

Federal Court



Cour fédérale

Date: 20230526

Docket: T-374-21

Citation: 2023 FC 741

Ottawa, Ontario, May 26, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**VIDÉOTRON LTÉE
TVA GROUP INC
TVA PRODUCTIONS II INC**

**Plaintiffs
Defendants by Counterclaim**

and

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

**Defendants
Plaintiffs by Counterclaim**

PUBLIC JUDGMENT AND REASONS

[1] The defendants developed an integrated technological solution for their hotel clients. As part of this service, they have been retransmitting the TVA and TVA Sports television channels

without having obtained the authorization of the plaintiff TVA Group Inc. The plaintiffs brought an action in order to stop this retransmission and obtain damages. For the reasons that follow, the defendants have failed to show that the regulatory framework flowing from the *Broadcasting Act*, SC 1991, c 11, authorizes them to retransmit the TVA Sports channels. I therefore grant an injunction prohibiting the retransmission of the TVA Sports channels, and I order the defendants Konek Technologies Inc, Coopérative de câblodistribution Hill Valley, Libéo Inc and Jean-François Rousseau to pay \$553,000 in statutory damages. I also dismiss the claims that the parties have filed against each other under section 7 of the *Trademarks Act*, RSC 1985, c T-13, mainly because they have not established causation between the opposing party's alleged conduct and their alleged damage.

I. Background

A. *The Facts*

[2] The plaintiffs Vidéotron limitée [Vidéotron] and TVA Group Inc [TVA Group] are subsidiaries of Quebecor Media Inc [Quebecor Media]. TVA Group is a broadcaster that operates a number of television channels, including TVA and TVA Sports, and that produces—either itself or through its subsidiaries, including the plaintiff TVA Productions II Inc [TVA Productions]—several programs that are broadcast on these channels. Vidéotron is a company that offers a range of telecommunications services, including cable television services.

[3] The defendant Libéo inc [Libéo] is a company that operates in the networking and information technology sector and that employs approximately 75 people. It was founded in

1996 by the defendant Jean-François Rousseau, who remained its chief executive officer until 2019. The defendant Joé Bussière has been the president of Libéo since 2016. Mr. Rousseau and Mr. Bussière have a long-standing business relationship and work together at various other IT companies.

[4] In 2016, Mr. Rousseau began collaborating with the defendant Louis Michaud in order to design new technological solutions for hotels. To that end, they formed the defendant Konek Technologies Inc [Konek] in September 2017. Konek designed a system that, using an internal network and boxes connected to the television in each room of a hotel, offers a wide range of functions to hotel guests, such as WiFi and IP telephony, while also providing various marketing tools to the hotel.

[5] One of the features of this system is the retransmission of television channels in hotel rooms. In this regard, the Konek system is an alternative to traditional cable television. This dispute relates to the manner in which the defendants sought to obtain the rights required to retransmit TVA Group's television channels.

[6] The defendants set up a hybrid corporate structure in order to benefit from the exemption set out in section 31 of the *Copyright Act*, RSC 1985, c C-42. This provision allows a cable operator, also called a "broadcasting distribution undertaking" or "BDU", to retransmit the signal of certain television channels without the consent of the copyright owner.

[7] This is why, in February 2020, Mr. Rousseau and the other individual defendants created the defendant Coopérative de câblodistribution Hill Valley [Hill Valley]. According to Mr. Rousseau, the purpose of creating Hill Valley was to provide a broader range of television channels to hotels receiving Konek services (Transcript no 5 of February 21, 2023, at 106–107). On December 30, 2020, Hill Valley applied to the Canadian Radio-television and Telecommunications Commission [CRTC] in order to be recognized as an exempt BDU pursuant to 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*, and subjected them to a more limited set of obligations. The CRTC approved Hill Valley’s application for exemption on February 3, 2021.

[8] A prototype of the Konek system was tested at a hotel in the summer of 2018. Other hotels subscribed to the services provided by Konek and Hill Valley starting in 2019, cancelling in the process their subscriptions to the cable television services offered by Vidéotron or its competitors. The defendants have been broadcasting the TVA channels to their clients since July 2018, and the TVA Sports channels since March 2020.

[9] The defendants never obtained the plaintiffs’ consent to retransmit the TVA and TVA Sports channels. On February 26, 2021, Vidéotron and TVA Group commenced this action, seeking various declarations; an injunction prohibiting, in particular, the defendants from retransmitting TVA Group’s programs; and damages.

[10] It should be emphasized that Konek and Hill Valley initially obtained the signals that they were retransmitting by subscribing to Vidéotron's services. When the action was commenced, Vidéotron cancelled this service. To obtain the signal for the TVA Sports channels, Konek and Hill Valley then subscribed to Internet streaming services. TVA Group never authorized these services to retransmit the signal for the TVA Sports channels, and according to the evidence submitted at the trial, these services are likely illegal.

B. *The Summary Judgment*

[11] In June 2021, the plaintiffs filed a motion for summary trial in order to obtain judgment on certain issues. It can be said, simplifying somewhat, that these issues aimed to define the scope of the exemption set out in section 31 of the *Copyright Act* and determine which of the corporate defendants were liable for copyright infringement. I rendered judgment on this motion in February 2022: *Vidéotron Ltée v Technologies Konek inc*, 2022 FC 256 [the Summary Judgment].

[12] The first issue concerned section 31 of the *Copyright Act*, which provides that certain forms of retransmission of television signals by a BDU do not constitute copyright infringement. The plaintiffs' initial position was that this provision did not authorize the defendants to broadcast either the TVA channels or the TVA Sports channels. The defendants argued the exact opposite. At the hearing, the defendants recognized that section 31 could not apply to the TVA Sports channels because these channels are not broadcast over the air. The plaintiffs, for their part, acknowledged that an exempt BDU using technology similar to that of the defendants

could claim the benefit of section 31 with regard to the TVA channels, but they contended that Hill Valley could not benefit from this exemption because it was merely a front.

[13] In the Summary Judgment, I gave effect to the mutual concessions of the parties and found that section 31 of the *Copyright Act* does not allow for the retransmission of the TVA Sports channels. In addition, I found that Hill Valley was not merely a front and that, since its registration with the CRTC on February 3, 2021, it could broadcast the TVA channels by relying on the exemption set out in section 31.

[14] With regard to the second issue, I found that Konek and Hill Valley were solidarily liable for any copyright infringement arising from the retransmission of the TVA and TVA Sports channels. However, I found that Libéo was not liable for such infringements because it benefits from the exemption that sections 2.4 and 31.1 of the *Copyright Act* confer on Internet service providers.

C. *Subsequent Decisions*

[15] Shortly after the Summary Judgment was issued, Quebecor Media asked the CRTC to revoke the exemption that had been granted to Hill Valley on the grounds that the latter's activities infringed its copyright. In response, Hill Valley requested that the CRTC initiate a dispute resolution process with the goal of reaching an agreement that would allow it to broadcast the TVA Sports channels.

[16] On December 21, 2022, in Broadcasting Decision CRTC 2022-346, the CRTC denied Quebecor Media's request. The CRTC first observed that Hill Valley was eligible for an exemption under the Small BDU Order and that there were no grounds to revoke that exemption. The CRTC found that Hill Valley was authorized to retransmit the TVA channels. The CRTC also suggested that the retransmission of TVA Sports was contrary to the *Copyright Act*, although it noted that this issue did not fall within its jurisdiction. The CRTC therefore denied Quebecor Media's requests. With respect to Hill Valley's request, the CRTC stated that distributing TVA Sports channels was not a regulatory requirement. Nevertheless, the CRTC encouraged the parties to negotiate a mutually acceptable agreement, while clarifying that it was not condoning any breach of the *Copyright Act*.

[17] The defendants reacted to this decision by applying again to the CRTC, in order to obtain a final offer arbitration regarding the distribution of the TVA Sports channels. On March 27, 2023, in Broadcasting Decision CRTC 2023-99, the CRTC denied this request. It found that the requirements for holding such an arbitration were not present. It also reiterated that:

There is no regulatory requirement for Quebecor to provide its discretionary programming service to Hill Valley for distribution. Conversely, there is no requirement for Hill Valley to distribute TVA Sports, or for TVA Sports to be offered by Hill Valley.

[18] Moreover, the plaintiffs appealed the part of the Summary Judgment in which I found that Libéo was not liable for infringements of the *Copyright Act* committed by Konek and Hill Valley. On May 3, 2023, the Federal Court of Appeal reversed this part of the judgment and found that Libéo was solidarily liable for the infringements of the *Copyright Act* at issue in this

proceeding. The Federal Court of Appeal's decision settles this issue and I need not address the submissions made by the parties at trial in this regard.

II. Analysis

[19] After the Summary Judgment was rendered, a certain number of issues remained to be decided and proceeded to trial. It is helpful to begin the analysis by providing an overview of these issues and my findings with respect to each of them.

[20] Several of these issues pertain to the plaintiffs' claim for copyright infringement. Firstly, the defendants argue that the plaintiffs failed to show that they own the copyright on the works at issue. They also assert that the CRTC is about to compel TVA Group to license them to distribute the TVA Sports channels and that it would be unfair to grant an injunction in the meantime. Lastly, they allege that the plaintiffs have implicitly waived their rights. For the following reasons, I reject these submissions and find that Konek, Hill Valley and Libéo infringed the plaintiffs' copyright.

[21] The appropriate remedies must therefore be determined. Given that the copyright infringement is ongoing, an injunction is in order. I also allow the claim for statutory damages, but for a lower amount than the amount claimed by the plaintiffs. In this regard, I am of the view that a lump sum of \$553,000 is sufficient to compensate for the damage that the copyright infringement caused the plaintiffs, to denounce the defendants' stubbornness in asserting a right to retransmit the TVA Sports channels, and to deter other businesses from engaging in similar

conduct. In addition to Konek, Hill Valley and Libéo, Mr. Rousseau will be solidarily liable to pay these damages given the central role that he played in the copyright infringement.

[22] Furthermore, the parties claimed damages against each other pursuant to section 7 of the *Trademarks Act*, which prohibits discrediting a competitor or making false or misleading statements. I dismiss these claims because the parties have not shown causation between the statements in question, assuming that they were false or misleading, and the alleged damage.

[23] I will therefore address the issues in the following order: ownership of copyright; TVA Group's alleged obligation to grant a licence; TVA Group's supposed waiver of its rights; the extent of the copyright infringement; the appropriate remedies; and the claims under section 7 of the *Trademarks Act*.

A. *Does TVA Group Own the Copyright?*

[24] As in any action for infringement, the first issue is to determine whether the plaintiffs have proven that they are the owners of the copyright on the works that have been reproduced or, at the very least, are the exclusive licensees. In this respect, the plaintiffs are not asserting a copyright in a communication signal, as set out in section 21 of the *Copyright Act*; instead, they are asserting a copyright in a collection of cinematographic works, namely, certain daily or weekly programs broadcast on the TVA and TVA Sports channels. TVA Group or TVA Productions, as the case may be, state that they are the makers of these works and are claiming the benefit of the presumptions established by paragraphs 34.1(1)(b) and 34.1(2)(c) of the *Copyright Act*, which read as follows:

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

...

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

(2) Where any matter referred to in subsection (1) is at issue and no assignment of the copyright, or licence granting an interest in the copyright, has been registered under this Act,

...

(c) if, on a cinematographic work, a name purporting to be that of the maker of the cinematographic work appears in the usual manner, the person so named shall, unless the contrary is proved, be presumed to be the maker of the cinematographic work.

34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

[...]

b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.

(2) Dans toute contestation de cette nature, lorsque aucun acte de cession du droit d'auteur ni aucune licence concédant un intérêt dans le droit d'auteur n'a été enregistré sous l'autorité de la présente loi :

[...]

c) si un nom paraissant être celui du producteur d'une œuvre cinématographique y est indiqué de la manière habituelle, cette personne est présumée, jusqu'à preuve contraire, être le producteur de l'œuvre.

[25] In addition, the plaintiffs rely on the definition of “maker” that is set out in section 2 of the *Copyright Act*:

maker means

(a) in relation to a cinematographic work, the

producteur La personne qui effectue les opérations nécessaires à la confection d'une œuvre

person by whom the arrangements necessary for the making of the work are undertaken, or

cinématographique, ou à la première fixation de sons dans le cas d'un enregistrement sonore.

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken;

[26] The plaintiffs rely on several decisions in which this Court stated that the maker of a television program benefits from the presumption established by paragraph 34.1(1)(b) of the *Copyright Act* because a program of this nature is considered to be a cinematographic work. The maker is therefore presumed to be the copyright owner: *Interbox Promotion Corp v 9012-4314 Québec Inc*, 2003 FC 1254 [*Interbox*] at paragraph 24; *Bell Canada v L3D Distributing Inc (INL3D)*, 2021 FC 832 [*L3D*] at paragraphs 47–49; *Canadian Broadcasting Corporation v Conservative Party of Canada*, 2021 FC 425 [*Conservative Party*] at paragraph 33; *Voltage Holdings, LLC v Doe#1*, 2022 FC 827 [*Voltage Holdings*] at paragraph 28. The plaintiffs add that without such a presumption, it would be difficult to bring proceedings against persons or entities pirating television signals.

[27] In order to establish that they benefit from these presumptions, the plaintiffs relied on the testimony of Martin Picard, Vice President and Chief Operating Officer of TVA Group. Mr. Picard explained in great detail that the programs in which the plaintiffs are asserting a copyright were created by executive producers, directors, hosts and technical personnel who are all employees of TVA Group or TVA Productions (Affidavit of July 7, 2021, Exhibit 10; Confidential Transcript no 2 of February 20, 2023, at 4–16; exhibits 32–69). This evidence is

intended to demonstrate that TVA Group or TVA Productions were, “in relation to a cinematographic work, the person[s] by whom the arrangements necessary for the making of the work [were] undertaken”. In addition, he submitted screenshots of samples of these programs, in which the name of one of the plaintiffs appears in the credits, in order to claim the benefit of the presumption in paragraph 34.1(2)(c) (Transcript no 1 of February 20, 2023, at 135–145; exhibits 70–85). It must be emphasized that the plaintiffs do not claim to be the authors of the works in question. Indeed, the plaintiffs argue that a cinematographic work does not necessarily have an author.

[28] The defendants, on the other hand, allege that the decisions of this Court that apply the presumption of paragraph 34.1(1)(b) to the maker of a cinematographic work were wrongly decided. Relying on an article by Professor David Vaver entitled “Owning Copyright of Movies and Films in Canada: May I Presume?” (2022) 34 IPJ 233, the defendants contend that only the maker of a sound recording benefits from the presumption and that, with respect to a cinematographic work, it is the author and not the maker who is presumed to be the copyright owner. They base their argument on the scheme of the *Copyright Act*, which contemplates distinct systems for works (including cinematographic works) and sound recordings, and on commentary that substantiates their reading of section 34.1: John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Carswell, 2003) at paragraphs 11.7 and 17.28; Laurent Carrière, *ROBIC Canadian Copyright Act Annotated* (Toronto: Thomson Reuters, 2021) at paragraph 34.1:5.2.1; Roger T Hughes and Susan J Peacock, *Hughes on Copyright and Industrial Design*, 2nd ed (Scarborough: LexisNexis Butterworths, 2005) at paragraphs 11 (“author”) and 37 (“ownership-general”); Normand Tamaro, *The 2023 Annotated*

Copyright Act (Toronto: Thomson Reuters, 2023). Lastly, they note that a bill tabled in Parliament would have added to the *Copyright Act* a provision stating explicitly that the maker of a cinematographic work is the first owner of the copyright, but that the provision in question was never adopted: Bill C-115, 34th Parliament, 3rd session.

[29] Whatever their persuasive value, the defendants' arguments run up against the binding force of precedent. In *R v Sullivan*, 2022 SCC 19 [*Sullivan*], the Supreme Court of Canada recently reiterated that trial courts must follow their own decisions, except in certain very narrow circumstances that Justice Nicholas Kasirer summed up as follows at paragraph 75:

Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached *per incuriam* (“through carelessness” or “by inadvertence”); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[30] The binding force of *Interbox*, *L3D*, *Conservative Party* and *Voltage Holdings* is not affected by a subsequent decision of the Federal Court of Appeal or Supreme Court of Canada. Nor can it be said that these decisions were not fully considered because they were taken in exigent circumstances that prevented the judges from consulting the appropriate sources.

[31] It remains to be determined whether these decisions were reached *per incuriam*, that is to say, “without considering a relevant statute or binding authority”: *Sullivan*, at paragraph 77. In substance, the defendants state that my colleagues failed to take into consideration the

interpretive arguments raised by the doctrinal sources cited above, in all likelihood because the parties did not bring them to their attention. However, doctrinal sources are only persuasive sources; they are not binding. A decision has not been reached *per incuriam* solely because it fails to address a doctrinal source. In the same way, failing to consider certain interpretive arguments does not mean that a decision was reached *per incuriam*: *Chandi v Atwell*, 2013 BCSC 830 at paragraph 57, reversed on other grounds by 2014 BCCA 446; *Higgins v Arseneau*, 2013 NBQB 332 at paragraph 49. If that were the case, any interpretive disagreement would allow a judge to depart from his or her colleagues' previous decisions. However, the Supreme Court has clearly stated that decisions reached *per incuriam* are rare: *Sullivan*, at paragraph 77. In short, a decision is reached *per incuriam* only in the two scenarios mentioned in *Sullivan*: failure to consider a relevant legislative provision or failure to consider a "binding authority", that is to say, a judicial decision binding on the judge. The defendants are not arguing that such is the case. Consequently, I am bound by *Interbox*, *L3D*, *Conservative Party* and *Voltage Holdings*.

[32] The defendants submit that I am not bound by *L3D* because it is a default judgment. However, there is no basis on which I can conclude that a default judgment lacks the force of precedent. Before rendering this type of judgment, this Court carries out a comprehensive analysis of the file and must be convinced that the plaintiff has established their claims and is entitled to the relief that they are requesting: *NuWave Industries Inc v Trennen Industries Ltd*, 2020 FC 867 at paragraphs 16–21. In any event, *Interbox* and *Conservative Party* were not default judgments, and an intervener argued a position that was opposed to that of the plaintiff in *Voltage Holdings*.

[33] The defendants also allege that I should not follow *Interbox*, *L3D*, *Conservative Party* and *Voltage Holdings* because there was no true adversarial debate regarding the scope of section 34.1. However, at least in the first three cases, the Court's finding on this matter formed part of the *ratio decidendi* of the decision, meaning that it was a necessary step in the Court's reasoning. I cannot ignore a part of the *ratio decidendi* on the grounds that the issue was purportedly not subject to a sufficiently robust debate. A decision's binding force does not vary based on the quality of the arguments presented by the parties.

[34] In fact, there is every indication that the defendants are relying on the more flexible application of the doctrine of *stare decisis* to trial decisions that is advocated by Justice Robert J. Sharpe of the Court of Appeal for Ontario in his book *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 155. However, in *Sullivan*, the Supreme Court of Canada explicitly closed the door on such an approach.

[35] I will therefore assume that, for the purposes of this case, paragraph 34.1(1)(b) of the *Copyright Act* sets out a presumption in favour of the maker of a cinematographic work. On that basis, I find that Mr. Picard's testimony establishes that TVA Group or TVA Productions, as the case may be, are the makers of the television programs at issue because they undertook the arrangements necessary for their making. Moreover, TVA Group or TVA Productions, as applicable, benefit from the presumption set forth by paragraph 34.1(2)(c) because their names appear in the programs in the usual manner, i.e., in the credits. The plaintiffs have therefore proven that they are the owners of the copyright in the works that have been retransmitted by the defendants.

B. *Does TVA Group Have an Obligation to License the Defendants?*

[36] Throughout the proceedings, the defendants argued that the *Broadcasting Act* and its regulations impose on TVA Group an obligation to license Hill Valley to broadcast the TVA Sports channels. In all fairness, the plaintiffs would not be able to seek an injunction if the alleged copyright infringement stemmed from their refusal to grant such a licence. For their part, the plaintiffs deny that they are under any such obligation. For the reasons that follow, I agree with the plaintiffs that no obligation of this nature exists.

[37] In terms of economic principles, the defendants' position is based on the concepts of vertical integration and undue disadvantage. Because TVA Group, a broadcaster, and Vidéotron, a BDU, are vertically integrated, that is, they belong to the same parent company, TVA Group should afford equal treatment to Vidéotron and all other BDUs, such as Hill Valley. It should therefore grant a licence to broadcast TVA Sports to all BDUs that request it. By refusing Hill Valley's request, TVA Group would be imposing an undue disadvantage on Hill Valley.

[38] While the defendants' position can be understood from an economic perspective, it must nonetheless have some foundation in law in order for me to accept it. In this regard, the defendants' position has changed over time and has not always been put forward in a coherent manner. For the sake of exhaustiveness, I will attempt to analyze all the submissions made by the defendants at one time or another. The defendants' position seems to originate in the following excerpts from the regulatory framework relating to vertical integration (Broadcasting Regulatory Policy CRTC 2011-601):

9. Historically, the Commission has permitted programming undertakings such as conventional television stations and specialty services to acquire exclusive rights to broadcast programs. As such, individual programming undertakings may be the only ones that broadcast a particular program or series.

10. However, the Commission requires through its regulations that programming services be offered to all BDUs (e.g. cable and DTH services). In this way, most Canadians have access to broadcast programs that have been acquired on an exclusive basis. This serves to implement the objectives set out in section 3(1)(d) of the Act.

[39] The defendants did not explain how their situation is captured by the paragraphs above. A full reading of this section of the regulatory framework suggests that the CRTC instead had in mind various types of exclusivity agreements. In any event, the regulatory framework alone does not create any rights or obligations. Indeed, at paragraph 24, the CRTC states that it will publish draft regulations in order to implement its intentions. The defendants did not indicate whether such regulations were adopted.

[40] In fact, a review of the regulatory framework currently in force under the *Broadcasting Act* reveals no obligation to grant a licence to broadcast the TVA Sports channels. In order to fully understand this, the difference between mandatory and discretionary channels must be clarified. A channel is said to be mandatory when all BDUs are required to distribute it. The TVA channels are mandatory. On the other hand, a channel is said to be discretionary if a BDU is not required to distribute it. The TVA Sports channels are discretionary. In that case, each BDU must negotiate a licence with the broadcasters for the channels that it wants to distribute.

[41] Even though the TVA Sports channels are discretionary in theory, the defendants put forward three possible sources of an obligation on the part of TVA Group to license the defendants to distribute these channels. First, the defendants rely on the “standstill rule” set out in section 15 of the *Discretionary Services Regulations*, SOR/2017-159. Pursuant to this provision, during a dispute between a broadcaster and a BDU, the broadcaster must continue to provide its programming services at the existing rates and based on the existing terms and conditions. However, it is clear that this provision only applies when an agreement already exists between the broadcaster and the BDU, which is not the situation in this case.

[42] Second, the defendants rely on section 11 of the *Discretionary Services Regulations*, which states that a broadcaster “shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.” However, the defendants did not clearly explain how TVA Group’s refusal to grant them a licence amounts to an undue disadvantage, considering that they had distributed the TVA Sports channels without TVA Group’s consent.

[43] In this regard, a recent CRTC decision, Broadcasting Decision CRTC 2021-341, runs counter to the defendants’ submissions. With respect to the standstill rule, the CRTC wrote the following:

42. Given its purpose, the Standstill Rule was clearly never intended to be used to compel the distribution of services and functionalities that had not been previously authorized under a valid and enforceable contract by the programming undertaking.

...

45. The Standstill Rule does not require a programming undertaking to authorize the distribution of new services or functionalities in the context of a dispute in the absence of an agreement. Where a BDU has never distributed the services or

functionalities of a programming undertaking and such services or functionalities were not included during the term of the contract, the Standstill Rule cannot be used by a BDU to impose new legal obligations on programming undertakings. Doing so would grant an effective right to distribute contrary to the purpose of the Standstill Rule.

[44] With respect to the prohibition from giving undue preference, the CRTC stated that it does not have the effect of compelling a broadcaster, in that case Bell Media, to provide a discretionary service in the absence of an agreement to that effect:

60. The Commission considers that Bell Media should not be obliged to provide services and functionalities that were not already provided prior to the dispute and the expiry of the agreements. Bell Media is within its rights to refuse to provide the services and functionalities in question in the absence of a contract covering those services and functionalities. CCSA members have not been prevented from concluding alternate carriage agreements for new services or functionalities.

[45] Third, the defendants rely on section 15.02 of the *Broadcasting Distribution Regulations*, SOR/97-555, which provides that a BDU can broadcast a new programming service while waiting for an agreement to be reached with the broadcaster. However, this provision does not apply in this case because TVA Sports is not a new service as it has been broadcast since 2011. Furthermore, section 15.02 is inconsistent with the idea that broadcasters would have an obligation to grant a licence to distribute a discretionary service to any BDU that requests it. Indeed, if such a general obligation existed, there would have been no need to provide for an obligation for the specific case of new services.

[46] In addition, the defendants made their submissions to the CRTC, but were unsuccessful. Shortly after the Summary Judgment was issued, Quebecor Media, the parent company of

TVA Group and Vidéotron, requested that the CRTC revoke the exemption allowing Hill Valley to carry on a BDU. In response to this request, Hill Valley requested that the CRTC order TVA Group to negotiate an agreement regarding the distribution of the TVA Sports stations within 90 days, failing which the CRTC would decide the matter. In support of its request, Hill Valley relied on the abovementioned provisions of the regulatory framework, the notion of undue preference and the fact that it was broadcasting TVA Sports “pending the signing of a distribution agreement”.

[47] In Broadcasting Decision CRTC 2022-346, which was rendered on December 22, 2022, the CRTC denied Quebecor Media’s request because Hill Valley was in compliance with the terms and conditions governing its exemption. Although it found that Hill Valley had carried on its undertaking without authorization until February 3, 2021, it did not deem it necessary to impose sanctions.

[48] Moreover, the CRTC considered Hill Valley’s obligation to retransmit TVA and TVA Sports. It found that such an obligation existed with regard to TVA, but not with regard to TVA Sports:

39. . . . In general, unless they are mandatorily distributed under paragraph 9(1)(h) of the Act, discretionary services are normally negotiated between a BDU and a programming service and are provided under an agreement between the two parties.

. . .

49. Given that the programming service declined to participate in a staff-assisted mediation, Hill Valley proposed as an alternative that the Commission indicate in its decision that it expects Quebecor to engage in expedited and good-faith negotiations.

50. The Commission notes that there is no regulatory requirement to distribute discretionary services, including TVA Sports.

51. Despite this, the Commission notes that Hill Valley is a small business that offers an innovative alternative to the hotel industry. Accordingly, and given the conclusions set out above, the Commission encourages the parties to negotiate a mutually acceptable agreement.

[49] There is therefore no basis to the defendants' argument that the regulatory framework arising from the *Broadcasting Act* imposes on TVA Group an obligation to authorize them to broadcast the TVA Sports channels. Paragraph 39 of the CRTC's decision, which I have reproduced above, leaves no doubt in that respect. Additionally, paragraphs 49 and 50 of that decision explicitly deny Hill Valley's request to compel TVA Group to negotiate a licence. The CRTC reaffirmed these conclusions once more in its decision 2023-99.

[50] A recurring theme in the defendants' submissions is that the CRTC can use its dispute resolution powers in order to confer on them the right to distribute TVA Sports channels or in order to compel TVA Group to grant them a licence to this effect. However, as the CRTC stated in decision 2023-99, arbitration can only relate to monetary issues and cannot compel a broadcaster to consent to the distribution of a discretionary service.

[51] The defendants have therefore failed to demonstrate that the *Broadcasting Act* or its regulations excuse the unauthorized retransmission of the TVA Sports channels.

C. *Did the Plaintiffs Waive the Assertion of their Copyright?*

[52] The defendants also rely on the principle of issue estoppel to oppose the various claims made by the plaintiffs. In substance, they allege that the plaintiffs, through their conduct or statements, waived the assertion of their rights, tacitly consented to their conduct, or implicitly committed to granting them a licence.

[53] It is not necessary to clarify the legal basis of these submissions (in particular, as regards the application of issue estoppel—a common law principle—in Quebec) because they are entirely devoid of factual basis.

[54] The defendants first point to discussions with employees of Fibrenoire inc [Fibrenoire], a company offering high-volume connectivity services. Fibrenoire was acquired by Vidéotron in 2016. Fibrenoire's operations were gradually integrated with those of Vidéotron between 2019 and 2021.

[55] In August 2019, Konek retained Fibrenoire's services to install point-to-point links in certain hotels. At trial, Mr. Rousseau stated that he had explained his business plan to Fibrenoire's employees and that they had expressed their agreement and even shown enthusiasm (Transcript no 5 of February 21, 2023, at 103–104).

[56] No conclusions of any kind can be drawn from these exchanges. The Fibrenoire employees did not testify. There is no basis to find that they became aware of the copyright

infringement that would result from the defendants distributing the TVA Sports channels. Moreover, these employees had no authority whatsoever to grant a licence on behalf of TVA Group. It is important to bear in mind that TVA Group is a separate legal entity from Vidéotron and that at that time, the integration of Fibrenoire's operations with Vidéotron's operations had only just begun.

[57] The defendants also refer to certain attempts to initiate a dialogue with Vidéotron or TVA Group representatives. In 2019, Mr. Michaud requested a meeting with Mr. Robert Cabana of Vidéotron (Confidential Transcript no 9 of February 22, 2023, at 84–85). Despite email exchanges showing a certain level of interest, the planned meeting never took place. In the summer of 2021, Mr. Rousseau sent an email to Ms. Josiane Nader of TVA Group to ask for permission to distribute the LCN channel (Transcript no 5 of February 21, 2023, at 126; Exhibit 182). According to Mr. Picard's testimony, no one followed up on this email because the employee in question was on leave (Confidential Transcript no 4 of February 20, 2023, at 32–33). In both cases, no actual discussion between the parties took place. It is completely absurd to claim, on the basis of these events, that the plaintiffs waived their rights in any way.

D. *The Extent of the Copyright Infringement and the Persons Liable*

[58] Where the section 31 exception does not apply, it is not seriously disputed that the copyright owner, pursuant to paragraph 3(1)(f) of the *Copyright Act*, has the sole right to engage in the retransmission of TVA and TVA Sports channels, that is, “in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication”.

[59] The findings of the Summary Judgment help determine the extent of the copyright infringement committed by the defendants. I found that the retransmission of the TVA channels benefited from the exemption set out in section 31 as of February 3, 2021. Moreover, the Federal Court of Appeal concluded that Konek, Hill Valley and Libéo are liable for the copyright infringement at issue.

[60] The issues that remain to be disposed of are the following. Firstly, were Konek and Hill Valley *de facto* BDUs that could claim the benefit of section 31 of the *Copyright Act* prior to Hill Valley's registration with the CRTC on February 3, 2021? Secondly, at the summary trial, the parties agreed to postpone until the trial the issue of the personal liability of the Konek, Hill Valley and, if applicable, Libéo directors.

(1) Were Konek and Hill Valley *De Facto* BDUs Before February 3, 2021?

[61] The defendants argue that, prior to February 3, 2021, Konek and Hill Valley benefited from the exemption set out in section 31 of the *Copyright Act*. They argue that Hill Valley, and possibly Konek, were not required to register with the CRTC because some of the hotels served by Hill Valley and Konek were located in regions that did not have BDUs. Therefore, Hill Valley and Konek would have been "*de facto*" BDUs, even before Hill Valley registered with the CRTC. I reject this contention. To understand why, it is necessary to recall, in broad strokes, the reasons for the Summary Judgment with respect to this issue.

[62] Section 31 of the *Copyright Act* sets out that, in certain circumstances, the retransmission of a signal for a television channel does not constitute copyright infringement provided that the

retransmission is “lawful” under the *Broadcasting Act*. It is the Small BDU Order that makes Hill Valley’s activities “lawful”. Section 25 of that order states that a small BDU that wants to operate in a region that is already served by licensed BDUs must register with the CRTC three months prior to commencing operations. This is exactly what Hill Valley did. At paragraph 54 of the Summary Judgment, I explained that prior to the date of this registration (February 3, 2021), Hill Valley’s activities were not lawful within the meaning of the *Broadcasting Act*. It follows that Hill Valley could not benefit from the exemption set out in section 31 of the *Copyright Act* before this date.

[63] Hill Valley now claims that certain of its activities were not subject to the registration requirement that flows from section 25 of the Small BDU Order because some of its clients were not located in regions served by licensed BDUs. In such situations, Hill Valley would have benefited from the Small BDU Order as of right, without having to register with the CRTC. Therefore, its activities would have been “lawful” prior to February 3, 2021.

[64] However, this issue was already decided in the Summary Judgment. In truth, the defendants are asking me to revisit my decision in light of new submissions or facts. When an issue is decided by summary judgment and the matter continues to trial, the parties cannot ask that the Court revisit this issue save in exceptional circumstances such as those contemplated in rules 397 and 399 of the *Federal Courts Rules*, SOR/98-106. A summary judgment that has not been appealed is *res judicata*: *Oh v Coquitlam (City)*, 2018 BCCA 129 at paragraph 26. When a motion for summary judgment or a motion for summary trial is brought, the defendant must “put their best foot forward”: *CanMar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at paragraph 27,

[2021] 1 FCR 799; *Gemak Trust v Jempak Corporation*, 2022 FCA 141 at paragraph 67. It follows that the defendant cannot, at trial, make new submissions that seek to reverse the summary judgment. In fact, allowing the outcome of a summary judgment or summary trial to be revisited at a later stage of the proceedings would reduce the usefulness of these procedural tools.

[65] The defendants could and should have made their submissions in respect of Hill Valley's *de facto* BDU status at the summary trial. Nothing prevented them from doing so. They also did not appeal the Summary Judgment. At trial, Mr. Rousseau merely stated that he had only recently realized that some of Hill Valley's clients were located in regions that were not served by licensed BDUs (Confidential Transcript no 9 of February 22, 2023, at 20–21). This is not one of the exceptional circumstances contemplated by rules 397 and 399.

[66] In any event, the evidence shows that Hill Valley retransmitted the TVA channels to hotels located in regions, including the city of Québec, that were already served by licensed BDUs (Exhibit 137). Therefore, this retransmission was not lawful before Hill Valley registered with the CRTC, whatever the situation may have been in other regions. As regards Konek, it cannot benefit from section 31 of the *Copyright Act* because it is a “new media retransmitter” within the meaning of that provision, regardless of the region where it retransmits the signal for a television channel: Summary Judgment, at paragraph 52.

(2) The Directors' Liability

[67] The plaintiffs are also seeking to have Mr. Rousseau, Mr. Bussière and Mr. Michaud found solidarily liable in their capacity as directors of Konek and Hill Valley.

[68] In this regard, the Supreme Court of Canada reiterated, in *Cinar Corporation v Robinson*, 2013 SCC 73 at paragraph 64, [2013] 3 SCR 1168 [*Cinar*], that “[a]n officer of a corporation cannot be held personally liable for copyright infringement merely on the basis of his hierarchical status as officer.” However, the Court writes the following at paragraph 60:

For a director and/or officer to be held liable for his or her company’s infringement of a copyright, “there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it”:
Mentmore Manufacturing Co. v. National Merchandising Manufacturing Co. (1978), 89 D.L.R. (3d) 195 (F.C.A.), at pp. 204–5, *per* Le Dain J.

[69] In light of these principles, I consider that Mr. Rousseau incurred personal liability by personally taking the actions that constitute copyright infringement. He is the architect of Konek’s and Hill Valley’s network and played a major role in designing and programming the Konek boxes. He is in charge of what I would call Konek’s and Hill Valley’s regulatory compliance, which includes, in particular, taking the necessary steps with the CRTC in order to register Hill Valley as a BDU and respond to Quebecor Media’s complaint. According to the evidence, he is the one who directly controls Konek’s and Hill Valley’s operations and who is responsible for the day-to-day management of their network. More specifically, he had the decoders that were leased from Vidéotron installed, which made it possible for Konek and Hill Valley to obtain the signals of the TVA and TVA Sports channels until March 2021. It was also Mr. Rousseau who, later on, subscribed to online streaming services in order to obtain these signals even though there is every reason to believe that these services were illegal.

[70] With regard to Mr. Bussière and Mr. Michaud, the plaintiffs are seeking to have them found personally liable only on account of the false and misleading statements that they allegedly made on behalf of Konek and Hill Valley. I will address this issue later in these reasons.

E. *Remedies*

[71] Now that I have established the extent of the copyright infringement and determined the persons who are liable, I must address the issue of remedies.

(1) Injunction

[72] The principles that govern the granting of a permanent injunction were examined in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 66, [2017] 1 SCR 824 (Côté J, dissenting on other grounds); *NunatuKavut Community Council Inc v Nalcor Energy*, 2014 NLCA 46 at paragraphs 46–72; and *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at paragraph 34. In a nutshell, the plaintiff must prove an infringement of their rights, that there is sufficient risk that this infringement will continue, that there is no adequate alternative remedy, and that there are no discretionary considerations that weigh against granting the injunction.

[73] In the present case, the plaintiffs have established the infringement of their copyright. Moreover, I consider that there is sufficient risk that this infringement will continue. Indeed, Mr. Rousseau testified that he firmly believed that he had the right to retransmit the TVA Sports channels (Transcript no 5 of February 21, 2023, at 102, 103 and 105; Transcript no 8 of

February 22, 2023, at 5–7). As far as I can understand, this belief is based on an implausible interpretation of the regulatory framework under the *Broadcasting Act*. As a matter of fact, Mr. Rousseau acknowledged [TRANSLATION] “that there was no case law to compel Quebecor, without delay, for us to keep TVA Sports” (Transcript no 7 of February 21, 2023, at 103). Furthermore, the fact that he used streaming services that are likely illegal suggests that Mr. Rousseau has only a limited concern for compliance with the law. In addition, the defendants have not alleged that there were any alternative remedies or discretionary factors that weigh against granting an injunction. I therefore consider that an injunction is necessary.

[74] In theory, as the plaintiffs are asserting their copyright in certain specific programs and not in the signal itself, the injunction should only cover the retransmission of these programs. However, relying on section 39.1 of the *Copyright Act*, they are seeking an injunction prohibiting the retransmission of the TVA Sports channel signal itself. This provision allows an injunction to be granted with respect to works—including future works—other than those that were subject to infringement:

39.1 (1) When granting an injunction in respect of an infringement of copyright in a work or other subject-matter, the court may further enjoin the defendant from infringing the copyright in any other work or subject-matter if

(a) the plaintiff is the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; and

(b) the plaintiff satisfies the court that the defendant will

39.1 (1) Dans les cas où il accorde une injonction pour violation du droit d’auteur sur une œuvre ou un autre objet, le tribunal peut en outre interdire au défendeur de violer le droit d’auteur sur d’autres œuvres ou d’autres objets dont le demandeur est le titulaire ou sur d’autres œuvres ou d’autres objets dans lesquels il a un intérêt concédé par licence, si le demandeur lui démontre que, en l’absence de cette interdiction, le défendeur

likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so.

violera vraisemblablement le droit d'auteur sur ces autres œuvres ou ces autres objets.

(2) An injunction granted under subsection (1) may extend to works or other subject-matter

(2) Cette injonction peut viser même les œuvres ou les autres objets sur lesquels le demandeur n'avait pas de droit d'auteur ou à l'égard desquels il n'était pas titulaire d'une licence lui concédant un intérêt sur un droit d'auteur au moment de l'introduction de l'instance, ou qui n'existaient pas à ce moment.

(a) in respect of which the plaintiff was not, at the time the proceedings were commenced, the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; or

(b) that did not exist at the time the proceedings were commenced.

[75] The defendants do not object to the wording proposed by the plaintiffs for the injunction that they are seeking. An injunction that only targets specific programs would result in obvious implementation issues. In the absence of any challenge, I therefore consider it appropriate to grant an injunction prohibiting the retransmission of the TVA Sports channels.

(2) Statutory Damages

[76] Instead of compensatory damages, the plaintiffs are seeking the statutory damages set out in section 38.1 of the *Copyright Act*. They are seeking an amount of \$1,000 for each of the 8,000 TVA programs that were retransmitted between July 2018 and February 2, 2021, an amount of \$2,500 for each of the 798 TVA Sports programs that were retransmitted between March 2020 and the date of the Summary Judgment, and an amount of \$5,000 for each of the

292 TVA Sports programs that have been retransmitted since that date. The total amount that is sought is \$11,455,000. For their part, the defendants argue that these amounts are exaggerated and should be lowered to \$12.50, \$125 and \$250 per program, respectively.

[77] For the reasons that follow, I consider it appropriate to award statutory damages in an amount of \$553,000.

(a) *General Principles*

[78] Statutory damages are among the range of remedies that the *Copyright Act* makes available to copyright owners. They are governed by section 38.1 of that Act, the relevant portions of which read as follows:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une œuvre donnée ou à un autre objet donné du droit d'auteur

or other subject-matter, if the infringements are for commercial purposes; and

...

(3) In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than \$500 or \$200, as the case may be, that the court considers just, if

(a) either

(i) there is more than one work or other subject-matter in a single medium, or

(ii) the award relates only to one or more infringements under subsection 27(2.3); and

(b) the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

...

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

—, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

[...]

(3) Dans les cas où plus d'une œuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel ou dans le cas où seule la violation visée au paragraphe 27(2.3) donne ouverture aux dommages-intérêts préétablis, le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque œuvre ou autre objet du droit d'auteur, le montant minimal visé à l'alinéa (1)a) ou au paragraphe (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.

[...]

(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :

(a) the good faith or bad faith of the defendant;	a) la bonne ou mauvaise foi du défendeur;
(b) the conduct of the parties before and during the proceedings;	b) le comportement des parties avant l’instance et au cours de celle-ci;
(c) the need to deter other infringements of the copyright in question; and	c) la nécessité de créer un effet dissuasif à l’égard de violations éventuelles du droit d’auteur en question;
...	[...]

[79] Drawing on American law, this provision aims to adapt the general rules governing the award of damages to the specific context of copyright infringement claims: *Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584, [2007] 1 FCR 444 [*Telewizja Polsat*]; *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794, aff’d *2424508 Ontario Ltd v RallySport Direct LLC*, 2022 FCA 24 [*Rallysport FCA*]; *L3D* at paragraph 92. Three considerations are often relied on to explain the purpose of this type of damages.

[80] Firstly, it can be difficult to establish the nature and the extent of the damage caused by a copyright infringement. Often, proceedings go ahead by default and the defendant does not provide information that would make it possible to determine the extent of the infringement or the resulting profit. More generally, the value of a copyright-protected work or the loss that the owner incurs as a result of the infringement can be difficult to assess. By enacting section 38.1, Parliament chose to use easily accessible data—namely, the number of infringed works—as the basis for the calculation.

[81] Secondly, Parliament clearly intended to give statutory damages a punitive dimension. In particular, awarding considerable sums seemed necessary in order to deter potential copyright infringers. Indeed, if damages were limited to the cost of a licence, there would be no incentive for copyright infringers to abide by the law and to obtain such a licence; instead, it would be in their interest to infringe copyright and run the risk of getting caught.

[82] Thirdly, awarding statutory damages can help facilitate access to justice for copyright owners. Awarding amounts that are greater than the damage suffered allows copyright owners to pay for some of the costs incurred to bring an action. This is an incentive to initiate such claims. Ultimately, imposing sanctions for copyright infringement more frequently contributes to greater compliance with the law.

[83] These are the same considerations that led this Court to grant lump sum damages in trademark infringement cases even though the *Trademarks Act* does not contain any provision similar to section 38.1 of the *Copyright Act*: *Kwan Lam v Chanel S de RL*, 2016 FCA 111 at paragraph 17; *Ragdoll Productions (UK) Ltd v Doe*, 2002 FCT 918, [2003] 2 FC 120; *Lululemon Athletica Canada Inc v Campbell*, 2022 FC 194 [*Lululemon*] at paragraphs 37–44.

[84] However, contrary to lump sum damages awarded for trademark infringement, statutory damages can be awarded pursuant to section 38.1 of the *Copyright Act* even when there is no evidence of the damage that the owner has suffered, and even when it has been established that the owner suffered no damage: *Rallysport FCA* at paragraph 29. Nonetheless, the actual damage

suffered, when it is possible to measure it, is a relevant factor in assessing the amount to be awarded as statutory damages: *Rallysport FCA* at paragraph 28.

[85] In laying down a statutory range for the amount of damages, Parliament intended to constrain judicial discretion without eliminating it entirely. Indeed, the heightened degree of certainty that results from a statutory range streamlines the evidentiary process and reinforces deterrence. However, there are cases in which these amounts are not appropriate. As my colleague Justice Yvan Roy pointed out in a trademark case, the mechanical application of the principles governing the awarding of such damages can lead to “astronomical amounts” that are not grounded in reality: *Louis Vuitton Malletier SA v Wang*, 2019 FC 1389 at paragraph 153; see also *Thomson v Afterlife Network Inc*, 2019 FC 545 [Thomson] at paragraph 63; *Lululemon* at paragraphs 42–43; *Louis Vuitton Malletier v Sheine Reyes Rosales*, 2023 FC 217 at paragraphs 44–51. In an effort to avoid such excesses, Parliament contemplated, in subsection 38.1(3) of the *Copyright Act*, the possibility of reducing the amount of statutory damages if applying the lower limit of the range would result in an amount that is “grossly out of proportion”.

(b) *Analysis of the Relevant Factors*

[86] I will now move on to a review of the factors that are relevant to assessing statutory damages, starting with the factors that are explicitly mentioned in subsection 38.1(5). Following this, I will be able to decide whether subsection 38.1(3) should be applied, and I will then determine the appropriate amount.

[87] The first relevant factor is the good faith or bad faith of the defendants (paragraph 38.1(5)(a)). In this regard, the plaintiffs attempted to liken the defendants to “pirates” whose only activity is the unlawful retransmission of signals, as in *L3D*, or to resellers of counterfeit merchandise, as in *Lululemon*, who carry out their activities in a clandestine manner, knowing full well that these activities are unlawful. I am of the view that such a comparison is not appropriate and that a more nuanced assessment is in order.

[88] The defendants dedicated considerable resources to developing an integrated technological solution for hotels. It is true that the retransmission of television signals is an important feature of this system. However, there is no reason to believe that the other functions of the system are merely a front intended to conceal what would be nothing but an unlawful retransmission business. As a matter of fact, it is unlikely that a well-established company such as Libéo would have put itself at risk by associating itself with a fundamentally unlawful project.

[89] In light of all the evidence, I find instead that the defendants developed services and products that are, in principle, legitimate. Indeed, the CRTC recognized their innovative nature, at paragraph 51 of Broadcasting Decision CRTC 2022-346, reproduced above. The problem, however, is that the defendants did not make sure to obtain from the outset the rights necessary for the retransmission of the signal for the television channels. When they became aware of this issue, they sought to take as much advantage as possible of the opportunities offered by the regulatory framework flowing from the *Copyright Act* and the *Broadcasting Act*, including by setting up Hill Valley. As I explained in the Summary Judgment, this structure is legitimate and

allows over-the-air channels, such as TVA, to be retransmitted. However, it does not allow for the retransmission of TVA Sports.

[90] Even though their project was legitimate at the outset, the defendants' conduct, in my opinion, was reprehensible in two respects. First, they started operating their business before ensuring that they had obtained the necessary rights and authorizations. By so doing, they ran the risk that certain aspects of their activities could prove to be unlawful. In other words, they were reckless with respect to the risk associated with legal uncertainty. In taking this risk, they must now face the consequences of an intentional breach of the law.

[91] Second, the defendants were wilfully blind in holding out, up until the trial, the possibility that the CRTC would grant them some form of authorization to retransmit the TVA Sports channels. It should have been obvious from early 2021 that section 31 of the *Copyright Act* does not authorize the retransmission of TVA Sports. If the defendants sincerely believed that the regulatory framework flowing from the *Broadcasting Act* allowed them to retransmit TVA Sports, they should have made an application to the CRTC at that time. It was only in response to the request made by Quebecor Media in the summer of 2022 that Hill Valley made an application to this effect. As noted above, the CRTC denied it.

[92] This wait-and-see attitude might have been understandable at the start of the project. The defendants were novices as regards the regulatory framework governing broadcasting. They initially relied on the advice provided by CRTC employees. However, this attitude became unacceptable later on. The defendants had the benefit of legal advice. They must have become

aware, although the evidence does not indicate at which exact moment, that the regulations made under the *Broadcasting Act* gave them no right to retransmit a discretionary channel such as TVA Sports. From that point onward, continuing in this way could have only been intended as a means to perpetuate the lack of clarity and to play for time.

[93] Finally, one cannot ignore the fact that the defendants obtain the TVA Sports signal by subscribing to streaming services that are, in all likelihood, illegal. Once again, this is wilful blindness at the very least.

[94] Therefore, the defendants acted in bad faith in certain respects, which must be taken into consideration in determining the statutory damages.

[95] The defendants' conduct during the proceedings is the second factor that Parliament identified (at paragraph 38.1(5)(b)). This factor is especially relevant for copyright infringers who carry out their activities in a more or less clandestine manner, who are not participating in the proceedings and who are seeking, by various means, to evade the authority of the Court, as was the case in *L3D*, for example.

[96] In the present case, the situation is more nuanced. The defendants participated in the proceeding and were successful on a number of important issues. During the proceedings, the plaintiffs conceded that the architecture of Hill Valley's network complied with section 31 of the *Copyright Act*, and they withdrew their claim for punitive damages against two of the individual defendants. I also dismissed the plaintiffs' submissions with respect to purported changes to

Konek's and Hill Valley's network architecture in the summer of 2021. Although I reject the defendants' submissions regarding the presumption of paragraph 34.1(1)(b) of the *Copyright Act*, their position is not frivolous. In contrast, their position based on the *Broadcasting Act* is entirely devoid of merit, as we have seen above.

[97] In reality, the plaintiffs' main complaint is that the defendants continued to retransmit TVA Sports during the proceedings. For the aforementioned reasons, I agree with the plaintiffs, although it is difficult to determine the exact date on which the defendants should have become aware of the illusory nature of their applications to the CRTC.

[98] The third factor that must, pursuant to the legislation, be reviewed is the need to deter (paragraph 38.1(5)(c)). Insofar as I have concluded that the defendants were in bad faith, their conduct must be denounced and deterred. The defendants sold a service without making sure that they had obtained the necessary rights beforehand. The defendants adopted a cavalier attitude that aimed to obtain these rights by confronting the other party with a *fait accompli*. By so doing, the defendants sought to deny the plaintiffs the right not to consent to the use of their copyright. Such conduct, which undermines the foundations of the *Copyright Act*, must be denounced.

[99] In my view, there are two other relevant factors in this case. First, the manner in which the extent of the copyright infringement changed over time should be delineated. Indeed, the plaintiffs are claiming statutory damages covering a period of time that began in July 2018. However, at that time, Konek was providing its services to only one hotel, which was serving as a prototype. Also, the analysis that I have laid out below (paragraph [101]) regarding the amount

of royalties paid by the defendants shows that it was only as of 2021 that their client base began to grow more markedly.

[100] Lastly, even though awarding statutory damages does not depend on there being evidence of actual damage and is not limited to the value of this damage, the extent of the damage remains a relevant factor. The parties did not seek to introduce complete evidence of this damage because the plaintiffs contend that this issue is irrelevant and the defendants argue that there was no damage. In the absence of other guidance, the extent of the damage caused can be measured based on the notional licensing fee: *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at paragraphs 68–72. In this respect, the following conclusions may be drawn from the evidence.

[101] Pursuant to section 31 of the *Copyright Act*, the retransmission of the TVA channels leads to the payment of royalties if the signal is a distant one. The defendants submitted proof of payment of these royalties for the years 2018 to 2022 (Exhibits 142, 152, 162, 178 and 179). These royalties amounted to less than \$1,000 per year up until 2020, and reached \$2,000 in 2021 and \$3,600 in 2022; these amounts covered all the channels that the defendants had retransmitted. The only conclusion I can draw from this evidence is that, given the scale of the defendants' business, the value of a licence to retransmit the TVA channels is minimal compared to the amounts claimed. Furthermore, these royalties were paid, and the plaintiffs did not describe the nature of the damage that they had allegedly suffered.

[102] The situation is different with respect to the retransmission of the TVA Sports channels, which is not covered by section 31 of the *Copyright Act*. Rather, this retransmission is subject to agreements between TVA Group and the BDUs, and between the BDUs (such as Vidéotron) and their hotel clients. At trial, Mr. Picard explained how TVA Group set the rates for retransmitting the TVA Sports channels when a BDU provides services to hotel clients (Exhibit 101; Confidential Transcript no 2 of February 20, 2023, at 17–21). For his part, Mr. Tremblay submitted a table showing the share of the amount paid by Vidéotron to all the broadcasters whose signal Vidéotron retransmits for clients of Konek who were former Vidéotron clients (Exhibit 136). Moreover, a set of documents filed by Konek includes the number of hotel rooms (or rooms within homes for senior citizens) that Konek provided services to each month (Exhibits 142, 152, 162, 178 and 179). From all this information, I am able to infer that a licence allowing Konek or Hill Valley to retransmit the TVA Sports channels would have cost between approximately █████ per month (at the start of the period) and approximately █████ per month (at present). For the entire period in question, the actual damage suffered by the plaintiffs would amount to approximately \$100,000. Needless to say, these are ballpark figures, not precise estimates.

(c) *Application of Subsection 38.1(3)*

[103] The next step in the reasoning process is to verify whether it is appropriate to apply subsection 38.1(3) of the *Copyright Act*, which makes it possible to reduce the amount of statutory damages if they are grossly out of proportion. I first address the preliminary issue of whether the infringing works are found in a “single medium.” I then turn to the issue of gross disproportion, assessing separately the retransmission of the TVA and TVA Sports channels.

(i) A “single medium”?

[104] The plaintiffs submit that subsection 38.1(3) does not apply in the present case because the infringing works are not found in a single “medium” (“*support matériel*” in French). Indeed, Konek and Hill Valley do not keep copies of the programs that they retransmit. Therefore, these programs would not exist in a single medium at the same time.

[105] I reject this interpretation of subsection 38.1(3). I would point out that the purpose of this provision is to prevent a mechanical application of section 38.1 from leading to the awarding of disproportionate sums. It would be paradoxical if the purpose of this provision could be frustrated by interpreting it in a too technical or mechanical fashion. The concept of “medium” must be applied while taking into account the wide variety of types of works that can be subject to copyright and the growing diversity of technological means of reproducing or retransmitting these works. In my view, a pragmatic approach is called for.

[106] Moreover, I do not see anything in the wording of subsection 38.1(3) that requires works to be present simultaneously on a single medium, such as a hard drive or RAM. In my view, a “single medium” includes any technological infrastructure that makes it possible to reproduce, display or retransmit several works one after another. This is the situation in this case: the medium is Konek’s and Hill Valley’s network infrastructure, which makes it possible to retransmit several works one after another.

[107] There is little case law dealing with the application of subsection 38.1(3) to electronic means of communication, and there are no decisions that support a requirement of simultaneity. In *Trader Corp v CarGurus Inc*, 2017 ONSC 1841 at paragraphs 57–58, the court gave a broad interpretation to the concept of “single medium” and applied it to a collection of photographs available on a website. In *Thomson*, this Court applied subsection 38.1(3) to obituaries reproduced on a website without there being evidence establishing the conditions under which this information was recorded. In *Telewizja Polsat*, this Court applied subsection 38.1(3) to the retransmission of television programs over the Internet. The plaintiffs are seeking to distinguish this case, pointing out that it concerned an on-demand retransmission system and that the defendant kept all the programs on its server. I am not convinced that such a distinction is relevant; indeed, following the plaintiffs’ argument would lead to the conclusion that the defendant in *Telewizja Polsat* acquired the benefit of subsection 38.1(3) by retaining copies of the infringing works, which seems absurd to me.

(ii) The TVA channels

[108] The plaintiffs are seeking an amount of \$1,000 for each of the 8,000 programs broadcast on the TVA channels, for a total amount of \$8,000,000. If the minimum amount of \$500 per infringing work is used, the total amount is \$4,000,000. In my view, such an amount is grossly out of proportion. Even taking into account the defendants’ bad faith and their conduct to the extent mentioned above, as well as the need to deter, it is not necessary to award such a significant amount in order to achieve the objectives of denunciation and deterrence.

[109] It is now legal to retransmit the TVA channels. As I mentioned in the Summary Judgment, Hill Valley benefits from the exemption set out in section 31 of the *Copyright Act*. Contrary to the situation in most infringement cases, Hill Valley has the right to a type of “compulsory licensing”. Moreover, one can watch the TVA channels over the air for free. Deterrence is therefore not as important as it usually is. In reality, the defendants can be criticized only for having delayed in setting up the corporate structure that allows them to claim the benefit of section 31. Furthermore, as I pointed out above, the actual damage the plaintiffs suffered is minimal as compared with the amounts claimed. Lastly, as I mentioned above at paragraph [99], the unlawful retransmission of the TVA channels took place at a time when the defendants’ clientele was more limited.

[110] Cases in which sums of more than one million dollars were awarded as statutory damages are rare. At paragraphs [87] to [89], I explained that *L3D*, contrary to the present case, involved a company whose sole activity was the unlawful retransmission of television channels. The *Thomson* case was a class action involving over one million class members. In both cases, the defendant did not participate in the proceedings, and there was every indication that the defendant was aware that its activities were completely unlawful.

(iii) The TVA Sports channels

[111] I reach a different conclusion with respect to the TVA Sports channels. Applying the minimal amount of \$500 to each of the 1,090 programs covered by the claim leads to an amount of \$545,000. This is about five times the approximate damage suffered by the plaintiffs. I would perhaps not have awarded so high an amount had I applied the ordinary principles governing

damages. However, in light of the factors analyzed above and of the necessity to denounce the defendants' conduct and to deter any similar conduct, I am unable to find that this amount is "grossly out of proportion."

(d) *The Appropriate Amount*

[112] With respect to the retransmission of the TVA Sports channels, I award an amount of \$500, which is the lower limit of the range of statutory damages, for each of the 1,090 programs. In my view, such an amount is more than sufficient to compensate for the damage and to accomplish the purposes of denunciation and deterrence.

[113] In contrast, with respect to the retransmission of the TVA channels, applying the minimum amount of statutory damages would result in an award that is "grossly out of proportion." Subsection 38.1(3) then allows me to award damages "that the court considers just". When exercising this discretion, I must take into account the factors listed in subsection 38.1(5) as well as the other relevant factors, which I have analyzed above.

[114] For the reasons set forth at paragraph [109], I find that a symbolic amount is sufficient. Moreover, insofar as the retransmission of the TVA channels before February 3, 2021 is a reprehensible act that needs to be denounced and deterred, the statutory damages awarded in respect of the retransmission of the TVA Sports channels are more than sufficient to accomplish these purposes. I therefore award an amount of \$1 per program, for a total amount of \$8,000.

[115] I therefore award an amount of \$553,000 in statutory damages.

(3) Punitive Damages

[116] In addition to statutory damages, the plaintiffs are also claiming punitive damages. They are relying on subsection 38.1(7) of the *Copyright Act*, which provides that the awarding of statutory damages does not preclude the awarding of punitive damages.

[117] However, if statutory damages include a significant punitive component, awarding punitive damages would be redundant. This punitive component must not go beyond what is required to achieve the purposes of denunciation and deterrence: *Civil Code of Québec*, art 1621; *Whiten v Pilot Insurance Co*, 2002 SCC 18 at paragraphs 71 and 74, [2002] 1 SCR 595. If what is necessary has already been awarded, it is difficult to see how the awarding of an additional amount would be required in order to meet the same objectives. To that effect, see *Telewizja Polsat* at paragraph 52; in *Rallysport*, punitive damages were awarded solely because of the defendants' efforts to insulate themselves from the consequences of a judgment.

[118] This is the situation in this case. Although the plaintiffs suffered appreciable damage on account of the retransmission of the TVA Sports channels, the awarding of statutory damages mainly fulfils a punitive function. It is not necessary to award an additional amount as punitive damages in order to achieve the same purpose.

[119] It is true that punitive damages are often awarded in trademark infringement cases. In those cases, however, the lump sum damages only serve a compensatory purpose, and an award of punitive damages is not redundant: *Lululemon* at paragraph 41.

F. *Claims Based on the Trademarks Act*

[120] In addition to the claims arising from the copyright infringement, Vidéotron has filed a claim under paragraphs 7(a) and (d) of the *Trademarks Act*. The defendants have filed a counterclaim under the same provisions. In essence, each party accuses the opposing party of having made a certain number of false or misleading statements regarding the lawfulness or unlawfulness of the defendants' activities, contrary to paragraph 7(a) or paragraph 7(d). These statements allegedly led hotel clients to terminate their contracts with one of the parties, thereby causing it to lose revenue.

[121] The relevant provisions of the *Trademarks Act* read as follows:

<p>7. No person shall</p> <p>(a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;</p> <p>...</p> <p>(d) make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to</p> <p>(i) the character, quality, quantity or composition,</p> <p>(ii) the geographical origin, or</p>	<p>7. Nul ne peut :</p> <p>a) faire une déclaration fautive ou trompeuse tendant à discréditer l'entreprise, les produits ou les services d'un concurrent;</p> <p>[...]</p> <p>d) employer, en liaison avec des produits ou services, une désignation qui est fautive sous un rapport essentiel et de nature à tromper le public en ce qui regarde :</p> <p>(i) soit leurs caractéristiques, leur qualité, quantité ou composition,</p> <p>(ii) soit leur origine géographique,</p>
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(iii) the mode of the manufacture, production or performance

(iii) soit leur mode de fabrication, de production ou d'exécution.

of the goods or services.

[122] I do not need to conduct a detailed analysis of the elements required to show a breach of these provisions. Indeed, insofar as one is seeking to base a claim for damages on these provisions, it goes without saying that it is necessary to establish a causal link between the alleged damage and the breach of the law. For example, in *S & S Industries Inc v Rowell*, [1966] SCR 419 at 424, the Supreme Court states that the “*resulting damage*” (emphasis added) is an essential element of such an action. Similarly, in *EAB Tool Company Inc v Norske Tools Ltd*, 2017 FC 898 [*EAB Tools*] at paragraph 76, Justice George Locke dismissed the application, noting that the evidence was “insufficient to establish any causal link” between the breach of the law and the alleged loss of sales.

[123] Given that I can decide the matter on the basis of the lack of evidence of a causal link, I do not intend to express an opinion on the false or misleading nature of the wide range of statements on which the parties have based their claims. Insofar as these statements pertain to the Summary Judgment, I will limit myself to observing that each party made selective statements that underscored the parts of that judgment that were in its favour.

(1) Vidéotron’s Claim

[124] According to Vidéotron, the defendants misrepresented to their clients that they had the right to broadcast the TVA Sports and RDS channels. (RDS is a discretionary channel broadcast

by Bell Media. There is no dispute that the defendants are retransmitting this channel without the consent of Bell Media.) These misrepresentations allegedly prompted 10 hotel clients to terminate their contracts with Vidéotron, causing an estimated loss of \$323,150.06 (Exhibit 136).

[125] The misrepresentations that Vidéotron alleges against the defendants can be grouped into two different categories. Firstly, during the negotiations between the defendants and their clients, the defendants would have asserted that they had the right to broadcast TVA Sports and RDS even though they had not—and still have not—obtained that right. Secondly, Vidéotron takes issue with various statements that the defendants made to their clients following the Summary Judgment, to the effect that their activities were lawful. In both cases, these statements purportedly misled their clients regarding an essential characteristic of their product, i.e., the lawfulness of the services being provided.

[126] In both cases, Vidéotron failed to show that there is a causal link between the breaches of the *Trademarks Act* and the alleged loss of revenue. It did not adduce any direct evidence to demonstrate this crucial element. It did not call any of the 10 clients that it had lost to testify regarding the reasons for their decisions. In this regard, one cannot rely on hearsay or indirect evidence: *EAB Tools* at paragraph 66; *Bombardier Recreational Products Inc v Arctic Cat, Inc*, 2020 FC 691 at paragraph 136. During his testimony, Mr. Muñoz, Vidéotron's director general of business sales, acknowledged that Vidéotron did not know why the 10 clients who are concerned by the claim terminated their contracts. He recognized that clients must weigh a number of factors, including the cost and quality of services, when choosing their service provider (Transcript no 5 of February 21, 2023, at 57–58). When he stated that three clients had

returned to Vidéotron, Mr. Muñoz did not connect this decision in any way to the unlawful nature of the defendants' services. In fact, in one case, technical problems were apparently the primary issue (Transcript no 5 of February 21, 2023, at 44–45).

[127] Regarding the first category of misrepresentations, Vidéotron argues that the causal link can be inferred from the fact that the TVA Sports and RDS channels are very important to hotel clients. Consequently, the defendants would not have been able to sign contracts with Vidéotron's former clients if they had not provided these channels.

[128] There is no doubt that TVA Sports and RDS are important channels, but Vidéotron's argument draws the attention away from the alleged misrepresentations. What is false in these representations is the lawful nature of the retransmission of TVA Sports and RDS. To establish causation, Vidéotron must show that its former clients would not have subscribed to Konek's and Hill Valley's services had the latter not misrepresented the lawful nature of the retransmission of TVA Sports and RDS.

[129] Quite the contrary—the evidence instead tends to show that the hotel clients were ready to do business with the defendants even though they knew that the lawfulness of the retransmission of TVA Sports was the subject of litigation. This belies the existence of a causal link between the alleged misrepresentations regarding the lawfulness of Konek's and Hill Valley's services and Vidéotron's alleged loss.

[130] Mr. Muñoz confirmed that seven of Vidéotron's 10 lost clients—namely, Cotico (which became Les Hôtels Nouvelle-France and Hôtel L'Ermitage), Hôtel Le Priori, the Comfort Inn St-Nicolas, Château Bellevue, Le Littoral-Hôtel et Spa, the Quality Inn & Suites Lévis and Auberge Saint-Antoine—received a letter from Vidéotron in March 2021 (Exhibit 135; Transcript no 5 of February 21, 2023, at 76–77). In this letter, Vidéotron informed its former clients that an action had been brought against the defendants on the grounds of an infringement of TVA Group's copyright. It was indicated that the defendants had never obtained permission from TVA Group to broadcast its channels. Lastly, Vidéotron notified its former clients that [TRANSLATION] “because you retained the services of Konek Technologies inc. and are offering your clientele the opportunity to benefit from these services, you would be participating in the perpetration of this infringement”.

[131] Even though they were notified about the potentially unlawful nature of the defendants' activities, four of these seven hotels are still their clients to this day. As for the three others, Les Hôtels Nouvelle-France and Hôtel L'Ermitage (Cotico) waited almost one year after receiving the letter to re-subscribe to Vidéotron's services in February 2022, and it was only in December of 2022 that Auberge Saint-Antoine did the same. Clearly, all these clients kept doing business with Konek and Hill Valley in full knowledge of the dispute regarding the lawfulness of the latter's services. Moreover, two other hotels (the Hôtel Valcartier and the Hôtel Espresso) subscribed to Konek's and Hill Valley's services in late 2022. The evidence shows that the existence of the present dispute was well known in the hotel industry at that time. Thus, it is difficult to conclude that the alleged misrepresentations were a determinative factor in the hotel clients' decision to terminate their contracts with Vidéotron.

[132] With respect to the second category of misrepresentations alleged against the defendants, it must first be pointed out that eight of the 10 clients concerned by the claim terminated their contracts with Vidéotron before the Summary Judgment was rendered and before the defendants made their statements regarding its scope. Any causal link between these statements and the loss of Vidéotron's clients can easily be ruled out. With respect to the two other clients, for the aforementioned reasons, I have no evidence of the role that the statements in question could have played in the decision to terminate their contracts with Vidéotron.

[133] In short, Vidéotron had to demonstrate that the misrepresentations regarding the lawfulness of the defendants' services led to the termination of the contracts of 10 of its clients. However, there is no direct evidence of what could have motivated this termination. On the contrary, the evidence suggests that these 10 clients were ready to run the risk that the retransmission of the TVA Sports and RDS channels would be declared unlawful at the conclusion of this proceeding. Therefore, Vidéotron did not discharge its burden of proving a causal link. Its claim must be dismissed.

[134] Lastly, I would point out that this Court sometimes infers that a causal link exists with respect to loss of sales under paragraph 7(b) of the *Trademarks Act* when the product is "very similar" and is sold on the same markets: *Group III International Ltd v Travelway Group International Ltd*, 2017 FCA 215 [*Travelway*] at paragraph 84; *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2019 FC 724 [*Alliance Laundry*] at paragraphs 58–60.

[135] The facts in the present case differ from those cases. Contrary to the situation in *Travelway*, which involved luggage and bags bearing marks that were almost identical, and in *Alliance Laundry*, which concerned washing machines with the same slogan, I am not convinced that the defendants' products and those of Vidéotron are interchangeable. The Konek system offers functions that go beyond retransmitting television channels. Indeed, in an email to Vidéotron, a representative of Château Bellevue stated the following:

[TRANSLATION]

As you know, I had tried to obtain more comprehensive services from Vidéotron, but I was unsuccessful when we made the decision. Konec [*sic*] offers another type of service, and we tasked it with terminating the contract with you for us; this was part of its offer. (Exhibit 215)

[136] As a result, Vidéotron has not established that its services are interchangeable with the defendants' services. There is therefore no reason to infer the existence of a causal link as the courts did in *Travelway* and *Alliance Laundry*.

(2) The Defendants' Claim

[137] In their counterclaim, the defendants allege that the plaintiffs have, by various means, undertaken a smear campaign aimed at discouraging potential clients or partners from doing business with them. In particular, after the Summary Judgment was rendered, the plaintiffs issued a press release and published an article in *Journal de Montréal* and *Journal de Québec* that allegedly contained false statements. In this respect, the defendants have made a claim for \$32 million, which represents the loss of various contracts, subsidies or business opportunities.

[138] Several reasons lead me to summarily dismiss this claim.

[139] First, the defendants have not proven the damage that they allege. A claim for \$32 million cannot be seriously supported using a table of just one page (Exhibit 183). In his testimony, Mr. Rousseau did not provide any details with respect to the clients that the defendants had apparently been deprived of. The alleged damage is purely hypothetical.

[140] Second, there is no evidence of a causal link between statements made by the plaintiffs and the alleged damage, particularly the loss of Konek and Hill Valley clients. Just as we do not know why certain clients terminated their contracts with Vidéotron in order to subscribe to the services offered by Konek and Hill Valley, we also do not know why several of them did the opposite, and we know even less why certain potential clients declined the services offered by Konek and Hill Valley. The only tangible evidence of damage is an email from ville de Québec withdrawing a grant from Konek (Exhibit 184). However, the withdrawing of this grant occurred prior to the Summary Judgment and the alleged misrepresentations. Therefore, the latter cannot have caused the loss of the grant. Similarly, Mr. Rousseau did not clearly state whether the loss of certain grants or certain investments was caused by the plaintiffs' alleged misrepresentations as opposed to the mere existence of the present proceedings (Transcript no 5 of February 21, 2023, at 128–132).

[141] Third, apart from the letter sent to the clients that Vidéotron lost to Konek (Exhibit 135), there is no admissible evidence of the statements that representatives of the plaintiffs allegedly

made to current or potential clients of the defendants. What Mr. Rousseau related on this subject during his testimony is hearsay.

III. Conclusion

[142] For the foregoing reasons, I issue an injunction prohibiting the defendants from retransmitting the TVA Sports channels, and I order the defendants Konek, Hill Valley, Libéo and Mr. Rousseau, solidarily, to pay \$553,000 in statutory damages. The claims based on the *Trademarks Act* are dismissed.

[143] Pursuant to subsections 36(1) and 37(1) of the *Federal Courts Act*, RSC 1985, c F-7, the laws that govern interest on amounts awarded by judgment in a province apply if the cause of action arose in that province. Given that all the facts in the present case took place in Quebec, I will apply the rules of the *Civil Code of Québec*. However, prejudgment interest with respect to an award of punitive damages runs only from the date of the judgment: *Genex Communications inc c Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201 at paragraphs 138–153, [2009] RJQ 2743. Given that the amount I am awarding as damages fulfils a mainly punitive function, I will only award interest and the additional indemnity from the date of the judgment.

[144] The parties requested that costs be reserved in order to allow them to make additional submissions in this respect. I allow this request.

JUDGMENT in T-374-21

THIS COURT’S JUDGMENT is that:

1. The action is allowed in part.
2. The defendants are ordered to cease, both directly and through their shareholders, directors, executives, officers, agents, representatives and employees, as well as through any other business to which they are tied, in which they have an interest or which is under their authority or control, communicating the TVA Sports channels and the programs broadcast on these channels to the public by telecommunication without the authorization of the plaintiff TVA Group.
3. The defendants Konek Technologies inc., Coopérative de câblodistribution Hill Valley, Libéo inc. and Jean-François Rousseau shall pay, solidarily, \$553,000 to the plaintiffs, plus interest at the legal rate and the additional indemnity set out in article 1619 of the *Civil Code of Québec* as of the date of this judgment.
4. Costs are reserved.
5. The plaintiffs shall serve and file their submissions on the issue of costs, which are not to exceed 10 pages, within 30 days from the date of this judgment.
6. The defendants shall serve and file their submissions on the issue of costs, which are not to exceed 10 pages, within 15 days of the plaintiffs’ submissions being filed.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-374-21

STYLE OF CAUSE: VIDÉOTRON LTÉE, TVA GROUP INC, TVA PRODUCTIONS II INC v KONEK TECHNOLOGIES INC, COOPÉRATIVE DE CÂBLODISTRIBUTION HILL VALLEY, LIBÉO INC, LOUIS MICHAUD, JOÉ BUSSIÈRE, JEAN-FRANÇOIS ROUSSEAU

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DATED: MAY 26, 2023

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