Federal Court of Appeal | Cour d'appel fédérale

Date: 20230518

Docket: A-285-21

Citation: 2023 FCA 106

CORAM: **BOIVIN J.A.**
GLEASON J.A.
GOYETTE J.A.

BETWEEN:

BELL CANADA, BELL EXPRESSVU LIMITED PARTNERSHIP, BELL MEDIA INC., GROUPE TVA INC., VIDÉOTRON LTD., ROGERS COMMUNICATIONS CANADA INC. and ROGERS MEDIA INC.

Appellants

and

ERIC ADWOKAT and RED RHINO ENTERTAINMENT INC.

Respondents

Heard at Toronto, Ontario, on February 7, 2023.

Judgment delivered at Ottawa, Ontario, on May 18, 2023.

REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BOIVIN J.A.
DISSENTING REASONS BY:	GOYETTE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] We have before us two matters: a motion by the appellants to adduce additional evidence and an appeal from the sentence for contempt imposed by the Federal Court in *Bell Canada v. Red Rhino Entertainment Inc.*, 2021 FC 895, [2021] F.C.J. No. 1050 (QL) (*per* Norris J.). In

their appeal, the appellants seek to have this Court increase the fine imposed by the Federal Court.

[2] In the judgment under appeal, the Federal Court sentenced the respondents to a fine of $40,000.00, for which they were jointly and severally liable, for violations of an interlocutory injunction that prohibited the sale of devices that the appellants claim were used to breach their copyright in television programs they broadcast.

[3] For the reasons that follow, I would dismiss both the motion and the appeal, with costs.

I. The Motion to Adduce Additional Evidence

[4] As concerns the motion, the test for allowing fresh evidence on appeal is well settled and requires the party seeking to file such evidence to establish that the evidence: (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court below. An appellate court maintains a residual discretion to admit new evidence on appeal where these criteria are not met. However, such discretion should be exercised sparingly and only in the clearest of cases where the interests of justice so require (*Coady v. Canada (Royal Mounted Police*), 2019 FCA 102, 304 A.C.W.S. (3d) 869 at para. 3 and cases cited therein).

[5] The first of the foregoing criteria, as noted by the majority of the Supreme Court of Canada recently in *Barendregt v. Grebliunas*, 2022 SCC 22, 469 D.L.R. (4th) 1 [*Barendregt*] at paragraph 36 "… focuses on the conduct of the party seeking to adduce the evidence. It requires litigants to take all reasonable steps to present their best case at trial. This ensures finality and order in the judicial process [citations omitted]".

[6] Here, the fresh evidence that the appellants seek to tender could have been adduced before the Federal Court had they been more diligent in their quest for it. The key components of the fresh evidence are the banking records for the two bank accounts of the respondent, Red Rhino Entertainment Inc. (Red Rhino), which suggest that, once the respondent was aware of the Federal Court's injunction, Red Rhino may well have made sales in violation of the injunction that generated gross revenues equal to at least $600,000.00. Although the appellants wrote several times to the trustee in bankruptcy of the respondent to request production of the bank statements of Red Rhino, they took no other steps to obtain them.

[7] It was open to the appellants to have obtained the banking records of Red Rhino via proceedings that were available under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the BIA). More specifically, the appellants could have sought an order to examine Mr. Adwokat, the sole director of Red Rhino, under subsection 163(2) of the BIA or could have sought production from the T.D. Bank, where the accounts were held, if they had obtained an order under section 38 of the BIA. Indeed, the trustee in bankruptcy of the respondents told the appellants that, in his opinion, one of these alternative avenues was more likely to be successful.

[8] In addition, Mr. Adwokat filed an affidavit on the sentencing motion. He could have been cross-examined about his and Red Rhino's assets and earnings and could have been asked to produce all relevant banking records during the cross-examination. If necessary, an adjournment could have been sought to facilitate production or to seek an order requiring it. However, the appellants pursued none of these avenues.

[9] It rather appears that the appellants perhaps made a tactical choice to refrain from making further efforts to seek the banking records for Red Rhino, as the respondents submit. In this regard, the appellants argued during the sentencing hearing that the respondents' failure to disclose the banking records to the trustee in bankruptcy was an aggravating factor, meriting a more severe sentence.

[10] The appellants, accordingly, have failed to meet the test for acceptance of the fresh evidence because they have failed to establish the first of the prerequisites for its admission since they were not duly diligent in its pursuit.

[11] In the circumstances, I am not convinced that this is an appropriate case to exercise our exceptional discretion to admit the fresh evidence that the appellants seek to tender. As noted at paragraphs 70-72 of *Barendregt*, it is only in rare and exceptional circumstances, where the interests of justice so require, that an appellate court should exercise its discretion to admit evidence that could have been tendered in the court below if the party seeking to adduce it had been duly diligent. In my view, there are no rare and exceptional circumstances in this case that would warrant the exercise of discretion.

[12] I would accordingly dismiss the appellants' motion, with costs.

II. The Appeal

[13] Turning to the merits of the appeal, contrary to what the appellants contend, I see no error that would permit this Court to intervene to vary the penalty imposed by the Federal Court.

[14] In *Simon v. Bacon St-Onge*, 2023 CAF 1, [2023] A.C.F. n° 17 (QL) [*Simon*], this Court recently outlined the bounds of permissible appellate review of penalties for contempt, noting that the principles from the criminal sentencing context are applicable and thus that great deference is to be accorded to a sentencing judge. Hence, an appellate court cannot intervene simply because it might have imposed a different penalty or might have weighed the relevant factors differently. Instead, absent an extricable error of law, intervention is only warranted where an appellate court is convinced that the penalty is demonstrably unfit or clearly unreasonable (*Simon* at paras. 6-12).

[15] In *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 , the majority of the Supreme Court of Canada underscored at paragraph 12 that, "… if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts." Thus, appellate courts must be deferential in cases such as the present.

[16] Here, I am of the view that the Federal Court applied the correct principles in determining the appropriate penalty.

[17] Contrary to what the appellants submit, I am not convinced that the Federal Court needed to say more about the need for general deterrence or inappropriately disregarded this factor, particularly in light of the relatively little evidence tendered by the appellants regarding the claimed need to more severely penalize contemptuous behaviour similar to that of the respondents due to the alleged propensity for such behaviour. On this point, there was little evidence beyond the situation of Mr. Wesley, who breached the same injunction (*Bell Canada v. Wesley (d.b.a. MtlFreeTV.com)*, 2016 CF 1379 [*Wesley*]), and general statements in the affidavits tendered by the appellants regarding the claimed need for more severe penalties for contemptuous conduct like that of the respondents.

[18] Indeed, in making this submission, the appellants conflate to a certain extent the purposes of penalties for contempt with the civil remedy of damages available for copyright infringement. The purpose of a sentence for contempt is to foster compliance with court orders by sanctioning those who flout them (*Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 30, *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 at para. 35). Civil damages for copyright infringement, on the other hand, seek to compensate plaintiffs whose copyright is infringed and to more generally dissuade infringement. Much of the appellants' evidence spoke to the alleged prevalence of copyright infringement as opposed to the alleged frequency of breach of court injunctions.

[19] Nor is the penalty imposed by the Federal Court so disproportionate that it cannot stand when the evidence that was before that Court is considered.

[20] The Federal Court knew only that the respondents were operating on a commercial basis, had a bricks and mortar office, and had offered for sale and presumably sold the infringing products at several trade and home shows, flea markets, over the internet and through their bricks and mortar location. The Federal Court also had evidence of the lifestyle enjoyed by Mr. Adwokat, which included stays in expensive hotels and first class air travel. However, the Federal Court had no concrete information as to the actual magnitude of Red Rhino's sales made in violation of the injunction.

[21] The Federal Court found that the respondents were carrying on a more sophisticated and commercial operation than Mr. Wesley (who was sentenced to fines of $15,000.00 and $30,000.00 for two successive instances of contempt of the same injunction in *Wesley*, above, and *Bell Canada v. Wesley (d.b.a. MtlFreeTV.com)*, 2018 FC 861).

[22] The Federal Court noted the differences between the two cases, and found that the more commercial and sophisticated nature of the respondents' operations weighed in favour of a more severe penalty but that the two successive findings of contempt in Mr. Wesley's case were more serious. Weighing this as well as the penalties imposed in other cases, the Federal Court fined the respondents $40,000.00.

[23] In my view, when one considers the evidence that was before the Federal Court, the penalty it selected cannot be said to be so disproportionate as to be unfit.

[24] I note in this regard that the range of penalties imposed by the Federal Court in many previous and subsequent cases for acts of contempt for breach of an injunction issued to protect a plaintiff's intellectual property rights range, in 2023 dollars, from a little over $1,500.00 to approximately $190,000.00. The latter sum was imposed in *Apotex Inc. v. Merck & Co. Inc.*, 2003 FCA 234, 227 D.L.R. (4th) 106, on a large, corporate defendant who earned several million dollars in breach of a judgment. The majority of fines levied by the Federal Court are at the lower end of the range. Cases where sentences were imposed in somewhat similar circumstances to those in the case at bar are summarized in the Appendix A to these reasons, along with cases from the Ontario courts, which have imposed prison sentences for somewhat similar acts of contempt.

[25] Before this Court, the appellants no longer seek a penalty of imprisonment and rather seek to have this Court vary the fine imposed, to increase it by $200,000.00.

[26] In my view, this is uncalled for because the $40,000.00 fine leveled in the case at bar is not clearly disproportionate with those levied in other cases when one considers the facts that were before the Federal Court in the instant case.

[27] That said, had the additional evidence that the appellants seek to adduce on appeal been before the Federal Court, I am of the view that a stiffer penalty may well have been appropriate

and might have included a period of incarceration or a much greater fine. In the absence of such evidence, though, I believe there is no basis to interfere with the Federal Court's Order.

[28] Before closing, I wish to comment on the Dissenting Reasons of my colleague, Justice Goyette, which I have read in draft.

[29] I cannot agree with her proposed disposition because it fundamentally misconceives the role and authority of this Court. I do not see how we could increase the costs award made by the Federal Court, when that award was not appealed and the appellants did not seek to vary it, or award imprisonment, when that was not ever at issue before us. While the case law from the Ontario courts was discussed before us, the appellants no longer sought imprisonment and there was never any question or discussion of the possibility that this Court might impose a term of imprisonment on Mr. Adwokat.

[30] The disposition proposed by Justice Goyette would accordingly fundamentally violate the respondents' procedural fairness rights. The Dissenting Reasons would result in the respondents finding themselves subject to a much increased costs award, and in the case of Mr. Adwokat, to imprisonment, when the possibility of these remedies being awarded by this Court was never in issue before us.

[31] A court cannot raise a new legal issue in its decision that was not raised by either party or by necessary implication or seek to award remedies that were not requested without first raising the issue with the parties and giving them the right to make submissions: *R. v. Mian*, 2014 SCC

54, 377 D.L.R. (4th) 385 at paras. 41, 54; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, 384 D.L.R. (4th) 1 at para. 26; *Adamson v. Canada (Human Rights Commission)*, 2015 FCA 153, 255 A.C.W.S. (3d) 956 at para. 89; *CSX Transportation, Inc. v. ABB Inc.*, 2022 FCA 96, [2022] F.C.J. No. 870; *Vidéotron Ltée c. Technologies Konek Inc.*, 2023 CAF 92, [2023] A.C.F. no 576).

[32] Thus, this Court cannot, on its own motion, award the remedies my colleague seeks to impose.

[33] I also am of the view that the Dissenting Reasons fail to understand the role of an appellate Court and the limits of its authority to intervene in factual matters.

[34] We are not tasked with drawing inferences, which is the sole province of a trial court. Nor can we set aside factual determinations made by the Federal Court simply because we would have reached a different conclusion. The decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 [*Housen*], at paragraphs 19 to 35 makes it clear that factual inferences made – or not made – by a trial court cannot be interfered with in the absence of a palpable and overriding factual error.

[35] There is no such error in the Federal Court's refusal to draw the inference of continued contemptuous behaviour by the respondents in the case at bar. There was no evidence before the Federal Court directly establishing that the respondents were involved with what my colleague terms copycat companies. In the absence of such evidence, the Federal Court's decision to

decline to infer continued contemptuous behaviour by the respondents is not a palpable and overriding error.

[36] As this Court noted in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*], declining to draw an inference, absent a logical error or disregard of the evidence, is not a palpable error. The following conclusion reached at paragraphs 79-80 of *Mahjoub* applies equally to the case at bar:

> In this Court, Mr. Mahjoub frequently invites this Court to reassess and reweigh the evidence before the Federal Court and to substitute its fact-finding and exercises of discretion for that of the Federal Court …. Sometimes he asks this Court to draw factual inferences the Federal Court declined to draw …, to find more prejudice on the facts than the Federal Court was willing to find …, to assume the Federal Court disregarded evidence that it did not mention …, to allege the Federal Court misconceived evidence in order to encourage this Court to substitute its own factual finding for that of the Federal Court, … and to challenge credibility findings…
>
> The invitations must be declined. They tempt us to travel down a road the law forbids to us. Unless we see legal error, the only road we can travel is one in the direction of palpable and overriding error.
>
> [emphasis added]

[37] In the case at bar, the Federal Court carefully considered the evidence adduced by the appellants demonstrating the alleged connection between the copycat companies and the respondents. The Federal Court evaluated this evidence in light of its assessment of the credibility of Mr. Adwokat and acknowledged doubts as to Mr. Adwokat's credibility, but found that continued contempt had not been established on a balance of probabilities (Federal Court Reasons at paras. 47-50).

[38] In my view, it is particularly significant that the Federal Court evaluated the evidence relied on by Justice Goyette against an apology given by Mr. Adwokat, acknowledging that his conduct was wrongful. The Federal Court noted, “Mr. Adwokat reiterated this apology in his testimony before me on March 10, 2021. He added that he also apologized for making it difficult for the plaintiffs to serve him with documents in connection with this matter” at paragraph 45. The Federal Court then found that, despite some doubts as to Mr. Adwokat’s credibility, “I accept as sincere his statement that he now recognizes the error of his ways, that he has not engaged in conduct contrary to the injunction since November 2019, and that he will not do so in the future” (Federal Court Reasons at para. 50). The Federal Court thus determined that this expression of remorse should be accorded some weight, even in light of some possible connection with copycat companies.

[39] The Dissenting Reasons suggest overturning the Federal Court’s appreciation and weighing of these elements of the evidence. The Dissenting Reasons do not demonstrate the deference that is due from an appellate court to a trial court, nor do the Dissenting Reasons acknowledge the privileged position of the Federal Court in hearing *viva voce* testimony. Instead, the Dissenting Reasons imagine this Court to be in an equally good position relative to the Federal Court to appreciate this case’s extensive evidentiary record and recalibrate the weight given to the various elements of the record to draw an inference the Federal Court declined to draw. This seems to me to be directly contrary to the teachings of *Housen* at paragraphs 10-14, which emphasize the relatively disadvantaged position of appellate courts when it comes to making findings of fact, which animates the standard of palpable and overriding error.

[40] For these reasons, I find that the "error" identified by the Dissenting Reasons cannot be properly characterized by this Court as an error at all, much less as one of a palpable and overriding nature. As put succinctly by the majority of the Supreme Court in *Salomon v. Matte-Thompson*, 2019 SCC 14 at paragraph 33, "[t]he fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made."

[41] We therefore cannot draw the inference the Federal Court refused to draw. Without this inference, one cannot say that the sentence imposed by the Federal Court was clearly disproportionate.

III. Proposed Disposition

[42] Thus, I would dismiss this appeal and the motion, both with costs.

[43] The respondents may serve and file costs submissions of no more than ten pages, within ten days of the date of these Reasons, and the appellants may file responding submissions of equal length within ten days of receipt of the respondents' submissions. The respondents may file a reply to the appellants' responding submissions, of no more than three pages, within five days of receipt of the appellants' responding submissions.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

GOYETTE J.A. (Dissenting Reasons)

[44] I reach a different result from my colleagues.

[45] Appellate courts can modify a sentence when:

> (1) the sentencing judge made an error in principle, *i.e.* an error in law, a failure to consider a relevant factor, or an erroneous consideration of a factor, and this error had an impact on the sentence; or
>
> (2) the sentence is demonstrably unfit.
>
> (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424 [*Friesen*] at para. 26.)

[46] In this case, the sentence of the Federal Court must be modified.

[47] The primary purpose of imposing sanctions for civil contempt is to ensure compliance with court orders: *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79 at paras. 31, 41; *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2021 FC 1346 [*P.S. Knight*] at para. 15. To this end, specific and general deterrence are key factors to consider, especially in content piracy matters: *Apotex Inc. v. Merck & Co. Inc.*, 2003 FCA 234 [*Merck*] at paras. 85-89, leave to appeal refused, [2003] S.C.C.A. No. 366 (S.C.C.); *Dish Network LLC et al. v. Gill et al.* (27 April 2018), Hamilton CV-13-40368 (Ont. S.C.) [*Dish Network*] at pp. 3, 16-17; *Trans-High Corporation v. Hightimes Smokeshop and Gifts Inc.*, 2015 FC 919 at para. 25; *Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc.*, 28 A.C.W.S. (3d) 321, 37 C.P.R. (3d) 8 (F.C.T.D.) at paras. 23-24; *DIRECTV Inc. v. Boudreau*, 2005 CarswellOnt 7026 (Ont. S.C.) [*DIRECTV*] at para. 7, varied in

[2006] O.J. No. 1583, 2006 CarswellOnt 2391 (Ont. C.A.); *Echostar Communications Corporation v. Rodgers*, 2010 ONSC 2164 at paras. 60-63.

[48] Specific and general deterrence will ensure that the contemnor and others who would be tempted to commit contempt do not form the view that court orders can be defied without consequences: *Merck* at para. 89; *Bell Canada et al. v. Vincent Wesley DBA MtlFreeTV.com* (28 August 2018), Ottawa T-759-16, Doc. 395 (F.C.) at para. 31; *9038-3746 Quebec Inc. v. Microsoft Corporation*, 2010 FCA 151 at paras. 18-19, leave to appeal dismissed, *Carmelo Cerrelli v. Microsoft Corporation*, 2010 CanLII 77120 (S.C.C.).

[49] In the case at bar, I find that the Federal Court either failed to apply the principle of deterrence or did not have, in law, the correct understanding of deterrence. This had an impact on the sentence. Otherwise, given the deplorable aggravating circumstances before it, a much more significant sentence would have been imposed on Mr. Eric Adwokat — the directing mind of Red Rhino Entertainment Inc. (Red Rhino). The Federal Court's fine of $40,000 is demonstrably unfit.

[50] This error of law and demonstrably unfit sentence allow this Court to perform its own sentencing analysis to determine a fit sentence that relies on the Federal Court's findings of fact to the extent that they are not affected by an error in principle: *Friesen* at paras. 26-28; *Federal Courts Act*, R.S.C. 1985, c. F-7, para. 52*(b)*(i).

[51] The respondents' conduct was evasive, defiant, and egregious. They continued to act in contempt even after the Federal Court found them guilty. In these circumstances, a fine is meaningless. The only fit sentence is incarceration: *Dish Network*; *DIRECTV*.

I. The Respondents' Conduct Was Evasive, Defiant, and Egregious

[52] This is a case of evasive, defiant, and egregious conduct. To use the words of the Federal Court, the respondents' conduct fell at the high end of the scale of objective gravity and moral blameworthiness: *Bell Canada v. Red Rhino Entertainment Inc*., 2021 FC 895 [*Sentencing Decision*] at paras. 25, 32. I note:

- The respondents built their business around an illegal activity: the configuring, marketing and selling of devices (set-top boxes) and subscriptions to IPTV services that provide unauthorized access to the appellants' live and on-demand television programming: *Bell Canada v. Red Rhino Entertainment Inc*., 2019 FC 1460 [*Contempt Decision*] at paras. 8, 28, 47;

- In June 2016, the Federal Court issued an interlocutory injunction to refrain from the activities carried on by the respondents: *Contempt Decision* at paras. 5, 71;

- Motivated by financial gain, the respondents wilfully chose to evade the injunction through a large-scale, sophisticated operation that lent an unwarranted and misleading air of legitimacy to an illegal activity: *Sentencing Decision* at paras. 28-29. The Red Rhino set-top boxes, retailed between $350 and $499, were sold with the assistance of some 16 salespersons through at least two brick-and-

mortar locations, at least two websites, at least three third-party distributors, and at sales booths at numerous high-traffic commercial events in some 32 North American cities (the "shows") to which Mr. Adwokat and the salespersons flew "chilling in first class": see Screen Capture of Mr. Eric Adwokat's Facebook Page, Appeal Book, vol. 4, TX-145, Exhibit NS-1, at 1293; and

- They did so in plain view for at least 32 months: *Contempt Decision* at paras. 28, 68.

[53] In addition, the respondents made a concerted effort to thwart the appellants' ability to enforce their legal rights and protect their legitimate economic interests, namely, by:

- Evading service of Court documents more than 30 times over a period of 28 months: *Contempt Decision* at para. 68; *Sentencing Decision* at para. 34; see Affidavits of Attempted Service, Appeal Book, vol. 5, TX-162 to TX-165, at 1739 to 1753, and TX-169 to TX-174, at 1777 to 1814;

- At the eleventh hour of the contempt hearing, filing notices of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the BIA) in "ill-conceived attempts to frustrate the exercise of the [Federal] Court's duty to ensure that its orders are respected": *Contempt Decision* at para. 68 *in fine*;

- Arranging to deprive the victims of their contemptuous activities from claiming compensatory damages by showing $201 of assets in their names and not a dollar in a bank account: Statement of Affairs of Red Rhino, Appeal Book, vol. 7,

Exhibit AM-27, at 2338-2351; Red Rhino's Income Tax Assessments, Appeal Book, vol. 7, Exhibit AM-30, at 2362-2382; and

- Constantly lying to the Federal Court: *Contempt Decision* at paras. 51, 57, 64; *Sentencing Decision* at paras. 32, 35-37, 46, 47, 50, 65, 67.

II. The Respondents Continued to Act in Contempt

[54] In addition to the evasive, defiant, and egregious conduct described above, the only logical inference from the circumstantial evidence before the Federal Court, which the Court failed to draw, is that contempt was continuing at the time of the sentencing hearing. I therefore disagree with the conclusion that contempt has been purged.

[55] Shortly after having been found guilty of contempt, Mr. Adwokat left the country. He attended the sentencing hearing in March 2021 from Costa Rica where he had been living for a year: *Sentencing Decision* at para. 65; Cross-examination of Mr. Eric Adwokat, Appeal Book, vol. 11, at 3926, lines 10-18, and at 3930 to 3939. In parallel, between June 2019 and mid-2020, copycat companies of Red Rhino appeared — that is, companies selling the same products through quasi-identical websites and using the same marketing strategy. Access to Red Rhino's website is automatically redirected to one of the copycat companies' websites, and two of these copycats accept Red Rhino credentials. With one exception (Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1887, at paras. 110-111, referring to Exhibit AM-58, at 2707-2730), these copycat companies are incorporated outside of Canada, share the same phone number, and obfuscate the identity of their operators to the public. The one copycat company incorporated in

Canada is, by an "inexplicable coincidence", owned by a friend of Mr. Adwokat's brother and operates in Costa Rica through a subsidiary: *Sentencing Decision* at paras. 47-48; see generally Appendix B.

[56] The Federal Court found a connection between these copycat companies and the respondents: *Sentencing Decision* at paras. 47-49. The Court also found that Mr. Adwokat lied by denying the connection: *Sentencing Decision* at para. 47 *in fine*. However, because it did not know "on a balance of probabilities what exactly that connection is", the Federal Court ruled that that there was "no evidence that [Mr. Adwokat] engaged in any offending conduct since [the contempt decision]": *Sentencing Decision* at paras. 47, 49. I disagree.

[57] From the moment that there is evidence of (1) companies pursuing Red Rhino's activities beyond the contempt decision, and (2) a connection between such companies and Mr. Adwokat, I fail to see what else is needed to conclude that the contemptuous activities are continuing: see Appendix C. This is particularly true when the person who can best provide additional information about the connection, Mr. Adwokat, is lying about the connection: *Sentencing Decision* at para. 47 *in fine*; see *Barendregt v. Grebliunas*, 2022 SCC 22 [*Barendregt*] at para. 60. Thus, by failing to draw the proper inference from the evidence, the Federal Court made a palpable error in fact which led it to disregard continuous contempt — an aggravating factor. This palpable error is inextricably linked to the Federal Court's failure to apply the principle of deterrence. As a result, this Court does not owe deference to the Federal Court's finding regarding continuous contempt: *Friesen* at para. 28; *R. v. Makokis*, 2020 ABCA 330 at para. 15 *in fine*; *R. v. Batstone*, 2022 BCCA 171 at para. 49; *R. v. Stevic*, 2022 BCCA 45 at para. 11; *R. v.*

R.O., 2023 BCCA 65 at para. 35. Continuous contempt demonstrates a callous disregard for court orders and weighs heavily towards incarceration: *Dish Network* at pp. 2, 14; *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 137 at para. 42 [*Polsat*]; *P.S. Knight* at paras. 19(ix), 20.

III. The Principle of Restraint Cannot Apply

[58] Despite the principle of restraint in the use of incarceration (*Criminal Code*, R.S.C. 1985, c. C-46, paras. 718.2(*d*) and (*e*); Clayton Ruby, *Sentencing* 10th ed. (Toronto: LexisNexis, 2020) at para. 13.9; *R. v. Sharma*, 2022 SCC 39 at para. 60; *Tremaine v. Canada (Human Rights Commission)*, 2014 FCA 192 [*Tremaine*] at para. 36), the analysis above shows that the elements supporting a sentence of incarceration are present: *DIRECTV*; *Dish Network*. In all likelihood, incarceration would have been imposed by the Ontario courts on Mr. Adwokat had this matter been adjudicated by these courts: *Dish Network* at p. 14; *DIRECTV*. Federal courts, including our Court, have been much more lenient. In civil contempt cases involving copyright matters, I am only aware of three Federal court cases that ordered incarceration, but only if certain conditions were not met: *Lari v. Canadian Copyright Licensing Agency*, 2007 FCA 127 [*Lari*]; *P.S. Knight*; *Polsat*. This conflict in approach between these courts should no longer continue. The Federal Court should not be a safe haven for persons in contempt.

[59] A fine is not an appropriate alternative when a contemnor's conduct, in addition to being egregious, evasive, and continuous, hinders a court's ability to determine a fine that achieves deterrence: *Borer v. Nelson*, 2020 ONSC 4259 at para. 22; *Majormaki Holdings LLP v. Wong*, 2009 BCCA 349 at paras. 8, 25; *Cellupica v. Di Giulio*, 2011 ONSC 1715 at paras. 15, 41, 48.

"Hindrance" aptly describes the respondents' conduct. They chose not to produce any financial information to the Federal Court: *Sentencing Decision* at para. 64 *in fine*. Despite the appellants' numerous requests, the respondents did not comply with their obligation under paragraph 158(*b*) of the BIA to provide the trustee in bankruptcy, and by the same token the appellants, with the books and records relating to their property or affairs: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1868 and 1869, at paras. 74-76; E-mail Exchanges Between Appellants' Counsel and Trustee in Bankruptcy, Appeal Book, vol. 7, Exhibit AM-28, at 2352.

[60] Against this refusal to provide financial information, Mr. Adwokat sent a clear message on social media and to whoever observed the respondents' activities that their business was highly profitable, that money was no object to them: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1867-1868, at paras. 70-71; Mr. Adwokat's Trips Posted on Facebook, Appeal Book, vol. 7, Exhibit AM-25, at 2325-2332; Mr. Adwokat's Use of Vehicles Posted on Facebook, Appeal Book, vol. 7, Exhibit AM-26, at 2333-2336.

[61] The appellants, through affidavits of numerous investigators supported by hundreds of exhibits, tendered all the evidence that they could access to show the magnitude of the respondents' contemptuous activities and the lavish lifestyle that these activities provided to Mr. Adwokat. Yet, this evidence does not allow for the determination of a fine that would achieve deterrence. This determination requires financial information that is held exclusively by the respondents, but they chose not to provide it.

[62] Given the respondents' choice to not produce the required financial information, their deplorable conduct, and continuous contempt, I find that the only fit sentence to deter and drive home that Canadian courts enforce their orders is a sentence of incarceration for Mr. Adwokat.

[63] While the evidence does not allow for the determination of a fine that would achieve deterrence, it is clear that the $40,000 fine imposed by the Federal Court is demonstrably unfit. Indeed, this amount seems to be close to the sales that the respondents would make at a commercial event in one day: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1868, at paras. 57-59; Photos of Red Rhino's Sales Force, Appeal Book, vol. 7, Exhibit AM-20, at 2282-2298; Photos of Containers Filled With Red Rhino Set-top Boxes, Appeal Book, vol. 7, Exhibit AM-21, at 2299-2301; Statement of Events Describing Purchase of Red Rhino Set-top Box, Appeal Book, vol. 3, TX-130, at 1097-1109.

[64] In other words, a $40,000 is a "mere licence fee, which other [individuals and] corporations, in contemplation of similar activity, can simply budget for": *Merck* at para. 89.

IV. Jurisdiction to Order Incarceration

[65] Before this Court, the appellants seek "further and other relief as […] this Honourable Court may consider just": Appellants' Notice of Appeal, at para. 4; see *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 41-42. After applying the principles of sentencing afresh to the facts, the sentence that I consider just is incarceration: *Friesen* at para. 27; *Tremaine* at para. 19.

[66] I acknowledge that the appellants no longer ask for incarceration on appeal. However, the sentence of incarceration remains a remedy sought in their Notice of *Ex Parte* Motion (see Appeal Book, vol. 1, at 207, at para. 2b)) which this Court must pronounce on since it must now make the judgment the Federal Court should have made: *Federal Courts Act*, para. 52*(b)*(i). And while sentencing is for this Court to decide in light of the parties' submissions, it is also in the public interest and in defence of orders of the Federal Court. In other words, the public nature of civil contempt requires me to order a sentence that transcends the interests of the parties: *Droit de la famille — 21819*, 2021 QCCA 759 [*Droit de la famille*] at para. 56; *Vidéotron Ltée. v. Industries Microlec Produits Électroniques Inc*., [1992] S.C.J. No. 79, [1992] 2 S.C.R. 1065 at p. 1076; *Business Development Bank of Canada v. Cavalon Inc*., 2017 ONCA 663 at para. 79, application for leave to appeal dismissed, *Robyrt Regan v. Business Development Bank of Canada*, 2018 CanLII 71041 (S.C.C.). As well, the parties had the opportunity to adduce evidence and thoroughly debated the issues relating to the appellants' original request for incarceration. Thus, procedural fairness has been respected: *Droit de la famille* at para. 57; *Brégaint c. Daoust*, 2016 QCCA 721 at paras. 27-28.

V. Motion to Adduce New Evidence Is Not Necessary

[67] As a result of the conclusion above, there is no need for me to take a position on the appellants' motion to adduce new evidence. How many more cat-and-mouse games do we need to play? In these circumstances, I would dismiss the motion — it is unnecessary: *Barendregt* at para. 29, citing *Palmer v. The Queen*, 106 D.L.R. (3d) 212, [1980] 1 S.C.R. 759 at 775.

VI. Imposition of Costs

[68] As for costs, the appellants incurred $690,620.51 (excluding tax) in legal fees plus $39,423.12 in disbursements relating to the contempt proceedings: *Sentencing Decision* at para. 73. Before the Federal Court, they did not seek solicitor-client costs even though it is customary to claim such costs in civil contempt cases: *Sentencing Decision* at para. 74; see *Lari* at para. 38 and cases cited therein. Rather, they claimed a partial indemnity of an all-inclusive lump amount of $400,000: *Sentencing Decision* at para. 73. I see no reason why the appellants should not have been entitled to their costs at that amount.

[69] The Federal Court imposed costs of $35,000: *Sentencing Decision* at para. 79. This amount does not even cover the appellants' disbursements for which the respondents' conduct was largely responsible (*Dreco Energy Services Ltd. v. Wenzel*, 2005 ABCA 185 at para. 11), *e.g.* by evading legal service more than 30 times. I agree with the Federal Court that costs should not be a disincentive for a person of limited means to defend oneself against contempt charges: *Sentencing Decision* at paras. 75-76. However, the respondents are not persons of limited means. Moreover, imposing low costs on contemnors in a situation similar to the present will tell victims, especially copyright owners of limited means (*e.g.* new technology start-ups), to not bother protecting their legal rights and assisting the Federal Court in enforcing its orders: see *Lari* at para. 38 and cases cited therein.

VII. Proposed Disposition

[70] I would allow the appeal, set aside the judgment of the Federal Court dated September 1, 2021 in file T-759-16, and in making the judgment that the Federal Court should have made,

grant in part the custodial sentence sought by the appellants in their motion for civil contempt by issuing a Warrant of Committal for Mr. Eric Adwokat who shall be arrested and incarcerated for a period of fifteen (15) days, to be served continuously: see *Federal Courts Act*, para. 52(*b*)(i); see Notice of *Ex Parte* Motion, Appeal Book, vol. 1, at 207, at para. 2b); *Sentencing Decision* at para. 3.

[71] Given that I set aside the sentencing judgment, any award of costs included in that judgment should also be set aside. Therefore, I would grant the appellants their costs in the Federal Court in the amount of $400,000 and costs in this Court in the amount of $50,000: *Federal Courts Rules*, SOR/98-106, Rule 400(1); *Federal Courts Act*, para. 52(*b*)(i); *Eli Lilly Canada Inc. v. Novopharm Limited*, 2010 FCA 219 at para. 13d.

"Nathalie Goyette"

J.A.

APPENDIX A

Decision	Context	Sentence
Federal		
Baxter Travenol Laboratories of Canada Ltd v. Cutter (Can.) Ltd., [1987] F.C.J. No. 205, 3 A.C.W.S. (3d) 326	After a patent infringement case that ordered an injunction, Defendant failed to deliver up infringing goods (blood bags) and sold them at a value of $1 million	$50,000 **2023 value: $114, 850.75**
Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc. (1990), 37 C.P.R. (3d) 8, 28 A.C.W.S. (3d) 321 (FCTD)	Sold luxury brand products (bags) in violation of order restraining trademark infringement	$5,000 **2023 value: $10,032.59**
Canada (Attorney General) v. de l'Isle, [1994] F.C.J. No. 955, 56 CPR (3d) 371 (FCA)	Violated permanent injunction by continuing to commit offences contrary to *Food and Drugs Act* i.e. publishing a drug directory (for alternative medicine)	3 months imprisonment for individual $50,000 for corporation **2023 value: $89,372.82**
Manufacturers Life Insurance Co. v. Guaranteed Estate Bond Corp., [2000] F.C.J. No. 172, [2000] A.C.F. No 172 (FCTD)	Continued to infringe trademarks by selling insurance products and related financial services	$5,000 **2023 value: $8,229.95**
Lyons Partnership, L.P. v. MacGregor, [2000] F.C.J. No. 341, 186 F.T.R. 241 (FCTD)	Dressed up as Barney at a performance, despite injunction to not do so (copyright infringement), and had material in breach of injunction	$3,000 **2023 value: $4,937.97**
Desnoes & Geddes Ltd. v. Hart Breweries Ltd., [2002] F.C.J. No. 869, 2002 FCT 632	Company infringed registered trademarks by distributing and selling alcoholic beverages with certain words and designs The individual aided and abetted company	$2,000 for individual **2023 value: $3,153.69** $4,000 for corporation **2023 value: $6,307.38**

Apotex Inc. v. Merck & Co. Inc., 2003 FCA 234, 227 D.L.R. (4th) 106	Sale of a drug in contravention of a finding made in reasons for judgment before the judgment was issued and entered, with sales equal to $9,000,000.00	$125,000 **2023 value: $188,602.94**
Chum Ltd. v. Stempowicz, 2004 FC 611, [2004] F.C.J. No. 732	Defendant is in contempt for continuing to sell and service equipment and devices allowing access to DIRECTV	$25,000 **2023 value: $37,245.89**
Brilliant Trading Inc. v. Wong, 2005 FC 1214, 42 C.P.R. (4th) 215	Defendants failed to obey order to cease using, advertising, marketing, or selling wares associated with plaintiff's trademark	$10,000 **2023 value: $14,615.38**
Telewizja Polsat S.A. v. Radiopol Inc., 2006 FC 137, [2006] F.C.J. No. 257	Decoded encrypted subscription programming without authorization	$10,000 and 6 months imprisonment (no prison if takes down the website in 5 days) for individual **2023 value: $14,223.66** $25,000 for corporation **2023 value: $35,559.15**
Dursol-Fabrik Otto Durst GmbH Co. v. Dursol North America Inc., 2006 FC 1115, 151 A.C.W.S. (3d) 585	Breached prohibition orders to market, sell, and deliver up metal polish and other wares	$20,000 for individual and corporation, jointly and severally **2023 value: $28,447.32**
Canadian Copyright Licensing Agency v. U-Compute, 2007 FCA 127, 156 A.C.W.S. (3d) 1064	Third time breach of Anton Piller order to refrain from unauthorized copying and selling of textbooks; also did not allow access to business premises for inspection	6 months imprisonment, suspended if obeys permanent injunctions and performs 400 hours of community service
Bell Canada v. Wesley dba MtlFreeTV.com, 2016 CF 1379	Breached interlocutory injunction by continuing to sell set-top boxes that facilitated unauthorized access to copyrighted content	$15,000 **2023 value: $18,205.84**

Bell Canada v. Vincent Wesley dba MtlFreeTV.com, 2018 FC 861	Breached interlocutory injunction by continuing to sell set-top boxes that facilitated unauthorized access to copyrighted content for the second time	$30,000 **2023 value: $35,056.95**
Canadian Standards Association v. P.S. Knight Co. Ltd., 2021 FC 1346, 193 C.P.R. (4th) 236	Charged with three counts of contempt for disobeying terms of a judgment issued in a copyright infringement proceeding (para 6), i.e. selling copyrighted materials and failing to deliver up materials (para 11)	$100,000 and imprisonment of individual respondent for 6 months suspended if purges contempt in 10 days **2023 value: $111,360.35**
Ontario		
DIRECTV Inc. v. Boudreau, [2006] O.J. No. 1583, 2006 CarswellOnt 2391 (Ont. C.A.)	Breached injunction by operating satellite piracy business and order to attend sentencing hearing	Imprisonment of 3 months
Dish Network L.L.C. v. Ramkissoon, 2010 ONSC 5205, 194 A.C.W.S. (3d) 463	Husband and wife in contempt of two Anton Piller orders in the context of very serious satellite pirating theft	Imprisonment of 4 months for one individual and 2 months for another individual
Dish Network L.L.C. v. Gill, unreported reasons dated April 27, 2018, docket CV-13-40368 (Ont. S.C.)	Breached permanent injunction by advertising piracy technology and illegal subscriptions, sold one illegal device to access encrypted satellite TV, and assisted third parties to operate the single device sold (p. 1)	Imprisonment of 4 months
Dish Network L.L.C. et al. v. Butt et al., 2022 ONSC 1710	In contempt for streaming TV and movie content under "Shava TV", which belonged to Dish Network, by selling set-top boxes	Conditional discharge subject to probation of 2 years less a day
Note: 2023 values were calculated using the Bank of Canada Inflation Calculator at https://www.bankofcanada.ca/rates/related/inflation-calculator. This tool uses the monthly consumer price index information from 1914 o the present.		

APPENDIX B

Evidence that the Respondents Continued to Act in Contempt Through Copycat Companies

B.1 Copycat companies of Red Rhino appeared:
Warranty Services Ltd: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1877, at para. 92; Similarities between Red Rhino's website and Warranty Services Ltd.'s website, Appeal Book, vol. 7, Exhibit AM-41, at 2485-2490;
New Pay Group LLC: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1879, at paras. 96-97; Similarities Between Red Rhino's Website and New Pay Group LLC's Website, Appeal Book, vol. 7, Exhibits AM-44.1 to 44.12, at 2504 to 2528;
Lime Juice Box: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1882, at paras. 104-107, referring to Similarities Between Red Rhino's Website and Lime Juice Box Websites, Appeal Book, Exhibit AM-53, at 2701-2707.
B.2 Access to Red Rhino's website is automatically redirected to one of the copycat companies' websites, and two of these copycats accept Red Rhino credentials:
Warranty Services Ltd: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1875 at paras. 88-89, and 1878 at para. 93, referring to Printouts of Access to Website of Warranty Services Ltd. Using Red Rhino Credentials, Appeal Book, vol. 7, Exhibits AM-42.1 to AM-42.5, at 2491 to 2501;
New Pay Group LLC: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1880, at para. 98, referring to Printouts of Access to Website of New Pay Group LLC Using Red Rhino Credentials, Appeal Book, vol. 7, Exhibits AM-45.1 to AM 45.5, at 2529 to 2539.
B.3 Copycat companies are incorporated outside of Canada:
Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1879 at para. 95, 1881 at para. 97, and 1880 at para. 100, referring to Exhibit AM-47, vol. 7, at 2540; see also Exhibits AM-40.1 at 2459 to AM-40.9 at 2477.
B.4 Copycat companies share the same phone number:
Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1881, at paras. 101-102, referring to Exhibit AM-40.1, vol. 7, at 2459-2461, Exhibit AM-44.1, vol. 7, at 2504-2506, and Exhibit AM-48, vol. 7, at 2572-2573.
B.5 Copycat companies obfuscate the identity of their operators to the public:
Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1878 at para. 94 (referring to Exhibit AM-43, Appeal Book, vol. 7, at 2503), 1881 at para. 99, and 1886 at para. 108 (referring to Exhibits AM-54 to 56, Appeal Book, at 2708-2714).
B.6 Another copycat company operates in Costa Rica:
Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1887-1888, at paras. 111-115, referring to Exhibits AM-59 to 62 of Appeal Book, at 2731-2967; see: Lime Juice Box Costa Rica Facebook Page, Appeal Book, Exhibit AM-62, at 2966.

APPENDIX C

Evidence of Companies Pursuing Red Rhino's Activities Beyond the Contempt Decision

November 21, 2019: Access to Red Rhino Warranty's website was automatically redirected to Warranty Services Ltd.'s website: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1875, at para. 89, citing Appeal Book, vol. 7, Exhibit AM-38, at 2455; see also Whois Record for Warranty Services, Appeal Book, vol. 7, Exhibit AM-43, at 2503;
January 2, 2020: Lime Juice Box Costa Rica Facebook Page created, with latest activity on July 1, 2020, and still online as of December 15, 2020: Appeal Book, Exhibit AM-62, at 2965;
March 23, 2020: Lime Juice Box websites created: Anthony J. Martin Investigation Report, Appeal Book, Exhibit AM-63, at 2972; see also Exhibits AM-54 to AM-56, at 2709, 2712, and 2714, and online as of July 8, 2020: Exhibits AM-57.1 to AM-57.3, at 2715-2726;
March 26, 2020: Lime Juice Box USA was incorporated: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1888, at para. 114, citing Appeal Book, Exhibit AM-61, at 2962;
June 16, 2020: Access to Warranty Services Ltd.'s website, New Pay Group LLC's website, and Lime Juice Box's websites is possible: Affidavit of Jason Vallée Buchanan, Appeal Book, vol. 9, at 2975-2980, at paras. 2-6, citing Exhibits JFV-1.1 to JFV-4.15, at 2982 to 3127;
July 10, 2020: Access to Warranty Services Ltd.'s website and New Pay Group LLC's website was possible using Red Rhino credentials: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1878, at paras. 93, 98, citing Appeal Book, vol. 7, Exhibits AM-42.1 to 42.2, at 2492 and 2494, and Exhibits AM-45.1 to 45.2 , at 2530 and 2532;
December 12, 2020: Mr. Adwokat was still the sole director of Red Rhino: Affidavit of Anthony J. Martin, Appeal Book, vol. 6, at 1875, at para. 87, citing Corporation Profile Report for Red Rhino, Appeal Book, vol. 7, Exhibit AM-37, at 2451.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BOIVIN J.A.
DISSENTING REASONS BY:	GOYETTE J.A.
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