

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180220

Docket: A-202-17

Citation: 2018 FCA 42

**CORAM: NOËL C.J.
GAUTHIER J.A.
DE MONTIGNY J.A.**

BETWEEN:

**BELL CANADA
BELL EXPRESSVU LIMITED PARTNERSHIP
BELL MEDIA INC.
VIDÉOTRON S.E.N.C.
GROUPE TVA INC.
ROGERS COMMUNICATIONS CANADA INC.
ROGERS MEDIA INC.**

Appellants

and

ADAM LACKMAN dba TVADDONS.AG

Respondent

Heard at Montréal, Quebec, on November 16, 2017.

Judgment delivered at Ottawa, Ontario, on February 20, 2018.

REASONS FOR JUDGMENT BY:

DE MONTIGNY J.A.

CONCURRED IN BY:

**NOËL C.J.
GAUTHIER J.A.**

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellants Bell Canada, Bell Expressvu Limited Partnership, Bell Media Inc., Vidéotron S.E.N.C., Groupe TVA Inc., Rogers Communications Canada Inc. and Rogers Media

Inc. (the appellants) are appealing the order of Justice Bell of the Federal Court (the Judge) dated June 29, 2017 (Justice Bell's Order or Reasons), whereby he vacated the Anton Piller order granted by Justice LeBlanc on June 9, 2017 (Justice LeBlanc's Order) and dismissed the appellants' motion for an interlocutory injunction. In the underlying action, the appellants alleged that Adam Lackman (the respondent) infringed copyright by communicating and making available to the public the appellants' programs, and by inducing and/or authorizing users of infringing add-ons to initiate acts of infringement through the business it operates under the name TVAddons.ag (TVAddons or the TVAddons website).

[2] Having carefully read the record and considered the written and oral submissions of the parties, I am of the view that the appeal should be allowed. The appellants have established a strong *prima facie* case of copyright infringement for the purposes of the Anton Piller order sought, and the Judge's conclusion to the contrary was based on a misapprehension of the case law and of paragraph 2.4(1)(b) of the *Copyright Act*, R.S.C. 1985, c. C-42 and on overriding and palpable errors in construing the facts. Likewise, the Judge erred in dismissing the motion for an interlocutory injunction and in concluding that the orders were not lawfully executed.

I. Facts

[3] The respondent was involved in the creation and operation of the TVAddons website. The website is a repository of "add-ons", a generic term for a type of software that can be used to supplement other applications with additional functions or features (Affidavit of Adam Lackman at para. 5, Appeal Book, volume 3, tab 26 (Lackman Aff.)). One such application that can be supplemented with add-ons is the KODI media player.

[4] KODI is a software application that can be installed on electronic devices and that allows users to play various types of multimedia content (video, music or pictures, for example). It can read both physical digital media (such as CDs, DVDs or Blu-ray) and digital files (such as MP3 or QuickTime). It is an “open source” software application, and is available for download for free on the Internet. When used in conjunction with add-ons, the KODI media player can be used to access and stream multimedia content hosted on the Internet. These add-ons fall into two categories: non-infringing add-ons, which direct users towards legitimate websites, and infringing add-ons, which direct users towards copyrighted content where the user has no authorized access (Affidavit of Andrew McGuigan at paras. 28-36, Appeal Book, confidential volume 1, tab 6 (Conf. McGuigan Aff.)).

[5] The TVAddons website is a repository of both infringing and non-infringing add-ons. The respondent claims that his website is primarily an Internet forum for users of the KODI application, and has two purposes: (1) providing a forum for the exchange of information between users of KODI about their experiences using this software and its add-ons, and (2) allowing developers of add-ons for KODI to make them available to the users (Lackman Aff. at para. 13). These add-ons are specialized search engines that give access to digital content hosted on other websites, and this content can also be found using other search engines such as Google (Lackman Aff. at paras. 19 and 21). The respondent also insists that the multimedia content accessed by the use of add-ons is not located on the TVAddons website but needs to be accessed and streamed on the Internet by using the KODI application (Respondent’s Memorandum of Fact and Law (Respondent’s MFL) at para. 51).

[6] The appellants, on the other hand, characterized the TVAddons website as a platform for copyright piracy. While it is a source of both infringing and non-infringing add-ons, the website holds itself out as “the best”, “most popular” and “all free” source of such add-ons (Conf. McGuigan Aff. at para. 64). Sixteen out of the 22 add-ons of the “Featured” category of the TVAddons website are reproduced in the appellants’ memorandum of fact and law. The appellants’ expert has tested 12 out of the 22 add-ons in that category and concluded that these 12 add-ons were all infringing (Confidential Appellants’ Memorandum of Fact and Law (Conf. Appellants’ MFL) at para. 33; Conf. McGuigan Aff. at paras. 61, 62, 70 and 71). The add-ons found on the website can be used to access Canadian television stations and live sports as well as on-demand television and motion pictures (Conf. McGuigan Aff. at para. 64).

[7] The TVAddons website also provides two additional features. It offers the “FreeTelly” application, a customized version of KODI that is accessible for download and which the appellants allege is preconfigured with a selection of add-ons that are principally infringing add-ons (Conf. McGuigan Aff. at para. 66). As such, one need not seek out and configure add-ons; access to infringing content is immediate (Conf. McGuigan Aff. at paras. 66-67). TVAddons also produces and supplies to the users guides with information on how to access and use its add-ons, and distributes “Indigo”, a tool which facilitates and automates the installation of add-ons by avoiding the completion of all installation steps (Conf. McGuigan Aff. at paras. 57, 73 and 74).

[8] Following *ex parte* and *in camera* motions, Justice LeBlanc issued an interim injunction on June 9, 2017 which, pursuant to Rule 374 of the *Federal Courts Rules*, S.O.R./98-106, was valid for 14 days. The respondent was enjoined and restrained from communicating or making

available to the public the appellants' programs and inducing or authorizing anyone to initiate acts of infringement of the appellants' rights to communicate their programs to the public by telecommunication. Justice LeBlanc also ordered the respondent to provide his login credentials for the domains and subdomains hosting the TVAddons website, as well as for various social media sites associated with the website. A computer forensics expert was authorized to modify the login requirements for various domains and subdomains, to deactivate the domains and subdomains that hosted the TVAddons website and to take control of the host server.

[9] In addition, Justice LeBlanc issued an Anton Piller order, also valid for 14 days, pursuant to Rule 377 of the *Federal Courts Rules*. It allowed the appellants' solicitors to inspect the respondent's residence, make copies of documents pertaining to the website as well as its financial records, remove certain materials and make mirror images of digital devices. The order also permitted the appellants' solicitors to question the respondent in regards to the location of the information and for names of third parties involved in the development of the TVAddons website, the "FreeTelly" and "Indigo" tools and similar software applications. The execution of the Anton Piller order was to be monitored by an independent supervising counsel hired by the appellants, who would then report to the Court on the motion to review.

II. The impugned decision

[10] At issue before Justice Bell was a motion to review the Anton Piller order and to convert the interim injunction into an interlocutory injunction. As stated by the Judge, his role at that stage was not to decide the merits of the case, but to assess the Anton Piller order on a *de novo* basis after having heard the respondent's point of view. To that effect, he first recalled the four

requirements established by the Supreme Court of Canada in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 35, [2006] 2 S.C.R. 189, and in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at para. 29, [2011] 1 S.C.R. 657: 1) that there be a strong *prima facie* case; 2) that the damage to the plaintiff caused by the defendant's alleged misconduct, potential or actual, be very serious; 3) that there be convincing evidence that the defendant has in its possession incriminating documents or things; and 4) that there be a real possibility that the defendant may destroy such material before the discovery process can do its work. He also set out the well-known tripartite test for interlocutory injunctions laid out in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 and in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (*RJR – MacDonald*).

[11] The Judge was very critical of the way in which the Anton Piller order was carried out. He referred to the questioning of the respondent as an “interrogation” that was tantamount to “an examination for discovery without any of the protections normally afforded to litigants in such circumstances” (Reasons at para. 19). Indeed, the Judge was concerned with the length of the interrogation, the fact that the respondent could not refuse to answer questions under fear of contempt proceedings, that his counsel was not allowed to clarify the answers to questions and that the questions were not really questions but orders. What he found most egregious was that the respondent was asked to provide names of those operating similar websites. He concluded that this question constituted a hunt for further evidence rather than preservation of then existing evidence (Reasons at para. 20).

[12] Before turning to the application of the first requirement for an Anton Piller order, the Judge prefaced his analysis with the following (Reasons at para. 21):

The *Anton Piller (sic)* Order under review was purposely designed by counsel for the Plaintiffs, as admitted by them, to completely shut down the Defendant's operations. To the Plaintiffs, it mattered not that, by their own estimate, just over 1% of the Add-ons developed by the Defendant were allegedly used to infringe copyright. I therefore conclude that the purpose of the *Anton Piller* Order under review was only partly designed to preserve evidence that might be destroyed or that could disappear. I am of the view that its true purpose was to destroy the livelihood of the Defendant, deny him the financial resources to finance a defence to the claim made against him, and to provide an opportunity for discovery of the Defendant in circumstances where none of the procedural safeguards of our civil justice system could be engaged.

[13] The Judge then turned to whether there exists a *prima facie* case. He accepted the respondent's position that his activities fell under the defence to copyright infringement as set out in paragraph 2.4(1)(b) of the *Copyright Act* as interpreted by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (*SOCAN*). He came to that conclusion on the basis of the "forthright manner" (Reasons at para. 22) in which the respondent described his knowledge of the KODI software and because infringing content accessible on the TVAddons website could also be located using Google. As such, the Judge found that the appellants did not meet the high threshold of a strong *prima facie* case. Having reached that conclusion, and given that in his view the Anton Piller order was much broader than only preserving evidence, he did not find it necessary to consider the other elements of the test.

[14] With regards to the interim injunction, the Judge accepted that there exists a serious issue to be tried and that the appellants might suffer irreparable harm if the injunction is not issued, but nevertheless found that the balance of convenience favours the respondent. To reach that

conclusion, the Judge relied on the fact that the respondent has demonstrated that he has an arguable case that he is not violating the *Copyright Act*, that the TVAddons website was his only source of income, and that the appellants seek to neutralize his business. Maintaining the order, in his view, would therefore deprive the respondent of the financial means necessary to mount a defence and would effectively bring the litigation to an end. Finally, he also relied on the appellants' "admission" that the vast majority of add-ons are non-infringing.

III. Issues

[15] This appeal raises the following issues:

- A. *Did the Judge err in vacating the Anton Piller order?*
- B. *Did the Judge err in dismissing the application for an interlocutory injunction?*

IV. Analysis

[16] There is no issue between the parties as to the requirements to issue an Anton Piller order or an interlocutory injunction. Rather, the appellants dispute the application made by the Judge of the legal standards to the facts of this case, and also challenge his findings of fact. It is well established that such questions are subject to the standard of overriding and palpable error (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 37, [2002] 2 S.C.R. 235). This is a highly deferential standard of review. As this Court stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46, 431 N.R. 286:

"Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

A. *Did the Judge err in vacating the Anton Piller order?*

[17] The appellants argue that the Judge misunderstood the nature of the respondent's activities in characterizing him as a software developer who has come up with add-ons that permit users to access material that is for the most part not infringing on the rights of the appellants. The appellants also challenge the Judge's finding that the allegedly infringing add-ons represent "just over 1%" (Reasons at para. 16) of the add-ons developed by the respondent. Finally, the appellants vigorously take exception with the Judge's assessment of the respondent ("I am impressed by the forthright manner in which the Defendant describes his knowledge and use of the open source KODI software and the similarities between TVAddons and Google" (Reasons at para. 22)), and refute the respondent's assertion that the add-ons hosted by his website can be assimilated to "mini Google" (Respondent's MFL at para. 60; Lackman Aff. at para. 19). Those factual errors, argue the appellants, led the Judge to err in his analysis and application of paragraph 2.4(1)(b) of the *Copyright Act*.

[18] I agree with the appellants that the Judge misapprehended the evidence and made palpable and overriding errors in his assessment of the strength of the appellants' case. Nowhere did the appellants actually state that only a tiny proportion of the add-ons found on the respondent's website are infringing add-ons. As stated by Andrew McGuigan in his affidavit (at para. 61):

By clicking on the "Addons" option from the main menu on the home page of the TVAddons website, users are presented with ten categories of Add-ons. The counter underneath the various categories of Add-ons suggests that TVAddons hosts over 1,500 Add-ons in total. However, the "Featured" category of Add-ons hosted by TVAddons contains a curated list of 22 Add-ons, *almost all of which are Infringing Add-ons* (...) (emphasis in original)

[19] It is an unwarranted stretch of logic to infer from that statement, as did the Judge, that “from the Plaintiffs’ own evidence, just over 1% of the Add-ons developed by the Defendant are alleged to be “infringing Add-ons”” (Reasons at para. 16). Indeed, what the affiant actually mentions is not that he found 16 infringing add-ons out of 1,500, but rather that many of the add-ons found in the “Featured” category of the website were infringing. Indeed, 16 out of the 22 add-ons of the “Featured” category of the TVAddons website are reproduced in the appellants’ memorandum of fact and law. The appellants’ expert has tested 12 out of the 22 add-ons in that category and concluded that these 12 add-ons were all infringing (Conf. Appellants’ MFL at para. 33; Conf. McGuigan Aff. at paras. 61, 62, 70 and 71). This was the only category tested by Mr. McGuigan, and there is no evidence as to how many add-ons found on the respondent’s entire website are infringing. The Judge therefore clearly misapprehended the evidence in this regard by concluding that just over 1% of the add-ons were purportedly infringing.

[20] The Judge also appears to have misunderstood the nature of the respondent’s activities, and to have been swayed by the fact that the actions performed by the appellants’ expert to access infringing material on the TVAddons website were replicated by the respondent using Google. While Google is an indiscriminate search engine that returns results based on relevance, as determined by an algorithm, infringing add-ons target predetermined infringing content in a manner that is user-friendly and reliable. The affidavit of Mr. McGuigan highlights key features that make add-ons distinctly different; they are designed to avoid dead links (i.e. links that appear to lead to infringing content but that are inoperative), advertisements and computer viruses or malwares that are common on these streaming sites (Conf. McGuigan Aff. at para. 51).

[21] Characterizing add-ons as “mini Google” suggests a mere difference in degree. This overlooks the targeted nature of add-ons, which is critical to the issue which the Judge was called upon to decide. The fact that a search result using an add-on can be replicated with Google is of little consequence. The content will always be found using Google or any other Internet search engine because they search the entire universe of all publicly available information. Using add-ons, however, takes one to the infringing content much more directly, effortlessly and safely.

[22] These factual errors, in turn, led the Judge to a misinterpretation of the law and of the cases. Pursuant to paragraph 3(1)(f) and section 27 of the *Copyright Act*, the appellants, as creators and distributors of television programs, have the sole right to communicate these works to the public by telecommunication and to authorize such act. There is clearly a strong *prima facie* case that the respondent, by hosting and distributing infringing add-ons, is making the appellants’ programs and stations available to the public by telecommunication in a way that allows users to access them from a place and at a time of their choosing, thereby infringing paragraph 2.4(1.1) and section 27 of the *Copyright Act*.

[23] The Judge nevertheless came to the opposite conclusion, relying on the exception set out in paragraph 2.4(1)(b) of the *Copyright Act* according to which participants in a telecommunication who only provide “the means of telecommunication necessary” are deemed not to be communicators. That provision reads as follows:

2.4 (1) For the purposes of communication to the public by telecommunication,

...

(b) a person whose only act in respect

2.4 (1) Les règles qui suivent s’appliquent dans les cas de communication au public par télécommunication :

[...]

b) n’effectue pas une communication

of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public; ...

au public la personne qui ne fait que fournir à un tiers les moyens de télécommunication nécessaires pour que celui-ci l'effectue; [...]

[24] That provision was considered by the Supreme Court of Canada in *SOCAN*. Writing for the majority, Justice Binnie first noted that this immunity was adopted to strike a balance between, on the one hand, the expansion of the notion of “communication to the public” to include all forms of “telecommunication” in paragraph 3(1)(f), and, on the other hand, the need to ensure that those who participate in the retransmissions solely as intermediaries would not be unfairly caught by that expanded definition (*SOCAN* at para. 90). In his view, paragraph 2.4(1)(b) was meant to “shield from liability the activities associated with providing the means for another to communicate by telecommunication” (*SOCAN* at para. 92). He also explained that the defence is available where one merely serves as a “conduit” and does not otherwise engage in any other act of communication. In order to be a conduit, one’s participation in the dissemination of information must be content neutral (*SOCAN* at para. 92).

[25] On that basis, the majority found that Internet service providers acted as mere conduits and could therefore garner the protection of paragraph 2.4(1)(b). In coming to that conclusion, Justice Binnie provided useful factors to be considered in determining whether one is serving the role of conduit (*SOCAN* at para. 101):

I conclude that the *Copyright Act*, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a “conduit”, as found by the Board, include a lack of actual knowledge of the

infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious. We are told that a large on-line service provider like America Online delivers in the order of 11 million transmissions a day.

[26] Interestingly, the Supreme Court also noted that this protection could be lost. For instance, providing content or creating embedded links which automatically precipitate to copyrighted content from another source could attract liability (*SOCAN* at para. 102).

[27] It is not entirely clear why the Judge accepted the respondent's claim that he is not communicating any content and is therefore entitled to benefit from the exemption of paragraph 2.4(1)(b). His reasoning appears to rest entirely on the assumption that Google is a conduit and so is the TVAddons website. With all due respect, when all the evidence on the record is properly considered, the respondent's website cannot be regarded as a mere neutral conduit for information provided by others.

[28] First of all, as previously explained, the add-ons contained on the TVAddons website cannot be assimilated to mini Google. Even assuming that a search engine like Google is indeed shielded from liability under paragraph 2.4(1)(b) of the *Copyright Act* (an issue that need not be decided in the present case), the respondent's website is not content neutral as it targets copyrighted content. In one of the guides found on the TVAddons website providing information as to how to access and use add-ons, attention is drawn to the most popular KODI add-ons, all of which are infringing add-ons designed to provide unauthorized access to motion pictures and on-demand and/or live television programming (Conf. McGuigan Aff. at paras. 58-59).

[29] In his affidavit, Mr. McGuigan also attaches (as Exhibit AM-8) a guide titled “Installing the Made in Canada IPTV Kodi Addon (17.0 Krypton or Above)”, which contains instructions on how to install the “Made in Canada IPTV” infringing add-on specialized in providing access to live Canadian television content. We have already seen that one of the categories into which the add-ons are organized on the website is called “Featured”, within which most of the add-ons are infringing. This is akin to providing embedded links or automatically precipitating a path to copyrighted content.

[30] There is more. The TVAddons website also “hosts and distributes the “Indigo” tool which, once installed on the KODI media player, facilitates and automates the installation of Add-ons, including Infringing Add-ons” (Conf. McGuigan Aff. at para. 74). TVAddons also develops, supports and provides download links to the “FreeTelly” application, which is preconfigured with at least 28 add-ons of which many are infringing add-ons (Conf. McGuigan Aff. at paras. 65-75).

[31] In light of that compelling evidence, one cannot conceive of TVAddons as being a mere conduit that does not engage in acts that relate to the content of the communication. The respondent’s website is clearly designed to facilitate access to infringing material and indeed claims to be the original source for the best unofficial KODI add-ons (Exhibit AM-9 of Conf. McGuigan Aff.). It is quite telling that “since 2012, the official KODI community has refused to provide access to, or technical support for, Infringing Add-ons that are deemed to be intended solely to view pirated content” (Conf. McGuigan Aff. at para. 38; see also exhibit AM-2). While

the respondent's website never explicitly promotes illegal activities, the implication of marketing "unofficial KODI add-ons" and naming an application "FreeTelly" are clear.

[32] It is also important to recall that the purpose of paragraph 2.4(1)(b) is to protect innocent disseminators. Again, I fail to understand how the respondent can cloak himself in the shroud of an innocent disseminator, when his website clearly targets those who want to circumvent the legal means of watching television programs and the related costs. By using the infringing add-ons that are promoted as being "the best", "most popular" and "all free" (Conf. McGuigan Aff. at para. 64), users can stream various types of television content from streaming sites immediately and for free. I do not think that Parliament envisioned this type of activity when paragraph 2.4(1)(b) was enacted.

[33] Nor can the respondent claim that he had no knowledge of the infringing content of the add-ons hosted on his website. The description of the infringing add-ons explicitly states that they are developed and/or supported by TVAddons. The respondent cannot credibly assert that his participation is content neutral and that he was not negligent in failing to investigate, since at a minimum he selects and organizes the add-ons that find their way onto his website.

[34] I further agree with the appellants that the respondent's website bears many similarities with the pre-loaded set-top boxes that were the subject of an interlocutory injunction in *Bell Canada v. 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, 271 A.C.W.S. (3d) 831, aff'd 2017 FCA 55, 278 A.C.W.S. (3d) 385 (*Bell Canada*). The pre-loaded set-top boxes at issue in those decisions are devices that can be connected to any standard television set in order to provide

additional functionalities to that television, including free and user-friendly access to content for which the appellants own the copyright. At paragraph 8 of her reasons, Justice Tremblay-Lamer identifies three types of pre-installed applications that can be found on the pre-loaded set-top boxes, all of which could be used to access copyrighted content. One of those was KODI, which she describes as enabling access to online streaming websites with the proper add-ons. The TVAddons website was later identified as the source of the infringing add-ons pre-loaded on these set-top boxes (Affidavit of Shawn Omstead at paras. 47-53, Appeal Book, confidential volume 3, tab 7).

[35] One of the defendants in that case also tried to raise the paragraph 2.4(1)(b) exception to infringement, arguing that his devices were merely a conduit for communications. The Federal Court judge (upheld by this Court) dismissed that argument in no uncertain terms at paragraph 22 of *Bell Canada*:

The devices marketed, sold and programmed by the Defendants enable consumers to obtain unauthorized access to content for which the Plaintiffs own the copyright. This is not a case where the Defendants merely serve as the conduit, as was argued by Mr. Wesley. Rather, they deliberately encourage consumers and potential clients to circumvent authorized ways of accessing content – say, by a cable subscription or by streaming content from the Plaintiffs’ websites – both in the manner in which they promote their business, and by offering tutorials in how to add and use applications which rely on illegally obtained content. The statutory defence provided in paragraph 2.4(1)(b) of the *Copyright Act* does not apply to the Defendants who go above and beyond selling a simple “means of telecommunication”. They also engage in acts related to the content of the infringed communications (*Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 92). Consumers can consequently stream or download the Plaintiffs’ programs and store them on their device without authorization from the Plaintiffs. This constitutes *prima facie* copyright infringement pursuant to section 27 of the *Copyright Act*.

[36] The service offered by the respondent through the TVAddons website is no different from the service offered through the set-top boxes. The means through which access is provided to infringing content is different (one relied on hardware while the other relied on a website), but they both provided unauthorized access to copyrighted material without authorization of the copyright owners. There is no principled reason to distinguish one from the other, as neither one of these services can be credibly considered to be a mere neutral conduit.

[37] For all of the foregoing reasons, I am of the view that the Judge erred in finding that the appellants did not have a strong *prima facie* case for copyright infringement. The Judge's conclusion was based on palpable and overriding errors in assessing the evidence and in applying the law to the facts of this case. The Judge also erred in failing to consider the appellants' separate claim that the respondent induced and authorized acts of infringement by encouraging users to access infringing content when they would otherwise not have done so. While the threshold for authorizing copyright infringement is high (see *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para. 38, [2004] 1 S.C.R. 339) and the appellants may not have been able to establish the necessary degree of control between the respondent and those who stream or upload copyrighted content onto the Internet, it ought to have been considered as a separate cause of action in determining whether the appellants have a strong *prima facie* case.

[38] The Judge did not pronounce on the other three criteria to determine whether an Anton Piller order should be granted. Had he not committed the aforementioned reversible errors with respect to the first criterion, he would have had no choice but to find that the appellants met all the criteria for the issuance of an Anton Piller order. Indeed, the respondent made no substantive

submission before the Judge or before this Court on the remaining criteria, and the appellants' claim that they suffer serious harm as a result of the respondent's activities, that there was clear evidence that the respondent had compromising evidence in his possession, and that there was a real risk that the respondent would destroy evidence before the discovery process, has not been credibly and seriously disputed.

[39] The only remaining issue upon which I wish to make some remarks is the execution of the Anton Piller order. As previously mentioned (see para. 11 of these reasons), the Judge's concerns in that respect arose from what he viewed as a lack of procedural safeguards and improper questioning of the respondent. Yet, a careful reading of the affidavit of the independent solicitor who monitored the execution of the Anton Piller order does not bear out the Judge's findings. The order was explained to the respondent in plain language, and he was informed of his right to remain silent and to refuse to answer questions other than those specified in the order. The respondent was permitted to have counsel present, with whom he consulted throughout the execution of the order. The independent solicitor ensured the questions fell within the scope of the order, and provided opportunity to the respondent's counsel to clarify answers to questions. The questioning did span a period of nine hours, but with several interruptions; nothing in the report suggests that it amounted to an "interrogation".

[40] The independent solicitor reported that the respondent was initially uncooperative when questioned, and only changed his behaviour when told that his conduct would be reported in the solicitor's affidavit of execution. This is a far cry from being threatened with contempt. It is also to be noted that nowhere in his reasons does the Judge seem to take into account that the

respondent, during the execution of the order, attempted to conceal crucial evidence and lied to the independent supervising solicitor regarding the whereabouts of that evidence. That evidence, which was later anonymously returned, included highly relevant evidence specifically targeted by the Anton Piller order.

[41] As previously mentioned, the Judge found that the “most egregious” part of the questioning was in providing the respondent with aliases of other people who might be operating similar websites. Yet, the question that was put to Mr. Lackman was with respect to “the username, name and address of all other companies, partnerships, trusts, legal entities and persons that are or were directly or indirectly involved in the development, operation, hosting, distribution or promotion of TVAddons, Infringing Add-ons, the “Free Telly” application, the “Indigo” tool, or any similar software application” (Exhibit DSD-6 of the Affidavit of Daniel S. Drapeau at 1541, Appeal Book, confidential volume 5, tab 24). That question was entirely consistent with the authorization given to the plaintiffs’ solicitors by Justice LeBlanc at paragraph 14 of his Anton Piller order. A list of names was put to the respondent by the plaintiffs’ solicitors, but it was apparently done to expedite the questioning process. In any event, the respondent did not provide material information on the majority of the aliases put to him.

[42] All things considered, the execution of the order was done in conformity with the acknowledged rules of the art. Despite a few objectionable questions, it is clearly an overstatement to conclude “unhesitatingly”, as did the Judge, that the respondent was “subjected to an examination for discovery without any of the protections normally afforded to litigants in such circumstances (discovery)” (Reasons at para. 19). For the most part, I am of the view that

the supervising solicitor acted in an independent and professional way, ensured that the inspection and removal of the respondent's property were executed within the four corners of the Anton Piller order issued by Justice LeBlanc, and that the vast majority of the questions to the respondent related to the location of known evidence or to passwords.

[43] The Judge seems to have been influenced in his analysis of the Anton Piller order and of its execution by his perception that the order was sought for the true purpose of destroying the respondent's business. In his summary of the evidence, the Judge quoted a short extract from the hearing in front of Justice LeBlanc, wherein counsel for the appellants stated that the purpose of his clients was to "neutralize" and "shut down" the respondent's website (Appeal Book, volume 4, tab 30 at 02299-02300). He then stated, in a passage already quoted at paragraph 12 of these reasons, that the true purpose of the appellants was to "destroy" the livelihood of the respondent, "deny" him the means to defend himself, and to allow for discovery where "none of the procedural safeguards of our civil justice system could be engaged".

[44] In my view, the Judge took the extract referred to above out of context. Earlier on in the transcript (see Appeal Book, volume 4, tab 30 at 02282-02285), counsel for the appellants explained why Justice LeBlanc's Order had to be so broad. First, the appellants suspected that the respondent was working with others who could reactivate the website, and therefore wanted to shut down the website completely to eliminate this possibility. Second, the appellants were concerned that the subject matter of the dispute (e.g. TVAddons websites and servers) would be taken out of the Court's jurisdiction. Given that a website can easily be moved and reactivated elsewhere, neutralizing the respondent's entire operation in a thorough manner was justified. In

any event, these measures were initially designed by Justice LeBlanc as part of the interim injunction order rather than the Anton Piller order. Indeed, point B) 5. of his order, which provides for the deactivation of the TVAddons domains and subdomains and its social media accounts, is found under the interim injunction order. The appellants explained before Justice Bell that they had not tested all add-ons on the TVAddons website, such an operation being highly time-consuming and quite difficult (Appeal Book, volume 4, tab 31 at 02356). As such, it was impossible, at that point, to know which add-ons needed to be removed to ensure that infringement of the appellants' rights ceased. This is why the order had to be broad and provide for the shutdown of the entire respondent's website.

[45] This conclusion appears all the more warranted considering the further evidence that was made available to the Judge and that was not before Justice LeBlanc. It is well established that a reviewing judge is not limited to consider the evidence that was before the judge who issued the order (*Viacom Ha! Holding Co. v. Doe* (2000), 6 C.P.R. (4th) 36, 96 A.C.W.S. (3d) 1042 (F.C.T.D.), aff'd 2001 FCA 395, 286 N.R. 392; *Netbored Inc. v. Avery Holdings Inc.*, 2005 FC 1405 at para. 27, 48 C.P.R. (4th) 241). Accordingly, the Judge should have taken into account the fact that the respondent has a history of copyright piracy and lying to a police officer. Indeed, the respondent admitted that he was involved in piracy of satellite television signals when he was younger, and there is evidence that he was involved in the configuration and sale of "jailbroken" Apple TV set-top boxes (Conf. McGuigan Aff. at paras. 167-168). When juxtaposed to the respondent's attempt to conceal relevant evidence during the execution of the Anton Piller order, that contextual evidence adds credence to the appellants' concern that the evidence could disappear without a comprehensive order.

[46] For all the foregoing reasons, I would therefore conclude that the Judge erred in vacating the Anton Piller order and in declaring that the execution of that order was not lawfully conducted.

B. *Did the Judge err in dismissing the application for an interlocutory injunction?*

[47] As previously mentioned, the Judge accepted that there was a serious issue to be tried and that the appellants would suffer irreparable harm if the injunction was not issued. He found, nevertheless, that the balance of convenience favoured the respondent and therefore declined to issue the injunction.

[48] I have already concluded that two of the reasons outlined by the Judge to find in favour of the respondent on the balance of convenience do not hold water. To the extent that the respondent does not have a defence under paragraph 2.4(1)(b) of the *Copyright Act*, he cannot have an arguable case that he is not in contravention of section 27 of that same act. I have also explained why the percentage of infringing add-ons on the TVAddons website is very likely much higher than 1%, as the 16 infringing add-ons out of 1,500 were found in the only category (“Featured”) that was tested by the appellants.

[49] The only remaining factor taken into account by the Judge to weigh the balance of convenience is the loss of income and the resulting lack of financial resources for the respondent to mount his defence. The factors that judges may take into account in assessing the balance of convenience are numerous and vary according to the facts in each case (*RJR – MacDonald*); they must, however, exercise great care in applying these factors, and ensure that they are supported

by the evidence. In the case at bar, for instance, reliance on the respondent's limited resources is somewhat problematic. The respondent has gone to great lengths to conceal his identity on the Internet and to dissociate himself from his operation of the TVAddons website. He has also made use of offshore bank accounts and business entities, the infringing add-ons distributed on his website are hosted on servers located at a domain which does not have a public-facing webpage, it is virtually impossible to trace the ultimate beneficiaries of the donations that users are invited to make on the respondent's website, and he makes use of a service provider that places itself between the Internet user and the website's hosting provider to conceal the true identity of that website's hosting provider.

[50] In those circumstances, it is extremely difficult to gather reliable information on the true financial means of the respondent. Indeed, the respondent filed no evidence to support his claim that he will lack the resources to defend the Statement of Claim filed by the appellants.

[51] Even if I were to accept this bald assertion of the respondent, it would clearly not be sufficient to support the Judge's finding on the balance of convenience requirement. First, injunctions should not be issued only when the respondent has the financial means to weather it; such a course of action would risk creating a two tier judicial system. Moreover, the Judge's conclusion on the balance of convenience is rooted in a misapplication of paragraph 2.4(1)(b) of the *Copyright Act* and a finding of fact not based on the evidence. As such, his finding is fatally flawed and cannot stand.

V. Conclusion

[52] For all of the above reasons, I would:

- a) Allow the appeal;
- b) Set aside the Order issued on June 29, 2017;
- c) Order that paragraphs C)17 to C)20 of Justice LeBlanc’s Order are to remain valid until the final determination of the action in Federal Court File No. T-800-17;
- d) Declare that the Anton Piller and interim injunction aspects of the Order of Justice LeBlanc were lawfully conducted; and
- e) Issue an interlocutory injunction order under Rule 373 of the *Federal Courts Rules* in the terms sought before Justice Bell, to remain valid until the final determination of the action in Federal Court File No. T-800-17.

[53] The appellants should also be entitled to their costs in this Court and the Court below, in a total lump sum amount of \$50,000, inclusive of disbursements and applicable taxes.

“Yves de Montigny”

J.A.

“I agree
Marc Noël C.J.”

“I agree
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-202-17

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PLACE OF HEARING: MONTRÉAL, QUEBEC

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CONCURRED IN BY: NOËL C.J.
GAUTHIER J.A.

DATED: FEBRUARY 20, 2018

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