Federal Court Cour fédérale

Date: 20250507

Docket: T-724-21

Citation: 2025 FC 840

Ottawa, Ontario, May 7, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

PLANET FITNESS INC.

Plaintiff/Defendant by Counterclaim

and

PLANET FITNESS FRANCHISING LLC,
ALSO KNOWN AS PFIP, LLC

Defendants/Plaintiffs by Counterclaim

~~CONFIDENTIAL~~ JUDGMENT AND REASONS

I. Overview

[1] Planet Fitness Franchising LLC and PFIP LLC [Defendants] have brought a motion for an order finding the Plaintiff/Defendant by Counterclaim Planet Fitness Inc [Plaintiff] and its director, Shawn Freeborn, in contempt of Court. The Defendants say that Mr. Freeborn

improperly disclosed information he obtained in the course of a confidential mediation, in violation of an order or process of this Court.

[2] The mediation was convened at the Court's direction with a view to resolving the Plaintiff's action against the Defendants for expungement of their 19 registered PLANET FITNESS trademarks, and damages for passing off. The Plaintiff claims to be the owner of the unregistered trademark PLANET FITNESS, which it has used in connection with a gym in Red Deer, Alberta since at least 1992. The Defendants have counterclaimed for infringement of their registered trademarks and depreciation of goodwill.

[3] For the reasons that follow, the Defendants have established beyond a reasonable doubt that the Plaintiff and Mr. Freeborn are in contempt of Court.

II. Evidence

[4] The evidence adduced in this contempt motion consists primarily of the Court record and videos Mr. Freeborn made and posted on social media. All of the videos relied upon by the Defendants were admitted into evidence by consent. Excerpts from the videos were played during the hearing of the motion, and the Court agreed to review the videos in their entirety after the hearing. For the most part, the transcripts of relevant portions of the videos reproduced below are taken from the Defendants' written submissions.

[5] On November 23, 2023, Associate Judge Catherine Coughlan directed the parties to attend a one-day mediation. Associate Judge Michael Crinson was appointed as mediator.

[6] On December 20, 2024, Associate Judge Coughlan issued an order scheduling the mediation for February 20, 2024 in Edmonton, Alberta. The parties were directed to exchange "without prejudice" mediation briefs by February 5, 2024.

[7] On February 10, 2024, Mr. Freeborn posted a 20-minute video to social media, in which he said the following:

> […] and they keep pushing and pushing … now we have a deadline – and when I say deadline, we have an upcoming event February 20th I don't know why cause they pretty much [redacted] … I'm not gonna talk because there's certain things that I, I believe that I'm not exposed to, you know being that we're going to a federal court and I'm gonna be careful about that […]
>
> […] we are gonna be going to the table on February I believe the 20th, coming up and I'm gonna keep you tuned right up to going up to that meeting I hope there will be a judge […]

[8] The parties attended the mediation with Associate Judge Crinson on February 20, 2024. Mr. Freeborn was accompanied by his son, Joshua Freeborn. Justin Vartanian, General Counsel for the Defendants, travelled from the United States to participate in the mediation. Legal counsel for all parties were also present.

[9] Associate Judge Crinson informed the participants at the beginning of the mediation that everything said during the process would be confidential. Mr. Freeborn does not dispute this, but nevertheless maintains that he understood only that the mediation would be "non-prejudice" (*i.e.*, "without prejudice"). He also claims not to have understood that Associate Judge Crinson was a judge.

[10] During the mediation on February 20, 2024, Associate Judge Crinson met with the parties both together and separately. Settlement offers were exchanged. One of the Defendants' offers included the following terms:

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

[11] The case did not settle on February 20, 2024, but the parties agreed to continue the mediation by Zoom videoconference at a later date.

[12] On February 21, 2024, Mr. Freeborn posted an 18-minute video to social media, in which he said the following:

[redacted]

[redacted]

> We're going to really be exposing this industry. This is going to be my goal, and quite honestly this is better than having a settlement and [redacted]
>
> I'm going to need some mediation people. [redacted] that I'm going to put together to come out after you. […]

[13] On March 21, 2024, Mr. Freeborn posted a 10-minute video to social media, in which he said the following:

> [redacted], you know, we have a geographical reach. They stopped us from opening in Edmonton, and that was done, you know, quite honestly, very, very mis-handedly. […]
>
> [redacted]

[14] The mediation resumed by Zoom videoconference on March 25, 2024. Associate Judge Crinson again informed all participants that everything said during the mediation would be confidential.

[15] On March 26, 2024, Mr. Freeborn reposted the 18-minute video that he had first posted on February 21, 2025 to his Planet Fitness Alberta Facebook page. He also posted an additional two-minute video, in which he said the following:

> Planet Fitness Inc live trading on the stock market. And I've been watching it now, having my coffee, [redacted]
>
> [..] And I've got a lot to say about this being in meetings with them right now[redacted] rights, the way they've dealt with me. I've been in litigation, we're headed to Federal Court. […]

[16] On April 3, 2024, the Defendants sent a letter to Plaintiff's counsel demanding that the videos be removed immediately, and expressing serious concern about continuing the mediation given the breach of confidentiality. The Defendants also informed the Court of the videos. They asked that the date of April 4, 2024, originally reserved to continue the mediation, be used instead to schedule a motion for sanctions and injunctive relief. The videos initially uploaded on February 21, 2024 and February 22, 204 were taken down that same day.

[17] On April 4, 2024, the parties appeared before Associate Judge Crinson by Zoom videoconference, and the Defendants advised of their intention to bring a motion for a contempt show cause hearing.

[18] Associate Judge Catherine Coughlan granted the Defendants' motion for a contempt show cause hearing on August 22, 2024.

III. Issues

[19] This motion for an order finding the Plaintiff and Mr. Freeborn in contempt of Court raises the following issues:

A. Was there an order or process of the Court that clearly required mediation discussions and materials to be kept confidential?

B. Did Mr. Freeborn have actual knowledge of the confidentiality requirement?

C. Did Mr. Freeborn intentionally disclose confidential information obtained in the course of the mediation?

IV. Analysis

[20] Rule 466 of the *Federal Courts Rules*, SOR/98-106, provides as follows:

Contempt	**Outrage**
466 Subject to rule 467, a person is guilty of contempt of Court who	**466** Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :
(a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;	a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance;
(b) disobeys a process or order of the Court;	

(c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court; […]	b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour; c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour; […]

[21] In *ASICS Corporation v 9153-2267 Québec inc*, 2017 FC 5, Chief Justice Paul Crampton explained the standard of proof for civil contempt (at paras 32-33, citing *Carey v Laiken*, 2015 SCC 17 [*Carey*]):

> Civil contempt has three elements which must be established beyond a reasonable doubt. First, the order or judgment that is alleged to have been breached must state clearly and unequivocally what should and should not be done. Second, the party alleged to be in breach must have actual knowledge of the order or judgment in question. Third, that party must have intentionally done the act that the order or judgment prohibits, or intentionally failed to do the act that the order or judgment compels (*Carey v Laiken*, 2015 SCC 17, at paras 32–35 [*Carey*]; Rul 469).
>
> With respect to the third element, all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has had notice. There is no additional requirement to establish "contumacious" intent, that is to say, an intention to disobey, in the sense of desiring or knowingly choosing to disobey the order or judgment in question. (*Carey*, above, at paras 39–42, and 47).

A. *Was there an order or process of the Court that clearly required mediation discussions and materials to be kept confidential?*

[22] There is no serious question that Associate Judge Crinson informed all participants in the mediation on February 20, 2024, and again on March 25, 2024, that the process was intended to

be confidential. This amounted to a direction to the participants to keep all information exchanged in the course of the mediation confidential.

[23] Rule 388 of the *Federal Courts Rules* provides as follows:

Confidentiality	**Confidentialité**
388 Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.	**388** Les discussions tenues au cours d'une conférence de règlement des litiges ainsi que les documents élaborés pour la conférence sont confidentiels et ne peuvent être divulgués.

[24] The mediation briefs submitted on behalf of the Defendants stated in bold print on each page that the contents were "CONFIDENTIAL Pursuant to Direction dated November 23, 2023, and Rules 386 to 391".

[25] In *Njoroge v Canada (Attorney General)*, 2023 FCA 98 [*Njoroge*], the Federal Court of Appeal (*per* Rennie J.) stated (at paras 10-11):

> […] the failure to comply with a direction appears to constitute conduct amounting to contempt under three categories listed in Rule 466: Rule 466(b) ("disobeys a process … of the Court"); Rule 466(c) ("interfere[s] with the orderly administration of justice"); or Rule 466(d) ("is an officer of the Court and fails to perform his or her duty"). Indeed, this Court has emphasized that a finding of contempt may result from a broad range of actions with the effect of obstructing justice, and does not arise only upon breach of an order of a tribunal or court (*Professional Institute of the Public Service of Canada v. Bremsak*, 2013 FCA 214 at para. 44).
>
> Directions are not mere suggestions as to what might happen in the conduct of a case, but are the expectation of the Court as to what will happen. Directions carry the weight of judicial authority and entail sanctions for non-compliance (*Fibrogen, Inc. v. Akebia*

> *Therapeutics, Inc.*, 2022 FCA 135 at para. 57). There are, however, many remedies short of contempt that are available where a party fails to comply with a direction. Those arise from the Court's plenary jurisdiction to manage its own process and proceedings. Because of this, contempt in the context of failure to follow a direction is, necessarily, a rare occurrence.

[26] The Plaintiff's written submissions respecting the Defendants' motion for a contempt show cause hearing included the following admission:

> [Associate] Judge Crinson did advise the parties during the mediations that the content of the mediations was confidential, although Mr. Freeborn misperceived all directive[s] as "without prejudice". It was not Mr. Freeborn's intention to disobey [Associate] Judge Crinson. Associate Judge Coughlan's December 20, 2023 order directed the parties to serve and file "without prejudice" mediation briefs. The Plaintiff's video content did discuss the mediation. Technically, then, the Defendants have established a *prima facie* case of contempt which would invite this Court to issue a show cause order.

[27] The Defendants have established, beyond a reasonable doubt, that there was an order or process of the Court that clearly required mediation discussions and materials to be kept confidential.

B. *Did Mr. Freeborn have actual knowledge of the confidentiality requirement?*

[28] There is no dispute that Mr. Freeborn was present at the mediation on February 20, 2024, and again on March 25, 2024, and heard Associate Judge Crinson's explanations of how the process would unfold. The evidence clearly establishes that this included the requirement that all information exchanged in the course of the mediation must be kept confidential. Counsel for the

Plaintiff admitted as much in the written submissions filed in response to the Defendants' motion for the contempt show cause order.

[29] Mr. Freeborn acknowledged in his testimony that Associate Judge Crinson informed all parties to the mediation that the process was confidential: "I don't disagree that the judge said it. Of course, he would have said it. I disagree that I understood it."

[30] Mr. Freeborn and his son both testified that they did not understand Associate Judge Crinson to be a judge. In the video he posted to social media on February 10, 2024, Mr. Freeborn acknowledged that he would be attending a mediation at the Federal Court. It is unclear whether he hoped a judge would be present, or that he knew a judge would be present and he hoped to keep his audience "tuned right up to going up to that meeting". At a minimum, Mr. Freeborn was aware that a judge could be present.

[31] Even if one accepts that Mr. Freeborn did not understand Associate Judge Crinson to be a judge, there is no dispute that the mediation was convened by order of Associate Judge Coughlin and took place at the Federal Court in Edmonton. It was therefore a process of the Court within the meaning of Rule 466(b).

[32] Mr. Freeborn seems to have acknowledged in the video he posted on February 10, 2024 that some aspects of the mediation would be confidential: "I'm not gonna talk because there's certain things that I, I believe that I'm not exposed to, you know being that we're going to a

federal court and I'm gonna be careful about that." It is unclear whether Mr. Freeborn intended to say "supposed to", rather than "exposed to".

[33] Mr. Freeborn was shown copies of the mediation brief submitted on behalf of the Defendants. The document was marked "CONFIDENTIAL", and referred to an expert report whose author expressed the view that [redacted]. The Defendants' mediation brief also stated [redacted]

[34] Mr. Freeborn said he assumed that he had read the mediation brief submitted on behalf of the Defendants, but he was unsure. He said that he relied on his counsel to keep him apprised of the contents of legal documents.

[35] Mr. Freeborn testified that he understood only that the mediation would be "non-prejudice", or "without prejudice". He said he clearly remembered explaining to his son Joshua that this meant neither party could use the information exchanged during the mediation in subsequent legal proceedings. He recalled that his son was very nervous, and was swaying in his chair from side to side.

[36] Mr. Freeborn's testimony was self-serving and unconvincing. The testimony of his son Joshua was equally unsatisfactory. It strains credulity to claim that Mr. Freeborn and his son formed identical misapprehensions of whether the mediation was intended to be confidential, and whether Associate Judge Crinson was in fact a judge.

[37] Joshua's testimony included the following exchange with counsel for the Plaintiff:

> A. […] Honestly, I remember even when we got in separate rooms, we – we were – me and the judge were – like, we kinda talked about it and stuff, and, yeah, so non-prejudice, yeah.
>
> Q. Were you aware he was a judge at the time?
>
> A. What's that, sorry?
>
> Q. Were you aware he was a judge at the time?
>
> A. No – I, immediate, no. To be honest, like, this is new to me.

[38] Joshua departed from the line of questioning prepared by Plaintiff's counsel to corroborate his father's account of their discussion regarding the meaning of the term "non-prejudice", or "without prejudice":

> Q. So originally, I understand you were all in the room together but eventually moved to breakout rooms, right?
>
> A. Separate rooms? Yeah.
>
> Q. Yeah.
>
> A. Yeah.
>
> Q. Okay. And so how did that go?
>
> A. Well, for – I do kinda want to go a little bit back too. When we kinda started, you know, I was kinda pretty nervous and stuff. […] but, you know, swing my chair back and forth and – you

> know, and kinda ask my dad, like, what does that mean, you know? And we were talking non-prejudice, that nothing can be used against us in court, them or us.

[39] The Court was left with the strong impression that Mr. Freeborn and his son had planned their testimony carefully, and Joshua was determined to reinforce his father's evidence, whether or not the questions of counsel invited him to do so.

[40] Mr. Freeborn acknowledged that he received the order of Associate Judge Coughlan directing that a mediation take place. He was aware that the mediation was a process of the Court, and a judge could be presiding. He recalled reading the parties' mediation briefs, both of which were marked as confidential. The Plaintiff's counsel was in attendance throughout the mediation, and available to provide advice regarding the process.

[41] Mr. Freeborn was present both times Associate Judge Crinson informed the parties that the process was intended to be confidential. Moreover, the video he posted to social media on February 10, 2024 suggests he was aware of the possibility that information concerning the mediation may be confidential.

[42] The Defendants have established, beyond a reasonable doubt, that Mr. Freeborn had actual knowledge of the confidentiality requirement for all information exchanged in the course of the mediation.

C. *Did Mr. Freeborn intentionally disclose confidential information obtained in the course of the mediation?*

[43] There is no serious question that the videos posted by Mr. Freeborn on various social media platforms disclosed confidential information he obtained in the course of the mediation. Counsel for the Plaintiff admitted as much in the written submissions filed in response to the Defendants' motion for the contempt show cause order.

[44] The confidential information that was improperly disclosed by Mr. Freeborn included the following:

(a) the Defendants' settlement offer was comparable to [redacted];

(b) Associate Judge Crinson [redacted];

(c) the Defendants had retained an expert who expressed the view that [redacted];

(d) [redacted]; and

(e) the Defendants' offer included [redacted].

[45] Mr. Vartanian was asked to comment on the following excerpt from the video Mr. Freeborn posted to social media on February 21, 2024:

> And here's one thing I really would like to say. [redacted] You're not going to go home – you're not worried about this. This is left on us, with your – the offer you've made is left on us.
>
> But I'm coming back at you, Justin, and I'm not going to go away. And if you think that you're going to continue to build Alberta branches in this province and around me and especially in Red Deer, Justin, you have a fight that you've never known before, and it is called a legal battle. […]

[46] Mr. Vartanian described Mr. Freeborn's comments as "[j]ust completely disturbing. […] It felt like a threat to me". He confirmed that Mr. Freeborn's comments were made in reference to discussions that took place at the mediation on February 20, 2024.

[47] The Plaintiff notes that a finding of contempt for failing to respect a direction is a rare occurrence (citing *Njoroge* at para 11). The contempt power should be used cautiously and with great restraint, and is an enforcement measure of last resort (citing *Carey* at para 36).

[48] The confidentiality of mediation is intended to encourage out-of-court settlements and thereby contribute to improving access to justice. The requirement of confidentiality stems from the principle that parties will hesitate to commit themselves in open negotiations if they fear that concessions made can be used against them (*Thibodeau v Halifax International Airport Authority*, 2018 FC 223 at para 33).

[49] Mr. Freeborn's breach of the confidentiality necessary to ensure a viable mediation process was egregious. It undermined the parties' faith in the process, and resulted in the waste of scarce judicial resources. Mr. Freeborn's conduct was exacerbated by the personal threats included in his commentary, and his unsatisfactory testimony before this Court.

[50] Mr. Vartanian testified to his clients' loss of confidence in the mediation process following Mr. Freeborn's breach of confidentiality. He also recounted the shock he felt personally due to the threatening tone of some of Mr. Freeborn's remarks.

[51] The Plaintiff argues that the videos Mr. Freeborn posted to social media were expressions of frustration. After more than eight years, his encounter with Mr. Vartanian was the first time the Defendants had agreed to meet in person to resolve the dispute. Mr. Freeborn was disappointed, even insulted, by the settlement offers he received. Much of the information he disclosed on social media was already public knowledge, and none of it caused the Defendants any significant financial prejudice. Mr. Freeborn removed the offending videos the moment he was asked to.

[52] None of these considerations provide Mr. Freeborn with a defence to the charge of contempt, although they may be relevant to the Court's assessment of the appropriate penalty.

[53] The function of the contempt power is not merely to penalize a breach of Court processes, but also to deter breaches and encourage respect for the administration of justice

(*Carey* at para 41). It is imperative that the Court's orders and processes be obeyed (*Viking Corp v Aquatic Fire Protection Ltd* (1985), 2 CPR (3d) 470 (FCTD) at 471-2).

[54] The Defendants have established, beyond a reasonable doubt, that Mr. Freeborn's disclosure of confidential information obtained in the course of the mediation was intentional, and sufficiently serious to warrant a finding of contempt.

V. Conclusion

[55] The Defendants have established beyond a reasonable doubt that the Plaintiff and Mr. Freeborn are in contempt of Court. The penalty will be determined following a further hearing of the Court, to be scheduled at a later date.

[56] The parties may advise the Court, within twenty-one (21) days of the date of this Judgment and Reasons, whether any portions of the Reasons must be redacted before they are made public.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Plaintiff Planet Fitness Inc and Mr. Shawn Freeborn are in contempt of Court.

2. The penalty will be determined following a further hearing of the Court, to be scheduled at a later date.

3. The parties may advise the Court, within twenty-one (21) days of the date of this Judgment and Reasons, whether any portions of the Reasons must be redacted before they are made public.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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~~**CONFIDENTIAL**~~ **JUDGMENT AND REASONS:**	FOTHERGILL J.
DATED:	MAY 7, 2025

APPEARANCES:

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