Federal Court of Appeal  Cour d'appel fédérale

**Date: 20220223**

**Dockets: A-25-21**
**A-26-21**

**Citation: 2022 FCA 34**

**CORAM:** **GAUTHIER J.A.**
**GLEASON J.A.**
**RIVOALEN J.A.**

**BETWEEN:**

**TYLER WHITE, dba BEAST IPTV and COLIN WRIGHT, dba BEAST IPTV**

**Appellants**

**and**

**WARNER BROS. ENTERTAINMENT INC., AMAZON CONTENT SERVICES LLC, BELL MEDIA INC., COLUMBIA PICTURES INDUSTRIES, INC., DISNEY ENTERPRISES, INC. NETFLIX STUDIOS, LLC, NETFLIX WORLDWIDE ENTERTAINMENT, LLC, PARAMOUNT PICTURES CORPORATION, SONY PICTURES TELEVISION INC. and UNIVERSAL CITY STUDIOS PRODUCTIONS, LLLP**

**Respondents**

Heard by online video conference hosted by the registry on February 23, 2022.

Judgment delivered from the Bench at Ottawa, Ontario, on February 23, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Ottawa, Ontario, on February 23, 2022).**

**GLEASON J.A.**

[1] The appellant, Tyler White, appeals from the order of the Federal Court (*per* Roy, J.), reasons for which are indexed as *Warner Bros. Entertainment Inc. v. White (Beast IPTV)*, 2021 FC 53.

[2] In the order under appeal, the Federal Court, among other things: (1) extended its earlier *ex parte* interim orders into interlocutory orders (with certain modifications) to be in force until the final disposition of the respondents' underlying action for copyright infringement; and (2) issued show cause orders to the appellants pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106, requiring them to appear at a contempt hearing by reason of their alleged non-compliance with the Federal Court's *ex parte* interim orders.

[3] The appellant, Colin Wright, discontinued his appeal on September 21, 2021 with the consent of the respondents.

[4] On September 20, 2021, after this appeal was commenced, Mr. White appeared before the Federal Court and entered a plea of guilt to the contempt charges (see *Warner Bros. Entertainment Inc. v. White (Beast IPTV)*, 2021 FC 989). By reason of such plea, as acknowledged by Mr. White, the portion of Mr. White's appeal that seeks to set aside the Federal Court's show cause order is moot.

[5] In terms of the remaining portions of the Federal Court's order that are not moot, Mr. White alleges that they should be set aside principally because:

(1) the Federal Court erred in law in selecting the test applicable to assess whether to issue the *ex parte* interim orders, which, according to Mr. White, required in relevant part that the Federal Court be satisfied that there was "an extremely strong *prima facie* case" as opposed to merely a "strong *prima facie* case";

(2) counsel for the respondents failed in their duty of candour to the Federal Court by failing to disclose apparently controlling case law, namely the decision of this Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2020] F.C.J. No. 671 (QL), [*ESA*]; and

(3) the Federal Court erred in relying on hearsay and double hearsay evidence from confidential sources.

[6] As concerns the applicable test for issuance of the *ex parte* interim orders, although the Federal Court declined to find them to be *Anton Piller* orders, it nonetheless held that the test applicable to determine whether to issue them was the same as that applicable to an *Anton Piller* order due to their intrusiveness. Thus, nothing in this appeal turns on whether the interim orders are properly characterized as *Anton Piller* orders.

[7] Contrary to what Mr. White says, the test for issuance of an *ex parte* interim *Anton Piller* order requires as the first of four essential conditions that the party seeking the order demonstrate that there is a "strong *prima facie* case" **NOT** an "extremely strong *prima facie* case". This is clear from the leading authority from the Supreme Court of Canada in *Celanese Canada Inc. v. Murray Demolition Corp*., 2006 SCC 36, [2006] 2 S.C.R 189 at para. 35.

[8] The applicability of the "strong *prima facie* case" test for issuance of an interim *Anton Piller* order was confirmed by the Supreme Court of Canada in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657 at para. 29 and more recently by this Court, for example, in *Bell Canada v. Lackman*, 2018 FCA 42, [2018] 4 F.C.R. 199 at para. 10.

[9] The Federal Court therefore did not make the first error that Mr. White alleges. Nor do we see any palpable and overriding error in the way the Federal Court assessed whether there was a strong *prima facie* case in light of the facts that were before the Federal Court.

[10] Turning to Mr. White's second argument, largely for the reasons given by the Federal Court, we do not believe it was incumbent on counsel for the respondents to have placed the *ESA* case before that Court when the respondents made their *ex parte* motion. In short, we are not convinced that the *ESA* case was so decisive that a failure to refer to it required that the *ex part*e orders be set aside.

[11] Finally, as concerns the reliance on hearsay evidence, Mr. White principally contests the admissibility of the hearsay evidence as opposed to the inferences the Federal Court drew from such evidence.

[12] His argument on admissibility fails because the impugned evidence was admissible by virtue of Rule 81 of the *Federal Courts Rules*, which authorizes evidence on information and belief in motions such as those at issue in this appeal. Evidence on information and belief is hearsay evidence. In commenting on the predecessor to Rule 81 of the *Federal Courts Rules*, namely what was previously Rule 332(1), which was materially similar to Rule 81(1), this Court stated in *Lumonics Research Ltd. v. Gould et al.*, [1983] 2 F.C. 360 (C.A.), 70 C.P.R (2d) 11 at p. 18:

> …R. 332(1) imposes only two conditions to the admissibility of affidavit evidence of belief: first, that the affidavit be filed on an interlocutory motion, and, second, that the deponent indicate in his affidavit the grounds of his belief. Once those conditions are met, the affidavit evidence is, in my view, admissible even though it may have little or no weight or probative value.

[13] The impugned hearsay evidence was therefore admissible.

[14] To the extent Mr. White disputes the use the motion judge made of the evidence, the impugned hearsay evidence that the motion judge relied on was largely irrelevant to Mr. White as such evidence was primarily directed towards identifying Mr. Wright as the co-defendant in the action before the Federal Court. Thus, Mr. White cannot point to any palpable and overriding error the motion judge made in his use of the impugned evidence or in the weight he attributed to it.

[15] This appeal will accordingly be dismissed, with costs.

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-25-21 and A-26-21 |
| **STYLE OF CAUSE:** | TYLER WHITE, dba BEAST IPTV AND COLIN WRIGHT, dba BEAST IPTV v. WARNER BROS. ENTERTAINMENT INC., AMAZON CONTENT SERVICES LLC, BELL MEDIA INC., COLUMBIA PICTURES INDUSTRIES, INC., DISNEY ENTERPRISES, INC. NETFLIX STUDIOS, LLC, NETFLIX WORLDWIDE ENTERTAINMENT, LLC PARAMOUNT PICTURES CORPORATION, SONY PICTURES TELEVISION INC. and UNIVERSAL CITY STUDIOS PRODUCTIONS, LLLP |
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| **REASONS FOR JUDGMENT OF THE COURT BY:** | GAUTHIER J.A.<br>GLEASON J.A.<br>RIVOALEN J.A. |
| **DELIVERED FROM THE BENCH BY:** | GLEASON J.A. |

**APPEARANCES:**

| | |
|---|---|
| Howard P. Knopf<br>Meika C. Ellis<br>Abbas Kassam | FOR THE APPELLANT (TYLER WHITE dba BEAST IPTV) |
| Francois Guay<br>Ryan Evans<br>Guillaume Lavoie Ste-Marie | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Ridout & Maybee LLP<br>Ottawa, ON | FOR THE APPELLANT (TYLER WHITE dba BEAST IPTV) |
| Smart & Biggar<br>Montreal, Quebec | FOR THE RESPONDENTS |