

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

**B E T W E E N:**

**WISEAU STUDIO, LLC and TOMMY WISEAU d.b.a. WISEAU-FILMS**

Plaintiffs / Defendants by Counterclaim  
(Moving Parties)

- and -

**RICHARD HARPER, FERNANDO FORERO MCGRATH, MARTIC RACICOT D.B.A. ROCKHAVEN  
PICTURES, ROOM FULL OF SPOONS INC., PARKTOWN STUDIOS INC., RICHARD STEWART TOWNS**

Defendants / Plaintiffs by Counterclaim  
(Respondents)

**FACTUM OF THE PLAINTIFFS / MOVING PARTIES  
(MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT)**

March 23, 2018

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**PART I: INTRODUCTION**

1. The Moving Parties/Plaintiffs, Wiseau Studio, LLC and Tommy Wiseau d.b.a. Wiseau-Films (the **"Moving Parties"**), seek leave to appeal from the Order of the Honourable Justice Koehnen (the **"Motions Judge"**) dated November 1, 2017 and issued and entered on March 20, 2018, which Order dissolved an interim injunction against the Defendants and awarded costs of the injunction proceeding against the Plaintiffs in the amount of \$97,034.68 (the **"Order"**).
2. The Moving Parties submit that leave to appeal is warranted under Rule 62.02(4)(b) of the *Rules of Civil Procedure*.

**PART II: STATEMENT OF FACTS**

3. This is a motion in writing for leave to appeal of the Order. The learned Motions Judge gave reasons for decision concerning the dissolution on an interim injunction on November 1, 2017 (**"Injunction Reasons"**) and for awarding costs on January 17, 2018 (**"Costs Reasons"**). The Order was signed by the Motions Judge on March 19, 2018 and issued and entered on March 20, 2018.

**B. The Film and The Documentary**

4. The individual Plaintiff, Tommy Wiseau (**"Wiseau"**), wrote, directed, produced and played the lead role in the movie *The Room* (the **"Film"**). The worldwide copyright in the Film is currently owned by Wiseau Studio LLC.
5. The Film was released in 2003. It is a cult sensation with millions of fans worldwide and thousands of screenings internationally. To this date, the Film is still screened around the world, and Wiseau often personally attends such screenings.

**Moving Parties' Motion Record, Tab 3, Reasons for Judgment of Justice Koehnen, dated November 1, 2017 at paras 1-3 ("Injunction Reasons").**

**Moving Parties' Motion Record, Tab 5C, Affidavit of Tommy Wiseau Sworn  
June 13, 2017 at paras 14-15 ("June Wiseau Affidavit").**

6. Given the Film's popularity and its status as a cult classic, it has inspired various other works, including a stage production entitled *The Room/The Play*, a non-fiction book entitled *The Disaster Artist*, and a film adaptation of the same name. These works were all authorized and licensed by the Moving Parties.

**Injunction Reasons at para 5-6.**

**June Wiseau Affidavit at paras 16-17.**

7. The Defendants created a documentary about *The Room* entitled *Room Full of Spoons* (the "**Documentary**"). The Documentary discusses the making of the Film and its cult status. The Defendants did not obtain a licence from the Plaintiffs for any use of any portion of the Film but nevertheless included in their Documentary more than 60 excerpts from the Film comprising over seven minutes of footage, including many of the most iconic and important scenes of the Film. The Defendants also did not obtain a licence to include in the Documentary and related marketing materials various still images from the Film, photographs and other footage in which the Moving Parties own copyright.

**June Wiseau Affidavit at paras 25-41.**

8. The Documentary has been screened around the world, including in Toronto, Montreal, Ottawa, Winnipeg, Madrid, Poznan, Copenhagen, Sheffield, Philadelphia and Mexico City.

**Injunction Reasons at para 144.**



**C. The Proceedings**

9. On June 14, 2017, Justice Diamond issued an *ex parte* interim injunction restraining the release of the Documentary and adjourned the motion to June 23, 2017 to afford the Defendants the opportunity to respond.

**Injunction Reasons at para 7.**

10. On June 23, 2017, the Plaintiffs' injunction motion came before Justice Akbarali. Some of the Defendants appeared in person, but the Defendants had not retained counsel and sought an adjournment to do so and to file materials. Justice Akbarali extended the interim injunction until October 10, 2017, when the injunction motion could be argued on the merits.

**Injunction Reasons at para 8.**

11. On October 10, 2017, the learned Motions Judge heard the injunction. At such time, he reserved his decision and extended the injunction (on consent) until the release of his decision. The Injunction Reasons were issued on November 1, 2017 and dissolved the interim injunction against the Defendants. In the opinion of the Motions Judge, the Moving Parties had made material non-disclosure in their appearances before Justice Diamond and Justice Akbarali. The Motions Judge also concluded that the Moving Parties failed to meet the tri-partite test for obtaining an interlocutory injunction.

**Injunction Reasons at paras 9, 12 and 52-53.**

12. At the time of the Injunction Reasons, and until December 29, 2017, the Moving Parties were represented by Michael Charles ("**Charles**") of Bereskin & Parr LLP. A Notice of Change of Lawyer dated December 29, 2017 was filed with the Court changing the Moving Parties' counsel of record to its current counsel.

13. After the issuance of the Injunction Reasons, and up until December 4, 2017, Charles and counsel for the Defendants were actively engaged in settlement discussions. On December 4, 2017, the Defendants' informed the Motions Judge that they intended to bring a motion to enforce an alleged settlement of this action resulting from those discussions.

**Moving Parties' Motion Record, Tab 16, Affidavit of Adam Jacobs Sworn March 22, 2018 at para 7 and Exhibit "D".**

14. On January 17, 2018, the Motions Judge issued the Costs Reasons and awarded costs of the injunction proceeding against the Moving Parties in the amount of \$97,034.68.

**Moving Parties' Motion Record, Tab 4, Endorsement of Justice Koehnen, dated January 17, 2018 ("Costs Reasons").**

15. Between November 3, 2017 and March 1, 2018, the parties were unable to agree as to the appropriate form and content of the Order. In particular, the parties disagreed about the scope of paragraph 2 of the Order, and whether the Defendants were required to attribution the use of "still photographs and other works" or only "still photographs" in which the Plaintiffs owned the copyright. The dispute was resolved by agreement on March 1, 2018, and the Motions Judge signed the order on March 19, 2018.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at para 3.**

16. The Defendants' motion to enforce the alleged settlement was dismissed with costs by Madam Justice Chiappetta on March 6, 2018.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at para 25 and Exhibit "R".**

**PART III: POINTS IN ISSUE**

17. The sole issue on this motion is should this Court grant leave to appeal from the Order.

**PART IV: LAW AND ARGUMENT**

**A. The Test for Leave to Appeal Under Rule 62.02(4)(b)**

18. Rule 62.02(4)(b) of the *Rules of Civil Procedure* contains a two part conjunctive test. The Moving Parties must satisfy the court that (1) there is good reason to doubt the correctness of the Motions Judge's decision; and (2) that the appeal raises matters of general importance.

19. In order to obtain leave to appeal from the Injunction Reasons and Costs Reasons pursuant to Rule 62.02(4), the Moving Parties need not show that the learned Motions Judge was wrong or even probably wrong. The Moving Parties need only show that the correctness of the Order is open to serious debate. In addition, the Moving Parties must demonstrate that the proposed appeal involves matters of such importance relevant to the development of the law and the administration of justice that leave should be granted.

***T. Misasi v. 502046 Ontario Inc. c.o.b. as Call of the North, et al*, 2017 ONSC 3497 at paras 27-28, Moving Parties' Book of Authorities (MPBOA) at Tab 3.**

***Ignjatovic v. Vukojevic*, 2017 ONSC 2247 at para 9, MPBOA at Tab 4.**

**B. The Moving Parties are Entitled to Leave to Appeal from the Injunction Reasons**

20. With respect, there are numerous reasons to doubt the correctness of the Order. In addition, the Injunction Reasons which are the basis for the Order raise matters of general importance beyond the interests of the parties in the manner in which it deals with allegations of material non-disclosure and its approach to the test for interlocutory injunctions, fair dealing and infringement of moral rights.

**(i) Material Non-Disclosure**

21. The Motions Judge found that the interim injunction should be dissolved solely on the basis of material non-disclosure. In the Motions Judge's opinion, there were three parts of the Moving Parties'

complaints on the interim injunction motion that “entail material nondisclosure to the court,” namely:

- (a) the Documentary “mocks, derides and disparages” the Film;
- (b) the Documentary “casts aspersions on” Mr. Wiseau’s character and invades his privacy;  
and
- (c) the Defendants are in material breach of copyright law.

**Injunction Reasons at paras 18-19.**

Each of these categories is addressed below.

**A. Documentary “mocks, derides and disparages” the Film**

22. The Motions Judge summarized the Moving Parties’ complaints about the Documentary’s treatment of the Film by incorrectly stating that the Moving Parties alleged that the Documentary “mocks, derides and disparages” the Film. On the basis of this conclusion, the Motions Judge took issue with the fact that the Wiseau affidavit sworn June 13, 2017 (“**June Wiseau Affidavit**”) did not explicitly state that the Film’s fame rests on its “apparently abysmal quality as a movie” and that the June Wiseau Affidavit did not disclose the full title of a non-fiction book entitled *The Disaster Artist: My Life Inside The Room, the Greatest Bad Movie Ever Made*. The Motions Judge did not specify which portions of the June Wiseau Affidavit alleged that the Documentary “mocks, derides and disparages” the Film, and in fact no such phrase appears in that affidavit.

**Injunction Reasons at paras 20-26.**

23. Although clearly relevant to the claim of material non-disclosure, the Motions Judge also did not identify which of the claims asserted by the Moving Parties were supported by the allegation that the Documentary “mocks, derides and disparages” the Film. In fact, the only possible relevance that

this allegation could have is to the Moving Parties' claim of infringement of moral rights. "Moral rights" is the short description of the right granted by the *Copyright Act* to the integrity of a copyright work and the right to be associated with the work as the author by name.

***Copyright Act, RSC 1985, c C-42, s. 14.1(1), MPBOA at Tab 2.***

24. The June Wiseau Affidavit made two specific allegations in respect of the alleged breach of the Moving Parties' moral rights in the Film, namely that the Documentary "made fun" of the Film (and not that it "mocks, derides and disparages" the Film) and that the Documentary falsely attributed direction of the Film to Sandy Schklair.

***June Wiseau Affidavit at paras 35 and 46(b).***

25. Not only did the learned Motions Judge not explain why the "omitted" facts concerning the general view of the public about the poor artistic quality of the Film were so critical to the injunction motion that their non-disclosure in the lengthy June Wiseau Affidavit merited dismissal of the injunction motion, he also gave no explanation as to why this fact is material to any claim made by the Moving Parties against the Defendants, and failed to tie the alleged importance of this fact to the tripartite test for granting an interlocutory injunction. The Moving Parties submit that a fact cannot be material, much less of such great importance as to justify the dismissal of the injunction motion, if it cannot be tied to any pleaded issue or to the test for granting an interlocutory injunction.

26. It is simply not material to either of the two claims for moral rights infringement whether or not the Film's "fame rests on its apparently abysmal quality as a movie." Whether or not the Film is known as a bad film or a good film does not alter the Moving Parties' allegation that the Documentary falsely attributes the direction of the Film to Mr. Schklair, nor does it diminish the Moving Parties' right to the integrity of the Film which the Moving Parties assert has been infringed given that the

Documentary “made fun” of the Film. There is simply no basis for the learned Motions Judge’s conclusion that the failure to explicitly disclose how members of the public view the quality of the Film is somehow material either to the issue of moral rights infringement or to whether the interlocutory injunction should have been granted.

**Injunction Reasons at para 20.**

**B. The Documentary “casts aspersions on” Mr. Wiseau’s character and invades his privacy**

27. The Motions Judge held that the Moving Parties did not disclose material facts concerning three separate items, namely that the Documentary alleged that Wiseau financed the Film through drug dealing; that he had a gay relationship with Greg Sestero (one of the other actors appearing in the Film); and that Wiseau was born in Poland.

**Injunction Reasons at para 27.**

28. While the specifics of each of these factual allegations is discussed below, it appears that the Motions Judge made a fundamental error in respect of all of these factual items. In each case, the Motions Judge was of the view that the Moving Parties should have disclosed additional facts that tended to show either that the allegations made in the Documentary were either true or that some members of the public speculated about whether those allegations were true. With great respect to the Motions Judge, this exhibits a fundamental misunderstanding of Wiseau’s claim in respect of these three factual statements, which was for the breach of his privacy through the tort of “intrusion upon seclusion” (which is not in any way dependent on the truth or falsehood of the statements in the Documentary), and not in defamation or any other reputational tort (which would be dependent on the falsity of the factual statements about Wiseau made in the Documentary). Although the June Wiseau Affidavit does indicate that some of the factual allegations in the Documentary are in

Wiseau's view false, the complaint set out in the Statement of Claim is that the Defendants delved into Wiseau's private affairs without his consent and made disclosure of private facts about him, not that what was ultimately disclosed about Wiseau in the Documentary was false. The entirety of the Motions Judge's decision concerning the alleged non-disclosure of facts about Wiseau's personal life is based on the failure of the learned Motions Judge to understand this distinction.

**Moving Parties' Motion Record, Tab 5D, Statement of Claim issued June 13, 2017.**

29. With respect to the allegation that Wiseau financed the Film through drug dealing, the Motions Judge deals with this issue as though it was the basis of a claim for defamation, as opposed to a claim for intrusion upon seclusion. The Motions Judge was of the view that evidence about prior rumours or interest into Wiseau's financing of the Film should have been included in the June Wiseau Affidavit, but those facts are irrelevant and immaterial to the test for a claim of intrusion upon seclusion, a tort which focuses on a defendant's intentional invasion into the plaintiff's private affairs.

***Jones v. Tsige*, 2012 ONCA 32 at para 71, MPBOA at Tab 7.**

30. Further, the Motions Judge concluded that the Moving Parties made a "material misstatement of what the documentary actually says" regarding drug dealing, but several paragraphs later expressly agrees that the Documentary alleges (through its reporting of unsubstantiated rumours) that Wiseau may have obtained money from drug sales. It is unclear exactly what the Motions Judge would have required the Moving Parties to disclose to meet their obligation under Rule 39.01(6) or how such information would be relevant either to a claim for intrusion upon seclusion or the tri-partite test for obtaining an interlocutory injunction.

**Injunction Reasons at paras 28-31.**

31. Regarding the second issue, with respect to the allegations that Wiseau had a sexual relationship with Mr. Sestero, the learned Motion Judge was of the view that Wiseau should have disclosed that there were rumours about such a relationship and that Mr. Sestero's mother had asked Wiseau not to have sex with Mr. Sestero. The Motions Judge does not explain how such evidence would have any relevance whatsoever to a claim for intrusion upon seclusion or the tri-partite test for obtaining an interlocutory injunction. It is clear that these allegations are of a very personal and sensitive nature (and therefore would clearly be the subject of an intrusion upon seclusion claim), that Wiseau denied such allegations in his affidavit, and that there is no evidence to the contrary. It is irrelevant and immaterial to a claim for intrusion upon seclusion whether or not others (including Mr. Sestero's mother) have speculated on a relationship between Wiseau and Mr. Sestero, and the non-disclosure of the fact of such speculation has no relevance whatsoever to the issues which were before the Court on the injunction motion.

**Injunction Reasons at paras 32-33.**

**June Wiseau Affidavit at para 46(d).**

32. The final alleged material non-disclosure in this section of the Injunction Reasons relates to the Documentary's speculation regarding Wiseau's family background and ethnicity. Again, neither the fact that others have speculated about Wiseau's background and ethnicity, nor the truthfulness of the statements made in the Documentary about that topic, are at all relevant or material to a claim for intrusion upon seclusion or the tri-partite test for obtaining an interlocutory injunction and cannot form the basis for a claim of material non-disclosure. The reliance by the Motions Judge on the non-disclosure of such wholly irrelevant facts was a serious error.



C. The Defendants are in material breach of copyright law

33. Finally, the Motions Judge took issue with the fact that the Moving Parties did not disclose that unauthorized copies of the Film had been available on YouTube for approximately four years before the hearing of the interim injunction motion and stated (incorrectly) that the Moving Parties had not taken any steps to have these infringing copies removed prior to obtaining the *ex parte* injunction. As with the other instances of alleged non-disclosure, the Motions Judge did not explain what cause of action the alleged non-disclosure related to or how the alleged non-disclosure impacted on the tri-partite test for obtaining an interlocutory injunction. However, it appears that this alleged non-disclosure was related to the statement in paragraph 55 of the June Wiseau Affidavit that, if the Documentary were released, the Moving Parties would lose control and exclusivity over copyright in the Film. In addition, the Motions Judge found that the Moving Parties should have disclosed that the Defendants were relying on the concept of fair dealing and that a finding of fair dealing would not result in the loss of exclusivity of copyright in the Film.

**Injunction Reasons at paras 36-38.**

34. The Moving Parties admit that paragraph 55 of the June Wiseau Affidavit states that: "once [the Documentary] is released, [the Moving Parties] will lose control over copyright in our most famous and valuable work [...]. There will be no exclusivity of copyright associated with these works and the resulting harm will be irreparable." It is apparent from the context of that statement that Wiseau is saying that if the Defendants are permitted to release the Documentary without getting a licence from the copyright owner, then others will believe that they can similarly use portions of the Film without a licence and the licensing revenue and opportunities presently available to the Moving Parties will vanish. However, the Motions Judge interpreted this paragraph of the June Wiseau Affidavit to be alleging that the Moving Parties would lose exclusivity of the copyright itself once there

was any infringing use of the Film. This is not what the June Wiseau Affidavit says, and is of course not an accurate statement of copyright law. Evidence of past copyright infringement by third parties has no relevance whatsoever to a claim for copyright infringement and therefore non-disclosure of infringement by others cannot possibly be material on a motion for an injunction to restrain infringement by the Defendants.

**June Wiseau Affidavit at para 55.**

35. Lastly, the learned Motions Judge held that the Moving Parties had not disclosed that the Defendants were relying on the defence of fair dealing. With respect, this is simply not true. Paragraph 50 of the Statement of Claim states clearly the Defendants "have even claimed their activities constitute fair dealing under the *Copyright Act*, which they do not." The Motions Judge admits in paragraph 49 of the Injunction Reasons that the Moving Parties' factum on the hearing before Justice Akbarali also explicitly refers to the fact that the Defendants would likely be alleging a fair dealing defence. However, the Motions Judge states that this was insufficient since "nowhere does the factum explain the concept of fair dealing and nowhere does the factum suggest that the concept of fair dealing gives parties like the defendants the express right to use to use (sic) the plaintiff's work for the purposes of review, critique or news." With respect, this is not the law. The Motions Judge appears to have confused material non-disclosure of relevant facts (which he admits did not occur here as the potential for a fair dealing defence was explicitly and accurately described in both the pleadings and the factum of the Moving Parties) with a moving party intentionally misleading the court as to the state of the law (of which there is no allegation whatsoever). There is no obligation on a party to extensively explain a clear and well-known area of the law to the Court as a condition of obtaining an interim injunction; if the Court wanted to have a more detailed explanation of fair dealing, such an explanation could have easily been requested. There is absolutely

no indication that there was any misunderstanding about what was being claimed by the Moving Parties or that the judges who had heard the interim injunction motions were not fully aware a fair dealing defence might be asserted by the Defendants.

**Statement of Claim issued June 13, 2017 at para 50.**

**Injunction Reasons at para 49.**

**D. The Law of Material Non-Disclosure**

36. Rule 39.01(6) places a heavy burden on a moving party to make full and frank disclosure of all material facts. "The obligation to make disclosure of 'all material facts' should be interpreted to mean only 'all facts that might reasonably affect the outcome of the motion.'" Thus, the material facts are those relevant to the issues before the court on an interim injunction, namely the tri-partite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and any legal tests which must be considered under the first leg of the tri-partite test (whether there is a serious issue to be tried).

***R. A. Fox v. R.S. Fox*, 2014 ONSC 1135 at para 12, MPBOA at Tab 8.**

***Hunter's Square Developments Inc. v. 351658 Ontario Ltd.*, 2002 CanLII 49491 at para 53, MPBOA at Tab 9.**

37. As discussed above, there is good reason to doubt the correctness of the learned Motions Judge's conclusion that the Moving Parties failed to disclose material facts.

38. The Moving Parties' Notice of Motion dated June 14, 2017 sought an interim and interlocutory injunction given the Defendants copyright infringement and infringement of moral rights, appropriation of personality, passing off and intrusion upon seclusion.

**Moving Parties' Motion Record, Tab 5A, Notice of Motion at paras 1 and 12.**

39. Non-disclosure of the facts cited by the Motions Judge was wholly irrelevant to the issues to be considered in determining whether to issue, dissolve or continue the interim injunction, and specifically, whether the Defendants' infringed the Moving Parties' copyright, breached Wiseau's moral rights and intruded upon Wiseau's seclusion.

**(ii) *Serious Issue to be Tried***

40. The first leg of the test to obtain an interlocutory injunction involves a limited review of the legal and factual basis for the claim. Judges often avoid wading further into the underlying dispute than is strictly necessary to deal with the injunction before them. The threshold to be met to show a serious issue to be tried is low and the motion judge must make a preliminary assessment of the merits of the case and be satisfied only that the issue is neither vexatious nor frivolous. "A prolonged examination of the merits is generally neither necessary nor desirable."

***RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338, MPBOA at Tab 10.**

***Earhart v. Bath Institution (Warden)*, 2017 ONSC 4908 at para 10, MPBOA at Tab 11.**

***Kinnear v. Hanley*, 2017 ONSC 1165 at para 23, MPBOA at Tab 12.**

41. Throughout the Injunction Reasons, the learned Motions Judge incorrectly applied the first leg of the tri-partite test for granting or continuing an interlocutory injunction by embarking on a lengthy assessment of the relative strength of each of the claims asserted by the Moving Parties based solely on the limited evidence before the Court instead of simply assessing whether the Moving Parties' claims raised a serious issue to be tried. This is demonstrated most forcefully in paragraph 51 of the Injunction Reasons, where the Motions Judge states that, in his view, the Defendants "are small-scale filmmakers, who appear to be acting in good faith, and, in my view, have a legitimate right to have their documentary distributed." (emphasis added). This determination, on the basis of limited

affidavit evidence, is not the proper function of the Motions Judge, and taints the entire analysis conducted in the Injunction Reasons.

**Injunction Reasons at para 51.**

42. With respect to copyright infringement, the learned Motions Judge conducted an extensive fair dealing analysis and attempted to weigh what he saw as all relevant factors applicable in such an analysis. Although the Motions Judge does not explicitly conclude that the Defendants' use of the Moving Parties' copyright material was fair dealing, such a conclusion is implicit in the Motions Judge's 32-paragraph discussion of fair dealing.

**Injunction Reasons at paras 59-90.**

43. The Motions Judge's approach to copyright infringement and fair dealing demonstrates that he failed to appreciate the low threshold for the first leg of the tri-partite test and failed to simply assess whether the Moving Parties' copyright infringement claims were neither vexatious nor frivolous.

44. Similarly, the Motions Judge's discussion of the other claims asserted by the Moving Parties (including misappropriation of personality (paras 100-113), passing off (paras 114-117), infringement of moral rights (paras.118-122), intrusion upon seclusion (paras 123-131), and breach of contract and fraudulent misrepresentation (paras 132-137)) all are attempts by the Motion Judge to determine the issues rather than determine if there is a serious issue to be tried. This is a fundamental and serious legal error.

45. Rather than deal with all of the many errors made by the Motions Judge in conducting his lengthy assessments of the merits of each claim, the Moving Parties will concentrate on the incorrect

approach taken by the Motion Judge in determining that there was no serious issue to be tried in respect of the Moving Parties' copyright infringement claims.

**(iii) *Incorrect Application of the Fair Dealing Factors***

46. The Motions Judge made numerous erroneous and incorrect legal statements in his application of fair dealing and erred in his approach to the fair dealing factors based on the limited evidence before him.

47. With respect to the "character of the dealing", the second fair dealing factor which is meant to assess how the underlying work is dealt with, the Motions Judge concluded that "[i]t is common practice in documentary films to show a film clip of another event and then have people comment on the content of the clip." While the customs or practice of a particular trade or industry may in some cases be used to determine whether or not the character of the dealing is fair, the Motions Judge made a fundamental error by coming to a conclusion on the "common practice in documentary films" without any expert or sworn evidence about the appropriate qualitative and quantitative amounts of underlying works which can validly be used in documentary films.

**Injunction Reasons at para 80.**

***CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 at para 55, MPBOA at Tab 13.**

48. When discussing the third fair dealing factor, the amount of the dealing, despite acknowledging (correctly) that "the onus is on the defendants to establish fair dealing", the Motions Judge then clearly shifted the onus onto the Moving Parties to show that the use by the Defendants' was unfair by noting that the Moving Parties had produced no evidence that the dealing was unfair. This is an incorrect application of fair dealing as the Supreme Court of Canada has stated that "the onus is on the person invoking 'fair dealing' to satisfy all aspects of the test." The Defendants failed to

adduce any expert or sworn evidence regarding the fairness of the amount of the dealing (and alternatives to the dealing) of the Film by the Defendants, and, therefore, the Motions Judge erred in concluding that this factor favoured the Defendants.

**Injunction Reasons at para 81.**

***Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 12, MPBOA at Tab 14.**

49. Furthermore, the Supreme Court of Canada has expressed that “both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness” of the amount of the dealing. Despite this, the Motions Judge only considered the quantitative amounts of the Film used by the Documentary and made no reference to the qualitative amount used. In fact, the sworn and uncontradicted evidence before the Motions Judge was that the Documentary “reproduces the most iconic scenes from [the Film] and does so in a way that the essence of [the Film] is replicated in the [Documentary].” In addition, the Motions Judge referred to the proportion of the Documentary which was comprised of excerpts from the Film instead of focusing on the amount of the Film used in the Documentary in relation to the runtime of the Film itself.

***CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 at para 56, MPBOA at Tab 13.**

**Injunction Reasons at paras 83-84.**

**June Wiseau Affidavit at para 40.**

50. Lastly in respect of the amount of the dealing, the Motions Judge relied on the decision of the U.K. Court of Appeal in *Time Warner Entertainments Co. L P v. Channel Four Television Corporation PLC* (“*Time Warner*”) as validation for his view that the use of excerpts from the Film was fair dealing. With respect, the Motions Judge ignored the central finding of that case (for which it is generally cited) which is that to qualify as fair dealing the use of the copyright work must criticize or review the

work itself and that fair dealing cannot be used as a defence if the intent of the dealing was to use the copyright work for the infringer's own purposes.

"As Lord Atkin said in a different context 'The path of criticism is a public way: The wrongheaded are permitted to err therein...' (*Ambard v A.-G. for Trinidad and Tobago* [1936] AC 322 at 335). 'Fair dealing' in its statutory context refers to the true purpose (that is, the good faith, the intention and the genuineness) of the critical work — is the programme incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism, and so profit unfairly from another's work? As Lord Denning said in *Hubbard v Vosper* ( [1972] 2 QB 84 at 93): 'It is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit.'"

The Motions Judge made no mention of the intent of the Defendants despite the fact that this was held by Henry L.J. in *Time Warner* to be a critical issue with respect to fair dealing for the purposes of criticism and review.

***Time Warner Entertainments Co. L P v. Channel Four Television Corporation PLC*, [1994] E.M.L.R. 1 at 14 ("*Time Warner*"), MPBOA at Tab 15.**

***Ashdown v. Telegraph Group Ltd* [2001] EWHC Ch 28 at para 24, MPBOA at Tab 16.**

***Pro Sieben Media A.G. v Carlton Television Ltd & Anor*, [1998] EWCA Civ 2001, MPBOA at Tab 17.**

51. In assessing the "nature of the work," the fifth fair dealing factor, the Motions Judge stated that the Film "has been widely available in its entirety and in portions on YouTube." The Supreme Court of Canada has held that the inquiry at this stage of a fair dealing analysis queries whether the work is confidential or unpublished, not whether there has been prior infringement. Whether a work has been available through an infringing reproduction by third parties is irrelevant to the fair dealing analysis. The confusion of the Motions Judge on this point is evident in paragraph 87 of the Injunction Reasons, where he states that there is "nothing confidential about the Room." There was no



suggestion from anyone that the Film was a confidential work or that this has anything to do with whether the appropriation of over seven minutes of the Film could be seen as fair dealing. In addition, the Motions Judge failed to address or recognize that the Moving Parties' sworn and uncontradicted evidence was that the Moving Parties "have taken steps to have [YouTube videos of clips from, or the entirety of, the Film] taken down" and that certain unauthorized uploads of the Film to YouTube have been removed by YouTube.

**Injunction Reasons at para 87.**

***CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 at para 58, MPBOA at Tab 13.**

**Moving Parties' Motion Record, Tab 8A, Reply Affidavit of Tommy Wiseau Sworn September 27, 2017 at paras 10-11.**

52. Finally, in respect of the final fair dealing factor, the effect of the dealing on the work, the Motions Judge erred in concluding that "the documentary is no substitute for the social experience of seeing the movie" since there was no evidence to this effect. In fact, the sworn and uncontradicted evidence of Wiseau was that the Film's "essence" is replicated by the Documentary. The Motions Judge's conclusion in respect of the effect of the dealing of the work was, therefore, made without regard to the uncontradicted evidence before the Court on this issue.

**June Wiseau Affidavit at para 40.**

**(iv) *Incorrect Application of Fair Dealing to Moral Rights***

53. A final error made by the learned Motions Judge in respect of fair dealing was his conclusion that "concept of moral rights is also subject to the user right of fair dealing enshrined in the *Copyright Act*."

**Injunction Reasons at para 120.**

54. In fact, infringement of moral rights is not subject to a defence of fair dealing. Moral rights are not included in the definition of “copyright” in section 2 of the *Copyright Act*, and, therefore, are not applicable or susceptible to the *Copyright Act*’s fair dealing provisions which only apply to “copyright” (as defined in the *Copyright Act*). No Canadian or common law court has ever extended fair dealing to apply as a defence to an infringement of moral rights.

***Copyright Act, RSC 1985, c C-42, ss. 2, 29, 29.1 and 29.2, MPBOA at Tab 2.***

55. “Moral rights” are defined separately in section 2 of the *Copyright Act*, and there is no statutory basis to conclude that fair dealing is applicable to an infringement of moral rights.

***Copyright Act, RSC 1985, c C-42, s. 2 and 28.1, MPBOA at Tab 2.***

56. Given this, there is a serious issue to be tried in respect of the Defendants’ fair dealing defence and infringement of the Moving Parties’ moral rights. The Motions Judge’s contrary conclusion demonstrates that there is good reason to doubt the correctness of the Injunction Reasons.

**(v) *Irreparable Harm and Balance of Convenience***

57. The Motions Judge erred in his approach to irreparable harm and balance and convenience in respect of cases of copyright infringement. The Motions Judge found it conclusive that the Moving Parties had not provided any evidence of actual damage even though the Documentary had been exhibited on a limited basis before the injunction was granted. In cases where there is no dispute as to the ownership of copyright, and a work (such as the Film) has been used without permission, and therefore infringes an owner’s copyright, the threshold for meeting irreparable harm and balance of convenience can be set so low as to be irrelevant. As noted by the Federal Court:

“In the case of copyright actual damage need not be proved. This is because the right of the owner of a copyright is not measured by the amount of the actual damage suffered. Copyright being a species of property the owner is entitled to protection of that property. If

infringement is proven an injunction will issue without proof of actual damage.” (emphasis added)

By failing to consider this applicable case law, the Motions Judge erred in his approach to irreparable harm.

***Horn Abbot Ltd. v. W.B. Coulter Sales Ltd. (1984), 77 C.P.R. (2d) 145, MPBOA at Tab 18.***

**(vi) *Issues of General Importance***

58. The Moving Parties’ appeal from the Injunction Reasons involves matters of importance relevant to the development of the law and the administration of justice for at least four reasons.

59. First, matters involving material non-disclosure do not often arise in *ex parte* interlocutory injunctions involving copyright and fair dealing. Clarity from this Court is required about the nature of the factual and legal disclosure required in cases involving copyright infringement and fair dealing. Further, clarity from this Court is required as to whether and how any alleged material non-disclosure must relate to the test for an interlocutory injunction since no such connection was identified by the Motions Judge.

60. Second, the Motions Judge’s approach to the “serious issue to be tried” leg of the tri-partite test for obtaining an interlocutory injunction essentially allows a Court to determine the merits of an entire action based on the limited evidentiary record tendered on interlocutory injunctions. Such a development, if left to stand, would be contrary to guidance from the Supreme Court of Canada that it is not necessary nor desirable to conduct a prolonged examination of the merits on a motion for an interlocutory injunction.

61. Third, as detailed in paragraphs 46-52 above, the Motions Judge's approach to fair dealing develops the law in a manner which is contradictory to the guidance provided for by the Supreme Court of Canada.

62. Fourth, and perhaps most importantly, the Injunction Reasons is the first time a Canadian court has concluded that fair dealing can override moral rights despite the fact that such an override is not supported by the *Copyright Act* nor by jurisprudence in Canada or any other common law jurisdiction. In addition, this point was not argued by either of the parties. If left to stand, it is submitted that such a finding develops the law in a manner contrary to Parliament's intent in respect of the application of fair dealing as expressly stated in the *Copyright Act*.

**C. The Moving Parties are Entitled to Leave to Appeal from the Costs Reasons**

63. Even if this Court decides that the learned Motions Judge did not err in the application of the tri-partite test for obtaining an interlocutory injunction, but was incorrect in determining that there had been material non-disclosure by the Moving Parties, then there is good reason to doubt the correctness of the Costs Reasons since the only reason the Motions Judge gave for awarding substantial indemnity costs was due to the alleged material non-disclosure.

**Costs Reasons at paras 5-6.**

64. In light of the incorrect application of the law of material non-disclosure (as detailed in paragraphs 21-39 above) and its impact on the Costs Reasons, there is good reason to doubt the correctness of the Costs Reasons.

**D. The Moving Parties Do Not Require an Extension of Time to Seek Leave to Appeal**

65. It is anticipated that the Respondents may argue that the Moving Parties have missed the required time to seek leave to appeal of the Order. However, the Moving Parties have sought leave to

appeal of the Order within the required 15 days required by Rule 61.03(1)(b) *Rules of Civil Procedure* as the Moving Parties served and filed their Notice of Motion for Leave to Appeal on February 1, 2018.

66. As a general rule, the time period within which to seek leave to appeal begins to run on the date the order under appeal is pronounced. However, this general rule is “not unqualified” and the time to seek leave to appeal may commence from the date of the formal entry of the signed order when a judgment is uncertain on an issue and clarification is required, something of substance may have been missed, or the parties had to make an application to the Court to settle the Order on a substantial question affecting the rights of the parties which had not been clearly disposed of in the reasons.

***Fontaine v. Canada (Attorney General)*, 2012 ONCA 206 at paras 57 and 59, MPBOA at Tab 5.**

***Byers v. Pentex Print Master*, 2003 CanLII 42272 (ON CA) at paras 31-33, MPBOA at Tab 6.**

67. In the present case, the parties had a substantial disagreement as to the correct form and content of the Order. The parties’ disagreement related to paragraph 2 of the Order, and namely, whether the mandatory order should require the Defendants to attribute the use of “still photographs and other works” in which the Plaintiffs owned the copyright, or whether this mandatory provision only applied to “still photographs” as stated in paragraphs 92 and 95 of the Injunction Reasons.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at para 3.**

68. In fact, the Defendants were correct that the Moving Parties’ proposed form of the Order to be taken out was not “consistent with the [Injunction Reasons]” since the Injunction Reasons only specified that the Defendants were required to provide attribution for “certain still photos.”

**Affidavit of Adam Jacobs Sworn March 22, 2018 at para 21 and Exhibit "O".**

**Injunction Reasons at paras 92 and 95.**

69. However, the Moving Parties maintained that the Motions Judge had clearly made an error in the wording of the Injunction Reasons, that both still photos and other clips in which copyright subsists required attribution, and that the Order necessarily required such an interpretation despite the wording of the Injunction Reasons.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at paras 5, 10, 14, 16, 20 and 22.**

70. The Defendants disagreed with the Moving Parties' position in respect of attribution of works and stated on a number of occasions that they intended to write to the Motions Judge for him to settle the dispute regarding the appropriate form and content of the Order. It was only after a call between counsel in late February 2018 that the Defendants agreed that the Injunction Reasons did not reflect the evidence before the Motions Judge, and that attribution was required for both still photographs and other works.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at paras 9, 15, 17, 19, 22 and 23.**

71. While the parties attempted to have the Order issued and entered on the basis of their agreement, this did not occur, and the Moving Parties were required to write to the Motions Judge on March 19, 2018 and explain that paragraph 2 differed "slightly from [His Honour's] reasons at paragraph 95 of [His Honour's] decision as the Order includes more than the still photographs referred to in that paragraph."

**Affidavit of Adam Jacobs Sworn March 22, 2018 at paras 26-28 and Exhibit "S".**

72. The Order was signed by the Motions Judge on March 19, 2018, and issued and entered on March 20, 2018.

**Affidavit of Adam Jacobs Sworn March 22, 2018 at paras 28-29.**

**Moving Parties' Motion Record, Tab 2, Order of Justice Koehnen, dated November 1, 2017, entered March 20, 2018.**

73. In light of the above, the Moving Parties submit that it is clear that the Injunction Reasons were incorrect (or at least uncertain) on a substantive issue, namely the scope of the works for which the Defendants were to be required to provide attribution, and clarification was required from the Motions Judge in order to have the Order issued and entered. The uncertainty about this aspect of the Injunction Reasons materially affected the rights of the Moving Parties and was not clearly disposed of in the Injunction Reasons. As a result, it is clear the time to seek leave to appeal commenced from entry of the Order (namely March 20, 2018), and not from the date of the Injunction Reasons or the Costs Reasons. Since the Notice of Motion seeking leave to appeal was served and filed on February 1, 2018, the Moving Parties have not sought leave to appeal outside of the required timeline mandated by the *Rules of Civil Procedure*.

**PART V: ORDER REQUESTED**

74. The Moving Parties request:

- (a) leave to appeal from the Order on the following issues:
  - (i) whether there was material non-disclosure by the Moving Parties?
  - (ii) whether the tri-partite test for granting an interlocutory injunction was satisfied?
  - (iii) whether the Motions Judge correctly applied fair dealing to the facts before him?
  - (iv) whether fair dealing applies to a claim of moral rights infringement?and
- (b) their costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** on March 23, 2018.



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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *T. Misasi v. 502046 Ontario Inc. c.o.b. as Call of the North, et al*, 2017 ONSC 3497
2. *Ignjatovic v. Vukojevic*, 2017 ONSC 2247
3. *Jones v. Tsige*, 2012 ONCA 32
4. *R. A. Fox v. R.S. Fox*, 2014 ONSC 1135
5. *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.*, 2002 CanLII 49491
6. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
7. *Earhart v. Bath Institution (Warden)*, 2017 ONSC 4908
8. *Kinnear v. Hanley*, 2017 ONSC 1165
9. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339
10. *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37
11. *Time Warner Entertainments Co. L P v. Channel Four Television Corporation PLC* [1994]  
E.M.L.R. 1
12. *Ashdown v. Telegraph Group Ltd* [2001] EWHC CH 28
13. *Pro Sieben Media A.G. v Carlton Television Ltd & Anor* [1998] EWCA Civ 2001
14. *Horn Abbot Ltd. v. W.B. Coulter Sales Ltd.* (1984), 77 C.P.R. (2d) 145

15. *Fontaine v. Canada (Attorney General)*, 2012 ONCA 206

16. *Byers v. Pentex Print Master*, 2003 CanLII 42272 (ON CA)

## **SCHEDULE "B"**

### **TEXT OF STATUTES, REGULATIONS & BY-LAWS**

#### **1. *Rules of Civil Procedure, RRO 1990, Reg 194***

##### **Full and Fair Disclosure on Motion or Application Without Notice**

**39.01(6)** Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

##### **MOTION FOR LEAVE TO APPEAL TO DIVISIONAL COURT**

###### **Notice of Motion for Leave**

**61.03 (1)** Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

###### **Grounds on Which Leave May Be Granted**

**62.02(4)** Leave to appeal shall not be granted unless,

(b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3).

#### **2. *Copyright Act, RSC 1985, c C-42***

##### **Definitions**

###### **Section 2**

*Copyright* means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer's performance
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal; (droit d'auteur)

*Moral Rights* means the rights described in subsections 14.1(1) and 17.1(1); (droits moraux)

##### **Moral Rights**

**Section 14.1(1)** The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

### **Moral Rights Infringement – Infringement Generally**

**Section 28.1** Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer's performance is, in the absence of the author's or performer's consent, an infringement of those rights.

### **Fair Dealing – Research, private study, etc.**

**Section 29** Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

### **Fair Dealing – Criticism or review**

**Section 29.1** Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

### **Fair Dealing – News Reporting**

**Section 29.2** Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal

**WISEAU *et al.***

Plaintiffs / Defendants by Counterclaim (Moving Parties)

**-and-**

**HARPER *et al.***

Defendants / Plaintiffs by Counterclaim (Respondents)

Divisional Court File No. 081/18

Court File No. : CV-17-577020

***Ontario***  
**SUPERIOR COURT OF JUSTICE**  
**(DIVISIONAL COURT)**

Proceeding Commenced at Toronto

**MOVING PARTIES' FACTUM**  
**(MOTION FOR LEAVE TO APPEAL)**

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