

Federal Court



Cour fédérale

Date: 20180124

Docket: T-759-16

Citation: 2018 FC 66

Ottawa, Ontario, January 24, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

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

**Applicants /
Plaintiffs**

and

VINCENT WESLEY DBA MTLFREETV.COM

**Defendant /
Respondent**

and

**1326030 ONTARIO INC. DBA ITVBOX.NET
AND AL**

**Defendants /
Non-Respondents**

JUDGMENT AND REASONS

[1] Mr. Prothonotary Morneau cited for contempt Vincent Wesley dba MTL FreeTv.com on February 23, 2017. He was to appear before this Court to hear the evidence and to be prepared to present any defence he deems appropriate. He appeared before the Court on June 27-28-29, 2017, and this constitutes the decision on the contempt of court with which he is charged.

[2] The order made pursuant to rule 467 of the *Federal Courts Rules*, SOR/98-106 [Rules], charges the defendant with the following:

a) disobeying paragraphs 2(a), 2(b) and 2(j) of the Interlocutory Injunction Order of the Honourable Madam Justice Tremblay-Lamer, dated June 1, 2016 (the “Interlocutory Injunction Order”), which constitutes contempt of Court under Rule 466(b) F.C.R., by accomplishing the following act:

(i) on January 13, 2017, offering for sale, configuring and selling a TX3 Pro “Pre-loaded Set-top box” (as defined at paragraph 2(a) of the Interlocutory Injunction Order);

which amounts to:

(i) communicating works for which the copyright is owned by the Plaintiffs to the public by telecommunication in violation of sections 2.4(1.1), 3(1)(f) and 27(1) of the *Copyright Act* and of paragraphs 2(a) and 2(j) of the Interlocutory Injunction Order; and

(ii) offering for sale, selling, and possessing a Pre-loaded Set-top box that is used or intended to be used to receive the Plaintiffs’ subscription programming signal after it has been decoded otherwise than under and in accordance with an authorization from the Plaintiffs, in violation of section 10(1)(b) of the

Radiocommunication Act and of paragraph 2(b) and 2(j) of the Interlocutory Injunction Order.

[3] Essentially, the defendant stands charged with selling a device, on January 13, 2017, which is commonly referred to as a set-top box. The applicant is alleged to have contravened an interlocutory injunction issued by my colleague Madam Justice Tremblay-Lamer on June 1, 2016 (2016 FC 612) concerning the sale of these devices.

[4] Since the Prothonotary's order refers specifically to paragraphs 2(a), 2(b) and 2(j) of the interlocutory injunction, they are hereby reproduced in their entirety:

THIS COURT ORDERS that:

2. The Defendants, their agents, employees, associates, and representatives, are enjoined and restrained from directly or indirectly:

a. Communicating works for which the copyright is owned by the Plaintiffs [the Plaintiffs' Programs] to the public by telecommunication, including by configuring, advertising, offering for sale or selling set-top boxes that are adapted to provide users with unauthorized access to the Plaintiffs' Programs [Pre-loaded Set-top Boxes];

b. Manufacturing, importing, distributing, leasing, offering for sale, selling, installing, modifying, operating or possessing Pre-loaded Set-top Boxes that are used or intended to be used to receive the Plaintiffs' subscription programming signal after it has been decoded otherwise than under and in accordance with an authorization from the Plaintiffs;

j. As more particularly applicable to the Defendant Vincent Wesley dba MtlFreeTV.com, configuring, advertising, offering for sale or selling any Pre-loaded Set-top Box having the characteristics listed at paragraphs 2(a)

to 2(e), including the MXQ, MXIII and Minix X8-H Plus Pre-loaded Set-top Boxes.

I. How did we get here

[5] There have already been a number of events leading to these contempt of court proceedings that can be summarized for our purposes as follows:

- On May 12, 2016, after noting what they believed to be violations of their rights under the *Copyright Act*, RSC (1985), c C-42 and the *Radiocommunication Act*, RSC (1985), c R-2, the plaintiffs brought an action against the defendant and others. Originally, the action was brought against five defendants, but this number has already increased considerably through five amendments to the statement of claim;
- Soon thereafter, the plaintiffs sought an injunction. An interlocutory injunction was issued by our colleague, Justice Tremblay-Lamer, on June 1, 2016;
- The defendant sold to plaintiffs' employees, posing as clients, devices in the form of set-top boxes after the interlocutory injunction prohibiting certain behaviour was issued. Two set-top boxes were sold on June 9 and June 17, 2016. This resulted in an order pursuant to rule 467 by Prothonotary Morneau on July 18, 2016. This order was varied by him on October 5, 2016, to add another charge resulting from a third sale by Mr. Wesley on July 29, 2016, this time just a few days after the original order citing the defendant in contempt of court;
- Justice René Leblanc received the defendant's guilty plea on November 21, 2016. The sentencing decision (2016 FC 1379) was rendered on December 16, 2016;

- The plaintiffs now allege that on January 13, 2017, after pleading guilty to selling three set-top boxes, the defendant again sold a set-top box that, based on their allegations, is once again a device the applicant is prohibited from selling pursuant to the June 1, 2016, interlocutory injunction;
- This resulted in another order pursuant to rule 467 on February 23, 2017. The order rendered by Prothonotary Morneau refers to the allegation that paragraphs 2(a), 2(b) and 2(j) of the interlocutory injunction had been violated. The charge—because that is what the order is required to describe with sufficient particularity—submits that, in doing so, the defendant violated the following provisions of the *Copyright Act*: 2.4(1.1), 3(1)(f) and 27. Paragraph 10(1)(b) of the *Radiocommunication Act* was also violated;
- On March 20, 2017, the Federal Court of Appeal dismissed the appeal from the decision to issue an interlocutory injunction (2017 FCA 55). The Court of Appeal was of the view that the trial judge had not committed a palpable and overriding error in assessing the three conjunctive components of the applicable three-part test to issue an interlocutory injunction (*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311), and especially the irreparable harm that would be caused to the plaintiffs if the interlocutory injunction were not granted.

[6] At this stage, the injunction is unassailable. Its validity was challenged, without success. The alleged contempt is with respect to an order of the Court which it is claimed has been disobeyed. The matter was clear when this application was heard before the Court. In this case, the plaintiffs are calling for a conviction leading to a sentence that can only be described as

particularly exemplary. If a conviction is reached, the sentence will have to be justified. They are asking for a warrant of committal for a period of incarceration of 180 days. The defendant would remain incarcerated until 50% of a fine of \$150,000.00 will have been paid. Only then can the defendant be released on an undertaking to pay the difference within the next six months. If the defendant fails to comply with the undertaking, the plaintiffs may bring a motion before this Court to obtain another period of incarceration of 90 days. Furthermore, the plaintiffs want sequestration of the defendant's inventory pursuant to rule 429 of the Rules.

II. The context

[7] I am indebted to Justice Tremblay-Lamer, who summarized the substratum of the case. The paragraphs in her judgment on the interlocutory injunction provide what is necessary to understand what will follow:

[3] The Plaintiffs Bell Media Inc., Rogers Media Inc., and Groupe TVA Inc. [collectively the Media Plaintiffs] are well-known Canadian broadcasters that own and operate a number of television stations throughout Canada broadcasting a variety of television programs, for which they own the Canadian rights.

[4] The Plaintiffs Bell Canada, Bell Expressvu Limited Partnership, Rogers Communications Canada Inc. and Vidéotron s.e.n.c. [collectively the Distribution Plaintiffs] are broadcast distribution undertakings, which receive broadcasts from a number of television stations and retransmit them to subscribers by various means of telecommunication.

[5] The Defendants are individuals and businesses which sell set-top boxes, electronic devices that can be connected to any standard television set in order to provide additional functionalities to that television, on which they have previously installed and configured a set of applications. This distinguishes the Defendants' "pre-loaded" set-top boxes from those generally found in retail stores, which do not contain any pre-loaded applications, or

contain only basic applications, such that the user must actively seek out and install the applications he or she wishes to use.

[6] Around April 2015, the Bell Plaintiffs became aware that pre-loaded set-top boxes were an emerging trend and began investigating them. Vidéotron also became aware of the trend sometime in 2015 and the Rogers Plaintiffs began their own investigation in 2016.

[7] Between April 2015 and April 2016, the Plaintiffs' experts on fraud, piracy and technology investigated the trend and tested the Defendants' products. They found that the devices sold by the Defendants could be used to access protected content produced and/or retransmitted by the Plaintiffs using online streaming websites, and that the Defendants advertised their products as a way to access free television content and avoid cable bills. They also noticed a significant increase in the prominence of pre-loaded set-top boxes, the product appearing at trade shows and sold at dedicated brick-and-mortar locations.

[8] The Plaintiffs specifically identified three types of pre-installed applications which they submit could be used to access copyrighted content:

A. KODI: with the proper add-on(s), the open-source media player KODI could be used to access online streaming websites;

B. Showbox: the media player software Showbox could be used to access online streaming websites and permanently download content such as television programming or motion pictures; and

C. Private IPTV Services: these are private Internet servers which re-transmit television broadcasts over the Internet, usually for a monthly fee.

III. The facts

A. *The investigators*

[8] Two witnesses testified concerning the acquisition of a set-top box and how the purchaser would use that set-top box in order to gain illegal access to the plaintiffs' programs.

[9] The first witness is Jonathan Sansoucy. He has been working as an investigator for Videotron, one of the plaintiffs, since August 2016. Before that, he was already employed by Videotron. His supervisor, Gabriel Lewis, asked him to buy a set-top box from the business concern controlled by Mr. Wesley, MTLFreeTV.com. Mr. Wesley is doing business as MTLFreeTV.com. To do so, an appointment had to be made with Mr. Wesley in January 2017, contrary to what was the practice in 2016, through his company's website. Exhibit P-3 is presented as evidence of this new site. An examination of exhibit P-3 shows that there is a requirement to contact MtlFreeTV and answer questions like, "How did you hear about us?", "How can we help you?", as well as a description of the request. The investigator followed the instructions and, apparently, he was able to make an appointment without any trouble as can be seen from exhibit P-11, which is the e-mail exchange with the defendant to make the appointment.

[10] Moreover, the investigator carried with him an audio recorder that he turned on when he left the parking lot to enter Mr. Wesley's premises. The audio recording is filed under exhibit P-12. I have listened to it.

[11] Once Mr. Sansoucy reached the room where Mr. Wesley was doing business in a non-descript building, he described the premises as one room that was approximately 15 feet by 20 feet. Behind an L-shaped counter, there was a table with set-top boxes and a television. Another television was located in a space where customers could move around freely.

[12] The television that was easily accessible to customers had a page showing some content, such as “Mobdro”, “KODI” and “Showbox.” Once he was able to speak with Mr. Wesley, Mr. Sansoucy asked whether it was possible to access content such as Netflix and YouTube. He purchased a box presented as the “TX3 Pro”.

[13] Mr. Wesley advised that different boxes have different properties, such as, for example, their power and speed, but essentially they all have the same utility.

[14] The box purchased by Mr. Sansoucy was presented as not being pre-configured with applications. During his cross-examination, counsel for Mr. Wesley stressed that his client had clearly informed Mr. Sansoucy that the box purchased was not configured. Mr. Sansoucy testified that it was discussed whether the box could be configured, tutorials, such as the one found at exhibit P-9, were easy to use.

[15] Thus, the witness purchased the TX3 Pro box in question for \$100, paid in cash. He was given a purple bag containing the TX3 Pro box and a wireless keyboard. Leaflets to help with the necessary configuration were also available. Exhibit P-8 consists of the contents of the bag and leaflets that were acquired during the January 13, 2017 visit. Exhibit P-9 is a sheet with a bar code that gives direct access to a YouTube page where the video tutorial is found (exhibit P-15).

[16] The role of this witness was to purchase the item and to give it to Mr. Lewis on January 13, 2017, the day of the purchase. He did not operate the set-top box purchased on January 13, 2017. He gave it, together with the contents of the purple bag, to Mr. Lewis.

[17] Mr. Lewis is manager of the fraud and investigations department at Videotron and Mr. Sansoucy's supervisor. He has held this position since 2011. The purchased item was transferred directly to him and he tried to use it immediately as anyone else would upon receiving the device.

[18] He testified that he became interested in Mr. Wesley's company in the spring 2016. Starting on April 22, 2016, it was possible to purchase products from Mr. Wesley. At that time, those who made the purchases could go to the premises without an appointment. He confirmed that the sketch of the premises found in exhibit P-14 matched the layout of the premises in the spring 2016.

[19] Mr. Lewis was, in effect, the only witness offered by the plaintiffs to establish the essential elements of the charge. He is the person who received the accused device and who operated it on January 13, 16 and 27, 2017. He documented his "expérience de l'utilisateur" ("user's experience") from start to finish.

[20] The witness purchased the first box, on April 22, 2016, which is the set-top box which was used in order to be granted the interlocutory injunction allegedly disobeyed in this case. Mr. Lewis testified on the user's experience concerning devices that have become the subject of the first contempt proceedings. Under exhibit P-22, the Court received the homepage one would see after the devices were powered up. What is important for our purposes is that the user would be able to go directly from the homepage to offending websites. There was no prior operation required of the customer: access to the site was without any intermediate step or operation.

[21] The user's experience was different when Mr. Lewis operated the device purchased on January 13, 2017 which is the subject of the current proceedings. Once Mr. Sansoucy brought the material purchased earlier on January 13 (exhibits P-26 – P-8) at around 3:00 p.m. on the same day, Mr. Lewis plugged the device in and proceeded to follow the steps appearing on the page itself.

[22] As became clear during the hearing, the major difference between the user's experience on January 13, 2017, and the user's experience using previous devices that were made the subject of the first contempt proceedings, is that the accused device requires that the customer perform the steps that appear on the screen.

[23] The witness documented his experience through a series of photographs taken by the witness (exhibits P-27, P-28 and P-29).

[24] Mr. Lewis testified that he "clicked" on the icon identified as MFTMC3, from the homepage, taking him to what appeared at exhibit P-29. As can be seen from the exhibit, there is the mention "click here to finalize MFTMC installation"; the witness "clicked", which took him to "config MFTMC-9%", which indicates that the configuration is ongoing. The third photograph documents that "MFTMC has now been successfully installed". Once installed, it is possible to use MFTMC in order to gain access to content which is alleged to be protected by law. The last photograph in exhibit P-29 is the capture by the witness of what he found at 3:51 p.m. on January 13, 2017. That photograph was reached some 4 minutes after the witness clicked on the page indicating "click here to finalize MFTMC installation".

[25] On January 27, 2017, the witness identified networks and programs which he claims were accessed through the device purchased on January 13, 2017. The results are presented at exhibit P-30.

[26] The witness remitted the accused device to counsel sometime after January 27. He claimed that the device was kept in a secure area (the “bunker”) during the time he was in control of the device.

[27] The cross-examination was surprisingly short. Counsel enquired as to why the witness did not make a video of his user’s experience, instead of creating a series of photographs, which were not all timestamped. Similarly, the witness was not able to provide counsel with the exact date on which the accused device was transferred to counsel for the plaintiffs, although this information could be retrieved if needed. The witness made the same comment about the precise moment when photographs were taken by him.

B. *The defence*

[28] The defendant chose to present a defence to the charge. Mr. Wesley testified first and an expert he had retained followed.

[29] The witness asserted that he did not sell a device that was “pre-loaded”. He testified that when he met Mr. Sansoucy, he told him that he would have to install the program himself. The only explanation offered by Mr. Wesley is that he had chosen to be extremely careful since he had been found guilty and he has not been “putting anything on the device”.

[30] On cross-examination, it was established that Mr. Wesley does not have any employees. Counsel questioned the witness about the devices he had purchased over time. The last purchase of “boxes” would have been in October/November 2016; annually, he would purchase around 400 to 600 “boxes”. Furthermore, he refreshed his website (MTLFreeTV.com) recently (early June 2017). Mr. Wesley was also questioned on the content of his new website as of June 22, 2017 (exhibit P-32).

[31] The questioning turned on prices for products offered by Mr. Wesley, compared to some products offered by a well-known provider of electronics equipment. The said products appeared on Mr. Wesley’s website for the first time in June 2017, although he would have had some before he advertised them in June. In the end, the evidence establishes that the products offered by Mr. Wesley are never cheaper than those offered by major distributors and, in fact, they are advertised by these distributors at prices significantly lower once rebates are factored in. Mr. Wesley explained that major distributors are able to acquire merchandise at a lower price.

[32] The witness was questioned about exhibit P-9, a form of advertisement on the front and back sides of the marketing flyer for MTLFreeTV remitted to Mr. Sansoucy by Mr. Wesley on January 13, 2017. The flyer bears the words “The box they don’t want you to own”. Mr. Wesley acknowledged that this refers to the kind of device we are concerned with and that the word “they” referred to the plaintiffs and others. That was followed with questions about exhibit P-17, an article published by CBC News in June 2017 entitled “Streaming apps for “free tv” android box disappear following U.S. lawsuit threat”. Mr. Wesley is featured therein. He acknowledged that the following passage was accurate:

Wesley claims there are still many dealers peddling boxes and that a court case can't kill the industry. He says the same is true for the add-on community, even with TVAddons' future in question.

"It's definitely a blow to the community, but it's not a fatal blow" Wesley said. He points out that there are numerous similar apps available that have no association with TVAddons.

TVAddons rebranded?

Wesley also believes that even if TVAddons disbands, it may rebrand itself and return under a different name.

"It's a huge nuisance or annoyance to have to start from scratch, but it's something that can be done," he says. "You're not 'TVAddons' anymore; you're 'Streaming Addons' now and you just kind of move on."

In re-examination, Mr. Wesley indicated that he was speaking in general when quoted by CBC News.

[33] Under cross-examination, Mr. Wesley continued to state that he sold "vanilla boxes". His devices sold in January 2017 did not contain "add-ons". He did not sell set-top boxes that have the applications. However, he did not offer any evidence of the boxes sold by him nor the boxes he supplied his expert, Mr. Laycraft, for the testing he would have conducted in British Columbia. Not having the burden of proof, he did not feel the need to bring a sample of the set-top boxes. If the box sold on January 13 had add-ons, they must have been installed after it was sold to Mr. Sansoucy.

C. *The experts*

[34] The defendant offered what was presented as expert evidence the testimony of William Laycraft, an employee of ReStoring Data, a business concern operating out of British Columbia. As explained by the witness, ReStoring Data, as its name implies, assists in searching for and retrieving lost data. The parties consented to their technical witnesses testifying as experts without the need for a voir dire.

[35] Thus, the plaintiffs did not challenge the witness with a view to disqualifying him as an expert: they focused instead on the probative value of his evidence.

[36] Mr. Laycraft presents himself as a “digital forensic analyst” who would assist the Court in two respects: the “forensic soundness” of the techniques employed by Mr. Lewis and an examination of a TX3 Pro set-top box which, the plaintiffs contend, was purchased by one of its agents on January 13, 2017.

[37] It is still unclear, in spite of repeated questions, what the use of “forensic” adds in the examination of this matter. The Canadian Oxford Dictionary defines “forensic” as being used in connection with courts of law, especially in relation to crime detection. We know of forensic medicine as being the application of medical knowledge to legal problems; similarly, forensic science implies the application of biomedical, or other scientific techniques, to the investigation of crime. In our case, it remained unclear what is the discipline, whether it be something akin to medicine, accounting or some scientific methodology, being applied by the witness towards

crime detection or some legal issue. Indeed, one would think that it is for the Court to determine if evidence is admissible and what is its probative value.

[38] The witness does not have training in electronic engineering or any similar scientific training. At the time of his testimony, he had completed a Bachelor of Technology in Forensic Investigation (Computer Crime Option) at the British Columbia Institute of Technology. He had never testified before a judicial adjudicator (although there must, of course, be a first time) and his past experience does not suggest any particular expertise. In his curriculum vitae submitted in support of his testimony, he lists the following tasks as part of his duties as a “digital forensic analyst”, a position he holds since January 2017 only:

- use various techniques to access and organise data of potential evidential value for clients;
- analyse and report on information obtained for digital forensic cases;
- author reports in a manner acceptable for the intended jurisdiction;
- attend to court when requested for cross-examination;
- contribute to data recovery cases.

[39] The limited scope of the testimony and the results presented, and the lack thereof, might help to explain why this witness’ expertise was not challenged. Rather, the plaintiffs were content for the evidence to be considered for its probative value instead of being excluded for lack of relevant specialized knowledge (*R v Mohan*, [1994] 2 SCR 9, *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23; [2015] 2 SCR 182).

[40] At any rate, it continues to be the province of the trier of fact to assess critically the evidence offered by “experts” (*R v Bingley*, 2017 SCC 12).

[41] Mr. Laycraft testified on the soundness of the “techniques” used by Mr. Lewis. He found that Mr. Lewis ought to have made a “verifiable” copy of the evidence before he performed any operation on the device acquired in January 2017. He described that as the “most basic best practice for handing [*sic*] of digital evidence” in his report. That consists of copying the internal storage at the time the device was purchased.

[42] It would appear that his “concern” stems from his contention that Mr. Lewis “powered on and made changes to files and configurations to a piece of evidence” (page 8 of 20, Mr. Laycraft’s report). The system clock would have been of particular interest for the witness. I note that the witness stated in his report that “I appreciate it could be technically challenging to create a copy of the TX3 Pro’s internal storage for analysis” (page 8 of 20, Mr. Laycraft’s report). However, it is his opinion that the investigator ought to be able to find out how that could be done. It remained very much unclear what difference that would have made to the user’s experience once the device was powered on for the first time.

[43] The second set of observations concerned the experimentation that was to be conducted by the witness on the accused device on May 15, 2017. It proved to be unsuccessful.

[44] It seems that Mr. Laycraft was attempting to copy the internal storage from the purchased device, the TX3 Pro Android OS set-top box. Prior to May 15, 2017, he developed a protocol,

using two devices, supplied by the accused but not produced at trial. The only information provided was that one was pre-loaded, whatever that means, and the other one was not, such that the expert compared the two, said the defendant, in an attempt to by-pass the operating system in order to copy the internal storage. Mr. Laycraft intended to use the Team Win Recovery Project version 3.0.2-0 (TWRP). Very little information was made available by the witness as to what that tool is. The best that could be found is in the report, at page 5 of 20:

From TWRP's publisher, Team Win LLC: [edited for clarity and conciseness]

TWRP is an open source community project. Team Win was originally formed to work on porting WiMAX to CM7 for the HTC EVO 4G. After our work on the EVO 4G we wanted to work on a project that would work on more devices than just the EVO 4G and we settled on working on a recovery. Today TWRP is the leading custom recovery for Android phones.

No other explanation about the tool was offered either in the report or at trial. It was, however, noted that the TWRP seems to be used, presumably with a measure of success, for Android phones. The device under review is not an Android phone.

[45] The report and the testimony are to the same effect. The attempt made on May 15, 2017, to retrieve information from the purchased device proved to be a failure.

[46] The witness claimed he used his technique on the two devices supplied by the defendant. However, no detail about that initial experiment was offered. Thus, the witness writes at page 13 of 20 of his report that using the two sample units supplied by Mr. Wesley, "I assume that the device in evidence is of the same make/model/manufacturing lot and can be expected to function

in the same manner” [my emphasis]. The witness recognized that it is an important assumption that he nevertheless considers to be highly likely to be correct “based on my observations, the plaintiff’s affidavits [and] Mr. Wesley’s assertions”. Once again, there is no articulation as to why those could support the view that the two sample devices can be properly used because they are either identical or very similar. Furthermore, the witness did not provide an explanation of what was achieved with the two samples about which the TWRP would have been applied. In effect, the evidence is simply to state that the technique used was successful with two units provided by Mr. Wesley. But whatever success there was, the witness was unable to replicate it with the device purchased on January 13, 2017.

[47] Moreover, as the witness was attempting to perform his testing on the device, on May 15 last, he conceded in his report that he encountered “technical difficulties”. Ultimately, it seems that the witness attempted to obtain a verifiable precise copy of the device’s internal data storage. The witness’s aim was to search for when and how any infringing content would have been included in the device in the hope of establishing what the plaintiffs, or someone unknown, would have changed on the device while they were in possession of it. Mr. Laycraft was never able to conduct his operation with any success, speculating later that the micro SD card slot was broken.

[48] As a result of the failure of the witness, the only conclusion that can be reached by the Court is that there is no evidence before it. The experiment led by the expert failed and therefore there is nothing before the Court. The failure does not establish that there was infringing content

on the device; it surely does not establish either that there was not such content. At the end of the day, the evidence of Mr. Laycraft was of no assistance to the defendant or the Court.

[49] In the circumstances, the evidence of Tom Warren, the expert retained by the plaintiffs to challenge the respondents' expert became largely surplusage. He is a former policeman with experience in evidence handling and investigation who founded twenty years ago Net-Patrol International, Inc. (NPI) which provides information and technology services in computer and internet security. Mr. Warren is currently an I.T. Consultant - Forensic specialist at NPI. He has also held positions as professor of information technology at two colleges in Southern Ontario. He has testified as an expert before; his expertise was not challenged before this Court.

[50] In a nutshell, the expert was retained to attend at Mr. Laycraft's performance of his protocol on May 15, 2017. Mr. Warren asserts that there is no recognized procedure to create, process and analyse an image of the type of device (TX3 Pro set-top box operating on the android operating system). The software Mr. Laycraft tried to use is not technically mature; it is "not recognized as being reliable in the digital forensics industry" (para 22 d)(iii), Mr. Warren's report). In fact, he pointed out that there does not exist a forensic process to create and analyse an image of the device such as the one in this case. This comment is not dissimilar to the one made by Mr. Laycraft that "it could be technically challenging to create a copy of the TX3 Pro's internal storage for analysis" (page 8 of 20, Mr. Laycraft's report). Mr. Warren explained that TWRP is an "open source" software still in development by a community of developers without a formal structure. It has not been tested for performance and reliability against the performance and reliability of other tools.

[51] As for the experimentation that took place on May 15, 2017, on the device purchased on January 13, 2017, Mr. Warren was very critical, from the lack of equipment of Mr. Laycraft (an expert brings his own equipment and does not rely on that of others) to the repeated failure of the different attempts on a control box. Indeed, when, after 4 unsuccessful attempts, Mr. Laycraft was finally able to load a mirror image of the control box on a USB device, it remained impossible to confirm whether the control box contained the same application as the purchased device, whether the parameters were the same and whether it would have even been possible to process the image in order to analyse and report on its content.

[52] I note that Mr. Warren opined about the handling of the device by Mr. Lewis. Not too surprisingly, he found it to fall within a proper evidence handling protocol.

[53] Under cross-examination, which was very limited, it was established that the expert never testified concerning a set-top box. However, the witness expressed the view that it was very unclear whether timestamps could have been used because the time appearing on the control box was itself unreliable when the fifth try on the control box produced some times. The witness confirmed that there are many reasons why the experimentation of Mr. Laycraft failed. Finally, he agreed that having a video of the user's experience would be marginally superior to having photographs. He agreed that it would be preferable to have the time when that photograph was taken.

IV. Arguments and analysis

A. *Arguments*

[54] As we were reminded again recently in *R v Bradshaw*, 2017 SCC 35, a trial is a truth-seeking process that relies on the evidence presented:

[19] The truth-seeking process of a trial is predicated on the presentation of evidence in court. Litigants make their case by presenting real evidence and *viva voce* testimony to the trier of fact. In court, witnesses give testimony under oath or solemn affirmation. The trier of fact directly observes the real evidence and hears the testimony, so there is no concern that the evidence was recorded inaccurately. This process gives the trier of fact robust tools for testing the truthfulness of evidence and assessing its value. To determine whether a witness is telling the truth, the trier of fact can observe the witness's demeanor and assess whether the testimony withstands testing through cross-examination (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 35).

Only the evidence presented at trial can be assessed to reach a verdict.

[55] Here, the Court must be satisfied beyond a reasonable doubt. Rule 469 could not by any clearer:

Burden of proof

469 A finding of contempt shall be based on proof beyond a reasonable doubt.

Fardeau de preuve

469 La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

[56] The defendant chose to argue the plaintiffs did not discharge their burden: he argued that the proof made was not beyond a reasonable doubt. Rule 470 mandates that “evidence on a

motion for contempt order ... shall be oral”; although “(a) person alleged to be in contempt may not be compelled to testify” (rule 470(2)), the defendant chose to testify and present a denegation that he offered for sale a device that was “pre-loaded”. These are not affidavits submitted at an *ex parte* hearing: the evidence was tested to the extent the parties chose to test the evidence through cross-examination of the witnesses who appeared.

[57] This case boils down to witnesses appearing for the plaintiffs who testify that they purchased a set-top box from the defendant. When they tried to use the box, they found that it differed from boxes purchased in the past, where the user was able to turn on the device and immediately gain access to icons referring directly to content. This time, the evidence of Mr. Lewis is rather that there were steps to be taken to gain access to what is alleged to be illegal content. The steps are however minimal. By clicking on the icon MFTMC3, which appears on the homepage (exhibit P-27) when the user turns the device on, the witness is immediately taken to a page where he is told to “click here to finalize MFTMC installation” (exhibit P-29). On that same page appears the logo used by Mr. Wesley which bears the title “MTL FREETV” together with references to three websites. Once the installation is completed, the user is advised that MFTMC has been successfully installed and that the website www.mtlfreetv.com can be visited for future support. From the moment when the installation began to when the witness was able to have access to content claimed to be illegal, it would have taken no more than a few minutes according to the witness. The witness testified that a closer examination of what can be accessed by the user showed many stations and programs of the plaintiffs (exhibit P-30). Those, the plaintiffs argue, constitute the facts needed to establish beyond a reasonable doubt the contempt

of court, as charged. I note that the “*expérience de l'utilisateur*” was not challenged on cross-examination.

[58] The plaintiffs add to their evidence a number of circumstantial elements to support their contention:

- a) the use of a non-descript building where Mr. Wesley is operating his business could suggest that he wishes to operate under the radar;
- b) before the conviction for contempt of court, there was no need to make an appointment in order to gain access to the business premises;
- c) purchasing a “plain-vanilla” device from MTLFREETV is not a bargain, compared to other plain vanilla devices sold by other well-known suppliers of electronics products;
- d) in a report of CBC News not challenged by Mr. Wesley, he claims that the future of the “add-ons” will not be killed by a court case. It is reported that “Wesley also believes that even if TVAddons disbands, it may rebrand itself and return under a different name.” It may be suggested that it is in essence what Mr. Wesley did here, pretending that requiring that the customer complete the installation of add-ons takes the matter outside of the four corners of the injunction.

[59] On the other hand, the defendant claims that he has not pre-loaded the box sold to the investigators. The defendant made it clear throughout that he did not accuse the plaintiffs or their agents of installing that which was not in the set-top box when he sold Mr. Sansoucy the device

on January 13, 2017. However, he did not challenge on cross-examination of the two witnesses presented by the plaintiffs the claim of possession of the device or impugn their credibility.

[60] Counsel for the defendant concedes, somewhat surprisingly, that a mere denial will not automatically suffice to raise a reasonable doubt. Indeed, the defendant did not explain on the stand what he met by pre-loading a set-top box. He rather focused on the manner in which the investigation was conducted. In his view, there are factors that add weight to the denial.

[61] Without pointing the finger at the plaintiffs, accusing them of installing the MFTMC on the device or tampering with the device, the defendant seeks to raise a reasonable doubt by discounting some of the evidence brought forth by the plaintiffs and suggesting that the evidence was not adequate to reach the threshold of beyond a reasonable doubt::

- a) the fact that the defendant operates out of a nondescript building identified as “U-Haul” (exhibit P-33) as the other tenants appear to be offices (Déneigement X, Déneigement Y, Impôt Z, Math Education Center, etc. ; See exhibit P-13) is not decisive says the defendant;
- b) the fact that he was operating on appointment only after pleading guilty to the first contempt charge could be explained by the fact that he had a new job;
- c) the difference in prices for devices sold by Mr. Wesley compared to major distributing chains is not a major issue, Mr. Wesley asserting that prices are basically the same;

- d) the plaintiffs' evidence is not the best it could have been: instead of pictures, there should have been a video made by the investigators or a demonstration performed. Furthermore, the photographs taken should have been timestamped. The investigators did not make accurate notes about when the device was transferred to counsel. However, there was never an explanation of what that entails or, in other words, what difference would that make in view of the "expérience de l'utilisateur";
- e) the chain of possession of the device, once purchased from Mr. Wesley, would be deficient;
- f) the main investigator, Mr. Lewis, did not provide his evidence with timestamps and it appears he did not have notes of the events he reported.

In other words, the defendant argues that the evidence was less than perfect and that the other corroborative elements can be explained.

[62] These elements fall in different categories. Some put forth by the plaintiffs would tend to prove that Mr. Wesley knew about the product he was selling and its legality. As for the alleged deficiency of the chain of possession, it might suggest an opportunity for the device to have been tampered with after it was sold by Mr. Wesley; the fact that only photographs are available to support the testimony of Mr. Lewis would go to the probative value of that evidence. The defendant also suggested that the fact that Mr. Lewis could have easily made a video, instead of mere photographs, should make the Court draw a negative inference about his credibility.

[63] To summarise, the defendant suggested that, not only does he deny having “pre-loaded” the box sold on January 13, 2017, but a reasonable doubt should emerge because, as I understand the argument, the quality of the evidence is not sufficient to sustain a conviction.

B. *Analysis*

[64] In my view, the facts of this case have been proven beyond a reasonable doubt. The technical arguments on behalf of Mr. Wesley never got any traction given the evidence offered by the plaintiffs. The investigators testified and they were barely cross-examined. The core of the testimony of Mr. Lewis is that he operated the device on January 13, 2017 when it was brand new, having been purchased just a few minutes before. The initial operation of the device was documented on that day. The cross-examination conducted by counsel never challenged the user’s experience when turning on the device on January 13. Indeed, there was no active challenge to the chain of possession of the device, although given what was done on January 13, 2017, its importance in this case is, at any rate, less than it might be in other cases. The evidence is to the effect that Mr. Lewis received the device purchased by the other investigator, operated it, and he kept possession of it in “the bunker”. There is no evidence to the contrary. If Mr. Lewis is to be believed, and there is no reason to doubt him, he documented his use of the device when he received it, the very same day. The chain of possession becomes at best a peripheral issue once the user’s experience has been established.

[65] The fact that he took photographs during the steps he followed when prompted, after having clicked on the MFTMC3 icon on the homepage appearing on the device once plugged in, instead of making a video of the whole sequence, means that a more probative piece of evidence

could have been created. But unless the defendant alleges that Mr. Lewis was attempting to hide evidence, one is hard pressed to understand how that, in and of itself, can be problematic. Indeed, the testimony of a witness may be enough in a simple prosecution. The pictures taken support the narrative. The issue for the Court is whether the evidence led by the plaintiffs suffices to establish proof beyond a reasonable doubt. As I pointed out at the hearing, it is not because a person witnesses an assault while in possession of a camera, but without using it, that her evidence will not suffice to establish the offence. She may be cross-examined on the quality of her observations, but her evidence may well stand even if challenged. The user's experience ("expérience de l'utilisateur") in this case was never challenged.

[66] If the story of the "expérience de l'utilisateur" ("user's experience"), as reported by the witness as having taken place on January 13, 16 and 27, 2017, is not challenged on cross-examination or otherwise, its probative value must still be assessed. Here its probative value remains intact in spite of issues such as the chain of possession or the lack of timestamps on all the photographs which are largely irrelevant in view of the unchallenged testimony under oath. The same is true for the date on which the device was transferred to counsel for the plaintiffs. To put it another way, nothing meaningful rides on the chain of possession and timestamps. That is because the unchallenged evidence of the investigator is what is essential; if believed it establishes the use that is to be made of the device, how it operated on the very day it was purchased. I observed carefully the two plaintiffs' witnesses. They were forthcoming and testified without any attempt to embellish. Their testimony was clear and believable and their credibility was not challenged.

[67] But at any rate, there is no indication whatsoever that the chain of possession was deficient. There was never any argument mounted about the timestamps in spite of numerous attempts on the Court's part to elucidate the issue with counsel for the defendant. Can speculations, suppositions, suggestions raise a reasonable doubt?

Reasonable doubt

[68] The parties did not discuss at trial what a reasonable doubt is at law. There was a time when it was agreed that the term "reasonable doubt" is an ordinary expression; the law should rely on the common sense of the trier of fact (Glanville Williams, *Criminal Law: The General Part* (2nd ed 1961), Stevens and Sons Ltd, London, pp 873). As Professor Williams put it then:

The gravamen of Lord Goddard's objection to the formula of "reasonable doubt" seems to have been the muddle occasionally created by an impromptu effort to explain to a jury the meaning of this phrase. A simple solution would be to refrain from explaining it, relying on the common sense of the jury. As Barton J. said in an Australian case, "one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary use with reference to this subject-matter, and which is usually stated to a jury without embellishment as a well understood expression." However, some modes of embellishment seem to be unobjectionable. There is probably no harm in telling the jury, as some judges do, that a reasonable doubt is one for which a sensible reason can be supplied.

[my emphasis]

Such is not the state of the law in Canada.

[69] It is important to note, at the outset, that the prosecution carries the burden to prove its case beyond a reasonable doubt throughout the trial. Even if an accused testifies and is not

believed, that does not constitute a short cut to conclude that he is guilty. The Court will have to review the evidence in its entirety and be “convinced beyond a reasonable doubt by that evidence of the guilt of the accused” (*R v W (D)*, [1991] 1 SCR 742, p 758). This makes eminently important that there be a proper understanding of the meaning at law of the term “reasonable doubt”. Hence, the Supreme Court of Canada sought to give a definition to the concept of reasonable doubt.

[70] In its unanimous decision on the need to define “reasonable doubt”, in *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court recognised, because they “have a specific meaning in the legal context” (para 22), that the term must be defined to assist jurors in criminal cases. The guidance is useful.

[71] The summary found at paragraphs 36 and 37 of the reasons for judgment will suffice for our purpose:

36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;

- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

37 On the other hand, certain references to the required standard of proof should be avoided. For example:

- describing the term “reasonable doubt” as an ordinary expression which has no special meaning in the criminal law context;
- inviting jurors to apply to the task before them the same standard of proof that they apply to important, or even the most important, decisions in their own lives;
- equating proof “beyond a reasonable doubt” to proof “to a moral certainty”;
- qualifying the word “doubt” with adjectives other than “reasonable”, such as “serious”, “substantial” or “haunting”, which may mislead the jury; and
- instructing jurors that they may convict if they are “sure” that the accused is guilty, before providing them with a proper definition as to the meaning of the words “beyond a reasonable doubt”.

[my emphasis]

[72] Recently, in *R v Villaroman*, 2016 SCC 33; [2016] 1 SCR 1000 [*Villaroman*], the Supreme Court elaborated on the term in the context of a case based in large part on circumstantial evidence. The Court insists that the reasonable doubt is based on reason and common sense and it is not imaginary or frivolous. The prosecution does not have to establish “absolute certainty”, but the reasonable doubt is logically connected to the evidence or the

absence of evidence. At the end of the day, what is considered is the degree of persuasion needed to find the accused guilty, how sure the trier of fact must be of the guilt in order to convict.

[73] A particular difficulty occurs when one tries to differentiate between speculation and plausible theories; the former does not bring about a reasonable doubt which the latter does. A gap in the evidence may give rise to a reasonable doubt as long as inferences are reasonable.

Paragraph 36 reads:

[36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[my emphasis]

Once again, human experience and common sense will inform the assessment of the evidence or lack thereof. Other plausible theories or other reasonable possibilities may be inconsistent with guilt. But they "must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation" (para 37). That said the test is encapsulated at paragraph 38:

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[74] An illustration of the test is found at paragraph 42:

[42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that “[c]ircumstantial evidence does not have to totally exclude other conceivable inferences”; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

The case against the defendant

[75] In the case at bar, the evidence against Mr. Wesley is strong:

- a) a set-top box was purchased from Mr. Wesley, who is the sole employee of MTLFreeTV;
- b) the device was brought directly to Mr. Lewis who proceeded immediately to try to use it; the narrative was documented through photographs taken by the investigator. The evidence shows that the investigator was able to have access to content deemed to be illegal through steps followed when prompted. That evidence was not challenged;
- c) contrary to devices about which the defendant entered guilty pleas on contempt charges, there is no direct access to “illegal content” this time around. Rather, the customer must perform simple steps once prompted to reach the “illegal content”. In essence, once the steps (“click here to finalize MFTMC installation” and click “OK” once appears on the screen the mention “MFTMC has now been successfully installed”) have been completed, the same direct

access to “illegal content” is possible. Infringing content which can then be accessed directly is listed in exhibit P-30.

The plaintiffs have submitted in evidence (exhibit P-11) that since the conviction for contempt at the end of 2016, the defendant required an appointment be made by potential clients. The form used to make an appointment asks the question, “How did you hear about us?” and states that “Due to the Cartel’s injunction all questions on device configuration will be ignored”. These questions are not needed if the purpose is only to make an appointment because of Mr. Wesley’s reduced availability. Evidently, the defendant wished to be careful about contravening again the injunction. The suggestion that the appointment is needed because the defendant has a new job does not explain why the questionnaire is framed as something more probing than merely making an appointment. The questionnaire and the reference to the “Cartel” confer an air of suspicion which is not consonant with doing business openly, especially if it is true that the defendant wanted merely to liquidate his inventory.

[76] Mr. Wesley is doing business, by himself, as “MontrealFreeTV.com”. The inference that must be drawn is that he favours having access to television without having to pay for it. Some television programming is still available through the airwaves, but this is not something for which one purchases a set-top box: an antenna will suffice. Furthermore, the front and back sides of the marketing flyer for MTLFreeTV (exhibit P-9) bear the mention “The box they don’t want you to own!” As already noted, Mr. Wesley acknowledged that “They” refers to the plaintiffs, among others. Indeed, the CBC article (exhibit P-17) suggests strongly that Mr. Wesley is a

believer in the future of television being free tv. He states that “a court case can’t kill the industry”. As he said:

It’s a huge nuisance or annoyance to have to start from scratch, but it’s something that can be done”, he says. You’re not "TVAddons" anymore; you’re "Streaming Addons" now and you just kind of move on.

Indeed, the same article states that “Wesley also believes that even if TVAddons disbands, it may rebrand itself and return under a different name”. Change a little something and it is a new ball game.

[77] Actually, it is difficult to understand why customers would show up at a non-descript building (exhibit P-33) to purchase a device for more than it can be bought at reputable chains if nothing more than the “plain vanilla” is offered. The conversation between Mr. Sansoucy, the investigator who purchased the device, and Mr. Wesley, which was recorded by Mr. Sansoucy, reveals that the investigator wanted to purchase a “box” which would give him access to “pay-per-view” movies and programs, at no-cost. That is what the defendant purported to sell, a box that will give access illegally to content. We hear the defendant saying that the customer must configure. However, the “configuration”, according to the evidence, is simply to click when prompted. The accused device contains all that is needed to gain access to “pay-per-view” movies and programs, at no cost. Mr. Wesley even suggests that the customer go to his website “pour la navigation”.

[78] In my view, there is no doubt, on the evidence presented in this case, that Mr. Wesley knowingly sold a set-top box that allowed access to “illegal content” through some steps that

must be performed by the customer/user once prompted by the accused device. The changes to the protocol were intended. Before considering if the behaviour falls within the four corners of the injunction, we must first consider if the defence offered by the defendant can raise a reasonable doubt.

The specific defence raised

[79] A reasonable doubt may emerge from the plaintiff's evidence as well as the defence offered by a defendant. As pointed out before, the defence regarding the chain of possession, if there was a defect, is not useful to the accused; the same can be said of "timestamps" as the basic facts were established. Certainly having a video, instead of photographs, would be the preferred choice. But such does not raise anything but sheer speculation in view of Mr. Lewis' testimony. The defendant did not challenge the witnesses who gave their narrative. There is no plausible theory or reasonable possibility that emerges from the evidence or the absence of evidence. Common sense and human experience lead to only one reasonable conclusion. There was no gap in the evidence and the plaintiffs did not have to prove their case to an absolute certainty. Without any challenge to Mr. Lewis' evidence that he performed the steps described in his testimony and documented in photographs, that evidence stands.

[80] The theory of the case on behalf of the defendant was that the agents of the plaintiffs are not accused of tampering with the device purchased in January 2017, yet something may have happened to the device. The problem with this theory is that it did not account for the testimony of Mr. Lewis which, if believed, establishes what the device did the day it was purchased. Whether the investigation could have been conducted differently is largely irrelevant if Mr.

Lewis is believed. Mr. Lewis' evidence is persuasive and he was not challenged on his user's experience. In fact, the defendant's speculation does not rise above mere suspicion or supposition, a hypothesis, not based on any evidence.

[81] Similarly, the expert's evidence offered by the defendant is of no use whatsoever in view of the absence of positive results. This constitutes the very definition of speculation. We do not know to this day whether the methodology chosen by the expert could have produced any result: it was not successful and the expert retained by the plaintiffs presented strong evidence that the likelihood of success was very much in doubt because the methodology and tools appear to be less than mature.

[82] Suggesting as a general proposition that a mirror image of the contents of the purchased device ought to have been taken only to concede that "it could be technically challenging to create a copy of the TX3 Pro's internal storage for analysis" (expert Laycraft's report, page 8/20) is less than helpful. Indeed, there is no evidence of what difference that could have made in a case where the device was operated immediately after the purchase and produced the results reported by the witness who operated the device. In effect, the defendant speculated that there could have been tampering without any basis in evidence. If Mr. Lewis did not tamper with the device on January 13 and 16, who did since he retained possession of the device? As stated in *Villaroman*, speculation is not a plausible theory, only suppositions. Here, there was never a plausible theory. The doubt, to be reasonable, must be based on reason and common sense; it is not imaginary or frivolous doubt and it must be logically based upon the evidence or lack of evidence.

[83] Thus, the Court is convinced beyond a reasonable doubt that the facts were established by the plaintiffs. The last question is to determine if the behaviour found beyond a reasonable doubt constitutes a violation of the injunction.

The injunction

[84] What is at stake is the functioning of the judicial process (*Baxter Travenol Laboratories v Cutter (Canada)*, [1983] 2 SCR 388). There is an order of this Court, in the form of an interlocutory injunction, which must be obeyed. For the time being, the Court's task is to determine what is prohibited as per the injunction and whether the defendant's actions, even in their modified form in that an extra step is now required of customers to gain access to "illegal" content, constitute a violation of the injunction as framed.

[85] The fact that the defence failed does not translate into automatic guilt. Rather it is the examination of the evidence as a whole that leads to the conclusion that the defendant sold a device that allowed for gaining access to "illegal" content. In other words, was the device as sold covered by the interlocutory injunction? Does the introduction of added steps ("click here to finally MFTMC Installation" and once completed "MFTMC has now been successfully installed. Please visit www.mtlfreetv.com for future support") change the device such that it does not violate the injunction as framed?

[86] In order to answer that question, the terms of the injunction must be reviewed to assess what is prohibited. Once issued, the terms of the injunction must govern and must be obeyed.

[87] The defendant stands charged with disobeying paragraphs 2(a), 2(b) and 2(j) of the interlocutory injunction issued by Justice Tremblay-Lamer on June 1, 2016 by, “on January 13, 2017, offering for sale, configuring and selling a TX3 Pro” pre-loaded set-top box (as defined at paragraph 2(a) of the Interlocutory Injunction Order). For ease of reference, I reproduce again paragraphs 2(a), 2(b) and 2(j):

THIS COURT ORDERS that:

2. The Defendants, their agents, employees, associates, and representatives, are enjoined and restrained from directly or indirectly:
 - a. Communicating works for which the copyright is owned by the Plaintiffs [the Plaintiffs’ Programs] to the public by telecommunication, including by configuring, advertising, offering for sale or selling set-top boxes that are adapted to provide users with unauthorized access to the Plaintiffs’ Programs [Pre-loaded Set-top Boxes];
 - b. Manufacturing, importing, distributing, leasing, offering for sale, selling, installing, modifying, operating or possessing Pre-loaded Set-top Boxes that are used or intended to be used to receive the Plaintiffs’ subscription programming signal after it has been decoded otherwise than under and in accordance with an authorization from the Plaintiffs;
 - j. As more particularly applicable to the Defendant Vincent Wesley dba MtlFreeTV.com, configuring, advertising, offering for sale or selling any Pre-loaded Set-top Box having the characteristics listed at paragraphs 2(a) to 2(e), including the MXQ, MXIII and Minix X8-H Plus Pre-loaded Set-top Boxes.

[88] The context in which the interlocutory injunction was issued is found in paragraph 22 of the reasons for the order of June 1, 2016:

[22] The devices marketed, sold and programmed by the Defendants enable consumers to obtain unauthorized access to content for which the Plaintiffs own the copyright. This is not a

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

[89] In order to contravene the injunction, by the terms of the order itself, it will have been established beyond a reasonable doubt that, even indirectly:

- a) the defendant communicated the plaintiff’s programs by configuring, advertising, offering for sale and selling devices, called set-top boxes, that are adapted to provide with unauthorized access to those plaintiffs’ programs;

According to the uncontroverted evidence led at trial, the defendant did just that by selling a device that is adapted to provide unauthorized access to the plaintiffs’ programs. By merely adding a step in the process, by requiring that the user to “Click here to finalize MFTMC” and to successfully conclude that simple operation by clicking on “OK”, the defendant was contravening the express words of the order. The device was adapted to provide access.

- b) the defendant offered for sale and sold a device, the said device having been modified, intended to be used to receive programming signal after it has been decoded

otherwise than under and in accordance with the required authorization from the plaintiffs;

As was shown beyond a reasonable doubt, once the steps using only the accused device have been completed, the investigator was able to gain access to programs offered by the plaintiffs. The defendant sold a modified device used or intended to be used to receive programming signal otherwise than in accordance with the required authorization.

- c) in the case of Mr. Wesley, he is specifically prohibited from configuring, advertising, offering for sale and selling set-top boxes adapted to provide users with unauthorized access to the plaintiffs' programs. [my emphasis]

As with a), above, the evidence shows that the device sold by Mr. Wesley was adapted to provide unauthorized access. The device was already loaded, or adapted, to provide access. The steps added to complete the process do not change the nature of the operation: the device was already adapted. In fact, the customer activates that which is already in the set-top box. To put it bluntly, the set-top box was "pre-loaded" as defined in the injunction. It was not pre-loaded as the set-top boxes involved in the first contempt proceedings, but it was still pre-loaded as per the definition in the injunction. The actions of the defendant were prohibited by the injunction.

[90] Mr. Wesley may have surmised that the difference between the devices sold in the first instance (first contempt of court proceedings) and that sold on January 13, 2017 was that the customer had to finish installing that which was already programmed. However, that difference is not enough to fall outside of the four corners of the injunction.

[91] The law of contempt does not require an intention to interfere with the administration of justice. An intent to breach the order is not an element of the offence as found in *Carey v Laiken*, 2015 SCC 17; [2015] 2 SCR 79 [*Carey*]:

[29] However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not accept Mr. Carey’s position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

Civil contempt requires no more than the intentional doing of the action which is prohibited by the order (*Carey*, paras 35 and 38). The set-top box sold by Mr. Wesley had the features required to gain access illegally to content, even if the features required the customer to perform easy steps once prompted by the device sold. It does not suffice to change a device’s feature to escape liability. The intent required is to deliberately do the act that is prohibited, which was proven beyond a reasonable doubt, not to interfere with the administration of justice.

V. Conclusion

[92] The defendant did not raise his good faith in attempting to comply with the order, but rather claimed that he avoided breaching the order by not selling loaded set-top boxes. However, he sold a prohibited device in that the user’s experience showed that a simple extra step was required in order to reach the unauthorized access (“illegal” content), an act covered by the terms of the injunction. He sold a set-top box contrary to the Court order. Mr. Wesley is a true believer in free television, as the CBC interview (exhibit P-17) shows and his website professes

(MTLFreeTV.com). He presents the set-top box as being the “Future of Television” and “The Box They Don’t Want You To Own”.

[93] The civil contempt of court upholds a court’s dignity and process, it declares that a party has acted in defiance of its order. To quote directly from *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, “the rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect” (p 931). As in *Carey*, the order was clear and the introduction of an extra step does not alter the fact that the set-top box was “adapted to provide users with unauthorized access to the Plaintiff’s programs”. That is how the order defines the “Pre-loaded set-top boxes”. Although different from the devices sold before, the device purchased on January 13, 2017 was adapted: the minimalist step required to have access did not change the fact that the device was adapted. As a result, the defendant, Mr. Vincent Wesley, is found guilty of contempt of court.

[94] Given this finding of guilt, the parties are to provide their full submissions on an appropriate sentence. The written submissions are limited for each party to 10 pages. These submissions are expected no later than February 7, 2018, unless the parties communicate to the Court’s registry such other date as might be more suitable or their wish to be heard by the Court.

JUDGMENT in T-759-16

THIS COURT'S JUDGMENT is that:

1. Mr. Vincent Wesley is found guilty of contempt of court.
2. The parties are to provide their full submissions on an appropriate sentence no later than February 7, 2018, unless the parties communicate to the Court's registry such other date as might be more suitable or their wish to be heard by the Court.
The written submissions are limited for each party to 10 pages.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-759-16

STYLE OF CAUSE: BELL CANADA, BELL EXPRESSVU LIMITED PARTNERSHIP, BELL MEDIA INC., VIDÉOTRON S.E.N.C., GROUPE TVA INC., ROGERS COMMUNICATIONS CANADA INC., ROGERS MEDIA INC. v VINCENT WESLEY DBA MTLFREETV.COM AND 1326030 ONTARIO INC. DBA ITVBOX.NET AND AL

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 27, 2017, JUNE 28, 2017, JUNE 29, 2017

JUDGMENT AND REASONS ROY J.

DATED: JANUARY 24, 2018

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