



OCT 23 1997

Between:

**PROCTOR & GAMBLE INC. and  
RICHARDSON-VICKS INC.**

Plaintiffs

- and -

**JOHN DOE c.o.b. as CLARION TRADING INTERNATIONAL,  
798117 ONTARIO LIMITED c.o.b.  
as PRIVATE LIMOUSINE SERVICE,  
MARIO RUFFO, SAMUEL NESTICO and MARTY USHER**

Defendants

**REASONS FOR ORDER AND ORDER**

**TEITELBAUM, J.:**

Upon motion dated the 10th day of September, 1997, on behalf of the  
Plaintiffs for:

1. An Order reviewing the execution of the Order of Mr. Justice Dubé dated  
May 23, 1996 as against the Defendant Marty Usher, only;
2. Costs of this motion; and
3. Such further or other Order as to this Honourable Court may seem just.

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**REASONS FOR ORDER**

The Plaintiffs filed into the Federal Court Registry a Notice of Return of Motion for, as is stated in the Notice:

1. an Order reviewing the execution of the Order of Mr. Justice Dubé dated May 23, 1996 as against the Defendant Marty Usher, only;
2. Costs of this motion; and
3. Such further and other order as to this Honourable Court may seem just.

The review of the Order of Mr. Justice Dubé dated May 23, 1996 as against the Defendant Marty Usher came up for hearing before me on September 23, 1997, on a regular Motions day.

Before the commencement of the review hearing, a preliminary issue as to whether I had the jurisdiction to review the *ex parte* Order of Mr. Justice Dubé was raised by counsel for the Defendant Marty Usher.

I decided that I did have the jurisdiction to review the May 23, 1996 *ex parte* Order of Mr. Justice Dubé, but after being told by both counsel that the hearing would take at least three hours, and the fact that I still had to hear an *ex parte* request for an Anton Piller Order in another case, I felt that the review hearing should be set down for hearing on a day especially set aside after the parties made a request to the Associate Chief Justice for such a date.

The following are the reasons for my deciding that I, or any other Trial Division Judge, has the jurisdiction to review Mr. Justice Dubé's *ex parte* May 23, 1996 Order.

Under the heading "Review Notice of Motion", in paragraph 16 of Mr. Justice Dubé's Order, he states:

REVIEW NOTICE OF MOTION

16. The Persons Serving this Order shall also serve a Notice of Motion to have the issuance and execution of this Order reviewed. This Notice of Motion may also request an Order continuing the interim injunction of this Order until trial against the Respondents served with the Order, in which case the Plaintiff need not, pursuant to Rule 321.1(6) of the Federal Court Rules, serve or file a Record, unless otherwise ordered by the Court. The said Notice of Motion may also request costs of the execution of this Order and costs of the attendance upon the return of the motion to review the issuance and execution of this Order. This Notice of Motion shall be returnable at the sittings of this Court in Toronto within, if possible, ten days of the service of this Order, or, in any event, no later than the first motions day in Toronto after the said ten day period. Such a review motion may be brought on short notice.

It is to be noted that Mr. Justice Dubé orders the service of "a Notice of Motion to have the issuance and execution of this Order reviewed". His Order does not state "to have the issuance and execution of this Order reviewed" by me. I take this to mean that he foresaw that the review would be by any other Trial Division Judge.

As can be seen from a reading of paragraph 16 of the Order, Mr Justice Dubé states "This Notice of Motion (the review Notice of Motion) shall be returnable at the sitting of this Court in Toronto within, if possible, ten days of the service of this Order, or, in any event, no later than the first Motions day in Toronto after the said ten day period. Such a review motion may be brought on short notice".

Surely, one can only conclude from reading the above, it was not Mr. Justice Dubé's intention to prevent any other Trial Division Judge to review his *ex parte* Anton Piller Order.

The case of *Indian Manufacturing Limited and 951268 Ontario Limited vs. Kin Ming Lo, et al.*, A-288-96, June 24, 1997 (F.C.A.) was submitted as authority that only the Judge that issued the *ex parte* Order is permitted to review the issuance of the said Order. In this case, at page 5, Mr. Justice Stone states:

That apart, the authorities are clear that, save in exceptional circumstances, an *ex parte* order is to be reviewed, varied or rescinded by the judge who makes it: Wilson v. The Queen, [1983] 2 S.C.R. 594, at pages 607-08. See also Gulf Islands Navigation Ltd. v. Seafarers' International Union (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), Canada (Director of Investigation and Research) v. Softkey Software Products Inc. (1994), 57 C.P.R. (3d) 480 (F.C.T.D.). Indeed, the practice in England suggests that an *ex parte* Anton Piller order is not to be pursued on appeal until after the judge who made it has rendered a decision on a matter falling within its scope: WEA Records Ltd. v. Visions Channel 4 Ltd., [1983] 2 All E.R. 589 (C.A.).

In the case of *Wilson v. The Queen* [1983] 2 S.C.R. 584, at pages 607-08, Mr. Justice McIntyre states:

Since no right of appeal is given from the granting of an authorization and since prerogative relief by *certiorari* would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an *ex parte* application. In civil matters, there is a body of jurisprudence which deals with the review of *ex parte* orders. There is a widely recognized rule that an *ex parte* order may be reviewed by the judge who made it. In *Dickie v. Woodworth* (1883), 8 S.C.R. 192, Ritchie C.J. said, at p. 195:

The judge having in the first instance made an *ex parte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted....

This review is reflected in the words of Mathers C.J.K.B. in the case of *Stewart v. Braun*, [1924] 3 D.L.R. 941 (Man. K.B.), at p. 945:

But it frequently happens that Judges and judicial officers are called upon to make orders *ex parte*, where only one side is represented and where the order granted is not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an *ex parte* order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it...

Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in *Re Stewart and The Queen* (1975), 23 C.C.C. (2d) 306 (County Court, Ottawa-Carleton Judicial District (Ont.)), application for *certiorari* dismissed: (1976), 30 C.C.C. (2d) 391 (Ont.H.C.); *Re Turangan and Chui and The Queen* (1976), 32 C.C.C. (2d) 249 (B.C.S.C.), appeal dismissed for lack of jurisdiction (1976), 32 C.C.C. (2d) 254 (B.C.C.A.).

The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an *ex parte* order. See, for example, *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.), and *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.) In the case of *Gulf Islands Navigation Ltd. v. Seafarers' International Union* (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), Smith J.A. said at pp. 626-27;

After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's *ex parte* order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, *e.g.*, where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it *de novo* as to both the law and facts involved.

It is apparent from the wording of paragraph 16 of Mr. Justice Dubé's *ex parte* Order that Mr. Justice Dubé gave his "leave" that another Judge of the Trial Division could review his *ex parte* Order.

I am also satisfied "special circumstances" are present. Judges of the Federal Court live in Ottawa or within a radius of 40 kilometres of Ottawa, Ontario. They, as well, have jurisdiction in Federal Court matters throughout Canada. It is virtually impossible for such a Judge to be available to review his own Anton Piller *ex parte* Order when such a Notice of Motion "shall be returnable at the sittings of this Court in Toronto within, if possible, ten days.....". It is more so, that is, virtually impossible if "such a review Motion may be served on short notice".

The administration of the Court could not function properly if the Judge who issued the *ex parte* Anton Piller Order was the only one who had jurisdiction to review the said Order.

**ORDER**

The matter of the review of the *ex parte* Order of Mr. Justice Dubé dated May 23, 1996 is adjourned to a date to be fixed by the Office of the Associate Chief Justice at the joint request of the parties.

Any Judge of the Trial Division has the jurisdiction to review the said *ex parte* order.

"Max M. Teitelbaum"

Judge

September 23, 1997  
Toronto, Ontario

**FEDERAL COURT OF CANADA**

**Names of Counsel and Solicitors of Record**

COURT NO: T-1198-96

STYLE OF CAUSE: PROCTOR & GAMBLE INC. and  
RICHARDSON-VICKS INC.  
  
- and -  
  
JOHN DOE c.o.b. as CLARION TRADING  
INTERNATIONAL, et al.

DATE OF HEARING: SEPTEMBER 22, 1997

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR ORDER  
AND ORDER BY: TEITELBAUM, J.

DATED: SEPTEMBER 23, 1997

**APPEARANCES:**

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