

ONTARIO  
 SUPERIOR COURT OF JUSTICE  
 (COMMERCIAL LIST)

<b>BETWEEN:</b>	)	
	)	
ECHOSTAR COMMUNICATIONS CORPORATION, ECHOSTAR SATELLITE LLC, ECHOSTAR TECHNOLOGIES CORPORATION, AND NAGRASTAR LLC	)	<i>Ira Nishisato and Elissa Goodman, for the Plaintiffs</i>
	)	
Plaintiffs	)	
<b>- and -</b>	)	
	)	
STEVEN RODGERS a.k.a. STEVEN R. RODGERS a.k.a. TOMICO a.k.a. TOMICO-IND a.k.a. K-OS a.k.a. DSSWHOLESALEDIRECT a.k.a. DSSWHOLESALE, STEVEN RODGERS c.o.b. as TOMICO INDUSTRIES, STEVEN RODGERS c.o.b. as TOMICO INDUSTRIES (IND), STEVEN RODGERS c.o.b. as TOMICO INDUSTRYS, STEVEN RODGERS c.o.b. as TOMICO IND, STEVEN RODGERS c.o.b. as <i>www.tomico-satellites.com</i> , STEVEN RODGERS c.o.b. as <i>www.tomico-ind.com</i> , STEVEN RODGERS c.o.b. as <i>www.tomicoreviews.com</i> , STEVEN RODGERS c.o.b. as <i>www.electronics-elite.com</i> , STEVEN RODGERS c.o.b. as <i>www.sales-dynamics-firm.com</i> , STEVEN RODGERS c.o.b. as <i>www.dss-wholesaledirect.com</i> , ROSS RODGERS a.k.a. ROSS GEORGE RODGERS, <u>NICOLA DE SANTIS</u> a.k.a. <u>NICK DE SANTIS</u> , KRIS BOUCHARD a.k.a. KRIS MICHAEL BOUCHARD a.k.a. KRISTOPHER MICHAEL JOEL BOUCHARD, KRIS BOUCHARD c.o.b. as J.A.C. UNLIMITED SOLE PROPRIETORSHIP, KRIS BOUCHARD c.o.b. as <i>www.tomico-satellites.com</i> , KRIS BOUCHARD c.o.b. as <i>www.tomico-ind.com</i> , KRIS BOUCHARD c.o.b. as <i>www.electronics-elite.com</i> , KRIS BOUCHARD c.o.b. as <i>www.sales-dynamics-firm.com</i> , <u>NAVDEEP BHAMBRA, 6048951 CANADA INC.</u> , JOHN DOE, JANE DOE and other persons unknown who have conspired with the named Defendants	)	Ross George Rodgers and Palma Pauline Rodgers, representing themselves
	)	
Defendants	)	

AND BETWEEN: )  
 )  
BELL EXPRESSVU LIMITED )  
PARTNERSHIP )  
 )  
Plaintiff )

- and - )  
 )

STEVEN RODGERS a.k.a. STEVEN R. )  
RODGERS a.k.a. TOMICO a.k.a. TOMICO- )  
IND a.k.a. K-OS a.k.a. )  
DSSWHOLESALEDIRECT a.k.a. )  
DSSWHOLESALE, STEVEN RODGERS c.o.b )  
as TOMICO INDUSTRIES, STEVEN )  
RODGERS c.o.b as TOMICO INDUSTRIES )  
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NICOLA DE SANTIS a.k.a. NICK DE )  
SANTIS, KRIS BOUCHARD a.k.a. KRIS )  
MICHAEL BOUCHARD a.k.a. KRISTOPHER )  
MICHAEL JOEL BOUCHARD, KRIS )  
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BOUCHARD c.o.b. as *www.sales-dynamics-* )  
*firm.com*, NAVDEEP BHAMBRA, 6048951 )  
CANADA INC., JOHN DOE, JANE DOE and )  
other persons unknown who have conspired )  
with the named Defendants )

Defendants )

HEARD: March 17 and April 7, 2010

CAMERON J.

## **MOTION**

[1] The Plaintiffs seek a contempt finding and sentence against Ross George Rodgers (“Ross”) and Palma Pauline Rodgers (“Palma”).

[2] The Anton Piller Orders required Ross and Palma to, *inter alia*:

- (a) permit the Independent Supervising Solicitor (“ISS”) to “**immediately** upon service...and before contacting a lawyer to seek legal advice” enter 5 Holly Meadow Road, Barrie, Ontario (the “Rodgers Residence”) to secure and preserve the Evidence (as defined in the Anton Piller Orders); and
- (b) permit the Authorized Persons to enter and re-enter the Rodgers Residence for the purpose of searching for, preserving, copying, and removing the Evidence.

## **FACTS**

### **(A) THE ANTON PILLER ORDERS AND CONTEMPT PROCEEDINGS**

[3] On February 12, 2010, I granted the Anton Piller Orders. Their purpose was to permit a search for and to preserve evidence relevant to a second contempt motion against Steven Rodgers (“Steven”), the son of Ross and Palma, who resides with them at the Rodgers Residence. The second contempt motion against Steven alleges that he has continued to engage in piracy-related activities despite the injunctions against him. The activities at the heart of the second contempt motion (*e.g.* operating piracy web sites and selling Piracy Technology over the Internet) are carried out using computers. As a result, the Anton Piller Orders focused on computers and electronic media, and the computers in the Rodgers Residence constitute essential evidence relevant to the second contempt motion.

[4] The Anton Piller Orders were the second Anton Piller Orders granted against Ross and Steven Rodgers. In 2006, Madam Justice Mesbur found Steven in contempt of Anton Piller Orders of Lederman J. dated August 1, 2006 for, *inter alia*, failing to permit immediate entry into certain premises. On December 19, 2007, Mesbur J. sentenced Steven to four months’ incarceration for his contempt. She dismissed the charge against Ross.

### **(B) SERVICE AND EXECUTION OF THE ANTON PILLER ORDERS**

[5] On February 16, 2010, the Plaintiffs executed the Anton Piller Orders. The Plaintiffs served the Anton Piller Orders and the motion records containing the evidence used to obtain them on Ross, Palma and Steven at the Restaurant.

[6] The ISS explained the Anton Piller Orders to Steven in the presence of Ross and Palma in plain language. Specifically, the ISS explained that:

- (a) paragraph 1 of the Anton Piller Orders requires Ross, Palma, Steven and any person served with the Orders to, immediately upon service of the Orders and before contacting a lawyer to seek legal advice, permit entry into the Premises (as defined in the

Anton Piller Orders, including the Rodgers Residence) to the ISS and such persons as he/she may require for the purposes of securing and preserving the Evidence;

(b) paragraph 2 of the Anton Piller Orders requires Ross, Palma, and Steven to grant entry and permit re-entry into each of the Premises to the Authorized Persons for the purposes of searching for, preserving, copying, and removing into the custody of the ISS the Evidence;

(c) paragraph 15 of the Anton Piller Orders requires Ross, Palma, and Steven, if served away from the Premises, to immediately attend at or return to the Premises to provide entry to the ISS and such other persons as he/she may require, to permit the ISS to preserve the Evidence and fulfil its duties pursuant to the Anton Piller Orders;

(d) paragraph 18 of the Anton Piller Orders requires Ross, Palma, and Steven and any person upon whom the Anton Piller Orders are served, to forthwith render any necessary assistance to the ISS and the persons assisting him/her to enable them to effectively carry out their responsibilities under the Anton Piller Orders.

[7] Ross, Palma and Steven acknowledged that they understood the Anton Piller Orders and did not require further explanation. The ISS offered to explain the Anton Piller Orders again to Ross and Palma, but they declined. Ross and Palma made various comments to the ISS when the ISS attempted to explain the Anton Piller Orders or point out specific clauses, including:

(a) During the ISS initial explanation of the Anton Piller Orders, Ross repeatedly indicated that he understood and to hurry up;

(b) When the ISS asked Ross if he heard the explanation of the Anton Piller Orders, he said "No, I don't need to. I don't care one way or the other", "I don't care. I don't need to know. I don't need to you know, you know why? It doesn't matter to me anymore", and "You know why? I don't give a shit about this anymore";

(c) When the ISS asked Ross if he got copies of the Anton Piller Orders and offered to explain them to him again, he said: "It's somewhere around. I don't really care. Because I'm committin' suicide, so anyways, it doesn't matter" and "No, I don't need to go through it", and "I'm right sick enough as it is. Of going through this shit"; and

(d) Palma said that she had "had enough now", but she remained present while the Anton Piller Orders were explained.

[8] The Restaurant was searched. However, Ross and Palma Rodgers flatly refused to grant entry to the Rodgers Residence to the ISS or to any of the Authorized Persons. The ISS was not permitted to enter the Rodgers Residence to preserve the Evidence and the Authorized Persons were not permitted to enter and search for the Evidence.

[9] Palma made the following statements regarding entry to the Rodgers Residence:

- a) "No. Nobody is coming in my house";
- b) "I'm not letting anybody in there"; and
- c) "Why don't you guys just get out now? I own this place. I want them out.... Get out!".

[10] Ross made the following statements which indicate his blatant refusal to permit entry to the Rodgers Residence:

- a) "and I'm saying no, and get out";
- b) "And it gives us the right to say no, you can't search. Get out."; and
- c) "Yes, I love contempt, yes, I'm refusing entry into the house".

[11] The ISS asked Ross and Palma to permit entry to the Rodgers Residence several times. Ross and Palma both refused and expressed concern about the impact of the Anton Piller Orders on their sixteen year old daughter, Pauline Rodgers ("Pauline"), who they said was at the Rodgers Residence alone.

[12] When Ross and Palma refused entry, the Plaintiffs offered to defer the search of the Rodgers Residence until Pauline could be removed. The ISS suggested various ways of removing Pauline from the Rodgers Residence so that the Anton Piller Orders could be executed there that day, but Ross and Palma maintained their refusal. The ISS explained that a search was necessary to make sure that all of the Evidence was disclosed and delivered up to the ISS.

[13] When the ISS asked Ross if he would permit a search of the Rodgers Residence if his daughter was first removed, Ross became angry and confrontational. Ross began to yell at the ISS, threatened to kill him, picked up the cash register as if he intended to throw it, and walked aggressively around the counter, while continuing to yell at the ISS. Steven and a police officer intercepted Ross and physically restrained him.

[14] After some discussion with the ISS, Steven went into the Rodgers Residence and brought out several computers and electronic devices. The ISS was not permitted to enter the Rodgers Residence with Steven and remained several houses down the street while Steven was inside. No search of the Rodgers Residence took place on the day the Anton Piller Orders were served.

## **(C) STATEMENTS MADE BY ROSS AND PALMA**

### **(1) Statements Made During the Execution of the Anton Piller Orders**

[15] Ross acknowledged that he understood that a refusal to comply with the Anton Piller Orders would lead to a contempt motion. He also made disparaging remarks about the Court in the following exchange with Jennifer Zdriluk of the ISS:

**J. Zdriluk:** And they list evidence in the Order when you go through it. I'm happy to show you that, okay? It's predominantly computer hardware evidence, emails, web sites, all of the sites and electronic media, okay? It also gives you some rights which includes two hours to get a lawyer.

**R. Rodgers:** And it gives us the right to say no, you can't search. Get out.

**J. Zdriluk:** And – you know what they'll do, right?

**R. Rodgers:** Yeah. Who cares?

**J. Zdriluk:** You know they'll go and get contempt. But I do point out that...

**R. Rodgers:** Yeah, I know, and this time I'm gonna tell the Judge where he can stick it.

[16] During the execution of the Anton Piller Orders, Ross was at times uncooperative. For example:

- a) When the ISS first attempted to explain the Anton Piller Orders to Ross, he questioned their legality;
- b) When Ross was asked whether he had a cell phone, he said: "Yes I do and you're not gettin' it", and "You know how I am, I'm stubborn. I don't give a shit. Because I don't give a fucking shit";
- c) When the ISS explained to Ross that he was prohibited from talking about the Anton Piller Orders for a period of 10 days, Ross said he would be "posting about it tonight", and "Oh, I'm going to be talking about it. I'm going online, too. Everybody's going to know about this"; and
- d) When the ISS advised Ross that the Authorized Persons would search the Restaurant, he said "Well you'd better hurry up, he's got 3 fucking minutes".

[17] Palma was also uncooperative at times. For example:

**JZ:** I am passing the ArmUlator card back. Steve, will you let me take custody of it?

**Steve:** No, you are not taking custody of it, cause it's mine. You took a picture of it, you can take a picture of it if you want.

**JZ:** This is what I am going to do, see if it's a fair solution, ok. How about this solution, Steve?

**Palma:** Why don't you guys just get out now? I own this place. I want them out.

**Steve:** Ma, shut-up, ok?

**Palma:** Get out!

**(D) ROSS AND PALMA FAIL TO APPEAR**

[18] On February 16, 2010, at approximately 3:30 p.m., after the Restaurant had been searched and Ross and Palma had refused entry to the Rodgers Residence, counsel for the Plaintiffs appeared before me *ex parte* in chambers and obtained the Orders to Appear.

[19] The Orders to Appear required Ross and Palma to attend on February 17, 2010 at 10:00 a.m. at 330 University Avenue, Toronto, Ontario, for the hearing of the Plaintiffs' motions for contempt of the Anton Piller Orders. The Orders to Appear and the materials for the contempt motion were served on February 16, 2010 at approximately 6:30 p.m.

[20] Ross and Palma failed to appear on February 17, 2010 and I issued Warrants for Arrest.

[21] On February 18, 2010, Ross and Palma were arrested in Barrie, Ontario and were brought before me on February 19, 2010 at approximately 4:00 p.m. I ordered that Ross and Palma remain in custody until 1.5 hours after the Authorized Persons entered the Rodgers Residence for the purpose of conducting the search permitted by the Anton Piller Orders and "they will then be released to appear on the return of this motion on 17 Mar 10".

[22] The Authorized Persons searched the Rodgers Residence on February 19, 2010 from approximately 7:45 p.m. to 9:00 p.m. By that time, four days had passed since the Anton Piller Orders were first served. The element of surprise had been lost.

**ISSUES AND THE LAW**

[23] The issues on this motion are:

- (a) Whether Ross and Palma are in contempt of the Anton Piller Orders.
- (b) If so, whether the Court should adjourn the sentencing to provide Ross and Palma with an opportunity to purge the contempt.
- (c) If not, what the appropriate penalty for the contempt should be.

**(A) ROSS AND PALMA ARE IN CONTEMPT**

**(1) General Principles**

[24] Civil contempt means intentionally disobeying a court order to do a specific act or to refrain from doing a specific act.

*DIRECTV, Inc. v. Boudreau ("Boudreau")*, [2004] O.J. No. 1219 at para. 50 (S.C.J.), modified [2006] O.J. No. 1583; (citing N. Lowe and B. Sufrin, *The Law of Contempt*, (London: Butterworths 1996) at p. 555

[25] A court order must be strictly complied with, both in letter and in spirit. A person served with a court order must take active steps and “must do all he can” to carry out the court order.

[s]o long as it exists, the order must be obeyed, and obeyed to the letter...

*Spokes v. Banbury Board of Health*, (1865) L.R. 1 Eq 42 at 48

It is not enough for a party to stand by; it must do all it can to carry out the terms of the order.

*GEAC J & E Systems Ltd. v. Craig Erickson Systems Inc.*, [1992] O.J. No. 2536 at 6 (Ont. Gen. Div.)

*Canada Metal Co. Ltd. v. Canadian Broadcasting Corporation* (No. 2) (“*Canada Metal Co.*”) (1975), 4 O.R. (2d) 585 at 20 (QL) (H.C.J.)(QL) aff’d (1975), 11, O.R. (2d) 167 (Ont. C.A.)

*Boudreau*, *supra* at para. 50

*Bell ExpressVu Limited Partnership v. Rodgers*, unreported, Court File No. 06-CL-6574 (September 18, 2006 per Mesbur J.) (“*Rodgers Contempt Reasons*”) (Ont. S.C.J.).

[26] Madam Justice Pepall has recognized that judges must have the will and ability to ensure compliance with orders:

[D]isobedience of court orders cannot be tolerated. Many of society’s traditional methods of ensuring compliance with the court’s process do not always prove effective. For instance, the taking of an oath on the Bible or other religious book or affirmation to tell the truth no longer uniformly ensures such a result at the commencement of proceedings. Once an order has been obtained, it is imperative that it be obeyed, that the public understand that it must be obeyed, and that judges have the will and ability to ensure compliance.

*EchoStar Satellite Corporation et al v. Megill et al.* (“*Megill*”); unreported reasons of Pepall J. dated April 19, 2007, docket 06-CL-6619, 06-CL-6618 at p. 42.

[27] The courts cannot allow their orders to be ignored with impunity because the administration of justice is “wounded” when court orders are ignored. As stated by Mr. Justice Blair, as he then was:

No society which believes in a system of even-handed justice can permit its members to ignore, disobey, or defy its laws and its courts’ orders at their whim because in their own particular view it is right to do so. A society which countenanced such conduct was a society tottering on the precipice of disorder and injustice.

*Surgeoner v. Surgeoner* (“*Surgeoner*”) (1992), 6 C.P.C. (3d) 318 at 319 (Gen. Div.).



[28] In this action, Mesbur J. echoed the following comments of Mr. Justice Cumming:

It is integral to a free and democratic society like Canada that citizens act pursuant to and under the rule of law. Court orders in force must be respected and followed. The deliberate failure to obey a court order strikes at the very heart of the administration of justice. This includes court orders relating to commercial matters as seen in the case at hand. If someone can simply ignore or finesse his way around a court order it will tend to add uncertainties and risks, with consequential inefficiencies and additional costs, as well as causing unfairness with consequential inequities and additional costs, to the commercial market place. Just as a white collar crime is crime, white collar contempt is contempt.

If the remedies a court directs to be put in place through its orders can be ignored with impunity, the road to civil anarchy is close at hand. The thin veil of civilization that cloaks our community through the rule of law is fragile, in need of constant protection, and in need of being seen by all members of the community to be constantly protected.

*Rodgers Sentencing Reasons, supra* at para. 15

*Sussex Group v. 3933938 Canada Inc.* [2003] O.J. No. 2906 at paras. 47-48 (S.C.J.) (“*Sussex v. 3933938*”)

[29] The test for contempt requires the moving party to show, beyond a reasonable doubt, that:

- a) the court order was personally served on the alleged contemnor; and
- b) the alleged contemnor intentionally committed an act which is in fact prohibited by a court order or that was designed to thwart a court order.

*Canada Metal Co., supra* at 21

*Re Sheppard and Sheppard*, [1976] O.J. No. 2083 at para. 15 (Ont. C.A.)

*Sussex v. 3933938, supra*, at para. 50

*Boudreau, supra* at para. 48

## (2) Application of the Test

[30] Representatives of the Plaintiffs personally served Ross and Palma with the Anton Piller Orders and the ISS explained the terms in plain language. Ross and Palma acknowledged that they understood the Anton Piller Orders.

[31] The Anton Piller Orders required Ross and Palma to permit:

- a) the ISS to “**immediately** upon service... and before contacting a lawyer to seek legal advice” enter the Rodgers Residence to secure and preserve the Evidence; and

- b) permit the Authorized Persons to enter and re-enter the Rodgers Residence for the purpose of searching for, preserving, copying, and removing the Evidence.

[32] Ross and Palma flatly refused to permit entry to the Rodgers Residence. They wilfully and deliberately chose to disobey the Anton Piller Orders in favour of contempt proceedings. Ross and Palma clearly breached the Anton Piller Orders and are in contempt.

[33] Ross acknowledged on this hearing on March 17, 2010 and on April 7, 2010, that he was in contempt of my order.

**(B) PROCEDURE UPON A FINDING OF CONTEMPT**

[34] The procedure for a contempt hearing is in the discretion of the presiding Judge. In this case it is appropriate to vary the usual bifurcated procedure for contempt motions and address the contempt and penalty at the same time, for the reasons that follow.

*The College of Optometrists of Ontario v. SHS Optical Ltd.* (“College of Optometrists”)  
2008 ONCA 685 at paras. 74, 81

[35] Generally, a contempt proceeding has two distinct stages, contempt and penalty. The moving party makes its case for a contempt finding and the respondent offers its defence. If a contempt finding is made, the contemnor is given the opportunity to purge the contempt, and the matter is adjourned to a hearing to address sentence. The two-stage procedure gives the contemnor an opportunity to purge the contempt, which can be a mitigating factor in sentencing.

*College of Optometrists, supra* at paras. 73, 79, 81, 102

[36] However, a bifurcated hearing is not required in all cases. In this case, it is neither necessary nor appropriate. The contempt herein arises from the failure of Ross and Palma to permit immediate entry to the Rodgers Residence. The Rodgers cannot purge the failure to provide immediate entry. Moreover, the search proceeded on February 19, 2010, and there is nothing more that the Ross and Palma can do that would be relevant to sentencing. A bifurcated hearing would not serve any purpose since the evidence needed to determine the contempt and penalty is already before the Court.

*College of Optometrists, supra* at paras. 81-83; Plaintiffs’ Authorities, Tab 11

**(C) PENALTY**

**(1) Available Sanctions**

[37] Madam Justice McLachlin, as she then was, explained the need to punish contempt as follows:

The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12<sup>th</sup> century have exercised the power to punish for contempt of court.

*United Nurses of Alberta v. Alberta (Attorney General)* (“*United Nurses*”), [1992] 1 S.C.R. 901 at 931 (S.C.C.)

*Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1993), 12 O.R. (3d) 72 at 82 (Ont. (Gen.Div.))

*Rodgers Sentencing Reasons*, *supra* at para. 13

[38] The importance of imposing penalties for contempt of court was recognized by Mr. Justice Borins, as he then was, as follows:

It is my opinion that unless proper penalties are imposed where a court order is deliberately disobeyed the orders of the court will have no real meaning. ... Without such sanctions our system would quickly and seriously break down if court orders could be ignored with impunity.

*777829 Ontario Ltd. v. McNally* (“*McNally*”) (1991), 9 C.P.C. (3d) 257 at 262 (Ont. (Gen. Div.))

[39] The Court has broad powers to punish for contempt in order to protect its process. Madam Justice Lax described the powers of the Court as follows:

The rule of law depends on the court’s ability to ensure the court’s order are enforceable and efficacious. When a person disrespects the court’s authority and flaunts its orders, they can be put in contempt ... Once a court places a person in a “state” of contempt, the court has broad remedial powers to use against a contemnor to uphold the authority of the court and to bring the administration of justice into repute.

*Chiang (Trustee of) v. Chiang* (“*Chiang SCJ*”), [2007] O.J. No. 1409 at para. 25 (S.C.J. re contempt); partially rev’d on other grounds 2009 ONCA 3.

[40] Rule 60.11 of the *Rules of Civil Procedure* provides that in disposing of a motion for civil contempt, a judge may make such order as is just and may order that the party in contempt:

- a) be imprisoned for such period and on such terms as are just;
- b) be imprisoned if the person fails to comply with a term of the order;
- c) pay a fine;
- d) do or refrain from doing an act;
- e) pay such costs as are just; and

- f) comply with any order that the judge considers necessary.

*Rules of Civil Procedure, r 60.11(1) and (5)*

*Megill, supra* at p. 6

**(2) Appropriate Sentence**

[41] The following factors are relevant to a determination of the appropriate sentence for civil contempt:

- a) the proportionality of the sentence to the wrongdoing;
- b) the presence of mitigating factors;
- c) the presence of aggravating factors;
- d) deterrence and denunciation;
- e) the available sentences;
- f) the similarity of sentences in like circumstances;
- g) the reasonableness of a fine; and
- h) the reasonableness of incarceration.

*Megill, supra* at pp. 7-8

*Rodgers Sentencing Reasons, supra* at para. 18

*Chiang SCJ, supra* re sentence [2007] O.J. No. 1866 at paras. 24-25

*Chiang (Trustee of) v. Chiang, 2009 OJ No. 41 (CA) (“Chiang Court of Appeal”)* at paras. 85-92

**(3) Proportionality**

[42] The Court should impose a sentence that is proportionate to the gravity of the contempt.

*Megill, supra* at p. 8

*Rodgers Sentencing Reasons, supra* at para. 88

[43] The Court should consider whether the contempt was blatant and whether the defendants were truly contemptuous. Ross and Palma’s contempt was deliberate, blatant and wilful. Ross and Palma are in their 50s and their conduct is not the product of youthful exuberance. Their

refusals were blatant. Palma said “No. Nobody is coming in my house”, “I’m not letting anybody in there” and she later told the ISS and the Authorized Persons to “get out”. Ross said “I’m saying no, and get out” and “Yes, I love contempt, yes, I’m refusing entry into the house”.

Second Abradjian Affidavit at paras. 12-13, 15-16

[44] The refusal to permit immediate entry to the Rodgers Residence frustrates the purposes of the Anton Piller Orders to search for and preserve the Evidence. It is impossible to know whether Evidence was removed or destroyed from the Rodgers Residence in the four days between service of the Anton Piller Orders and the search conducted on February 19, 2010. There was ample opportunity for Ross and Palma to destroy or conceal Evidence in the interim period, and it is appropriate for the Court to draw an adverse inference. Lord Denning has said of a defendant who refuses to comply with an Anton Piller Order: “It puts him in peril not only of proceedings for contempt, but also of adverse inferences being drawn against him...”.

*Megill, supra* at p. 28-31

*Anton Piller KG v. Manufacturing Processes Ltd and others (“Anton Piller KG”), [1976] 1 All ER 779 at 783 (CA)*

#### **(4) There Are No Mitigating Factors**

[45] A contemnor has the burden of proving the existence of mitigating factors that may affect the sentence on a balance of probabilities. This factor is generally focussed on steps taken to purge contempt. Ross and Palma took no steps to purge their contempt and at this stage, no purging is possible. This is no defence where the impossibility to comply results from Ross and Palma’s own actions. There are no mitigating factors in this case.

*Chiang SCJ, supra* at paras. 40-41, 146 (S.C.J.)

*Sussex v. 3933938, supra* at para. 53

[46] Palma offered an apology to me in her comments on April 7, 2010.

[47] Their daughter Pauline is depressed and taking drugs. She is at school and helps in the operation of their restaurant.

[48] Their son Steven helps in the operation of their restaurant.

[49] Ross is unemployed and collecting employment insurance. He helps in running the restaurant. If they both go to jail at the same time their daughter will leave school and they will probably have to close the restaurant and will lose the ability to pay their mortgage.

[50] Ross will lose unemployment insurance if he is incarcerated. Ross says he is suicidal, although there was no medical evidence presented at the hearing. Palma and Ross are both taking anti-depressants. Palma is waiting for surgery on a tumor in her throat which is scheduled to take place on Monday, April 19, 2010.

**(5) Aggravating Factors**

*a) Blatant and Wilful Nature of the Contempt*

[51] The blatant and willful nature of the contempt is an aggravating factor. Cumming J., in awarding a six-month prison sentence for contempt where the contemnor disregarded a court order to deliver business records and prepare an inventory, held:

Where the disobedience of an order of the Court has been wilful it will not be lightly regarded. Mr. Sylvester mocks the rule of law. His contempt is contrary to the public interest and is inimical to the administration of justice.

*Rodgers Sentencing Reasons, supra* at para. 88

*Sussex Group Ltd. v. Sylvester ("Sussex v. Sylvester")*, 2002 O.J. No. 4350 at para. 84 (Ont. S.C.J.)

[52] Ross and Palma understand what Anton Piller Orders are and that Court Orders must be strictly complied with. Ross, in particular, was previously served with the first Anton Piller Orders. They acknowledged to the ISS that they understood the Anton Piller Orders and they were told that contempt proceedings could be brought if they refused entry to the Rodgers Residence. Ross and Palma are also familiar with contempt proceedings and sanctions. Their son Steven was incarcerated for four months for contempt of the first Anton Piller Orders and they were witnesses in the contempt proceedings

First Abradjian Affidavit at para. 7

Second Abradjian Affidavit at paras. 9-10

*Rodgers Sentencing Reasons, supra*

*(b) Lack of Respect for the Court and the Legal System*

[53] Ross made comments that reveal that he does not respect this Court or the legal system, including "Yeah I know [that the Plaintiffs will pursue contempt proceedings] and this time I'm gonna tell the Judge where he can stick it."

*Megill, supra* at p. 32

Second Abradjian Affidavit at para. 18

Transcript of the Examination of Ross Rodgers March 26, 2007 at questions 2118-2121, Exhibit 42 to the Affidavit of Julie Laura Peacock sworn February 5, 2010; Plaintiffs' Motion Record for Contempt of Steven Rodgers and Anton Piller Order, Tab D42

(6) **Prejudice**

[54] When I granted the Anton Piller Orders, I recognized the risk that incriminating evidence could be removed or destroyed, and found that there was “a real concern based on previous conduct that Steven Rodgers will fabricate, remove, destroy and/or conceal the evidence if he is given advance notice”. The prejudice to the Plaintiffs from the loss or destruction of evidence is an aggravating factor.

[55] Imprisonment is appropriate where the refusal to comply with an Order frustrates the gathering of important information necessary for the resolution of a complex situation, with adverse consequences to the plaintiff. In *Sussex Group v. Sylvester*, Cumming J. held:

Mr. Sylvester’s contempt .... had serious adverse consequences for the applicant, Sussex.... It was critical that [Sussex] be able to get on top of the confused and complex situation involving Sussex quickly and the relevant documents of Sussex were important for this task. [Sussex] has been effectively frustrated to a very considerable extent by the intentional and wilful refusal of Mr. Sylvester to comply with the court’s Order. ...

Incarceration is appropriate because of the serious harm and prejudice to the applicant resulting from Mr. Sylvester’s contempt.

*Sussex v. Sylvester, supra* at paras. 78, 83.

[56] Imprisonment is also appropriate where non-compliance with the Court Order has had and will continue to have extremely serious consequences for the plaintiff. Incarceration can serve as an inducement or an incentive for a person to change his or her attitude and begin to appreciate and respect the legal system. Incarceration sends a clear message that non-compliance with Court Orders will not be tolerated or taken lightly and is therefore consistent with the sentencing goals of denunciation and specific and general deterrence.

*Tracey v. Tracey*, [1998] O.J. No. 5478 at para 23 (Ont. S.C.J.).

*Megill, supra* at p.10, 42.

*Rodgers Sentencing Reasons* at para. 107.

[57] A failure to permit entry to premises frustrates the purposes of an Anton Piller Order, which are to search for and preserve evidence. It is thereby prejudicial to the Plaintiffs and the administration of justice. When I granted the Anton Piller Orders, I was satisfied that “the plaintiffs will suffer very serious damage if the evidence sought is not available and obvious adverse financial impact and loss to its competitive position and reputation”. Pepall J. has also held that it is “obvious” that the failure to preserve evidence causes “severe prejudice” to the Plaintiffs who obtained Anton Piller Orders for that purpose. Mr. Justice Spence has held that the loss of evidence that should have been produced under an Anton Piller Order caused “serious prejudice” to the Plaintiffs and the administration of justice. Ross and Palma’s failure to permit access to the Rodgers Residence has deprived the Plaintiffs of important evidence and made it impossible to determine whether evidence was destroyed or concealed.

*Megill, supra* at 42

*Boudreau, supra.* at para. 8

*Anton Piller KG, supra.*

**(7) Deterrence and Denunciation**

[58] Mr. Justice Quinn, in awarding a six-month prison sentence for carrying on a taxi business contrary to a court order, commented that:

The primary purpose of sentencing in contempt proceedings is deterrence: both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is wounded when court orders are ignored. The sentence must be one that will repair the wound and denounce the conduct.

*Niagara (Municipality) (Police Services Board) v. Curran*, [2002] 57 O.R. (3d) 631 at 641 (Ont. S.C.J.)

[59] Similarly, Borins J. held:

As well, I place substantial weight upon the exemplary character of the penalty that is to be imposed because it is necessary to deter others from deliberately disobeying the order of the court. Without such sanctions our system would quickly and seriously break down if court orders could be ignored with impunity.

*McNally, supra* at 262

[60] In *Boudreau*, a satellite piracy case involving contempt of an Anton Piller Order, Spence J. held:

The cases are clear that civil contempt calls for the court to address matters of general and specific deterrence, otherwise court orders stand to be rendered ineffective and the rule of law to be weakened. There is evidence of a piracy community that keeps in communication about developments, so the sentence in a case such as this is likely to receive notice once word of it starts to get around. The defendant acted with total disregard for the law and he cannot be allowed to believe that he may do so with impunity.

*Boudreau* at para. 7

*Megill* at pp. 36, 43

[61] When Mesbur J. sentenced Steven for contempt, she recognized that the satellite piracy community communicates through web sites, and held that a sentence should address both general and specific deterrence:



Court orders must be obeyed. Those who fail to do so must be denounced and punished in an appropriate way so as to deter others from doing so as well. There is clear evidence of both a satellite piracy community and constant communication amongst its members through “forums” on various web sites, most particularly the anton-pillar.com website. Mr. Rodgers frequently posts messages on that website, and has used it to provide his community of what he calls “busted dealers” with up to date information about the progress of this litigation”.

Given the level of communication within that community, the sentence imposed in this case will likely receive widespread notice. As Pepall J. commented in *Megill*, the sentence should address general deterrence, so that others do not mimic Mr. Rodgers’ wrongdoing, and specific deterrence to deter Mr. Rodgers from repeating his wrongdoing.

*Rodgers Sentencing Reasons* at paras. 91-92

*Megill, supra* at p. 43

[62] During the execution of the Anton Piller Orders, the ISS told Ross that he was prohibited from talking about the Orders for a period of 10 days. In response Ross said he would be “posting about it tonight” and “Oh, I’m going to be talking about it. I’m going online, too. Everbody’s going to know about this”. Steven said “Ohh...don’t worry. I always wait for my 10 days and then after my 10 days, oh fuck, it’s on”.

Second Abradjian Affidavit at para. 20 and Exhibit C

[63] To permit Ross and Palma to blatantly defy the Anton Piller Orders – by denying access to the premises – without a significant penalty would encourage pirates to “weigh up” compliance with Court Orders against the penalty for contempt. If contempt is without meaningful consequence, disobedience of Court Orders will result.

*Boudreau, supra* at para. 7

#### **(8) Similar Sentences in Like Circumstances**

[64] Cumming J. awarded a six-month prison sentence for contempt where the contemnor disregarded a court order to deliver business records and prepare an inventory of the business records.

*Sussex v. Sylvester, supra* at para. 85

[65] Borins J. awarded a 12-month prison sentence for contempt where the contemnor breached a Court Order not to dispose of monies pending the return of a motion for a charging order and held:

I am satisfied that the course of conduct embarked upon by Mr. McNally was deliberate and occurred with the full knowledge of Mr. McNally that the order existed and prohibited him from doing what was done. He has not offered any

real excuse for what he did. It is, of course, a very serious matter to disobey the order of the court. If proceedings had been taken against him by way of indictment, the maximum penalty which he could have received was two years in jail...It is my opinion that unless proper penalties are imposed where a court order is deliberately disobeyed the orders of the court will have no real meaning.

*McNally, supra* at 262-263

[66] Mr. Justice McKinnon awarded a 15-month prison sentence where the contemnor failed to comply with various production orders. The Court of Appeal upheld the sentence stating:

We see no basis to interfere with the discretionary orders of contempt made by the motion judge. Given the serious, wilful and deliberate nature of the contempt, we are not persuaded that the motion judge was in error in imposing the sentences that he imposed.

*Milligan v. Lech*, [2006] O.J. No. 4700 at para. 9 (C.A.) aff'g [2006] O.J. No. 3127 (S.C.J.)

[67] Several Judges of this Court have imposed sentences of incarceration for contempt of Anton Piller Orders in satellite piracy cases:

- a) In *Megill*, Pepall J. ordered the defendant to be incarcerated for three months for failing to comply with an order designed to preserve evidence, which resulted in "severe prejudice" to the plaintiffs;
- b) In *Boudreau*, Spence J. ordered the defendant to be incarcerated for nine months (reduced on appeal to three months) for failing to grant access to a web site which resulted in the loss of evidence and severe prejudice to the plaintiffs; and
- c) In this case, Mesbur J. ordered Steven to be incarcerated for four months for failing to grant access immediately to a premises and several web sites, and for implementing a complicated scheme designed to conceal his activities.

*Megill, supra* at p. 42-43

*Boudreau, supra* at para. 7

*Rodgers Sentencing Reasons* at para. 125

## **(9) Appropriate Sentence**

[68] The contempt of Ross and Palma is serious and causes prejudice to the Plaintiffs and the administration of justice. The contempt merits a term of incarceration for the following reasons:

- a) Ross and Palma clearly understood that the Anton Piller Orders required them to permit entry immediately into the Rodgers Residence although they had two hours to consult a lawyer before the search commenced.

- b) Ross and Palma chose not to comply. Their contempt was blatant, wilful and deliberate.
- c) Ross and Palma were given several opportunities to permit a search of the Rodgers Residence and the Plaintiffs attempted to address their concerns about Pauline. Ross and Palma maintained their refusals.
- d) The fundamental purpose of the Anton Piller Orders, the preservation of evidence, was frustrated as a result of Ross and Palma's defiance.
- e) There are aggravating factors. Ross and Palma both displayed contemptuous attitudes. They told the Authorized Persons to "get out", Ross threatened to kill the ISS and Ross displayed a highly perjorative attitude towards the Courts, Judges and Orders.
- f) There are few mitigating factors.
- g) It is reasonable to expect that the satellite piracy community, recognized by Spence J., Pepall J. and Mesbur J. in other cases, is aware of this case. Denunciation and general deterrence are important to ensure that others not form the view that Anton Piller Orders can be disregarded without consequence.
- h) Ross and Palma failed to appear before me despite the Orders to Appear, and have never explained their lack of regard for these Orders.

[69] The contempt of Ross and Palma in this case is more serious than the contempt of Boudreau. Boudreau permitted access to his premises, but took no steps to assist the ISS and failed to provide immediate access to a web site. Boudreau was sentenced to three months in prison.

*Boudreau, supra* at para. 7


[70] In this case the contempt frustrated the fundamental purpose of the order.

**(D) SENTENCE**

[71] I order consecutive sentences. Ross is sentenced to 4 months in jail and on serving that sentence and being released Palma then will be taken into custody to serve 4 months in jail. This will allow their daughter Pauline to remain in school and allow them to keep the restaurant operating with help from their children. It will also allow them to keep up the mortgage on their house.

(E) COSTS

[72] If costs are sought, I may be spoken to.

  
CAMERON J.

**Released:** May 18, 2010

COURT FILE NO.: 06-CL-6574

AND BETWEEN:

BELL EXPRESSVU LIMITED PARTNERSHIP

Plaintiff

- and -

STEVEN RODGERS a.k.a. STEVEN R. RODGERS a.k.a. TOMICO a.k.a. TOMICO-IND a.k.a. K-OS a.k.a. DSSWHOLESALEDIRECT a.k.a. DSSWHOLESALE, STEVEN RODGERS c.o.b as TOMICO INDUSTRIES, STEVEN RODGERS c.o.b as TOMICO INDUSTRIES (IND), STEVEN RODGERS c.o.b as TOMICO INDUSTRYS, STEVEN RODGERS c.o.b as TOMICO IND, STEVEN RODGERS c.o.b. as *www.tomico-satellites.com*, STEVEN RODGERS c.o.b. as *www.tomico-ind.com*, STEVEN RODGERS c.o.b. as *www.tomicoreviews.com*, STEVEN RODGERS c.o.b. as *www.electronics-elite.com*, STEVEN RODGERS c.o.b. as *www.sales-dynamics-firm.com*, STEVEN RODGERS c.o.b. as *www.dss-wholesaledirect.com* , ROSS RODGERS a.k.a. ROSS GEORGE RODGERS, NICOLA DE SANTIS a.k.a. NICK DE SANTIS, KRIS BOUCHARD a.k.a. KRIS MICHAEL BOUCHARD a.k.a. KRISTOPHER MICHAEL JOEL BOUCHARD, KRIS BOUCHARD c.o.b. as J.A.C. UNLIMITED SOLE PROPRIETORSHIP, KRIS BOUCHARD c.o.b. as *www.tomico-satellites.com*, KRIS BOUCHARD c.o.b. as *www.tomico-ind.com*, KRIS BOUCHARD c.o.b. as *www.electronics-elite.com*, KRIS BOUCHARD c.o.b. as *www.sales-dynamics-firm.com*, NAVDEEP BHAMBRA, 6048951 CANADA INC., JOHN DOE, JANE DOE and other persons unknown who have conspired with the named Defendants

Defendants

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**REASONS FOR JUDGMENT**

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CAMERON J.

CITATION: Echostar Communications Corporation v. Rodgers, 2010 ONSC 2164  
COURT FILE NO.: 06-CL-6575  
DATE: 20100518

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

**BETWEEN:**

ECHOSTAR COMMUNICATIONS CORPORATION,  
ECHOSTAR SATELLITE LLC, ECHOSTAR  
TECHNOLOGIES CORPORATION, AND NAGRSTAR  
LLC

Plaintiffs

- and -

STEVEN RODGERS a.k.a. STEVEN R. RODGERS a.k.a.  
TOMICO a.k.a. TOMICO-IND a.k.a. K-OS a.k.a.  
DSSWHOLESALEDIRECT a.k.a. DSSWHOLESALE,  
STEVEN RODGERS c.o.b. as TOMICO INDUSTRIES,  
STEVEN RODGERS c.o.b. as TOMICO INDUSTRIES  
(IND), STEVEN RODGERS c.o.b. as TOMICO  
INDUSTRIES, STEVEN RODGERS c.o.b. as TOMICO  
IND, STEVEN RODGERS c.o.b. as *www.tomico-  
satellites.com*, STEVEN RODGERS c.o.b. as *www.tomico-  
ind.com*, STEVEN RODGERS c.o.b. as  
*www.tomicoreviews.com*, STEVEN RODGERS c.o.b. as  
*www.electronics-elite.com*, STEVEN RODGERS c.o.b. as  
*www.sales-dynamics-firm.com*, STEVEN RODGERS c.o.b.  
as *www.dss-wholesaledirect.com*, ROSS RODGERS a.k.a.  
ROSS GEORGE RODGERS, NICOLA DE SANTIS a.k.a.  
NICK DE SANTIS, KRIS BOUCHARD a.k.a. KRIS  
MICHAEL BOUCHARD a.k.a. KRISTOPHER MICHAEL  
JOEL BOUCHARD, KRIS BOUCHARD c.o.b. as J.A.C.  
UNLIMITED SOLE PROPRIETORSHIP, KRIS  
BOUCHARD c.o.b. as *www.tomico-satellites.com*, KRIS  
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BOUCHARD c.o.b. as *www.electronics-elite.com*, KRIS  
BOUCHARD c.o.b. as *www.sales-dynamics-firm.com*,  
NAVDEEP BHAMBRA, 6048951 CANADA INC., JOHN  
DOE, JANE DOE and other persons unknown who have  
conspired with the named Defendants

Defendants