Federal Court  Cour fédérale

Date: 20220224

Docket: T-374-21

Citation: 2022 FC 256

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, February 24, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

VIDÉOTRON LTÉE.
GROUPE TVA INC.

Plaintiffs
Defendants to counterclaim

and

KONEK TECHNOLOGIES INC.
COOPÉRATIVE DE
CÂBLODISTRIBUTION HILL VALLEY
LIBÉO INC.
LOUIS MICHAUD
JOÉ BUSSIÈRE
JEAN-FRANÇOIS ROUSSEAU
MANON GAUVREAU

Defendants
Plaintiffs by counterclaim

JUDGMENT AND REASONS

[1] The defendants designed a system that provides a range of technological services for hotel rooms. These services include the retransmission of television content, including TVA and TVA Sports, over a private network. The plaintiffs claim that the defendants infringed their copyright by retransmitting the television stations TVA and TVA Sports without their permission. The defendants argue that this retransmission was exempt under section 31 of the *Copyright Act*, RSC 1985, c C-42.

[2] The parties have agreed that the Court should decide these issues on a motion for summary trial. In the course of the proceedings, the parties narrowed the focus of the debate. It is now common ground that section 31 applies only to TVA stations and not TVA Sports stations. The plaintiffs also admit that, at the present time, the retransmission of TVA stations is in principle covered by the section 31 exemption.

[3] The remaining issues are three-fold.

[4] First, the plaintiffs argue that because of the relationship between the defendants, the entity currently carrying out the retransmission is merely a sham. Section 31 could therefore not apply. I reject this claim, which ignores the doctrine of corporate personality and is not based on any evidence of fraud, abuse of rights or infringement of the law.

[5] The second issue concerns a period that spans from February 2021 to summer 2021. The plaintiffs contend that at that time, TVA stations were retransmitted over the Internet and not

over a private connection, which would exclude the application of section 31; however, the analysis of the technical evidence does not support this claim.

[6] Third, the parties have asked me to determine which defendant corporations are liable for the copyright infringement, if any. Because of the inextricable links between their activities, defendants Konek and Hill Valley are jointly and severally liable. Defendant Libéo is not, however, since it is primarily a telecommunications service provider.

[7] The plaintiffs are also seeking further declarations and a permanent injunction. However, these requests exceed the scope of the parties' agreement regarding the issues to be addressed in this summary trial. I therefore reject these requests.

I. Background

[8] The plaintiffs, Vidéotron limitée [Vidéotron] and Groupe TVA inc. [Groupe TVA], are both subsidiaries of the Québecor Group. Groupe TVA is a broadcaster that operates several television stations, including the TVA and TVA Sports families of stations, and that produces several programs that are broadcast on these stations, either by itself or through its subsidiaries. Vidéotron is a company that provides various telecommunication services, including cable television services.

[9] Defendant Libéo inc. [Libéo] is a company that operates in the information technology and networking field; it employs around 75 people. It was founded in 1996 by the defendant Jean-François Rousseau, who was its chief executive officer until 2019. Since 2016, the

defendant Joé Bussière has been its president. Mr. Rousseau and Mr. Bussière have a long-standing business relationship and collaborate in various other information technology companies.

[10] In 2016, Mr. Rousseau began a collaboration with defendant Louis Michaud to design new technological products for hotels. For that purpose, they formed the defendant Konek Technologies Inc. [Konek] in September 2017. Konek designed a box known as the "Konek box", which allows the television in each hotel room to perform a wide range of functions. For now, it is sufficient to note that this box, which is connected to telecommunications infrastructure set up by Konek, makes it possible to retransmit several television stations in hotel rooms. Some components of the boxes were in fact designed by Libéo, pursuant to an agreement with Konek.

[11] A prototype of the system was tested at a hotel in summer 2018. As the project expanded, Mr. Rousseau gradually disengaged from his responsibilities at Libéo. He left his position as chief executive officer in March 2019. It was at this time that other hotels started subscribing to Konek's services.

[12] In February 2020, Mr. Rousseau and the other individual defendants formed the defendant Coopérative de câblodistribution Hill Valley [Hill Valley]. According to Mr. Rousseau, the purpose of Hill Valley was to provide a broader range of television stations to hotels receiving Konek's services. On December 30, 2020, Hill Valley applied to the Canadian Radio-television and Telecommunications Commission [CRTC] to be recognized as a

broadcasting distribution undertaking [BDU] that was exempted under Order CRTC 2017-320, which I will call the Small BDU Order. Through this order, the CRTC exempted BDUs with fewer than 20,000 subscribers from the requirements of the *Broadcasting Act*, SC 1991, c 11, and subjected them to a more limited set of obligations. The CRTC approved Hill Valley's application for exemption on February 3, 2021.

[13] Vidéotron became aware of Konek's activities by at least early 2020, when some of its hotel clients terminated their contracts with Vidéotron to do business with Konek. Starting in August 2020, Vidéotron ran various checks, booking rooms in hotels served by Konek and using a variety of investigative techniques. An engineer working for Vidéotron, Jean-François Hébert, and a renowned networking expert, Dr. Marie-José Montpetit, filed affidavits reporting their observations and findings.

[14] Some specific aspects of the tests performed by Mr. Hébert and Dr. Montpetit will be analyzed in detail below. For now, suffice it to say that they found that Konek and Hill Valley were using the Internet to retransmit the television content offered to their subscribers, in particular TVA and TVA Sports. They also explained that the technology used by Konek and Hill Valley does not have the features of the technology called Internet Protocol Television [IPTV]. Based on these findings, the plaintiffs took the position that Konek and Hill Valley cannot avail themselves of the exemption under section 31 of the *Copyright Act*.

[15] On February 26, 2021, Vidéotron and Groupe TVA instituted this action, seeking various declarations, an injunction prohibiting the defendants from retransmitting Groupe TVA's

programs, and damages. On the same day, Vidéotron and its subsidiary, Fibrenoire inc., gave Libéo a notice of termination of the service contract between them for the decoders used to retransmit the feed from the TVA and TVA Sports stations. This termination came into effect on March 1, 2021.

[16] On June 30, 2021, Vidéotron and Groupe TVA filed a motion for summary trial under rule 216 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The plaintiffs are seeking declarations stating that Groupe TVA owns the copyright for certain programs broadcast by TVA and TVA Sports, that the defendants transmitted these programs in a manner that infringes the *Copyright Act* and that they are not entitled to the section 31 exemption. In addition, the plaintiffs are seeking a permanent injunction prohibiting the defendants from transmitting Groupe TVA's programs. They are relying specifically on the technical evidence provided by Mr. Hébert and Dr. Montpetit.

[17] In response, the defendants submitted a report by Claude Roy, an expert with extensive experience in the field of networking. He expressed various opinions about Konek's and Hill Valley's infrastructure and the checks performed by Vidéotron and Dr. Montpetit. In essence, Mr. Roy found that Hill Valley uses a private network, not the Internet, to retransmit the TVA and TVA Sports feeds to hotels that have subscribed to its services.

II. The motion for summary trial

[18] Before dealing with the substance of the dispute, I have to set out the procedural framework. I will explain why it is appropriate to decide certain issues through a summary trial. I

will also explain why I will only decide the issues that are the subject of the parties' agreement on the scope of this summary trial.

A. *The appropriateness of a summary trial*

[19] Summary trials are part of a range of measures designed to provide a quicker outcome to certain proceedings, thereby furthering judicial economy. Like the motion for summary judgment, the summary trial allows the Court to dispose of certain issues on the basis of evidence presented by way of affidavit. However, Rule 216 allows a judge presiding over a summary trial to require a deponent or an expert to attend for cross-examination before the Court. The judge therefore has additional tools to deal with disputed questions of fact. This is why the criteria for determining whether it is appropriate to issue judgment after holding a summary trial are more flexible than those that govern the availability of summary judgment. In this regard, subsections 216(5) and (6) of the Rules provide as follows:

216 . . .	**216** . . .
(5) The Court shall dismiss the motion if	**(5)** La Cour rejette la requête si, selon le cas :
(a) the issues raised are not suitable for summary trial; or	**a)** les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(b) a summary trial would not assist in the efficient resolution of the action.	**b)** un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.
(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of	**(6)** Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de

conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

[20] This Court has identified a number of factors that need to be examined in order to determine whether it is appropriate to grant judgment at the end of a summary trial. These factors were summarized as follows by Justice Richard Boivin, then a member of this Court, in *Tremblay v Orio Canada Inc.*, 2013 FC 109 at paragraph 24, [2014] 3 FCR 404:

> In deciding whether a file lends itself to a summary trial, a judge may consider, among other things, the complexity of the matter, its urgency, the cost of taking the case forward to a conventional trial in relation to the amount involved . . ., whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort and whether the summary trial will result in litigating in slices . . . .

[21] See also *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paragraphs 35 to 38; *ViiV Healthcare Company v Gilead Sciences Canada, Inc*, 2021 FCA 122 at paragraph 38 [*ViiV Healthcare*].

[22] In the case at hand, the parties agree that a summary trial is appropriate. Given the parties' consent, it is not necessary for me to analyze this issue in depth: *Mainstreet Equity Corp v Canadian Mortgage Capital Corp*, 2022 FC 20 at paragraphs 44 to 47.

[23] I will simply say that the motion seeks a decision with respect to the main issues regarding the defendants' right to retransmit the plaintiffs' signals. The answers may allow the parties to negotiate an agreement concerning the resulting remedies, possibly including damages. The way these issues are circumscribed corresponds roughly to the distinction often made in complex cases between liability and damages.

[24] In addition, the evidence presented as part of this motion provides sufficient basis to decide fairly the questions of fact. The parties provided affidavits and detailed expert reports. The deponents and experts were cross-examined. It is difficulty to imagine what additional evidence would be presented at a trial. In addition, I find that I am able to decide the questions of fact without having attended the cross-examination of the witnesses. Holding a summary trial will save the Court and the parties considerable time.

B. *The scope of the summary trial*

[25] While the parties agree that a summary trial is appropriate here, they do not agree on the scope of the questions that I should decide.

[26] The notice of motion filed by the plaintiffs alleges the following:

> [TRANSLATION]
>
> 10. The parties agreed to have the following questions regarding the infringement of the plaintiffs' copyright decided by summary trial:
>
> (a) Are the impugned retransmission services those of a "retransmitter" or a "new media retransmitter" within the meaning of s. 31 of the [*Copyright Act* (CA)]?

(i) If they are not being provided by a "retransmitter", or if they are being provided by a "new media retransmitter", the parties agree that s. 31 of the CA does not apply.

(ii) If they are being provided by a "retransmitter", but not a "new media retransmitter", the parties agree that s. 31 of the CA applies in whole or in part (see question b).

(b) If s. 31 of the CA applies to the impugned retransmission services, does it cover the works of all Groupe TVA stations?

(c) Subject to the answer to questions 1 and 2, which defendants are liable for the copyright infringement?

[27] However, as indicated above, the plaintiffs are not merely seeking a declaration recording the Court's answers to these questions. If the answers are in their favour, they are also seeking an injunction prohibiting the infringement of their copyright, as well as a declaration that the defendants infringed their copyright.

[28] The defendants object to the issuance of an injunction, since it would be contrary to the parties' agreement regarding the scope of this motion for summary trial. In their defence, the defendants allege that the rules adopted by the CRTC require Groupe TVA to license Hill Valley to retransmit TVA and TVA Sports. During the discussions about the scope of the motion for summary trial that the plaintiffs intended to file, the defendants initially wanted to have the question of compulsory licensing determined but subsequently withdrew this demand so that an agreement could be reached. However, the plaintiffs can only be entitled to an injunction if they are not required to grant a licence. According to the defendants, it follows that an injunction could not be issued without the matter of compulsory licensing being determined beforehand, which would be contrary to the parties' agreement.

[29] The plaintiffs counter that they did not have to seek the defendants' consent regarding the scope of their motion for summary trial. In any event, once the main questions in the dispute are defined, they assert that they are entitled to raise "ancillary" questions or to seek remedies that would arise naturally from the answers to these questions, such as an injunction. The defendants would then be required to put their best foot forward on all the questions raised by the motion. If they wanted the Court to decide other issues, they would simply have had to file their own motion for summary trial. Furthermore, the plaintiffs contend that the defendants' argument regarding compulsory licensing is entirely unfounded. However, the plaintiffs do not deny that they have come to an agreement with the defendants regarding the scope of the proposed motion. Nothing suggests that paragraph 10 of their notice of motion does not faithfully reflect this agreement.

[30] I find that the plaintiffs are bound by their agreement with the defendants with respect to the scope of the motion for summary trial. In litigation between private parties, each party decides how to present its case : *ViiV Healthcare*, at paragraph 17. Each party is free to choose whether to use the procedural means available to it under the Rules. However, to be free is also to be free to commit oneself, in particular by way of an agreement. Parties are therefore free to reach agreement as to whether they will exercise their procedural rights under the Rules or waive them in whole or in part.

[31] Of course, such agreements, which are sometimes referred to as "judicial contracts", cannot deal with questions of public order or contradict the law or the Rules. For example, the parties cannot confer jurisdiction on the Court by contract. The parties also cannot displace the

Court's inherent power to manage its proceedings. Barring these exceptions, however, the Court should normally give effect to the parties' agreements regarding the conduct of a proceeding. As Justice Marie-Josée Hogue of the Quebec Court of Appeal writes, [TRANSLATION] "respecting promises and judicial contracts is a fundamental principle of the judicial system": *Ville de Boisbriand c Carrière St-Eustache ltée*, 2017 QCCA 1887 at paragraph 12; see also *Leblanc Robotique inc c Ferme Graveline*, 2022 QCCA 40. The administration of justice benefits from parties agreeing to limit the scope of the disputes they bring before the courts. This benefit would disappear if the parties were able to go back on their word with impunity.

[32] Thus, while it is true that the plaintiffs were free to select the issues raised in their motion for summary trial and did not have to seek the defendants' consent in this regard, they waived this freedom when they reached agreement with the defendants.

[33] In addition, the pleadings and the evidence before me do not allow me to conclude that the parties expressly agreed for the Court to issue an injunction in addition to addressing the questions that were explicitly asked, or that the defendants should have expected the plaintiffs to seek such a remedy. Given that proceedings are often split so that liability and remedies can be dealt with separately, I cannot conclude that an agreement dealing with issues of copyright infringement implicitly includes remedies. It would also be illogical for the Court to issue an injunction without deciding, be it implicitly or explicitly, the issue of compulsory licensing that the parties agreed not to submit to the Court at this stage. This is another indication that the parties did not agree on the Court issuing an injunction at the end of the summary trial.

[34] In this regard, the plaintiffs cannot argue that the defendants have not suffered harm, that they could have presented their evidence regarding the issue of compulsory licensing or that their arguments on this matter are unfounded. The common thread of these submissions is that issuing an injunction would not work unfairness upon the defendants. However, if I cannot issue an injunction in this summary trial, it is not because the defendants would suffer procedural unfairness but rather because the parties agreed on the issues to be decided and the injunction is not among them. A party cannot circumvent an agreement by arguing a relative lack of inconvenience for its opponent. If that were allowed, litigants would have no interest in agreeing on the course of a proceeding, knowing that their agreement could be jeopardized at any moment.

[35] It follows that the plaintiffs cannot seek an injunction as part of this motion.

[36] For the same reasons, the plaintiffs cannot seek a declaration about the existence of their copyright in certain programs broadcast on TVA and TVA Sports. This issue is not part of the parties' agreement on the scope of this summary trial. In any event, since I will not address the request for an injunction, there is no practical reason for defining the scope of the plaintiffs' copyright at this stage of the proceedings. The same is true of a declaration that this copyright was infringed.

[37] In their notice of motion, the plaintiffs are also seeking a declaration that the defendants circumvented the technical protection measures put in place by the plaintiffs. This issue exceeds the scope of the parties' agreement. In any event, the plaintiffs did not present any evidence on

this issue and made no mention of it in their memorandum of fact and law or in their oral submissions. This request will therefore be denied.

III. Section 31 of the *Copyright Act*

[38] We can now address the central issue between the parties: whether Konek and Hill Valley can avail themselves of the exemption granted by section 31 of the *Copyright Act*. After describing the origin of this provision, I will set out the parties' positions and then explain my conclusion that Hill Valley has been exempted since February 3, 2021.

A. *The scheme of section 31*

[39] Broadcasting television content to the general public in Canada requires various forms of regulatory approval issued by the CRTC under the *Broadcasting Act*, SC 1991, c 11. In addition, broadcasters must hold the copyright for the broadcast content or be licensed by the holder. In light of technological changes, Parliament and the CRTC have deemed it necessary to amend this legislative and regulatory framework. In *2251723 Ontario Inc v Bell Canada*, 2016 ONSC 7273 [*VMedia*], Justice Myers of the Ontario Superior Court of Justice traces the history of these changes. It is sufficient to highlight the broad strokes.

[40] Section 31 of the *Copyright Act* was enacted following the advent of cable television. Broadly speaking, it provides that a cable company does not infringe copyright by retransmitting the signal of an over-the-air television station as long as that the retransmission is "lawful" under the *Broadcasting Act*.

[41] After studying the issue in the 1990s, the CRTC found that the retransmission of television content over the Internet should not be regulated. As a result, it adopted Order 1999-197 [the New Media Exemption Order], which provides that "broadcasting services accessed and delivered over the Internet" do not require authorization issued under the *Broadcasting Act*. However, since this made this retransmission "lawful", section 31 of the *Copyright Act* allowed retransmitters to broadcast television content over the Internet without being copyright holders. Finding this outcome to be undesirable, Parliament amended section 31 in 2002 to exclude "new media retransmitters" from its scheme. Subsection 31(1) now features the following definitions:

retransmitter means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter	**retransmetteur** Personne, autre qu'un retransmetteur de nouveaux médias, dont l'activité est comparable à celle d'un système de retransmission par fil.
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;	**retransmetteur de nouveaux médias** Personne dont la retransmission est légale selon les dispositions de la Loi sur la radiodiffusion uniquement en raison de l'Ordonnance d'exemption relative aux entreprises de radiodiffusion de nouveaux médias rendue par le Conseil de la radiodiffusion et des télécommunications canadiennes à l'Annexe A de son avis public 1999-197, tel que modifié de temps à autre.

[42] Having established the legal parameters of the debate, I can now examine the parties' claims.

B. *The parties' positions and the issues*

[43] As I noted above, the issues have been defined by the parties' agreement, as set out in paragraph 10 of the notice of motion. However, the parties' arguments changed during the proceeding as each became aware of their opponent's evidence and legal position. This has led the parties to make some concessions, which simplifies the Court's task.

[44] The plaintiffs' position was initially based on a binary opposition between IPTV services and retransmission over the public Internet, which underlies Dr. Montpetit's report. However, at the hearing, the plaintiffs acknowledged that Hill Valley's current network architecture is in fact that of a "retransmitter" under section 31 of the *Copyright Act*. In doing so, they admitted that a television feed can be retransmitted over a private network without using IPTV technology. For this reason, I do not need to consider the question of whether the Hill Valley network has the characteristics of IPTV.

[45] For their part, the defendants now acknowledge that since the TVA Sports stations are not broadcast over the air but are only available to cable television service subscribers, section 31 cannot apply to their retransmission. I will therefore issue declaratory relief accordingly, which answers the second issue the parties agree to.

[46] The remaining issues are therefore as follows. First, in respect of the TVA stations, I have to determine the moment from which Konek or Hill Valley can invoke the section 31 exemption. Second, I must consider the plaintiffs' submission that Hill Valley is merely a sham or a legal

fiction and cannot currently avail itself of section 31, even though it retransmits TVA stations over a private network. Third, if the plaintiffs' copyright has been infringed, which of the defendant corporations are liable?

C. *The retransmission of TVA stations*

[47] In this section, I will concentrate on the defendants' right to retransmit the TVA stations pursuant to section 31 of the *Copyright Act*. Although the issues in the notice of motion are worded in the present tense, it is clear that the defendants' situation has changed over time. The plaintiffs suggest that three periods must be separately considered: before the exemption granted to Hill Valley; after this exemption was granted but before the summer 2021 changes to the Konek and Hill Valley infrastructure; and after these changes were made. The defendants, as we will see below, are focusing on the current situation.

[48] I find it preferable to start by looking at the situation prior to the Hill Valley exemption, which I will call the "Konek period", and then the current situation, which I will call the "Hill Valley period". It will then be easier to determine whether the period predating the changes made in summer 2021 should be treated separately.

[49] I must point out that I am not commenting on the broadcasting of content other than that of TVA stations. The companies concerned are not parties to the proceeding and no evidence has been submitted in this regard.

(1) The Konek period

[50] Before Hill Valley was formed and some of Konek's client hotels became members, only Konek was involved in the retransmission of TVA and TVA Sports. The Court therefore has to examine whether Konek could claim the protection of section 31 of the *Copyright Act*.

[51] Konek has never held a CRTC licence under the *Broadcasting Act*. It has also never sought to register under the Small BDU Order. For Konek, the only manner of broadcasting television content without violating the *Broadcasting Act* is to transmit it over the Internet, which would allow it to benefit from the exemption granted by the New Media Exemption Order.

[52] However, if Konek retransmits its signals over the Internet and benefits from the New Media Exemption Order, it is a "new media retransmitter" within the meaning of section 31 of the *Copyright Act* and therefore cannot avail itself of the exception provided by this provision.

[53] Konek does not really challenge this. Its evidence is intended mainly to describe the current architecture of the Hill Valley network. From a legal perspective, Konek has not attempted to show that it qualified as a "retransmitter" within the meaning of section 31. I therefore find that Konek could not benefit from section 31.

[54] This legal situation continued until Hill Valley registered with the CRTC under the Small BDU Order. In fact, section 25 of this order provides that a BDU with fewer than 20,000 subscribers that wants to operate in a region that is already served by licensed BDUs, as is the

case of Hill Valley, must file certain information with the CRTC at least three months prior to commencing operations. Hill Valley filed its form on December 30, 2020, indicating that it would commence operations on February 1, 2021. Although the application was not submitted three months before the undertaking's announced launch date, the CRTC agreed to add Hill Valley to the list of exempt BDUs as of February 3, 2021. This means that, prior to this date, Hill Valley's activities were not "lawful under the *Broadcasting Act*", as required by paragraph 31(2)(b) of the *Copyright Act*. The section 31 exemption can therefore only apply to Hill Valley as of this date, but only if Hill Valley fulfilled the other conditions of this provision, a question that we can now turn to.

(2) The Hill Valley period

[55] The factual situation changed when Hill Valley registered with the CRTC under the Small BDU Order. From that point on, Hill Valley can qualify as a retransmitter and claim the benefit of section 31 of the *Copyright Act*, provided that it is not a "new media retransmitter", that is, its content is not "delivered and accessed over the Internet". The question then becomes whether Hill Valley has used the Internet to retransmit TVA stations during this period.

[56] The question is more complex than it appears, since the CRTC has specified in recent decisions that the reference to the Internet in the New Media Exemption Order means the *public* Internet and not private networks. This distinction therefore needs to be clarified first. I will then be able to show that the Hill Valley network is a private network. Lastly, I will explain why I reject the plaintiffs' argument that Hill Valley is merely a sham. For these reasons, I find that Hill Valley is a "retransmitter" and can avail itself of section 31.

(a) *Public Internet, private network and IPTV*

[57] At the outset, it bears emphasizing that it is the responsibility of Parliament and the CRTC, not of the courts, to develop Canadian broadcasting policy. In the case before us, Parliament has given the CRTC the authority to determine which broadcasting undertakings should be exempt from the usual regulatory requirements. By mirror effect, it has also conferred on the CRTC the authority to determine who should benefit from the exemption provided for in section 31 of the *Copyright Act*. The CRTC is well aware of changes in broadcasting technologies. In exercising the powers delegated by Parliament, the CRTC may distinguish between different technologies. The Court's role is to apply the distinctions made by the CRTC and not to impose its own view.

[58] In that regard, it must be noted that the term Internet does not designate a physical communication infrastructure or even the protocols used by two computers connected by such an infrastructure to exchange data. Rather, it is a protocol for transmitting data packets over a network of connected computers, known by the acronym TCP/IP. Networks that use other types of protocols exist, but these networks are not part of the Internet, even though they may share the same physical infrastructure.

[59] This distinction between public Internet and other networks, which both parties' witnesses accepted, was not lost on the CRTC. In Broadcasting Public Notice 2006-47, it wrote as follows:

> The Commission notes that the phrase "broadcasting services delivered and accessed over the Internet", as used in the New

> Media Exemption Order, describes services that are available over the public Internet to Internet users through an ISP (albeit, in some cases, for a fee). Such services are delivered through the public Internet, rather than simply using Internet protocol (IP) for their delivery and/or relying on the use of dedicated networks for a portion or the entirety of their delivery. Generally, users will access the service in a manner that requires the use of a web browser and the entry of a Uniform Resource Locator (URL).

[60] Subsequently, the CRTC acknowledged in Broadcasting Order 2012-409 that IPTV did not use public Internet and was not covered by the New Media Exemption Order. In fact, even though they use the same physical connections, IPTV services are not delivered over the Internet because they use UDP/IP instead of TCP/IP. In a later decision, Broadcasting Decision 2015-184, the CRTC held that other technologies that are not based on IPTV protocol can also use private networks, thereby excluding them from the scope of the New Media Exemption Order.

[61] Thus, in order to determine whether Hill Valley is covered by the New Media Exemption Order, the real issue is whether its services are delivered over the public Internet or a private network. IPTV is a form of private network, but it is not the only one. Insofar as the *VMedia* decision of the Ontario Superior Court of Justice suggests that there is a binary opposition between public Internet and IPTV, I decline to follow it, since this would be contrary to what emerges from the aforementioned CRTC decisions.

(b) *The architecture of the Hill Valley network*

[62] The current Hill Valley network is described in Mr. Rousseau's affidavit and in Mr. Roy's expert report. The plaintiffs do not dispute this description.

[63] In essence, Hill Valley uses two methods to make its network private.

[64] First, the television content transmitted by Hill Valley uses a "tunnel" created by the L2TP and IPSec protocols. This tunnel simulates a direct connection between two private networks in a way that makes interception impossible. In addition, the data are encrypted. Such protocols are used to create the virtual private networks [VPNs] of many organizations. In paragraph 3.50 of his report, Mr. Roy describes the level of security provided by these technologies:

> [TRANSLATION]
>
> When L2TP and IPSec technology are combined to allow two private networks, X and Y, to communicate, there is absolutely no functional difference compared to using a simple, entirely private connection between the router of network X and the router of network Y.

[65] Second, some hotels are connected to Hill Valley's head-end server through a point-to-point link. Such links are physically separated from those used for the public Internet.

[66] In my view, the television content transmitted by Hill Valley through a "tunnel" is not "delivered and accessible over the Internet". *A fortiori*, the same is true of the content transmitted over the point-to-point link. At the hearing, the plaintiffs admitted that this was the case. I agree. It follows that the architecture of Hill Valley's network is that of a "retransmitter" within the meaning of section 31 of the *Copyright Act*.

(c) *Hill Valley's application to the CRTC*

[67] Hill Valley filed into evidence a copy of its application to the CRTC to benefit from the exemption for small cable companies. This application contains information that is substantially consistent with the information found in the descriptions provided by Mr. Rousseau and Mr. Roy. In particular, Hill Valley states that its services are not delivered over the Internet but over "private L2 layers", in other words, the "tunnel" that I described above.

[68] The plaintiffs make much of the fact that Hill Valley checked the "IPTV" box on the CRTC form, even though technically speaking Hill Valley does not use this protocol. It appears that this form has been designed on the premise of a binary opposition between IPTV and public Internet. I find that, overall, the detailed responses provided by Hill Valley in this form are consistent with the evidence that was presented to me regarding the architecture of its network. Nothing suggests that Hill Valley tried to mislead the CRTC.

[69] The CRTC approved Hill Valley's application for exemption. Although the letter of approval is brief, it can be inferred that the CRTC found that Hill Valley was covered by the Small BDU Order and not the New Media Exemption Order. This strengthens my earlier findings.

(d) *Is Hill Valley a Sham?*

[70] Despite the foregoing, the plaintiffs contend that Hill Valley cannot avail itself of section 31 of the *Copyright Act* because it is merely a sham or a legal fiction that allows Konek

to do indirectly what it cannot do directly. The plaintiffs argue that Hill Valley is entirely dependent on Konek with respect to its employees, its premises, and its technological infrastructure, and the contractual documentation for Hill Valley is almost non-existent.

[71] I reject the plaintiffs' contention. By definition, any corporation is a legal fiction. It is not unusual for separate corporate entities to have close ties and to structure themselves as a group of corporate entities to avail themselves of legal benefits. According to article 317 of the *Civil Code of Québec*, legal personality can only be disregarded when it is intended to "dissemble fraud, abuse of right or contravention of a rule of public order".

[72] The plaintiffs have failed to establish that the creation of Hill Valley pursued such goals. The mere fact that Hill Valley can avail itself of the exemption under section 31 of the *Copyright Act*, while Konek could not, is not enough to prove fraud or abuse of right. The plaintiffs have not argued that Hill Valley has infringed any legislative provisions whatsoever.

(3) An intermediary period?

[73] Although the plaintiffs now acknowledge that Hill Valley's infrastructure is that of a retransmitter that may avail itself of section 31 of the *Copyright Act*, they claim that this has not always been the case. To understand this argument, it is necessary to recall how this proceeding unfolded. It will then be possible to analyze the evidence to ascertain whether the plaintiffs' allegations have been established.

(a) *Background*

[74] Before filing the motion for summary trial, the plaintiffs performed various tests to demonstrate that the television content transmitted by Konek or Hill Valley was delivered over the Internet. These tests were conducted by Mr. Hébert, a Vidéotron engineer. During the last test, he was accompanied by Dr. Montpetit, who testified as an expert. Broadly speaking, Mr. Hébert booked a room in some of the hotels served by Konek. He disassembled the Konek box and intercepted the data packets that travel between this box and the hotel's main box.

[75] One of the tests conducted by Mr. Hébert consisted of extracting the URLs through which the boxes installed in the rooms could access the feeds from various television stations retransmitted by Konek or Hill Valley. On his return to the office, he entered these URLs into his Internet-connected multimedia player and was able to watch TVA and TVA Sports.

[76] Mr. Hébert's affidavit, which describes the results of this test and several others, was disclosed to the defendants in July 2021. Mr. Rousseau found that the fact that it was possible to access the feeds retransmitted by Hill Valley from any computer connected to the Internet revealed a security flaw. Without going into the technical details, Mr. Rousseau then made minor changes to the architecture of the Konek and Hill Valley network to prevent any access to the content retransmitted by Hill Valley from the Internet.

[77] The plaintiffs' position is that in summer 2021, the defendants made far more significant changes to their network architecture than simply correcting a security flaw. According to them,

the current architecture as described by Mr. Rousseau and Mr. Roy could not have been in place when Mr. Hébert performed his tests. The tests conducted by Mr. Roy would not be helpful in demonstrating otherwise, since they were performed after the changes were made.

[78] Yet Mr. Rousseau states that the only change made to the network architecture in summer 2021 was the correction of the security flaw. According to him, the features that make Hill Valley's network private, that is, the use of a "tunnel" and point-to-point links, were in place before summer 2021.

[79] To decide between the parties' positions, it is necessary to analyze the results of the tests conducted by Mr. Hébert in greater detail.

(b) *Analysis of test results*

[80] The goal of the tests conducted by Mr. Hébert was to show that Konek and Hill Valley transmitted television content, namely that of TVA and TVA Sports, over the public Internet. Mr. Hébert connected his laptop between the hotel room's Konek box and the wall outlet that normally connects this box to the hotel's network. By intercepting the data packets exchanged over this connection, he was able to obtain the URLs that allow the Konek box to have access to the feeds of various television stations. He also executed a so-called traceroute command to find the route taken by a data packet to reach the server associated with the Konek and Hill Valley domain names. Using his cellphone, he also connected the Konek box to the Internet without going through the hotel's network. On his return to the office, he used the URLs he obtained to

check whether the feeds from the various television stations retransmitted by Konek or Hill Valley could be accessed from the Internet.

[81] According to Mr. Hébert and Dr. Montpetit, the positive results of these tests show that Konek and Hill Valley use the Internet to retransmit the TVA and TVA Sports signals.

[82] In my view, however, it is difficult to reach such a conclusion, for the following reasons.

[83] First, some of Mr. Roy's results are due to the technical flaw corrected in summer 2021. This flaw allowed the Konek server to access the Hill Valley server. Since the Konek server is connected to the Internet, it was possible to access the content retransmitted by the Hill Valley server from the Internet. This is why, before the flaw was corrected, Mr. Hébert was able to access the TVA and TVA Sports feeds by connecting to the Internet at his office. As Mr. Roy demonstrated, this is no longer possible. The test is therefore inconclusive. In reality, a system cannot be defined by a security flaw. Since the findings of Mr. Hébert and Dr. Montpetit are based on such a flaw, they do not faithfully reflect how the Konek and Hill Valley infrastructure function.

[84] Second, the results obtained using the traceroute tool are not necessarily conclusive. On the one hand, Mr. Roy said that this tool is used to identify a route that leads to a particular address, but there is no guarantee that the server located at this address will respond to a request that reaches it by this route (paragraph 5.17). Specifically, when Mr. Roy's report was prepared, even though the traceroute tool revealed a public address for the Hill Valley server, it was

impossible to obtain the TVA station feed by sending a request to this address from the public Internet (paragraphs 5.35 to 5.42). What is more, the route identified by this tool depends on the DNS server to which a computer is connected. This is what Mr. Roy illustrates in paragraphs 5.10 to 5.16 of his affidavit. When cross-examined (questions 128 and 129), Mr. Hébert admitted that he did not know whether his computer used the private DNS server of the hotel's main box, which may well show that the traceroute tool did not reveal the actual route taken by the TVA station feed, at least during some of Mr. Hébert's visits to the hotels served by Konek.

[85] Third, connecting a Konek box to an external network, as Mr. Hébert did, does not constitute normal use of the system. The fact that Mr. Hébert was able to watch TVA in this manner does not establish that, when working normally, the system transmitted the TVA feed over the public Internet. I also cannot rule out the theory that the result of this test is due to the security flaw mentioned previously or even the fact that Mr. Hébert did not restart the Konek box after hooking everything up. Even though it is true that Mr. Roy did not have a clear explanation for this result, it alone cannot establish how the system functions normally.

[86] Fourth, some test results are consistent with the use of a L2TP/IPSec "tunnel" or a point-to-point link to retransmit TVA and TVA Sports. Although Mr. Hébert and Dr. Montpetit alluded to these results in their affidavits, they did not seek to clarify them or to verify to what extent they contradicted their findings. In addition, they failed to address the fact that these unexplained results specifically involve TVA.

[87] The result in question is described at paragraphs 108 and 109 of Mr. Hébert's affidavit and concerns the subdomain name "iptv-ybq.konek.tv". According to Exhibit JH-13 and paragraph 111 of Dr. Montpetit's affidavit, this is the name of the subdomain used to retransmit TVA. Although the NSLookup tool associated the name of this subdomain with a public IP address, the traceroute tool described a route consisting of a single hop, the destination being a private IP address that, as we now know, is that of the hotel's main box. Mr. Hébert simply indicated that the Konek box connects to one of the relevant subdomains by linking to a [TRANSLATION] "local server inside the hotel". Dr. Montpetit stated in paragraph 101 of her affidavit that [TRANSLATION] "this suggests to me that there is a local server somewhere in the hotel to which the Konek boxes connect to tune some stations (but not all, according to the tests performed)". At paragraph 103 of her affidavit, Dr. Montpetit assumes that the hotel's main box connects to Konek's or Hill Valley's head-end server over the public Internet. When cross-examined, Mr. Hébert admitted that if there was a proxy server at the hotel, the tools he used would have been unable to identify the route taken by the data packets between this proxy server and the Konek or Hill Valley head-end server (questions 160 to 168). Dr. Montpetit admitted that these results show that the feeds can take different routes and that she had not made an effort to clarify the matter (questions 150 to 156).

[88] These results, however, are equally compatible with the existence of a direct link, be it through a "tunnel" or through a point-to-point link, between the hotel's main box and the Konek or Hill Valley head-end server, over which TVA could be retransmitted. Similar tests conducted by Mr. Roy show that with a private connection, the traceroute tool reveals a route that only

contains private addresses. In addition, the packet captures shown in Exhibit JH-39 demonstrate that the TVA feed travelled between two private addresses.

[89] The plaintiffs insist that in spring 2021, the TVA station was being retransmitted using a server associated with the "konek.tv" domain rather than the "hillvalley.coop" one. Yet, when Mr. Roy performed his tests in September 2021, the server retransmitting TVA was associated with the "hillvalley.coop" domain. However, I attach little importance to the names of the domains or subdomains used to identify the head-end servers. At paragraph 4.13 of his affidavit, Mr. Roy points out in this regard that the same server can be accessed through more than one domain name. What is important is that TVA was being retransmitted through a "tunnel" or a point-to-point link and not over the public Internet.

[90] In summary, the evidence provided by the plaintiffs does not show that Hill Valley retransmitted TVA over the public Internet before summer 2021. On the contrary, some of the results obtained by Mr. Hébert suggest that, when the system was functioning normally, TVA was being retransmitted over a private connection, be it a "tunnel" or a point-to-point link. Thus, for the purposes of section 31 of the *Copyright Act*, the period from February 2021 to summer 2021 is not a separate period.

[91] For this reason, I also cannot agree with the plaintiffs' arguments insisting that Mr. Roy performed his tests after the summer 2021 changes to the infrastructure and that he therefore cannot contradict the opinions expressed by Mr. Hébert and Dr. Montpetit. The plaintiffs have failed to demonstrate that these changes had a significant impact on how the TVA feed was

transmitted when the system was functioning normally. Since these are not two distinct periods, Mr. Roy's report is relevant to the entire period.

IV. Who is liable for infringements of the *Copyright Act*?

[92] The parties are also asking me to determine who, if anyone, is liable for infringements of the *Copyright Act*. At the hearing, the parties asked me not to pronounce on the directors' liability. At this stage, only the liability of Konek, Hill Valley and Libéo are at issue.

[93] The plaintiffs essentially contend that Konek and Hill Valley are one and the same. They also claim that Libéo is liable because it leased from Vidéotron decoders that, until March 1, 2021, were used to retransmit TVA and TVA Sports. Libéo therefore actively participated in infringing Groupe TVA's copyright.

[94] For their part, the defendants assert that only Hill Valley can be liable for copyright infringement. They allege that Konek stopped retransmitting TVA stations when Hill Valley was established in January 2020 and never retransmitted TVA Sports stations itself. As for Libéo, it apparently benefited from the exemption granted to Internet service providers by paragraph 2.4(1)(b) and section 31.1 of the *Copyright Act*.

[95] I agree that it is not possible to distinguish between Konek and Hill Valley in respect of liability for copyright infringement. Hill Valley depends entirely on Konek's infrastructure in the retransmission of TVA and TVA Sports. There is no Hill Valley box that is independent of the Konek box. In reality, the Konek and Hill Valley networks are designed to work together:

depending on the television station a customer wants to watch, the feed is routed to either one or the other. In other words, Hill Valley would not have been able to retransmit TVA and TVA Sports if Konek's infrastructure had not been programmed for this purpose. Konek and Hill Valley are engaged in a joint venture that justifies their joint and several liability.

[96] However, it is not possible to group Konek and Hill Valley together with Libéo. Libéo provides server hosting and Internet services to Konek and Hill Valley. As set out in paragraph 2.4(1)(b) and section 31.1 of the *Copyright Act*, this is not sufficient to make Libéo liable for any copyright infringements committed by Konek or Hill Valley. Although Libéo was aware that the Konek system was intended to retransmit television stations, there was no basis for it to presume that this would be done in violation of the *Copyright Act*. Similarly, the fact that Libéo provided Konek with programming services for the Konek box software does not make Libéo liable for the content transmitted using these boxes.

[97] The fact that the same people are shareholders or directors of Konek and Libéo does not override the separate legal personalities of these corporations. The shareholders or directors of a corporation may create different corporations to operate different businesses. As I explained above, it is only in cases of fraud, abuse of right or contravention of a rule of public order that the corporate veil is lifted. The plaintiffs proved no such thing. The close ties between the two corporations or the fact that on its website, Libéo stated that it founded Konek do not mean that the two corporations' distinct legal personalities can be ignored.

[98] In reality, the evidence shows that the directors of Konek and Libéo wanted to separate the two companies. Although Konek used Libéo's resources initially, it now has its own premises and its own staff. Mr. Rousseau, who founded Libéo 25 years ago, gradually gave up his duties at Libéo to dedicate himself entirely to Konek.

[99] The plaintiffs rely on a particular fact to hold Libéo liable. Until March 1, 2021, Konek or Hill Valley, as the case may be, picked up TVA and TVA Sports using Illico decoders leased from Vidéotron. These decoders were in Libéo's server room and they were registered to Libéo by Vidéotron. I find this to be a very thin basis for holding Libéo liable. First, Mr. Rousseau testified that he himself ordered these decoders from Vidéotron and that the fees were always paid for by Konek. He also supervised the installation of these decoders in Libéo's server room. Mr. Bussière, on the other hand, states that he had not been aware of the presence of these decoders or their use. Second, even if the lease agreement for these decoders is deemed to have been between Vidéotron and Libéo, there is no evidence that Libéo was aware of the specific use of these decoders by Konek and Hill Valley. Ultimately, the plaintiffs rely on the fact that the same individual, Mr. Rousseau, was in fact the head of both Konek and Libéo. However, this is not a sufficient basis to treat the two corporations as one. Libéo is therefore not liable for any copyright infringements committed by Konek or Hill Valley.

V. Conclusion

[100] In summary, I find that since February 3, 2021, Hill Valley has been a retransmitter that can avail itself of the exemption provided by section 31 of the *Copyright Act*. Before this date,

neither Konek nor Hill Valley could avail themselves of this exemption. While the TVA stations may qualify for this exemption, the TVA Sports stations may not.

[101] In addition, if the *Copyright Act* was infringed through the retransmission of the TVA and TVA Sports stations, then Konek and Hill Valley are jointly and severally liable for this infringement. Libéo, however, is not.

[102] I will therefore issue a declaratory judgment that reflects these findings.

[103] The parties did not make any specific submissions on costs. Since the plaintiffs are partially successful, there is no basis to deviate from the usual rule according to which they should be awarded costs.

VI. Redaction of passages in the reasons for judgment

[104] In accordance with the Court's usual practice in cases where a confidentiality order has been made, a confidential draft of these reasons was sent to the parties to give them an opportunity to request the redaction of certain passages containing confidential information. The defendants submit that the passages dealing with the security flaw and certain aspects of the Konek and Hill Valley network architecture should be redacted.

[105] In principle, the judicial process, including the reasons for judgment, is open to the public. A confidentiality order can only be made if it is necessary to avoid a serious risk to an important public interest and the benefits of the order outweigh its negative effects: *Sherman*

Estate v Donovan, 2021 SCC 25 at paragraph 38 [*Sherman*]. In my view, this test applies equally to redactions in the reasons for judgment.

[106] The defendants did not establish a serious risk to an important public interest. As for the security flaw, the defendants fear that the disclosure of this information could harm their relationship with their clients. However, commercial reputation is not in itself an important public interest that justifies redacting the reasons for judgment. At issue is not individual dignity but sensibilities or discomfort, and these do not allow for an exception to the open court principle: *Sherman*, at paragraphs 31 and 84. In addition, it is clear that this flaw was corrected. Only someone who disassembled a box in a hotel room and used Mr. Hébert's investigative techniques could obtain the technical information required to exploit this flaw. I am far from persuaded that the disclosure of the existence and later correction of this flaw gives rise to a serious risk.

[107] The security of telecommunication services providers is undoubtedly a serious public interest. However, these reasons contain only very general information about the architecture of the Konek and Hill Valley network. The defendants have failed to show that disclosing this information would pose a serious risk to the security of their network. I have difficulty seeing how an attacker could use this information to infiltrate the network or obtain services from Konek or Hill Valley unlawfully.

[108] The defendants rely on the fact that during the trial, this information was designated as being confidential and that the plaintiffs did not oppose this designation. However, because of

the structure of confidentiality orders typically made by this Court, I have not had to consider the merits of the designations made by the parties. The mere fact that the designation of the information at issue was not challenged does not show that disclosing it would pose a serious risk to an important public interest.

[109] In sum, the *Sherman* test has not been met. These reasons are therefore identical to the confidential draft sent to the parties.

JUDGMENT in T-347-21

THIS COURT'S JUDGMENT is as follows:

1. Before February 3, 2021, neither the defendant Konek Technologies Inc. nor the defendant Coopérative de câblodistribution Hill Valley qualified as a "retransmitter" within the meaning of section 31 of the *Copyright Act*.
2. Since February 3, 2021, the defendant Coopérative de câblodistribution Hill Valley qualifies as a "retransmitter" within the meaning of section 31 of the *Copyright Act*.
3. The retransmission of TVA Sports stations is not covered by section 31 of the *Copyright Act*.
4. The defendants Konek Technologies Inc. and Coopérative de câblodistribution Hill Valley are jointly and severally liable for copyright infringements committed by one or the other in the retransmission of TVA and TVA Sports stations when this retransmission is not exempted under section 31 of the *Copyright Act*.
5. The defendant Libéo inc. is not liable for any copyright infringements committed by defendants Konek Technologies Inc. and Coopérative de câblodistribution Hill Valley in the retransmission of TVA and TVA Sports stations.
6. Costs are awarded to the plaintiffs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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