

Federal Court



Cour fédérale

**Date: 20191119**

**Docket: T-759-16**

**Citation: 2019 FC 1460**

**Ottawa, Ontario, November 19, 2019**

**PRESENT: Mr. Justice Norris**

**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.**

**Plaintiffs  
(Moving Parties)**

**and**

**RED RHINO ENTERTAINMENT INC. and  
ERIC ADWOKAT**

**Defendants  
(Respondents)**

**and**

**ANDROID BROS INC. and others**

**Non-Respondent Defendants**

**JUDGMENT AND REASONS**

I. OVERVIEW

[1] The plaintiffs are well-known Canadian broadcasting and media distribution companies. Among many other things, they provide access to a wide range of television programming (for which they own the Canadian broadcasting or distribution rights) for a fee. Some people, at least, would prefer to have access to this programming without paying this fee so a market for devices that make this possible has emerged. One such device is a “set-top box.”

[2] A set-top box (sometimes also referred to as an Android TV box) is an electronic device that can be used to provide additional functionalities to a standard television. Once connected to a television and the internet, a set-top box can allow individuals to use their television to, for example, browse the internet, access email, play games, or watch videos on YouTube.

Commercially available set-top boxes have many legitimate or non-offending uses. However, if configured with the necessary applications or add-ons, a set-top box can also be used to gain unauthorized access to the plaintiffs’ live and on-demand television programming. While someone with the requisite knowledge and skill could configure a set-top box to perform this latter function from scratch, for most people it is much easier simply to purchase one already set up for this purpose by someone else.

[3] In response to the growing prevalence of ready-made devices permitting unauthorized access to their television programming, in May 2016 the plaintiffs commenced an action against five defendants who were alleged to be configuring, advertising, offering for sale and selling pre-loaded set-top boxes and private IPTV services. (A private Internet Protocol Television [IPTV]

service allows users to connect directly to private internet servers that stream unauthorized re-transmissions of television broadcasts.) The plaintiffs allege that these activities violate certain provisions of the *Copyright Act*, RSC, 1985, c C-42, and the *Radiocommunication Act*, RSC, 1985, c R-2, including the plaintiffs' exclusive right to make their programming available to the public. See, in particular, sections 2.4(1.1), 3(f) and 27 of the *Copyright Act*.

[4] As will be seen shortly, what is meant by “pre-loaded set-top box” is the central question in this case.

[5] On June 1, 2016, Justice Tremblay-Lamer issued an interlocutory injunction enjoining the initial defendants from, among other things, directly or indirectly:

- Configuring, advertising, offering for sale or selling set-top boxes that are adapted to provide users with unauthorized access to the plaintiffs' television content [“pre-loaded set-top boxes”];
- 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; and
- Advertising, offering for sale or selling subscriptions to private IPTV services, including by advertising, offering for sale or selling pre-loaded set-top boxes that permit users to access private IPTV services.

See *Bell Canada v 1326030 Ontario Inc. (iTVBox.net)*, 2016 FC 612, particularly clauses 2(a), (b) and (e) of the Court's order. (The interlocutory injunction was upheld by the Federal Court of Appeal: see *Wesley (Mtlfreetv.com) v Bell Canada*, 2017 FCA 55.)

[6] Justice Tremblay-Lamer's order also provided for its service upon additional individuals or businesses as they became known to the plaintiffs. Once the order was served on a new individual or business, the plaintiffs could amend their pleadings to add that individual or business as a defendant in the underlying action. Once added as a defendant, the individual or business could, within fourteen days of this occurring, bring a motion to seek a variation of the interlocutory injunction as it applied against them, should they so choose. Unless excluded from its application on such a motion, the interlocutory injunction applied against all new defendants impleaded in this manner.

[7] To date, the plaintiffs have amended their Statement of Claim some ten times and have impleaded some 175 defendants.

[8] Among these additional defendants are Red Rhino Entertainment Inc. and its sole director, Eric Adwokat. The plaintiffs allege that Red Rhino and Mr. Adwokat are (or were) in the business of configuring, marketing and selling set-top boxes and private IPTV services that provide unauthorized access to the plaintiffs' live and on-demand television programming. An Amended Statement of Claim and the interlocutory injunction were served on Red Rhino at its office in Toronto on June 21, 2016. The Amended Statement of Claim was amended again in October 2016 to add Mr. Adwokat himself as a defendant given his alleged role as the directing

mind of Red Rhino. This Amended Statement of Claim and the interlocutory injunction were served on Mr. Adwokat personally on February 24, 2017, at a Red Rhino sales booth operating at the Canadian International Auto Show in Toronto. He acknowledged in the present proceeding, however, that he was aware of the order at least as early as July 25, 2016.

[9] Neither Red Rhino nor Mr. Adwokat moved for relief from the application of the interlocutory injunction to them.

[10] As well, to date, neither Red Rhino nor Mr. Adwokat has filed a Statement of Defence in the underlying action.

[11] By Notice of Motion dated September 26, 2018, the plaintiffs moved under rule 467 of the *Federal Courts Rules*, SOR/98-106, for an order requiring Red Rhino and Mr. Adwokat to attend for a hearing to determine whether they are in contempt of the interlocutory injunction. This order was made by Prothonotary Tabib in her capacity as Case Management Judge on October 23, 2018. The contempt hearing then proceeded before me over several days in June 2019.

[12] Relying largely on evidence gathered by private investigators working on their behalf, the plaintiffs allege that, between December 2016 and March 2018, Red Rhino and Mr. Adwokat continued to configure, market and sell set-top boxes in breach of the interlocutory injunction.

[13] For the reasons that follow, I am satisfied beyond a reasonable doubt that the activities of Red Rhino Entertainment Inc. and Eric Adwokat between December 2016 and March 2018 described more particularly below were in breach of the interlocutory injunction and constitute contempt of Court.

## II. THE TEST FOR CIVIL CONTEMPT

[14] In a case such as this, where the allegation is one of civil contempt in the form of disobeying a Court order under rule 466(b), the moving party (here, the plaintiffs) must establish an intentional act or omission that is in breach of a clear order of which the alleged contemnor has actual knowledge: see *Carey v Laiken*, 2015 SCC 17 at paras 33-35 and 38 [*Carey*]. For civil contempt, it is not necessary for the alleged contemnor to have intended to disobey the order or, more broadly, to have intended to interfere with the administration of justice (*Carey* at paras 29 and 38).

[15] Unusually for a civil proceeding, the plaintiffs must establish the elements of contempt beyond a reasonable doubt before Red Rhino or Mr. Adwokat can be found guilty (see rule 469). As is well-known from criminal proceedings, this is a demanding standard of proof. To meet their burden, the plaintiffs are not required to establish the elements of contempt to an absolute certainty or beyond any doubt. But they must establish them beyond a reasonable doubt. A reasonable doubt is not an imaginary or frivolous doubt or a mere hypothetical possibility. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is a doubt that is based on reason and common sense. It is a doubt that is logically connected to the evidence or absence of evidence. Proof beyond a reasonable doubt is stronger than proof on a

balance of probabilities. Indeed, if placed on a scale of standards of proof, proof beyond a reasonable doubt sits much closer to absolute certainty than to probable guilt. Thus, it is not sufficient for me to conclude merely that Red Rhino and Mr. Adwokat are probably guilty or likely guilty. If that is all the evidence establishes, they must be found not guilty. I may find Red Rhino and Mr. Adwokat guilty of contempt of Court only if no reasonable doubt remains and I am therefore sure they are guilty. See *R v Lifchus*, [1997] 3 SCR 320 at paras 36-39; *R v Starr*, [2000] 2 SCR 144 at paras 241-42; and *R v Cyr-Langlois*, 2018 SCC 54, [2018] 3 SCR 456, at para 15.

[16] As well, a Court's contempt powers are exceptional. They should be used only as a measure of last resort (*Carey* at para 36). A Court retains a discretion not to enter a contempt conviction even though all the requisite elements have been proven. A conviction for contempt "should only be entered where it is genuinely necessary to safeguard the administration of justice" (*Morassee v Nadeau-Dubois*, 2016 SCC 44, [2016] 2 SCR 232, at para 21 [*Morassee*]).

[17] As for the elements of the contempt alleged here, there is no issue that Red Rhino knew of the interlocutory injunction as of June 21, 2016, or that Mr. Adwokat himself was aware of it at least as of July 25, 2016. Mr. Adwokat claims to have read only the first few pages of the June 1, 2016, Order and Reasons. Even if this is the case, such wilful blindness would not allow him to escape liability if it is otherwise established (*Carey* at para 34). Generally speaking, wilful blindness is the legal equivalent of actual knowledge (*R v Sansregret*, [1985] 1 SCR 570 at 584-87; *R v Jorgensen*, [1995] 4 SCR 55 at paras 102-03).

[18] Nor is there any issue that configuring, marketing and selling Red Rhino devices are intentional acts in the requisite sense.

[19] The only element that is in issue is whether the order clearly prohibited configuring, marketing and selling Red Rhino boxes.

### III. PRELIMINARY MATTER

[20] Before turning to the merits of the motion to have Red Rhino and Mr. Adwokat found in contempt, it is necessary to address a preliminary matter. Is this proceeding stayed by the operation of section 69(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 [*BIA*]?

[21] Shortly before the contempt hearing began, Red Rhino Entertainment Inc. and Mr. Adwokat each filed a notice of intention to make a proposal under section 50.4 of the *BIA*. This fact was brought to the attention of the Court by way of correspondence from the licensed insolvency trustee with whom the notices had been filed. The trustee also provided a Notice of Stay of Proceedings under section 69(1) of the *BIA* dated June 6, 2019, in respect of each of Red Rhino Entertainment Inc. and Mr. Adwokat.

[22] Notably, in their respective lists of creditors with claims of \$250 or more, both Red Rhino and Mr. Adwokat list several (although for some reason not all) of the plaintiffs. The claim amount for each of the plaintiffs listed in the two notices is said to be \$250. The only explanation for these claims is a reference to the Court File Number of the action that gave rise



to the present motion (i.e. T-759-16). As against Red Rhino and Mr. Adwokat, this action, of course, remains outstanding. Liability has not been established.

[23] The trustee offered no explanation for why this correspondence had been sent to the Court. In response to a direction from the Court, the trustee advised that it took no position with respect to the present matter and would not be appearing at the hearing.

[24] At the outset of the contempt hearing, counsel acting for Red Rhino and Mr. Adwokat submitted that the stay of proceedings under section 69(1)(a) of the *BIA* prevented the present matter from going forward, at least at this time.

[25] As I indicated in brief reasons delivered orally at the hearing, I do not agree.

[26] Section 69 of the *BIA* is found under the heading “Stay of Proceedings.”

Paragraph 69(1)(a) in particular provides that, upon the filing of a notice of intention under section 50.4 by an insolvent person, “no creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.”

[27] Under the *BIA*, “creditor” means “a person having a claim provable as a claim under this Act” (*BIA*, s 2). The assertion that the plaintiffs are currently “creditors” of Red Rhino and Mr. Adwokat as a result of the underlying action is spurious. More to the point, whether or not they are or might one day become creditors with respect to Red Rhino Entertainment Inc. or

Mr. Adwokat, this is not the capacity in which the plaintiffs have brought the present motion. They have brought this motion so that the Court may determine whether Red Rhino or Mr. Adwokat were in contempt of the interlocutory injunction. The present proceeding is not, in any way, shape or form, a proceeding “for the recovery of a claim provable in bankruptcy,” as paragraph 69(1)(a) of the *BIA* contemplates (see *Recycling Worx Solutions Inc v Hunter*, 2018 ABQB 395 at paras 136-37 and the cases cited therein). It is a proceeding brought to safeguard the administration of justice. Paragraph 69(1)(a) of the *BIA* simply does not apply. It therefore does not pose any impediment to the present matter proceeding.

#### IV. ANALYSIS

##### A. *Introduction*

[28] The following factual matters are either admitted or not in dispute:

- At the relevant time, Eric Adwokat was the sole director and directing mind of Red Rhino Entertainment Inc.
- Mr. Adwokat is the person who was responsible for ensuring compliance with the interlocutory injunction by Red Rhino Entertainment Inc.
- Red Rhino Entertainment Inc. configured, marketed and sold Red Rhino devices between June 2016 and March 2018.
- Investigators acting on behalf of the plaintiffs purchased Red Rhino devices on the following dates from Red Rhino Entertainment Inc. or from third-party distributors for Red Rhino Entertainment Inc.:

- December 3, 2016, at the Pickering Flea Market
  - December 16, 2016, from the Red Rhino website
  - March 3, 2017, from Red Rhino’s office in Toronto
  - March 11, 2017, at the National Home Show in Toronto
  - August 21, 2017, at the Canadian National Exhibition in Toronto
  - February 18, 2018, at the Canadian International Auto Show in Toronto
  - March 11, 2018, at the National Home Show in Toronto.
- These Red Rhino devices could be used to gain unauthorized access to the plaintiffs’ live and on-demand television programming.

[29] Given this, the determinative question is whether Red Rhino devices fall within the clear terms of the interlocutory injunction. Specifically, are they “set-top boxes that are adapted to provide users with unauthorized access to the Plaintiffs’ Programs”? In other words, are they “pre-loaded set-top boxes” as defined in the interlocutory injunction?

[30] Mr. Adwokat contends that Red Rhino devices are not pre-loaded set-top boxes in the requisite sense because the applications or add-ons necessary to provide unauthorized access to the plaintiffs’ television programming are not loaded on the devices when they are sold. Instead, before a Red Rhino device can be used to gain unauthorized access to the plaintiffs’ television programming, the purchaser must download and install the necessary applications or add-ons him or herself, after purchasing the device. As a result, according to Mr. Adwokat, Red Rhino

devices are not pre-loaded set-top boxes as defined in the interlocutory injunction and nothing he or Red Rhino did was in breach of the injunction.

[31] On the other hand, the plaintiffs contend that Red Rhino configured the Red Rhino device to facilitate the downloading and installation of the necessary applications or add-ons and that this brings the device within the clear terms of the prohibitions of the interim injunction, even if these applications or add-ons themselves are not already loaded on the device at the time of sale. In support of the contempt allegation, the plaintiffs point to, among other things, the price of Red Rhino devices, how they were marketed (including the sales pitch at the point of sale), and the manner in which the applications or add-ons necessary to gain unauthorized access to the plaintiffs' television programming are installed on the devices after purchase.

[32] As I will explain, I am satisfied beyond a reasonable doubt that the Red Rhino devices purchased by the plaintiffs' investigators between December 2016 and March 2018 fall within the clear terms of the prohibitions in the interlocutory injunction.

B. *Is the scope of the interlocutory injunction clear?*

[33] As set out above, the only element of contempt that is in issue in this proceeding is whether configuring, marketing and selling Red Rhino boxes was in breach of a clear order prohibiting this. If the interlocutory injunction did not clearly prohibit the impugned conduct of Red Rhino and Mr. Adwokat, they cannot be found guilty of contempt.

[34] The requirement of clarity in the order alleged to have been breached is of the utmost importance. It ensures that a party will not be found in contempt where an order is unclear or ambiguous (*Carey* at para 33). While absolute precision is not required, an injunction “must give the enjoined party sufficient guidance by making it clear what activities are prohibited” (*Fettes v Culligan Canada Ltd.*, 2010 SKCA 151 at para 19 [*Fettes*]). An alleged contemnor is entitled to the most favourable interpretation of the order consistent with its ordinary meaning and taking into account the context in which it was made (*Fraser Health Authority v Schmidt*, 2015 BCCA 72 at para 4). Any ambiguity in the order should be resolved to the benefit of that party (*Fettes* at para 20; *Lee v Weidner*, 2019 BCCA 326 at para 47). Thus, before I can find Red Rhino and Mr. Adwokat guilty of contempt for breaching the interlocutory injunction, I must be satisfied, beyond a reasonable doubt, that that order states “clearly and unequivocally what should and should not be done” (*Carey* at para 33, quoting *Prescott-Russell Services for Children and Adults v G(N)* (2006), 82 OR (3d) 686 at para 27).

[35] Reduced to its essence, the interlocutory injunction prohibits the configuring, marketing and sale of pre-loaded set-top boxes. Justice Tremblay-Lamer introduces the distinction between “pre-loaded” set-top boxes (to which the injunction is directed) and other kinds of set-top boxes in paragraph 5 of her reasons, where she states:

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.

[36] In the evidence before Justice Tremblay-Lamer, three particular types of “pre-installed applications” capable of being used to access copyrighted content were identified (at para 8):

- 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.

There was no suggestion that these were the only kinds of applications or add-ons of concern to the plaintiffs.

[37] For the interlocutory injunction to be clear, it must be clear what types of devices it applies to and, equally, what types of devices it does not apply to. It is clear that it does not apply to a set-top box “which [does] not contain any pre-loaded applications, or contain[s] only basic applications, such that the user must actively seek out and install the applications he or she wishes to use” (cf. para 5 of Justice Tremblay-Lamer’s reasons, quoted above). It is also clear that it does apply to set-top boxes on which the applications or add-ons necessary to gain unauthorized access to the plaintiffs’ television programming are “pre-installed” – i.e. are already installed on the device when it is purchased.

[38] While having pre-installed applications or add-ons is a sufficient condition for being a pre-loaded set-top box covered by the interlocutory injunction, it is not a necessary condition.

This is because the term “pre-loaded set-top box” is defined more broadly than this in the order. It means: a set-top box that is “adapted to provide users with unauthorized access to the Plaintiffs’ Programs” (see clause 2(a) of the order). One way in which someone can “adapt” a set-top box in this manner is to pre-install the necessary applications or add-ons (as was the case with at least some of the devices in issue when the interlocutory injunction was first obtained). But it is not the only way. Another is to configure the device so that it is not necessary for the user to “actively seek out and install the applications he or she wishes to use” because the device guides the user through this process. In short, by the clear terms of the order, to “adapt” a device to provide users with unauthorized access to the plaintiffs’ programs covers more than simply pre-installing the necessary applications or add-ons.

[39] Mr. Adwokat adduced evidence through an expert, Bryan Zarnett, that the term “pre-load” is in common use in the computer software and hardware industry and that it means “to put information or a program onto a computer or technical device before it is sold or used.” Even if this is the case, it is beside the point given that “pre-loaded set-top box” is a defined term with a broader meaning in the order.

[40] This broader meaning is also clear in the references to private IPTV applications in the order. One way for a defendant to offer for sale or sell private IPTV services is to advertise, offer for sale or sell pre-loaded set-top boxes (as defined) “that permit users to access Private IPTV Services” (clause 2(e) of the order). A set-top box on which a private IPTV service is already installed would permit access to private IPTV services but it is not necessary for this to

be the case for the device to fall within the terms of the prohibition. All that is required is that the device be adapted to permit access to the service.

[41] Further, this broader meaning is also clear from clause (b) of the order, which prohibits certain actions in relation to pre-loaded set-top boxes that are “used or intended to be used to receive the Plaintiffs’ subscription programming signal” otherwise than under and in accordance with an authorization from the plaintiffs. A device can be used or intended to be used for this purpose without the necessary applications or add-ons being installed on it at the time of sale.

[42] Finally, this broader meaning is clear from Justice Tremblay-Lamer’s reasons for granting the injunction. In determining that the plaintiffs had met the test for obtaining an interlocutory injunction, she found as follows (at para 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.

These findings make crystal clear the type of devices and practices to which the interlocutory injunction is directed.



C. *Do Red Rhino boxes fall within the scope of the interlocutory injunction?*

[43] This brings us to the fundamental element of the alleged contempt: Do the Red Rhino devices purchased by the plaintiffs' investigators fall within the scope of the prohibitions in the interlocutory injunction? Given the terms of the injunction relied on by the plaintiffs, this question breaks down into three parts: (1) Are the Red Rhino devices "adapted to provide users with unauthorized access to the Plaintiffs' Programs" (clause 2(a) of the order)? (2) Are Red Rhino devices used or intended to be used to gain unauthorized access to the plaintiffs' television programming (clause 2(b) of the order)? (3) Do Red Rhino devices permit users to access private IPTV services in particular (clause 2(e) of the order)?

[44] As I will explain, I would answer all three questions in the affirmative. I am satisfied beyond a reasonable doubt that the terms of the interlocutory injunction clearly prohibited the configuring, marketing and sale of Red Rhino devices.

[45] Before proceeding further, I should note in connection with clause 2(b) of the order that no evidence was led in this proceeding concerning any process of "decoding" or the unauthorized reception of decoded programming as such. However, it is clear that the substance of the plaintiffs' complaint relates to the capability of the Red Rhino box to gain unauthorized access to the plaintiffs' programming in some manner or other. Red Rhino and Mr. Adwokat joined the issue accordingly.

[46] I also note that the interlocutory injunction holds Red Rhino and Mr. Adwokat liable not only for their own actions but also for the actions of their “agents, employees, associates, and representatives.” In advancing their case, the plaintiffs rely not only on the actions of Mr. Adwokat himself but also on the actions of several other individuals who, they allege, were “agents, employees, associates [or] representatives” of Red Rhino and/or Mr. Adwokat to establish that Red Rhino and Mr. Adwokat disobeyed the interlocutory injunction (e.g. the individuals working at the Red Rhino office or at temporary booths where Red Rhino devices were sold at different events). As discussed further below, while Mr. Adwokat made a token effort to distance himself from these individuals, there is no serious suggestion that they do not fall within the description of “agents, employees, associates, [or] representatives” of Red Rhino or Mr. Adwokat himself. Nor is there any suggestion that these individuals acted outside the scope of their authority or contrary to the terms of the interlocutory injunction despite Mr. Adwokat’s due diligence in seeking to ensure their compliance with it.

[47] Turning, then, to whether Red Rhino devices were adapted to provide or were intended to be used to gain unauthorized access to the plaintiffs’ programming, whether through an IPTV service or otherwise, I am satisfied beyond a reasonable doubt that they were and that they therefore fall within the scope of the clear prohibition in clauses 2(a), (b) and (e) of the interlocutory injunction. I have come to this conclusion primarily on the basis of the evidence demonstrating how the initial set-up of the devices proceeds. However, to put that evidence in context, it may be helpful to consider first how the Red Rhino device was marketed and why someone would purchase one in the first place.

[48] The plaintiffs presented uncontested evidence that a basic Android TV box with standard, non-offending functionalities could be purchased for as little as \$80. By contrast, the Red Rhino device was generally listed for sale at \$499.99. One of plaintiffs' investigators (Steven Rogers) purchased a unit at this price while other investigators purchased units for between about \$300 and \$350, depending on promotional discounts being offered. (A so-called Magic Wand – a remote control to use with the Red Rhino box – could be purchased for an additional \$49.99.) This raises the question: Why would someone be willing to pay this much for this particular device?

[49] Mr. Zarnett, the defence expert, explained that the Red Rhino device uses the Android operating system to provide a platform for multi-media presentation on external devices like a television. It uses a tailored version of the KODI application (or a KODI “build”) to provide users with a customized experience and to improve performance.

[50] Mr. Adwokat testified that the high quality of the Red Rhino device justified the price charged. The device provides an enhanced user experience compared to other set-top boxes. It has superior functionality and graphics. According to Mr. Adwokat, the Red Rhino's proprietary software improves the look and feel of the underlying KODI platform – it “makes it beautiful.” The device itself is attractively designed, has the best hardware and the best packaging.

[51] I am prepared to accept Mr. Adwokat's characterization of the Red Rhino device and the user experience it provides. However, I do not believe Mr. Adwokat when he claims that this is why someone would be willing to pay a premium price for it, nor does his evidence leave me

with a reasonable doubt. On the contrary, I find that the primary if not the only reason someone would be willing to pay such a price for a device like this is because they believed it would save them money in the long-run by freeing them from the cost of cable or subscription television services.

[52] Counsel for the plaintiffs put this suggestion to Mr. Adwokat in cross-examination. I find that his answers were evasive and non-responsive.

[53] That this is the principal selling feature of the Red Rhino box is patently obvious from how it is marketed. One need only consider how the device was presented at the temporary sales booths Red Rhino operated at the various locations listed in paragraph 28, above.

[54] The evidence clearly establishes the following:

- The sales booths were always emblazoned with several slogans:
  - “Free Video Streaming”
  - “All-in-One Home Entertainment”
  - “TV Shows, Movies, Sports, Games & So Much More”
- Posters on the walls of the sales booths in bold graphics juxtaposed the words “No Monthly Fees” with the words “TV Shows, Movies, Sports & Much More”.
- This same juxtaposition is found on the back of the Red Rhino t-shirts worn by sales representatives working at the booths, including Mr. Adwokat himself.

- Several televisions were incorporated into the sales booths. They either displayed movies and television programming (including content belonging to the plaintiffs) or sales representatives would use them to demonstrate to prospective purchasers what the Red Rhino device could be used for, including showing just how easy it was to stream movies and television programming (including content belonging to the plaintiffs).
- A vendor information listing for Red Rhino's booth at the 2018 Canadian International Auto Show stated in part:

Red Rhino Entertainment is North America's leading company in hardware, software, interface design & distribution of high end streaming television devices & accessories. We believe in providing our customers with best-in-class plug-and-play solutions. Watching free, uninterrupted, no-commercial, on-demand TV is our primary focus.

- When James Grimshaw, one of the plaintiffs' undercover investigators who purchased a Red Rhino device, questioned the price of \$350, the sales representative responded: "350, that's it, one time only. You cut your cable off and everything."

[55] On the basis of this evidence, together with other evidence showing how Red Rhino marketed its device (e.g. on its website, on Facebook and on Twitter), I find that the primary if not the only reason someone would pay what it cost to buy a Red Rhino device is to gain free access to content they would otherwise have to pay for (including, of course, the plaintiffs' television programming). Equally, I am satisfied beyond a reasonable doubt that Red Rhino and Mr. Adwokat intended that the Red Rhino device be used for this purpose (even if it could be used for other purposes as well). The qualities Mr. Adwokat described might distinguish Red Rhino's product from its direct competitors but no one would be interested in a device like

this in the first place unless they were looking for a way to avoid paying regular fees for television programming. If all someone wanted to do was check email or watch YouTube videos on their television, they would not need a Red Rhino device. An Android TV box costing a great deal less would surely suffice.

[56] (I note parenthetically that the prices paid by the plaintiffs' investigators apparently included a 12 month "warranty." The plaintiffs filed evidence in the form of Facebook posts from individuals complaining that their Red Rhino devices stopped working properly after the 12 month warranty expired. The theory of the plaintiffs appears to be that the "warranty" is actually a hidden charge for a one-year subscription to a private IPTV service known as Apollo Group. After 12 months, it was necessary to extend the "warranty" to renew the subscription for another year. None of the individuals who posted these complaints was called as a witness in this proceeding. Their posts, if considered for the truth of their contents, are hearsay. The plaintiffs have not suggested a basis upon which this hearsay could be admitted (either under the principled approach or under a common law exception). Further, none of the plaintiffs' witnesses provided first-hand testimony about what happens if one does not extend the "warranty" after 12 months. As a result, I will not consider these complaints of disgruntled customers or the plaintiffs' theory about a hidden subscription charge further.)

[57] Mr. Adwokat attempted to distance himself from what happened at the sales booths, asserting that they were run by distributors or independent agents or some other kind of third-party. I do not believe Mr. Adwokat's denial of a link between himself and the sales operations at issue here, nor does his evidence leave me with a reasonable doubt. I reach the same

conclusion regarding his claim that he had nothing to do with any of the other ways in which the Red Rhino device was marketed (e.g. on Facebook or Twitter). These claims are no more credible than his claim that he did not know a person who obviously worked in his office. The evidence demonstrates that the Red Rhino device was marketed with consistent messaging across a number of platforms, including at the temporary sales booths. Significantly, all the sales booths were set up in the same way and used the same sales pitch as those at which Mr. Adwokat himself was present and actively involved in the sale of Red Rhino devices – namely, the 2017 Canadian International Auto Show and the 2017 and 2018 National Home Shows. In any event, as noted at the outset, this was at best a token effort on Mr. Adwokat’s part and far from the crux of his defence.

[58] As I have indicated, the crux of Mr. Adwokat’s defence is the argument that the Red Rhino device was not sold with the applications or add-ons necessary to gain unauthorized access to the plaintiffs’ television programming already installed. Instead, a purchaser had to download and install these applications him or herself, once they had taken the device home. Mr. Adwokat himself testified to this effect. So did Mr. Zarnett, the expert called as a witness by Mr. Adwokat as part of his defence. Indeed, the plaintiffs did not dispute that the necessary applications or add-ons had to be downloaded and installed on the Red Rhino devices their investigators had purchased before the devices could be used to gain unauthorized access to the plaintiffs’ television programming.

[59] I have no difficulty finding on the basis of this evidence that the applications or add-ons necessary to gain unauthorized access to the plaintiffs’ television programming were not

installed on the Red Rhino devices at issue here at the time of sale. The difficulty for Red Rhino and for Mr. Adwokat, however, is that this does not place the devices outside the scope of the interlocutory injunction. On the contrary, evidence about how purchasers performed the initial set-up of the devices establishes beyond a reasonable doubt that the devices come within the clear terms of that order, as set out in paragraphs 35-42, above.

[60] When Mr. Grimshaw, one of the plaintiffs' undercover investigators, purchased a Red Rhino device at the 2018 Toronto National Home Show, he recorded Mr. Adwokat saying the following to him: "When you get to your home you connect [it] to the internet and the Red Rhino install will pop-up and just click install and you're good to go." While the specific steps that had to be taken varied slightly over the time period in question, it really was as simple as Mr. Adwokat suggested.

[61] As the plaintiffs' investigators demonstrated, to get a Red Rhino device to work, a purchaser first had to download an application called Super Installer. Sales representatives described to customers how to do this and at least some of the Red Rhino devices were sold with written step-by-step installation instructions as well. In some versions, one would download and install Super Installer simply by clicking on a button that said "Click to Install". Once Super Installer was downloaded and installed, the Red Rhino "skin" would appear. From there, the user would be guided by on-screen prompts. A menu offered the options of "Sports", "Music", "Movies", "Live TV" and so on. The first time one clicked on "Live TV", for example, the following prompt would appear:

**ADD-ON REQUIRED**

To use this feature you must download an add-on



Apollo Group

Would you like to download this add-on?

Yes No

If the user clicked “Yes”, the Apollo Group add-on would be downloaded and installed. Users would then be offered the option: “Use Apollo TV Guide? – Yes/No”. Once Apollo was installed, the user had access to a full range of television programming, including the plaintiffs’. A similar process gave one access to movies and live sports. The user was never required to do anything more than respond to the on-screen prompts. This is consistent with Red Rhino’s representation that its device was “plug-and-play”.

[62] As is generally required in a contempt hearing (see rule 470(1)), the plaintiffs presented oral evidence from investigators who performed the initial set-up of the Red Rhino devices that were purchased on March 3, 2017, March 11, 2017, August 21, 2017, February 18, 2018, and March 10, 2018. Their evidence is consistent with the instructions provided by Red Rhino and by Mr. Adwokat himself about how to set up the device for the first time. Indeed, there is no issue that the investigators proceeded as any purchaser of the device would. I am satisfied beyond a reasonable doubt on the basis of this evidence that the Red Rhino devices purchased by the plaintiffs’ investigators were “adapted to provide users with unauthorized access to the Plaintiffs’ Programs” by being designed to guide users to the applications or add-ons necessary for such access and that they were intended by Red Rhino and Mr. Adwokat to be used in this way. This evidence also demonstrates beyond a reasonable doubt that these Red Rhino devices “permit users to access Private IPTV,” particularly the Apollo Group. The evidence of Mr.

Zarnett, the defence expert, concerning how he ran the initial set-up of a different device in June 2019 does not cast any doubt on this evidence.

[63] There is no issue that, once the initial set-up was completed, testing confirmed that each of the seven devices purchased by the plaintiffs' investigators could be used to gain unauthorized access to content belonging to at least one of the plaintiffs in the underlying proceeding, whether through private IPTV services or otherwise. As a result, I am satisfied beyond a reasonable doubt that the Red Rhino devices purchased by the plaintiffs' investigators come within the scope of the interlocutory injunction. The configuring, marketing and selling of these devices engaged in by Red Rhino and Mr. Adwokat was, therefore, contrary to the clear prohibitions of clauses 2(a), (b) and (e) of the interlocutory injunction.

[64] The plaintiffs also tried in several ways to establish that there is a link between Mr. Adwokat personally and the Apollo Group and between him and Super Installer. Mr. Adwokat denied any such link. While I have many concerns about Mr. Adwokat's credibility generally, the evidence relied on by the plaintiffs falls well short of demonstrating such links. In any event, they are not an essential element of the contempt that is alleged against Red Rhino and Mr. Adwokat.

[65] I have given careful consideration to the fact that I did not hear from the investigator who performed the initial set-up and testing for the devices purchased on December 3, 2016 and December 16, 2016. Apparently he has retired. However, I have concluded that it is a reasonable inference that the initial set-up of these devices proceeded in the same manner as did

that for the devices purchased on the later dates. I am prepared to draw this inference because all of the devices are identical in all other material respects and were all marketed in the very same way. The evidence before me does not provide basis for a reasonable doubt that the first two devices performed differently than the others at the initial set-up stage. Once set up, all the devices performed identically (as confirmed by Anthony Martin, one of the plaintiffs' investigators who testified in this proceeding).

[66] Mr. Adwokat points out that among the signs posted on the sales booths was one that stated: "Red Rhino does not sell pre-loaded devices." He also points out that the receipt for the December 3, 2016, purchase states, among other things: "You the purchaser hereby acknowledge that the device, as purchased from TSIT Electronics, contains no application to facilitate, or assist in facilitating, the downloading or streaming of copyrighted material." Ignoring the fact that Mr. Adwokat has otherwise tried to distance himself from the operators of Red Rhino sales booths, a party cannot simply stipulate with self-serving statements like these that their conduct does not come within the scope of a court's order.

[67] Further, at one point in his testimony Mr. Adwokat volunteered in response to a question from his counsel that he had received legal advice that his devices were not pre-loaded and so he should not have been a defendant in the underlying action in the first place. This evidence was offered by way of explanation for why Mr. Adwokat did not move to challenge the application of the interlocutory injunction to the Red Rhino device after he was served with it. Be that as it may, there is no question that reliance on legal advice does not shield a party from a finding of contempt (*Carey* at para 44).

[68] As noted above, even if I am satisfied that the requisite elements of contempt have been established beyond a reasonable doubt, I retain a discretion not to find Red Rhino and Mr. Adwokat guilty. To repeat, a conviction for contempt “should only be entered where it is genuinely necessary to safeguard the administration of justice” (*Morassee* at para 21). I am satisfied that that is the case here. The conduct of Red Rhino and Mr. Adwokat during the time period in question continued unabated despite their knowledge of the interlocutory injunction. This was not a momentary lapse in judgment. Even limited to the specific purchases underlying the present motion, the offending conduct continued for almost two years in blatant disregard for an order of this Court. There is also evidence that it continued until at least as recently as February 2019. I also take note of the fact that on May 6, 2019, it was necessary for Prothonotary Tabib to make an order under rule 147(1) to validate service of the order to attend this hearing on Mr. Adwokat. Finally, I find that the eleventh-hour filing of notices of intention to make a proposal under the *BIA* by Red Rhino Entertainment Inc. and Mr. Adwokat were transparent and ill-conceived attempts to frustrate the exercise of the Court’s duty to ensure that its orders are respected. Having regard to all of these considerations, convictions here are necessary to safeguard the administration of justice.

[69] I would add one final note. In *Bell Canada v Vincent Wesley dba MtlFreeTV.com*, 2018 FC 66, my colleague Justice Roy dealt with very similar allegations of contempt against Mr. Wesley, another of the defendants in the underlying action. It appears that the conduct giving rise to the contempt allegations and the defence advanced were largely the same in that proceeding and this one (although the conduct in the other matter appears to have been on a much smaller scale than that established here). While I have reached the same ultimate

conclusion as my colleague, I did so solely on the basis of the evidence and submissions presented in the matter before me.

D. *Summary*

[70] In summary, I am satisfied beyond a reasonable doubt that the seven specific acts of contempt alleged by the plaintiffs (namely, offering for sale and selling Red Rhino devices on December 3, 2016, December 16, 2016, March 3, 2017, March 11, 2017, August 21, 2017, February 18, 2018 and March 10, 2018) are established and were in breach of clauses 2(a), (b) and (e) of Justice Tremblay-Lamer's order dated June 1, 2016. Accordingly, I am satisfied beyond a reasonable doubt that, by configuring, advertising, offering for sale and selling Red Rhino devices between December 2016 and March 2018, Red Rhino Entertainment Inc. and Eric Adwokat were both in contempt of Justice Tremblay-Lamer's order.

V. CONCLUSION

[71] For these reasons, I find both Red Rhino Entertainment Inc. and Eric Adwokat guilty of contempt for disobeying the interlocutory injunction ordered by Justice Tremblay-Lamer on June 1, 2016.

[72] With liability thus being established, it is necessary to move to the penalty phase of this proceeding.

[73] The Court's Registry will be in contact with the parties to schedule a case management teleconference for the purpose of planning and scheduling the next steps in this proceeding.

**JUDGMENT IN T-759-16**

**THIS COURT'S JUDGMENT is that** Red Rhino Entertainment Inc. and Eric Adwokat are guilty of contempt of court. The matter will now proceed to penalty phase.

“John Norris”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-759-16

**STYLE OF CAUSE:** BELL CANADA ET AL v RED RHINO  
ENTERTAINMENT INC. ET AL

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATES OF HEARING:** JUNE 11, 12, 13, 17, 28, 2019

**JUDGMENT AND REASONS:** NORRIS J.

**DATED:** NOVEMBER 19, 2019

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