CITATION: 2251723 Ontario Inc. v. Bell Canada, 2016 ONSC 7273
COURT FILE NO.: CV-16-561545
DATE: 20161122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2251723 ONTARIO INC. o/a VMEDIA Applicant	*Rocco DiPucchio and Ian Matthews*, for the Applicant
– and –	
BELL CANADA and BELL MEDIA INC. Respondents	*Steven G. Mason, Junior Sirivar, and Brandon Kain*, for the Respondents
	HEARD: November 17, 2016

F.L. MYERS, J.

REASONS FOR DECISION

The Applications

[1] VMedia seeks an order declaring that its new internet retransmitting service is not infringing Bell's copyrights in CTV television broadcasts. Bell seeks the opposite relief in a counter-application under Court File No. CV-16-561611. These reasons apply to both applications.

[2] VMedia says that it is entitled to simultaneously retransmit over the internet Bell's copyrighted over-the-air CTV television signals and programming on its new service without Bell's consent (i.e. for free). Bell says that as the owner or licensee of the copyrights in the signals and programming, it is entitled to prevent retransmission unless it consents (i.e. it is paid).

The Court does not set Broadcasting Policy in Canada

[3] It is the role of the court to interpret and apply the laws of the land as enacted by Parliament. Parliament has delegated the role of setting national broadcasting policy under the *Broadcasting Act,* SC 1991, c 11, to the Canadian Radio-television and Telecommunications Commission under the supervision of the federal cabinet. Parliament has also incorporated CRTC broadcasting policy into the definitions contained in the provisions of the *Copyright Act*, RSC 1985, c. C-42 that apply in this case. Therefore, resolving the matters before the court in

this case requires the court to consider both the meaning of federal law passed by Parliament and policies established by the CRTC as incorporated into the law.

[4] It should be clearly understood however that the court does not set broadcasting policy. It is not for the court to determine whether unregulated simultaneous retransmission of television programs over the public internet is good policy for Canadian consumers and the Canadian broadcasting industry. The court will not determine whether particular technological innovations are good or bad or should be subject to or exempt from broadcasting or copyright regulation.

[5] The court's role is to discern and declare how the existing law applies to the facts that the parties have proven before the court. If technology has overcome the existing laws and policies, it is open to interested parties to put the issues before the CRTC to try to revise the policies and the definitions discussed below. This decision says what the law is. It is for others to determine what the applicable law ought to be.

[6] For the reasons which follow, under the current state of the law VMedia's application is dismissed and Bell's application to enforce its copyrights is granted.

Background on the Overlap between Broadcasting Regulation and Copyright Protection in Canada

[7] Some of the statutory drafting and terminology used in this case is confusing. I therefore provide this overview to try to set out the basic concepts at play. This section is not intended to be comprehensive or complete. It is just a brief primer to try to introduce concepts in order to try to make the rest of the reasons more accessible and comprehensible.

(i) Broadcasters need Two Types of Approval

[8] People or companies who want to broadcast television programming over the public airwaves in Canada need at least two types of approval:

a. First, their broadcasting undertaking (that is, their broadcasting line of business) must be legal under the *Broadcasting Act,* SC 1991, c 11. To broadcast lawfully in Canada, a broadcaster needs either a license or an exemption order obtained from the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*.

b. Second, people who are entitled to broadcast television programming also need access to content to broadcast. They need TV shows or programming. The creators, authors, and owners of TV shows are protected by copyright laws. Under the *Copyright Act*, RSC 1985, c. C-42, the owner of the copyright in a work has the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatever." This means that if a broadcaster wants to air a program, it must either own the copyright (perhaps by producing the show itself) or obtain permission from the copyright owner to broadcast the program. This permission is often in the form of a license of the owner's copyright(s).

[9] A copyright license allows the license holder to reproduce a copyrighted work. It has nothing to do with a regulatory license to broadcast under the *Broadcasting Act*. There are two

distinct licenses at play which reflect permissions from two different sources – the CRTC and the owner of the copyright in a TV show.

[10] It is illegal under the *Broadcasting Act* for someone to broadcast a TV show without a license or an exemption from the CRTC even if the broadcaster owns or has permission from the copyright owner to reproduce the TV show. The converse is also true. A person with a broadcasting license or exemption order from the CRTC will breach a copyright owner's rights if it broadcasts a copyrighted program without the permission of the copyright owner.

[11] In effect, and historically, a broadcaster needed *both* a license from the CRTC *and* a license from the copyright owner in order to broadcast a TV show over the public airwaves in Canada.

[12] Then cable TV was invented.

(ii) The Invention of Cable TV led to Compulsory License Legislation

[13] Cable TV companies receive over-the-air TV signals and simultaneously retransmit them to customers along a fixed cable/wire/fiber. The advent of cable technology greatly improved the quality of the television signals received by customers and it allowed customers to obtain access to a large number of channels that the cable company was able to receive on its big, commercial antennas that householders could not receive at their homes.

[14] And Parliament said this was good.

[15] But, in order to operate legally, the cable companies needed copyright permission from the TV station broadcaster to retransmit along its cables the broadcaster's copyrighted TV signals and content. After studying the issue, the Government decided that copyright owners should not be able to use their copyrights to stop simultaneous retransmission of over-the-air TV signals by cable companies. The Government amended the *Copyright Act* to provide that it no longer infringed an owner's copyright for a cable company to simultaneously retransmit over-the-air television signals in Canada provided a number of conditions were met by the cable companies. One of the conditions was that the broadcaster must be lawfully entitled to broadcast under the *Broadcasting Act*.

[16] Although the statute does not actually provide for licensing from copyright owners to simultaneous retransmitters, since royalties can be payable in some circumstances under the statute, the situation looks much like a license and is generally referred to as a "compulsory license."

[17] Cable companies are not required to pay any royalties to simultaneously retransmit local TV signals under s. 31 of the *Copyright Act*. This was a policy decision taken by Parliament. This case deals with retransmitting of local CTV and CTV2 signals and programming owned or licensed by Bell. So while discussions use the terminology "compulsory license" there is no license or even royalties at play. If VMedia is successful, it will not have to pay Bell for its copyrighted works. Bell will not be asked to grant permission. Rather, VMedia's retransmission, if lawful, will not amount to a violation of Bell's copyright(s).

[18] Then along came the internet.

(iii) *The CRTC's Exemption Order for New Media Broadcasting Undertakings*

[19] In the late 1990s, the CRTC studied internet broadcasting and decided that it was in the best interests of Canadian broadcasting policy for internet broadcasting to remain unregulated. On May 17, 1999, the CRTC issued the *Exemption Order for New Media Broadcasting Undertakings* as Appendix A to Public Notice CRTC 1999-197. That order exempts from the license requirements under the *Broadcasting Act* all new media broadcast undertakings that "**provide broadcasting services delivered and accessed over the Internet**."

[20] Since, May, 1999, people who broadcast over the internet do not need to be licensed by the CRTC.

(iv) The New Media (Internet) Retransmitters are Denied a Compulsory License under the Copyright Act

[21] Shortly after the CRTC decided that all internet broadcasting will be legal in Canada without a license, the question arose as to whether unlicensed internet broadcasters ought to be entitled to the protection of the compulsory license provisions of the *Copyright Act* so as to enable them to simultaneously retransmit over-the-air television signals without infringing the program owner's copyright(s). Recall that the compulsory license provisions of the *Copyright Act* did not require that the broadcaster be *licensed* by the CRTC in order to be freed from the requirement to obtain copyright owner's consent to publish or republish its TV shows. The terms of the compulsory license under the C*opyright Act* only required that the broadcasting be *lawful* under the *Broadcasting Act.* Recall as well that the CRTC has the power to license and it also has the power to exempt broadcasters from the regulatory provisions of the statute. Therefore, when it exempted all internet broadcasters from licensing under the *Exemption Order*, the CRTC made their broadcasting on the internet lawful. By doing so, the CRTC potentially also entitled internet broadcasters to compulsory licenses to simultaneously retransmit local over-the-air TV programs for free under the *Copyright Act*.

[22] And Parliament said this was bad.

[23] Parliament decided that unregulated internet broadcasters should not be entitled to compulsory licenses under the *Copyright Act*. So it amended s. 31 of the *Copyright Act* in 2002 to remove the compulsory license from new media or internet broadcasters. That is, although they are unregulated and may lawfully broadcast on the internet without a license from the CRTC, if internet broadcasters want to obtain programming, they need the consent of copyright owners in the ordinary course even if they want to simultaneously retransmit local over-the-air television just like a cable company.[1]

[24] There is no doubt that the legislative purpose of the new definition of "new media retransmitters" that Parliament added to s. 31(1) of the *Copyright Act* was distinctly and clearly

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[1] The current version of s. 31 of the *Copyright Act* is appended to these reasons.

aimed at requiring internet broadcasters to obtain copyright approval for simultaneous retransmission over the internet of local over-the-air television. The statute was amended expressly to deal with this issue. The contemporaneous legislative history and *Hansard* are uniformly and unusually clear. Parliament first considered giving internet retransmitters access to compulsory licenses and introduced a draft bill in the House of Common to do so. But, after study in legislative committee, Parliament decided to change the bill to deny free programming to internet simultaneous retransmitters of local over-the-air television. While care must be taken with legislative history and especially with *Hansard,* to ensure that they fairly reflect a discernable intention of Parliament as a whole, rather than any individual member of Parliament or political party, in this case, the intention is unanimously expressed and particularly clear.[2]

[25] The legislative drafters of s. 31 expressed Parliament's decision to remove the compulsory license from internet broadcasters in an unusual way. Rather than just saying clearly that internet broadcasters do not qualify as "retransmitters" who obtain a compulsory license under s. 31 (2) of the *Copyright Act*, Parliament amended the definition of "retransmitters" in s. 31 (1) of the statute to exclude from "retransmitters" those broadcasters whose broadcasting is lawful only due to the CRTC's *Exemption Order*.

[26] By excluding from the group of broadcasters who are entitled to a compulsory license those whose broadcasts are lawful only due to the CRTC's *Exemption Order*, Parliament left it open to the CRTC to change its policy in future and to thereby provide compulsory licenses

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[2] I am not ignoring the proper manner of interpreting a statute under the modern approach. I deal with a minute assessment of the meaning of the words defining "new media retransmitter" in s. 31 (1) below. The grammar and ordinary sense of the provision are readily discernible from the words used and from their context in the section dealing with the regulation of compulsory licenses. I am dealing here only with a circumstantial affirmation of Parliament's intention as gleaned from the legislative record. In *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662 (CanLII), the Court of Appeal reiterated and I am bound by the following approach to interpret the meaning of legislation:

> [45] Driedger's modern principle is the crucial tool for construing skeletal legislation such as the CCAA. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See: Jackson and Sarra, at p. 47; *Elmer A. Driedger, The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, at para. 26. See also: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 23, 40.

without the need for Parliament to amend the statute again. Should the CRTC decide to regulate some internet broadcasters and set certain license terms for them, then those license holders would be entitled to broadcast under their newly defined licenses and they will not be broadcasting lawfully *only* by reason of the *Exemption Order*. Therefore, Parliament provided the CRTC with the power to decide whether to grant compulsory licensing to future internet retransmitters and thereby to exempt them from copyright infringement claims.

[27] Very shortly after the *Copyright Act* was amended, the CRTC was ordered by the Governor in Council to consider the question of whether the *Exemption Order* should be amended for people who simultaneously retransmit over-the-air television through the internet. In its *Broadcasting Public Notice CRTC 2003-2* the CRTC reported that it had decided not to amend the *Exemption Order*. At Para. 78 and 79 of its report, the CRTC wrote:

> 78. The Commission further notes, as discussed in Appendix B, the recent amendments to the *Copyright Act* exclude Internet retransmitters from the compulsory licensing regime embodied in section 31 thereof. Accordingly, internet retransmitters will be obliged to negotiate with copyright holders and obtain their consent in order to retransmit the programming of over-the-air broadcasters. The Commission considers the negotiation of Internet retransmission rights will allow broadcasters and producers to address the potential negative effects discussed above on a case-by-case basis, while leaving open the possibility that business models will evolve that will permit the realization of the potential benefits of Internet retransmission. The Commission further considers this requirement for negotiation sufficient at this time to ensure that Internet retransmission contributes to the attainment of the objectives of the *Broadcasting Act*.
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> 79. In light of the above, the Commission does not consider it necessary or appropriate to require the licensing of Internet retransmitters. Rather, Internet retransmission undertakings should remain exempt from these and other requirements under Part II of the *Broadcasting Act.* In addition, since the recent amendments to the *Copyright Act* address the main concern identified in this proceeding, the Commission sees no need to amend the *New Media Exemption Order* at this time.

[28] The CRTC was perfectly clear that it understood that the point of the recent amendment to the *Copyright Act* was to *exclude* internet retransmitters from the compulsory license copyright infringement protection provided to cable and other retransmitters. The CRTC determined that it was in the best interest of Canadian broadcasting policy for internet retransmitters to be subject to broadcasters' copyrights and to negotiate for licenses individually. It declined to change the *Exemption Order* at that time. It has made some amendments to the *Exemption Order* since then but none that affects the outcome of this case.

[29] It should also be noted that in the decision accompanying the *Exemption Order*, the CRTC recognized that a single broadcaster may carry on several distinct broadcasting undertakings or lines of business. The CRTC wrote that "[i]t considers that the new media activities of a company (or any person) involve a separate undertaking from any other type of undertaking that the company or person is licensed to operate." That is, the CRTC clarified that licensees who broadcast over the internet do *not* do so as part of their licensed undertakings but, rather, are carrying out a separate and exempt new media undertaking. This is the crucial issue in this decision.

VMedia's New Service

[30] VMedia is licensed by the CRTC to broadcast under several licenses in a number of provinces of Canada. In September of this year, VMedia commenced offering a new service to its customers. It started to simultaneously retransmit a package of over-the-air television channels at a cost of $17.95 per month to subscribers who have (a) a Canadian credit card; (b) an internet connection from a CRTC-registered internet service provider (ISP), (c) a Canadian postal code, and (d) a ROKU brand set-top box or VMedia's own proprietary set-top box. The package of channels that VMedia started retransmitting included CTV and CTV2 that are owned by Bell.

[31] In paragraph 36 of his affidavit sworn October 11, 2016, George Burger, a director of VMedia, concedes that VMedia's new service is transmitted over the internet. I find on the evidence of both parties, that the new service is both delivered and accessed over the internet. Therefore, it appears to fall under the provisions of the *Exemption Order*. If that is correct, then VMedia is not entitled to a compulsory license for simultaneous retransmitters under s. 31 (2) of the *Copyright Act* and VMedia must obtain Bell's consent to retransmit copyrighted CTV and CTV2 signals and programming on the new service.

Statutory Interpretation of Section 31 of the Copyright Act

[32] VMedia focuses on the word "only" in the definition of a new media retransmitter under s. 31 (1) of the *Copyright Act*. In defining the new media retransmitters who will be excluded from the compulsory license provided to other simultaneous retransmitters, the section says:

> *new media retransmitter* means a person whose retransmission is lawful under the *Broadcasting Act* ***only*** by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time. [Emphasis added.]

[33] VMedia says that its new service is lawful not *only* because of the E*xemption Order* but also under its licenses as a Broadcast Distribution Undertaking (BDU) under the *Broadcasting Act*. If VMedia is entitled to simultaneously retransmit local over-the-air television over the internet under its existing BDU licenses than the retransmission is not lawful ***only*** due to the *Exemption Order* and therefore it will qualify as a "retransmitter" and be entitled to a compulsory license as set out in s. 31(2) of the *Copyright Act*.

[34] The Supreme Court of Canada has recognized that licensed BDU's have the right to simultaneously retransmit local over-the-air television signals and programming without the consent of the initial broadcaster/copyright owner under s. 31 of the *Copyright Act*. Therefore, VMedia says that its BDU licenses are a full answer to Bell's claims. *Reference re Broadcasting Regulatory Policy 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, at para. 59.

[35] However, it is apparent from the Supreme Court's reasoning, and para. 58 of that decision in particular, that the Court was not dealing at all with the carve out from the compulsory licensing regime for new media or internet broadcasters. The Court noted in para. 58 that the statute granted rights to a "specific class of retransmitters" whom it was discussing.

The class of "retransmitters" who are entitled to a compulsory license that were the subject of the Supreme Court's discussion excludes new media or internet broadcasters from the definition of "retransmitters" in s. 31 (1) as discussed above.

[36] VMedia's argument runs squarely into the CRTC's determination that internet broadcasting by a licensee is a separate undertaking from its licensed broadcasting undertakings. If new media or internet broadcasting is a separate undertaking from VMedia's BDU licenses, then VMedia's use of the internet is indeed *only* lawful due to the *Exemption Order* and therefore it does not qualify for the compulsory license in s. 31 (2) of the *Copyright Act*.

VMedia's Argues that its BDU Licenses do not Prohibit Internet Broadcasting and therefore they Allow it

[37] VMedia has several arguments that it advances to say that it is acting under its BDU licenses and not the *Exemption Order*.

[38] First, it notes that its BDU licenses are silent on the subject of the internet. It is licensed to be a BDU and nothing in its license limits its right to broadcast over the internet. Therefore, it says that its BDU licenses do authorize its retransmissions and they do so outside of the *Exemption Order*. VMedia argues that the use of the word "only" in s. 31 (2) would be redundant or superfluous if its argument was not correct. If Parliament meant to prevent all who broadcast on the internet from qualifying for the compulsory license, it would have just said so. The fact that a compulsory license is denied to "only" some internet transmitter (i.e. those whose retransmission is pursuant to the *Exemption Order*) necessarily means that there must be another alternative for lawful broadcasting, such as VMedia's BDU licenses.

[39] I agree with VMedia that the use of the word "only" in the definition of new media retransmitter in s. 31 (1) must be meant to leave open other possibilities. The most obvious possibility is the situation where the CRTC decides to regulate or license some internet retransmitters. As discussed above, that issue went to the CRTC soon after the *Copyright Act* provision went into force and the CRTC decided not to change the *Exemption Order* at that time. Whether it does so in future, perhaps in response to this case for example, remains up to the CRTC.

[40] VMedia's argument that its BDU licenses are another alternative basis under which it lawfully retransmits on the internet has an obvious problem. The CRTC has been clear and express in both the *Exemption Order* and the subsequent discussion of whether to amend the *Exemption Order*, that it does not regulate or license internet broadcasting. Nothing in VMedia's BDU licenses purport to license it to retransmit on the internet because the CRTC does not license that activity. The silence is not because internet broadcasting is permitted under the license, but rather, because doing so does not require a license at all. VMedia seems to be arguing that a person with a driver's license can walk on the sidewalk under her driver's license. After all, nothing in a person's driver's license prohibits her from walking on the sidewalk. But walking on the sidewalk is legal, unregulated, and does not require a license. The silence in a license has nothing to do with the lawful entitlement of the license holder to do an unlicensed

activity – whether walking on the sidewalk or simultaneously retransmitting local over-the-air television on the internet. I do not understand the silence in the licenses therefore to be an explicit or implicit grant of permission to do an unlicensed activity. VMedia retransmits lawfully on the internet due to the *Exemption Order* and not due to the silence of its BDU licenses.

[41] VMedia argues that this interpretation fails to give a large and liberal interpretation to users' compulsory license rights under s. 31 of the *Copyright Act* as required by the Supreme Court of Canada. In addition, it argues that the court is not entitled to opine on the scope of VMedia's licenses as that would usurp the jurisdiction of the CRTC. I respectfully do not agree. VMedia has come to the court and not to the CRTC. VMedia asks the court to declare as a matter of law that it is entitled to a compulsory license under s. 31 of the *Copyright Act*. It has set out the facts underlying its new service and asked the court to conclude that this service is lawful for a reason *other* than the *Exemption Order* so that VMedia qualifies as a retransmitter (and not a new media retransmitter) under s. 31 (1) of the *Copyright Act*. For the court to answer the question posed, it must interpret the statutory provisions in a large and liberal manner that accords with the modern rule of statutory interpretation and then decide factually into which definition VMedia's new service fits. In performing these tasks, the court is assessing the meaning of what Parliament and the CRTC have written. Approaching a remedial statutory amendment seeking to capture the mischief at which the amendment was aimed is indeed a large and liberal approach. Moreover, implementing CRTC decisions so as to understand the state of the law does not usurp the CRTC's role. It is understanding the law as established by a tribunal of competent jurisdiction. The CRTC remains fully able to exercise its regulatory jurisdiction no matter what the outcome of this case may be.

[42] The factual question for the court is whether VMedia provides its new service under its BDU licenses or under the *Exemption Order*.

Is VMedia's New Service a regulated IPTV undertaking?

[43] Under the *Exemption Order* services that are exempt from regulation are "delivered and accessed over the Internet." It is apparent that the CRTC is very alive to technological innovation and has made several policy calls differentiating among new service delivery methods as they are invented. For example, the CRTC regulates a service referred to as IPTV which is television using internet protocol formatting that to the layperson sounds much like one would expect internet television to sound like. In its online Glossary[3], the CRTC defines IPTV and expressly distinguishes it from unregulated internet broadcasting as follows:

> Internet Protocol Television (IPTV) is television content that, instead of being delivered through traditional formats, is received by the viewer through the technologies used for computer networks. This is to say that the digital television content is formatted using IP and is supplied through a broadband connection.

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[3] http://crtc.gc.ca/multites/mtwdk.exe?k=glossary-glossaire&l=60&w=9&n=1&s=5&t=2,

> Fee-based IPTV, as it is today, terminates in a set-top box with the requisite access controls before landing on a TV screen…
>
> **Note: Fee-based IPTV should not be confused with TV over Internet, or Internet Television.** [Emphasis added.]

[44] VMedia argues that although its new service uses the internet, the technology has advanced so that it is now equivalent to IPTV and therefore it should fall under its BDU licenses like regulated IPTV. VMedia's new service is not just a website where anyone can just navigate to click and watch free television. It uses a set-top box that allows VMedia to manage privacy. Customers are required to have a Canadian address and credit card in a province in which VMedia is licensed. VMedia has the ability to prevent its signal from being accessed over the internet outside of those provinces. A regulated ISP delivers its service to customers' homes. It says that its service is a private, managed service that meets the definition of IPTV despite the fact that some of its signals travel through the internet. Moreover, although it could be entitled to retransmit without even paying a royalty under the *Copyright Act,* by submitting that it is operating under its BDU licenses, VMedia says that it is volunteering to meet the regulatory conditions of doing so. It is not just trying to get something for nothing. VMedia argues that its new service is the technological, functional equivalent of IPTV if not identical to it. Therefore it should be treated as IPTV, fall under its BDU licenses, and be entitled to a compulsory license accordingly.

[45] The argument that VMedia is somehow volunteering to be regulated is a straw man i.e. an argument premised on an alternative that does not exist. Its entire argument is that because it is operating under its BDU licenses, it is not broadcasting on the internet under the *Exemption Order* where it would be denied compulsory licensing. To then point to its BDU licenses and suggest that it is somehow volunteering to be regulated is not fair. Of course it is bound by its licenses if it is operating under them as it says it is. There is no extra credit available for doing what one's license requires. For VMedia to suggest that it is somehow volunteering to be regulated is to suggest that there is an alternative allowing unregulated retransmission over the internet without the consent of the copyright owner that it is voluntarily foregoing. But that alternative does not exist. Unregulated retransmission can occur under the *Exemption Order* but it is not entitled to a compulsory license under the *Copyright Act*. Claiming then to be *voluntarily* submitting to regulation is a rhetorical argument with no substance.

[46] Bell points to VMedia's application for its most recent BDU license to differentiate regulated IPTV and unregulated internet broadcasting. In 2014, VMedia proposed a service involving the use of a set-top box to receive VMedia signals in subscribers' homes. The CRTC asked VMedia whether its set-top box can be connected to the internet. In its letter dated June 3, 2014, VMedia responded, "No…the proposed BDU services are not accessed or delivered over the Internet." At pages 3 through 5 of its letter, VMedia distinguished between services delivered through a private, controlled network managed by VMedia and services which utilize the public internet. It made the clear submission to the CRTC that the BDU license it sought was for the former whereas the latter would fall under the *Exemption Order*.

[47] In its *Broadcast decision CRTC 2015-184*, the CRTC accepted VMedia's submissions. At para. 5, the CRTC recited the arguments of objectors who claimed that VMedia's proposed service should not be licensed because it was an internet service that fell under the *Exemption*

Order. At para. 11, the CRTC reiterated its view that broadcasting services that use a private, managed network are not "delivered and accessed" by the internet and do not fall under the *Exemption Order*. The use of a private, managed network rather than the public internet to transmit signals seems to be integral to the CRTC's understanding of IPTV. The "internet protocol" in IPTV refers to the formatting of the data that is transmitted. Not all transmissions that use internet protocol format actually travel over the public internet backbone architecture (wires). The CRTC regulates IPTV because it is not "delivered and accessed on the Internet" as required for the *Exemption Order* to apply.

[48] At para. 12 of VMedia's 2015 BDU license decision, the CRTC wrote:

> IPTV technology has evolved and new variants of IPTV have emerged over the last several years. The Commission considers that the undertaking as proposed by the applicant can be considered terrestrial BDUs. While [VMedia] would deliver its distribution service on the same connection as its Internet service or the Internet service of its agents, using mechanisms similar to those used by online video services that are exempt under the [*Exemption Order*], it would not deliver its service to Internet user at large. In other words, [VMedia's] set-top boxes are not nomadic ***and cannot connect to any point on the Internet***. The service is tied to a specific address using an Internet connection offered by VMedia or its agents and can only be operated on that ISP connection. [Emphasis added.]

[49] The CRTC was clear that it distinguished IPTV from internet retransmission by factors including: (a) whether the signal was delivered to users at large; (b) whether the set-top boxes used were nomadic i.e. whether they are fixed to one location or can be taken from place-to-place; (c) whether the set-top boxes can connect ***to any point on the internet***; and (d) whether service is tied to a specific address using an internet connection offered by VMedia or its agents and can only be operated on that ISP connection.

[50] VMedia argues that the CRTC allowed it to deliver its IPTV through third party agents and it is possible that an agent might use the internet to deliver VMedia's IPTV service. The CRTC considered the use of agents and was satisfied with VMedia's representations and the safeguards that VMedia imposed on the agents. The CRTC made no finding allowing VMedia's regulated IPTV service to be delivered or accessed over the internet.

[51] On the facts before the court, VMedia's new service does not meet the CRTC's factors to qualify as IPTV. Under factor (b), the new service set-top boxes are nomadic. They can be moved to any location within the geofenced limits of VMedia's licensed provinces. Under factor (c) the set-top boxes ***do connect to the internet***. Under factor (d) they are not tied to a specific address using an internet connection offered by VMedia or its agents which can only be operated on that ISP connection. The new service is accessible at any address to which the ROKU box is moved that is serviced by many of the numerous licensed ISPs in Canada who operate internet distribution services in the licensed provinces.

[52] The most significant factor to me however is simpler. As has been noted several times above, the *Exemption Order* applies where broadcasters "provide broadcasting services delivered and accessed over the Internet." The VMedia new service does just that. Whether some aspects

of VMedia's or other broadcaster's IPTV might also do so or whether VMedia's new service is functionally equivalent to some other licensed IPTV service is simply not the issue before me.[4]

[53] Finally, Bell argues that VMedia has already signed a contract with it that provides Bell's copyright approval for internet retransmission for other VMedia services for a fee. Bell argues that if VMedia had the right to a compulsory license, it would never have agreed to pay for its internet retransmission rights under this agreement. VMedia argues that the contract may not be valid since one cannot contract out of one's statutory rights. Without delving into the law of contracting out of statutes, it seems to me that this contract is a red herring. The issue of whether VMedia's new service qualifies for a compulsory license turns on an interpretation of the law as applied to the facts at hand. What the parties might have thought that law was previously or in other contexts is of little moment.

[54] I am called upon to decide if VMedia's new service is broadcast lawfully only by reason of the *Exemption Order*. As the new service is delivered and accessed over the internet it does. This is supported by the fact that VMedia's new service does not meet the factors for IPTV that the CRTC laid out in its 2015 decision that differentiated VMedia's IPTV service from service delivered and accessed over the internet that is lawful only under the *Exemption Order*. In offering its new service, VMedia is carrying on an undertaking as a new media retransmitter under s. 31 (1) of the *Copyright Act*. VMedia's new service therefore does not qualify for the compulsory license under s. 31 (2) of the *Copyright Act* which is only available to retransmitters who are not new media retransmitters.

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[4] VMedia went to some lengths to convince the CRTC that its 2014 IPTV service did not connect to the internet. VMedia then points to a letter from Bell to the CRTC in another matter in which Bell seems to have taken a position closer to the position advanced by VMedia in the case at bar. That may be so. Whether the CRTC found that position persuasive in the other case is for the CRTC. The court is aware that the case at bar has potential impact on the state of internet broadcast competition in Canada and that there are many arguments available on policy issues that may underlie not just this case but cases involving innumerable technological developments that may arise. The court will declare and enforce the law that that is in force when it is called upon to decide the case before it. The policy issues as to whether the law should change to reflect evolving technology are for the CRTC.

Remedy

[55] It follows that VMedia's application is dismissed. Bell is entitled to the relief sought in paras. 1 (a) and (c) of its amended notice of application dated October 3, 2016:

a. declaring that VMedia has infringed Bell's rights under the *Copyright Act* by proceeding without Bell's consent to simultaneously communicating CTV and CTV2 over-the-air television copyrighted works through VMedia's new service that is delivered and accessed over the internet; and

b. enjoining VMedia from continuing to do so on a permanent basis.

[56] I am satisfied that injunctive relief is appropriate to protect the integrity of Bell's intellectual property.

[57] Bell also seeks declaratory and injunctive relief concerning the possible breach of the agreement between the parties to which brief reference was made above. I am not satisfied that I can resolve the issue of whether VMedia's conduct amounted to a violation of the agreement. The written and oral argument was confined in the main to copyright issues and the agreement was referred to as an argument on those issues rather than as an independent cause of action. Whether Bell wishes to proceed with that argument and, if so, whether it is appropriate to deal with the breach of contract issues by way of summary application, can be dealt with at a Case Conference that counsel may book with my Assistant if so advised.

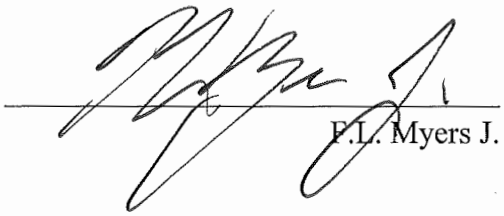
Costs

[58] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario),* 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[59] Costs generally follow the event and I see no reason for that not to be the case here.

[60] Bell seeks $194,365 for costs on a partial indemnity basis. VMedia's partial indemnity costs worked out to approximately $125,000. There is little question that Bell's counsel staffed its brief with more lawyers who put in more hours that VMedia's counsel. Although both sides brought applications, Bell was trying to shut down VMedia's new service and essentially had the burden of proving that it was unlawful. I am generally not hyper-critical of staffing in a complex matter especially where the result has been success. Moreover, practically speaking, VMedia took a very aggressive business position. It had to know that Bell would bring to bear all of the legal firepower that it could muster. I do not think that the amount of Bell's costs are outside the range of what VMedia ought to have reasonably expected given VMedia's hardball tactics of launching the service in face of its own contract and such a clear legislative regime.

[61] I am concerned with a few particular aspects of Bell's Costs Outline however. I do not think that VMedia can reasonably be required to pay for the third lawyer in court who was not a junior lawyer. Moreover, the hourly rates for first year lawyers, while perhaps perfectly acceptable as between counsel and client, yield a partial indemnity rate that exceeds the rate payable to more experienced counsel. There are also billings by both senior counsel that seem to involve some overlapping (such as at the cross-examinations and working on the factum). In all, and with no criticism, in my view it is fair, reasonable, and proportional for VMedia to pay costs to Bell on a partial indemnity basis of $150,000 inclusive of disbursements and taxes.



F.L. Myers J.

Released: November 22, 2016

Copyright Act, RSC 1985, c C-42

Retransmission

(i) Interpretation

- **31 (1)** In this section,

new media retransmitter means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

retransmitter means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

signal means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

- *Retransmission of local and distant signals*

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

- *Regulations*

(3) The Governor in Council may make regulations

(a) defining "local signal" and "distant signal" for the purposes of subsection (2); and

(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

- R.S., 1985, c. C-42, s. 31;R.S., 1985, c. 10 (4th Supp.), s. 7;1988, c. 65, s. 63;1997, c. 24, ss. 16, 52(F);2002, c. 26, s. 2.

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DATE: 20161122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2251723 ONTARIO INC. o/a VMEDIA

Applicant

– and –

BELL CANADA and BELL MEDIA INC.

Respondents

REASONS FOR JUDGMENT

F. L. Myers, J.

Released: November 22, 2016