

to forward copyright infringement notices from content owners to their subscribers. For example, if an ISP subscriber were to illegally download and distribute movies via BitTorrent, the ISP would be required to forward an infringement notice from the rightsholder to the subscriber. Millennium Producers alleged that Bell failed to properly forward over 40,000 infringement notices out of 81,000 sent between February 2019 and June 2021, seeking approximately \$400 million in damages (\$10,000 per notice). Bell counterclaimed, accusing the plaintiffs of misuse of copyright for their employment of the Notice and Notice regime for harassment and intimidation purposes. Misuse of copyright is described as a form of defence where it is alleged that the copyright holder has violated public policy or antitrust laws. The court rejected the misuse of copyright counterclaim, citing a lack of material facts provided by Bell Canada while also highlighting that the misuse of copyright doctrine has yet to be fully developed under Canadian law.

### **C. ELECTRONIC CONTRACTS AND ELECTRONIC TRANSACTIONS [§25.11]**

#### **I. “THUMBS UP” EMOJI CONSTITUTES ACCEPTANCE OF CONTRACT [§25.12]**

In *South West Terminal Ltd. v. Achter Land & Cattle Ltd.*, 2023 SKKB 116, the court confirmed that the use of a “thumbs up” emoji can amount to acceptance of a contract in specific circumstances. It was the plaintiff’s position that the parties entered into a deferred delivery purchase contract on March 26, 2021, whereby South West Terminal Ltd. (“SWT”) agreed to buy, and Achter Land & Cattle Ltd (“Achter”) agreed to deliver, 86 metric tonnes of flax for a contracted price of \$17 per bushel. SWT texted a photo of this contract—which SWT had signed electronically—to the defendant, along with the words “please confirm flax contract”. Achter responded to this text message with the “thumbs up” emoji. Achter argued that the emoji was nothing more than an acknowledgment that the message from SWT had been received, but the court disagreed. In reaching its decision, the court considered the principles of contract formation and specifically focused on whether the conduct of the parties was such that a reasonable person would conclude that the parties intended to be bound by a contract. The court considered several factors, including the long-standing nature between Achter and SWT, which involved Achter executing contracts by text messages reading, for example, “looks good”, “ok”, and “yup”. Achter delivered under these contracts, and the use of a “thumbs up” emoji was therefore similar to how contracts had previously been entered into between the parties. The

court also found that a “thumbs up” emoji is an “action in electronic form” that can be used to express acceptance as set out in s. 18(1) of *The Electronic Information and Documents Act, 2000*, S.S. 2000, c. E-7.22. Finally, the court held in relation to the written and signed requirement under s. 6 of the *Sale of Goods Act*, R.S.S 1978, c. S-1, the signature requirement was met by the emoji sent by Achter. There was no issue with the authenticity of the text message, which the court noted was the purpose of the requirement of s. 6.

## **D. PRIVACY [§25.13]**

### **I. PRIVACY COMMISSIONER’S COMPLAINT AGAINST FACEBOOK REGARDING CAMBRIDGE ANALYTICA DISMISSED [§25.14]**

In *Canada (Privacy Commissioner) v. Facebook, Inc.*, 2023 FC 533, the court dismissed an application brought by the complainant, the Privacy Commissioner of Canada, against Meta Platforms Inc. (formerly Facebook Inc.). The application followed an investigation of Meta’s compliance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“*PIPEDA*”), brought in light of news reports that a third-party application, had obtained data through the Facebook platform and subsequently disclosed it to a British research firm called Cambridge Analytica. The specific contents of the application were based on a 13-month investigation by the Commissioner, resulting in a report stating that Meta failed to obtain meaningful consent and adequately safeguard users’ personal information and therefore should be required to change its operations worldwide. However, the court ultimately dismissed the application, finding no breach of *PIPEDA* on consent and safeguards. The court emphasized the need for concrete evidence in *PIPEDA* applications and provided valuable guidance on interpreting and applying *PIPEDA*.

## **III. LEGISLATION UPDATES [§25.15]**

### **A. ONLINE NEWS ACT RECEIVES ROYAL ASSENT DESPITE MAJOR PUSHBACK [§25.16]**

Bill C-18, the *Online News Act* (the “Act”), received Royal Assent on June 22, 2023 and came into force in its entirety on December 19, 2023. The Act requires technology companies to compensate Canadian media organizations when they use Canadian news content on their platforms through links or other means. News businesses that may be eligible for compensation include those who are: qualified Canadian

journalism organizations under the *Income Tax Act*, R.S.C., 1985 c. 1 (5th Supp.); Canadian organizations producing news content focused primarily on issues of general interest, provided they employ at least two journalists and adhere to a code of journalistic ethics; licensed campus, community or Indigenous broadcasters; or Indigenous news outlets, run by Indigenous people. This framework aims to support news businesses in securing fair compensation for their content and promote balanced negotiations between digital intermediaries and news outlets. However, both Google and Meta (the companies behind Facebook and Instagram) have already rejected this mandate, deciding to block Canadian news from their platforms. On August 7, 2023, several Canadian news outlets filed an application with the Competition Bureau requesting an inquiry into Meta's decision to block news links. At the time of writing, there has not been a decision on this matter. However, the Federal Government issued a news release on September 1, 2023 announcing proposed regulations to implement the Act, which seemingly address some of stakeholders' key concerns. The proposed regulations provide clarity on which platforms are subject to the Act, and greater certainty on what they need to do to obtain an exemption from the mandatory bargaining process. To obtain an exemption, platforms must enter into agreements supporting the diverse production of Canadian news in communities across Canada. The total value of agreements must meet a certain threshold in order to qualify. The regulatory framework is still not finalized, and it remains unclear the precise impact this framework will have on the digital news market in Canada.

## **B. ONLINE STREAMING ACT RECEIVES ROYAL ASSENT [§25.17]**

The *Broadcasting Act*, S.C. 1991, c. 11 has undergone an amendment increasing its scope to include online streaming and on-demand services. This amendment, known as Bill C-11 or the *Online Streaming Act*, gained Royal Assent on April 27, 2023. This legislative update introduces online undertakings as a distinct category within broadcasting, thereby subjecting online undertakings to regulation by the Canadian Radio-television and Telecommunications Commission (the "CRTC"). The Department of Canadian Heritage emphasized that the *Online Streaming Act* will compel streaming platforms to contribute to Canadian content creation, production, and distribution in a meaningful way.

Following Royal Assent, the CRTC also unveiled a three-phase regulatory plan aimed at updating Canada's broadcasting landscape, which will commence in the 2024 spring season and extend until