

FEDERAL COURT OF APPEAL

ID 1

BETWEEN:

**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)**

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE		D E P O S E
F I L E D	09-JAN-2023	
N. Hradsky		
TORONTO, ON	1	

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
WARNER BROS. ENTERTAINMENT INC.**

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellants' solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS

after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____ Issued by _____
(Registry Officer)

Address of
local office: 180 Queen Street West, Suite 200
Toronto, Ontario, M5V 3L6

TO: THE ADMINISTRATOR
Federal Court of Appeal
180 Queen Street West
Toronto, ON M5V 2L6

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Solicitors for the Respondents

APPEAL

THE APPELLANTS, 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), APPEAL to the Federal Court of Appeal from the Judgment of the Honourable Justice Lafrenière dated December 28, 2022 in Court File No. T-1257-22, following a hearing on the costs determined as a result of the Court Order dated November 22, 2022.

THE APPELLANTS ASK that:

1. The appeal be allowed and any costs award of Justice Lafrenière be set aside;
2. No costs be ordered against the Appellants in the Federal Court, below;
3. Costs be awarded to the Appellants in the Federal Court of Appeal; and
4. Such further and other relief as may be requested by the Appellants this Honourable Court may allow.

THE GROUNDS OF APPEAL are as follows:

Overview

5. This appeal is in respect of a costs award and the adequacy of the Court's sanction against the Respondents for providing untruthful evidence in relation to their request for costs.

6. The execution of the Anton Piller Order on Marshall Macciachera ("Marshall") and Antonio Macciachera ("Antonio") was not lawfully executed and is the subject of appeal No. A-262-22. An Anton Piller Order must be executed with restraint and confined to a strict interpretation of the order. Any discretion in the order, is not unfettered discretion and cannot betray a reasonable interpretation of the order. The issuance and manner of the execution of an Anton Piller Order should be informed and consistent with the *Charter* (as defined below) and *Charter* values.

7. Marshall at all material times was a long-time commercial customer of the Plaintiff Rogers Media Inc. or a related entity ("Rogers") for the servers in issue in these proceedings.

8. Rogers and the Plaintiffs were aware of any alleged conduct in the statement of claim since at least as early as 2018. The disbursements are excessive in view of his relationship as a customer of Rogers and that he was clearly known to the Plaintiffs.

9. The execution of the Anton Piller Order dated June 28, 2022 on Marshall occurred essentially from **8:00 a.m. on July 14, 2022** to approximately **5:00 a.m. on July 15, 2022** (approximately 21 hours in a row) and resumed at approximately **12:15 pm. on July 15, 2022** to **12:47 a.m. on July 16, 2022** ("Duration of the Execution"). Most of the execution was not videotaped.

10. For the entirety of the execution, Marshall was with the Lead Independent Supervising Solicitor, aside from brief moments such as bathroom breaks, changing clothing, speaking with potential counsel and a 20-minute nap on July 15th in the early hours and the “sleep break”.

Affidavit of Elizabeth Adamczyk, a member of the Plaintiffs’ Law Firm

11. When a staff member at the Plaintiffs’ law firm, Elizabeth Adamczyk, described important material facts in her affidavit dated August 17, 2022 in support of the Plaintiffs cost submissions, Ms. Adamczyk swore that the facts were true, when she admitted on cross-examination that she knew those facts were not true at the time she swore the affidavit.

12. One of several admissions is the following.

9 As of August 17, you did not examine the
10 materials in EA-1 "to identify and isolate the
11 amounts, if any, which were not incurred in relation
12 to the preparation of the review motion", correct?

13 A. Correct, I did not examine them.

14 100. Q. And on August 17 when you swore the
15 affidavit saying that you examined them, you knew
16 that that statement was false, correct?

17 A. Yes.

18 101. Q. But you swore that it was true,
19 correct?

20 A. Yes.

13. It is well established that members of law firms should not swear affidavit on points in controversy to be argued by a law firm’s counsel. The costs in this matter are of significant

controversy. The cross-examination Ms. Elizabeth Adamczyk where she admits to being untruthful under oath is an excellent example of why this Honourable Court has found that members of law firms should not swear affidavits on points in controversy argued by those same law firms.

14. The discount of \$10,000 as a sanction against the Plaintiffs for providing untruthful evidence in relation to their request for costs is inadequate in the context of the cost award of \$407,912.57. Such a minor sanction for what the Court found to be a serious misconduct on the part of the Plaintiffs and warrants a serious sanction. Such a minor amount in context of the costs award does not sufficiently express the Court's disapproval and grave concern.

15. The calculation of the cost award rendered from the bench appears to differ from the written reasons.

16. It is respectfully submitted that the cost award was granted on incorrect legal principles and factual determinations that reveal reviewable errors including palpable and overriding errors. The Motions Judge committed the following reviewable errors.

- a. The Motions Judge erred in fact and/or law in the quantum of cost awarded to the Plaintiffs against the Defendants;
- b. The Motions Judge erred in fact and/or law in the method used to determine the quantum of the costs award, including, but not limited to, the amounts to which the 35% factor was applied and the 35% factor itself.
- c. The Motions Judge erred in fact and/or law in the quantum and manner of discount provided in view of the duplication of legal services on the file and "Cadillac" legal services.

- d. The Motions Judge erred in fact and/or law in failing to discount or reduce the disbursement amount in view of the “Cadillac” nature of the disbursements.
- e. The Motions Judge erred in fact and/or law in failing to discount or reduce the disbursement amount given that Rogers and the Plaintiffs were aware of any alleged conduct in the statement of claim since at least as early as 2018.
- f. The Motions Judge erred in fact and/or law in finding in the circumstances of this case that Tariff B of the *Federal Courts Rules* was inadequate to determine the quantum of the costs award and a lump such should be awarded;
- g. The Motions Judge erred in fact and/or law in failing to strike the affidavit of Elizabeth Adamczyk;
- h. The Motions Judge erred in fact and/or law in failing to give little to no weight to the Affidavit of Elizabeth Adamczyk;
- i. The Motions Judge erred in fact and/or law in finding that Elizabeth Adamczyk corrected her deficiencies of her information and belief in her first affidavit in her second affidavit prior to her cross-examination; and
- j. The Motions Judge erred in fact and/or law in finding that \$10,000 was an adequate and/or appropriate sanction against the Plaintiff for providing untruthful evidence in relation to their request for costs that their affiant knew was false at the time of affirming her affidavit;

17. The errors made by the Motions Judge, along with other errors of fact and law set out above, require correction by this Honourable Court. On correction of these errors, it is respectfully submitted that this Honourable Court ought to conclude that in the proceeding below, no costs are payable by the Appellants to the Respondents.

18. Section 27(1)(c) of the *Federal Courts Act* (R.S.C., 1985, c. F-7).

19. Rule 400 of the *Federal Courts Rules*.

20. Such other grounds as counsel may advise and this Honourable Court may permit.



January 6, 2023

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Solicitors for the Appellants

Court File No: A-_____

FEDERAL COURT OF APPEAL

B E T W E E N:

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