

Federal Court



Cour fédérale

Date: 20221221

Docket: T-1169-19

Citation: 2022 FC 1695

Ottawa, Ontario, December 21, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**BELL MEDIA INC. GROUPE TVA INC.
ROGERS MEDIA INC.**

**Plaintiffs/
Moving Parties**

and

**JOHN DOE 1 dba GOLDTV.BIZ
JOHN DOE 2 dba GOLDTV.CA**

Defendants

and

**BELL CANADA
BRAGG COMMUNICATIONS INC. dba
EASTLINK
COGECO CONNEXION INC.
DISTRIBUTEL COMMUNICATIONS
LIMITED
FIDO SOLUTIONS INC.
ROGERS COMMUNICATIONS CANADA
INC.
SASKATCHEWAN
TELECOMMUNICATIONS SHAW
COMMUNICATIONS INC.
TEKSAVVY SOLUTIONS INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.**

Third Party Respondents

PUBLIC ORDER
(Confidential version issued December 8, 2022)

UPON motion by the Plaintiffs for the renewal and variation of an Order issued by the Court on November 15, 2019 against the Third Party Respondents [Original Order] pursuant to section 44 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] and Rule 373 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*];

AND UPON noting that the Federal Court of Appeal affirmed the validity of the Original Order in File No. A-440-19 on May 26, 2021 (*Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100 [*GoldTV FCA*]);

AND UPON noting that pursuant to the Original Order, the Third Party Respondents are ordered to block or attempt to block access to a number of domains, subdomains and/or IP addresses listed at Schedule 1 to the Original Order and associated with two Target Websites, namely the “GoldTV.ca Service” and the “GoldTV.biz Service”;

AND UPON considering that the Original Order contains a “sunset clause” pursuant to which it would have terminated on November 15, 2021 – two years after its date of issuance – unless the Court ordered otherwise and that by Order issued November 15, 2021 the Original Order has remained in force pending final determination of this motion;

AND UPON taking note that, the GoldTV.ca Service appears to have been inactive since at least the issuance of the Original Order;

AND UPON noting the Plaintiffs' motion seeks certain amendments to the Original Order with respect to the GoldTV.biz Service only;

AND UPON considering the Plaintiffs' motion record, including the Plaintiffs' affidavit evidence and oral submissions at the hearing of this motion;

AND UPON considering the written submissions and the oral submissions of certain of the Third Party Respondents including Telus Communications Inc. [Telus], Cogeco Connexion Inc. [Cogeco], and Distributel Communications Limited [Distributel] and the affidavit evidence filed by Telus;

AND UPON noting the Plaintiffs' March 14, 2022 letter, Telus's March 16, 2022 letter, Distributel's March 17, 2022 letter, Cogeco's March 21, 2022 letter and their respective proposed revisions to the draft renewal Order;

AND UPON considering subsections 2.4(1.1), 3(1)(f) and 27(1) of the *Copyright Act*, RSC, 1985, c C-42; section 36 of the *Telecommunications Act*, SC 1993, c 38; sections 44 and 50 of the *Federal Courts Act*, and Rules 151, 373 and 399(2)(a) of the *Federal Courts Rules*;

AND UPON noting that, while implementing the Original Order, the Plaintiffs have continued to monitor the infrastructure of GoldTV.biz Service and, as provided for at paragraph 2 of the Original Order, have sought to update Schedule 1 on four occasions to add domains and subdomains; that no objection was brought to the proposed updates; that on each occasion an updating Order issued – December 20, 2019, July 10, 2020, November 13, 2020 and September

14, 2021 – and that the domains and subdomains no longer associated with the GoldTV.biz Service have been removed from Schedule 1;

AND UPON noting that, since implementing the Original Order, no motion has been brought by the operators of any other website claiming to be affected by the Order or any Internet service customer of the Third Party Respondents seeking to vary the Order as provided for at paragraph 10 of the Original Order; and that there is no evidence indicating that implementation of the Original Order has resulted in technical, security or other difficulties requiring any Third Party Respondent to temporarily suspend compliance as provided for at paragraph 9 of the Original Order;

AND UPON noting the affidavit of Sarah Farrugia, Vice President of Content and Business Intelligence with the Third Party Respondent, Bell Canada, affirmed November 1, 2021, in which Ms. Farrugia reports that Bell Canada estimated a drop in the number of its subscribers that use the GoldTV.biz Service from 77,000 in November 2019, prior to implementation of the Original Order, to approximately 18,500 subscribers between September and October 2021 – a drop of approximately 77 percent;

AND UPON considering the consent of Bell Canada, Fido Solutions Inc., Rogers Communications Canada Inc. and Videotron Ltd.;

AND UPON considering that the Third Party Respondents who have served and filed written submissions in response to the Plaintiffs' motion, either do not oppose or do not take a position on the renewal of the Original Order, but instead submit the Court must be satisfied that

the Plaintiffs have met the test for granting an interlocutory injunction and that any renewal order must include terms that safeguard the Third Party Respondents and the public;

AND UPON considering the authority to renew the Original Order and to vary the Original Order to address matters that arose or were discovered subsequent to the issuance of an order (Rule 399(2)(a) *Federal Court Rules; Janssen Inc. v. AbbVie Corporation*, 2014 FCA 176 at paras 40-43);

AND UPON considering the well established three-part test to be applied in considering an interlocutory injunction:

- a) is there a serious issue to be tried, to be assessed on the heightened standard of a strong *prima facie* case in this instance;
- b) will irreparable harm be suffered by the person seeking the injunction if the relief is not granted; and
- c) does the balance of convenience favour granting the requested relief (*GoldTV FCA* at paras 45, 60 and 64).

AND UPON noting that, although renewal of the Original Order is not being opposed, the Third Party Respondents object to certain proposed variations to the Order, including:

- A. the shortening of various time periods;
- B. the Plaintiffs' proposal that the Original Order be varied to allow amendments to Schedule 1 by way of a process of judicial notice as opposed to the process of judicial authorization provided for at paragraph 2 of the Original Order;

- C. the Plaintiffs' proposal that the Order provide that domains or subdomains falling within the scope of a proposed Schedule 1.1 be considered domains or subdomains that have as their sole or predominant purpose to enable or facilitate access to the GoldTV.biz Service;
- D. in the Original Order the use of "reasonable marginal costs of implementation" as the basis for indemnification of the Third Party Respondents; and
- E. the Plaintiffs' request that the underlying action be stayed for a period of two years.

AND UPON noting that the time periods are no longer in issue;

AND UPON concluding:

I. Updating

- The judicial authorization process remains the appropriate mechanism by which the Plaintiffs may update Schedule 1. The interests engaged where site blocking is undertaken extend beyond those of the Plaintiffs, the Defendants and the Third Party Respondents to include the public. In this specific context, the judicial authorization process is not merely procedural but serves an important oversight role. I am of the opinion more than judicial notification is required in these circumstances.

II. Proposed Schedule 1.1

- Adopting the Plaintiffs' proposed Schedule 1.1 would have the effect, in certain instances, of lowering the intentionally high threshold the "sole or predominant purpose" test is intended to impose.
- It is recognized that the high threshold for adding domains, subdomains or IP addresses to Schedule 1 requires a significant investment of time and effort to satisfy that threshold. It is not disputed that under-blocking may be the result in some circumstances. However, the high threshold for including a domain, subdomain or IP address in Schedule 1 is one of the means of mitigating the risk of over-blocking. In light of the Plaintiffs' evidence indicating the effectiveness of the Original Order and also recognizing the broad and significant interests engaged where site blocking is undertaken, I am not, at this time, convinced that the Plaintiffs' proposed Schedule 1.1 has been justified.

III. Indemnification

- Altering the present indemnification wording of "reasonable marginal costs of implementation" is not warranted.
- It is acknowledged and accepted that "the costs of implementation should not be borne by the Third Party Respondents" (*Bell Media Inc v GoldTV.Biz*, 2019 FC 1432 at para 91). Telus acknowledges it was not opposed to the "reasonable marginal costs" formulation at the time the Original Order issued due to both the factual context of the proceeding and the limited anticipated costs at issue. Neither of these circumstances have changed and no claim for indemnification has been made under the Original Order. The current objection is driven, at least in part, by a concern that the formulation might be invoked as a binding

precedent in different circumstances where “reasonable marginal costs” may not capture “the costs of complying.”

- Within the context of this specific matter, including the fact that no party has yet sought indemnification, the concern with the “reasonable marginal costs” formulation is best addressed by the inclusion of a statement in the Order clearly indicating that the indemnification obligations set out in the Order are limited to the circumstances of this proceeding. This approach is in accord with the alternative position Telus has advanced in written submissions.

IV. Stay

- The Plaintiffs’ requested stay should not be granted on the basis that a stay is inconsistent with both the principle that interlocutory relief is not to be viewed as a permanent resolution to a dispute as well as the expectation that a Plaintiff will actively pursue their claim. Instead the Court expects the Plaintiffs will continue their efforts to identify the Defendants and move the action forward.

AND UPON consideration of the evidence, the written submissions and oral argument presented to the Court, that: (1) the Plaintiffs have satisfied the test for granting an interlocutory injunction; (2) the proposed Order, as amended and set out below, acknowledges and balances the competing interests engaged; and (3) the evidence establishes the domains and subdomains listed at Schedule 1 have for their sole or predominant purpose to enable or facilitate access to the GoldTV.biz Service;

THIS COURT ORDERS that:

1. Within ten (10) business days¹ of the issuance of this Order, the Third Party Respondents shall block or attempt to block access by at least their residential wireline Internet service customers to the GoldTV.biz Service by blocking or attempting to block access to all of the domains, subdomains and IP addresses identified in Schedule 1 to this Order.

2. If the Plaintiffs are made aware of any other domain, subdomain or IP address that has as its sole or predominant purpose to enable or facilitate access to the GoldTV.biz Service:
 - a) The Plaintiffs may serve and file a proposed amended Schedule 1 together with an affidavit that may be limited to:
 - i. identifying the additional domain(s), subdomain(s) or IP address(es);
 - ii. stating that such additional domain, subdomain or IP address has as its sole or predominant purpose to enable or facilitate access to the GoldTV.biz Service and that any additional IP address is not associated with any other active domain;
 - iii. stating that such additional domain, subdomain or IP address was identified pursuant to generally the same investigation methods as

¹ For the purpose of this Order, a “business day” is a day that is not a “holiday” as defined at Rule 2 of the *Federal Courts Rules*.

set out in section II.A. of the Ninth Affidavit of Mr. Anthony Martin, dated October 29, 2021; and

- iv. proposing to supplement Schedule 1 to this Order to include such additional domain, subdomain, and IP address.

- b) Any Third Party Respondent may bring a motion to object to the additional proposed domain, subdomain and IP address by serving and filing a motion record within ten (10) business days of service of the Plaintiffs' affidavit and proposed amended Schedule 1. In the event that such a motion record is filed, the Third Party Respondents shall not be ordered to block or attempt to block the domains, subdomains or IP addresses that are the subject of the motion until the motion is decided or the Court orders otherwise.

- c) If no Third Party Respondent brings a motion to object within ten (10) business days in accordance with paragraph 2(b) of this Order, the Court may grant the Order without further proceedings.

- d) The Plaintiffs' affidavit and proposed amended Schedule 1 shall be accepted for filing as confidential, and be treated as confidential by the Third Party Respondents until the earlier of a period of ten (10) business days following the date of any Order that is final and determinative of a proposal to amend served and filed, pursuant to paragraph 2(a) of this Order, or the day on which they have implemented the Order.

3. The Third Party Respondents have no obligation to review, audit or verify whether the Plaintiffs' updates to Schedule 1 to this Order are correct or the purpose of the domains, subdomains or IP addresses listed therein and are wholly reliant on the Plaintiffs accurately identifying the domains, subdomains or IP addresses associated with the GoldTV.biz Service.

4. If and once the Plaintiffs become or are made aware of the following situations, the Plaintiffs must notify the Third Party Respondents as soon as reasonably practicable:
 - a) any domain, subdomain or IP address contained in Schedule 1 to this Order (as updated) no longer has as its sole or predominant purpose to enable or facilitate access to the GoldTV.biz Service, in which case the Plaintiffs shall provide to the Third Party Respondents and file with the Court an updated Schedule 1 removing said domain, subdomain or IP address and the Third Party Respondents shall no longer be ordered to block or attempt to block access to said domain, subdomain or IP address; and

 - b) any IP address contained in Schedule 1 to this Order (as updated) hosts one or more active website(s) other than the GoldTV.biz Service, in which case the Third Party Respondents shall no longer be ordered to block or attempt to block access to said IP address.

5. Notices and service of documents under this Order may be made by the Plaintiffs, the Third Party Respondents and their agents to one another by electronic means at the addresses determined and agreed upon in the context of the Original Order. Service and filing of documents pursuant to paragraph 2 of this Order may be made no more frequently than every ten (10) business days.

6. To the extent practicable, where access to the GoldTV.biz Service is blocked by a Third Party Respondent pursuant to this Order, that Third Party Respondent must take reasonable steps to make available the following information to its residential Internet service customers who attempt to access the GoldTV.biz Service and whose access is blocked:
 - a) that access has been blocked by this Order;

 - b) the identity of the Plaintiffs and Federal Court Docket T-1169-19; and

 - c) a statement to the effect that the operator(s) of the GoldTV.biz Service (the John Doe 1 Defendant), the operators of any other website who claim to be affected by this Order, and any Internet service customer affected by the Order may apply to the Court to seek a variation of this Order pursuant to paragraph 10 of this Order (below).

7. A Third Party Respondent will be deemed to have complied with paragraphs 1 and 2 of this Order if it uses the technical means set out in Schedule 2 to this Order, or alternative or equivalent technical means, provided that the Third Party Respondent notify the Plaintiffs of the change in technical means.

8. If a Third Party Respondent, in complying with this Order, is unable to implement one of the steps referred to in Schedule 2 of this Order, that Third Party Respondent must, within ten (10) business days of the issuance of this Order or the issuance of an Order referred to in paragraph 2 of this Order, notify the Plaintiffs of the step or steps it has taken and why it could not comply with the Order.

9. A Third Party Respondent shall not be in breach of this Order if it temporarily suspends, for no longer than is reasonably necessary, its compliance with paragraphs 1 and 2 of this Order, in whole or in part, when such suspension is necessary to:
 - a) correct or investigate potential over-blocking that is caused or suspected to be caused by the steps taken pursuant to paragraphs 1 and 2 of this Order;

 - b) maintain the integrity or quality of its Internet services or the functioning of its blocking system(s);

 - c) upgrade, troubleshoot or maintain its Internet services or blocking system(s); or

 - d) prevent or respond to an actual or potential security threat to its network or systems;

provided that the Third Party Respondent (i) gives notice to the Plaintiffs during or following such suspension and provides the reason for such suspension and an

estimate of its duration or (ii) if the suspension does not last longer than 48 hours, uses commercially reasonable efforts to maintain a record of the suspension and provides that record to the Plaintiffs upon request. The Plaintiffs shall treat any information received pursuant to this paragraph confidentially and shall use it solely for the purposes of monitoring and ensuring compliance with this Order.

10. The operator(s) of the GoldTV.biz Service (the John Doe 1 Defendant), the operators of any other website who claim to be affected by this Order, and any Internet service customer of the Third Party Respondents affected by the Order, may bring a motion to seek a variation of this Order insofar as this Order affects their ability to access or distribute non-infringing content by serving and filing a motion record within thirty (30) days of the first occurrence of the event that allegedly affects them and that results from this Order.
11. The Plaintiffs shall indemnify and save harmless the Third Party Respondents for:
 - a) the reasonable marginal cost of implementing paragraphs 1 and 6 of this Order and updating the implementation of this Order in response to notifications and/or service from the Plaintiffs pursuant to paragraphs 2 and 4 of this Order;
 - b) any reasonably incurred loss, liability, obligation, claim, damages, costs (including defence costs), or expenses resulting from a third party complaint, demand, action, claim, application or similar proceeding whether administrative, judicial, or quasi-judicial in nature, in respect of

the Third Party Respondents as a result of their compliance with the Order; and

- c) for certainty, the scope of the Plaintiffs' indemnification obligations set out in this paragraph is limited to the circumstances of this proceeding, and this paragraph of the Order is specifically without prejudice to the ability of the Third Party Respondents, Plaintiffs or any other party to seek indemnification obligations of a different scope in other cases or proceedings.

12. With respect of the costs referenced in paragraph 11(a) of this Order:

- a) the Third Party Respondents shall provide the Plaintiffs with an invoice setting out the claimed cost elements and the total cost claimed after having complied with one or more terms of this Order;
- b) the Plaintiffs shall, within thirty (30) days of receipt of the invoice, either (i) pay the invoice or (ii) serve and file a motion disputing the reasonableness of the costs claimed in the invoice, failing which the costs shall be deemed to be reasonable; and
- c) in the event the Plaintiffs fail to pay the invoice or serve and file the motion referred to in paragraph 12(b) of this Order, the Third Party Respondents shall no longer be required to comply with terms of this Order with respect to the domains, subdomains, or IP addresses to which the invoice relates.

13. This Order shall terminate two (2) years from the date of issuance, unless the Court orders otherwise.
14. All without prejudice to the ability of any Third Party Respondents to subsequently seek to stay, vary, or set aside this Order or to oppose on any basis any other related or similar Order sought by any of the Plaintiffs or any other party.
15. Paragraphs 56(a), 56(b), 56(c), 58, 59, 65, 91(b), and 98 to 114, and at Exhibits AM-131, AM-132 and AM-139 to AM-142 to the affidavit of Anthony Martin filed in support of the Plaintiffs' motion, and portions of paragraphs 3, 12, 13, 14, 15, 18 of the affidavit of Daniel Freiji filed in the responding motion record of Third Party Respondent Telus Communications Inc., shall be treated as confidential. The confidential version of such affidavits filed by the Plaintiffs and Telus under confidential seal wherein these paragraphs, or confidential portions thereof, and exhibits are unredacted shall remain confidential, and a public version of such affidavits wherein these paragraphs, or confidential portions thereof and exhibits are redacted shall remain on the public Court record.
16. Paragraphs 71(b) and 72(d)(a) and (b) of the Plaintiffs' written representations filed in support of their motion and a portion of paragraph 8 of Telus' memorandum of fact and law shall be treated as confidential. The confidential version of these written representations filed by the Plaintiffs and Telus under confidential seal wherein these paragraphs, or confidential portions thereof, are unredacted shall remain confidential, and a public version of these written

representations wherein these paragraphs, or confidential portions thereof, and exhibits are redacted shall remain on the public Court record.

17. Paragraph 27(b) of the Notice of Motion and paragraph 4 of its Schedule A, filed by the Plaintiffs on October 22, 2021, shall be treated as confidential. The Federal Court Registry shall place under confidential seal the Notice of Motion and its Schedule A as filed, and the Plaintiffs shall file a public version of the Notice of Motion and its Schedule A wherein these paragraphs are redacted.
18. Should the parties be unable to agree on costs, the parties are to so notify the Court and propose a schedule for the filing of submissions, within 14 days of the date of this Order.

"Patrick Gleeson"
Judge

Schedule 1 – GoldTV.biz Service

Domains to be blocked	Subdomains to be blocked	IP addresses to be blocked
	gold.myiptvplanet.com	
	global.myiptvplanet.com	
destv.me		
	4k.new4k.net	
	app.new4k.net	
	4k.new4k.cc	
	app.new4k.cc	
	z.zcatt.net	
	app.zcatt.net	
	z.zcatt.cc	
	app.zcatt.cc	
	mag7.abctv.me	
905iptv.com		
	new.atntv.cc	
	app.atntv.cc	
	app.atntvv.cc	
	new.atntvv.cc	
	live.aircell.cc	
	6.aircell.cc	
	live.aircel.me	
	6.aircel.me	
	<u>tv.aircel.live</u>	
	<u>pay.aircel.live</u>	
	<u>new.atnt.cc</u>	
	<u>app.atnt.cc</u>	
	<u>bill.atnt.cc</u>	
firtio.club		

	mail.firtio.club	
	admin.firtio.club	
jiocdn.cc		
	cdn.jiocdn.cc	
new4k.co		
	4k.new4k.co	
	app.new4k.co	
	tab.new4k.co	
zkat.me		
	z.zkat.me	
	app.zkat.me	

a) Schedule 2 – Technical Means

1. For domains identified in Schedule 1 (as updated): DNS blocking, or alternatively DNS rerouting to comply with paragraph 7 of the Order.
2. For domains, subdomains or specific paths identified in Schedule 1 (as updated): DNS blocking or DNS re-routing, or at the Third Party Respondent's election URL path blocking, to the extent that the Third Party Respondent's existing technical infrastructure allows this blocking method. For certainty:
 - a) for domains and subdomains identified in Schedule 1 (as updated), the Third Party Respondents do not need to implement URL path blocking if they implement DNS blocking or DNS re-routing in accordance with paragraph 1 of this Schedule 2.
 - b) no Third Party Respondent shall be required to acquire the hardware and software necessary to put in place or upgrade URL path blocking.
3. For the IP addresses identified in Schedule 1 (as updated): IP address blocking, or alternatively IP address re-routing. For certainty, IP address blocking, or IP address rerouting, shall only be required to block IP addresses in respect of which the Plaintiffs or their agents notify the Third Party Respondents that, to the best of their knowledge, the server associated with the notified IP address does not also host an active website other than the GoldTV.biz Service.