

Federal Court



Cour fédérale

Date: 20220527

Docket: T-955-21

Citation: 2022 FC 775

Ottawa, Ontario, May 27, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

**ROGERS MEDIA INC.
ROGERS COMMUNICATIONS INC.
BCE INC.
BELL MEDIA INC.
CTV SPECIALTY TELEVISION
ENTERPRISES INC.
THE SPORTS NETWORK INC.
LE RESEAU DES SPORTS (RDS) INC.
GROUPE TVA INC.**

Plaintiffs

and

JOHN DOE 1

JOHN DOE 2

**OTHER UNIDENTIFIED PERSONS WHO OPERATE UNAUTHORIZED
STREAMING SERVERS PROVIDING ACCESS TO NHL LIVE GAMES IN CANADA**

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.
TEKSAVYY SOLUTIONS INC.
TELUS COMMUNICATIONS INC.
VIDEOTRON LTD.**

Third Party Respondents

and

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
AND PUBLIC INTEREST CLINIC
BEANFIELD TECHNOLOGIES INC.**

Interveners

**ORDER AND REASONS
PUBLIC VERSION
(CONFIDENTIAL VERSION ISSUED ON MAY 27, 2022)**

ORDER

THE COURT ORDERS that:

1. The Plaintiff's motion for an interlocutory injunction is granted, on the terms set out below.
2. There is no order as to costs.

TERMS OF THE ORDER

3. In this Order, "**NHL Live Game**" refers to the live footage of a National Hockey League ("**NHL**") game and/or the live television program produced by adding text, images, videos, commentaries and/or animations to said footage, and which is produced and/or broadcast by the Plaintiffs in Canada under license from the NHL or its Canadian franchise teams.
4. Subject to the terms of this Order, the Third Party Respondents shall, during each of the NHL Live Game Windows (as this term is defined in Confidential Schedule 2 of this Order) specified in Schedule 1 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 have notified to the Third Party Respondents in accordance with this Order.
 - 4.1 Timing of Implementation

- a) The Third Party Respondents shall begin to block access to the specified IP addresses under 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;
- c) Any Third Party Respondent that is unable to fully comply with the terms of this Order within fifteen (15) days shall advise the Plaintiff, pursuant to the terms of paragraph 8.

5. The Plaintiffs shall collectively appoint a single agent to fulfill the duties outlined in this Order (the “Agent”).

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

- (a) The Agent has detected that the IP address is being used:
 - (i) during an NHL Live Game Window to communicate an NHL 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 authorization one of the Plaintiffs’ stations on which an NHL Live Game is scheduled to be broadcast during the NHL Live Game Window; or

- (iii) in a manner that meets one or more of the detection conditions specified in paragraph (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 NHL 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 NHL Live Game Window. The Third Party Respondents shall use reasonable efforts to un-block as soon as reasonably practical after the end of the NHL 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 their appointed 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 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 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 of this Order if it uses the technical means set out in paragraph of this Order within thirty (30) minutes of the start of an NHL Live Game Window and at least every hour thereafter until the end of the NHL Live Game Window, or according to such other schedule as may be agreed between the relevant Third Party Respondent and the Plaintiffs in writing.
10. A Third Party Respondent shall not be in breach of this Order if it temporarily suspends its compliance with paragraph, 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;
 - (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 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 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 NHL Live Game Window accompanied by the start and anticipated end time for each Window and each IP address 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 the said platform on an ongoing basis during each NHL Live Game Window, and (save as set out in paragraph below) not during other periods; and
 - (d) be published in such a manner that they are put actively to the attention of all Third Party Respondents as contemporaneously as is reasonably practicable.

12. Any notifications given by the Agent under paragraph of this Order must be notified to the Third Party Respondents by the same means as those specified in paragraph of this Order and given within fifteen (15) minutes of the expiry of the relevant NHL Live Game Window, and shall be effected by publishing an empty list of IP addresses.

Notification to Target Servers

13. Where the Agent notifies an IP address for blocking in accordance with paragraph 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 NHL 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 below.

Notification to Third Party Respondents Customers

14. 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 each of their websites, in a prominent manner.
15. 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:

- (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 John Doe 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 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 Plaintiff or its agent to direct any complaints, including false positives.

The reasonable expenses incurred by the Third Party Respondents in making the efforts required by this section 12 shall be paid by the Plaintiffs.

15.1 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

16. 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. 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.
17. The Plaintiffs must report any deletions to the Court, on a confidential basis, within 30 days of the end of the NHL Playoffs.
18. 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

19. The operators of the Target Servers (i.e. the John Doe 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.
20. 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 or renewal 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 NHL Live Game Window.

Sunset clause

21. This Order shall terminate at the end of the last NHL Live Game Windows of the 2021-2022 NHL season (i.e., the final of the Stanley Cup), unless the Court orders otherwise.

Confidentiality

22. The Confidential Affidavits filed by any of the parties, any cross-examination on these Confidential Affidavits, and any written representations by any of the parties that refer to this information shall remain confidential and be sealed in the Court record, subject to those portions addressed in paragraph 23 below, because this is necessary to prevent a serious risk to the efficacy of the present Order and similar orders rendered 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.
23. The Court is satisfied that, while certain portions of the documents listed below can be made public, it is necessary for other portions to remain confidential. For greater certainty, the following portions of the documents listed below will be treated as confidential and be sealed in the Court record to prevent a serious risk to the efficacy of the present Order and similar orders rendered by courts in other jurisdictions; and that no reasonable alternative

measures will prevent that risk; and that the benefits of protecting this efficacy outweigh the negative effects of confidentiality:

- (a) Certain paragraphs of the Affidavit of Mr. George Demetriades sworn June 28, 2021;
- (b) Certain paragraphs of Exhibit JF-5 to the Affidavit of Mr. Jonathan Friend sworn October 15, 2021;
- (c) Certain portions of the cross-examinations of Mr. Demetriades (held October 25, 2021) and Mr. Friend (held November 4, 2021);
- (d) Certain paragraphs of the confidential version of the Plaintiffs' written representations in support of the present Order;
- (e) Schedule 2 to this Order (as well as Schedule 2 to the draft order submitted by the Plaintiffs);
- (f) Any portion of the written representations submitted by the Third Party Respondents and/or Intervenors that references the information contained in documents (a) to (f); and
- (g) Item (i) of the reports to be submitted to the Court pursuant to paragraph 17 of this Order.

(Collectively, "Confidential Information").

The parties are to provide proposed redactions, identifying the specific portions of the documents listed in paragraphs (a) to (d), and paragraphs (f) and (g) to be treated as “Confidential Information”, within 30 days of the issuance of this Order. The redactions approved by the Court will be incorporated into a revised Confidentiality Order. Until then, the existing Confidentiality Order continues to apply.

24. 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, the Intervenors and appropriate Court personnel.
25. Any defendant or third party bringing a motion pursuant to paragraph 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 paragraphs or 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 an independent expert, selected with input from the Third Party Respondents. If the parties cannot agree, they may 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. This expert shall have several principal tasks:
- a. To review the application of the criteria by the Plaintiff's Agent for the identification of IP addresses for blocking, including the application of all of the criteria set out in Confidential Schedule 2;
 - b. To convey to the Court a list (which list shall be prepared by the Agent) of all IP addresses that were notified for blocking, 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;
 - c. To review and report on the implementation of the blocking by as many of the Third Party Respondents as is feasible (and no less than four);
 - d. To report on compliance with the terms of the Order, by both the Plaintiffs and the Agent, as well as the Third Party Respondents;
 - e. To compile information on any complaint(s) received by any of the Plaintiffs or Third Party Respondents relating to the implementation of this Order (which information shall be compiled by the respective parties);
 - f. To assess and report on the expert's assessment of the effectiveness of the Order, including the criteria for measuring success, why these were selected, and the results of the assessment.

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 three reports:
 - a. An Initial Confidential Report – on the implementation of the Order, as set out in paragraphs (a) to (e) above, which shall be prepared and provided to the parties and the Court, on a confidential basis, within thirty (30) days of the end of the NHL Playoffs;
 - b. A Further Confidential Report – on the expert’s assessment of the effectiveness of the Order, as set out in paragraph (f) above, within sixty (60) days of the end of the NHL Playoffs; and
 - c. 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 Reports under paragraphs (a) and (b) above. This Report shall be posted on each Party’s website within thirty (30) days of its completion.

Costs of Implementation

31. 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.
32. With respect to the costs referenced in paragraph (a) above:
- a. the Third Party Respondents shall provide the Plaintiffs with an invoice setting out the claimed costs elements and the total cost claimed, within 30 days of the end of the NHL Playoffs;
 - 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

33. There shall be no costs on the motion.

“William F. Pentney”

Judge

SCHEDULE 1: NHL LIVE GAME WINDOWS

- The NHL Live Game Window of all national and regional NHL games broadcast in Canada by any of the Plaintiffs via television broadcast and/or online streaming during the regular 2021-2022 NHL season (starting on or around October 1st, 2021) as per the schedule found on the NHL website (<https://www.nhl.com/schedule>), as updated from time to time.
- The NHL Live Game Window of all national NHL games broadcast in Canada by any of the Plaintiffs via television broadcast and/or online streaming during the 2021-2022 Stanley Cup playoffs and final series as per the schedule found on the NHL website (<https://www.nhl.com/schedule>), as updated from time to time.

CONFIDENTIAL SCHEDULE 2: [REDACTED]

[REDACTED]

(a) [REDACTED] |
[REDACTED] |||||

(b) [REDACTED] |||||
[REDACTED] |||||
[REDACTED]

(c) [REDACTED] |||||
[REDACTED] |||||

(d) [REDACTED] |||||
[REDACTED] |||||

(e) [REDACTED] |||||
[REDACTED] |||||
[REDACTED]

(f) [REDACTED] ||||| [REDACTED]

(g) [REDACTED] ||||| [REDACTED]

1. [REDACTED] |||||

(a) [REDACTED]
[REDACTED] |||||

(b) [REDACTED]
[REDACTED] |||||
[REDACTED] |||||

(c) [REDACTED] |||||

(d) [Redacted] |||||

[Redacted]

(e) [Redacted] |||||

[Redacted] |||||

(f) [Redacted] ||

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