

Federal Court



Cour fédérale

Date: 20230718

Docket: T-1253-23

Vancouver, British Columbia, July 18, 2023

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

ROGERS MEDIA INC. GROUPE TVA INC.

Plaintiffs

and

**JOHN DOE 1, JOHN DOE 2,
OTHER UNIDENTIFIED PERSONS WHO
OPERATE UNAUTHORIZED STREAMING SERVERS
THAT PROVIDE OR WILL PROVIDE
ACCESS TO MLB LIVE GAMES IN CANADA**

Defendants

and

**BELL CANADA
BRAGG COMMUNICATIONS INC. dba EASTLINK
COGECO CONNEXION INC.
FIDO SOLUTIONS INC.
ROGERS COMMUNICATIONS CANADA INC.
SASKATCHEWAN TELECOMMUNICATIONS
TEKSAVVY SOLUTIONS INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.
2251723 ONTARIO INC. dba VMEDIA**

Third Party Respondents

ORDER

UPON MOTION by the Plaintiffs for an interlocutory injunction order against the Third Party Respondents pursuant to Section 44 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 373 of the *Federal Courts Rules*, SOR/98-106;

AND UPON considering the Plaintiffs' motion record and the oral submissions of counsel for the Third Party Respondents at the Case Management Conferences held on July 14 and July 18, 2023;

AND UPON considering that this Court has previously found in *Bell Media Inc. v. GoldTV.Biz*, 2019 FC 1432 that it has the jurisdiction to issue site blocking orders (i.e., injunctions enjoining third party Internet service providers to block their subscribers' access to certain websites or services), that this Order was upheld by the Federal Court of Appeal (*TekSavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100), and that leave to appeal to the Supreme Court of Canada was denied on March 24, 2022 (SCC File No. 39876);

AND UPON considering that this Court has since found in *Rogers Media Inc. v. John Doe 1*, 2022 FC 775 that the Third Party Respondents each have the capability to engage in the type of live and dynamic IP address blocking sought by the Plaintiffs;

AND UPON considering the consent of the Third Party Respondents Fido Solutions Inc., Rogers Communications Canada Inc., Vidéotron Ltd. and 2251723 Ontario inc. dba VMedia, for the issuance of this Order;

AND UPON considering that Third Party Respondents Bell Canada Inc., Bragg Communications Inc. dba Eastlink, Saskatchewan Telecommunications, TekSavvy Solutions Inc. and Telus Communications Inc. do not oppose or take no position on the issuance of this Order as it concerns them;

AND UPON considering the objections raised by Cogeco Connexion Inc. to paragraphs 20 and 28 of the Plaintiffs' Revised draft Order;

AND UPON considering subsections 2.4(1.1), 3(1)(f), 27(1) and 27(2.3) of the *Copyright Act*, RSC 1985, c C-42, section 36 of the *Telecommunications Act*, SC 1993, c 38, section 44 of the *Federal Courts Act*, and Rules 151 and 373 of the *Federal Courts Rules*;

AND UPON without prejudice to the ability of any Third Party Respondent 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 the Plaintiffs or any other party;

AND UPON being satisfied that the Order sought should issue, based on the evidence and argument presented to the Court;

THIS COURT ORDERS that:

1. In this Order, "**MLB Live Game**" refers to the full live game footage and/or full live telecast of certain live games of the Toronto Blue Jays, Canada's only Major League Baseball [**MLB**] team, and certain live MLB Jewel Events, produced and/or broadcast by the Plaintiffs in Canada under license from MLB and/or the Toronto Blue Jays, as outlined in Schedule 1 hereto.

A. AS FOR THE DEFENDANTS

1. Until a final judgment is rendered on the Plaintiffs' claim against the Defendants, the Defendants are ordered, by themselves or by their employees, representatives and agents, or by any company, partnership, trust, entity or person under their authority or control, or with which they are associated or affiliated, to immediately cease providing unauthorized access to live streams of MLB Live Games in Canada, including by directly or indirectly operating, maintaining, and/or promoting unauthorized streaming servers that provide or facilitate access to live streams of MLB Live Games in Canada, and to restrain from otherwise, directly or indirectly:
 - (a) communicating MLB Live Games to the public by telecommunication in Canada, including transmitting or otherwise making available MLB Live Games to the public by telecommunication in a way that allows members of the public to have access to them from a place individually chosen by them; or
 - (b) inducing and/or authorizing anyone to infringe the Plaintiffs' right to communicate MLB Live Games to the public by telecommunication in Canada.

B. AS FOR THE THIRD PARTY RESPONDENTS

2. Subject to the terms of this Order, the Third Party Respondents shall, during each of the MLB Live Game Windows (as this term is defined in Confidential Schedule 2 of this Order) specified in Schedule 1 of this Order, subject to paragraph 3 of this Order, block or attempt to block access, by at least their residential wireline Internet service customers, to each of the IP addresses for the Target Servers (as this term is defined in Confidential

Schedule 2 of this Order and as may be hereafter varied) which the Plaintiffs or their appointed agent has notified to the Third Party Respondents in accordance with this Order.

3. Timing of Implementation:

- (a) The Third Party Respondents shall begin to block access to the IP addresses of the Target Servers notified pursuant to this Order immediately, if they are in a position to do so;
- (b) Any Third Party that cannot begin immediately shall take steps to comply without delay, and in any case shall begin to block access under this Order no later than seven (7) days after it is issued; and
- (c) Any Third Party Respondent that is unable to fully comply with the terms of this Order within fifteen (15) days shall advise the Plaintiffs, pursuant to the terms of paragraph 8 of this Order.

4. The Plaintiffs shall collectively appoint a single agent to fulfill the duties outlined in this Order [the Agent].

5. The Agent may notify to the Third Party Respondents an IP address to be blocked as a Target Server pursuant to paragraph 2 of this Order if:

- (a) The Agent has detected that the IP address is being used:
 - (i) during an MLB Live Game Window to communicate an MLB Live Game to the public by telecommunication without authorization; or

- (ii) during the Pre-Monitoring Period (as defined in Confidential Schedule 2 of this Order) to communicate to the public by telecommunication without the Plaintiffs' authorization a station on which an MLB Live Game is scheduled to be broadcast during the MLB Live Game Window; or
 - (iii) in a manner that meets one or more of the detection conditions specified in paragraphs 2(c) and (d) of Confidential Schedule 2 of this Order; and
 - (b) the Agent has concluded that at the time of the detection the IP address satisfies the safeguard requirements of paragraph 2(e) and (f) of Confidential Schedule 2 of this Order.
6. Upon the conclusion of each MLB Live Game Window, the Agent shall give notice to the Third Party Respondents in accordance with this Order to unblock all Target Servers that have previously been notified for blocking during the MLB Live Game Window. The Third Party Respondents shall use reasonable efforts to unblock as soon as reasonably practical after the end of the MLB Live Game Window.
7. The Third Party Respondents have no obligation to verify whether the IP addresses to be blocked as Target Servers notified by the Agent pursuant to this Order have been correctly identified, and are wholly reliant on the Plaintiffs or the Agent accurately identifying and communicating to the Third Party Respondents such IP addresses in compliance with this Order.
8. A Third Party Respondent will be deemed to have complied with paragraph 2 of this Order if it uses either manual or automated IP address blocking, or an alternative or

equivalent technical means (provided that the Third Party Respondent provides reasonable notice to the Plaintiffs of said alternative or equivalent means). If a Third Party Respondent is unable to implement either manual or automated IP address blocking, or IP address rerouting, or alternative or equivalent technical means, that Third Party Respondent shall, within fifteen (15) business days of this Order, notify the Plaintiffs of the step(s) it has taken and why it will be unable to comply with the Order.

9. When blocking access to an IP address pursuant to paragraph 2 of this Order, the Third Party Respondents shall use reasonable efforts, subject to the limits of their networks and resources, to disable access to the IP address as soon as practicable following the notification by the Plaintiffs or their appointed Agent pursuant to this Order. A Third Party Respondent will be deemed to have complied with paragraph 2 of this Order if it uses the technical means set out in paragraph 8 of this Order within thirty (30) minutes of the start of an MLB Live Game Window and at least every thirty (30) minutes thereafter until the end of the MLB Live Game Window, or according to such other schedule as may be agreed between the relevant Third Party Respondent and the Plaintiffs in writing. For greater certainty, the Third Party Respondents are not required to make capital investments to acquire additional software and/or hardware to implement the present Order.
10. A Third Party Respondent shall not be in breach of this Order if it temporarily suspends its compliance with paragraph 2, in whole or in part, when such suspension is reasonably necessary:

- (a) to correct or investigate potential over-blocking that is caused or suspected to be caused by the steps taken pursuant to paragraph 2;
- (b) to maintain the integrity or quality of its Internet services or the functioning of its network and/or system(s);
- (c) to upgrade, troubleshoot or maintain its Internet services or blocking system(s), including as a result of technical or capacity limitations of its blocking system(s);
or
- (d) to prevent or respond to an actual or potential security threat to its network or systems,

provided that:

- (e) the Third Party Respondent gives notice to the Plaintiffs as soon as reasonably practical in advance of, during or following such suspension and provides the reason for such suspension and an estimate of its duration, or 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; and
- (f) the suspension lasts no longer than is reasonably necessary.

For greater certainty, a Third Party Respondent shall not be in breach of this Order where it suspends in part compliance with paragraph 2 because the capacity of its blocking system is exceeded by the number of IP addresses for the Target Servers notified in accordance

with this or another Order, provided it continues to block or attempt to block access to the number of IP addresses that does not exceed the capacity of its blocking system. A Third Party Respondent may hold a reasonable portion of its capacity in reserve if it deems it necessary to do so in order to be able to respond to threats to its subscribers and to maintain the integrity of its network and services. Any such measure must be justified with reference to the network capacity used for similar purposes within the 12 months preceding this Order.

The Plaintiffs shall treat any information received pursuant to this paragraph confidentially and shall use it solely for the purposes of monitoring compliance with this Order.

Notifications of IP addresses of Target Servers to the Third Party Respondents

11. Any notifications given by the Agent under paragraph 5 of this Order must:
 - (a) be notified to the Third Party Respondents by means of publishing a consolidated list of all the IP addresses of the Target Servers to be blocked during an MLB Live Game Window on a secure electronic platform to which each of the Third Party Respondents has been given access by arrangement with the Agent, in the manner specified in paragraphs (b) – (d);
 - (b) be in a fully specified data format, that is provided to the Third Party Respondents in advance.

- (c) be published to said platform on an ongoing basis during each MLB Live Game Window, and (save as set out in paragraph 12 below) not during other periods; and
 - (d) be published in such a manner that they are brought actively to the attention of all Third Party Respondents as contemporaneously as is reasonably practicable.
- 12. Any notifications given by the Agent under paragraph 6 of this Order must be notified to the Third Party Respondents by the same means as those specified in paragraph 11 of this Order and given within fifteen (15) minutes of the expiry of the relevant MLB Live Game Window, and shall be effected by publishing a list containing a single previously-disclosed IP address controlled by the Agent.
- 13. The notifications of IP addresses of Target Servers to the Third Party Respondents pursuant to this Order will follow the technical requirements set out in Confidential Exhibit GD-12 to the Affidavit of Mr. George Demetriades sworn on June 20, 2023.

Notification to Target Servers

- 14. Where the Agent notifies an IP address for blocking in accordance with paragraph 5 of this Order, the Agent must within a reasonable period of the first occasion when that IP address is notified (being no later than the end of the day on the day of the MLB Live Game Window in question) send to the hosting provider associated with the IP address an electronic notice which contains at least the following information:
 - (a) that access to the IP address has been blocked in Canada by Court Order;

- (b) the identity of the Plaintiffs who obtained this Order;
- (c) a link to an internet location from which the public version of this Order may be accessed; and
- (d) a statement that affected server operators have the right to apply to the Court to discharge or vary the Order pursuant to paragraph 21 below.

Notification to Third Party Respondents' Customers

- 15. The Plaintiffs shall post this Order, as well as an explanation of the purpose of the Order, and contact information for any inquires or complaints, on their websites, in a prominent manner.
- 16. Where access to a Target Server is blocked by a Third Party Respondent pursuant to this Order, that Third Party Respondent shall make reasonable efforts to make the following information immediately available to its residential Internet service customers who attempt to access the Target Servers and whose access is blocked, to the extent it is technically possible and practical with that Third Party Respondent's current technology:
 - (a) that access has been blocked by this Order;
 - (b) the identity of the Plaintiffs and the Federal Court File for this matter and contact information of the Plaintiffs, to be provided by the Plaintiffs to the Third Party Respondents for use by such customers;

- (c) a statement to the effect that the operators of the Target Servers (i.e., the Defendants), any third party who claim to be affected by this Order, and any Internet service customer affected by the Order, may apply to the Court to discharge or vary the Order pursuant to paragraph 21 below; and
 - (d) contact information that the Plaintiffs' Agent shall provide to the Third Party Respondents, and may update from time to time on 30 days' notice, that enables the affected customer to readily contact the Plaintiffs or their Agent to direct any complaints, including false positives.
17. Any personal information collected to achieve the objectives of this Order, or collected through any Deep Packet Inspection (DPI) or other system adopted to achieve the objectives of this Order, will be used solely for the purposes of providing notice to customers, will not be disclosed, and will only be retained as long as is strictly necessary to ensure the integrity of the customer notification obligation.

Changes to Confidential Schedule 2

18. No changes to the contents of PART 1, paragraphs (a) to (g), or to PART II, paragraphs (a) to (e) of Confidential Schedule 2 may be made unless approved by Order of this Court. No additions to PART II, paragraph (f) of Confidential Schedule 2 may be made unless approved by Order of this Court following an informal *ex parte* request supported by evidence and accompanied by a draft revised Order. For greater certainty, deletions from PART II, paragraph (f) may be made without approval of the Court, and must be

made without delay as soon as the Plaintiffs or Agent become aware that the criteria for inclusion are no longer met.

19. The Plaintiffs must report any deletions to the Court, on a confidential basis, within 30 days of the end of the last MLB Live Game Window of the 2023 MLB season.
20. All parties have permission to apply by way of motion to vary the contents of Confidential Schedule 2, such motion to be supported by evidence and on notice to all the other parties.

Permission to apply

21. The operators of the Target Servers (i.e., the Defendants), any other third party who claims 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.
22. This Order shall in no way limit the ability of a Third Party Respondent to seek to stay, vary, or set aside this Order or oppose on any basis any other related or similar Order sought by the Plaintiffs or any other party. In particular and without limitation, this Order shall in no way limit the ability of a Third Party Respondent to raise issues in connection with the implementation of this Order on grounds relating to the technical implementation of this Order, impacts on a Third Party Respondent's services to its

subscribers, or the effectiveness of the Order in preventing the unauthorized streaming during an MLB Live Game Window.

Sunset clause

23. This Order shall terminate at the end of the last MLB Live Game Window of the 2023 MLB season (i.e., the final game of the World Series) or at the time judgment is rendered on the Plaintiffs' underlying action or the latter is dismissed, which ever occurs first.

Confidentiality

24. The Court is satisfied that the following documents filed in support of the Plaintiffs' motion for the issuance of the present Order shall remain confidential and be sealed in the Court record because it is necessary to prevent a serious risk to the efficacy of the present Order and similar orders rendered by this Court and by courts in other jurisdictions; and no reasonable alternative measures will prevent that risk; and the benefits of protecting this efficacy outweigh the negative effects of confidentiality:
- (a) The confidential version of the affidavit of Mr. George Demetriades (a public version having been provided);
 - (b) The confidential version of the affidavit of Mr. Bryce Mitchell (a public version having been provided);
 - (c) The confidential version of the affidavit of Mr. Mohamed Drif (a public version having been provided);

- (d) The confidential version of the plaintiffs' written representations (a public version having been provided);
- (e) Schedule 2 to this Order, which pertains to the detection and notification criteria;
- (f) Reports to be submitted to the Court pursuant to paragraph 31;
- and
- (g) Informal requests to be submitted to the Court pursuant to paragraph 18.

[Collectively, Confidential Information].

25. The Confidential Information shall be treated as confidential by the Registry of the Court and shall not be available to anyone other than the Plaintiffs, the Third Party Respondents and appropriate Court personnel. Any Defendant or third party bringing a motion pursuant to paragraph 21 of this Order who wishes to have access to the Confidential Information for the purposes of these proceedings shall serve and file a motion record seeking leave from the Court to have access to the Confidential Information.
26. Any party who is authorized to have access to the Confidential Information pursuant to paragraph 25 of this Order may only make use of the Confidential Information for the purposes of these proceedings and shall not disclose the Confidential Material to anyone (except their legal counsel or experts who have been informed of the present Order), without leave from the Court.

Reporting to the Court

27. The Plaintiffs shall retain the services of Mr. David Lipkus as an independent expert to review the application of the criteria by the Plaintiffs' Agent for the identification of IP addresses for blocking, including the application of all of the criteria set out in Confidential Schedule 2. If Mr. Lipkus is unavailable or the Plaintiffs seek to retain a different independent expert, the Plaintiffs shall, with input from the Third Party Respondents, propose up to three possible experts by letter to the Court, and the Court will advise the Plaintiffs which of the list they must retain.
28. The Expert shall be provided the necessary access to facilities, processes or information that is needed to fulfil these responsibilities.
29. The Expert will be subject to an ongoing obligation of confidentiality, and shall not disclose any information obtained pursuant to this mandate, except as permitted by the terms of this Order.
30. The Expert will prepare i) an Initial Confidential Report, which shall be prepared and provided to the parties and the Court, on a confidential basis, within thirty (30) days of the last MLB Live Game Window of calendar year 2023, and ii) a "Public" Report – which shall be prepared following consultations with all parties as to proposed redactions or alternate wording needed to protect confidential information. If the parties cannot agree on proposed redactions, the Expert can seek the assistance of the Court to resolve the issue. This Report shall be issued as soon as is feasible following the completion of

the Initial Confidential Report. This Public Report shall be posted on each Party's website within thirty (30) days of its completion.

31. Within 60 days of the last MLB Live Game Window of calendar year 2023, the Plaintiffs shall file with the Court, and serve on all Third Party Respondents, one or more affidavits comprising (i) a confidential list of all IP addresses that were notified for blocking pursuant to this Order, with the dates and times on which they were required to be blocked, and the criteria which were applied that resulted in them being notified for blocking; (ii) the details of any complaint received from operators of Target Servers, their hosting provider or any other third party (including customers of the Third Party Respondents); (iii) any material technical issues encountered with the implementation of this Order, including any issues reported by the Third Party Respondents to the Plaintiffs and (iv) any relevant available data pertaining to the effectiveness of the Order. This one or more affidavits shall be accompanied by a letter to the Court summarizing the material technical issues encountered, if any.

Costs of Implementation

32. The Plaintiffs shall indemnify and save harmless the Third Party Respondents for:
 - (a) the reasonable marginal cost of implementing this Order, up to a maximum amount of \$50,000.00; and
 - (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.

33. With respect to the costs referenced in paragraph 32(a) above:
- (a) the Third Party Respondents shall provide the Plaintiffs with an itemized invoice setting out the claimed costs elements and the total cost claimed, within 60 days of the last MLB Live Game Window of calendar year 2023; and
 - (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.

Costs

34. There shall be no costs on the motion.

"Roger R. Lafrenière"

Judge

SCHEDULE 1 to the Order of Justice Lafrenière in Court File No. T-1253-23:

MLB LIVE GAME WINDOWS

- The MLB Live Game Window of:
 - regular season MLB games played by the Toronto Blue Jays, with telecast produced and telecast in Canada by any of the Plaintiffs via television broadcast and/or online streaming between March 30, 2023, and October 1, 2023 as per the schedule found on the MLB website (<https://www.mlb.com/bluejays/schedule>), including the following currently scheduled games to be telecast by the Plaintiffs:

Date (mm/dd/yyyy)	Time (ET)
07-19-2023	7:00 PM
07-20-2023	7:00 PM
07-21-2023	10:00 PM
07-22-2023	4:00 PM
07-23-2023	4:00 PM
07-24-2023	10:00 PM
07-25-2023	10:00 PM
07-26-2023	4:00 PM
07-29-2023	3:00 PM
07-30-2023	12:00 PM
07-31-2023	7:00 PM
08-01-2023	7:00 PM
08-02-2023	7:00 PM
08-03-2023	3:00 PM
08-04-2023	7:00 PM
08-05-2023	4:00 PM
08-06-2023	1:30 PM
08-07-2023	7:00 PM
08-08-2023	7:00 PM
08-09-2023	7:00 PM
08-10-2023	1:00 PM
08-11-2023	7:00 PM
08-12-2023	3:00 PM
08-13-2023	1:30 PM
08-15-2023	7:00 PM
08-16-2023	7:00 PM
08-18-2023	6:30 PM
08-19-2023	6:30 PM

Date (mm/dd/yyyy)	Time (ET)
08-20-2023	1:30 PM
08-22-2023	7:00 PM
08-23-2023	7:00 PM
08-24-2023	7:00 PM
08-25-2023	7:00 PM
08-26-2023	3:00 PM
08-27-2023	1:30 PM
08-28-2023	7:00 PM
08-29-2023	7:00 PM
08-30-2023	3:00 PM
09-01-2023	8:30 PM
09-02-2023	8:00 PM
09-03-2023	3:00 PM
09-04-2023	4:00 PM
09-05-2023	9:30 PM
09-06-2023	3:30 PM
09-08-2023	7:00 PM
09-09-2023	3:00 PM
09-10-2023	1:30 PM
09-11-2023	7:00 PM
09-12-2023	7:00 PM
09-13-2023	7:00 PM
09-14-2023	7:00 PM
09-15-2023	7:00 PM
09-16-2023	3:00 PM
09-17-2023	1:30 PM
09-19-2023	7:00 PM
09-20-2023	7:00 PM
09-21-2023	7:00 PM
09-22-2023	6:30 PM
09-23-2023	4:00 PM
09-24-2023	1:00 PM
09-26-2023	7:00 PM
09-27-2023	7:00 PM
09-28-2023	7:00 PM
09-29-2023	7:00 PM
09-30-2023	3:00 PM
10-01-2023	3:00 PM

This schedule is subject to variations by the Toronto Blue Jays, as may be notified to the Third Party Respondents by the Plaintiffs and/or their Agent from time to time.

- each American League Wild Card Game (to be scheduled);
- each American League Division Series Games (to be scheduled) (except for Division Series Games available on the MLB Network in Canada);
- each American League Championship Series Game (to be scheduled);
- each World Series Game (to be scheduled);
- MLB All-Star Game (to be scheduled);
- MLB All-Star Home Run Derby (to be scheduled); and
- MLB All-Star Futures Game (to be scheduled),

broadcast in Canada by the Plaintiffs via television broadcast and/or online streaming during the 2023 MLB season, as per the schedule found on the MLB website (<https://www.mlb.com/schedule>), subject to variations by MLB, as may be notified to the Third Party Respondents by the Plaintiffs and/or their Agent from time to time.

**CONFIDENTIAL SCHEDULE 2 to the Order of Justice Lafrenière
in Court File No. T-1253-23:
DETECTION AND NOTIFICATION CRITERIA**

[omitted.]