

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230823

Docket: A-262-22

Citation: 2023 FCA 180

Present: MACTAVISH J.A.

BETWEEN:

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

Appellants

and

**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 and WARNER BROS.
ENTERTAINMENT INC.**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 23, 2023.

REASONS FOR ORDER BY:

MACTAVISH J.A.

Federal Court of Appeal



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REASONS FOR ORDER

MACTAVISH J.A.

[1] This appeal arises in the context of a case of copyright infringement involving three allegedly infringing streaming services operated by the appellants. The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic seeks leave to intervene in this appeal. For the reasons that follow, the motion will be dismissed.

I. The Nature of the Appeal

[2] This appeal raises issues with respect to the lawfulness of the execution of an *ex parte* Anton Piller Order issued by the Federal Court. There is no challenge to the validity of the Anton Piller Order itself.

[3] On a motion to review the execution of the Anton Piller Order, the Federal Court determined that the Order had been lawfully executed against the appellants. This is an appeal from the Federal Court's decision on the review motion. The appellants also challenge the costs order issued by the Federal Court in the context of the review proceeding.

II. The Proposed Intervener

[4] The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic describes its core mandate as being, amongst other things, “to advocate in the public interest on matters arising at the intersection of law and technology” and to “provid[e] legal assistance to under-represented organizations and individuals on law and technology issues”. It also provides expert testimony to parliamentary committees and participates in regulatory and quasi-judicial

proceedings. The Clinic has been granted intervener status in numerous proceedings in this and other courts.

[5] Through its activities, the Clinic states that it has developed substantial expertise in the application of the principles of equity to copyright actions.

[6] According to the Clinic, the outcome of this case has the potential to affect how Federal Courts handle future Anton Piller Orders, particularly in cases of copyright infringement. The Clinic further submits that it is crucial to maintain consistency in these orders, in order to strike a fair balance between the rights of plaintiffs and defendants. According to the Clinic, it is in a strong position to address these issues, as they directly align with its area of focus.

[7] If granted leave, the Clinic states that it will address the following issues:

- a) It will argue that the Federal Court should adopt a standard Anton Piller Order model that would provide explicit terms of Anton Piller Orders, like other Canadian and non-Canadian common law jurisdictions have adopted;
- b) It will argue that the Federal Court should adopt a roster of pre-approved independent supervising solicitors that specialize in the execution of Anton Piller Orders; and
- c) It will argue that the Court should adopt a list of pre-approved solicitors available to defendants during the execution of Anton Piller orders.

[8] The Clinic further states that it will actively coordinate with the parties to ensure that its proposed submissions do not duplicate their submissions, and that its submissions will be distinct from those of the parties in that they will derive from its public interest mandate. The Clinic also

submits that its proposed intervention will not cause a delay in the hearing of this case, nor will it prejudice the parties.

III. The Position of the Parties

[9] The appellants consent to the Court granting leave to the Clinic to intervene in this appeal. The respondents oppose the Clinic's motion, submitting that its proposed intervention will be of no assistance to this Court in determining the issues raised by this appeal. The respondents further contend that the issues that the Clinic seeks to raise are more properly addressed before bodies such as Bench and Bar Committees.

IV. The Test for Intervention

[10] The test for intervention in this case is well established: *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44.

[11] There are three elements that should be considered in determining whether leave should be granted in a given case. They are:

- (1) the usefulness of the intervener's participation with respect to the issues that the Court has to decide;
- (2) whether the proposed intervener has a genuine interest in the issues raised by the appeal; and
- (3) whether the intervention is consistent with the interests of justice.

[12] The criteria for allowing or not allowing an intervention must, however, remain flexible because every intervention application is different, involving different facts, different legal issues and different contexts: *Sport Maska*, above at para. 42.

V. The Issues Raised by the Appellants

[13] In order to determine whether the Clinic's submissions will be useful to the Court, it is first necessary to identify what the real issues are in this appeal: *Le-Vel Brands, LLC v. Canada (Attorney General)*, 2023 FCA 66 at para. 16.

[14] The appellants identify two issues in their memorandum of fact and law. The first is whether the Federal Court erred in finding that the execution of the Anton Piller Order was lawfully conducted. The second is whether the Federal Court erred in its costs award.

[15] Insofar as the issues relating to the lawfulness of the execution of the Anton Piller Order are concerned, the appellants' memorandum makes arguments relating to the time it took for the execution of the Order. Arguments are also advanced with respect to questions that were posed by the independent supervising solicitor to one of the appellants regarding the location of servers, and questions that the appellants say required that individual to make statements of law.

[16] The appellants' memorandum also argues that the Anton Piller Order was not properly explained to two of the appellants, and that recognized health and safety precautions were not observed.

[17] Insofar as the relief that the appellants seek on this appeal is concerned, their memorandum asks that this Court grant a declaration that the execution of the Anton Piller Order on June 28, 2022, as against the appellants was not lawfully conducted, and that the decision of the Federal Court in this regard be set aside. The appellants further ask that the costs award issued by the Federal Court be set aside, that no costs be ordered against the appellants in relation to the proceedings in the Federal Court, and that the appellants receive their costs in this Court.

VI. Analysis

[18] I accept that the Clinic is a credible organization with recognized expertise in matters of copyright infringement. However, I am not persuaded that the arguments that the Clinic proposes to make with respect to the issues that it has identified in its intervention application would be of assistance to the Court in deciding the issues that have been raised by the appellants in this appeal.

[19] As this Court has observed, interveners are not given “an open microphone” to discuss whatever may be on their mind about a given case: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, at para. 17. An outsider seeking admission to a proceeding as an intervener has to take the issues identified by the parties as it finds them, and cannot transform them or add to them: *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2015 FCA 34 at para. 19.

[20] The role of an intervener is thus not to introduce new issues, but rather to provide a different perspective that will “assist the determination of a factual or legal issue related to the proceeding”: *Federal Courts Rules*, SOR/98-106, Rules 3 and 109; *Tsleil-Waututh*, above at para. 54; *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FCA 151, paras. 7-10. As the Court stated in *Tsleil-Waututh*, “interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way”: at para. 55.

[21] As noted earlier, the validity of the Anton Piller Order granted by the Federal Court has not been challenged in this appeal. Questions with respect to the form of the Anton Piller Order issued by the Federal Court are thus not in dispute in this case, and the Clinic’s submissions with respect to the need for a standard form order will not be of assistance to the Court in the context of this appeal.

[22] What is at issue in this appeal are specific factual issues with respect to the manner in which that Order was executed in this case.

[23] However, the appellants do not argue that the execution of the Anton Piller Order was unlawful because one of the appellants was unable to retain counsel during the course of the execution of the Order. Consequently, the Clinic’s arguments with respect to the need for the Federal Court to adopt a list of pre-approved solicitors available to defendants during the execution of Anton Piller Orders would have no bearing on the outcome of this appeal, and would not assist the Court in this regard.

[24] The appellants also do not contend that the Independent Supervising Solicitors were unqualified to carry out their responsibilities under the Anton Piller Order issued by the Federal Court. Nor do the appellants argue that the Solicitors lacked independence in this case. Consequently, the Clinic's submissions with respect to the need for a roster of pre-approved Independent Supervising Solicitors who specialize in the execution of Anton Piller Orders would not assist the Court in assessing the lawfulness of the execution of the Anton Piller Order in this case.

[25] The Clinic's submissions would also be of no assistance to the Court as it relates to the costs issue.

[26] While I have chosen to focus my analysis on the lack of usefulness that the Clinic's submissions would provide to the Court as a basis for dismissing its intervention application, I also have grave doubts as to the Court's power to grant the remedies sought by the Clinic. As this Court has previously observed, Courts are not to engage in freestanding policy-making: *Le-Vel Brands*, above at para. 41.

[27] That is not to say that the issues identified by the Clinic are not important – they may well be – but rather that they are not suitable for resolution through this appeal. Indeed, I agree with the respondents that the issues are more appropriately raised before bodies such as the Intellectual Property Bar Liaison Committee of the Federal Court, the Intellectual Property Institute of Canada or the legislative branch of government.

VII. Disposition

[28] The motion for intervener status is dismissed, without costs.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-262-22

STYLE OF CAUSE:

MARSHALL MACCIACCHERA
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PARAMOUNT PICTURES
CORPORATION, UNIVERSAL
CITY STUDIOS LLC,
UNIVERSAL CITY STUDIOS
PRODUCTIONS LLLP and
WARNER BROS.
ENTERTAINMENT INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

MACTAVISH J.A.

DATED:

AUGUST 23, 2023

WRITTEN REPRESENTATIONS BY:

Mr. Paul Lomic

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