Date: 20230607

Docket: T-1257-22

Citation: 2023 FC 801

Ottawa, Ontario, June 7, 2023

PRESENT: Chief Justice Paul Crampton

BETWEEN:

BELL MEDIA INC.
ROGERS MEDIA INC.
COLUMBIA PICTURES INDUSTRIES, INC.
DISNEY ENTERPRISES, INC.
PARAMOUNT PICTURES CORPORATION
UNIVERSAL CITY STUDIOS LLC
UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP
WARNER BROS. ENTERTAINMENT INC.

Plaintiffs

and

MARSHALL MACCIACCHERA dba SMOOTHSTREAMS.TV
ANTONIO MACCIACCHERA dba SMOOTHSTREAMS.TV
ARM HOSTING INC.
STAR HOSTING LIMITED (HONG KONG)
ROMA WORKS LIMITED (HONG KONG)
ROMA WORKS SA (PANAMA)

Defendants

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Those who decide when and under what circumstances they will comply with a court order essentially take the law into their own hands. That cannot be countenanced in a society governed by the rule of law.

[2] The reasons below explain the basis for my finding that the Defendant, Antonio Macciacchera, is in civil contempt of several provisions of an Anton Piller Order that forms part of a broader order issued by Justice Vanessa Rochester on June 28, 2022 (the **"Rochester Interim Order"** or **"Interim Order"**). I also explain why I am unable to conclude, beyond a reasonable doubt, that Mr. Macciacchera is in contempt of certain other provisions of that Order.

[3] Considering the family relationship between the two individual Defendants, and not out of any disrespect, they will be referred to below solely by their first names.

II. Background

[4] The following is a short summary of a more detailed background provided by Justice Roger Lafrenière in connection with the Plaintiffs' Motion to review the execution of the Rochester Interim Order and to show cause for why Marshall and the corporate Defendants should be charged with contempt of Court for breaching the Anton Piller Order: *Bell Media Inc v Macciacchera (Smoothstreams.tv)*, 2022 FC 1139, at para 11 [***Macciacchera 1***].

[5] On June 17, 2022, the Plaintiffs commenced the underlying action for infringement of their copyright in a large number of entertainment works. In broad terms, the Plaintiffs allege in their Statement of Claim that the Defendants are responsible for developing, launching,

operating, maintaining, promoting and selling subscriptions to unlawful Internet services. More specifically, the Plaintiffs claim that Antonio and his son, Marshall, are the key individuals behind the operation of the Smoothstreams.tv Internet Protocol Television [**IPTV**] service network, including smoothstreams.tv, live247.tv, streamtvnow.tv and starstreams.tv (collectively referred as the **"SSTV Services"**). The Plaintiffs allege that the SSTV Services provide subscribers with unauthorized access to a large number of motion pictures and live television channels that broadcast television programming for which the copyright in Canada is owned by various rights holders, including the Plaintiffs.

[6] The Plaintiffs further allege that the Defendant Roma Works Limited (Hong Kong) is the payment processor for the StarStreams TV service, and that the Defendant Star Hosting Limited (Hong Kong) is the payment processor for the StreamTVNow service.

[7] Unauthorized IPTV services typically operate on a subscription-based revenue model and usually provide access to hundreds or thousands of television stations for a cost of approximately $USD 10 to $USD 14 per month. The content that they distribute is obtained either from illegitimate sources or from legitimate sources that are then retransmitted without authorization.

[8] On June 28, 2022, Justice Rochester issued the Interim Order, which included the Anton Piller Order and a range of injunctive and other related relief requested by the Plaintiffs.

[9] Among other things, the Anton Piller Order included extensive provisions for the search, seizure and preservation of evidence and equipment related to the SSTV Services. It also

required the Defendants to disclose information regarding the SSTV Services, as well as their financial and other assets. In addition, the broader Interim Order required the Plaintiffs to appoint an independent lawyer (the **"ISS"**) to supervise the service and execution of the Anton Piller Order. Ultimately, the ISS who provided such supervision in respect of the service and execution against Antonio was Mr. Mark Davis, a partner at the firm Cassels Brock and Blackwell LLP.[1]

[10] The Statement of Claim, the Interim Order, and redacted versions of the materials filed in support of the Plaintiffs' Motion for the Interim Order were served on Antonio July 14, 2022 (the **"Attempted Execution Date"**), at approximately 8:05 a.m., by Mr. Robert Arnone of Xpera. Mr. Arnone was accompanied by Mr. Davis as well as by counsel to the Plaintiffs, Mr. Guillaume Lavoie Ste-Marie, and a videographer, Ms. Natalie Hansen. At that time, Messrs. Davis and Lavoie-Ste-Marie unsuccessfully attempted to execute the Interim Order.

[11] The following week, on July 21, 2022, Associate Judge Benoit Duchesne[2] issued an Order requiring Antonio to attend a hearing to hear proof of ten acts of contempt with which he was charged, and to present any defence that he may have to those charges (as amended, the **"Duchesne Charging Order"**). In addition, he ordered the Plaintiffs to file, by no later than August 18, 2022, a copy of all of the documents they intended to adduce into evidence at the contempt hearing, and to serve them upon Antonio on or before August 15, 2022.

[1] Another ISS, Mr. Daniel Drapeau, was retained in connection with the service and execution against Marshall, who is the subject of separate contempt proceedings.
[2] At that time, the title of the Court's Associate Judges was "Prothonotary".

[12] On July 28, 2022, Justice Lafrenière issued his decision on part of the Motion mentioned at paragraph 4 above. Among other things, the Order that accompanied that decision charged Marshall and the corporate Defendants with many of the same counts of contempt that were mentioned in the Duchesne Charging Order in relation to Antonio.

[13] On November 22, 2022, Justice Lafrenière issued his decision on the review of the execution of the Interim Order.[3] Ultimately, he found that the executions of the Interim Order at the residences of each of Antonio and Marshall, respectively, were lawful: *Bell Media Inc v Macciacchera (Smoothstreams.tv)*, 2022 FC 1602, at para 106 [***Macciacchera*** **2**]. He also found that both of the ISS's fully complied with the terms of the Interim Order and conducted themselves professionally, in a manner that protected the Defendants' rights adequately: *Macciacchera 2*, at para 105.

III. Overview of the Evidence

[14] The evidence in the contempt hearing before me consisted of video recordings taken by Ms. Hansen (the **"Video Recordings"**), testimony by Mr. Davis, and a small number of documents.

[15] The Video Recordings show that after the abovementioned materials were served on Antonio, Mr. Davis read a detailed script that he had prepared to explain the Anton Piller Order to him. They also show Antonio unsuccessfully attempting to reach his principal lawyer (Mr.

[3] This part of the Plaintiff's Motion on July 22, 2022 was adjourned to a later date, and therefore was dealt with separately by Justice Lafrenière: see *Macciacchera 2*, above, at paras 48-50.

Yoel Lichtblau) by telephone, and then refusing to permit Mr. Lavoie St.-Marie to explain other provisions of the Interim Order to him. Antonio explained that he did “not want to hear any more about law stuff” that he did not understand, and that he wanted to speak with his lawyer before proceeding any further: Exhibit P-6, Video #3 at 8:35. Antonio maintained that position during his interactions with Mr. Davis that lasted approximately five hours, including the extended periods of time when Mr. Davis was forced to wait outside, off Antonio’s property.

[16] During that five-hour period, the Video Recordings reflect that Antonio was able to speak with two or more lawyers, who advised him that he needed to speak with an intellectual property lawyer. Antonio explained: “They say ‘look, that’s not my field’, so I have to hire an IP lawyer. I have to phone around now and get an IP lawyer to deal with you”: Exhibit P-6, Video #9, at 00:53. Antonio reiterated that until he could find such a lawyer, he would not consent to the execution of the Anton Piller Order, he would not permit Mr. Davis or Mr. Lavoie-Ste. Marie to explain the other provisions of the Interim Order to him, he would not read the box of materials that were served upon him, and he would not consent to Mr. Davis and his colleagues remaining on his property.

[17] After Mr. Davis repeated, at approximately 1:15 p.m., that the Order provided that its execution was not to be delayed by more than two hours, he stated that he understood Antonio’s position. Mr. Davis then requested Antonio to contact him and Mr. Lavoie-Ste. Marie when Antonio had spoken with his lawyer. He then returned to his office.

[18] I will now turn to Mr. Davis' testimony. As noted above, Mr. Davis is a partner at the firm Cassels Brock and Blackwell LLP, where he practises exclusively in the area of intellectual property law. He is also certified by the Law Society of Ontario as a specialist in patents, trademarks and copyright. He testified with respect to his role as the ISS in relation to the service and execution of the Interim Order against Antonio, including the videotaping of thereof. His testimony also included a brief overview of the coordination of that service and execution against Antonio with the simultaneous service and execution against Marshall, under the leadership of a separate ISS, Mr. Daniel Drapeau. In addition, he addressed the nine time-stamped videos that were adduced as Exhibit P-6 to this proceeding.

[19] I found Mr. Davis to be forthright, candid, succinct, and very credible. I did not have any concerns whatsoever about his testimony.

[20] With respect to the documentary evidence mentioned at paragraph 14 above, it consisted of the Rochester Interim Order, two affidavits by Mr. Davis summarizing the service and execution of that Order, Mr. Davis' execution script, the handwritten notes Mr. Davis made during the execution, a typed version of those notes, and two e-mail messages sent by Antonio's legal counsel (Mr. Paul Lomic) to the Plaintiffs' counsel. As I understand it, the latter two documents were adduced as evidence of an ongoing breach of the Rochester Interim Order. This will be further discussed below.

IV. The Duchesne Charging Order

[21] At an *ex parte* hearing on July 21, 2022, Associate Judge Duchesne heard the Motion made by the Plaintiffs pursuant to Rule 467(1) of the *Federal Courts Rules*, SOR/98-106 (the ***"Rules"***). In that Motion, the Plaintiffs sought an order requiring Antonio to appear before this Court to hear proof of the acts for which he was charged with contempt and to present any defences he may have had to the charges of contempt. Following that hearing, Associate Judge Duchesne issued the Duchesne Charging Order**,** which is attached at Appendix 1 hereto.

[22] For the present purposes, the Duchesne Charging Order identified the following ten acts of contempt with which Antonio was charged:

i) <u>on July 14, 2022 and since,</u> disobeying paragraph 20 of the Order which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide to the independent supervising solicitor and/or to the Plaintiffs' solicitors the technical information related to the SSTV Services and/or any other Unauthorized Subscription Services under his control;

ii) <u>on July 14, 2022 and since,</u> disobeying paragraph 24(a) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to disclose the assets, revenues, expenses and profits referred to in that paragraph;

iii) <u>on July 14, 2022 and since,</u> disobeying paragraph 24(b) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide all information pertaining to these assets, including by refusing to provide the documents likely to contain that information;

iv) <u>on July 14, 2022 and since,</u> disobeying paragraph 24(c) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide the identity and contact information of the banks, financial institutions or other service providers with which these assets are registered or through which they are controlled;

v) on July 14, 2022 and since, disobeying paragraph 25 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide his written consent to authorise banks, financial institutions or other service providers to disclose information pertaining to his assets to the independent supervising solicitor and to the Plaintiffs' solicitors;

vi) on July 14, 2022 and since, disobeying paragraph 29 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to disclose the location of evidence to be preserved under the Order;

vii) on July 14, 2022 and since, disobeying paragraph 30 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to assist the persons enforcing the Order in accessing the evidence to be preserved under the Order;

viii) on July 14, 2022 and since, disobeying paragraph 31 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to deliver up the evidence to be preserved under the Order to the persons enforcing the Order;

ix) on July 14, 2022 and since, disobeying paragraph 32 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore concealing evidence to be preserved under the Order;

x) on July 14, 2022 and since, disobeying paragraph 37 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to cooperate with the persons enforcing the Order;

V. Analysis

[23] The sole issue before me is whether Antonio is in civil contempt of the Rochester Interim Order, and more specifically the ten provisions described immediately above.

[24] If an affirmative finding on this issue is made, the issue of penalty will be addressed in a separate hearing.

A. *General Principles*

[25] The principle objective of the law of civil contempt is to foster compliance with court orders: *Carey v Laiken*, 2015 SCC 17, at para 30 [***Carey***]; *Bell Canada v Adwokat*, 2023 FCA 106, at para 18. This is essential to maintain public confidence in the administration of justice, support the rule of law, and ensure that "social order prevails rather than chaos": *Morasse v Nadeau-Dubois*, 2016 SCC 44, at para 81 [***Morasse***], per Wagner CJC (dissenting on other grounds); *Minister of National Revenue v Bjornstad*, 2006 FC 818, at para 5; see also *Canada (Human Rights Commission) v Canadian Liberty Net (CA)*, [1996] 1 FC 787, at 796 (CA). This is because contempt of court is "a challenge to the judicial authority whose credibility and efficiency it undermines as well as those of the administration of justice": *9038-3746 Quebec Inc v Microsoft Corporation*, 2010 FCA 151, at para 18 [***Microsoft***].

[26] To establish civil contempt, three elements must be established. First, the order or judgment that is alleged to have been breached must state clearly and unequivocally what should and should not be done. Where an order contains overly broad language, has an unclear meaning due to external circumstances, or omits an essential detail, the Court *may* find that this first element has not been established: *Carey*, above, at para 33. In addition, where there is ambiguity, the alleged contemnor is entitled to the most favourable interpretation of the order. However, this does not mean "that the alleged contemnor is entitled to have the courts contort the language of an order to narrow its ambit. The court will interpret the order in accordance with its ordinary

meaning, taking into account its context": *Fraser Health Authority v Schmidt*, 2015 BCCA 72, at para 4 [***Schmidt***]. Moreover, "a defendant cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice": *Zhang v Chau*, 229 DLR (4th) 298 [QCCA], at para 32.

[27] The second element to be established is that the party alleged to be in breach must have actual knowledge of the order or judgment in question. Such knowledge can be inferred from the circumstances, and can be deemed to exist in the presence of wilful blindness: *Carey*, above, at para 34; *Bell Canada et al v Red Rhino Entertainment Inc et al*, 2019 FC 1460, at para 17 [***Red Rhino 2019***]; *Canadian Private Copying Collective v Fuzion Technology Corp et al*, 2009 FC 800, at paras 58 and 63 [*CPCC*].

[28] The third element to be established is that the alleged contemnor must have intentionally done the act that the order or judgment prohibits, or intentionally failed to do the act that the order or judgment compels. It is not necessary to establish "contumacious" intent, that is to say, an intention to interfere with the administration of justice or to disobey, in the sense of desiring or knowingly choosing to disobey the order or judgment in question. It will suffice to demonstrate an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has had notice: *Carey*, above, at paras 29, 35, 38 and 47. Stated differently, it will suffice to demonstrate that the defendant knowingly contravened the order or judgment in question: *Urus Industrial Corp v Lifegear Inc*, 2005 FCA 63, at para 1.

[29] Each of the three elements of civil contempt described above must be established on the evidentiary standard of beyond a reasonable doubt: Rule 469, *Federal Courts Rules*, SOR/98-106, [the ***Rules*****];** *Carey*, above, at para 32. This standard is more onerous than proof on a balance of probabilities, but is not as high as absolute certainty. If there are alternative explanations or inferences that give rise to a doubt based on reason and common sense that is logically based upon the evidence or lack of evidence, the standard of proof beyond a reasonable doubt will not be met: *R v Lifchus*, [1997] 3 SCR 320, at paras 30 and 36. However, those alternative explanations or inferences must be reasonable: *R v Villaroman*, 2016 SCC 33, at 36 [***Villaroman***]. Doubts that are speculative, imaginary or frivolous in nature will not be reasonable: *Villaroman*, at 28 and 35-36; *R v Cyr-Langlois*, 2018 SCC 54, at para 15.

[30] Where the three requisite elements have been established beyond a reasonable doubt, the Court retains the discretion to decline to find an alleged contemnor in contempt.

B. *Application of the Test*

(1) Preliminary issue: Nexus

[31] At the outset of Antonio's oral submissions before me, his counsel raised a threshold issue concerning the nexus between Antonio and several of the ten counts with which he was charged. In brief, counsel maintained that there was no evidence whatsoever *tendered in the hearing before me* that connected Antonio to the subject matter of the counts in question.

[32] For example, no evidence was *adduced in the hearing before me* that Antonio had any technical information related to SSTV Services and/or any other Unauthorized Subscription

Services under his control, as set forth in charge (i) of the Duchesne Charging Order. Likewise, there was no evidence tendered in the hearing before me to establish that Antonio actually had any undisclosed assets or financial information to be preserved that was specifically required to be disclosed and delivered up, as contemplated by charges (ii), (iv), (vi) and (viii).

[33] In the particular circumstances of this case, I agree that the Plaintiffs failed to provide the evidence required to support a finding of contempt in relation to charges (i), (ii), (iv), (vi) and (viii).

[34] In paragraph 3 of the Duchesne Charging Order, the Plaintiffs were required to serve Antonio with (i) a copy of that order, and (ii) "*their materials for the Contempt Hearing* by no later than August 8, 2022" [emphasis added]. The latter date was subsequently changed to August 15, 2022.

[35] In the documents that were included in the Plaintiffs' Amended Document Disclosure, dated August 15, 2022, there was no evidence linking Antonio to the subject matter of charges (i), (ii), (iv), (vi) and (viii). There was also no mention of such evidence in the "Will Say" Statements that were provided to Antonio on that date.

[36] Based on the foregoing, counsel to Antonio submitted:

> We made strategic choices and we formulated our defence based on the evidence that was before us, and so in our respectful submission, it would be profoundly unfair to a fair trial to now change and say, "Actually, the evidence before you that you had to meet, the burden that you had to meet was actually something

> entirely different. It was a box of motion records. That's what you were supposed to be challenging.
>
> Transcript, at 197.

[37] I agree. Given the terms in paragraph 3 of the Duchesne Charging Order mentioned at paragraph 34 above, and given Antonio's consequential understanding of the basis upon which the hearing before me would be conducted, it would be procedurally unfair to permit the Plaintiffs to rely on the evidence that was before Justice Rochester to demonstrate that Antonio is in contempt of the Order she issued.

[38] Another reason why it was not open to the Plaintiffs to rely on such evidence is that Rule 470 provides: "*Unless the Court directs otherwise*, the evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral" [emphasis added]. Apart from paragraph 3 of the Duchesne Charging Order, *the Court did not direct otherwise* prior to the hearing before me.

[39] Antonio maintains that there are two other reasons why the Court, in a contempt hearing, cannot consider evidence that was adduced at the time it issued the Order in respect of which a contempt ruling is sought. Given the conclusions reached immediately above, it is not strictly necessary to address those submissions. However, I will briefly do so for the record.

[40] First, Antonio asserts that a contempt hearing is not a motion, but rather is a distinct proceeding, "akin to a criminal trial", and separate from the civil proceeding in which the Order in question was issued. However, the only authority that he was able to identify in support of his

position is *Coca-Cola Ltd. v Pardhan*, [1999] FCJ No 1764 [*Pardhan*], at paragraph 158, where Justice Allan Lutfy, as he then was, reached certain conclusions based on “the record before [him].” In the course of reaching those conclusions, he did not state or suggest that other evidence filed in connection with the underlying trademark infringement proceeding could not be considered in the contempt hearing before him.

[41] I disagree with Antonio’s position that a contempt hearing is not a motion brought within a larger proceeding, but is rather distinct proceeding, separate from the civil proceeding in which the Order that is the subject of the contempt hearing was issued.

[42] Rules 467 and 470 contemplate that contempt proceedings are brought by way of a motion. This implies that they are interlocutory proceedings, brought within the context of a larger action or application. This is confirmed by this Court’s jurisprudence, which holds that (i) contempt proceedings are part of the underlying civil proceedings from which allegations of contempt have arisen, and (ii) evidence from those civil proceedings can be relied upon in a contempt proceeding: see generally *ASICS Corporation v 9153-2267 Québec Inc et al*, 2017 FC 5, at paras 22–29. However, it bears underscoring that in the contempt hearing contemplated by Rule 470, documentary evidence filed in the underlying or “within” action or application can only be adduced if the Court so directs.

[43] In the present case, the underlying action is the Plaintiffs’ action for infringement of their copyright in a large number of entertainment works. The hearing that took place before Justice

Rochester, and the evidence that was filed on that Motion, was "within" that underlying copyright infringement action.

[44] In the typical case, contempt proceedings have two stages, followed by a hearing to address the penalty or sentence, if a finding of contempt is made. The first stage consists of a Motion for an Order under Rule 467(1), which may be made *ex parte*, pursuant to Rule 467(2). If the plaintiff is successful at that stage, an Order addressing the matters described in paragraphs (a) – (c) of Rule 467(1) will be issued. The second stage is the hearing contemplated by the Order issued under Rule 467(1). The person alleged to be in contempt is required to attend that hearing. As noted above, pursuant to Rule 470, the evidence at such hearing must be oral, unless the Court otherwise directs. If the Court makes a finding of contempt, the Court ordinarily schedules a separate hearing to address the penalty: *Winnicki v Canada (Human Rights Commission*), 2007 FCA 52, at para 13 [***Winnicki***]; *Bowdy's Tree Service Ltd v Theriault International Ltd*, 2019 FC 1341, at para 35*; Canadian Standards Association v PS Knight Co. Ltd*, 2021 FC 770, at para 69.[4]

[45] In the case at bar, the first stage of the contempt process consisted of the request for, and the granting of, the Duchesne Charging Order. The second stage comprised the hearing that occurred before me, as stipulated in the Duchesne Charging Order, and the issuance of my Order below. During that hearing, it was understood that if I ultimately found Antonio to be in contempt of any of the provisions of the Rochester Interim Order, a separate sentencing hearing

[4] Prior to *Winnicki*, the Court sometimes addressed the issue of penalty at the end of the contempt hearing, after giving counsel an opportunity to make submissions. See, e.g. *Chum Ltd. v. Stempowicz*, 2004 FC 611, at paras 32 - 39, and *Lyons Partnership, L.P. v. Macgregor*, 2000 CanLII 14898 (FC), at paras 17 – 24.

would be scheduled. This process was initiated by way of the Plaintiffs' Notice of Motion for an Order pursuant to Rule 467, dated July 15, 2022.

[46] I will observe in passing that Antonio had every opportunity to challenge the evidence that provided the basis for the issuance of the Rochester Interim Order. Although that Order was issued after an *ex parte* hearing, Antonio could have challenged it after it was served on him, on July 14, 2022. Despite the fact that this was explicitly stated at paragraph 18 of the Rochester Interim Order, Antonio did not avail himself of that opportunity. He also could have challenged that evidence in the review motion before Justice Lafrenière, who noted that the Plaintiffs relied on the affidavit evidence that was before Justice Rochester: *Macciacchera 1*, above, at para 14. A third opportunity to challenge this evidence was during the motion before Associate Judge Duchesne. Once again, Antonio did not to so. Having failed on multiple occasions to challenge the evidence that provided the basis for the issuance of the Rochester Interim Order, Antonio cannot now advance what amounts to a collateral attack on that Order: *Manis v Manis*, 55 OR (3d) 758, at paras 21-23 and 27 (CA); *Blatherwick v Blatherwick*, 2016 ONSC 2902, at paras 5-58.

[47] Antonio also submits that the evidence relied upon by the Court in issuing the Rochester Interim Order cannot be relied upon in a contempt hearing because that evidence simply met the civil standard applicable in Anton Piller Order hearings. In such hearings, a Plaintiff is required to establish a strong *prima facie* case: *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, at paras 1 and 35 [***"Celanese"***]. That standard contemplates "a strong likelihood on the law and the evidence presented that … the applicant will ultimately be successful …": *R v*

Canadian Broadcasting Corp, 2018 SCC 5, at para 17. Antonio notes that this is a lower standard than the "beyond a reasonable doubt" standard applicable in contempt proceedings. The same is true for the additional requirement at the Anton Piller Order stage that a plaintiff provide "convincing evidence that the defendant has in its possession incriminating documents or things": *Celanese*, above.

[48] However, this submission conflates the evidence itself with the standard upon which it is adjudged. Evidence that is relied upon to establish a strong *prima facie* case, or to "convince" the Court that the defendant has incriminating documents or things in its possession, may well also meet the standard of beyond a reasonable doubt. Such determinations will turn on the facts of each particular case. In the present case, the evidence that provided the basis for the issuance of the Rochester Interim Order led Justice Lafrenière to conclude that there was "an extremely strong prima facie case of copyright infringement against the Defendants": *Macciacchera*, above, at para 15.

[49] Insofar as Antonio is concerned, the evidence that provided the basis for Justice Lafrenière's conclusion was set forth in an affidavit of Andrew McGuigan, sworn on June 2, 2022. That affidavit provided detailed evidence of Antonio's involvement in the SSTV Services. Had the Court authorized the Plaintiffs to avail themselves of that evidence, upon notice to Antonio, it may very well have assisted the Court to conclude, beyond a reasonable doubt, that Antonio had contravened one or more of the provisions of the Rochester Order that were the subject of contempt charges (i), (ii), (iv), (vi) and (viii). However, the Court provided no such authorization. Indeed, it does not appear that any request for such authorization was made.

Therefore, that evidence was not admissible in the hearing before me. I will simply add for the record that no specific reference was made to that evidence in any event.

[50] In summary, for the reasons provided at paragraphs 33-37 above, I agree with Antonio's position that it would be procedurally unfair to permit the Plaintiffs to rely on the evidence that was before Justice Rochester to demonstrate that he is in contempt of the order she issued. This is because paragraph 3 of the Duchesne Charging Order required the Plaintiffs to serve Antonio with the materials upon which they intended to rely in the contempt hearing, and those materials did not include the evidence that was before Justice Rochester. Antonio's understanding of the basis upon which the hearing before me would be conducted was premised on the terms of that paragraph.

[51] Moreover, as discussed at paragraph 38 above, the evidence that was before Justice Rochester was documentary in nature, and the Court did not direct that it could be considered in the hearing before me, as required by Rule 470.

[52] In the absence of that evidence, there was no evidence whatsoever before me that Antonio had any of the technical information, undisclosed assets, financial information or other information that was specifically required to be disclosed, provided or delivered up, as contemplated by charges (i), (ii), (iv), (vi) and (viii) of the Duchesne Charging Order. Accordingly, I cannot conclude that those charges have been established, beyond a reasonable doubt.

[53] This is subject to the caveat that Antonio did not disclose a list of certain assets that were within the scope of the paragraph 24(a) of the Interim Order and charge (ii) of the Duchesne Charging Order, for approximately two weeks after the Attempted Execution Date. Specifically, on July 29, 2022, Antonio provided a list of those assets and certain other information falling within the scope of charge (v) (which I will address below), "in compliance with the [Interim] Order …": Exhibit P-8. I will return to this in discussing the exercise of my discretion, in Part V.C. of these reasons.

[54] The remaining five charges ((iii), (v), (vii), (ix) and (x)) will be addressed sequentially below.

(2) The clarity of the Interim Order

(a) *Charge (iii)*

[55] In charge (iii), Antonio was charged with having:

> on July 14, 2022 and since, disobey[ed] paragraph 24(b) of the [Interim] Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide all information pertaining to these assets, including by refusing to provide the documents likely to contain that information;

[56] Given that paragraph 24(b) cross references paragraph 24(a), I will reproduce the entire paragraph 24:

> 24. [The Court] Orders the Defendants to disclose to the independent supervising solicitor and the Plaintiffs' solicitors:
>
> a) the existence of any assets, revenues, expenses and profits derived from the operation of the SSTV Services or other Unauthorized Subscription

Services, whether located in Canada or abroad, including but not limited to bank account or account from any other institutions or persons that deal in financial matters; safety deposit boxes; investment accounts; brokerage accounts; financial instruments or other assets within the control of a bank, financial or similar institution; cryptocurrency; and any other asset that is owned by, directly or indirectly controlled by or registered to the Defendants, by themselves or through any person or entity related to them or to the SSTV Services or any other Unauthorized Subscription Services;

b) all information pertaining to the assets identified pursuant to subparagraph (a), including the identity of their owner, account number, type, creation date, <u>transaction history,</u> value and balance, including by providing all documents likely to contain this information, such as financial records, banking statements, invoices, and other similar documents [emphasis added]; and

c) the identity and contact information of the bank(s), financial institution(s) or other service provider(s) with which these assets are registered or through which they are controlled.

[57] Antonio states that paragraphs 24(a) and 24(b) are unclear. I disagree.

[58] In support of his position, Antonio notes that the Plaintiffs and Mr. Davis, the ISS who attempted to execute the Interim Order against him, have very different interpretations of this provision. Specifically, the Plaintiffs maintain that paragraph 24(a) contains “a broad asset disclosure obligation” that was not previously challenged by Antonio: Transcript, at 159. By comparison, on cross-examination, Mr. Davis stated that the words “derived from the operation

of the SSTV Services or other Unauthorized Subscription Services", which appear in the second line of paragraph 24(a), modify everything that follows in that paragraph: Transcript, at 95-96.

[59] I accept that the disagreement between the Plaintiffs and Antonio has some bearing on whether the language of paragraph 24(a), and indirectly paragraph 24(b), is clear and unequivocal about what should and should not be done. However, ultimately, I must interpret the Interim Order "in accordance with its ordinary meaning, taking into account its context": *Schmidt*, above.

[60] In my view, the use of a semi-colon to separate the various components of paragraph 24(a), together with the underlined word "or" in the following passage, makes it very clear and unequivocal that the Plaintiffs' interpretation of that paragraph is correct:

> and any other asset that is owned by, directly or indirectly controlled by or registered to the Defendants, by themselves or through any person or entity related to them or to the SSTV Services or any other Unauthorized Subscription Services;
>
> [emphasis added]

[61] I note that Antonio's counsel shared the Plaintiffs' view of the broad scope of the foregoing language, when he provided a list of Antonio's assets to the Plaintiffs, "in compliance with the [Interim Order]", in an e-mail dated July 29, 2022. Similar language was repeated a second time, later in that e-mail: Exhibit P-8.

[62] Having regard to the foregoing, I am satisfied beyond a reasonable doubt that the language of paragraph 24(a), which is cross-referenced in paragraph 24(b), is clear and unequivocal.

[63] In refusing to comply in any way with paragraph 24(b) at the time the Plaintiffs attempted to execute the Interim Order, it is clear beyond a reasonable doubt that Antonio failed to abide by the clear terms of that provision. Although Antonio subsequently provided, on July 29, 2022, a list of his assets in compliance with that provision, he failed to provide the transaction history of the two bank accounts that he disclosed at that time. There is no evidence before me to indicate that he had provided such transaction history, which was specifically required by paragraph 24(b), before the hearing that took place before me.

[64] I will return to paragraph 24(b) and charge (iii) in my discussion of the exercise of my discretion, in part V.C. of these reasons below.

(b) *Charge (v)*

[65] In charge (v), Antonio was charged with having:

> on July 14, 2022 and since, disobey[ed] paragraph 25 of the [Interim] Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide his written consent to authorise banks, financial institutions or other service providers to disclose information pertaining to his assets to the independent supervising solicitor and to the Plaintiffs' solicitors;

[66] Paragraph 25 of the Interim Order states as follows:

> 25. [The Court] Orders the Defendants to provide their written consent, in the form of Schedule III of this Order (with the

> necessary modifications as appropriate), to authorize the bank(s), financial institution(s) or other financial service provider(s) identified pursuant to this Order to disclose to the [ISS] and the Plaintiffs' solicitors all information pertaining to their assets, including but not limited to the types of information listed at subparagraph 24(b) above.

[67] The language of the foregoing provision is clear and unequivocal, beyond a reasonable doubt. Antonio does not suggest otherwise.

[68] Antonio failed to comply with paragraph 25 at the time the Plaintiffs attempted to execute the Interim Order. Although he provided, on July 29, 2022, partially complete forms of Schedule III for each of his two disclosed bank accounts, those two documents *explicitly excluded* the transaction history of the accounts in question. It is clear beyond a reasonable doubt that, by failing to provide that information, Antonio was in non-compliance with the clear and unequivocal terms of Paragraph 25 of the Interim Order. As noted at paragraph 63 above, there is no evidence before me that such transaction history had been provided before the time of the hearing that took place before me.

[69] Antonio maintains that I should exercise my discretion to find that he is not in contempt of paragraph 25, because the two bank accounts are shared jointly with his spouse, and there are no provisions in the Interim Order that permit him to withhold personal, non-relevant, information. I will return to this at paragraphs 113-119 below.

(c) *Charge (vii)*

[70] In charge (vii), Antonio was charged with having:

> on July 14, 2022 and since, disobeyed] paragraph 30 of the [Interim] Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to assist the persons enforcing the Order in accessing the evidence to be preserved under the Order; [emphasis added]

[71] Paragraph 30 of the Interim Order states as follows:

> 30. [The Court] Orders the Defendants and any other person apparently in charge of the Premises to open and make available to the persons enforcing this Order any vehicle, container, safe or storage area within their possession, custody or control; open any locked doors of the Premises behind which the persons enforcing this Order have reasonable grounds to believe there may be any aforementioned property, information, documentation or equipment; provide to the persons enforcing this Order any login credentials necessary to enforce this Order; provide to the persons enforcing this Order the means necessary to decrypt any encrypted device as necessary to enforce the Order; and otherwise assist by any other means the persons enforcing this Order in accessing any aforementioned property, information, documents and equipment.

[72] The language of the foregoing provision is clear and unequivocal, beyond a reasonable doubt. Once again, Antonio does not suggest otherwise. Among other things, paragraph 30 required Antonio to assist the persons enforcing the Interim Order by providing access to his property and to the specified evidence therein that the persons enforcing the Order had reasonable grounds to believe was located there. Those reasonable grounds were provided by the Interim Order itself, which was issued after Justice Rochester satisfied herself that there was a strong *prima facie* case that the information, documents and equipment described in the Order were located at Antonio's residence. It is clear beyond a reasonable doubt that, in failing to provide the assistance and access described in paragraph 30, Antonio was not in compliance with the explicit terms of the Interim Order. There is no evidence before me that Antonio complied with paragraph 30 at any time prior to the hearing before me.

(d) *Charge (ix)*

[73] In charge (ix), Antonio was charged with having:

> on July 14, 2022 and since, disobey[ed] paragraph 32 of the [Interim] Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore concealing evidence to be preserved under the Order; [emphasis added]

[74] Paragraph 32 of the Interim Order states as follows:

> 32. [The Court] Orders the Defendants or any other person apparently in charge of the Premises not to take any steps to destroy or conceal any aforementioned property, information, document or equipment.

[75] The language of the foregoing provision is clear and unequivocal. Once again, Antonio does not suggest otherwise. He also acknowledges that he refused entry to his residence, as contemplated by charge (ix).

[76] However, Antonio maintains that there is no evidence that he concealed anything that was specifically described in the Interim Order: Transcript, at 226 and 228. For the reasons discussed in part V.B.(1) of these reasons above, I agree. In brief, paragraph 3 of the Duchesne Charging Order required the Plaintiffs to serve Antonio with the materials upon which they intended to rely in the contempt hearing. Those materials did not include any evidence of property, information, documents or equipment located at Antonio's residence. Consequently, I am unable to conclude beyond a reasonable doubt that Antonio intentionally took any steps to destroy or conceal any such evidence.

[77] As previously observed, it is possible that the evidence which provided the strong *prima facie* grounds for the issuance of the Interim Order may have also enabled me to conclude, beyond a reasonable doubt, that at least some of the property, information, documents or equipment described in the Interim Order was located at Antonio's residence. However, without an ability to assess such evidence and have it tested by Antonio during the contempt hearing, I am not in a position to make such a determination.

(e) *Charge (x)*

[78] In charge (x), Antonio was charged with having:

> on July 14, 2022 and since, disobeyed paragraph 37 of the [Interim] Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to cooperate with the persons enforcing the Order;

[79] Paragraph 37 of the Interim Order states as follows:

> 37. [The Court] Orders the Defendants and/or the persons served to cooperate with the persons executing this Order.

[80] Once again, the terms of paragraph 37 are clear and unequivocal, beyond a reasonable doubt. Indeed, Antonio concedes that he failed to comply with this provision of the Interim Order: Transcript, at 193, 226 and 228.

(f) *Summary*

[81] In summary, the terms of the provisions of the Interim Order contemplated by charges (iii), (v), (vii) and (x) of the Duchesne Charging Order are clear and unequivocal. For the reasons I have given, it is also clear beyond a reasonable doubt that Antonio failed to comply with those

provisions. However, for the reasons provided at paragraphs 76 and 77 above, I am unable to conclude beyond a reasonable doubt that Antonio failed to comply with paragraph 32 of the Interim Order, as contemplated by charge (ix) of the Duchesne Charging Order.

[82] Accordingly, the remainder of these reasons will be confined to charges (iii), (v), (vii) and (x).

(3) Antonio’s knowledge of the Order

[83] During the hearing before me, Mr. Lomic appeared to maintain on behalf of Antonio that the Plaintiffs had not demonstrated beyond a reasonable doubt that Antonio had knowledge of the Interim Order. In support of that position, he stated that the Mr. Arnone, the process server, did not testify and that Mr. Davis did not check his identity: Transcript, at 201-202. When it was pointed out that the Plaintiffs had filed an affidavit sworn by Mr. Arnone, Mr. Lomic stated that no one had corroborated Mr. Arnone’s signature.

[84] I pause to note that, in his affidavit, Mr. Arnone stated that he had served Antonio with a copy of the Interim Order, as well as various other materials, at 8:05 a.m. on the Attempted Execution Date, and that he was able to identify Antonio by means of verbal acknowledgement. For greater certainty, Mr. Arnone’s affidavit was included in the materials that were served on Antonio on August 15, 2022, in accordance with paragraph 3 of the Duchesne Charging Order.

[85] Based on the Video Recordings, I am satisfied beyond a reasonable doubt that Mr. Arnone served the Interim Order on Antonio at the above-mentioned time. That evidence clearly

shows Mr. Arnone handing Antonio a box of materials, which Mr. Davis repeatedly stated included the Interim Order and various other documents that he specifically identified: Exhibit P-6, Video #1, starting at 4:20 . In addition, that evidence shows Mr. Davis introducing Mr. Arnone by his full name: Exhibit P-6, Video #2, at 10:06. That evidence also demonstrates, and confirms, that Mr. Davis scrupulously followed his script, including at paragraph 20, where he introduces Mr. Arnone and the other two individuals which joined them that day: Exhibit P4, at paragraph 20. Given all of the foregoing, I am satisfied that Antonio's assertion that the person introduced may not have been Mr. Arnone is pure speculation: see the jurisprudence cited at paragraph 29 above.

[86] Despite several attempts by Mr. Davis to encourage, and even to strongly encourage, Antonio to read the Interim Order, Antonio refused to do so without his lawyer: see e.g., Exhibit P-6, Video #3, at 4:40, 5:52 and 7:45; Video #7 at 0:45; Video #8, at 2:12; and Video #9, at 1:48. In these circumstances, the Court may impute knowledge of the Order to Antonio on the basis of the wilful blindness doctrine: *Carey*, above, at para 34; *Red Rhino*, above, at para 17; *Brilliant Trading Inc v Wong*, 2005 FC 1214, at paras 15 and 17; *Canada (Minister of National Revenue) v Iwaschuk*, 2004 FC 1602, at paras 12-14.

(4) Antonio's intention

[87] Throughout the attempted execution of the Interim Order, Antonio repeatedly explained that he would not permit Mr. Davis to execute that Order until he had contacted his lawyer. As discussed above, he also refused to read the Order until he had contacted his lawyer. He maintained that position for over five hours, despite the fact that Mr. Davis repeatedly stated that

the Interim Order provided for a two-hour window for Antonio to contact his lawyer, and that if Antonio refused to cooperate after the expiry of that period, he would be in contempt of the Interim Order: see e.g., Exhibit P-6, Video #1 at 11:10: Video #3, at 7:56; Video #7, at 01:58; Video #9, at 01:10, 03:46-03:56 and 05:16-05:32.

[88] It is clear from the Video Recordings that Antonio understood that the Order provided for a two-hour window for him to seek legal advice. Among other things, Antonio conveyed that fact when he left a voicemail message for his counsel, Mr. Lichtblau: Exhibit P-6, Video #1, at 15:28. Antonio also repeatedly stated that he felt two hours was an unreasonable period of time: see e.g., Video #7, at 02:04 – 02:30 and 05:05: Video #8, at 00:50 and 04:15; and Video #9, at 05:20. He maintained this position despite the fact that Mr. Davis stated that Justice Rochester had considered the amount of time that should be allocated for that purpose, and had decided that two hours was reasonable: see e.g., Exhibit P-6, Video # 7, at 4:37 – 05:00; and 05:19 – 05:25. He also understood that the consequences of not complying with a Federal Court Order are potentially significant. In this regard, he stated as follows:

> "I got you. Well, you know what. I will deal with that with the lawyer again, because, I will argue the fact that, you know, no reasonable person can get a hold of a lawyer within two hours. And, you know, unless you are somebody [who is] VIP important, that two hours is not sufficient."
>
> Exhibit P-6, Video #7, at 04:55 – 05:15.

[89] Given the foregoing evidence, it is readily apparent that Antonio intentionally failed to take actions that were required by the Interim Order. This included all or some of the actions contemplated by charges (iii), (v), (vii) and (x) of the Duchesne Charging Order, discussed above.

[90] Antonio's inability to locate counsel with specialized expertise in intellectual property within the two-hour period of time specified in the Interim Order does not excuse his overt disobedience of the Interim Order. Paragraph 17(d) of that Order provided Antonio with an entitlement to seek the advice of "counsel" before complying with the terms of the Order, subject to the proviso that "such advice must be sought and obtained within two (2) hours from the time the Order has been explained, or any other longer delay deemed necessary and reasonable by the [ISS]." This was described in plain and simple language at paragraph 11 of the overview of the Interim Order, which further explained that the two-hour period would begin to run from the time the Order had been explained to Antonio – which happened at approximately 8:37 a.m. on the Attempted Execution Date. Likewise, paragraph 18 referred to Antonio's "right to seek legal advice" and to "refuse entry to the premises for a period not exceeding two (2) hours", subject to the ability of the ISS to enter the premises and take such steps as the ISS deemed necessary to secure and preserve the evidence described in the Order.

[91] Any qualified member of the bar would have been able to explain the Interim Order to Antonio and to advise him accordingly. Put differently, any member of the bar ought to have been more than capable of explaining to Antonio the provisions of the Interim Order, his rights, and the consequences of not complying with that Order. Antonio did not require a specialist in the execution of Anton Piller Orders, or in intellectual property law more generally, to advise him of these matters.

[92] In any event, it was not up to Antonio to unilaterally decide to wait until he could find such a specialist before complying with the Interim Order. Pursuant to the above-described

provisions of that Order, Antonio's right was to seek "legal advice" from "counsel", within a reasonable period not exceeding two hours. It was not an unbounded right not to seek the advice of specialized counsel, over an indeterminate period of time.

[93] For greater certainty, it was not up to Antonio to decide what constituted a reasonable period of time in the circumstances. As noted above, paragraph 17(d) of the Interim Order provided the ISS with the ability to defer executing the order for a period of time beyond two hours as the ISS deemed reasonable and necessary. In the particular circumstances of this case, the ISS extended the two-hour period for almost three additional hours, before abandoning the attempted execution of the Interim Order at 1:19 p.m. on the Attempted Execution Date.

[94] In the meantime, Antonio was in fact able to contact his lawyer. This is readily apparent from the following exchange that took place at approximately 1:13 p.m. that day:

> Mark Davis: Hi Mr. Macciacchera it is Mark Davis calling again.
>
> Antonio: Yes.
>
> Mark Davis: I'm just wondering whether you have had a chance to speak with counsel.
>
> Antonio: No, because I'm getting, I'm getting the message here from people that I need an IP lawyer, not a regular lawyer. And the regular lawyers are … you know I can't even talk to them *because they say*, "Look, that's not my field." So, I have to hire an IP lawyer. I have to call around now to get an IP lawyer to deal with this. [Emphasis added.]
>
> Exhibit P-6, Video #9, at 0:36 – 01.04.

[95] The two-hour period of time that was provided to Antonio to contact legal counsel is common in Anton Piller Orders issued by this Court. It has also been adopted by the Ontario

Superior Court of Justice in this context: see e.g., *Echostar Communications Corporation v Rogers*, 2010 ONSC 2164, at para 15 [***Rogers***]; and *Clancy v Farid*, 2022 ONSC 947, at para 138. See also the Ontario Superior Court of Justice's Commercial List Precedent Order to allow entry and search of premises, at paragraph 11. A two-hour period of time has also been endorsed by the Supreme Court of Canada [**SCC**], subject to the issuing judge's discretion, having regard to the fact that "unnecessary delay may open the door to mischief": *Celanese*, above, at 214-215. That mischief includes the distinct possibility of the destruction or removal of important evidence from the premises to be searched. It also includes the opportunity to transfer of illicit proceeds or funds that would otherwise be available to satisfy a judgment in the underlying action, beyond the jurisdiction of the Court: *Celanese*, above, at 207, citing *Anton Piller KG v Manufacturing Processes Ltd*, [1976] 1 Ch 55 (CA), at 61. See also *Warner Bros. Entertainment Inc v White (Beast IPTV)*, 2021 FC 53, at para 90.

[96] Reducing the scope for such mischief explains why "Anton Piller orders are often conceived of, obtained and implemented in circumstances of urgency": *Celanese*, above, at para 40. In the present proceeding, the prospect of such mischief was very real, in part because of Antonio's links to Roma Works SA (Panama), a company that he started: Exhibit P-9. This prospect of Antonio quickly shifting funds beyond the reach of the Court weighed strongly in favour of commencing the execution of the Interim Order within the period of time contemplated therein.

[97] I am sympathetic to Antonio's position that the clock ought not to have begun to run until the start of his legal counsel's typical work day: Exhibit P-6, Video #7, at 02:05 – 02:19. This is

consistent with the SCC's teaching that the execution of an Anton Piller Order "should be commenced during normal business hours when counsel for the party to be searched is more likely to be available for consultation": *Celanese*, above, at 215.

[98] Nevertheless, it was not open to Antonio to continue to refuse to comply with the Interim Order more than two hours after the start of what could reasonably be claimed to be the start of normal business hours for legal counsel in the Greater Toronto Area where he lived. Stated differently, he could not justify his disobedience of the Interim Order after that time, based on his stated desire to obtain legal advice, whether from his regular counsel (Mr. Lichtblau) or from a specialist in intellectual property law. Assuming that he was not able to communicate with Mr. Lichtblau within that period of time, he ought to have obtained advice from another counsel who was in fact available.

[99] Having regard to all of the foregoing, I find that Antonio had the requisite intention to fail to take actions that were required by the Interim Order. For greater certainty, this included the actions contemplated by charges (iii), (v), (vii) and (x) of the Duchesne Charging Order, discussed in part V.B.(2) above. Indeed, although it is unnecessary for me to find contumacious intent, Antonio's refusal to cooperate with the execution of the Interim Order, after the terms of the Interim Order were explained to him, and after the consequences of failing to comply were repeatedly conveyed to him, rose to the level of contumaciousness. This finding will be relevant to the exercise of my discretion, discussed in Part V.C. below.

(5) Summary

[100] In summary, for the reasons set forth in parts V.B.(2) – (4) above, I find that the Plaintiffs have established beyond a reasonable doubt the three elements that must be demonstrated before a finding of contempt may be made in connection with charges (iii), (v), (vii) and (x) of the Duchesne Charging Order. In brief, the provisions of the Interim Order that were the subject of those charges were clear and unequivocal. In addition, given Antonio's repeated refusal to read the Interim Order upon having it served on him, his knowledge can be inferred on the basis of the wilful blindness doctrine: *Carey*, above, at para 34. Finally, Antonio had the requisite intention to fail to take actions that were required by the Interim Order and that were contemplated by charges (iii), (v), (vii) and (x). For greater certainty, I also find beyond a reasonable doubt that Antonio failed to take those actions.

C. *The Court's discretion*

[101] Antonio maintains that even if I find that the Plaintiffs have established the three elements of contempt summarized immediately above, I should exercise my discretion to refrain from finding that he is guilty of contempt and consequentially liable for his actions.

[102] In support of this position, Antonio makes several submissions.

[103] First, he states that the ISS failed to properly explain the health and safety provisions of the Interim Order to him. More specifically, he asserts that *the recognized health and safety precautions* referenced in paragraph 38 of the Interim Order were not explained to him.

[104] Paragraph 38 states as follows:

> 38. [The Court] Orders those who are authorized to enforce this Order, the Defendants, and those who are otherwise present on the premises where this Order is executed and who have notice of this Order, to abide by *recognized health and safety precautions* in light of the ongoing COVID-19 pandemic, as deemed reasonable and necessary by the independent supervising solicitor. [Emphasis added.]

[105] Antonio maintains that, in the video evidence before the Court, the ISS did not even mention the recognized health and safety precautions. He adds that the ISS was wrong when he stated to him that he had the option to wear a mask. In making this point, he appears to suggest that recognized health and safety precautions required him to wear a mask. He further states that on cross-examination, the ISS (Mr. Davis) (i) admitted that he did not receive medical advice regarding recognized health and safety precautions, and (ii) could not answer basic questions regarding the COVID-19 test that was taken by the ISS team. Moreover, Antonio asserts that at one point during the video evidence, Mr. Davis was beside him without a mask.

[106] Essentially the same arguments were made by Antonio and rejected by Justice Lafrenière in *Macciacchera 2*, above, at paras 72-74. In brief, Justice Lafrenière concluded that reasonable health and safety precautions were taken by ISS Davis and his team prior to or when they arrived at Antonio's residence. In this regard, Justice Lafrenière noted that the ISS team completed a negative antigen test the prior day, wore N95 masks, and maintained physical distancing during their interactions with Antonio. Justice Lafrenière added that the Defendants failed to establish under what authority Mr. Davis could compel Antonio to wear a mask over his objections.

[107] I agree with Justice Lafrenière's findings. I would simply add that the terms of paragraph 38 of the Interim Order simply required Mr. Davis to abide by such recognized health and safety

precautions as *he* deemed reasonable and necessary. This is how Mr. Davis interpreted that provision: Transcript, at 79. Antonio has not demonstrated how the steps taken by Mr. Davis and his team, and described by Justice Lafrenière, may not have been reasonable in the circumstances, particularly given that Antonio himself refused to wear a mask when one was offered to him on two separate occasions: Exhibit P-6, Video #1, at 03:11 – 03:14 and 07:17 – 07:24. Moreover, on the sole occasion when Mr. Davis entered onto Antonio's property without a mask, he was called onto the property by Antonio, who had the police on the telephone.

[108] Antonio also submits that the Plaintiffs failed to abide by the SCC's teachings that the contempt power should be invoked "cautiously and with great restraint", and relied upon as "an enforcement power of last rather than first resort": *Carey*, above, at para 36. In support of this submission, Antonio notes that the Plaintiffs had already decided, by the end of the attempted execution of the Interim Order, that they would be bringing a motion for a contempt order. That decision was conveyed to Antonio by Mr. Davis: Exhibit P-6, Video #9, at 02:28 – 02:40.

[109] The abovementioned teachings of the SCC were not provided in the Anton Piller order context. For greater certainty, none of the authorities cited by the SCC in connection with the statements quoted immediately above involved an Anton Piller order.

[110] As the SCC has recognized, an Anton Piller order is an extraordinary remedy that can only be justified where there has been a demonstration of a strong *prima facie* case that, "absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear": *Celanese*, above, at para 1. The SCC proceeded to state as follows:

> 32. Experience has shown that despite their draconian nature, there is a proper role for Anton Piller orders to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished …

[111] In this context, judicial encouragement of plaintiffs to explore alternatives to an order for contempt could well produce the unintended consequence of entirely frustrating the purpose for issuing an Anton Piller order in the first place – namely, preventing the circumvention of the court's processes by pre-empting the destruction or removal of evidence, or the shifting of funds beyond the Court's reach.

[112] Accordingly, I do not accept Antonio's position that the Plaintiffs' swift decision to bring a contempt motion against him merits a weighting in his favour, in the exercise of my discretion to enter a finding of guilt in relation to charges (iii), (v), (vii) and (x) of the Duchesne Charging Order. That decision of the Plaintiffs was entirely consistent with the Court's rationale for issuing the Interim Order in the first place. I do not accept that the Plaintiffs ought to have spent days or weeks negotiating with Antonio to secure a resolution to their dispute. They were fully entitled to the complete and expeditious execution of the Interim Order, and to resort to immediately bringing a motion for contempt against him in the face of his five-hour long failure to cooperate.

[113] Antonio further asserts that I should exercise my discretion not to find him guilty of contempt because he acted in good faith to comply with the Interim Order when he provided

certain information to the Plaintiffs on July 29, 2022. That information consisted of a few details regarding Roma Works SA (Panama), a very short list of assets and two consent forms in relation to the two bank accounts that were disclosed in his list of assets. However, as previously noted, even those consent forms excluded consent for his banks to disclose information regarding the transaction history of the accounts.

[114] I consider that these "good faith" efforts to comply with the Interim Order do not warrant significant weight in Antonio's favour, in the exercise of my discretion. Not only did Antonio wait for over two weeks before providing that information, but the disclosed information was very limited in scope. It did not represent a substantial effort to expeditiously comply with the Interim Order as soon as Antonio was able to speak to his counsel. To the extent that the Plaintiffs were unable to enter Antonio's residence and prevent the destruction or removal of evidence, or the transfer of funds beyond the jurisdiction of the Court, Antonio's subsequent and limited efforts to comply with the Interim Order do not warrant much favourable recognition by the Court.

[115] Antonio also notes that there were no provisions in the Interim Order for withholding non-relevant personal, private information, including the transaction history of the two banking accounts that he shares jointly with his spouse. I recognize and accept that the terms of Anton Piller orders "should be no wider than necessary" and should include terms:

> " … setting out the procedure for dealing with solicitor-client privilege or other confidential information … with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise."

Celanese, above, 213-214.

[116] The Interim Order contained provisions in paragraphs 13, 33 and 34, as well as Schedule VI, to protect information covered by solicitor-client privilege. That Order also contained various provisions to protect the confidentiality of any information obtained by the Plaintiffs, as well as the existence of the Plaintiffs' proceeding in this Court, the Interim Order and the contents of the Court record. However, it did not contain any provisions to enable Antonio to withhold non-relevant personal or private information.

[117] This is something that should have been addressed in the Interim Order. However, in the particular circumstances of this case, the absence of such provisions does not absolve Antonio of his outright refusal to comply with the Interim Order. Antonio ought to have cooperated with the execution of that Order as soon as he was able to speak with his regular counsel on the Attempted Execution Date, before Mr. Davis abandoned his efforts to execute the Interim Order after five hours without success. In the course of doing so, he would have had the opportunity to object to the seizure or the accessing of any non-relevant personal or private information. By persistently refusing to so cooperate, he completely frustrated the execution of the Order. He cannot now expect the Court to exercise its discretion in his favour, on the ground that the Order failed to contain a provision to protect non-relevant personal or private information.

[118] The only information that Antonio has claimed is not relevant, personal or private is (i) non-disclosed information pertaining to Roma Works SA (Panama), and (ii) the transaction history of the two bank accounts he jointly shares with his spouse. That transaction history was

within the scope of paragraph 24(b) of the Interim Order, which, in turn, was the subject of charge (iii) of the Duchesne Charging Order.

[119] Given that Antonio chose to set up those two accounts jointly with his spouse, it can hardly be said that the provisions of the Interim Order were "no wider than necessary" in this regard, as contemplated by the SCC in *Celanese*, above, at 213. The transaction history in those accounts may well prove to be very relevant. To the extent that there is any non-relevant personal or private transactions, they could be redacted, subject to the Court's oversight.

[120] Finally, Antonio submits that I should take into account the fact that he is 70 years old and was "noticeably upset and flustered and was in his pyjamas" at the time of the attempted execution of the Interim Order. In my view, these considerations do not excuse his blatant and contumacious disregard for the Interim Order. That disregard for the Interim Order is perhaps best captured in the following exchange that took place towards the end of its attempted execution:

> **Antonio:** Where is that material that I can contact Lavoie?
>
> **Mark Davis:** If you look at the materials in the box …
>
> **Antonio:** In the box … why would it be in a box? Why wouldn't you leave a card on top?
>
> **Mark Davis:** That's what, that's what I am offering to do right now. You have my card. What I am offering to do is give you Mr. Lavoie St-Marie's card, or his contact information is, as I say, in the materials that were served on you.
>
> **Antonio:** Why, why do I have, why do I gotta to speak with him and not you?
>
> **Mark Davis:** Well, because at this point in time Sir, you won't allow me to come on and execute the order …

> **Antonio:** That's right.
>
> **Mark Davis:** No, and I understand your decision. There are going to be consequences to that decision …
>
> **Antonio:** That's fine. That's fine, there's consequences. There's also consequences in the fact that you're bullying somebody, you know, 70 years old that you want, who want them [sic] to understand the law.
>
> Exhibit P-6, Video #9, at 03:04 – 03:56.

[121] In addition to the foregoing, and beyond refusing to cooperate and to let Mr. Davis execute the Interim Order, Antonio shut his door several times despite being told by Mr. Davis that he was not supposed to close the door and that he was supposed to stay with Mr. Davis. In this regard, Antonio's complete disregard for the Interim Order was aptly captured in the following exchange:

> **Antonio:** I think we should close the door, and wait for my lawyer.
>
> **Mr. Davis:** Well, I think that's not what the Rochester Order says.
>
> **Antonio:** I don't believe you.
>
> **Mr. Davis:** Well, in the box there …
>
> **Antonio:** Ya, I'm not going to read the box. I don't have time to read the box. You just got me out of bed.
>
> **Mr. Davis:** Well, we're operating in compliance with the Rochester Order …
>
> …
>
> **Antonio:** I'm going to shut the door … and as soon as the lawyer comes to the phone, if the lawyer comes to the phone, he will listen to you, and then I will comply with whatever the lawyer agrees with.
>
> **Mr. Davis:** OK, in the meantime …
>
> **Antonio:** You'll be waiting outside.

Exhibit P-6, Video #3, at 04:28 – 05:45.

[122] Having regard to the foregoing, I do not consider it to be appropriate to exercise my discretion in favour of Antonio, by finding him not guilty of charges (iii), (v), (vii) and (x) of the Duchesne Charging Order.

[123] Antonio's disobedience of the Interim Order was flagrant. It was nothing short of a challenge to the Court, "whose credibility and efficiency it undermines as well as those of the administration of justice": *Microsoft*, above.

[124] The importance of the rule of law is such that disobedience of court orders cannot be countenanced: *Rogers*, above, at paras 26-28.

VI. Conclusion

[125] For the reasons set forth in part V.B.(1) above. I am unable to conclude that Antonio is in contempt of the provisions of the Interim Order contemplated by charges (i), (ii), (iv), (vi) and (viii) of the Duchesne Charging Order.

[126] For the reasons given at paragraphs 76-77 above, I an unable to conclude that Antonio is in contempt of the provision of the Interim Order contemplated by charge (ix) of the Duchesne Charging Order, namely, paragraph 32.

[127] For the reasons provided in parts V.B.(2) – (4) and V.C. above, I find that Antonio is in contempt of the provisions of the Interim Order contemplated by charges (iii), (v), (vii) and (x) of the Duchesne Charging Order.

ORDER T-2023-18

THIS COURT ORDERS THAT:

1. The Defendant, Antonio Macciacchera, is guilty of contempt for disobeying paragraphs 24(b), 25, 30 and 37 of the Order issued by Justice Rochester, dated June 28, 2022, as contemplated by charges (iii), (v), (vii) and (x), respectively, of the Order of Associate Judge (then Prothonotary) Duchesne, dated July 21, 2022.

2. The Plaintiffs may request the Judicial Administrator for a time and place for a hearing regarding the appropriate penalty for Antonio Macciacchera's contempt. Any written submissions that the Plaintiffs may wish to make shall be served and filed at least 21 days in advance of such hearing. Any submissions that Mr. Macciacchera may wish to make shall be served and filed at least 7 days in advance of that hearing.

3. In accordance with paragraph 2 of the aforementioned Order issued by Associate Judge Duchesne, the parties shall provide brief written submissions regarding the costs of this motion as well as the costs of the motion that took place before Associate Judge Duchesne, within ten (10) days of the issuance of the present Order. To reduce the time and cost that would be associated with preparing a detailed bill of costs, the parties are encouraged to reach an agreement regarding an appropriate lump sum amount to be paid by Antonio Macciacchera to the Plaintiffs. Failing such agreement, the parties are encouraged to make their respective submissions regarding such lump sum amount.

4. In the interest of judicial economy, the undersigned will remain seized of this matter.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1257-22
STYLE OF CAUSE:	BELL MEDIA INC. V. MACCIACCHERA (SMOOTHSTREAMS.TV)
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	AUGUST 24, 2022
JUDGMENT AND REASONS:	CRAMPTON CJ.
DATED:	JUNE 7, 2023

APPEARANCES:

François Guay Guillaume Lavoie Ste-Marie Ryan E. Evans Denise Felsztyna	FOR THE PLAINTIFF
Paul Lomic	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Smart & Biggar LLP	FOR THE PLAINTIFF
Lomic Law	FOR THE DEFENDANT

APPENDIX 1 – The Duchesne Charging Order

Federal Court Cour fédérale

Date: 20220721
Docket: T-1257-22

Ottawa, Ontario, July 21, 2022

PRESENT: Prothonotary Benoit M. Duchesne

BETWEEN:

BELL MEDIA INC.
ROGERS MEDIA INC.
COLUMBIA PICTURES INDUSTRIES, INC.
DISNEY ENTERPRISES, INC.
PARAMOUNT PICTURES CORPORATION
UNIVERSAL CITY STUDIOS LLC
UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP
WARNER BROS. ENTERTAINMENT INC.

Plaintiffs

and

MARSHALL MACCIACCHERA dba SMOOTHSTREAMS.TV
ANTONIO MACCIACCHERA dba SMOOTHSTREAMS.TV
ARM HOSTING INC.
STAR HOSTING LIMITED (HONG KONG)
ROMA WORKS LIMITED (HONG KONG)
ROMA WORKS SA (PANAMA)

Defendants

AMENDED ORDER

UPON reading the notice of motion, the affidavits of Mark Davis sworn on July 15, 2022, and the exhibits attached thereto, and the written representations made by the Plaintiffs for an Order pursuant to Rules 467(1) of the *Federal Courts Rules*, SOR/98-106, (the "*Rules*") requiring

the Defendant Mr. Antonio Macciacchera to appear before a judge at time and place to hear proof of the act(s) for which he is charged with contempt and to present any defence(s) he may have to the charges of contempt, the whole being brought *ex parte* as is authorized by Rule 467(3) of the *Rules*;

AND UPON HEARING the oral submissions made by the solicitors for the Plaintiffs at a special sitting of this Court on July 21, 2022, no one appearing for the Defendant Mr. Antonio Macciacchera as this motion was heard *ex parte*;

AND UPON CONSIDERING that a party seeking an order pursuant to Rule 467(1) of the *Rules* must establish a *prima facie* case of willful and contumacious conduct on the part of the contemnor (*Chaudhry v. Canada*, 2008 FCA 173, at para. 6) and must prove (1) a Court Order or other Court process, (2) the contemnor's knowledge of the Order or process, and, (3) a deliberate flouting of the Court Order or process that by the contemnor (*Chédor v. Canada (Immigration, Refugees and Citizenship,* 2017 FC 291 at para. 22; *Warner Bros. Entertainment Inc. v. White (Beast IPTV)*, 2021 FC 53 (CanLII), at para. 49);

AND UPON CONSIDERING and concluding that the Plaintiffs have discharged their burden of proof on this motion and have shown *prima facie* that Mr. Antonio Macciacchera willfully and contumaciously disobeyed the interim order made by the Honourable Madam Justice Rochester of this Court on June 28, 2022 (the "Order") and thereby engage in contempt;

AND UPON being satisfied that the Order sought should issue, based on the evidence presented by the Plaintiffs and considered by the Court;

THE COURT ORDERS AS FOLLOWS:

1. The Defendant Antonio Macciacchera is ordered to:

   a) appear via videoconference before a Judge of this Court, at the general sittings in Ottawa on Wednesday, August 17, at 9:30 am for a contempt hearing, to hear proof of the following acts, purportedly committed by him, with which he is

charged herein, and to be prepared to present any defence that he may have to the charges (the "Contempt Hearing"):

i. on July 14, 2022 and since, disobeying paragraph 20 of the Order which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide to the independent supervising solicitor and/or to the Plaintiffs' solicitors the technical information related to the SSTV Services and/or any other Unauthorized Subscription Services under his control;

ii. on July 14, 2022 and since, disobeying paragraph 24(a) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to disclose the assets, revenues, expenses and profits referred to in that paragraph;

iii. on July 14, 2022 and since, disobeying paragraph 24(b) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide all information pertaining to these assets, including by refusing to provide the documents likely to contain that information;

iv. on July 14, 2022 and since, disobeying paragraph 24(c) of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide the identity and contact information of the banks, financial institutions or other service providers with which these assets are registered or through which they are controlled;

v. on July 14, 2022 and since, disobeying paragraph 25 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to provide his written consent to authorise banks, financial institutions or other service providers to disclose information pertaining to his assets to the independent supervising solicitor and to the Plaintiffs' solicitors;

vi. on July 14, 2022 and since, disobeying paragraph 29 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing to disclose the location of evidence to be preserved under the Order;

vii. on July 14, 2022 and since, disobeying paragraph 30 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to assist the persons enforcing the Order in accessing the evidence to be preserved under the Order;

viii. on July 14, 2022 and since, disobeying paragraph 31 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to deliver up the evidence to be preserved under the Order to the persons enforcing the Order;

ix. on July 14, 2022 and since, disobeying paragraph 32 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore concealing evidence to be preserved under the Order;

x. on July 14, 2022 and since, disobeying paragraph 37 of the Order, which constitutes contempt of Court under Rule 466(b) of the *Rules*, by refusing entry to his residence and therefore failing to cooperate with the persons enforcing the Order;

2. Costs on the present motion and for the Contempt Hearing shall be determined following the filing of brief written submissions by the parties within ten (10) days of the issuance of the judgment on the Contempt Hearing.

3. The Plaintiffs shall serve the Defendant Mr. Antonio Macciacchera with a copy of this order forthwith, and shall serve the Defendant Mr. Antonio Macciacchera with their materials for the Contempt Hearing by no later than August 8, 2022.

"Benoit M. Duchesne"

Prothonotary