

Federal Court



Cour fédérale

Date: 20191115

Docket: T-1169-19

Citation: 2019 FC 1432

Ottawa, Ontario, November 15, 2019

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

ORDER AND REASONS

I. Overview

[1] The Plaintiffs bring this motion seeking an interlocutory mandatory injunction against the Third Party Respondent Internet Service Providers [ISPs]. The relief sought will compel the innocent Third Party Respondents to take steps to block their customers from accessing websites and Internet services operated by the anonymous Defendants.

[2] Bell Media Inc., Groupe TVA Inc., and Rogers Media Inc.—the Plaintiffs—are Canadian broadcasting companies. They broadcast a variety of television programming via television and through online broadcasting or streaming services. The Plaintiffs either own the Canadian rights to broadcast this programming or are exclusive licensees of these rights. The Plaintiffs claim the two Defendants—John Doe 1, doing business as goldtv.biz, and John Doe 2, doing business as goldtv.ca [the GoldTV Services]—are operating unauthorized subscription services that provide subscribers access to their programming content over the Internet, contrary to the *Copyright Act*, RSC, 1985, c C-42 [*Copyright Act*].

[3] The Third Party Respondents Bell Canada, Fido Solutions Inc., Rogers Communications Inc. and Videotron Ltd. consent to the motion. The Third Party Respondents Bragg Communications Inc. dba Eastlink, Saskatchewan Telecommunications, Shaw Communications Inc. and Telus Communications Inc. [Telus] take no position. The Third Party Respondents Distributel Communications Limited [Distributel] and Cogeco Connexion Inc. [Cogeco] take no

position on the merits of the motion but do take issue with terms of the draft order. Third Party Respondent Teksavvy Solutions Inc. [Teksavvy] opposes the motion on a number of grounds.

[4] For the reasons that follow I am satisfied that the Order, in an amended form, should issue.

II. Procedural History

[5] In an effort to combat the Defendants' alleged infringing activities the Plaintiffs filed a Statement of Claim with this Court on July 17, 2019. In it the Plaintiffs sought, among other things, interim, interlocutory, and permanent injunctions against the Defendants.

[6] On July 25, 2019, Justice Renée Leblanc issued a fourteen-day interim injunction ordering the Defendants to cease operating the GoldTV Services. On August 8, 2019, Justice Catherine Kane issued an interlocutory injunction to the same effect.

[7] In issuing the July 25 and August 8 Orders, Justices Leblanc and Kane took notice of the Defendants' "obvious efforts to remain anonymous and avoid legal action by rights holders such as the Plaintiffs". Justices Leblanc and Kane also noted that despite having engaged in diligent investigation the Plaintiffs had been unable to identify the Defendants. Substituted service was authorized and continues to be relied upon by the Plaintiffs as the identity of the Defendants remains unknown. The Defendants have not filed any response to the Statement of Claim.

[8] Despite the issuance of the interim and interlocutory injunctions against the Defendants some of the GoldTV Services remain in operation and the alleged infringement continues. The Plaintiffs now seek an order that will compel the Third Party Respondents to block access to the websites and Internet services operated by the Defendants. An order of this nature has not previously issued in Canada but has in other jurisdictions, including the United Kingdom, where it has been referred to as a “website-blocking order” (*Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658 [*Cartier CA*] at para 5 and *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28 [*Cartier SC*] at para 5). The parties to this motion refer to the order sought as a “site-blocking order”.

III. The Third Party Respondents

[9] As noted above, the Third Party Respondents are all ISPs. ISPs control the infrastructure through which it is possible to access the Internet.

[10] The Third Party Respondents serve the majority but not all Canadian Internet users. Of the eleven Third Party Respondents only Teksavvy and Distributel have filed records with the Court. Telus made brief submissions at the hearing.

[11] TekSavvy opposes the motion arguing that: (1) the motion relates strictly to the issue of site blocking; (2) the subject matter of the dispute falls within the specialized expertise and mandate of the Canadian Radio-television and Telecommunications Commission [CRTC] pursuant to the *Telecommunications Act*, SC 1993, c 38 [*Telecommunications Act*]; and (3) in this circumstance, and although the Court may have jurisdiction, in a narrow sense, the Court

should decline to exercise that jurisdiction. TekSavvy further submits that if the Court concludes otherwise, then in the alternative the Plaintiffs have failed to satisfy the test for an interlocutory injunction.

[12] Distributel does not take a position on the merits of the injunction motion, but argues the Plaintiffs' proposed order will have an overly intrusive impact on the Third Party Respondents. Distributel proposes a number of amendments to the proposed order to address its concerns.

[13] At the conclusion of the hearing the parties were directed to further consult on the content of the draft order. As a result the issues in dispute were narrowed. However disagreement remains with respect to aspects of the draft order. The parties' positions have been set out in correspondence to the Court from the Plaintiffs, Teksavvy, Distributel, Telus and Cogeco. The content of the order is addressed later in these reasons.

IV. What is site-blocking?

[14] The affidavit evidence filed on this motion explains how the Internet is structured and how users access content through the Internet.

[15] The Internet consists of a series of "nodes". Every device connected to the Internet represents a node. For example, when a website is accessed through a laptop computer, the server upon which the website is hosted, one node, connects with the laptop, another node.

[16] Every node has a numerical label known as an Internet Protocol [IP] address. IP addresses are numerical codes that can be unwieldy for users. Instead of using an IP address, users generally use a name, referred to as a “domain name”, to access a particular node. When a user seeks to connect to a node by using a domain name, the “Domain Name System”, a directory that generally forms part of the ISP infrastructure, is automatically accessed and the domain name is associated with the appropriate IP address.

[17] Within a domain name there may be subdomains and “Uniform Resource Locator” [URL] paths. URL paths will take a user to a very specific location within a domain. A domain name will typically be associated with a single IP address although multiple domain names may be hosted at a single IP Address.

[18] An ISP may block a user’s access to a website by relying on one or more of the three primary methods of site-blocking:

- A. DNS blocking, where an ISP can prevent a particular domain name from properly translating into its corresponding IP address;
- B. IP address blocking, where ISPs can reroute all traffic to a particular IP address away from that IP address to a non-existent destination; and
- C. URL path blocking, a more refined form of DNS blocking, where ISPs can prevent users from accessing a specific path within a domain or subdomain.

[19] The evidence indicates that most, if not all, of the Third Party Respondents can carry out DNS blocking and all of the Third Party Respondents are able to carry out IP address blocking. However, URL path blocking is beyond the capabilities of most ISPs. It appears that Bell Canada is the only Third Party Respondent with the ability to employ URL path blocking.

[20] The evidence also establishes that options are available to circumvent site-blocking measures. Users can configure their device to access a DNS server other than that used by the ISP thereby avoiding any DNS blocking an ISP may undertake. A user may also put in place a Virtual Private Network [VPN]. In doing so the user will only rely on the ISP to facilitate the connection to the VPN; all other Internet connections are initiated through the VPN thereby avoiding any blocking undertaken by the ISP. An operator of a blocked site may also take steps to circumvent site-blocking by registering a new domain name or creating a new server to host the blocked site at a different IP address.

V. Issues

[21] The motion raises the following issues:

- A. Does this Court have jurisdiction to issue a site-blocking order?
- B. Should the Court decline to exercise that jurisdiction?
- C. What is the test to be applied?
- D. Have the Plaintiffs met that test?
- E. On what terms should the order issue?

VI. AnalysisA. *Does this Court have jurisdiction to issue a site-blocking order?*

[22] Sections 4 and 44 of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] establish the Federal Court as a court of equity and grant it an injunction power subject only to the condition that the injunction be “just and convenient”:

Federal Court — Trial Division continued

4 The division of the Federal Court of Canada called the Federal Court — Trial Division is continued under the name “Federal Court” in English and “Cour fédérale” in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

[...]

Mandamus, injunction, specific performance or appointment of receiver

44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all

Maintien : Section de première instance

4 La section de la Cour fédérale du Canada, appelée la Section de première instance de la Cour fédérale, est maintenue et dénommée « Cour fédérale » en français et « Federal Court » en anglais. Elle est maintenue à titre de tribunal additionnel de droit, d'équité et d'amirauté du Canada, propre à améliorer l'application du droit canadien, et continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

[...]

Mandamus, injonction, exécution intégrale ou nomination d'un séquestre

44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction

cases in which it appears to the court to be just or convenient to do so.

[Emphasis added.]

ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[Non souligné dans l'original.]

[23] In *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824 [*Equustek*], the Supreme Court of Canada considered whether an interlocutory injunction that would require Google to globally de-index the websites of a company in breach of several court orders was available. In considering the question, the Supreme Court addressed the availability of injunctive relief against someone who is not a party to the underlying litigation. Justice Abella, writing for the majority, first noted that injunctions are equitable remedies and that the powers of a court with equitable jurisdiction are, subject to any relevant statutory limitation, unlimited, not restricted to any area of substantive law, and enforceable through a court's contempt power (*Equustek* at para 23).

[24] Justice Abella then reviewed the jurisprudence in support of her conclusion that injunctive relief was available against Google, a non-party to the underlying litigation. She noted that *Norwich* orders can compel non-parties to disclose information and *Mareva* injunctions may require non-parties to assist in the preservation of assets subject to litigation. Such obligations are imposed where parties are not themselves engaged in any wrongdoing but are in a position to facilitate the harm. She noted that this rationale was applied by the England and Wales Court of Appeal [EWCA] in *Cartier CA*, where a site-blocking order issued against five ISPs (*Equustek* at paras 31–33).

[25] In written submissions Teksavvy took the position that this Court lacks jurisdiction to issue a site-blocking order. In oral submissions TekSavvy conceded that, in a “narrow” sense, the Court does possess the jurisdiction to issue the order but that it should decline to do so.

[26] I am satisfied that this Court’s equitable jurisdiction does encompass the authority to issue an injunction in the nature sought by the Plaintiffs.

B. *Should the Court decline to exercise its jurisdiction?*

[27] Teksavvy submits that this motion must be considered in the broader context of the Canadian debate on site-blocking that is occurring before Parliament and the CRTC. When considered in this context, it argues the Court should decline to exercise any jurisdiction or discretion it may have to grant a site-blocking order.

[28] First, TekSavvy argues that the remedies available to a copyright holder set out in the *Copyright Act* are exhaustive and do not include site-blocking orders. TekSavvy further notes that in introducing reforms to the *Copyright Act* in 2012 Parliament considered but chose not to provide for a site-blocking regime. It submits that the Federal Court should not now provide a remedy to the Plaintiffs that Parliament declined to make expressly available in legislation. The argument is not persuasive.

[29] Parliament’s choice not to adopt a site-blocking regime does not equate to Parliament prohibiting this Court from exercising its equitable jurisdiction to issue a site-blocking order. Furthermore, subsection 34(1) of the *Copyright Act* recognizes that, subject to that Act, a

copyright owner is “entitled to all remedies by way of injunction [...] that are or may be conferred by law for the infringement of a right”. This includes the right to seek relief against a non-party in circumstances where that non-party facilitates, albeit innocently, the harm being complained of (*Equustek* at para 31).

[30] This broadly stated entitlement to injunctive relief is not consistent with Teksavvy’s view that Parliament’s failure to legislate a site-blocking regime equates to an implicit intent to limit the availability of a similar remedy before the courts.

[31] Teksavvy further submits that the sole issue before the Court on this motion is a proposed site-blocking order against the Third Party Respondents, an issue that is discrete from the underlying action relating to the alleged copyright infringement. Teksavvy submits that site-blocking is a matter that falls within the CRTC’s mandate as set out in the *Telecommunications Act* and the CRTC has, in its decisions and policy documents, held that site-blocking is only warranted in exceptional circumstances. Teksavvy points to sections 7 and 36 of the *Telecommunications Act* to argue that the granting of the order would (1) usurp the CRTC’s role in ruling on the appropriateness of site-blocking, and (2) supplant the CRTC’s role in deciding which, if any “exceptional circumstances” warrant site-blocking in furtherance of Canadian telecommunications policy objectives as set out at section 7 of the *Telecommunications Act*.

[32] In the course of oral submissions Teksavvy requested and was granted leave to provide supplementary written submissions on section 36 of the *Telecommunications Act*. The Plaintiffs, in turn, have filed supplementary written submissions in reply.

[33] Section 36 provides the CRTC with the authority to authorize an ISP to block a website:

Content of messages	Neutralité quant au contenu
<p>36 Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.</p>	<p>36 Il est interdit à l'entreprise canadienne, sauf avec l'approbation du Conseil, de régir le contenu ou d'influencer le sens ou l'objet des télécommunications qu'elle achemine pour le public.</p>

[34] In a 2018 decision the CRTC addressed the reach of section 36, in the context of considering an application from a group referred to as the FairPlay Coalition. The FairPlay Coalition requested that the CRTC create a regime that would allow the CRTC to require ISPs to block access to websites and services engaged in copyright piracy. The CRTC concluded it lacked the jurisdiction to implement the proposed regime and denied the FairPlay Coalition's application. In doing so, in the Telecom Decision 2018-384 [*FairPlay* decision] at para 67, it considered the scope of the power granted to it by section 36:

67. Section 36 of the *Telecommunications Act* limits the ability of carriers to control the content of messages carried over their networks without prior Commission authorization. While this section gives the Commission the explicit power to authorize an ISP to block a website, the proposed regime would go further and require such blocking pursuant to a Commission order. Because section 36 confers authorizing power and not a mandatory power, the power to mandate blocking must be found elsewhere and must relate to the subject matter that is clearly within the Commission's jurisdiction under the *Telecommunications Act*. [Emphasis added.]

[35] In the *FairPlay* decision the CRTC also concluded it possessed no jurisdiction over matters of copyright infringement. The CRTC held that Parliament had intended the *Copyright Act* to be an exhaustive regime and that clear language would be required to establish that rights

and remedies related to copyright were available under the *Telecommunications Act* (*FairPlay* decision at paras 60, 61 and 65).

[36] I have considered the jurisprudence cited by Teksavvy in its supplementary written submissions (*MTS Allstream v TELUS Communications Company*, 2009 ABCA 372 at paras 20, 23, 28–29, and 32; *Bazos v Bell Media Inc*, 2018 ONSC 6146 at paras 66–72; *Iris Technologies Inc, et al v Telus Communications Company*, 2019 ONSC 2502 at paras 30 and 33; *Shaw Cablesystems (SMB) Ltd. et al v. MTS Communications Inc. et al.*, 2006 MBCA 29 at paras 52 and 54–55; *Association canadienne des télécommunications sans fil c. Procureure générale du Québec*, 2018 QCCS 3159 at para 119). As the Plaintiffs note, the jurisprudence Teksavvy relies upon is limited to situations where the essential character of the dispute in issue falls within the scope of the CRTC's statutorily prescribed jurisdiction.

[37] Teksavvy seeks to characterize the issue on this motion as one of site blocking only. I am not convinced the injunction remedy sought can be so simply divorced from the essential character of the underlying copyright infringement action.

[38] Teksavvy has not argued that the CRTC erred in concluding it lacked jurisdiction in the area of copyright infringement. For the purposes of addressing the issues before me and absent argument to the contrary I accept the CRTC conclusion that Parliament intended the *Copyright Act* to be an exhaustive regime. Absent clear statutory language to the contrary, where the essential character of the dispute is one of copyright, remedies are to be found in the *Copyright Act*.

[39] Teksavvy's characterization of the relief sought as being discrete from the underlying copyright action is not persuasive and is at odds with the CRTC's conclusions set out above. There is an absence of CRTC jurisdiction over the underlying copyright issues and an absence of authority to grant the type of relief being sought on this motion. On these facts one cannot conclude that the granting of the injunctive relief sought would in any manner usurp, supplant or erode the CRTC's role under sections 7 or 36 of the *Telecommunications Act*.

[40] In the course of the oral submissions counsel for Teksavvy also raised the issue of whether the Third Party Respondents would be required to seek section 36 approval from the CRTC prior to implementing a site-blocking order. Teksavvy did not pursue this argument in its supplementary written submissions.

[41] Having concluded above that the Court may bind the Third Party Respondents in the exercise of its equitable jurisdiction, I agree with and adopt the Plaintiffs' submissions in this regard. Section 36 of the *Telecommunications Act* cannot be interpreted or applied in a manner that would allow the CRTC to interfere with an order of the Court aimed at impeding further infringement of rights under the *Copyright Act (Reference re Broadcasting Act SC 1991 (Canada), 2012 SCC 68 at paras 39 and 45)*.

[42] In summary, the Court has jurisdiction to grant the relief sought. I am not convinced that any of the provisions of the *Telecommunications Act*, nor the fact that there is ongoing debate about the role of site blocking in Canada's telecommunications regulatory regime, support the view that the Court should decline to exercise its discretion in this case.

C. *What is the test to be applied?*

[43] The Plaintiffs submit that to obtain a site-blocking order they must satisfy the standard test, as set out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110 [*Metropolitan Stores*] and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], under which an interlocutory injunction will issue if: (1) there is a serious issue to be tried; (2) irreparable harm will result if the injunction is not granted; and (3) the balance of convenience favours the plaintiff.

[44] Further, and because the order is aimed at innocent third parties, the Plaintiffs must demonstrate that the proposed order is properly targeted, that the Third Party Respondents should be justifiably bound by it, and that, considering the balance of convenience, the effects of the order must appropriately balance the interests of the Defendants, the Third Party Respondents, and the public.

[45] The Plaintiffs submit that the targeting requirement is satisfied in this context by establishing that GoldTV Services are involved in the infringement of copyright. Demonstrating the Third Party Respondents are ISPs will in turn justify the Third Parties being bound by the order. I agree, and also note that these elements of the test are not in dispute.

[46] In assessing proportionality and weighing the effects of the order on the Third Party Respondents and the public the Plaintiffs have relied on jurisprudence from the United Kingdom for guidance. The Plaintiffs submit that factors identified in *Cartier CA* and endorsed in *Cartier*

SC are relevant to the Court's consideration of the balance of convenience prong of the interlocutory injunction test.

[47] Teksavvy has taken issue with the Plaintiffs' reliance on the UK jurisprudence. It argues that unlike in Canada, the UK Parliament has codified the power to grant a site-blocking order in cases of copyright infringement (*Copyright, Designs and Patents Act 1988* and *Cartier SC* at para 4). However, Teksavvy has not disputed or taken issue with the test to be met or the factors that have been identified based on the UK jurisprudence.

[48] Teksavvy correctly notes that the *Cartier* decisions arise in a context where the availability of site-blocking orders has been codified and the interpretation and application of European Union directives also arises. Nonetheless, in *Cartier CA*, the EWCA held that it would have been prepared to find the authority to issue a site-blocking order in subsection 37(1) of the *Senior Courts Act, 1981* (UK), c 54 [*Senior Courts Act*] (*Cartier CA* at para 72):

37 Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interrogatory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

[49] Subsection 37(1) of the *Senior Courts Act* mirrors the powers granted to this Court at section 44 of the *Federal Courts Act* to "grant or award ... an injunction ... in all cases in which it appears to the court to be just or convenient to do so".

[50] Despite the different statutory context, I am satisfied that it is appropriate to seek guidance from the UK jurisprudence. The principles of equity and the application of those principles in the two jurisdictions have evolved from a common tradition. The factors considered in the UK context, albeit flowing from statute, will be of assistance in determining whether the relief sought in this case should issue.

[51] The fundamental question to be asked where an injunction is sought is whether the granting of the injunction is just and equitable in all of the circumstances (*Equustek* at para 25). The balance of convenience prong of the test best represents this balancing of equities and has been described as a determination of which of the parties will suffer the greater harm from the granting or refusal of the injunction (*Metropolitan Stores* at p. 129).

[52] In *Cartier CA* the EWCA endorsed a number of principles or factors as being relevant in determining if a site-blocking order is proportional. The factors are:

- A. Necessity – a consideration of the extent to which the relief is necessary to protect the plaintiff’s rights. The relief need not be indispensable but the court may consider whether alternative and less onerous measures are available;
- B. Effectiveness – a consideration of whether the relief sought will make infringing activities more difficult to achieve and discourage Internet users from accessing the infringing service;
- C. Dissuasiveness – a consideration of whether others not currently accessing the infringing service will be dissuaded from doing so;

- D. Complexity and Cost – a consideration of the complexity and cost of implementing the relief sought;
- E. Barriers to legitimate use or trade – a consideration of whether the relief will create barriers to legitimate use by unduly affecting the ability of users of ISP services to access information lawfully;
- F. Fairness – a consideration of whether the relief strikes a fair balance between fundamental rights of the parties, the third parties and the general public;
- G. Substitution – a consideration of the extent to which blocked websites may be replaced or substituted and whether a blocked website may be substituted for another infringing website; and
- H. Safeguards – a consideration of whether the relief sought includes measures that safeguard against abuse.

[53] The necessity factor is, in my view, closely linked to the irreparable harm branch of the test. I will consider arguments relating to the availability of alternative and less onerous measures under this branch of the test and not as part of the balance of convenience analysis.

[54] The remaining factors will be of assistance in assessing balance of convenience and determining what is just and equitable in considering the legitimate but conflicting interests as between the Plaintiffs, the Third Party Respondents, and the broader public. I do not view the listed factors as exhaustive, nor do I view any one factor as being determinative of the balance of

convenience prong of the test. Each of the factors will be considered but they will be addressed holistically in my assessment of the balance of convenience.

D. *Have the Plaintiffs met that test?*

[55] Where copyright infringement has been alleged and a strong *prima facie* case of substantial or complete copying is demonstrated the jurisprudence recognizes that the allegations warrant special consideration. However, such consideration does not relieve the plaintiffs of the burden of establishing irreparable harm (*Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)* 2016 FC 612 at para 28 [*iTVBox.net*], upheld on appeal by *Wesley (Mtfreetv.com) v. Bell Canada*, 2017 FCA 55, citing *Somerville House Books Ltd v Tormont Publications Inc* (1993), 50 CPR (3d) 390 (FCTD) at para 10).

[56] As recognized by Justice Danièle Tremblay-Lamer in *iTVBox.net* the three prongs of the injunction test are not to be treated as individual silos. A strong finding in respect of one of the prongs of the test may lower the threshold on the other two:

[30] That being said, I agree with the statement by Justice Annis in *Geophysical Service Inc* that a strong finding on one prong of the tripartite injunction test – as is the case here – may lower the threshold on the other two prongs:

[35] Moreover, the three prongs of the interlocutory injunction test are to some degree to be treated together and not as separate silos: Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora: Canada Law Book, 2010 at para 2.600) as quoted in *Morguard Corporation v InnVest Properties Ottawa GP Ltd*, 2012 ONSC 80 at para 12:

The terms ‘irreparable harm’, ‘status quo’ and ‘balance of convenience’ do not have a

precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weaknesses on another.

[36] There exist situations where the applicant's case is sufficiently strong that the threshold for meeting the other two factors can be set so low as to be irrelevant. I believe that this may have been the approach underlying the statement in *Diamant Toys*, above, that it was not necessary to establish irreparable harm where copying is blatant.

(1) Serious Issue

[57] There is no dispute on this branch of the test. The evidence discloses a strong *prima facie* case of copyright infringement by the Defendants, infringing activity that continues despite Justice Kane's August 8, 2019 Order directing that the Defendants cease operating the GoldTV Services. The evidence further establishes that the Third Party Respondents own and/or operate the infrastructure that allows their subscribers to access the Internet and in turn access GoldTV Services. It is not disputed that GoldTV Services use and rely upon the Third Party Respondents to engage in the alleged infringing activity.

[58] This strong finding in respect of the serious issue prong of the test is, as has been set out above, relevant when assessing the threshold the Plaintiffs must meet in respect of the other two prongs of the test.

(2) Irreparable Harm

[59] TekSavvy argues that the Plaintiffs have not demonstrated that they will suffer irreparable harm if the order does not issue.

[60] Teksavvy first points to the evidence of Mr. Paul Stewart, Vice President of Technology at TekSavvy, indicating that a number of the targeted websites have been taken down since the issuance of the interim and interlocutory injunctions. Teksavvy argues that this suggests the interim and interlocutory injunctions are having the intended effect and that if the Defendants move their infringing activity to new websites then the Plaintiffs have the option of returning to the Court to vary the interlocutory injunction against the Defendants.

[61] Teksavvy further argues that there are alternative methods to target the remaining offending sites, alternatives that the Plaintiffs have failed to pursue.

[62] Finally Teksavvy submits that the Plaintiffs' financial success indicates that any financial harm they are suffering as a result of the infringing activity is "minimal at best". Financial harm can be compensated by way of a damages award.

[63] The evidence does demonstrate that the ability to access the GoldTV Services has been restricted since the issuance of the interlocutory injunction. However, the evidence also establishes that infringing activity is ongoing. While returning to the Court to vary the

interlocutory injunction may be an option, it is not clear what effect if any this would have. The fact remains that infringing activity continues despite the current interlocutory injunction.

[64] Teksavvy further argues that there are a series of less intrusive means available to the Plaintiffs and that the absence of evidence indicating any of these less intrusive methods have been pursued should result in a denial of the relief now sought. The alternative means identified include pursuit of the possibility of compelling third parties to block payments to the operators of the infringing sites and the removal of GoldTV related applications from Internet application stores.

[65] Teksavvy's submissions in this regard are not particularly compelling. There is no evidence to support the view that any of the proposed measures would be effective. Both the measures and their possible impact on the infringing activity could be at best characterized as speculative. On the other hand, there is evidence in the September 3, 2019 Affidavit of Yves Rémillard, an investigator employed by one of the Plaintiffs, to the effect that the proposed measures would not be effective, and a variety of reasons are provided in support of this assessment.

[66] Considering the claims related to financial loss, I agree that such losses are normally compensable in damages. However, the harm in this case arises in a context where there is a strong *prima facie* case of an ongoing infringement of the Plaintiffs' copyright where the defendants are unknown. In addition, the evidence indicates there is no agreed upon methodology for assessing the impact of unauthorized subscription services on consumer

behavior and the resulting financial consequences to the Plaintiffs. It is not evident that losses are readily quantifiable or compensable on these facts.

[67] Similarly Teksavvy's submissions to the effect that the financial impact of the infringing activity is minimal relative to the Plaintiffs' overall financial success does not render the harm irrelevant or of no consequence. In the *FairPlay* decision, the CRTC "acknowledges that the record [before it] demonstrates that there is evidence that copyright piracy results in harm to the Canadian broadcasting system" (para 72). This indicates that in addition to the ongoing rights infringement, the actions of the Defendants are harmful to the Plaintiffs as participants in that system.

[68] As were my colleagues Justices Leblanc and Kane, I am satisfied that the Plaintiffs have established that irreparable harm will result if the injunction is not granted.

(3) Balance of Convenience

[69] Teksavvy takes the position that the balance of convenience favours refusal of the injunction. It argues that site-blocking is an extreme measure that risks inadvertently stifling free expression by blocking legitimate content. As a result, it submits that the impact of a site-blocking order on the Third Party Respondents and Canadian consumers outweighs any harm the Plaintiffs might incur as a result of the infringing activity.

[70] As noted above, consideration of the balance of convenience engages numerous factors that will vary from case to case. The *Cartier* factors, excepting the necessity factor which I have

addressed as part of the irreparable harm analysis, provides a framework in which to consider and address the interests of the Plaintiffs, the Third Party Respondents and the broader public.

(4) The *Cartier* Factors

(a) *Effectiveness*

[71] Effectiveness requires a consideration of whether the order sought will render the infringing activity more difficult and discourage access to the infringing services. Effectiveness has been challenged on two primary grounds. First that site-blocking can be circumvented and second on the basis that not all ISPs in Canada have been named as Third Party Respondents.

[72] The evidence relating to the effectiveness of site-blocking is mixed. The Plaintiffs' affiant, Mr. Erone Quek, states that site blocking is an effective means of thwarting access to websites engaged in infringing activities noting the experiences in jurisdictions where site-blocking orders have been available. However he acknowledges that options are available that allow users and website operators to circumvent blocking. He describes these measures as difficult to implement and states that they tend to be ineffective.

[73] On the other hand, Mr. Paul Stewart, Teksavvy's affiant, states that site-blocking can be circumvented fairly easily by both users and website operators. On cross-examination Mr. Stewart acknowledged that he had little practical experience with the circumvention techniques addressed in his affidavit.

[74] The evidence establishes that site-blocking can be circumvented but the complexity of certain techniques, the potential impact on the quality of Internet services and the cost effectiveness of circumvention are all potential barriers to subscribers pursuing circumvention options. Similarly, while the evidence establishes that operators of infringing websites have access to circumvention options, it also establishes that such techniques are often impractical to implement.

[75] It is clear from the evidence that site-blocking will not eliminate user access to infringing services. However, the evidence does establish that in those jurisdictions where site-blocking measures have been implemented there has been a significant reduction in visits to infringing websites. I am satisfied that a site-blocking order is an effective means of limiting access to GoldTV Services.

[76] Teksavvy also argues that the effectiveness of any order will be limited because the Plaintiffs have not named numerous smaller Canadian ISPs or Canadian post-secondary institutions as Third Party Respondents. Many post-secondary institutions do not rely on ISPs to deliver Internet access to their post-secondary students.

[77] In support of this position Teksavvy has placed evidence before the Court demonstrating that there are approximately 2 million students enrolled in post-secondary education in Canada and that 51% of online consumers between 18 and 34 years of age access infringing content on the Internet.

[78] While Teksavvy's arguments in this respect are persuasive, they must be considered in the context of the subscriber evidence placed before the Court by the Plaintiffs.

[79] The Plaintiffs rely on the CRTC's 2018 Communications Monitoring Report to establish that residential Internet service subscriptions reached 12.8 million in 2017. Relying on publicly reported data for 2018 the Plaintiffs also estimate that the major common carrier ISPs in Canada, all of whom are Third Party Respondents on this motion, accounted for in excess of 12.8 million subscribers in 2018.

[80] Although not all Canadian ISPs have been named, it is clear that the subscribership of the Third Party Respondents represents a significant portion of Canadian subscribers. While post-secondary students may have access to the Internet through their post-secondary institutions the evidence falls well short of demonstrating that this segment of the population relies solely on the services provided to them by post-secondary institutions to access the Internet or that the infringing services in issue are even accessible through any or all of these means.

[81] The evidence does demonstrate that site-blocking orders have proven effective in other jurisdictions and that the Third Party Respondents' subscribership represents a significant percentage of ISP subscribers in Canada. Therefore, I am satisfied that the order sought is likely to reduce overall access to the infringing services and is an effective means of protecting the Plaintiffs' rights and limiting harm.

(b) *Dissuasiveness*

[82] The Plaintiffs submit that a site-blocking order will dissuade third parties not currently using GoldTV Services and other potential operators of infringing services for the same reasons that it will be effective in relation to current users and operators. The Plaintiffs further submit that the circumvention costs will bring a user's total cost of accessing content through the infringing GoldTV Services closer to the cost of legitimately accessing that content, again having a dissuasive effect.

[83] Teksavvy acknowledges that the adoption of circumvention methods, such as the use of a VPN, results in financial and performance costs to a user. However, Teksavvy submits that many users already employ VPN technology for other purposes. There is therefore no incremental cost consequence to these users and in any event, additional financial and performance costs of employing VPN technology are minimal.

[84] There is some merit in the position advanced by Teksavvy. However, I am not convinced that additional costs and complexity can simply be overlooked or discounted on the basis that not all potential future users of the infringing services will be dissuaded by these considerations. In jurisdictions where site-blocking measures have been authorized the Courts have recognized that even minimal increases in costs may have a dissuasive or deterrent effect (*Twentieth Century Fox Film Corp. v British Telecommunications PLC* [2011] EWHC 1981(Ch) at para 196).

(c) *Complexity and Cost*

[85] TekSavvy has submitted that “to implement and maintain a system of site-blocking could run into the hundreds of thousands of dollars and could involve significant strain on TekSavvy’s human resources”. TekSavvy also suggests the granting of a site-blocking order in this case would create a precedent that could ultimately see ISPs faced with hundreds or even thousands of site-blocking orders. Having considered the terms of the draft order and the limited evidence in support of the estimates of the potential costs of compliance, this argument is not persuasive.

[86] The draft order requires that the Third Party Respondents engage in DNS blocking, and IP address blocking with respect to domains and IP addresses identified in the order. The draft order does not compel the Third Party Respondents to engage in URL blocking. TekSavvy acknowledges that it has the hardware and software to technically perform DNS blocking and IP address blocking. There is no suggestion that Teksavvy or any other Third Party Respondent will be required to acquire hardware or software in order to comply with the draft order.

[87] Teksavvy submits that despite having the technical capability to comply with the order it lacks a system or business process to do so. It also notes that re-routing users attempting to access a blocked site to an information page “would almost never be possible on systems using modern secure DNS servers”.

[88] I accept Teksavvy's evidence to the effect that it currently lacks a system or business process to implement and monitor site blocking; however, that evidence does not establish that the cost and complexity of doing so tips this factor in favour of not issuing the order sought.

[89] Similarly, and although the draft order imposes an obligation on the Third Party Respondents to take reasonable steps to make certain information available to users who attempt to access the blocked domains and IP addresses, those reasonable steps are not limited to re-routing or re-directing users to a notice page. Other notification options may be implemented.

[90] The draft order also provides for the indemnification of the Third Party Respondents' costs. The indemnification provisions have been the subject of disagreement and are addressed later in these reasons. However, for the purposes of this part of the analysis, it is sufficient to note that the draft order imposes indemnification obligations on the Plaintiffs, recognizing that the costs of implementation should not be borne by the Third Party Respondents.

[91] In summary, the draft order makes provision for the technical limitations of the Third Party Respondents, recognizes that the cost of implementation should not be borne by the Third Party Respondents, and includes a process for indemnification of the Third Party Respondents by the Plaintiffs.

[92] I am not convinced that cost or complexity, within the context of the provisions of the proposed order weigh against the issuance of the order being sought.

(d) *Barriers to legitimate trade*

[93] In addressing this factor I must consider whether the proposed order will unduly prevent the Third Party Respondents' customers from accessing lawful content. In my opinion it will not for the following reasons:

- A. The order is limited to those domains, subdomains and IP addresses identified in the draft order. It has not been disputed that the sole or predominant purpose of the identified domains, subdomains and IP addresses is to enable or facilitate access to the GoldTV Services;
- B. Although the order makes provision for the addition of domains, subdomains or IP addresses this can only occur after notice to the Court and the filing of evidence to establish the sole or predominant purpose of the newly identified domains or addresses;
- C. The order also makes provision for removal of a domain or IP address where the "sole or predominant purpose" criteria are no longer satisfied; and
- D. The order provides for the temporary lifting of the site blocking by the Third Party Respondents to allow them to respond to technical or security concerns or to avoid over-blocking.

[94] While these measures will not eliminate all risk of over-blocking they will minimize that risk. The potential for over-blocking is anticipated and ISPs are empowered if this occurs.

(e) *Fairness*

[95] Teksavvy argues that the draft order is contrary to the principle of net neutrality, the concept that all traffic on the Internet should be given equal treatment by ISPs. It further argues that the draft order will unfairly reduce the competitiveness of smaller ISPs like Teksavvy, and negatively impact ISP users including their individual freedom of expression rights.

[96] The Plaintiffs argue that the principle of net neutrality does not apply in this context. They submit that the net neutrality principle flows from section 36 of the *Telecommunications Act* which is in turn a codification of the “common carrier doctrine”. The Plaintiffs rely on the common carrier jurisprudence to submit that the doctrine cannot oblige a carrier to receive or facilitate access to goods or services that are illegal (*Graham & Strang v Dominion Express Company*, 1920 Carswell ON 56 at para 37).

[97] I am not prepared to conclude, as the Plaintiffs have suggested, that the principle of net neutrality is of no application where a site-blocking order is sought. However, I am satisfied, in the face of a strong *prima facie* case of ongoing infringement and a draft order that seeks to limit blocking to unlawful sites and incorporates processes to address inadvertent over-blocking that neither net neutrality nor freedom of expression concerns tip the balance against granting the relief sought. As has been previously noted by the Supreme Court of Canada, albeit in a different context, the jurisprudence has not, to date, accepted that freedom of expression requires the facilitation of unlawful conduct (*Equustek* at para 48). Similarly I am not convinced that the

principle of net neutrality, or the common carrier doctrine, is to be applied in a manner that requires ISPs to facilitate unlawful conduct.

[98] There are statements in the evidentiary record to the effect that the cost of implementation and the exclusion of some third party ISPs from the scope of the order will potentially negatively impact the competitive position of smaller ISPs including Teksavvy.

[99] There is little, if any, evidence to support Teksavvy's assertions of a negative competitive impact. Teksavvy points to a provision in the order that, as initially drafted, would have allowed the Plaintiffs to unilaterally supplement the order. Changes to the draft order discussed below address this concern. Teksavvy's submissions relating to the financial impact of implementation and maintenance have been addressed at paras 85 to 92 above.

[100] I am satisfied that fairness considerations weigh in favour of granting the order.

(f) *Substitution*

[101] This factor requires consideration of whether the blocked websites may be replaced or substituted by another infringing website.

[102] Substitution is a possibility. However, as discussed in the irreparable harm section of these reasons, operators of infringing sites face cost and efficiency barriers to substitution. While the operators of other infringing services may benefit from the blocking of GoldTV Services, the evidence does not establish this. In any event the mere possibility of substitution is not a

sufficient ground upon which to conclude that this factor weighs against granting of the relief sought.

(g) *Safeguards*

[103] As described, the order contains a series of measures to safeguard the varying interests engaged from abuse or misuse of the order.

[104] Having considered the *Cartier* factors and recognizing the legitimate competing interests that arise in the context of the relief being sought I am satisfied that the balance of convenience favours the Plaintiffs.

VII. On what terms should the order issue?

[105] Distributel has noted that the Third Party Respondents are not accused of wrongdoing and as a result any order issuing on the motion must be minimally intrusive. In written submissions Distributel has taken the position that the Plaintiff's draft order fails to meet this standard on a number of grounds. Further discussions between the Plaintiffs and the Third Party Respondents after oral submissions regarding the content of the draft order have narrowed but not eliminated areas of disagreement.

A. *Paragraph 2: The Updating Provision*

[106] Paragraph 2 of the order sets out the process by which the Plaintiffs may update or supplement the order to capture any additional domain or IP addresses that have as their sole or predominant purpose the enabling or facilitating of access to GoldTV Services.

[107] Distributel and other Third Party Respondents submit that the word “active” should be removed from subparagraph 2(a)(ii) and that text should be added requiring judicial authorization as opposed to judicial notification of any additions to the order.

[108] I am not convinced that an associated but inactive domain provides a sufficient basis upon which to shield an IP address that should otherwise be subject to the operation of the order. The order makes provision for the Third Party Respondents to suspend compliance for the purpose of investigating over-blocking (para 9). While not determinative, I also note that “active” is used in other parts of the draft order in a similar context (paragraph 4(b) and paragraph 3 of Schedule 2) and no objection has been taken.

[109] With respect to the requirement for judicial authorization as opposed to judicial notification of any additions to the order, I am satisfied in light of the interests site-blocking engages that more than judicial notification is required. The amendments to paragraphs 2(a) and (c) will be included.

[110] Paragraph 2 as amended states:

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 Target Websites:
 - a) the Plaintiffs may serve and file an affidavit and proposed amended Schedule 1:
 - (i) identifying the additional domain(s), subdomain(s) or IP address(es);
 - (ii) stating such additional domain, subdomain or IP address has as its sole or predominant purpose to enable or facilitate access to the Target Websites and that any additional IP address is not associated with any other active domain; and
 - (iii) 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 Order;
 - c) if no Third Party Respondent brings a motion to object within ten (10) business days in accordance with paragraph 2(b), the Court may grant the Order without further proceedings.

B. *Paragraph 6: The Customer Notice Provision*

[111] Paragraph 6 requires the Third Party Respondents to make certain information available to customers who attempt to access blocked sites. The following language has been proposed:

6. To the extent practicable, where access to a Target Website 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 Target Website 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
- c) a statement to the effect that the operators of the Target Websites (i.e. the John Doe Defendants), 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 below.

[112] TekSavvy indicates that it is unable to comply with this provision by way of a redirecting page and seeks to have the order confirm that the “reasonable steps” allows for some other method of communicating the information listed in subparagraphs (a) through (c). TekSavvy has not suggested any alternative language. I am not convinced any change to the proposed language is required. Paragraph 6 does not limit the means of notification to a redirecting page.

C. *Paragraph 11: The Indemnification Provision*

[113] Paragraph 11 addresses indemnification. Distributel identified a number of concerns with this paragraph in its written and oral submissions and changes have been made in the course of the post-hearing discussions. It appears all of the Third Party Respondents with the exception of TekSavvy are now satisfied with the indemnification provisions.

[114] TekSavvy objects to the provisions on the basis that they are “too narrow,” but has not provided any further explanation as to the nature of its concerns or suggested text to address the concern. I am satisfied that the indemnification provisions as updated reflect the underlying thrust of Distributel’s position that any order should be minimally intrusive in respect of the impact on the Third Party Respondents.

D. *Paragraph 13: The Sunset Provision*

[115] Paragraph 13 provides that the order shall terminate after two years. TekSavvy believes that the order should terminate after one year. I am satisfied that the two year period is appropriate.

VIII. Conclusion

[116] The motion is granted and the order, as amended, will issue.

[117] The Plaintiffs had initially sought costs against those Third Party Respondents contesting the motion. In the course of oral submissions the request for costs was abandoned. No costs are awarded.

ORDER IN T-1169-19

THIS COURT ORDERS that:

1. Within fifteen (15) days 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 websites or online services identified at Schedule 1 to this Order (the “Target Websites”), by blocking or attempting to block access to all of the Target Websites’ domains, subdomains and IP addresses identified therein. For clarity, the GoldTV.ca Service is a Target Website for the purpose of this Order. Schedule 1 to this Order is empty for the GoldTV.ca Service as of the date of issuance of this Order, and may be supplemented by the Plaintiffs if and when appropriate in accordance with paragraph 2 of 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 Target Websites:
 - a) the Plaintiffs may serve and file an affidavit and proposed amended Schedule 1:
 - (i) identifying the additional domain(s), subdomain(s) or IP address(es);
 - (ii) stating such additional domain, subdomain or IP address has as its sole or predominant purpose to enable or facilitate access to the Target Websites and that any additional IP address is not associated with any other active domain; and

- (iii) 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 Order;
 - c) if no Third Party Respondent brings a motion to object within ten (10) business days in accordance with paragraph 2(b), the Court may grant the Order without further proceedings.
- 3. The Third Party Respondents have no obligation to verify whether the Plaintiffs' updates to Schedule 1 to this Order are correct, and are wholly reliant on the Plaintiffs accurately identifying the domains, subdomains or IP addresses associated with the Target Websites.
- 4. If and once they 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 for sole or predominant purpose to enable or facilitate access to the Target Websites, 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 Target Websites, 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 addresses to be determined and agreed upon by them. Service and filing of documents pursuant to paragraph 2 may be made no more frequently than every ten (10) business days.
6. To the extent practicable, where access to a Target Website 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 Target Website 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
 - c) a statement to the effect that the operators of the Target Websites (i.e. the John Doe Defendants), 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 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 Respondents notify the Plaintiffs of the change.

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 fifteen (15) business days of service of this Order, or of the expiry of the ten (10) business day period referred to in paragraphs 2 b) and c) 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, in whole or in part, when such suspension is necessary to: correct or investigate potential over-blocking that is caused or suspected to be caused by the steps taken pursuant to paragraphs 1 and 2; maintain the integrity or quality of its Internet services or the functioning of its blocking system(s); upgrade, troubleshoot or maintain its Internet services or blocking system(s); 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 ahead of (or, if necessary, as soon as reasonably practical 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 operators of the Target Websites (i.e. the John Doe Defendants), 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 effects 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; 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.

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), 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 Plaintiffs or any other party.
15. There shall be no costs on the motion.

"Patrick Gleeson"

Judge

Schedule 2 – Technical Means

1. For domains identified in Schedule 1 (as updated): DNS blocking, or alternatively DNS re-routing to comply with paragraph 6 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 URL path blocking.
3. For the IP addresses identified in Schedule 1 (as updated): IP address blocking or IP address re-routing. For certainty, IP address blocking, or IP address re-routing, 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 Target Websites.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1169-19

STYLE OF CAUSE: BELL MEDIA INC. GROUPE TVA INC. ROGERS MEDIA INC. v JOHN DOE 1 DBA GOLDTV.BIZ JOHN DOE 2 DBA GOLDTV.CA 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.

PLACE OF HEARING: OTTAWA, ONTARIO

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DATED: NOVEMBER 15, 2019

APPEARANCES:

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