

CANADA / JUDGMENT

Bell Media Inc. v. Marshall Macciacchera

2024 FC 1292

COURT

Federal Court

DECIDED

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Bell Media Inc. v. Marshall Macciacchera

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Date: 20240821

Docket: T-1257-22

Citation: 2024 FC 1292

Ottawa, Ontario, August 21, 2024

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

BELL MEDIA INC.

ROGERS MEDIA INC.

COLUMBIA PICTURES INDUSTRIES, INC.

DISNEY ENTERPRISES, INC.

PARAMOUNT PICTURES CORPORATION

UNIVERSAL CITY STUDIOS LLC

UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP

WARNER BROS. ENTERTAINMENT INC.

Plaintiffs

and

MARSHALL MACCIACCHERA dba SMOOTHSTREAMS.TV

ANTONIO MACCIACCHERA dba SMOOTHSTREAMS.TV

Arm Hosting Inc.

STAR HOSTING LIMITED (hONG KONG)

ROMA WORKS LIMITED (HONG KONG)

ROMA WORKS SA (pANAMA)

Defendants

ORDER AND REASONS

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I. Overview [1] The Plaintiffs seek an order finding Marshall Macciacchera, Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited, in contempt of court for failing to comply with the terms of an order that contained, among other things, an Anton Piller order and a range of injunctive relief. The underlying dispute between the parties is one of copyright infringement. The Plaintiffs allege that the Defendants have been distributing their television and film content without authorization.

[2] The Plaintiffs, Bell Media Inc. [Bell] and Rogers Media Inc. [Rogers], are Canadian broadcasters that own and operate a number of television stations on which they broadcast a wide variety of programming. Bell and Rogers also broadcast television programming on their respective subscription-based on demand internet streaming services. The Plaintiffs, Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Paramount Pictures Corporation, Universal City Studios LLC, Universal City Studios Productions LLLP, and Warner Bros. Entertainment Inc., are engaged in the production and distribution of motion pictures and television content.

[3] The Defendants are alleged to be operating unauthorized subscription services through which they deliver the Plaintiffs' copyrighted content through internet infrastructures. As described in detail by Justice Roger Lafrenière in *Bell Media Inc v Macciacchera* (Smoothstreams.tv), 2022 FC 1139, unauthorized subscription services typically operate on a subscription-based revenue model and provide access to extensive content at a significantly lower price than legitimate services (at paras 29-30). The operators of unauthorized subscription services often process payments through a separate website that is under their control but appears to belong to an unrelated business, thereby distancing themselves from the infringing activities and making it extremely difficult for rights holders to lodge complaints with third-party payment platforms (ibid at para 32).

- [4] On June 17, 2022, the Plaintiffs commenced the present action against the Defendants alleging that they have been operating a number of unauthorized subscription services, whereby they sold and delivered television and motion picture content to subscribers through the internet without obtaining authorization from the copyright owners. The Plaintiffs allege that the Defendants have jointly engaged in the development, operation, maintenance, updating, hosting, distribution and sale of unauthorized subscription services, including by operating ancillary payment processing services and distributing ancillary software applications that provide access to the streaming services. The Plaintiffs allege that these unauthorized streaming services provide access to a vast amount of television content and motion pictures for which the copyright is owned by the Plaintiffs.
- [5] The Defendants, Antonio Macciachera and his son, Marshall Macciachera, are alleged to be the directing minds of the corporate Defendants. The Defendants are alleged, either alone or with associates, to have been operating a number of unauthorized subscription services under an umbrella brand called “Smooth Streams” [SSTV Services]. At the time the action was instituted, the Plaintiffs were aware of three active services under the SSTV Services, known as Live247, StreamTVNow, and StarStreams TV.
- [6] In conjunction with commencing the present action, the Plaintiffs brought an ex parte motion for an interim injunction, an Anton Piller Order, and other ancillary orders against the Defendants. Following an in camera hearing, on June 28, 2022, I granted the Plaintiffs’ motion and issued the order for an interim injunction pursuant to Rule 374 of the Federal Courts Rules, SOR/98-106 [Rules], an Anton Piller Order pursuant to Rule 377 of the Rules, and other ancillary orders [Interim Order].
- [7] The Interim Order contained, among other things, an interim injunction which enjoined the Defendants from engaging in certain activities related to the operation of SSTV Services or other unauthorized streaming services. It also enjoins the Defendants from dissipating, transferring or otherwise concealing assets, along with ordering them to disclose certain financial information. It authorizes an independent supervising solicitor [ISS] to search the premises identified in the Interim Order in order to seize and preserve certain evidence. In addition, the Interim Order notifies the Defendants that if they fail to comply they risk being found to be in contempt of Court and subject to a fine and/or imprisonment. The contents of the Interim Order are described in detail in Section II of the present Order and Reasons.
- [8] The Interim Order was served on the Defendants on July 14, 2022. With respect to Marshall Macciachera, the Interim Order was executed over a period of two days by an ISS, Me Daniel Drapeau [ISS Drapeau], and his team, at two locations located in Barrie, Ontario: (a) Marshall Macciachera’s residence [Residence]; and (b) a commercial facility [Commercial Premises] [collectively, the Premises]. With respect to Antonio Macciachera, a separate ISS sought to execute the Interim Order at his residence in Woodbridge, Ontario, but Antonio Macciachera refused entry.

- [9] Upon being served with the Interim Order, and prior to the commencement of the search of the Premises, Marshall Macciachera was provided with a detailed explanation by ISS Drapeau, in plain language, of the terms of the Interim Order and the consequences should he fail to comply. Marshall Macciachera was equally provided with the opportunity to ask questions and to seek the advice of counsel. The execution of the Interim Order, including the detailed explanation by ISS Drapeau and the subsequent search of the Premises, was captured on video by a videographer forming part of ISS Drapeau's team.
- [10] Following the execution of the Interim Order, the Plaintiffs sought an order pursuant to Rule 467 of the Rules charging Marshall Macciachera, and three of the corporate Defendants, Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited [Corporate Defendants] with contempt of the Interim Order. Marshall Macciachera is the president of Arm Hosting Inc. and the sole director of each of the Corporate Defendants. The Plaintiffs alleged that Marshall Macciachera and the Corporate Defendants refused to comply with many aspects of the Interim Order.
- [11] On July 28, 2022, Justice Lafrenière concluded, based on the evidence before him, that a prima facie case of contempt had been made out by the Plaintiffs (*Bell Media Inc v Macciachera*, 2022 FC 1139 at para 58 [Charging Order]). Justice Lafrenière found that the Plaintiffs "were able to uncover evidence of a sophisticated operation running out of Marshall's residence and the [Commercial Premises]." (Charging Order at para 46). He further noted that, during the execution of the Interim Order, the Plaintiffs had "seized and preserved evidence that includes dozens of television receivers, encoders, and servers allegedly responsible for capturing and redistributing infringing television content on a massive scale through the SSTV Services." (*ibid*). Justice Lafrenière concluded that Marshall Macciachera and the Corporate Defendants had, on a prima facie basis, failed to comply with the Interim Order, notably deliberately failing to make the required financial disclosures, refusing to answer numerous questions regarding their assets, various login credentials, and certain unauthorized streaming services (Charging Order at paras 55-59).
- [12] Consequently, Justice Lafrenière charged Marshall Macciachera and the Corporate Defendants with contempt [Charged Defendants]. The Charging Order required them to appear before a judge of this Court for a contempt hearing in order to (i) hear proof of the acts purportedly committed by them with which they are charged; and (ii) to be prepared to present any defence they may have.
- [13] The contempt hearing proceeded before me over four days in April 2023, during which five witnesses gave evidence. Further submissions were filed on June 2, 2023, June 19, 2023, July 4, 2023, January 23, 2024, and January 29, 2024. This is the resulting judgment. To be clear, Antonio Macciachera and Roma Works SA [Antonio Defendants] were the subject of separate contempt proceedings before Chief Justice Paul S. Crampton (*Bell Media Inc v Macciachera (Smoothstreams.tv)*, 2023 FC 801 [Contempt Judgment Antonio Defendants]) and are thus not the subject of the present Order and Reasons.

- [14] It is the Plaintiffs' position that the Interim Order was clear and that ISS Drapeau spent considerable time explaining it to Marshall Macciachera, such that there was no confusion or lack of understanding as to what was required under its terms. The Plaintiffs submit that the Charged Defendants, despite having actual knowledge of the Interim Order, have intentionally failed to perform multiple obligations contained therein. The Plaintiffs allege that the Charged Defendants have lied, concealed and attempted to conceal evidence - and remain in breach of their obligations to this day.
- [15] The Charged Defendants allege that the ISS Drapeau was not independent and thus this begs the question as to how the Charged Defendants can have confidence that they are being treated fairly by the Court. They submit that the manner in which ISS Drapeau executed the search robbed Marshall Macciachera of his dignity and was "out of bounds". The Charged Defendants further submit that reasonable doubt exists as the Plaintiffs have failed to lead expert evidence on what ought to have been produced under the Interim Order. They plead that the three Corporate Defendants are not interchangeable pieces and one must have sufficient evidence of contempt for each Corporate Defendant, which they submit is lacking. Finally, the Charged Defendants allege that the combination of their levels of compliance with the Interim Order, and the egregious nature of the search, means that the Court ought to exercise its residual discretion and show mercy.
- [16] For the reasons that follow, based on the evidence before me, I am satisfied beyond a reasonable doubt that the Charged Defendants knowingly breached the terms of the Interim Order and are guilty of contempt of Court. The defences raised by the Charged Defendants do not, in my view, excuse their breaches of the Interim Order.
- [17] Finally, the issuance of the present Order and Reasons was delayed as a result of an injury following an accident. While the parties were kept updated by way of directions, I nevertheless thank the parties for their patience. Waiting for a judgment on the issue of contempt is almost certainly an unsettling experience and I have been very mindful of that.

II. The Order at Issue and its Subsequent Treatment [18] As noted above, the Interim Order contained an interim injunction which enjoined the Defendants from, among other things (i) engaging in certain activities related to the operation of SSTV Services or other unauthorized streaming services, and (ii) dissipating, transferring or otherwise concealing assets. It further orders them to disclose certain banking and financial information to the ISS and authorize financial institutions to share records with the ISS for the purpose of the present case.

- [19] In addition, the Interim Order orders the Defendants to provide access to, and transfer control over, the infrastructure of SSTV Services to the ISS, as a custodian, and for that infrastructure to be shut down. The Interim Order also authorizes the ISS, assisted by computer forensic experts and investigators, to search the premises described in the Interim Order, and to seize and preserve evidence and equipment related to the SSTV Services and the Defendants' assets.

- [20] The Interim Order requires that the ISS and the Plaintiffs' solicitors serve on the persons on whom the order is executed, copies of (i) the Interim Order, (ii) the materials in support thereof, (iii) the Statement of Claim, and (iv) the Notice of Motion for a review of the execution of the order that is returnable within 14 days from the service of the Interim Order. The Interim Order further requires that the ISS and the Plaintiffs' solicitors explain the order to the person served in plain language, in English or French, at the person's preference, including the right to seek legal advice and to segregate documents over which legal privilege is claimed.
- [21] The Interim Order, in the section entitled "Notice to the Defendants", notifies the Defendants that the execution of the Interim Order will be reviewed within 14 days, and that they may ask the Court to vary or set it aside, either at that time or earlier upon request.
- [22] Following the execution of the Interim Order by ISS Drapeau and his team at the Premises, the hearing of the motion to review the Interim Order was held before Justice Lafrenière (*Bell Media Inc v Macciachera (Smoothstreams.tv)*, 2022 FC 1602 [Interlocutory Order]).
- [23] During the hearing of the motion to review the Interim Order, the Defendants did not contest the validity of the Interim Order vis-à-vis any of the Defendants, nor did they contest the Interim Order itself or its conversion into an interlocutory order. There was also no request to vary or set the Interim Order aside. Rather, the Defendants challenged the Plaintiffs' assertion that the Interim Order was lawfully conducted. In Justice Lafrenière's words, "[t]he Defendants do not take issue with the terms of the Interim Order. The focus of their arguments in opposing the motion is rather on the manner in which the Interim Order was executed, which they say was unlawful." (Interlocutory Order at para 60). In a subsequent order, the Federal Court of Appeal has noted that there "is no challenge to the validity of the Anton Piller Order itself" (*Macciachera (Smoothstreams.tv) v Bell Media Inc*, 2023 FCA 180 at para 2 [Bell Media]).
- [24] In support of their motion to review the Interim Order, the Plaintiffs relied on the evidence that was before me in support of the Interim Order, along with the affidavit of ISS Drapeau, dated July 22, 2022, as corrected, two affidavits of a second ISS, Mark Davis dated July 14, 2022, and the affidavits of two investigators pertaining to their role in the execution of the Interim Order at the Premises.
- [25] As described by Justice Lafrenière, "the Defendants did not file any affidavit evidence in response to the Plaintiffs' motion. They chose instead to cross-examine ISS Drapeau on his affidavit, leaving the remaining affidavits unchallenged. In opposing the Plaintiffs' motion, the Defendants rely mainly on the transcript of the cross-examination of ISS Drapeau and video footage taken by videographers who attended the execution on the [Premises] [...]" (Interlocutory Order at para 13).

- [26] The issues before Justice Lafrenière were: 1) Whether the Court should issue a declaration that the execution of the Interim Order was lawfully conducted; 2) If so, whether the Court should authorize the return of the Plaintiffs' security for damages; and 3) Whether a portion of the interim relief provided by the Interim Order should be converted to interlocutory relief (Interlocutory Order at para 15).
- [27] Following an extensive review of the evidence, Justice Lafrenière found that the executions of the Interim Order at the various premises were lawful and that the Defendants' arguments in this regard were unfounded and without merit (Interlocutory Order at para 105). He concluded that the two ISS, Me Drapeau and Me Davis, conducted themselves professionally and in a manner that protected the rights of the Defendants (*ibid*).
- [28] As to whether an interlocutory injunction should be granted pending the determination of the proceedings on its merits, Justice Lafrenière concluded as follows:
- [110] Based on the evidence before me, which is not challenged by the Defendants, I find that the execution of the Interim Order directly corroborates and bolsters the evidence presented at the *ex parte* motion before Justice Rochester. A strong case has been established by the Plaintiffs that the Defendants have infringed the Plaintiffs' copyrights. I further find that in the absence of an interlocutory injunction enjoining the Defendants from being involved in unauthorized subscription services, the Plaintiffs will suffer irreparable harm that cannot be adequately compensated in damages. Finally, I conclude that the balance of convenience favours granting the interlocutory injunction on the terms requested by the Plaintiffs.
- [29] Consequently, many of the terms of the Interim Order were continued, notably that the Defendants were enjoined from directly or indirectly developing, operating, maintaining, hosting, promoting, providing support for, or selling subscriptions to unauthorized subscription services, including under the SSTV Services brands, and were ordered to disclose certain information concerning the unauthorized subscription services and their financial assets to ISS Drapeau.
- III. The Charging Order [30] As noted above, on July 28, 2022, Justice Lafrenière issued the Charging Order. Justice Lafrenière commented that "content piracy is not a victimless crime" and that "[t]he deleterious impact of such acts of copyright infringement cannot be understated." (Charging Order at para 34).
- [31] Justice Lafrenière noted that in order to charge the Defendants Marshall Macciachera, Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited, with contempt, the Plaintiffs must present evidence that there is a court order, that the alleged contemnor has knowledge of the order and that they deliberately disobeyed the order (Charging Order at para 53).

- [32] Justice Lafrenière found that the Interim Order was personally served on Marshall Macciachera in his personal capacity and in his capacity as the sole director of Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited, and that each of the three corporations were responsible for operating the subscription management/payment portals for one of the SSTV Services (Charging Order at para 54).
- [33] Justice Lafrenière concluded that a prima facie case of contempt had been made out by the Plaintiffs, highlighting Marshall Macciachera's refusal to answer questions about a number of topics and his refusal to provide the password for his computer. Accordingly, the Charged Defendants were charged with contempt of Court under Rule 466(b) of the Rules. The Charging Order sets out the specific charges as follows:
8. The acts with which the Defendants Marshall Macciachera, Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited are charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that they, by their conduct or inaction breached paragraph 20 of the Interim Order by refusing to provide to the independent supervising solicitor and/or to the Plaintiffs' solicitors the technical information related to the SSTV Services and/or any other unauthorized subscription services under their control.
 9. The acts with which the Defendants Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that they, by their conduct or inaction:
 - (a) breached paragraph 24(a) of the Interim Order by refusing to disclose the assets, revenues, expenses and profits referred to in said paragraph.
 - (b) breached paragraph 24(b) of the Interim Order by refusing to provide all information pertaining to these assets, including by refusing to provide the documents likely to contain that information.
 - (c) breached paragraph 24(c) of the Interim Order by refusing to provide the identity and contact information of the banks, financial institutions or other service providers with which these assets are registered or through which they are controlled.
 - (d) breached paragraph 25 of the Interim Order by refusing to provide their written consent to authorise banks, financial institutions or other service providers to disclose information pertaining to their assets to the independent supervising solicitor and to the Plaintiffs' solicitors.
 10. The acts with which the Defendant Marshall Macciachera is charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that he, by his conduct or inaction breached paragraph 30 of the Interim Order by refusing to disclose the login credentials for his home computer necessary to enforce the Interim Order in accessing the evidence to be preserved thereunder.

[34] In summary, each of the Charged Defendants are charged with deliberately disobeying paragraph 20 of the Interim Order. In addition, Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are charged with deliberately disobeying paragraphs 24 and 25 of the Interim Order. Finally, Marshall Macciachera is charged with deliberately disobeying paragraph 30 of the Interim Order.

IV. The Witnesses Called by the Parties [35] An overview of the parties' positions is set out in paragraphs 11 and 12 of the present Order and Reasons, above.

[36] As noted previously, five witnesses testified during the hearing. I found each of the witnesses to be credible and forthright. The testimonial evidence will be referred to in greater detail in Section VI (Analysis) of the present Order and Reasons, however, a brief overview is warranted.

[37] Three of the witnesses were called by the Plaintiffs to testify. First, Daniel Stephan Drapeau, an intellectual property lawyer who acted as the ISS during the execution of the Interim Order at the Premises. ISS Drapeau testified extensively on various matters relating to the execution of the Interim Order. His testimony addressed, among other things, the discussions that took place with Marshall Macciachera, and the documents, information, and equipment that was seized and/or obtained. As noted previously, a videographer and member of ISS Drapeau's team captured the execution of the Interim Order on video, which ISS Drapeau authenticated.

[38] Second, Branko Vranesh, a digital forensics consultant who was present during the execution of the Interim Order at the Premises. Mr. Vranesh testified as to what he observed at the Premises, the equipment he witnessed, and the disconnection and seizure of certain equipment. He further testified as to which login credentials have been provided to him and which ones have not.

[39] Third, Anthony Martin, an investigator with the integrity team of Bell Canada. Mr. Martin testified as to his observations when monitoring certain SSTV Services remotely before, during and after the execution of the Interim Order. He also provided testimony on the investigation by the Plaintiffs into Marshall Macciachera, which ultimately led to the motion for the Interim Order.

[40] The fourth and fifth witnesses were called by the Charged Defendants to testify. First, Mark Davis, who is an intellectual property lawyer who acted as the ISS for the execution of the Interim Order at the residence of Antonio Macciachera. He testified as to his understanding of the scope of the Interim Order with respect to personal information. He was questioned on an alleged oral direction from Justice Lafrenière and testified as to his communications with Plaintiffs' counsel by text message.

[41] Second, Ryan Evans, a lawyer at Smart & Biggar and counsel for the Plaintiffs, who was present during the execution of the Interim Order at the Residence. He was questioned on an alleged oral direction from Justice Lafrenière and testified that he had not communicated with ISS Drapeau by text message.

V. Issues [42] The sole issue in this contempt proceeding is whether one or more of the Charged Defendants are guilty of civil contempt for failing to comply with the terms of the Interim Order, specifically paragraphs 20, 24, 25 and 30.

[43] At the outset of the hearing of this matter, a number of objections were raised by the Charged Defendants concerning the admissibility of certain evidence. Over the course of the hearing, I provided my decisions and reasons orally from the bench. Given the nature of certain objections, however, it is worthwhile to also set out the reasoning for those rulings in the present Order and Reasons. As such, several sections of the analysis below address evidentiary matters, namely subsections C (The Protections Against Self Incrimination), D (Contempt is Not a Distinct Proceeding), and E (Collateral Attack on the Interim Order).

VI. Analysis A. The Law of Contempt [44] The law of contempt in this Court is governed by the Rules and the common law (*King v Federation of Newfoundland Indians Inc*, 2021 FC 1312 at para 34).

[45] As stated recently by Chief Justice Crampton, “[t]hose who decide when and under what circumstances they will comply with a court order essentially take the law into their own hands. That cannot be countenanced in a society governed by the rule of law.” (Contempt Judgment Antonio Defendants at para 1). Contempt of Court rests on the ability of the courts to enforce their process and uphold their dignity and respect (*Carey v Laiken*, 2015 SCC 17 at para 30 [Carey]). The contempt powers granted to the courts foster compliance with court orders by sanctioning those who flout them (*Carey* at para 30; *Bell Canada v Adwokat*, 2023 FCA 106 at para 18 [Adwokat FCA]). As stated by Justice Tremblay-Lamer “[t]he deliberate disobedience of a court order represents a defiance of judicial authority which depreciates and makes a mockery of our system of justice.” (*Canada (Human Rights Commission) v Heritage Front (TD)*, [1994] 3 FC 710 at 718 [Heritage Front]).

[46] Rules 466 through 472 of the Rules govern contempt of Court. A person who disobeys a process or order of the Court or who impairs the authority or dignity of the Court is guilty of contempt of Court (Rule 466(b) and (c)).

[47] The parties and the Court agree that in *Carey*, the Supreme Court set out the three cumulative elements necessary for a finding of civil contempt (at paras 33-35). First, the order alleged to have been breached must clearly and unequivocally state what should and should not have been done (*ibid* at para 33). Second, the party alleged to have breached the order must have had actual knowledge of it or have been willfully blind to it (*ibid* at para 34). Third, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*ibid* at para 35).

- [48] With respect to the third element, it is not necessary to prove that the party allegedly in breach intended to (i) interfere with the administration of justice; or (ii) impair the authority or dignity of the Court; or (iii) disobey the order. Rather, it is sufficient to find that the person committed an act that is in fact a breach of a clear order of which they had knowledge (Contempt Judgment Antonio Defendants at para 28; Apotex Inc v Merck & Co Inc, 2003 FCA 234 at para 60 [Apotex]; Carey at para 38). In other words, in civil contempt cases, the person must have intended to commit the prohibited act – the act must not have occurred accidentally (Apotex at para 60).
- [49] A finding of contempt shall be based on proof beyond a reasonable doubt (Rule 469; Carey at para 32). Justice John Norris in *Bell Canada v Red Rhino Entertainment Inc*, 2019 FC 1460 [Red Rhino] explains in detail the concept of reasonable doubt in the context of contempt proceedings:
- [50] [15] Unusually for a civil proceeding, the plaintiffs must establish the elements of contempt beyond a reasonable doubt before Red Rhino or Mr. Adwokat can be found guilty (see rule 469). As is well-known from criminal proceedings, this is a demanding standard of proof. To meet their burden, the plaintiffs are not required to establish the elements of contempt to an absolute certainty or beyond any doubt. But they must establish them beyond a reasonable doubt. A reasonable doubt is not an imaginary or frivolous doubt or a mere hypothetical possibility. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is a doubt that is based on reason and common sense. It is a doubt that is logically connected to the evidence or absence of evidence. Proof beyond a reasonable doubt is stronger than proof on a balance of probabilities. Indeed, if placed on a scale of standards of proof, proof beyond a reasonable doubt sits much closer to absolute certainty than to probable guilt. Thus, it is not sufficient for me to conclude merely that Red Rhino and Mr. Adwokat are probably guilty or likely guilty. If that is all the evidence establishes, they must be found not guilty. I may find Red Rhino and Mr. Adwokat guilty of contempt of Court only if no reasonable doubt remains and I am therefore sure they are guilty. The party charged with contempt is presumed to be innocent, and the burden of proving contempt rests with the accuser and never shifts to the accused (*Canadian Standards Association v PS Knight Co Ltd*, 2021 FC 770 at para 23 [PS Knight Co]; *Sweda Farms Ltd v Ontario Egg Producers*, 2011 ONSC 3650 at paras 24-25). Furthermore, the party charged with contempt cannot be compelled to testify (Rule 470(2)).
- [51] The Court's contempt powers are both exceptional and discretionary. The Court retains a residual discretion not to enter a finding of guilt even if all the requisite elements have been proven. In *Carey*, the Supreme Court declined to delineate the full scope of this discretion, but noted the possible examples of where an alleged contemnor acted in good faith in taking reasonable steps to comply with an order and where imposing a contempt finding would work an injustice in the circumstances of the case (at para 37).

B. Anton Piller Orders [52] As noted above, the Interim Order provided injunctive relief, an Anton Piller Order, and other ancillary relief. It authorized ISS Drapeau and his team to inspect the Premises and make copies of documents pertaining to the unauthorized subscription services, the Corporate Defendants, and certain financial records. It equally authorized ISS Drapeau to remove certain materials and make mirror images of digital devices. It further authorized ISS Drapeau to ask various questions about the Defendants, the unauthorized subscription services and financial assets. The Interim Order also enjoined the Defendants from concealing or destroying any evidence and ordered them to disclose certain information. Given the contents of the Interim Order, the facts of this particular case, and the nature of the contempt charges, it is worthwhile to briefly consider the nature of an Anton Piller Order.

- [53] Anton Piller Orders find their origin in the English Court of Appeal case of *Anton Piller KG v Manufacturing Processes Ltd*, [1975] EWCA Civ 12, where Lord Denning, citing the Court's inherent jurisdiction, permitted the plaintiff's solicitor to enter the defendants' premises, with their permission, albeit under the threat of contempt, in order to examine and copy evidence in the defendants' possession so as to avoid its destruction. The defendants in the case were alleged to have been disclosing the plaintiff's trade secrets to competitors and there was a real concern that they would destroy evidence. Lord Denning highlighted that should a defendant refuse entry to his premises, "he refuses at his peril. It puts him in peril not only of proceedings for contempt, but also of adverse inferences being drawn against him; so much so that his own Solicitor may often advise him to comply." (at 61).
- [54] In order to obtain an Anton Piller Order pursuant to Rule 377 of the Rules, a moving party must establish: (1) that there is a strong prima facie case; (2) that the damage to the plaintiff caused by the defendant's alleged misconduct, potential or actual, is very serious; (3) that there is clear and convincing evidence that the defendant has in its possession incriminating documents or things; and (4) that there is a real possibility that the defendant may destroy such material before the discovery process can do its work (*Bell Canada v Lackman*, 2018 FCA 42 at para 10; *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36 at para 35 [*Celanese*]).
- [55] In cases involving unauthorized subscription services, including the present case, the destruction of relevant evidence and the transfer of control over the websites and servers is a very real possibility (see *Warner Bros Entertainment Inc v White (Beast IPTV)*, 2021 FC 53). When the Interim Order was issued, I was satisfied that the four criteria set out in *Celanese* had been met. In particular, I was satisfied that but for the issuance of the Anton Piller Order, there was a real possibility that the Defendants may destroy or conceal incriminating documents. The record before me evidenced the Defendants Marshall and Antonio Macciachera's previous involvement with unauthorized subscription services and how, once the Plaintiffs' had launched a separate action and obtained a permanent injunction, the Defendants Marshall and Antonio Macciachera indicated to subscribers that they were eligible to transfer their memberships to SSTV Services. As described by Justice Lafrenière, "the Plaintiffs appear to be drawn into an endless game of whack-a-mole to try to prevent the

online theft of their copyrighted content by disparate actors who seek to take advantage of any vacuum created in the illicit market by the Plaintiffs' efforts." (Charging Order at para 35).

- [56] One must bear in mind that the Interim Order was issued, among other things, for the purpose of seizing and preserving evidence, and avoiding the transfer of assets and control over the SSTV Services outside this Court's jurisdiction. With respect to information stored on digital media, it can be concealed, erased, and/or access can be denied. It was made very clear to the Charged Defendants at the time the Interim Order was served that the penalty for non-compliance is contempt of Court. In the words of Lord Denning, a refusal to comply on the part of the Charged Defendants is "at [their] peril".

C. The Protections Against Self-Incrimination [57] As noted above in the issues section of the present Order and Reasons, a number of objections were raised by the Charged Defendants at the outset of the hearing. Among them was an objection based on the principle against self-incrimination protected by the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter]. The Charged Defendants objected to the use of evidence collected during the execution of the Interim Order, including the video recordings, any observations made by people present at the time, seized equipment, and documents copied or collected while at the Premises. The Charged Defendants also objected to the use of any documents produced in the underlying action, including the affidavits of documents. The Charged Defendants pled that the protections against self-incrimination include the use of incriminating evidence given under compulsion. During their submissions, they highlighted video taken during the execution of the Interim Order and sought to underscore its "highly prejudicial" nature and the "serious, irreparable damage" that it could cause if admitted into evidence. It was submitted that certain things, put simply, "look really bad".

- [58] At the time, I suggested to counsel for the Charged Defendants that if the Charged Defendants were correct in their view that all evidence that may incriminate them must be excluded from the contempt proceedings, then the only situations where one could be found in contempt would be where the alleged contemnor admits contempt or where the act was committed in the presence of a judge as per Rule 468 of the Rules. I sought to explore with counsel for the Charged Defendants whether self-incrimination was something beyond, to use their words, something that is "bad for my client". Counsel clarified that it was any evidence that the Charged Defendants were compelled to provide that may tend to support their finding of guilt, and thus would cause prejudice to them.
- [59] The Plaintiffs submitted that Rule 470 of the Rules ensures that the Charged Defendants cannot be compelled to testify, which they have not been - thereby respecting both Rule 470 of the Rules and section 11 of the Charter. Moreover, a witness who testifies in any proceedings has the right to not have any incriminating evidence used to incriminate that witness in another proceeding pursuant to section 13 of the Charter. The Plaintiffs pled that the law is clear that in any event, the responses to questions during the execution of the

Interim Order are not “testimony”, Anton Piller defendants are not “witnesses”, and Anton Piller defendants lie outside the protections of sections 11 and 13 of the Charter.

- [60] The Plaintiffs further underscored the history and purpose of Anton Piller orders to deal with those who infringe people’s rights, seek to evade the jurisdiction of the courts, and hide and destroy evidence. The Charged Defendant’s position cannot stand because it would mean that evidence of falsehoods, destruction of documents, and refusals to comply could not be used to establish contempt. In such a world, there is no way, in the Plaintiffs’ view, that Anton Piller orders would ever be respected.
- [61] After considering the parties’ submissions, I ruled from the bench that the objection was overruled. I concluded that the protections against self-incrimination in the context of a motion for contempt are contained in Rule 470(2) of the Rules, which provides that a person alleged to be in contempt may not be compelled to testify. I found the protection against self-incrimination was far narrower than the Charged Defendants’ stated position and rather was in line with the Plaintiffs’ representations.
- [62] It cannot be, in the context of a motion for contempt in the Federal Court, that any evidence obtained during the execution of an Anton Piller order or during the underlying proceedings generally is excluded on the basis that it may be prejudicial to the alleged contemnor. If this were to be the case, then it would be next to impossible for anyone to be found to be in contempt, which would, in my view, hamper the ability of the courts to enforce their process and uphold their dignity and respect (Carey at para 30).
- [63] If, during the execution of an Anton Piller order, an alleged contemnor is caught on video by an ISS flouting that very order, to render such a video inadmissible because it would support a finding of guilt would be contrary to the very purpose of granting contempt powers to the courts. These powers are granted in order to foster compliance with court orders by sanctioning those who flout them (Carey at para 30; Adwok at FCA at para 18). In reality, the court will have great difficulty sanctioning those who flout an Anton Piller order if guilt must be proven beyond a reasonable doubt but no prejudicial evidence arising from the execution or attempted execution of an Anton Piller order may be adduced.
- [64] As to section 13 of the Charter, I agree with the Plaintiffs that the present contempt motion is not an “other proceeding” from the civil proceeding in which it was brought within the meaning of this provision (see *Sakab Saudi Holding Company v Saad Khalid S Al Jabri*, 2023 ONSC 2488 at para 38; *McClure v Backstein*, [1987] OJ No 498, 17 CPC (2d) 242 at para 9 (Ont SC) [McClure]). Justice Mackay in *Merck & Co Inc v Apotex Inc (TD)*, [1996] 2 FC 223 [Merck 1] was clear that contempt proceedings to enforce the terms of a court’s order are an integral part of the proceedings in which the order was made (Merck 1 at 251).

[65] More recently, Chief Justice Crampton considered Merck 1, McClure, and other authorities in the context of an argument based on section 13 of the Charter by an alleged contemnor (ASICS Corporation v 9153-2267 Québec inc, 2017 FC 5 [ASICS]). The Chief Justice concluded that contempt proceedings arising out of an alleged breach of an order in an underlying civil action are an integral part of the same action – thus contempt proceedings are not a distinct or other proceeding (ASICS at paras 22-28).

[66] I am therefore satisfied, for the foregoing reasons, that the submissions of the Charged Defendants on the issue of protections against self-incrimination are unfounded.

D. Contempt is Not a Distinct Proceeding [67] Among the blanket objections raised at the outset of the hearing by the Charged Defendants was an objection founded on the principle that testimony from former proceedings is hearsay and thus is inadmissible save for where it meets the requirements of necessity and reliability. The Charged Defendants' submission was that any evidence in the action generally, for example, evidence that was used to obtain the Interim Order, is evidence from a "prior proceeding" or a "distinct proceeding" and thus not admissible as hearsay. The Charged Defendants pled that as the Plaintiffs had not demonstrated that any affiants were unavailable, no evidence from the action generally should form part of the Court record for the present contempt hearing. The Charged Defendants further submitted that evidence in the record for the purposes of the Interim Order or the Interlocutory Order was directed to a different purpose with a different standard of proof. It would not be fair, in the Charged Defendants' view, to permit the Plaintiffs to now shield their evidence from cross-examination.

[68] The Plaintiffs submitted that the Charged Defendants' arguments are misplaced as the case relied upon, Merck & Co v Apotex Inc, [1998] 3 FC 400 [Merck 2], is inapplicable. In Merck 2, at a show cause hearing for why the defendant and its CEO should not be found in contempt, the plaintiff sought to introduce documents from a judicial review application in the Ontario court. The Federal Court found that the evidence was inadmissible on the basis of the hearsay rule, as the Ontario proceedings were different proceedings which raised different issues. The Plaintiffs argued that while Merck 2 is not applicable to the issue at hand, Merck 1 is because it stands for the proposition that civil contempt proceedings are not separate but form an integral part of the entire civil action from its commencement through to judgment. Consequently, the Court, in the Plaintiffs' submission, may refer to evidence in the record generally, including such evidence that led to the issuance of the Interim Order (Merck 1 at 311-312; Blatherwick v Blatherwick, 2016 ONSC 2902 at paras 44-45).

[69] The issue of the implied undertaking of confidentiality also arose, which the Plaintiffs submit was equally answered by Merck 1, where the argument was raised that it is improper to rely on information subject to the implied undertaking in the context of contempt, because one is then using such information for a collateral or ulterior purpose. The Court in Merck 1 found that the use of information obtained through the implied undertaking is permitted because it is not being used for a collateral or ulterior purpose, given contempt proceedings are an integral part of the action.

- [70] After considering the parties' submissions, I ruled from the bench that the Charged Defendants' blanket objection was overruled. I agreed with the Plaintiffs that the present contempt proceedings are not separate or distinct proceedings such that the rule against hearsay is triggered or that there would be a breach of the implied undertaking (Merck 1 at 311-12; McClure at para 9; ASICS). The Plaintiffs were entitled, as they did, to include material from their motion for the Interim Order in their motion record for the present contempt hearing. They were equally entitled, as they did, to include documents in the present motion record that had also been filed in their motion before Justice Lafrenière for the Interlocutory Order.
- [71] I note that the present matter differs from the contempt proceedings involving the Antonio Defendants, where the material before me for the Interim Order had not been included in the Plaintiffs' motion record for the contempt hearing before Chief Justice Crampton (Contempt Judgment Antonio Defendants at paras 31-37). That is not the case in the present proceeding. The Charged Defendants were served with the documents that the Plaintiffs intended to adduce into evidence on April 10, 2023, in accordance with the order rendered by the Case Management Judge Benoit M. Duchesne on February 6, 2023 [Case Management Order 1]. The documents served on the Charged Defendants included materials that were before the Court for the Interim Order, the Charging Order, and the Interlocutory Order. Subject to what follows, the Court is not precluded from referring to evidence that led to the issuance of the Interim Order and/or subsequent orders.
- [72] At the hearing, I did, however, inform the Charged Defendants that they were not precluded from objecting to the admissibility of evidence in specific instances depending upon how it is utilized by the Plaintiffs. Where the evidence in the record is referred to for context or in relation to the basis upon which the Plaintiffs were entitled to the issuance of the Interim Order, it is permissible. If, however, affidavit evidence that was previously submitted is being utilized to demonstrate that the Charged Defendants had deliberately disobeyed the Interim Order, then this would run afoul Rule 470(1) of the Rules unless the Court directs otherwise. Rule 470(1) of the Rules provides that, unless the Court directs otherwise, evidence on a motion for a contempt order, save for a motion for a show-cause order, shall be oral.
- [73] Contrary to the Charged Defendants' submissions on this blanket objection, I conclude that material before the Court in the context of the Interim Order, Charging Order and Interlocutory Order, that was served on the Charged Defendants in advance of the contempt hearing pursuant to Case Management Order 1, is not hearsay and is admissible – subject to the caveat above concerning the manner in which the evidence is sought to be used. As to the Charged Defendants' submission that the Plaintiffs are unfairly seeking to shield their evidence from cross-examination, it shall be addressed in subsection E of the present Order and Reasons below.

[74] The Charged Defendants’ rely on Chief Justice Crampton’s contempt judgment for Antonio Macciachera for the proposition that the aforementioned evidence be excluded. Chief Justice Crampton concluded that given that the evidence was not served on Antonio in accordance with the applicable case management order prior to his contempt hearing “it would be procedurally unfair to permit the Plaintiffs to rely on the evidence that was before Justice Rochester to demonstrate that Antonio is in contempt of the Order she issued.” (Contempt Judgment Antonio Defendants at para 37, see also paras 31–37). The present case differs as the evidence did form part of the Plaintiffs’ motion record and it was served on the Charged Defendants in accordance with the applicable order, Case Management Order 1. While the evidence at issue was not before Chief Justice Crampton in the contempt proceedings for Antonio Macciachera, the Chief Justice did note that “[a]s previously observed, it is possible that the evidence which provided the strong prima facie grounds for the issuance of the Interim Order may have also enabled me to conclude, beyond a reasonable doubt, that at least some of the property, information, documents or equipment described in the Interim Order was located at Antonio’s residence” (ibid at para 77).

E. Collateral Attack on the Interim Order [75] The Supreme Court in Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892 [Taylor], adopting the reasoning of Mahoney J. of the Federal Court of Appeal, found that where an alleged contemnor has neglected to challenge the legitimacy of an order directly, the alleged contemnor cannot then seek to attack it collaterally as a defence in a contempt proceeding (at 942). Justice Tremblay-Lamer in Heritage Front, relied on Dickson C.J.’s judgment in Taylor, noting that the order at issue was not appealed or otherwise challenged and thus the alleged contemnors could not now challenge it as a defence to the charge of contempt (at 717). Justice Tremblay-Lamer highlighted that one cannot “deliberately disobey a valid order of the Court which is not under attack” (at 729). She further underscored that it “is the duty of the courts to ensure that deference to their process is not undermined in any way.” (ibid).

[76] The Plaintiffs submit that the Charged Defendants efforts to exclude evidence on the basis that it was before the Court for the Interim Order and the Interlocutory Order is in essence a challenge to the Plaintiffs’ right to those Orders at the time. By seeking to have the Plaintiffs go through the exercise again, the Charged Defendants are, in the Plaintiffs’ view, launching an impermissible collateral attack in the context of the contempt proceedings. The Plaintiffs rely on Manis v Manis, (2001) 55 OR (3d) 758 [Manis], where the Ontario Court of Appeal concluded that the alleged contemnor failed to appeal the judgment, and thus cannot defend himself at the contempt stage by an impermissible attack on a valid court order (at paras 22-23). It is therefore impermissible, in the Plaintiffs’ view, to permit the Defendants to now attack the basis upon which the Interim and Interlocutory Orders were issued if they did not do so at the time.

- [77] Subject to the caveat I described in subsection D above on the use of evidence and Rule 470 of the Rules, I agree with the Plaintiffs. It is not open to the Charged Defendants to seek to defend themselves against the charge of contempt by now attacking the validity of the Interim Order, including the grounds upon which it was issued. The Charged Defendants had the opportunity to contest the validity of the Interim Order before Justice Lafrenière, however they did not do so.
- [78] As discussed in detail in Section II of the present Order and Reasons, during the hearing to review the Interim Order, the Charged Defendants did not contest the validity of the Interim Order vis-à-vis any of the Defendants. Nor did they contest the terms of the Interim Order, the evidence relied upon by the Court, or the Interim Order's conversion into an interlocutory order. Rather, the Charged Defendants objected to the manner in which the Interim Order was executed by ISS Drapeau (Interlocutory Order at para 60). The Federal Court of Appeal has equally noted that there was no challenge to the validity of the Interim Order (Bell Media at para 2).
- [79] If this Court were to allow the Charged Defendants to now attack the Interim Order and the grounds upon which it was issued, it would be tantamount to allowing litigants to decide whether or not to comply with a court order depending on whether they perceive a basis for questioning that order - and would thus amount to permitting an improper collateral attack on a valid and binding order of the court (Manis at para 23; see also Taylor at 942; Heritage Front at 717; Contempt Judgment Antonio Defendants at para 46).
- [80] If alleged contemnors are permitted to collaterally attack Anton Piller orders, particularly in this day and age when relevant evidence can be destroyed in a single keystroke, it would encourage unscrupulous defendants to act in defiance of judicial authority and serve to erode the very purpose for which these orders are issued. I am mindful of the comments of the Supreme Court in Celanese as to the purpose and the utility of Anton Piller orders:
32. Experience has shown that despite their draconian nature, there is a proper role for Anton Piller orders to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished ...
- [81] I am equally mindful of the recent comments of Chief Justice Crampton that one must be cautious of "frustrating the purpose for issuing an Anton Piller order in the first place - namely, preventing the circumvention of the court's processes by pre-empting the destruction or removal of evidence, or the shifting of funds beyond the Court's reach." (Contempt Judgment Antonio Defendants at para 111).
- [82] I now return to the Charged Defendants' submission that it would be unfair to permit the Plaintiffs to shield their evidence from cross-examination. I do not agree that this is the case with respect to the material before the Court in the motions for the Interim Order and the

Interlocutory Order. The Charged Defendants had every opportunity to contest the Interim Order and submit evidence before Justice Lafrenière had they wished to and they did not (Interlocutory Order at para 13). The Charged Defendants also had every opportunity to cross-examine the Plaintiffs' affiants, however, they chose to only cross-examine ISS Drapeau on his affidavit, leaving the remainder of the affidavits unchallenged (Interlocutory Order at para 13).

- [83] I find that it is not unfair to the Charged Defendants for the complete record to be before the Court. They were served with the documentation before the hearing of the motion to review the Interim Order in 2022, and were served again with it in advance of the present hearing in accordance with Case Management Order 1. The Charged Defendants had every opportunity to cross-examine the affiants and attack the foundations upon which the Interim Order was issued. If they disagreed that there was clear and convincing evidence that they were in possession of the required information, it was certainly open to them to contest or seek to vary the Interim Order. If there was an issue with compliance with the terms of the Interim Order, the Charged Defendants were free to raise it. Ultimately, they chose not to challenge the validity of the Interim Order at the time, and their failure to do so cannot now be used as a defence in the context of contempt proceedings or as a tactic to exclude evidence.
- [84] Despite the unfairness claimed by the Charged Defendants, I am satisfied that their rights are being protected. As discussed in subsection D above, it remained open to the Charged Defendants in these proceedings to object in specific instances if affidavit evidence was being tendered to demonstrate that the Charged Defendants refused to comply with the Interim Order. In such instances, Rule 470 of the Rules requires, absent a direction from the Court, that such evidence be oral.
- [85] Finally, it does bear mention that challenging the clarity of an order - as to whether it clearly states what one should and should not do - in the context of contempt proceedings is not a collateral attack. Rather, a clear order is one of the necessary elements for a finding of contempt (Carey at para 33). The Charged Defendants did raise arguments as to the clarity of the Interim Order, specifically whether expert evidence ought to have been adduced in relation to understanding the terms of the Interim Order and whether the steps taken by Marshall were sufficient to constitute compliance. These arguments are addressed in subsection H below.

F. The Alleged Unlawful Execution of the Order [86] Over the course of the hearing, the Charged Defendants repeatedly raised arguments as to the manner in which ISS Drapeau executed the Interim Order. In particular, the Charged Defendants allege that the search of the Residence robbed Marshall of his dignity, was outrageous, and was not compliant with recognized health and safety procedures. In terms of the Commercial Premises, in the Charged Defendants' view, the manner in which the search was conducted was equally egregious and unlawful. The Charged Defendants highlight, in particular, the COVID-19 testing regime, the safety precautions around COVID-19, and the length of time taken to the search of the Premises, including the short time provided for a sleep break. The Charged Defendants further allege that Marshall was not

provided with a zone of privacy to change his clothes by ISS Drapeau.

[87] The Charged Defendants plead that in light of the manner in which the Interim Order was executed, the Court ought to use its residual discretion pursuant to the Supreme Court's decision in *Carey* and enter a finding of not guilty. They submit that if ISS Drapeau's conduct is not sanctioned, it will happen again. The way to recognize it and sanction it, in the Charged Defendants' view, is to exercise discretion that find them not guilty given the circumstances. The Charged Defendants plead that it is about mercy, given what they had to go through, rather than seeking to punish or literally sanction ISS Drapeau.

[88] I agree with the Charged Defendants that the contempt power is discretionary. The Supreme Court instructs that a judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt (*Carey* at para 37). While the Supreme Court in *Carey* declined to delineate the full scope of this discretion, they did indicate the possibility exists where to impose a finding of contempt would work an injustice in the circumstances of the case (*Carey* at para 37).

[89] I have not been persuaded by the Charged Defendants that the exercise of discretion in order to avoid an injustice is appropriate in the present circumstances.

[90] As noted in Section II of the present Order and Reasons above, the issue of whether the execution of the Interim Order was lawful was considered and decided by Justice Lafrenière in the Interlocutory Order. Both parties extensively argued the issue at the time of the Interlocutory Order (at para 58 and ff). The stated issues to be determined were:

[15] The issues that remain to be determined are:

- 1) Whether the Court should issue a declaration that the execution of the Interim Order was lawfully conducted.
- 2) If so, whether the Court should authorize the return of the Plaintiffs' security for damages.
- 3) Whether a portion of the interim relief provided by the Interim Order should be converted to interlocutory relief.

[91] The arguments raised before Justice Lafrenière were for the most part identical to the ones raised before me in the present proceedings. Justice Lafrenière undertook a thoughtful and detailed analysis before concluding the following:

[105] For the above reasons, I find the Defendants' arguments to be unfounded and without merit. I conclude that ISS Drapeau and ISS Davis conducted themselves professionally and in a manner that protected the Defendants' rights adequately. Further, I find that they fully complied with the terms of the Interim Order.

- [92] I find that the arguments raised by the Charged Defendants are ultimately an attempt to re-litigate the question that was before Justice Lafrenière. They had the opportunity to fully ventilate the issue before him and are not entitled to a second kick at the can in the context of these proceedings. Furthermore, the Interlocutory Order is currently under appeal. It is thus appropriate that any findings as to the lawfulness of the execution of the Interim Order be left to the Federal Court of Appeal.
- [93] Given the fact that a finding of contempt is at issue, I have nevertheless been mindful of anything new that has arisen since the Interlocutory Order was rendered. As such, I have taken a very liberal view of the Charged Defendants' arguments on the lawfulness of the execution of the Interim Order and the potential for it to impact on a finding of contempt.
- [94] Having done so, however, I have not been persuaded that the issues raised by the Charged Defendants rise to the level of injustice so as to negate a finding of contempt under the circumstances. The Charged Defendants have repeatedly emphasized that the execution of the Interim Order continued late in the evening of July 14, 2022, and past midnight into July 15, 2022. When considering the statements and comments made by Marshall Macciachera that are alleged to be breaches of the Interim Order, these statements were not made late in the evening or at night. Rather, they were made in the afternoon of July 14, 2022.
- [95] The Charged Defendants also allege that testimony given by Mr. Branko Vranesh during the present contempt proceedings reveals that there was potentially a more expeditious way to disconnect and inventory the servers at the Commercial Premises. The Plaintiffs submit that simply unplugging the Ethernet cable was not sufficient, especially given Antonio Macciachera's non-compliance with the Interim Order and the inability to prevent someone from entering the Commercial Premises overnight had the team left.
- [96] Contrary to the Charged Defendants' submissions, I do not consider that Mr. Vranesh's evidence is "shocking" or that it precludes the Charged Defendants from being found in contempt. Moreover, I do not consider that Mr. Vranesh's testimony calls into question Justice Lafrenière's finding that the Defendants had failed to establish that ISS Drapeau's decision to continue the execution at the Commercial Premises was unreasonable let alone unlawful (Interlocutory Order at paras 75-80). I note that the Charged Defendants' argument that it would have been more reasonable to place an investigator at the front door and seal the back door overnight rather than deactivating and inventorying the servers at the Commercial Premises was raised before Justice Lafrenière as well.
- [97] I therefore find the Charged Defendants' submissions as to the lawfulness of the execution of the Interim Order, in so far as they relate to the issue of contempt, unfounded.

G. The Independence of ISS Drapeau [98] The Charged Defendants have alleged that ISS Drapeau is not in fact independent. They submit that because ISS Drapeau is the independent supervising solicitor, how can the Charged Defendants have confidence that they are being treated fairly by the Court if the alleged violations by ISS Drapeau are not sanctioned?

- [99] The foundation for this allegation is a discussion that took place during a hearing with Justice Lafrenière held on July 26, 2022. The hearing lasted one hour and ten minutes. During an exchange between counsel and the Court, counsel for the Plaintiffs notified the Court that they would need to liaise with the two ISS, Me Drapeau and Me Davis, regarding their representation at their cross-examinations as “in real life, our clients are probably going to end up paying for this counsel”. Counsel for the Plaintiffs notified the Court that they would be having side discussions with the ISSs regarding their representation. The Court responded that there was no property in a witness and the Plaintiffs, just like the Charged Defendants, were free to do so.
- [100] Counsel for the Charged Defendants raised the issue that there had been texting and group texts with ISS Drapeau about the videos and other matters, but that they were hard to produce and as such they preferred emails for administrative matters. Counsel for the Charged Defendants stated that if the Plaintiffs wanted to speak to ISS Drapeau as a witness that is a separate issue, but that “it’s just - we believe that it’s just easier if people just communicate by email and copy each other. It’s very difficult to text.” It was the Charged Defendants’ view that texts were too confusing and unnecessary for administrative things and that type of communication can be misunderstood. Accordingly, Justice Lafrenière commented that “Administrative matters will be done by email so that people are kept in the loop and you know, there are no miscommunications.”
- [101] The hearing before Justice Lafrenière, held on July 26, 2022, resulted in the Charging Order. The Charging Order dealt with a number of administrative and substantive issues, along with charging the Charged Defendants with contempt. At the conclusion of the Charging Order, the Court issued a 14 paragraph order. The mode of communication, email or text, with ISS Drapeau was not a point that was addressed in the Charging Order.
- [102] The Charged Defendants argue that the exchange that occurred during the hearing with Justice Lafrenière constituted an order, or at the least, an oral direction of the Court that must be respected. The Charged Defendants highlight that after July 26, 2022, ISS Drapeau and one of the counsel for the Plaintiffs had exchanged a number of text messages. This fact, in their view, was in defiance of a Court direction and calls into question ISS Drapeau’s impartiality and the ability of the Charged Defendants to have confidence that they are being treated fairly by the Court. The Charged Defendants, in their view, ought to have been copied.
- [103] The text message exchanges, which were comprised of six screen shots, have been disclosed. During the contempt hearing, ISS Drapeau was cross-examined on them extensively. First, it is clear from the text messages themselves, as well as ISS Drapeau’s testimony, that the majority of the exchanges are unrelated to the present matter. By way of example, they concern other cases where ISS Drapeau was appointed as an ISS by counsel for the Plaintiffs, exchanges on hiring law students, and back and forth about setting up a phone call. Where the few texts did relate to the present case, it involved the payment of invoices.

- [104] Second, ISS Drapeau was clear that at no point was he informed that he could be precluded from contacting Plaintiffs' counsel by text. On the contrary, he understood that he could communicate with Plaintiffs' counsel. He was not present at the hearing on July 26, 2022, nor was he informed of any direction to this effect.
- [105] The Charged Defendants have failed to call into question ISS Drapeau's independence and integrity. There is no indication that anything untoward occurred, despite the Charged Defendants attempts to make it appear that way.
- [106] I have carefully reviewed the transcript of the July 26, 2022 hearing and watched the zoom recording. What was effectively an administrative housekeeping matter, has been distorted into something that it was not. There is nothing in the exchange with Justice Lafrenière that would lead me to conclude that counsel for the Plaintiffs and ISS Drapeau were prohibited from exchanging the type of text messages that they did. Rather, for administrative expediency, at the request of counsel for the Defendants on the basis that texts are hard to produce and "its very difficult to text", email was to be the method used for group messages.
- [107] In addition, in response to the Plaintiffs having mentioned that the Charged Defendants wished to preclude counsel for the Plaintiffs from contacting ISS Drapeau without them present - Justice Lafrenière was very clear that there was no property in a witness. The Plaintiffs' counsel was entitled to speak to ISS Drapeau without the Charged Defendants present.
- [108] Allegations of bias or a lack of independence against a member of the legal profession acting as an independent supervising solicitor should not be made lightly. Such allegations strike at the very core of the duties incumbent on an ISS. In the present case, I consider that not only were they made lightly, considerable Court time was used seeking to call into question the integrity of ISS Drapeau when there was no foundation for doing so.
- [109] The Charged Defendants ask how are they to have confidence that they are being treated fairly by the Court, if the alleged violations by ISS Drapeau are not sanctioned. The allegation that they risk being treated unfairly by the Court or losing confidence in the fairness of the judicial process was made numerous times over the course of the contempt hearing. This is in essence an allegation of bias, which engages the very foundation of our judicial system (*Coombs v Canada (Attorney General)*, 2014 FCA 222):
- [14] Further, the appellants repeatedly attack the integrity of the Prothonotary, of the Judge and of the Federal Court The appellant's allegations are most serious, and such a step should not be undertaken lightly. Indeed, an allegation of bias engages the very foundation of our judicial system. The appellants' allegations call into question not only the personal integrity of the Prothonotary and of the Judge, but the integrity of the entire administration of justice.

[Citation omitted.]

- [110] The test for determining whether there is actual bias or a reasonable apprehension of bias by a decision maker is well established (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394-395). The Federal Court of Appeal in *Firsov v Canada (Attorney General)*, 2022 FCA 191, recently confirmed that the test is:
- [56] ... whether “an informed person, viewing the matter realistically and practically – and having thought the matter through – ... [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly”: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, 26.
- [111] The Supreme Court in *Cojocaru v British Columbia Women’s Hospital and Health Centre*, 2013 SCC 30 [Cojocaru] explains that the presumption of judicial impartiality is strong and cannot be easily rebutted:
- [15] Judicial decisions benefit from a presumption of integrity and impartiality — a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings.
- ...
- [20] The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.
- ...
- [22] The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant’s right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.
- [112] It is the Charged Defendants, the ones alleging partiality, unfairness, and in essence, bias, who bear the onus of rebutting the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that this Court has failed to come to grips with the issues and decide them impartially and independently (*Cojocaru* at para 22).
- [113] In my view, the Charged Defendants have “carelessly evoke[d] the possibility of bias in a judge” (*Cojocaru* at para 20). In so doing, they have provided no cogent evidence, and have instead relied on bald allegations.

[114] The Charged Defendants allegations attacking the independence of ISS Drapeau and the impartiality of this Court appear to me to be nothing more than a tactic. I have been provided with no evidence whatsoever that would indicate that bias, or a reasonable apprehension of bias, exists in the present matter.

H. A Clear and Unequivocal Order [115] Having dealt with the evidentiary matters, the execution of the Interim Order, and the independence of ISS Drapeau, I now turn to the first of the three elements that are required to be present for a finding of civil contempt. As discussed in subsection A of the present Order and Reasons above, the first element required to support a finding of contempt is that the Interim Order must clearly and unequivocally state what a party is to do or to refrain from doing (Carey at para 33). The objective is to ensure that a party will not be held in contempt if an order is unclear (*ibid*). While absolute precision is not required, an order must give sufficient guidance such that it is clear what activities are prohibited (Red Rhino at para 34). An order may be considered to be unclear where, for example, an essential detail is missing, such as, when or to whom it applies; if the language is overly broad; or if external circumstances have obscured its meaning (Carey at para 33; PS Knight Co at para 30).

[116] The Charged Defendants allege that the Interim Order was not clear in that “the entire universe of documents required to be produced is unknown”. They state that this is the case in relation to the scope of the financial disclosure and the level of access to the servers and on-line accounts. The Charged Defendants reference paragraphs 20 and 24 of the Interim Order.

[117] Notwithstanding the breadth of the language in the above referenced paragraphs, I find the language to be clear on its face. In other words, there was “sufficient guidance that it is clear” what the Charged Defendants were obliged to disclose to ISS (Red Rhino at para 34).

[118] Moreover, I find the paragraphs at issue are clear and unambiguous in the circumstances of the present case in that there are no external circumstances that have obscured the meaning of the paragraphs (Carey at para 33; *Fettes v Culligan Canada Ltd*, 2010 SKCA 151 at para 21).

[119] The breadth of the language in the Interim Order, on the facts as I have found them, cannot be used as a defence given the information the Charged Defendants have failed to disclose. This is not a case where there is uncertainty about whether or not the type of information that a defendant is alleged to have failed to disclose falls within the scope of an order. The information at issue in the present case fits squarely within the language of the paragraphs of the Interim Order – there is no ambiguity or uncertainty.

[120] I am satisfied beyond a reasonable doubt that the Charged Defendants, namely Marshall Macciachera in his personal capacity and as the sole director of each of the Corporate Defendants, concealed and failed to disclose information that clearly fell within the language in the Interim Order. As will be discussed further below, such information included financial information pertaining to bitcoin and crypto currencies, as well as banking information for Roma Works Limited and Star Hosting Limited. In short, on the

facts of the present case, I find beyond a reasonable doubt that the Charged Defendants were aware that they had information that was responsive to and covered by the language in the paragraphs 20 and 24 of Interim Order and chose not to disclose it.

- [121] While the Charged Defendants have made a number of general allegations as to the clarity of the Interim Order, they have not, however, specified in what way paragraphs 20 and 24 of the Interim Order were unclear or ambiguous in the present situation. Nor have they specified what essential details may have been missing that were necessary in order for the Charged Defendants to understand the language contained in the Interim Order. I note that Marshall Macciacchera, did not, at any point, express that he failed understand the language, the terms or the scope of the Interim Order or ISS Drapeau's explanation of the Interim Order. On the contrary, video recordings of the execution of the Interim Order demonstrate that ISS Drapeau clearly explained the terms and provisions of the Interim Order. Included in these explanations was the right to contest the Interim Order, which the Charged Defendants did not do.
- [122] Marshall Macciacchera is effectively seeking to argue that the language of the Interim Order was unclear such that he did not know what financial and technical information was covered by it. This position cannot stand as there is evidence before me, which I accept, that Marshall Macciacchera understood that information on his computer that fell within the language of the Interim Order and that he was obliged to disclose it. After ISS Drapeau witnessed relevant information on Marshall Macciacchera's computer screen and requested a copy of the computer be made, Marshall Macciacchera refused to provide his computer password, which was necessary to access the information contained on the computer, stating, "there is evidence against me [on the computer] that I don't want to login for you to collect information against me." The video footage of the execution of the Interim Order, along with the testimony of ISS Drapeau, demonstrates that such relevant information was present on Marshall Macciacchera's computer screen.
- [123] The Charged Defendants state that, with respect to the financial disclosure pursuant to paragraphs 24(a) and 24(b) of the Interim Order, ISS Drapeau was unable to identify all the categories of financial documentation that could be included due to the expansive nature of the financial information. In the Charged Defendants' view, expert evidence on this point was required. I disagree. Simply because ISS Drapeau could not provide an exhaustive list of every possible financial document that could fall within the ambit of the Interim Order, does not, in my view, negate the fact that the Charged Defendants did not provide, among other things, access to the financial documentation contained on Marshall Macciacchera's computer. Nor did they disclose assets and accounts for Star Hosting Limited or Roma Works Limited at HSBC Bank. Marshall Macciacchera is shown, in video footage of the execution of the Interim Order, stating, "I don't know if these companies have assets, and if they do, I don't know that I have the authority to disclose them to you." I am satisfied that the scope of the Interim Order was clear to Marshall Macciacchera as it pertained to the information in his possession and/or that he had access too. As argued by the Plaintiffs, the

Charged Defendants understood what it meant to disclose financial information, as Arm Hosting Inc. did in fact provide a series of financial disclosures and Marshall Macciachera disclosed a number of accounts.

- [124] In addition, the clarity of the Interim Order was extensively addressed by Chief Justice Crampton, who rejected the Antonio Defendants' arguments and concluded that, among others, subparagraphs 24(a) and (b) , were clear and unequivocal (Contempt Judgment Antonio Defendants at paras 55-64). The Defendants have raised the similar arguments before me. I agree with Chief Justice Crampton's analysis on the clarity of the provisions of the Interim Order that were the subject of the charges against both the Antonio Defendants and the Charged Defendants.
- [125] Paragraph 20 of the Interim Order orders the Charged Defendants to disclose technical information related to unauthorized subscription services, including the identity, location and login credentials. Regarding the technical disclosure, the Defendants state that paragraph 20 of the Interim Order is unclear and therefore, it was not possible for Marshall Macciachera to know the extent of the disclosure required, specifically regarding what domains needed to be disclosed and what was meant by access at the highest available privilege. They argue that expert evidence was required to clarify the terms of the Interim Order. They further state that Marshall Macciachera did in fact provide a number of passwords.
- [126] I disagree with the Charged Defendants that the Interim Order was unclear on what domains needed to be provided by Marshall Macciachera. Paragraph 20 of the Interim Order directly referenced Schedule I of the Interim Order, which contained a list of domains, subdomains and servers required to be disclosed by Marshall Macciachera. Again I note, as discussed in detail in Section II of the present Order and Reasons, during the hearing to review the Interim Order, the Charged Defendants did not contest the validity of the Interim Order or its terms (Interlocutory Order at para 60; Bell Media at para 2).
- [127] In addition, during and following the execution of the Interim Order, Marshall Macciachera only provided credentials that gave access to certain websites as a user. During the hearing, Mr. Vranesh, a digital forensics consultant, testified that Marshall Macciachera failed to disclose the credentials for the domains and subdomains other than for those relating to Arm Hosting Limited (armhosting.ca and client.armhosting.ca). Nor did Mr. Vranesh receive the login credentials for registrar accounts, some of which were connected to cryptocurrency wallets, or the login credentials for Marshall Macciachera's computer. As the sole director of each of the Corporate Defendants, I consider that the Interim Order was sufficiently clear such that Marshall Macciachera understood that it required him to provide login credentials beyond those provided for the sites mentioned above. The video footage of the execution of the Interim Order evidences login credentials for other domains contained in Schedule I on Marshall Macciachera's computer screen, namely those for Starhosting.me. I therefore disagree with the Charged Defendants that it

was unclear to Marshall Macciachera what information in his possession was responsive to the technical disclosure covered by the language in the Interim Order.

[128] For the foregoing reasons, I am therefore satisfied that the first element required to support a finding of contempt is fulfilled.

I. The Charged Defendants' Knowledge of the Interim Order [129] I now turn to the second element required to support a finding of contempt. As discussed in detail in subsection A of the present Order and Reasons, above, the second element is that the party alleged to be in breach of the order must have had actual knowledge of it or have been willfully blind to it, which can be inferred from the circumstances (Carey at para 34).

[130] Having watched the video of the execution of the Interim Order, and taking into account the testimony of ISS Drapeau, I am satisfied beyond a reasonable doubt that each of the Charged Defendants had knowledge of the Interim Order. Marshall Macciachera is the president of Arm Hosting Inc. and the sole director of each of the Corporate Defendants. The video footage of the execution of the Interim Order evidences that the order was explained clearly and at length by ISS Drapeau to Marshall Macciachera. ISS Drapeau further explained the Charged Defendants' obligations to them as situations arose during the course of the execution of the Interim Order.

[131] By way of example, when ISS Drapeau requested Marshall Macciachera's computer password, he clearly explained that the password was required to access and make a copy of the computer, and therefore Marshall Macciachera was obliged to provide it. Marshall Macciachera initially refused on the basis that he did not wish to disclose information that could be used against him, then later refused on the basis that he first wished to consult with legal counsel. ISS Drapeau repeatedly informed him that the Interim Order did not allow him to seek the advice of counsel before complying with its terms - once the period provided to seek advice had elapsed. Despite having retained legal counsel following the execution of the Interim Order, Marshall Macciachera has continued to maintain his refusal to disclose his computer password.

[132] In addition, as discussed in detail in subsection H of the present Order and Reasons above, I am satisfied that the Charged Defendants not only had actual knowledge of the Interim Order, its terms were clear to them such that they actively sought to conceal information that was responsive to its terms.

J. Charged Defendants Intentionally Failed to Comply with the Interim Order [133] I now turn to the third element required to support a finding of contempt. As discussed in detail in subsection A of the present Order and Reasons, above, the third element is that the party alleged to be in breach of the order must have intentionally done the act that the order prohibits or failed to do the act that the order compels (Carey at para 35). With regard to the third element, it is not necessary to prove that the alleged offending party intended (i) to interfere with the administration of justice; or (ii) to undermine the authority or dignity of the Court; or (iii) to disobey the order. It is sufficient to find that the person has committed an act which in fact

constitutes a violation of a clear order of which they had knowledge (Contempt Judgment Antonio Defendants at para 28; Apotex at para 60; Carey at para 38). In other words, in civil contempt cases, the person must have intended to commit the prohibited act – the act must not have occurred accidentally (Apotex at para 60).

[134] For the reasons that follow, I find that the Charged Defendants intentionally failed to take certain actions required by the Interim Order. Specifically, I find beyond a reasonable doubt that (i) the Charged Defendants deliberately disobeyed paragraph 20; (ii) Marshall Macciachera, Star Hosting Limited, and Roma Works Limited deliberately disobeyed paragraphs 24 and 25; and (iii) Marshall Macciachera deliberately disobeyed paragraph 30 of the Interim Order.

- (1) Paragraph 20 [135] Paragraph 20 of the Interim Order orders the Defendants to:
- a) provide to the independent supervising solicitor the identity of the registrar accounts with which the domains and subdomains listed in Schedule I attached to this Order are registered, and provide the independent supervising solicitor the login credentials for each of these accounts;
 - b) provide to the independent supervising solicitor the identity and location of the servers and hosting provider accounts for the servers associated with the SSTV Services and/or with the domains and subdomains listed in Schedule I to this Order, and provide the independent supervising solicitor the login credentials and any other credentials necessary to access the highest available privilege level for these servers and accounts; and
 - c) disclose to the independent supervising solicitor and the Plaintiffs' solicitors any other domain, subdomain, registrar account, hosting provider account, and server associated with the development, hosting, operation, promotion and sale of the SSTV Services and/or any other Unauthorized Subscription Service under the Defendants' control, which shall then be treated as being part of Schedule I for the purpose of this Order.

[136] The Charging Order states:

8. The acts with which the Defendants Marshall Macciachera, Arm Hosting Inc., Star Hosting Limited, and Roma Works Limited are charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that they, by their conduct or inaction breached paragraph 20 of the Interim Order by refusing to provide to the independent supervising solicitor and/or to the Plaintiffs' solicitors the technical information related to the SSTV Services and/or any other unauthorized subscription services under their control.

[137] Each of the Charged Defendants are charged with breaching paragraph 20 of the Interim Order.

[138] I am satisfied that Marshall Macciachera failed to disclose the required technical information associated with SSTV Services. At the Residence, video footage taken during the execution of the Interim Order shows that ISS Drapeau asked Marshall Macciachera

whether any of the towers of equipment in his living room were used for SSTV Services. Marshall Macciachera answered, “I don’t think so, it’s just whatever it is for watching tv”. Similarly, at the Commercial Premises, which is owned by Marshall Macciachera, video footage taken during the execution of the Interim Order shows Marshall Macciachera indicating that the servers in certain cabinets were not used for streaming services. The evidence demonstrates, however, that in both of these instances, it was determined that the equipment in question was being used to stream unauthorized content. Based on the testimony of ISS Drapeau, Mr. Martin and Mr. Vranesh, I find that the equipment located at the Premises was used to stream unauthorized content. I further note that when Mr. Vranesh, a digital forensics consultant, confronted Marshall Macciachera with evidence that certain servers were being used to stream unauthorized content during the execution of the Interim Order, Marshall Macciachera then recanted his initial denial.

- [139] Furthermore, when the equipment in question was disconnected, a number of the channels ceased streaming and there were interruptions to the SSTV Services. Mr. Martin, an investigator in the Corporate Security Department of BCE Inc., Bell Media’s parent company, testified in detail as to the impact on SSTV Services, and specifically Live247, once equipment at the Premises had been disconnected and seized. Mr. Martin, who had been monitoring Live247, observed that Live247 listed approximately 200 channels, 160 of which were active, prior to the execution of the Interim Order. Over the course of the execution, as equipment was disconnected and seized both at the Residence and at the Commercial Premises, the number of channels streaming decreased until only one channel remained on Live247 by July 19, 2022.
- [140] Despite the equipment in his possession, and the evidence that he had access to technical information for the SSTV Services, Marshall Macciachera, in his personal capacity, and in his capacity as the sole director of Arm Hosting Inc, Star Hosting Limited and Roma Works Limited, intentionally failed to disclose that information. Stills taken from the video of the execution of the Interim Order evidence that Marshall Macciachera had technical information for each of the three Corporate Defendants that acted as payment processors for the streaming services under the SSTV Services umbrella brand. Even though Marshall Macciachera denied having technical knowledge relating to Star Hosting Limited and Roma Works Limited during the execution, it is clear from the evidence before me that such information was in his possession given that it appeared on his computer screen.
- [141] I am equally satisfied beyond a reasonable doubt that the Charged Defendants failed to provide credentials for the required accounts, domains, subdomains and servers contained in Schedule I of the Interim Order. Having considered the testimonies of ISS Drapeau and Mr. Vranesh, along with the video evidence of the execution of the Interim Order, the Charged Defendants have had numerous opportunities to provide the required access and have not done so. I find beyond a reasonable doubt that Marshall Macciachera has or is able to access the credentials for the domains, subdomains and registrar accounts related to the SSTV Services.

[142] I note that Marshall Macciachera, in his capacity as President and sole director of Arm Hosting Inc., has provided login credentials for the registrar account of armhosting.ca, along with the identity of and credentials for the servers of and armhosting.ca and client.armhosting.ca. There is thus a measure of compliance with the Interim Order in this regard. What has not been provided by Arm Hosting Inc., however, are the credentials for the domain of live247.tv or the identity of and credentials for the server that streams the Live247 service. Arm Hosting Inc. is the payment processor associated with Live247. Furthermore, the Residence and the Commercial Premises contained various equipment that were streaming channels on Live247. I am therefore satisfied, for the reasons stated above, that Marshall Macciachera is able to access the required credentials.

[143] The Charged Defendants plead that they have in fact provided sufficient disclosure. I note that following the execution of the Interim Order, further disclosure was made for streamtvnow.tv, for whom Star Hosting Limited is the payment processor, and starstreams.tv, for whom Roma Works Limited is the payment processor. The disclosed credentials, however, only permitted users access to certain websites rather than registrar access or access such that one may take control of the websites. Accordingly, my finding of guilt with respect to paragraph 20 of the Interim Order for the Charged Defendants remains.

- (2) Paragraph 24 [144] Paragraph 24 of the Interim Order orders the Defendants to disclose to the ISS and the Plaintiffs' solicitors:
- (a) the existence of any assets, revenues, expenses and profits derived from the operation of the SSTV Services or other Unauthorized Subscription Services, whether located in Canada or abroad, including but not limited to bank account or account from any other institutions or persons that deal in financial matters; safety deposit boxes; investment accounts; brokerage accounts; financial instruments or other assets within the control of a bank, financial or similar institution; cryptocurrency; and any other asset that is owned by, directly or indirectly controlled by or registered to the Defendants, by themselves or through any person or entity related to them or to the SSTV Services or any other Unauthorized Subscription Services;
 - (b) all information pertaining to the assets identified pursuant to subparagraph (a), including the identity of their owner, account number, type, creation date, transaction history, value and balance, including by providing all documents likely to contain this information, such as financial records, banking statements, invoices, and other similar documents; and
 - (c) the identity and contact information of the bank(s), financial institution(s) or other service provider(s) with which these assets are registered or through which they are controlled.

[145] The Charging Order states:

9. The acts with which the Defendants Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that they, by their conduct or inaction:
- (a) breached paragraph 24(a) of the Interim Order by refusing to disclose the assets, revenues, expenses and profits referred to in said paragraph.
 - (b) breached paragraph 24(b) of the Interim Order by refusing to provide all information pertaining to these assets, including by refusing to provide the documents likely to contain that information.
 - (c) breached paragraph 24(c) of the Interim Order by refusing to provide the identity and contact information of the banks, financial institutions or other service providers with which these assets are registered or through which they are controlled.

[146] Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are each charged with breaching paragraph 24 of the Interim Order. This charge is not brought against Arm Hosting Inc., who as noted above, has disclosed a number of accounts in its name. Unlike the other two corporate defendants, Arm Hosting Inc. is incorporated in Ontario.

[147] As noted previously, Marshall Macciachera is the sole director of both Star Hosting Limited and Roma Works Limited. The two companies are incorporated in Hong Kong. When first questioned about Star Hosting Limited and Roma Works Limited during the execution of the Interim Order, Marshall Macciachera initially denied any involvement with the two companies. During the execution of the Interim Order, multiple documents were uncovered evidencing an active relationship between Marshall Macciachera and Star Hosting Limited and Roma Works Limited. Such documents included (i) financial statements; (ii) notes on the companies' corporate structure and task lists itemizing taxes, accounting, and privacy policies; (iii) HSBC banking documentation; (iv) HSBC credit card for "Star Hosting LTD"; and (v) correspondence from HSBC to the attention of Star Hosting Limited and Roma Works Limited. By way of example, correspondence from HSBC is addressed to "Macciachera M. C/O Star Hosting Ltd." with an address in Hong Kong.

[148] Later during the execution, Marshall Macciachera was questioned about assets and again about his relationship with the two companies. The following exchange between Marshall Macciachera, Mr. Evans and ISS Drapeau took place and was captured on video:

MR. EVANS: I just want to make sure everything is clear. You made a comment, so when we talking about assets you understood that was Canadian or foreign, ---

MR. MACCIACCHERA: Yeah.

MR. EVANS: --- right so you have no assets anywhere else in the world? ---

MR. MACCIACCHERA: Got it. Yeah.

MR. EVANS: --- And Arm Hosting has no assets anywhere else in the world?

MR. MACCIACCHERA: Right.

MR. EVANS: And you're not able to say anything about any of the other companies?

MR. MACCIACCHERA: Correct.

MR. EVANS: I thought I heard you say this morning, and I may have misheard, that the other defendants were also your companies?

MR. MACCIACCHERA: No, no.

MR. EVANS: No? So like Star Hosting Limited as well?

MR. MACCIACCHERA: Oh that one yeah yeah yeah.

MR. EVANS: That is your company?

MR. MACCIACCHERA: *sigh* Yeah, that's me.

MR. EVANS: So you should be able to answer questions about the assets of that company?

MR. MACCIACCHERA: Uh not entirely maybe not entirely to your satisfaction but...

MR. EVANS: Well does that mean you are authorized uh to access its assets?

MR. MACCIACCHERA: Uh yeah on those I'm gonna stick with my answer of I don't know on those ones.

MR. EVANS: You don't know what its assets are?

MR. MACCIACCHERA: Correct.

MR. EVANS: And you aren't able to look it up?

MR. MACCIACCHERA: Uh not no.

...

MR. EVANS: So that was Star Hosting. Roma Works Limited, is that one of your companies?

MR. MACCIACCHERA: No.

MR. EVANS: And you don't have a position with that company?

ISS DRAPEAU: I think the question should be do you know of any assets ---

MR. MACCIACCHERA: I don't know the assets.

ISS DRAPEAU: --- of Roma Works?

MR. MACCIACCHERA: I don't know the assets.

MR. EVANS: So that was Roma Works Limited. Same question for Roma Works SA.

ISS DRAPEAU: Do you know of any assets ---

MR. MACCIACCHERA: I don't know.

ISS DRAPEAU: --- of Roma Works SA?

[149] During the execution of the Interim Order, and subsequently, neither Star Hosting Limited nor Roma Works Limited have disclosed any assets or financial information in accordance with paragraph 24 of the Interim Order – excluding, of course, the above-mentioned documents that were obtained by ISS Drapeau and his team during the search. Nor did Marshall Macciachera do so on their behalf.

[150] I have no doubt, based on the evidence before me, that Marshall Macciachera is aware of financial information relating to the two Hong Kong companies that is responsive to the Interim Order that he has intentionally failed to disclose on their behalf. I am satisfied beyond a reasonable doubt that Star Hosting Limited and Roma Works Limited, through the actions of their directing mind, have intentionally failed to comply with paragraph 24 of the Interim Order.

[151] I turn now to the charge against Marshall Macciachera in his personal capacity. As highlighted by the Plaintiffs, digital stills taken from the video of the execution demonstrate that a number of references to “crypto” and crypto currencies on Marshall Macciachera’s computer screen, including with a wallet folder and a “crypto” folder. There is equally a reference to bitcoin. In addition, Mr. Vranesh testified to a number of the registrar accounts being connected to crypto currency and there were references to crypto and coins in a notebook seized during the execution of the Interim Order.

[152] The fact that the Interim Order explicitly referred to crypto currency was explained to Marshall Macciachera. He was also informed that the Plaintiffs were aware that he accepted crypto currency as a mechanism for payment for the SSTV Services. I note that Marshall Macciachera did ultimately disclose two crypto currency accounts, Netcoins and Payward Ventures Inc. (Kraken). The Plaintiffs state that these accounts can effectively be characterized as dormant. The Charged Defendants have objected to the admissibility of the correspondence flowing from the two disclosures (signed consent forms) on the basis of authenticity, although the parties came to an agreement that counsel may make submissions on the documents. In any event, I find that the two disclosures are insufficient, given the video evidence and the testimonies of ISS Drapeau and Mr. Vranesh, to cure Marshall Macciachera’s breach of the Interim Order.

[153] In addition, the Plaintiffs’ estimate there were approximately 2.5 million visits to the SSTV Services in 2021 based on the monthly users and unique visits. Using the estimated subscribers and subscription fees, the Plaintiffs estimate the annual revenue to be approximately \$1.517 million per year. While I consider these figures to be simply estimates, it beggars belief, given the evidence on Marshall Macciachera’s computer screen and the fact that SSTV Services accepted crypto as a form of payment, that there are no assets of any value in the form of crypto currency to be disclosed.

- [154] The evidence before me also demonstrates that Marshall Macciacchera was aware that foreign assets were covered by the disclosure obligations, however, he failed to disclose any assets located abroad. Documentation seized during the execution of the Interim Order evidences that he has a residential address in Phuket, Thailand. He was wearing a Thailand t-shirt during the execution of the Interim Order. His presence in Thailand has been further corroborated by affidavit evidence, which I accept, of a Facebook post of a photo of him in Thailand and a reference in the post that he will return in several months' time. At no point has Marshall Macciacchera made any disclosures concerning foreign assets or accounts, in Thailand or elsewhere.
- [155] The Plaintiffs allege that Marshall Macciacchera plans to build or redecorate a substantially sized house in Asia based on plans and notations found in a notebook during the execution of the Interim Order. I do not rely on this evidence for my conclusion on the present charge as it is not sufficiently evident to me on the face of the document that this is Marshall Macciacchera's project and it is in fact taking place.
- [156] The Charged Defendants state that Marshall Macciacchera signed Schedule III of the Interim Order to authorize the Toronto-Dominion Bank [TD Bank] to disclose to ISS Drapeau his assets and accounts held at the TD Bank. The Charged Defendants submit that this is therefore compliance with the Interim Order. The Plaintiffs allege that Marshall Macciacchera had disclosed certain accounts at the TD Bank, but not others – which were later discovered during their exchanges with the TD Bank.
- [157] The Charged Defendants objected to the admissibility of the evidence pertaining to the additional TD Bank documents on the basis of hearsay and that the witness tendered from the Plaintiff's counsel's firm neither sent nor received the documents. The Plaintiffs were not able to obtain a witness from the TD Bank. The parties came to an agreement that counsel may make submissions on the documents. I find that the documents from the TD Bank, namely bank and credit card statements, along with the correspondence with the TD Bank related thereto, that were not authenticated by a witness from the TD Bank (or by a witness who sent or received the documents) are not admissible. Consequently, I do not find Marshall Macciacchera guilty of contempt for having failed to disclose certain accounts at the TD Bank. Rather, I agree with the Charged Defendants that when Marshall Macciacchera signed Schedule III of the Interim Order for TD Bank, this constituted compliance with the Interim Order with respect to all the accounts held at the TD Bank.
- [158] The Plaintiffs' allege that Marshall Macciacchera has followed a pattern of denying involvement and seeking to conceal information. In the Plaintiffs' submissions, it is only once he is confronted with a fact that he cannot deny does he then recant or offer up a snippet of information. The Plaintiffs state that Marshall Macciacchera "only discloses when he's stuck in a corner, whereas [the Interim Order] calls for candour and full disclosure". The Plaintiffs' allege that the disclosures he had made to date are those where he knows there are little or no assets or he cannot escape disclosing. I am satisfied that there is evidence before me of several instances during the execution of the Interim Order

where Marshall Macciachera has initially denied knowledge or involvement and then been forced to recant or change his initial answer when confronted with additional information. Instances of such behaviour include the computer equipment used to stream unauthorized content at his Residence and at the Commercial Premises, along with his denials regarding the assets of the two Hong Kong companies.

[159] I find, beyond a reasonable doubt, that Marshall Macciachera, in his personal capacity, intentionally failed to disclose financial information as required by paragraph 24 of the Interim Order. While certain disclosures were made, I am satisfied that Marshall Macciachera has failed to disclose assets and accounts, notably those located abroad and those in the form of crypto currency.

[160] Accordingly, I find Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are each guilty of intentionally breaching paragraph 24 of the Interim Order.

(3) Paragraph 25 [161] Paragraph 25 of the Interim Order states:

Orders the Defendants to provide their written consent, in the form of Schedule III of this Order (with the necessary modifications as appropriate), to authorize the bank(s), financial institution(s) or other financial service provider(s) identified pursuant to this Order to disclose to the independent supervising solicitor and the Plaintiffs' solicitors all information pertaining to their assets, including but not limited to the types of information listed at subparagraph 24(b) above.

[162] The Charging Order states:

The acts with which the Defendants Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that they, by their conduct or inaction:

...

(a) breached paragraph 25 of the Interim Order by refusing to provide their written consent to authorize banks, financial institutions or other service providers to disclose information pertaining to their assets to the independent supervising solicitor and to the Plaintiffs' solicitors.

[163] Marshall Macciachera, Star Hosting Limited, and Roma Works Limited are each charged with breaching paragraph 25 of the Interim Order. This charge is not brought against Arm Hosting Inc.

[164] Despite the execution of the Interim Order uncovering a banking relationship between HSBC Bank and both Star Hosting Limited and Roma Works Limited, no written consent in the form of Schedule III or otherwise was provided to ISS Drapeau. Such consent is required so that HSBC Bank may disclose to ISS Drapeau and the Plaintiffs' counsel information pertaining to their assets. In fact, there has been no written consent provided by Marshall Macciachera, or anyone else, on behalf of the two Hong Kong companies for

any financial institutions or other financial service providers. Nor has Marshall Macciachera, in his personal capacity, provided written disclosure for any foreign financial institutions or financial service providers despite the documentation seized pertaining to his residential address in Phuket, Thailand.

[165] Furthermore, despite accepting crypto currency as a payment method for the SSTV Services, and the evidence of crypto currency on Marshall Macciachera's computer screen, no written consent had been provided for financial service providers for crypto currencies, and/or access to crypto wallets, that hold assets of any value.

[166] I note that Marshall Macciachera, in his personal capacity, has executed Schedule III consent forms with respect to two banking institutions in Canada. The consent forms pertained to personal checking accounts with the TD Bank and the Bank of Montréal. I find this insufficient, however, given the facts as I have found them, to constitute sufficient compliance with paragraph 25 of the Interim Order.

[167] In sum, I find Marshall Macciachera, Star Hosting Limited, and Roma Works Limited guilty beyond a reasonable doubt of intentionally breaching paragraph 25 of the Interim Order.

(4) Paragraph 30 [168] Paragraph 30 of the Interim Order states:

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

[169] The Charging Order states:

9. The acts with which the Defendant Marshall Macciachera is charged with contempt of Court under Rule 466(b) of the Federal Courts Rules is that he, by his conduct or inaction breached paragraph 30 of the Interim Order by refusing to disclose the login credentials for his home computer necessary to enforce the Interim Order in accessing the evidence to be preserved thereunder.

[170] Marshall Macciachera is the sole Defendant charged with breaching paragraph 30 of the Interim Order.

[171] During the execution of the Interim Order, Marshall Macciachera logged into his computer. While Marshall Macciachera was operating his computer, ISS Drapeau witnessed information on the computer screen, specifically financial documents, that were

within the scope of the Interim Order. Accordingly, ISS Drapeau requested that a mirror copy of the computer be made. Given that access to the computer required login credentials, it was necessary to obtain those credentials in order to access the data on the mirrored copy of the computer. During the execution, it was explained to Marshall Macciachera that while a copy can be made, one cannot access the contents without the password because they are encrypted. Marshall Macciachera was equally informed by ISS Drapeau that he was required under paragraph 30 of the Interim Order to disclose the password.

- [172] I find, having viewed the video of the execution of the Interim Order, that ISS Drapeau clearly explained to Marshall Macciachera that he was obliged to disclose the computer password. Since Marshall Macciachera was able to login to his computer in the presence of ISS Drapeau, the fact that he has the login credentials, including the password, is not in dispute. Furthermore, while Marshall Macciachera was operating his computer, the videographer was several feet behind him and was able to capture parts of his screen video. There is ample evidence in the record, in the form of video and digital stills from the video, of information on Marshall Macciachera's computer that is responsive to the Interim Order.
- [173] Initially, Marshall Macciachera's response to the request was that "there is evidence against me that... I don't want to login for you to collect information against me." Marshall Macciachera also sought to justify his refusal on the basis that the computer contained personal information. In addition, a further justification for his refusal was that he wished to speak to legal counsel first. This was the case despite ISS Drapeau repeatedly informed him that the Interim Order did not allow him to seek the advice of counsel before complying with the terms of it once the period provided by the Interim Order to seek advice had elapsed. By the time of the present hearing, approximately eight months following the execution of the Interim Order, Mr. Vranesh testified that he had yet to receive the login credentials for the hard drive of Marshall Macciachera's computer.
- [174] I am satisfied beyond a reasonable doubt that Marshall Macciachera intentionally failed to disclose his computer password as required by paragraph 30 of the Interim Order.

K. The Court's Discretion [175] Having found that the requisite elements of contempt have been established beyond a reasonable doubt, I nevertheless retain a discretion to find the Charged Defendants not guilty of contempt. While the Supreme Court in *Carey* declined to elaborate the full scope of this discretion, they did state that this discretion could be exercised when, for example, an alleged contemnor acted in good faith in taking reasonable steps to comply with an order or where imposing a contempt finding would work an injustice in the circumstances of the case (at para 37).

- [176] The Charged Defendants submit that I should exercise my discretion to refrain from finding them guilty of contempt because the manner in which the Interim Order was executed was unlawful, unreasonable and robbed Marshall Macciachera of his dignity. I have addressed

this argument in detail in subsection F of the present Order and Reasons, above. For the reasons stated in that section, I do not find that, under the present circumstances, it is appropriate to exercise my discretion in order to negate a finding of contempt. I am not satisfied that a finding of guilt would be an injustice in the present case.

[177] The Charged Defendants submit that they made “substantial attempts to comply [with the Interim Order]”, namely by signing Schedule III. Contrary to the Charged Defendants’ submissions, I do not consider their disclosures to be sufficient to constitute good faith efforts to comply with such that it would negate a finding of contempt for their intentional breaches of the Interim Order. To use the words of Justice Norris in *Red Rhino*, the actions of the Charged Defendants were not “momentary lapse[s] in judgment” (at para 68). The Charged Defendants have concealed and failed to disclose information that was covered by the Interim Order both during and following its execution. As noted previously, by the time of the present hearing, approximately eight months after the execution of the Interim Order, they have yet to comply.

[178] Considering all the circumstances of the present case, I remain of the view that it would not be appropriate to exercise my discretion to decline to make a finding of contempt. The Charged Defendants intentional disobedience of the Interim Order is in essence “a defiance of judicial authority” (*Heritage Front* at 718). I find that the present convictions are necessary in order “to safeguard the administration of justice” (*Red Rhino* at para 68; see also *Contempt Judgment Antonio Defendants* at para 123).

VII. Conclusion [179] For the foregoing reasons, based on the evidence presented, I am satisfied beyond a reasonable doubt that the Charged Defendants are in contempt of the Interim Order issued on June 28, 2022 and served on the Charged Defendants on July 14, 2022. The Plaintiffs have established, beyond a reasonable doubt, the requisite three elements of a finding of contempt for each of the Charged Defendants.

[180] Arm Hosting Inc. is guilty of one charge of contempt for deliberately disobeying paragraph 20 of the Interim Order. Star Hosting Limited and Roma Works Limited are each guilty of three charges of contempt for deliberately disobeying paragraphs 20, 24, and 25 of the Interim Order. Marshall Macciachera is guilty of four charges of contempt for deliberately disobeying paragraphs 20, 24, 25, and 30 of the Interim Order.

[181] Having found the Charged Parties in contempt of the Interim Order, this proceeding will advance to the next stage whereby a hearing will be held to determine the appropriate penalty for the Charged Defendants’ contempt. The Court’s Registry shall be in contact with the parties to schedule a case management conference with Case Management Judge Duchesne for the purpose of planning and scheduling the next steps in this proceeding.

VIII. Costs [182] The Plaintiffs seek an all-inclusive lump sum in the amount of \$375,312.93, payable forthwith, comprised of (i) 50% of their total legal fees incurred for the contempt proceedings; and (ii) their reasonable disbursements.

- [183] I agree with the Plaintiffs that a lump sum award is appropriate in the present case. Rule 400(4) of the Rules permits such an award either in lieu of, or in addition to, any assessed costs. In the context of intellectual property cases, I note the statement by the Federal Court of Appeal that lump sum awards “tend to range from 10% to 50% of actual fees, [although] awards between one-quarter and one-third of fees are the norm” (Apotex Inc v Shire LLC, 2021 FCA 54 at para 22 [Shire]; see also Nova Chemicals Corporation v Dow Chemical Company, 2017 FCA 25 at paras 16-17, where the Federal Court of Appeal indicated the range to be between 25% and 50% of actual fees). Such fees are in addition to reasonable disbursements.
- [184] In assessing a lump sum award, the Court may consider the factors set out in Rule 400(3) of the Rules. I find the following factors to be relevant to the matter at hand, (a) the result of the proceeding; (c) the importance and complexity of the issues; (g) the amount of work; (h) whether the public interest in having the proceeding litigated justifies a particular award of costs; (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; (k) whether any step in the proceeding was...improper, vexatious or unnecessary, or...taken through negligence, mistake or excessive caution; and (o) any other matter that it considers relevant.
- [185] The Plaintiffs have succeeded in demonstrating that the Charged Defendants are guilty as charged on all counts. The proceedings were complex, both in respect of the substantive issues and in terms of the evidentiary record. The issue of contempt is an important one and one which is in the public interest - as the failure to adhere to an order of the Court undermines the administration of justice. I note the Charged Defendants’ argument that they should not have to pay for “Cadillac legal services or experts”, however, I find the amount of work was largely appropriate in the circumstances of the present case. As to the conduct of the parties, I agree with the Plaintiffs that the Charged Defendants’ blanket objections and failure to admit certain documents until the last day of the hearing unnecessarily lengthened the hearing. The Charged Defendants state that the four-day hearing ended on time. While that is true, in order to ensure the hearing was completed in four days, the Court sat until 5 p.m. on the first day, almost 7 p.m. on the subsequent two days, and almost 6 p.m. on the final day. I, again, thank the registry staff at the Court for their professionalism and their hard work into the evenings.
- [186] I am particularly mindful that the present proceeding is one of contempt. The Plaintiffs, relying on Canadian Copyright Licensing Agency v U-Compute, 2007 FCA 127 [Canadian Copyright], submit that a party who assists the Court in the enforcement of its orders should not, as a rule, be out of pocket for having been put to that trouble. As such, in the Plaintiffs’ submission, costs on a solicitor-client basis should be awarded (Canadian Copyright at paras 38-40).

- [187] The Charged Defendants submit that a sanction of no costs is appropriate given the manner in which the execution of the Interim Order was conducted. The Charged Defendants further submit that there was an injustice in that a version of a certain report, identified as the Downey Report, was not disclosed to them. Having considered the parties' submissions on these two points, including the Charged Defendants' Sur-Reply Submissions filed June 30, 2023, I find both these arguments to be without merit.
- [188] Given the factors outlined above, and taking into account the parties' oral and written submissions on costs, I find it appropriate that the Plaintiffs be awarded 50% of the total legal fees incurred for the contempt proceedings, being \$283,477.30. Indeed, having reviewed the docket entries contained in the invoices addressed to the various Plaintiffs, I consider the Plaintiffs' request for 50% of those legal fees to be reasonable. While this is on the upper end of the range for lump sum awards of legal fees as noted by the Federal Court of Appeal in *Shire* (at para 22), I find the Plaintiffs' request to be justified given the present proceeding is one of contempt and the Charged Defendants have been found guilty on all charges (*Canadian Copyright* at para 38).
- [189] I note the affidavit of Martine Guy, filed by the Plaintiffs, affirming that the file number used by counsel for the Plaintiffs to track the legal fees and disbursements for the contempt proceedings is a separate file number from that of the copyright action generally. Having reviewed the affidavit and the attached invoices, I am satisfied that the risk of double counting has been negated.
- [190] I turn now to the award of disbursements. I am satisfied that the Plaintiffs should not be out of pocket in this respect and are entitled to 100% of their reasonable disbursements.
- [191] The Charged Defendants raise a number of arguments, however, I find them all to be without merit. There is one in particular that bears mention. The Charged Defendants object to the fees incurred for ISS Drapeau having retained his own counsel, Woods LLP. They allege ISS Drapeau made poor choices and that a non-party witness at a hearing is not entitled to their own counsel at the Charged Defendants' cost.
- [192] I do not find it to be unreasonable for ISS Drapeau to have retained counsel given the Charged Defendants' allegations of unethical conduct and lack of independence on his part. Moreover, in view of the allegations, there was additional document disclosure, exchanges between the Charged Defendants' counsel and Woods LLP, and disclosure of material directly to the Court over which privilege was claimed, among other tasks. ISS Drapeau was cross-examined extensively on the disclosed text messages that formed the basis of the Charged Defendants' allegations. Given the circumstances and the allegations against him, I do not fault ISS Drapeau for seeking independent advice.
- [193] As discussed in detail in subsection G of the present Order and Reasons, above, I find the Charged Defendants have failed in their attempt to call into question ISS Drapeau's integrity. It was clear from both the disclosures and the cross-examination of ISS Drapeau that there was no foundation to the allegations of unethical conduct. It is the Charged

Defendants' failed allegations that gave rise to Woods LLP being instructed by ISS Drapeau. As stated in subsection G of the present Order and Reasons, above, allegations of bias against a member of the legal profession should not be taken lightly. I am thus satisfied that the legal fees for Woods LLP constitute reasonable disbursements.

- [194] As to the timing of any costs award, the Plaintiffs submit it is necessary for this Court to use its discretion and order the Charged Defendants to pay costs forthwith. They argue that this contempt proceeding should not have been necessary and once brought should not have been opposed. The Plaintiffs state that unless costs are payable forthwith, the Charged Defendants will be encouraged to continue their reprehensible conduct, including the concealment of their finances, and any eventual costs award will merely be illusory.
- [195] On the other hand, the Charged Defendants plead that if costs are awarded, they should not be made forthwith but rather in any event of the cause. At the hearing, the Charged Defendants pleaded that the quantum of costs sought by the Plaintiffs is larger than a typical contempt penalty. In their written submissions, the Charged Defendants highlight that a recent monetary penalty in a contempt case involving an Anton Piller was \$40,000 (citing *Adwokatz FCA*). Ordering costs forthwith rather than in any event of the cause is, in the Charged Defendants' view, akin to a penalty larger than the likely penalty that would be imposed by the Court.
- [196] In response the Plaintiffs submit that the issue of a penalty is irrelevant as (i) the costs sought by them are compensatory, not punitive; and (ii) the rights at issue in the present contempt hearing (a finding of contempt) is discrete from the other issues in the case and is a final judgment (*Carey* at para 65; *Federal Courts Act* ss 2(1)).
- [197] I agree with the Plaintiffs that rendering costs payable forthwith is not a penalty but rather is compensatory under the circumstances. They have sought, at their cost, to assist the Court in the enforcement of its Interim Order, which the Charged Defendants have flouted. Moreover, the amount requested is substantially less than the amount of fees and expenses actually incurred by the Plaintiffs. In addition, by the time of the contempt hearing, the Charged Defendants remained in breach of the Interim Order. Given the circumstances of the present matter, I am satisfied that it is appropriate to exercise my discretion to order that costs be made payable forthwith.
- [198] With respect to penalties, neither party has referenced or made submissions on Rule 472 of the Rules, which provides that where a person is found to be in contempt, a judge may order one or more of five listed penalties, including the payment of costs:

Penalty

Peine

472 Where a person is found to be in contempt, a judge may order that

472 Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

- (a) the person be imprisoned for a period of less than five years or until the person complies with the order;
- a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;
- (b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;
- b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;
- (c) the person pay a fine;
- c) qu'elle paie une amende;
- (d) the person do or refrain from doing any act;
- d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;
- (e) in respect of a person referred to in rule 429, the person's property be sequestered; and
- e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;
- (f) the person pay costs.
- f) qu'elle soit condamnée aux dépens.

[Emphasis added.]

[Soulignement ajouté.]

[199] Although Rule 472(f) was not explicitly raised, the Charged Defendants did raise the notion of ordering costs payable forthwith being akin to a penalty. I have thus considered this point and noted that award of costs is one of the potential penalties that may be ordered by the judge who presides over the sentencing hearing. While that may be, I do not consider that it is sufficient reason under the present circumstances to decline to render a costs award and/or make it payable forthwith at this stage, especially when the issue of costs has been fully ventilated by the parties both orally and in four sets of written submissions following the hearing.

[200] In addition, when the costs submissions were made, the Charged Defendants were represented by counsel. Counsel at the time of the contempt hearing has subsequently ceased representing the Charged Defendants, who at the present time are self represented. Furthermore, in the intervening time, I have been appointed to the Federal Court of Appeal. Consequently, I will not remain seized of the eventual sentencing hearing. Given the submissions by counsel previously made and the time devoted to the issue during the hearing, I do not consider it to be in the interests of justice to defer the issue of costs for the contempt hearing in order to have it eventually reheard by a different judge of the Federal

Court at the sentencing hearing. I note, and I would underscore to the Charged Defendants, that nothing precludes them from raising the present costs award at their eventual sentencing hearing should they wish to.

[201] Finally, Rule 400(3)(e) of the Rules provides that, in exercising its discretionary power over costs, the Court may consider any written offer to settle. During the costs submissions made orally on the final day of the hearing, reference was made by counsel for the Charged Defendants that settlement discussions may have taken place, and as such this possibility could touch on the issue of costs. As I indicated during the hearing, I find it appropriate that the parties should have an opportunity to make submissions as to the potential impact of settlement discussions, if applicable, on an award of costs. Consequently, if, a written offer to settle the contempt proceeding was in fact made prior to June 30, 2023, being the date of the Charged Defendants' sur-reply submissions on costs, then the Charged Defendants may apply to the Court on this basis only such that the Court may consider what impact, if any, such offer may have on the present costs award. Any such motion, if applicable, is to be brought by one or more of the Charged Defendants within 14 days of the date of the present Order and Reasons.

IX. Confidentiality Order [202] The Plaintiffs have requested a confidentiality order in respect of certain sections of the affidavit of Martine Guy and its Exhibits MG-1 and MG-2. Given the invoices contained in the two exhibits, including the detailed narratives of work performed, and the cost-sharing arrangements, I agree that it is appropriate that the information highlighted by the Plaintiffs be the subject of a confidentiality order. A public version, with the aforementioned information redacted, has also been filed by the Plaintiffs.

ORDER in T-1257-22

THIS COURT ORDERS that:

Arm Hosting Inc. is guilty of contempt as charged for disobeying paragraph 20 of the Interim Order issued on June 28, 2022.

Star Hosting Limited and Roma Works Limited are each guilty of contempt as charged for disobeying paragraphs 20, 24, and 25 of the Interim Order issued on June 28, 2022.

Marshall Macciachera is guilty of contempt as charged for disobeying paragraphs 20, 24, 25, and 30 of the Interim Order issued on June 28, 2022.

The Court's Registry shall be in contact with the parties to schedule a case management conference with Case Management Judge Benoit M. Duchesne for the purpose of planning and scheduling the penalty phase.

Pursuant to Rule 152 of the Rules, the confidential version of the affidavit of Martine Guy, along with Exhibits MG-1 and MG-2, shall remain confidential.

The Charged Defendants are, jointly and severally, liable to the Plaintiffs for costs, payable forthwith, in a lump sum amount of \$375,312.93, which is inclusive of legal fees, disbursements, and taxes thereon.

If a written offer to settle the issue of contempt was made by one of more of the Charged Defendants prior to June 30, 2023, the Charged Defendants may bring a motion within 14 days of the date of the present Order and Reasons in order that the Court may consider what impact, if any, such offer may have on the costs award in paragraph 6, above.

“Vanessa Rochester”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1257-22

STYLE OF CAUSE:

BELL MEDIA INC. ET AL v MARSHALL MACCIACCHERA ET AL

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

April 25, 26, 27, 28, 2023

FURTHER SUBMISSIONS:

jUNE 2, 19, JULY 4, 2023; jANUARY 23, 29, 2024

ORDER AND REASONS:

ROCHESTER j.

DATED:

AUGUST 21, 2024

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