have ordered Valve to "stop all transfers of in-game weapon skins for gambling purposes"³. Valve has been cooperative, and has informed the Commission that it has taken action against several skin betting websites by terminating their Steam accounts⁴. There has been no other formal legislative or regulatory response from lawmakers in the United States to provide a framework surrounding skin gambling.

Australian senator Nick Xenophon was one of the first legislators to sound the alarm on skin gambling, criticizing the lack of a firm regulatory stance within that country. Although Australia's *Interactive Gambling Act 2001* prohibits most forms of online gambling, including the use of in-game items as the wager in a bet, many argue that such legislation is behind the times when it comes to addressing these issues⁵. Proponents of such view maintain that the *Interactive Gambling Act 2001* was enacted before advancements in technology gave rise to the birth of skin gambling, and is therefore unsuited to properly regulate this emerging phenomenon.

Denmark is the most recent country to examine the practice of skin gambling. On February 6, 2018, Denmark's *Spillemyndigheden* regulatory agency won a court case forcing Danish ISPs to block access to 24 unauthorized gambling websites, including six eSports skin gambling websites. Although such sites were banned for failing to obtain permission from the *Spillemyndigheden* to operate as gambling platforms, the court noted that many regulators have expressed concern over skin gambling's popularity with underage gamers⁶.

SKIN GAMBLING IN CANADA

While Canadian federal and provincial governments have yet to directly target skin gambling, one new Quebec law poses an indirect threat to the practice. On May 18, 2016, Quebec's Bill 74⁷ received royal assent from Quebec's National Assembly. Bill 74 was meant to amend Quebec's *Consumer Protection Act*⁸ forcing ISPs to block access by Quebecers to Internet gambling sites that compete with Loto-Québec, the province's lottery operator. Arguably, such amendment to the *Consumer Protection Act* would target video games that include gambling-like components, whether embedded in the game's design or elicited by third parties. Bill 74 would require that ISPs make such sites unavailable in Quebec. Quebec was to become the second jurisdiction, after Denmark⁹, to require ISPs to restrict access to online gambling platforms.

Following the enactment of Bill 74, the Canadian Wireless Telecommunications Association (the "CWTA"), representing Canadian ISP members, filed a motion in Quebec Superior Court alleging that Bill 74 promotes online censorship and is in violation of the *Canadian Charter of Rights and Freedoms*¹⁰. On July 18, 2018, the Quebec Superior Court rendered its decision in *Association canadienne des télécommunications c. Procureure générale du Québec*¹¹. The Court considered the issues from the viewpoint of the constitutional division of powers between the federal and provincial governments. Restrictions on the content ISPs are allowed to diffuse fall squarely within the exclusive right of the federal government to legislate in telecommunications and criminal law matters¹². The Court did not agree with the provincial government's contention that such restrictions should be put in place to ensure consumer protection and improve public health, both provincial competencies. As a result, the Court sided with the CWTA and declared the relevant provisions of Bill 74 to be unconstitutional.

The Quebec government has until August 23, 2018 to appeal the Superior Court's decision. Fasken will continue monitoring this case closely, with the hope that its conclusion will serve as a building block in understanding Canada's stance on skin gambling.

[**Andrew Alleyne** is a partner at Fasken Martineau DuMoulin LLP. His practice is focused primarily on corporate and commercial transactions, particularly technology and M&A matters.

Jonathan Raizenne is an associate at Fasken Martineau DuMoulin LLP. He is a member of the firm's Corporate/Commercial group. His practice covers mergers and acquisitions involving venture capital, private equity and information technologies. Jonathan advises start-ups during every step in their development and has intervened in many share and asset purchase-sale transactions, including multi-jurisdictional complex cross-border transactions.

Michael Shortt is a lawyer and trademark agent at Fasken Martineau DuMoulin LLP. His practice focuses on both litigation and transactional work, with an emphasis on the videogame and artificial intelligence industries. As a member of the Québec and Ontario bars, he advises clients on both common-law and civil-law matters.]

¹ Section 2(g) of the Steam marketplace's subscriber agreement states: "[the user] may not use the Content and Services for any purpose other than the permitted access to Steam and [the user's] Subscriptions, and to make personal, non-commercial use of [the user's]

Subscriptions [...] [the user is] not entitled to: [...] exploit the Content and Services or any of its parts for any commercial purpose". *Steam Subscriber Agreement*, online.

² Gambling Commission, "Young People and Gambling 2017: A Research Study Among 11–16 Year Olds in Great Britain", December 2017, at p. 4.

³ Jacob Wolf, *Washington State Gambling Commission orders Valve to Stop Skins Gambling*, online.

⁴ Andy Chalk, *Valve denies wrongdoing in skin gambling rumblings "no factual or legal support for these accusations"*, online.

⁵ Catherine Armitage, "Nick Xenophon calls for curbs on teen gambling in eSports video games" *The Sydney Morning Herald* (July 30, 2016), online.

⁶ Steven Stradbroke, *Denmark ISPs ordered to block online gambling domains*, online.

⁷ *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015* SQ 2016, c. 7.

⁸ CQLR c. P-40.1.

⁹ George Miller, *Danish ISPs ordered to block online gambling domains*, online.

¹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

¹¹ [2018] J.Q. no. 6510, 2018 QCCS 3159.

¹² *Ibid.*, at para. 165.

• AIDING BY OMISSION IN CASL? GOOD ENOUGH, CRTC SAYS •

Nathan Schissel, Partner, Kristél Kriel, Associate, MLT Aikins
© MLT Aikins, Regina



Nathan Schissel



Kristél Kriel

enforcement action serves as a reminder that organizations can be liable under *Canada's Anti-Spam Legislation* (CASL) for failing to take appropriate steps to prevent abuse of their services by malicious actors.

To minimize the risks of non-compliance with CASL, organizations should take steps to appropriately vet their clients, follow current industry best-practices, and develop and implement CASL compliance programs.

On July 11, 2018, the CRTC issued a notice of violation to Sunlight Media Network Inc. ("Sunlight

The Canadian Radio-television and Telecommunications Commission (CRTC)'s recent

Media”) and Datablocks, Inc. (“Datablocks”). The CRTC levied a penalty against each company for “aiding” in the commission of an offence under CASL. In particular, they were cited as having helped execute a “malvertising” attack.

In this blog, we set out the context for the violation, review the law and comment on the possible implications of this decision.

THE TECHNOLOGY: HOW DOES MALVERTISING WORK?

In internet parlance, “malvertising” refers to a scheme that uses advertising networks to deliver what would be colloquially identified as “viruses” but more accurately described as “malware.”

The scheme operates in the following way. A malicious party enlists the service of a (presumably) unwitting advertising service to place an advertisement online. The ads are scattered across the internet. When clicked — or sometimes, simply viewed — the ad secretly installs malware, called an “exploit program,” on the user’s computer. From there, the exploit program is able to install additional and far more destructive malware that might steal sensitive information, spy on the user or lock up the computer’s data and hold it ransom.

THE LAW: HOW DOES CASL ADDRESS MALVERTISING?

Malvertising poses a significant risk to the safety, security and privacy of the public at large. To help mitigate this risk, CASL was equipped with provisions to deter and disrupt malvertising schemes.

Section 8 of CASL forbids a person from, among other things, installing “computer programs” on another person’s computer without his or her consent. A “computer program” is understood to be any data representing instructions or statements that causes the computer to perform a function. Even the most basic programs, like the “exploit program” referred to above, are thus caught by CASL.

FOR ADDED PROTECTION, SECTION 9 OF CASL PROVIDES THAT ANY PERSON WHO AIDS ANOTHER PERSON IN COMMITTING AN OFFENCE UNDER SECTION 8 IS LIABLE FOR THAT SAME OFFENCE

The CRTC is responsible for the investigation and enforcement of CASL. Enforcement may be done through, among other things, the assessment of an administrative monetary penalty of up to \$1 million in the case of an individual offender or \$10 million in the case of other persons (*e.g.*, corporations).

Currently, private actions for CASL are unavailable. We discussed the indefinite delay of these provisions in a past blog post.

With the technological and legal context in mind, we may now turn to the CRTC’s recent enforcement measures taken against Sunlight Media and Datablocks.

THE PARTIES

Sunlight Media and Datablocks are both in the online advertising business. Sunlight Media operates an advertising network. It accumulates ad space across a number of online publishers, and then connects advertisers to those publishers. This is accomplished

ELECTRONIC VERSION AVAILABLE

A PDF version of your print subscription is available for an additional charge.

A PDF file of each issue will be e-mailed directly to you 6 times per year, for internal distribution only.

by way of an auction that enables advertisers to bid on advertising space available on the network. Datablocks facilitates the auction process.

THE ALLEGATIONS

Reports issued by the University of California — Berkeley and cybersecurity companies Zscaler and FireEye had alleged that Sunlight Media and Datablocks were involved in disseminating malicious computer programs.

The CRTC investigated the claims, and found evidence that Sunlight Media and Datablocks's technology had been used in the commission of a malvertising scheme.

HOW WAS CASL APPLIED?

In the CRTC's view, Sunlight Media and Datablocks had "aided" the malicious actor in executing the malvertising scheme within the meaning of section 9 of CASL.

The CRTC pointed to a number of acts in support of its position:

- Providing the technical means to execute the malvertising scheme.
- Actively working to attract non-CASL compliant clientele.
- Promoting services that "foster" violations of section 8.
- Doing business with clients publicly known for facilitating section 8 violations and "other non-recommended practices".
- Facilitating anonymous use of the advertising network by allowing suspicious sign-ups and accepting cryptocurrency as payment.

THE CRTC ALSO CITED SPECIFIC OMISSIONS TO SUPPORT ITS VIEW THAT SUNLIGHT MEDIA AND DATABLOCKS HAD "AIDED" THE MALICIOUS ACTOR

In particular, the CRTC noted a failure to take action following alerts from the Canadian Cyber-Incident

Response Centre indicating that Sunlight Media and Datablocks's services had been used to distribute malware as early as 2015.

The CRTC identified specific industry practices that Sunlight Media and Datablocks ought to have taken, including:

- Implementing written contracts with clients, binding them to comply with CASL.
- Implementing monitoring measures governing clients' use of services.
- Developing and implementing CASL compliance policies.

ADMINISTRATIVE PENALTY

The CRTC considered Sunlight Media and Datablocks as having financially benefitted from the malicious actor's scheme.

This appears to have been based on no more than their business model of selling advertising generally. No evidence was cited indicating active cooperation on the part of Sunlight Media and Datablocks. A penalty of \$100,000 was assessed against Datablocks, and a penalty of \$150,000 was assessed against Sunlight Media.

For further reading on administrative penalties levied under CASL, see Nathan Schissel's post on the "First Significant Penalty issued Under Canada's Anti-Spam Law."

TAKEAWAYS

It is significant that advertising companies have now been penalized for "aiding" malvertising schemes. Also of significance is the way in which the CRTC established liability.

Interestingly, a review of the "acts" cited by the CRTC indicates that the main act Sunlight Media and Datablocks were engaged in was operating their respective businesses. The other "acts" are arguably better characterized as omissions, particularly omissions relating to vetting their clientele. This matter seems, then, to be more about steps Sunlight Media and Datablocks didn't take, rather than ones they did.

THE CRTC'S SUMMARY REPORT INDICATES THAT A FAILURE TO FOLLOW INDUSTRY BEST PRACTICES MAY CONTRIBUTE TO A FINDING THAT AN ADVERTISING COMPANY HAS "AIDED" A MALVERTISING SCHEME IN THE CASL CONTEXT

This represents a need for organizations in the business of online advertising to actively engage with industry best practices like the ones singled by the CRTC and otherwise to prevent the abuse of advertising services by malicious actors.

More broadly, there is every reason to believe that CASL violations outside the online advertising context may well be established in a way similar. The digital landscape is highly fragmented, with multiple

actors routinely involved in the delivery of end-user digital services. If one actor fails to prevent a CASL violation, following the reasoning in Sunlight Media and Datablocks, that actor may be subject to an administrative penalty.

[Nathan Schissel is a partner at MLT Aikins. He practises in the area of information technology, procurement, data protection and privacy, intellectual property commercialization and licensing, anti-spam, e-commerce, advertising and marketing, and mergers and acquisitions.]

Kristél Kriel is an associate at MLT Aikins. She has a general corporate commercial practice with a focus on privacy, freedom of information, technology, credit unions and non-profits.]

• CAN YOU ENHANCE THAT?: COPYRIGHT IN FACTS AND RETOUCHE IMAGES •

Catherine Lovrics, Partner and Trademark Agent and Max Rothschild, Associate,
Bereskin & Parr LLP,
© Bereskin & Parr LLP, Toronto



Catherine Lovrics



Max Rothschild

A recent case from Ontario's Small Claims Court serves as a good reminder that copyright does not extend to facts — regardless of the effort and lengths that a researcher may go to in their fact-finding mission — and provides insight into the limitations on copyright extending to the digitization of historical photos. The decision also serves as a reminder that copyright is balanced by user rights, including the right to fairly deal with someone else's work for news reporting, education and research purposes.

In *Goldi Productions Ltd. et al v. Adam Bunch*,¹ the plaintiff brought a copyright infringement claim for the use of the "entire story" of a historical figure they had researched, as well as related historic photographs that were uncovered during research and then digitized.

The plaintiff's "Canadian Anglo Boer War Museum" website catalogued information on Canada's role in the Boer War, and one of the subjects included on the website was J. Cooper Mason, a Canadian who was allegedly the first combat photographer. The plaintiff had contacted Mr. Mason's descendants and accessed the historical figure's diaries and photographs from during the Boer War. Using this information, the plaintiff detailed Mr. Mason's story on the museum website, and included photographs taken by Mr. Mason that the plaintiff claimed to have "enhanced" before posting them online. The defendant subsequently wrote an article titled "J. Cooper Mason and the Great Boer War" which cited its sources (including the plaintiff

and the museum website) and reproduced factual information set out on the museum website, as well as Mr. Mason's photographs.

The plaintiff claimed the defendant had infringed the plaintiff's copyright in the "entire story" of Mr. Mason, as well as in the photographs taken by Mr. Mason and reproduced on the plaintiff's museum website. On review, the Ontario Small Claims Court quickly dismissed the plaintiff's claim for copyright in the "entire story" of Mr. Mason, noting that "copyright protection does not extend to facts or ideas" and so "the claim of the plaintiff in regards to copyright in the facts of the story must fail."²

As for the photographs, the defendant claimed that the images were in the public domain (since they were taken by Mr. Mason, who died in 1923). The plaintiff, however, alleged to have "enhanced" the original photographs by Mr. Mason. The Court observed that, under Canadian law, for a work to be protected by copyright it must be "original," and that for a work to be original it "must be the product of an author's exercise of skill and judgment... [that] must not be so trivial that it could be characterized as a purely mechanical exercise."³ In this case, the plaintiff gave evidence that they (1) sourced the photos from Mr. Mason's descendants, (2) photographed the original photos, and (3) put the photos through a computer program to "enhance" the photos.

The Court found that the plaintiff's process of photographing and "enhancing" Mr. Mason's photos amounted to a purely mechanical process and therefore did not meet the standard for originality. While uncovering the historic photos (in which copyright had lapsed) no doubt involved time and effort by the plaintiff, that alone does not give rise to copyright. The Court further found that the process of photographing the photos [and presumably scanning would be treated similarly] and running the images through an enhancement program amounted to a purely mechanical process as described by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*. The Court in *Goldie* did not specifically comment on whether skill and judgment may have been involved in photographing Mr. Mason's original

photos, but presumably, the facts before the Court did not show sufficient skill and judgment by the plaintiff to give rise to copyright protection. Besides that the images had been "enhanced" via a computer program, there does not appear to have been any suggestion that the photos appearing on the museum website were retouched, colour corrected, or otherwise restored or altered. It is also not clear whether the plaintiff specifically dictated how the computer program "enhanced" the photos of Mr. Mason's original images, or whether this process was entirely automated.

It is worth noting that the Court did observe judicial precedent for copyright in photographs more generally. As has been noted by the Superior Court of Québec,

In the field of photography in particular, originality is recognized by the choice, arrangement and placement of the subject, the choice of the angle of view and lighting, and artistic work and the personal effort of the photographer [translated].⁴

The Ontario Small Claims Court in *Goldie* further noted a US case with "virtually identical" facts,⁵ in which a New York district court noted that:

There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. "Elements of originality... may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."⁶

Various elements of photography may give rise to sufficient originality for copyright to subsist in photographs. Depending on how a photographer were to retouch and "enhance" a historical photograph, it is arguable that such augmentations could give rise to a separate layer of copyright protection over the resulting "remastered" image. Notwithstanding the decision in *Goldie*, the door remains open for those exercises to create a separate layer of copyright as a result of the skill and judgment involved in restoring or otherwise altering the original photos.

Finally, notwithstanding that the Court concluded that the plaintiff held no copyright in the facts or

images, the defendant's use was found to be a fair dealing with the content on the museum website. Although the Court did not engage in a full fair dealing analysis, it agreed with the defendant's submission that "by analogy the defence of fair dealing should be applied to this situation where the purpose of the article of the defendant was to promote history." In Canada, fair dealing must be for an enumerated purpose, which includes news reporting (with source attribution), education, as well as research purposes. While the Court did not comment on the purpose, it is not unreasonable for the defendant's purpose to qualify, particularly since the plaintiff was attributed as the source.

It is interesting to note that there was no issue of whether the Terms of Use for the plaintiff's museum website prohibited copying the photographs, or otherwise would have restricted the defendant's acts. The issue of whether Terms of Use can be effectively relied on to restrict similar activities will be left for a future decision.

[Catherine Lovrics is a partner, lawyer and trademark agent at Bereskin & Parr LLP. Co-leader of the firm's Copyright & Digital Media practice group, Catherine's practice focuses on copyright, trademark, personality and publicity

rights, as well as marketing and advertising, consumer protection and privacy.

Max Rothschild is a lawyer and associate at Bereskin & Parr LLP. He is a member of the Copyright & Digital Media practice group, and his practice includes copyright matters such as registration, licensing, assignments, and clearances.]

- ¹ *Goldi Productions Ltd. et al v. Adam Bunch*, Court File No.: 15-5800, dated August 1, 2018 [*Goldi*].
- ² *Goldi* at para. 11, citing *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] S.C.J. No. 12, 2004 SCC 13 [*CCH*] at para. 22.
- ³ *Goldi* at para. 14, citing *CCH* at para. 25.
- ⁴ *Ateliers Tango argentin Inc. c. Festival d'Espagne & d'Amérique latine*, [1997] J.Q. no 3693, 84 C.P.R. (3d) 56, at para. 39.
- ⁵ *Bridgeman Art Library v. Corel Corp*, 36 F. Supp. 2d 191 [*Bridgeman*].
- ⁶ *Bridgeman* at p. 196. The authors note that the US standard for originality is generally considered to be higher than that in Canada. Nevertheless, the US Court's approach in this decision is generally consistent with Canadian law with respect to originality of photographs.

• QUÉBEC APPEALS SUPERIOR COURT RULING THAT BILL 74 IS UNCONSTITUTIONAL •

Michael D. Lipton Q.C. Senior Partner, Kevin J. Weber, Partner and Chantal Cipriano, Associate, Dickinson Wright LLP
© Dickinson Wright LLP, Toronto



Michael D. Lipton Q.C.



Kevin J. Weber



Chantal Cipriano

In August 2018, the Attorney General of Québec announced its intention to appeal the decision of

the Superior Court of Québec, which held that the Québec government's controversial attempt to force

Internet Service Providers (“ISPs”) to block certain iGaming sites is unconstitutional.

BACKGROUND

On May 17, 2016, the Québec government passed the omnibus Bill 74, which contained unprecedented Internet-censoring provisions. Bill 74 introduced amendments to the *Consumer Protection Act* that would purportedly restrict illegal online gambling by requiring ISPs to block persons in Québec from accessing unlicensed iGaming websites. Bill 74 empowered the body authorized to conduct and manage gaming in Québec (commonly known as “Loto-Québec”) to draw up a list of unlicensed iGaming sites and provide the list to the provincial gaming regulator (Régie des alcools, des courses et des jeux). The Régie would then send that list to ISPs operating in Québec, after which the ISPs had 30 days to block access to those websites.

Two months after the enactment of Bill 74, a group of Canada’s largest ISPs commenced legal proceedings and sought a declaration from the Superior Court of Québec stating that the amendments encroached upon federal jurisdiction and, therefore, were unconstitutional and of no force and effect. Concurrently in July of 2016, the Public Interest Advocacy Centre (“PIAC”) also filed an application with the Canadian Radio-television and Telecommunications Commission (“CRTC”) objecting to the law on similar grounds. Shortly thereafter, in September 2016, the CRTC temporarily suspended PIAC’s application while the constitutional issues went before the courts.

SUPERIOR COURT OF JUSTICE RULES THAT BILL 74 IS UNCONSTITUTIONAL

On July 24, 2018, the Superior Court of Québec held that the provincial rule creating mandated ISP blocking for unlicensed iGaming sites that compete with Loto-Québec is unconstitutional and *ultra vires* the powers of the Province. Although consumer protection is a matter of provincial jurisdiction, the Court concluded that both the object and the effects

of Bill 74 encroached upon two areas of exclusive federal jurisdiction: telecommunications and criminal law. As a result, the legal and practical effects of Bill 74 were outside of the scope of the provincial jurisdiction.

In his ruling, Justice Nollet cited the *Telecommunications Act*, which enshrines into law the concept of “net neutrality”, meaning that Internet companies should be neutral carriers of content and not favour certain sites over others, nor should they block access to certain sites. Section 36 of the *Telecommunications Act* states, “except where the Commission [CRTC] approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.” Even though the CRTC has this power, it blocks sites sparingly and almost exclusively for safety-related concerns (*i.e.*, security breaches).

The Court’s ruling is a major loss to Loto-Québec as the Court concluded that the impugned measure was designed to prevent competitive iGaming sites from being available in the Province rather than to protect Québécois consumer health as Loto-Québec had suggested. Giving more credence to this conclusion is the fact that Carlos Leitão, Québec’s Minister of Finance, had estimated the proposed amendments would increase the revenues of the provincially owned online gaming site “Espacejeux” to \$13.5 million in 2016-2017 and \$27 million a year thereafter.

THE QUÉBEC GOVERNMENT APPEALS RULING OF THE SUPERIOR COURT

On August 21, 2018, the Attorney General of Québec filed a Notice of Appeal with the Québec Court of Appeal. The provincial government submitted that the trial judge erred in his determination of the true character of the impugned provisions when assessing the “pith and substance” of Bill 74. Citing the Parliamentary debates, the provincial government asserted that the purposes of the legislation — gaming, consumer protection, prevention of crime, and public health — are *intra vires* the Province. In its Notice of Appeal, the Attorney General rejects Justice Pollet’s

conclusion that the true purpose of the legislation was to thwart competition in an effort to increase Espacejeux's market share and consequentially enable the Province to earn more money. To this end, the Province recognizes that although it will derive income from the enactment of the Bill, this fact is neither incompatible with nor does it negate the legitimacy of the stated goals.

The Attorney General further submitted in its filing that the provincially regulated activity of crime prevention could not be invalidated on the basis that its enforcement incidentally relates to the federally regulated telecommunications industry. Lastly, the Attorney General submitted that the trial judge wrongfully disregarded the provincial aspect applicable to the regulation of gaming activities as affirmed by subsections 92 (13) and (16) of the *Constitution Act*.

If the Québec Court of Appeal sides with the Attorney General, it may overrule the decision and reinstate the constitutionality of Bill 74. The timeline of the Province's appeal is unknown, but it is expected to take at least several months.

ANTICIPATED IMPACT ON THE IGAMING INDUSTRY

What is certain is that the Superior Court decision is a blow to the provincial monopolies across Canada, which seek to maintain the exclusive control of

iGaming in Canada under the monopoly established by the Criminal Code. The Superior Court ruling has sent a message to provincial governments: attempts to instigate Internet site-blocking schemes to further a province's goals, whether economic or otherwise, will likely to be unsuccessful. Deference must be accorded to the CRTC and, given its cautious attitude towards using its designated power to block websites, it seems unlikely that a province will be successful in its attempt to do so. As a practical consideration, if the decision of the Superior Court is reversed, Bill 74 would require Canadian ISPs to invest in new and expensive infrastructure to engage in the requisite blocking capabilities, the costs of which are likely to be subsidized by consumers nationally.

Will the Québec Court of Appeal uphold the decision that represents a crack in the provincial iGaming monopoly? Will it encourage offshore iGaming sites to continue to target Canadians? Only time will tell.

[Michael D. Lipton, Q.C. is a Senior Partner at Dickinson Wright LLP and Head of the Canadian Gaming Law Group and can be reached at 416.866.2929 or MDLiptonQC@dickinsonwright.com.]

Kevin J. Weber is a Partner in the Canadian Gaming Law Group at Dickinson Wright LLP and can be reached at KWeber@dickinsonwright.com.

Chantal Cipriano is an Associate in the Canadian Gaming Law Group at Dickinson Wright LLP and can be reached at CCipriano@dickinson-wright.com.]

Halsbury's Laws of Canada – Real Property (2016 Reissue)

Jeffrey Lem & Rosemary Bocska

New Edition!

\$135* + tax

74 Volumes

Hardcover | Billed as Issued

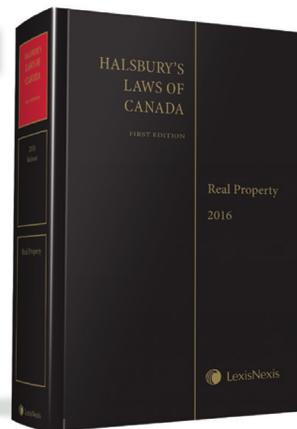
ISBN: 9780433454946

\$300 + tax

Approx. 950 Pages

Hardcover | December 2016

ISBN: 9780433490890



The cross-jurisdictional and cross-disciplinary nature of real property law makes it both a difficult and lucrative area of practice. Individual provincial statutes, combined with a large body of common law, further amplify the complexity of this intricate area.

Halsbury's Laws of Canada – Real Property (2016 Reissue) is a comprehensive statement of real property law in every province and territory throughout Canada. Covering key topics and emerging issues in property transactions, this volume is an essential resource for all real estate lawyers, real estate law professors and students, and any lawyer whose practice intersects with real property interests.

Order Today! Take advantage of the **30-Day Risk-Free[†]** Examination.
Visit lexisnexis.ca/store or call **1-800-387-0899**



[†] Pre-payment required for first-time purchasers.

* Per volume with commitment to purchase the entire 74-volume set.
Price and other details are subject to change without notice.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Group plc, used under licence. Butterworths is a registered trademark of RELX Group plc and its affiliated companies. Other products or services may be trademarks, registered trademarks or service marks of their respective companies. © 2017 LexisNexis Canada Inc. All rights reserved.