

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210914

Docket: A-440-19

Citation: 2021 FCA 181

**CORAM: NADON J.A.
LOCKE J.A.
LEBLANC J.A.**

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

and

BELL MEDIA INC., GROUPE TVA INC., ROGERS MEDIA INC., JOHN DOE 1 dba GOLDTV.BIZ, JOHN DOE 2 dba GOLDTV.CA, BELL CANADA, BRAGG COMMUNICATIONS INC. dba EASTLINK, COGECO CONNEXION INC., DISTRIBUTEL COMMUNICATIONS LIMITED, FIDO SOLUTIONS INC., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS HOLDING CORPORATION, SHAW COMMUNICATIONS INC., TELUS COMMUNICATIONS INC. and VIDEOTRON LTD.

Respondents

and

CANADIAN INTERNET REGISTRATION AUTHORITY, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS-FIAPF, CANADIAN MUSIC PUBLISHERS ASSOCIATION, INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS, MUSIC CANADA, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY,

**INTERNATIONAL PUBLISHERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF SCIENTIFIC,
TECHNICAL AND MEDICAL PUBLISHERS, AMERICAN
ASSOCIATION OF PUBLISHERS, THE PUBLISHERS
ASSOCIATION LIMITED, CANADIAN PUBLISHERS'
COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, THE
FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED,
DAZN LIMITED and THE BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION**

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 14, 2021.

REASONS FOR ORDER BY:

LOCKE J.A.

CONCURRED IN BY:

NADON J.A.
LEBLANC J.A.

Federal Court of Appeal



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INC. dba EASTLINK, COGECO CONNEXION INC.,
DISTRIBUTEL COMMUNICATIONS LIMITED, FIDO
SOLUTIONS INC., ROGERS COMMUNICATIONS CANADA
INC., SASKATCHEWAN TELECOMMUNICATIONS HOLDING
CORPORATION, SHAW COMMUNICATIONS INC., TELUS
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SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY &
PUBLIC INTEREST CLINIC, FÉDÉRATION
INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS
DE FILMS-FIAPF, CANADIAN MUSIC PUBLISHERS
ASSOCIATION, INTERNATIONAL CONFEDERATION OF
MUSIC PUBLISHERS, MUSIC CANADA, INTERNATIONAL
FEDERATION OF THE PHONOGRAPHIC INDUSTRY,
INTERNATIONAL PUBLISHERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF SCIENTIFIC,**

**TECHNICAL AND MEDICAL PUBLISHERS, AMERICAN
ASSOCIATION OF PUBLISHERS, THE PUBLISHERS
ASSOCIATION LIMITED, CANADIAN PUBLISHERS'
COUNCIL, ASSOCIATION OF CANADIAN PUBLISHERS, THE
FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED,
DAZN LIMITED and THE BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION**

Interveners

REASONS FOR ORDER

LOCKE J.A.

I. Background

[1] On May 26, 2021, this Court dismissed an appeal by Teksavvy Solutions Inc. (Teksavvy) against the issuance by the Federal Court of an interlocutory injunction in a copyright infringement action requiring a number of Canadian Internet service providers, including Teksavvy, to block access to certain websites by their customers. The websites in question could otherwise be used by those customers to access the services of GoldTV, which is a subscription service that offers allegedly copyright-infringing programming content. Such an injunction is known as a site-blocking order.

[2] The appeal was dismissed “with costs”. Now, the plaintiffs in the copyright infringement action, Bell Media Inc., Groupe TVA Inc. and Rogers Media Inc., who sought the site-blocking order and were the main respondents in the appeal (the plaintiffs), move for a lump sum award of costs in the amount of \$50,000. The plaintiffs also request that the confidential version of their

motion record be accepted for filing and treated as confidential by the Court as contemplated in Rule 151 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), notwithstanding the public interest in open and accessible court proceedings. Teksavvy does not oppose the request for confidential treatment of the plaintiffs' motion record, but it does oppose the elevated amount of costs sought by the plaintiffs.

II. Confidential Treatment of Motion Record

[3] I will begin with the request for confidential treatment of the plaintiffs' motion record. The information of concern comprises details of the plaintiffs' actual fees in this appeal and the cost-sharing arrangement between them. The plaintiffs assert that this information is confidential, and that they have a legitimate interest in maintaining that confidentiality. I accept these assertions. In view of the limited scope of the asserted confidential information, and the plaintiffs' filing of a public version of their motion record in which only the confidential information has been redacted, I accept that the confidential version of the plaintiffs' motion record should be accepted for filing and should be treated as confidential by the Court as contemplated in Rule 151.

III. Request for Elevated Lump Sum Costs Award

[4] I turn now to the costs issue. The plaintiffs argue that their request for an elevated lump sum award is justified by the following factors:

- There has been a recent trend to grant elevated costs on a lump sum basis, especially in intellectual property cases where there is a disjunction between what is covered by the default tariffs and the complexity of the proceedings;
- The parties are sophisticated commercial litigants;
- The plaintiffs were entirely successful in this appeal;
- The appeal was of critical importance to the plaintiffs in order to address blatant copyright infringement by the anonymous providers of the services of GoldTV, which infringement (i) could not be successfully addressed by a conventional interlocutory injunction against the infringers themselves, and (ii) the plaintiffs describe as being on a massive scale and having a virtually unquantifiable impact;
- The novelty of site-blocking orders in Canada;
- The large number of authorities cited by the parties and the presence of 16 interveners in the appeal illustrate the importance and complexity of the issues in this appeal;
- The plaintiffs' fees incurred in the appeal, excluding taxes and fees related to the interventions, amount to almost \$285,000;
- Teksavvy's argument that the Federal Court lacks jurisdiction to grant a site-blocking order in a copyright infringement action was conceded before the Federal Court, and should not have been argued before this Court; doing so unnecessarily increased the duration and complexity of the appeal;
- Costs fixed in accordance with Tariff B of the Rules at the default middle of Column III would be inadequate, yielding only \$6,470.66, or 2.27% of the plaintiffs' actual fees (the requested lump sum would amount to 17.6%); and
- Teksavvy rejected the plaintiffs' offer to settle the amount of costs.

[5] Teksavvy opposes the plaintiffs' motion, and argues that costs should be awarded in the amount of \$6,470.66 in fees plus \$31.11 in disbursements, as indicated in the bill of costs based on the middle of Column III of Tariff B that accompanied the plaintiffs' motion record. In support of its position, Teksavvy argues the following:

- The plaintiffs never sought elevated costs until after judgment on this appeal; the issue was not raised either in their memorandum of fact and law or at the hearing of the appeal;
- Costs awards are generally determined according to Tariff B;

- No special circumstances justify a departure from Tariff B; the objectives of costs (providing compensation, promoting settlement and deterring abusive behaviour) are met in this case by a costs award according to Tariff B;
- This appeal concerned an interlocutory injunction and not a complex intellectual property infringement proceeding for which elevated lump sum costs might be warranted; Teksavvy is an innocent third party in the underlying copyright infringement action, and is not accused of any wrongdoing;
- There was a public interest in having the novel issue of a site-blocking order heard on appeal;
- The plaintiffs never previously argued (in their memorandum of fact and law or orally), and this Court never found, that Teksavvy made any argument on appeal that it had conceded before the Federal Court; and
- The plaintiffs' reference to discussions regarding efforts to settle the amount of costs is irrelevant and improper; an offer to settle costs is not relevant when made after disposition of the appeal, and settlement discussions (especially those marked "without prejudice", as in this case) are privileged and should not be considered by the Court.

[6] In my view, the fact that the plaintiffs did not request elevated costs either in their memorandum of fact and law or at the hearing of the appeal does not deprive them of the right to make such a request now. *Collins v. Canada*, 2010 FCA 12, which Teksavvy cited, is distinguishable because it involved a request by a successful appellant at the Federal Court of Appeal for elevated costs in respect of the proceeding before the Tax Court from which the appeal was taken. The appellant in that case had cited the respondent's improper attempt to raise a new issue for the first time in argument at trial. Though the appeal was allowed in that case, this Court ruled that the request for elevated costs should have been raised in the appellant's memorandum of fact and law or at the hearing to avoid taking the respondent by surprise. In the present appeal, the issue is costs before this Court, not the Federal Court from which the appeal was taken.

[7] Despite my view that the present request for elevated costs is not improperly made, I am of the view that an elevated costs award (one not limited by Tariff B) is not justified in this case. I accept that the parties are sophisticated commercial litigants, but I find that the novelty of the site-blocking order that was in issue in the appeal, as well as the fact that its target, Teksavvy, is an innocent third party to the underlying copyright infringement action, are good reasons not to stray from Tariff B. Also, I agree with Teksavvy that the circumstances surrounding its argument that the Federal Court lacks jurisdiction to grant a site-blocking order are not such as to justify elevated costs.

[8] That said, I would make some changes to the bill of costs that the plaintiffs provided with their written representations. I would:

- Apply Tariff B at the top of Column IV (rather than the middle of Column III) to better reflect the importance and complexity of the issues in the appeal;
- Allow costs for second counsel as contemplated in item 22(b) of Tariff B, for the same reason; and
- Disallow costs for item 26 (assessment of costs), because it appears that this motion on costs was made necessary because of the plaintiffs' excessive demand.

[9] An amended bill of costs, with the foregoing changes, is appended to these reasons.

Based on this, I would set the amount of costs at \$12,885.39 in fees plus \$31.11 in disbursements, for a total of \$12,916.50.

[10] Before concluding, I wish to make a comment concerning the plaintiffs' reference to a "without prejudice" email exchange regarding efforts to settle the amount of costs. In reply to Teksavvy's submissions on this point, the plaintiffs argue that an exception to the rule of settlement privilege applies. They also argue that Rule 400(3)(e) of the Rules contemplates

consideration of “any written offer to settle” in determining the amount of costs, and that the law on this point is not settled. In my view, the brief email exchange (in which the plaintiffs’ counsel offered to settle costs at \$20,000, all-inclusive, and Teksavvy’s counsel refused) is not sufficiently probative to have an effect on the costs award. I note that both the plaintiffs and Teksavvy indicated explicitly that their respective emails were “without prejudice”. Regardless of whether an exception to settlement privilege applies, it appears that the parties shared a common view that the exchange should not be shared with the Court. However, even if I were to conclude that it was improper to refer the Court to this “without prejudice” exchange, my view would be that such a transgression is not of sufficient importance to disentitle the plaintiffs to any costs on the appeal as Teksavvy urges.

“George R. Locke”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
René LeBlanc J.A.”

ANNEX
Amended Bill of Costs

A) FEES :

Item	Assessable Service	Number of Units Column <u>IV</u>	Amount
Subparagraph F of Tariff B - Appeals to the Federal Court of Appeal			
16	Counsel fee: (a) motion for leave to appeal and all services prior to the hearing thereof; and (b) on an oral hearing of the motion for leave to appeal, per hour.	N/A N/A	N/A N/A
17	Preparation, filing and service of notice of appeal.	N/A	N/A
18	Preparation of appeal book. <i>Joint Appeal Book (filed on February 11, 2020):</i> <i>Review of the draft Appeal Book. (January 9, 2020)</i> <i>Participating in a conference call with the opposing counsel regarding the Appeal Book. (January 10, 2020)</i>	<u>(2)</u> <u>1.0 x \$150 = \$ 150</u>	<u>\$ 150</u>

The unit value of the Tariff *effective April 1, 2021*, is 150

Item	Assessable Service	Number of Units Column IV	Amount
	<p><i>Amended Joint Appeal Book (filed on March 10, 2021)</i></p> <p><i>Revising the opposing counsel's proposed Supplementary Appeal Book. (February 1, 2021)</i></p> <p><i>Reviewing Agreement on Appeal Book. (February 7, 2020)</i></p>	<u>1.0</u> x \$150 = \$ <u>150</u>	\$ <u>150</u>
19	<p>Memorandum of fact and law.</p> <p><i>Memorandum of Fact and Law of the Respondents Bell Media Inc., Groupe TVA Inc. and Rogers Media Inc. (filed on September 2, 2021)</i></p>	<p><u>(9)</u></p> <p><u>9</u> x \$150 = <u>\$1350</u></p>	\$ <u>1350</u>
20	Requisition for hearing.	<p><u>(1)</u></p> <p><u>0.5</u> x \$150 = \$75</p>	\$75
21	<p>Counsel fee:</p> <p>(a) on a motion, including preparation, service and written representations or memorandum of fact and law;</p> <p>(b) on the oral hearing of a motion, per hour.</p>	<p>N/A</p> <p>N/A <i>(considered without personal appearance)</i></p>	<p>N/A</p> <p>N/A</p>
22	<p>Counsel fee on hearing of appeal:</p> <p>(a) to first counsel, per hour;</p> <p><i>Total duration: 1.5 day: 1st day: 9h30am to 5h10pm (7.67) 2nd day: 9h10am to 12h10pm (3.0)</i></p> <p>(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).</p>	<p><u>(4)</u></p> <p>(a) <u>4</u> x \$150 x 10.67 = \$ <u>6402</u></p> <p><u>0.5</u> x \$6402 = <u>\$3201</u></p>	<p>\$ <u>6402</u></p> <p>\$ <u>3201</u></p>

The unit value of the Tariff *effective April 1, 2021*, is 150

Item	Assessable Service	Number of Units Column <u>IV</u>	Amount
Subparagraph G of Tariff B – Miscellaneous			
23	Attendance on a reference, an accounting or other like procedure not otherwise provided for in this Tariff, per hour.	N/A	N/A
24	Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court.	N/A	N/A
25	Services after judgment not otherwise specified.	(1) 0.5 x \$150 = \$75	\$75
26	Assessment of costs. <i>Preparation of the bill of costs.</i>	<u>N/A</u>	<u>N/A</u>
27	Such other services as may be allowed by the assessment officer or ordered by the Court.	N/A	N/A
28	Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor.	N/A	N/A
			Subtotal: \$11,403
			HST/GST (13%): \$1,482.39
			Total Fees: \$12,885.39

The unit value of the Tariff *effective April 1, 2021*, is 150

B) DISBURSEMENTS:

#	Item	Amount
1	Miscellaneous – Service charges: <i>Registered mail fees related to the service of the Notice of Appearance upon Cogeco Connexion Inc., Saskatchewan Telecommunications and Shaw Communications Inc. on November 28, 2019.</i>	\$27.06
Subtotal:		\$27.06
TPS (5%):		\$1.35
TVQ (9.975%):		\$2.70
Total Fees:		\$31.11

The unit value of the Tariff *effective April 1, 2021*, is 150

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-440-19

STYLE OF CAUSE: TEKSAVVY SOLUTIONS INC. v.
BELL MEDIA INC. *ET AL.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: **LOCKE J.A.**

CONCURRED IN BY: NADON J.A.
LEBLANC J.A.

DATED: SEPTEMBER 14, 2021

WRITTEN REPRESENTATIONS BY:

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INC.

FOR THE RESPONDENT,
TELUS COMMUNICATIONS
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FOR THE APPELLANT,
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FOR THE RESPONDENTS,
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