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PRESENT: THE HONOURABLE MADAM JUSTICE MACTAVISH

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BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)

Other Decisions

- Federal Court of Appeal
Tax Court of Canada
Supreme Court of Canada
Office of the Commissioner for Federal Judicial Affairs

Applicant

and

CANO TECH INC.

Respondent

REASONS FOR ORDER AND ORDER

[1] The Canadian Private Copying Collective ("CPCC") brings this application under the provisions of subparagraph 34(4)(c)(i) and 88(1) of the Copyright Act, R.S.C. 1985, c. C-42, seeking payment of \$79,791.47, plus interest, allegedly due from the respondent Cano Tech Inc. under the Private Copying Tariffs. The monies claimed relate to the importation and sale of blank audio recording media by Cano Tech between 2000 and 2003.

[2] Cano Tech argues that it should not be compelled to pay the levies claimed by the CPCC, as the sale of these items would not ordinarily have been subject to the levy. According to Cano Tech, it was only through inadvertence that it failed to complete the necessary paperwork with the CPCC so as to render the sales 'levy-free'. Moreover, Cano Tech says, the conduct of the CPCC in the course of its audit of Cano Tech, as well as its conduct in the course of this proceeding, is such that the CPCC should not be entitled to recover any unpaid levies from Cano Tech.

[3] Cano Tech also submits that in any event, the audit provisions of the Private Copying Tariffs are ultra vires the Copyright Act, and also violate section 8 of the Canadian Charter of Rights and Freedoms.

The Private Copying Tariffs

[4] Prior to March 19, 1998, the unauthorized reproduction of musical works, performances and sound recordings (referred to collectively as "recorded music"), for private use, constituted copyright infringement.

[5] Because of the difficulty in enforcing these rights, Parliament enacted Part VIII of the Copyright

Act, which provides that the copying of recorded music for private use no longer amounts to copyright infringement.

[6] At the same time, the legislation was amended to create a scheme to provide rightsholders with equitable remuneration through the imposition of a tariff or levy on manufacturers and importers of blank audio recording media sold in Canada. As the Federal Court of Appeal noted in *Canada (CPCC) v Canadian Storage Media Alliance*, [2004] F.C.J. No. 2115, 2004 FCA 424, leave to appeal to the Supreme Court of Canada denied, [2005] S.C.C.A. No. 74, the levy was created to support creators and cultural industries, by striking a balance between the rights of creators and those of users. (at ¶ 51)

[7] The rate of the levy is fixed each year through the certification of a *Private Copying Tariff* by the Copyright Board of Canada, in accordance with Part VIII of the Act. Since December of 1999, the Board has certified four tariffs determining which blank audio recording media are subject to levies, the amounts of those levies, and the terms and conditions applicable to the payment of those levies.

[8] The CPCC is a non-share, non-profit corporation, whose members are collective societies holding private copying remuneration rights on behalf of rightsholders. The CPCC has been designated by the Copyright Board of Canada as the collecting body, in accordance with paragraph 83(8)(d) of the Act.

[9] Levies collected by the CPCC are then distributed to eligible collective societies for redistribution to the rightsholders themselves.

[10] Under the provisions of the *Copyright Act* and the *Private Copying Tariffs*, manufacturers and importers of blank audio recording media are obliged to track and report sales activity to the CPCC. They must also keep records from which the CPCC can readily ascertain, through an audit, the amounts payable. The *Tariffs* also require that manufacturers and importers pay interest on overdue amounts owed to CPCC.

### **The Zero Rating Program**

[11] Because of objections raised by certain businesses and institutions, the CPCC instituted a program whereby it may agree to voluntarily waive the collection of levies from certain approved manufacturers and importers who sell blank audio recording media to specified classes of purchasers such as courts, law enforcement agencies, and religious and educational institutions, who do not use the media to copy music. This is known as the "Zero-rating Program".

[12] In order to be able to benefit from levy-free sales, eligible purchasers and companies selling blank audio recording media to them must enter into "Zero-rating Agreements" with the CPCC. Only distributors that have entered into Zero-rating Agreements with the CPCC are entitled to make royalty-free sales under the Zero-rating Program.

[13] Zero-rating Agreements impose a number of obligations on distributors of blank audio recording media, including the obligation to track the details of each royalty-free sale and to report these sales to the CPCC in accordance with the schedule established under the applicable tariff. These reports are subject to verification by the CPCC through the audit process.

### **The Facts Giving Rise to this Application**

[14] Cano Tech Inc. is a small Ontario corporation, whose president is Rajabali Khoja. Cano Tech's primary business is the distribution of accessories for video and audio cassettes, such as cases, labels and sleeves, although it also manufactures video and audio cassettes, which are mostly very short in length and are pre-recorded. In addition, the company purchases and sells blank recording media.

[15] It is common ground that Cano Tech has never entered into a Zero-rating Agreement with the CPCC, and that the CPCC never waived its right to collect levies from Cano Tech on its sales of blank audio recording media.

[16] Cano Tech came to the attention of the CPCC through a report filed by one of Cano Tech's Canadian customers, a company which will be referred to in this decision as "VWV". This report indicated that VWV had purchased blank audio recording media from Cano Tech.

[17] VWV is registered under the CPCC's Zero-rating Program.

[18] On May 13, 2003, the CPCC sent Cano Tech a letter advising that it had come to its attention that, as a manufacturer or importer of blank audio recording media, Cano Tech had failed to report the sales activity and to remit the levies required by the *Tariffs*. The letter further requested that Cano Tech submit all outstanding reports and payments, dating back to December of 1999, which was when the first tariff came

into effect.

[19] By letter dated May 28, 2003, Cano Tech responded to the CPCC. Cano Tech provided the CPCC with a report of its sales activity for the period in question, and enclosed a cheque in the amount of \$2,928.29, representing the levies due with respect to 10,732 blank audio cassettes sold by Cano Tech during the period in question, which Cano Tech concedes were activities covered by the *Tariffs*.

[20] Cano Tech also indicated to the CPCC that it tried not to sell to customers who were subject to the *Tariffs*. The company acknowledged having sold some 285,968 additional blank audio cassettes of either 60 or 90 minutes in length during the period under review, but claimed that these sales were made to customers who were exempt from paying the levies.

[21] Cano Tech did not report selling any other form of blank audio recording media at this time.

[22] The CPCC responded to Cano Tech by letter dated June 9, 2003, observing that Cano Tech was not authorized to dispose of blank audio recording media on a zero-rated basis, as it had not first obtained the authorization of CPCC. The CPCC further noted that, as a result, the transactions relating to the sale of the 285,968 blank audio cassettes, which were reported by Cano Tech as "zero-rated", were in fact subject to the levy. An invoice for \$79,781.47, representing the unpaid levies, was enclosed, as was an invoice for an additional \$285.39 for interest on the payment already made.

[23] While Mr. Khoja confirmed on cross-examination that he had been aware of the levy system as early as 2000, he also stated that he believed that as he was allegedly only supplying blank audio recording media to zero-rated purchasers, the company did not need to worry about the levy.

[24] Mr. Khoja asserts that it was only when Cano Tech received the CPCC's letter in May of 2003 that he became aware of Cano Tech's obligation to report to and register with the CPCC. Had he been aware that Cano Tech was required to enter into a Zero-rating Agreement with the CPCC, Mr. Khoja says that he would have had the company do so, as it was a relatively easy thing to do.

[25] It is also clear from Mr. Khoja's evidence that, despite the fact that he was aware of the levy system, at no time did he make any inquiries, or exercise any measure of diligence so as to ensure that his company complied with its obligations under the *Tariffs*.

### **The Settlement Discussions**

[26] The CPCC was initially prepared to settle with Cano Tech on the basis that Cano Tech would pay \$285.39, representing the outstanding interest on the \$2,928.29 already paid by the company. At this point, the CPCC was prepared to waive payment of the \$79,781.47 in outstanding levies owing with respect to the sale of the 285,968 other blank audio cassettes, and to issue a retroactive registration to Cano Tech as a Zero-rated vendor. This offer was, however, made conditional on the completion of an audit of Cano Tech's files, in order to verify the accuracy of the information provided to CPCC by Mr. Khoja.

[27] By letter dated January 22, 2004, the CPCC confirmed that Cano Tech was willing to resolve this matter on this basis. Cano Tech was advised that the firm of Gottschalk Forensic Accounting and Valuations Inc. had been retained by the CPCC to conduct the audit. The letter further advised Mr. Khoja that the records to be made available to the auditors included sales records, purchasing records, inventory records, as well as access to physical inventory, a list of locations, banking records, general ledgers, financial statements and all company prepared accounting records and supporting records.

[28] The January 22, 2004 letter advised at this time that the audit would take one to two days to complete, and proposed several possible dates for the audit to commence. The date of February 9, 2004 was subsequently agreed upon by the CPCC and Mr. Khoja as the date to start the audit.

[29] Amongst other things, the letter of instructions provided by the CPCC to the Gottschalk firm directed the auditors to verify that the only blank audio recording media manufactured and sold by Cano Tech were the 60 or 90 minute audio cassettes referred to in Cano Tech's June 9, 2003 reports.

[30] In contrast, Mr. Khoja deposes that the only purpose of the audit was to ascertain the veracity of the sales numbers for audio cassettes that he had provided to the CPCC on Cano Tech's behalf.

[31] I do not accept Mr. Khoja's evidence in this regard. The CPCC's January 22, 2004 letter makes it clear that the auditor wanted to examine a wide range of Cano Tech's records. Nothing in the letter limited the documents requested to those dealing with the manufacture, importation or sale of audio cassettes.

Moreover, common sense dictates that in order to confirm that all leviable transactions had been reported, the CPCC would want to verify that Cano Tech was not importing or manufacturing any other type of blank audio recording media that would attract the levies. Indeed, without this information, it would not have been possible to verify the accuracy of the reports provided by Cano Tech.

### **The Audit of Cano Tech's Records**

[32] On February 9, 2004, Mr. Gottschalk, the President of Gottschalk Forensic Accounting and Valuations Inc., attended at the Cano Tech premises in Mississauga in order to commence the audit of Cano Tech's records. Mr. Khoja was present, and initially assisted Mr. Gottschalk by answering Mr. Gottschalk's questions, and by making copies of certain documents as requested by Mr. Gottschalk.

[33] Mr. Gottschalk also brought a camera with him to Cano Tech's premises. There is, however, no evidence before the Court that the camera was ever used.

[34] According to Mr. Gottschalk, while Mr. Khoja was initially very cooperative, his attitude changed when Mr. Gottschalk began uncovering information which indicated that Cano Tech was dealing in blank recordable compact discs ("CDRs"). Not only had these CDRs not been reported to the CPCC, according to Mr. Gottschalk, Mr. Khoja had specifically advised him earlier in the day that Cano Tech did not deal in CDRs.

[35] According to Mr. Gottschalk, when he started to uncover evidence that Cano Tech was dealing in CDRs, Mr. Khoja said "You got me. You know what you are doing." Mr. Khoja does not deny making this statement.

[36] While Mr. Khoja initially told Mr. Gottschalk that the company purchased small numbers of CDRs from local retail stores, Mr. Khoja was unable to produce any receipts to confirm this. Moreover, as Mr. Gottschalk's investigation continued, he discovered that Cano Tech in fact purchased large numbers of CDRs from a Canadian numbered company, although the real source of these purchases remains in some doubt.

[37] Mr. Khoja does not deny having told Mr. Gottschalk that Cano Tech did not deal in CDRs. However his position is that the CPCC was only entitled to audit his records insofar as they related to the manufacture and sale of audio cassettes. According to Mr. Khoja, the CPCC's auditor had no business asking about other types of blank audio recording media.

[38] Mr. Khoja says that it was only when he realized that Mr. Gottschalk was going beyond what he says was the agreed-upon scope of the audit that he became upset and withdrew his consent to the process.

[39] As was previously noted, I do not accept Mr. Khoja's evidence in this regard, and find that Mr. Khoja had initially consented to the verification of all of Cano Tech's sales, so as to ensure that all sales subject to the levy had been reported to the CPCC.

[40] Mr. Gottschalk says that when he realized that Cano Tech was also dealing in CDRs, Mr. Gottschalk asked Mr. Khoja to provide written consent for the CPCC to contact Cano Tech's supplier, so as to verify the information relating to Cano Tech's purchases. Mr. Khoja declined to provide such consent, and it is common ground that he was entirely within his rights to do so.

[41] Mr. Gottschalk also says that he asked Mr. Khoja to produce evidence that the CDRs purchased by Cano Tech were purchased domestically, and were thus exempt from the levy. According to Mr. Gottschalk, it was at this point that Mr. Khoja ceased to be cooperative.

[42] At the end of the day, Mr. Gottschalk advised Mr. Khoja that he had not completed his audit, and would have to return the following day to complete the task. Mr. Khoja advised it was not convenient to have Mr. Gottschalk return the next day, and it appears that it was agreed that Mr. Gottschalk would return to Cano Tech on a mutually agreeable date.

[43] On March 1st, 2004, the CPCC wrote to Mr. Khoja, indicating that Mr. Gottschalk's audit had raised some significant concerns, particularly with respect to the purchase and sale of CDRs by Cano Tech. Concern was also expressed with respect to the alleged sale of 74 and 80 minute VHS media by Cano Tech, as the CPCC's research had evidently disclosed that VHS tapes were not produced in this length.

[44] Videotapes are not subject to levies under the *Private Copying Tariffs*.

[45] The CPCC also advised Cano Tech that a letter would soon be forthcoming from Mr. Gottschalk

identifying the additional documents that he required to complete his audit. Cano Tech was also advised that the CPCC would be unable to finally settle this matter until such time as the outstanding issues were resolved.

[46] On March 3, 2004, Mr. Gottschalk wrote to Mr. Khoja, asking him to provide various documents relating to the purchase and sale of CDRs by Cano Tech, as well as information with respect to the sale of 74 and 80 minute VHS media confirming that these were standard European lengths for VHS media, as had been claimed by Mr. Khoja. Cano Tech was also asked to provide details with respect to payments made by the company to a foreign exchange company known as Cambridge Mercantile. Mr. Gottschalk informed Mr. Khoja that he was required to complete his audit by March 19, 2004. As a consequence, Mr. Gottschalk asked that the documents be produced no later than March 12, 2004.

[47] The documents requested by Mr. Gottschalk were never produced by Cano Tech. Instead, Mr. Khoja wrote to the CPCC on March 10, 2004, complaining that Mr. Gottschalk had taken copies of confidential business records belonging to Cano Tech, without Mr. Khoja's consent.

[48] While Mr. Khoja admits that he himself made the copies of the documents in question at Mr. Gottschalk's request, he says that he never consented to the documents being removed from Cano Tech's premises.

[49] Given that Mr. Gottschalk had the original documents in front of him when he asked for the copies, one is left to ask why he would want copies of the documents, unless the copies were for him to retain for his records? In these circumstances, I find Mr. Khoja's claim that he did not consent to the removal of the documents to be disingenuous.

[50] Moreover, Mr. Khoja asserted in his letter that the audit amounted to an illegal search, and that it constituted professional misconduct on the part of Mr. Gottschalk. According to Mr. Khoja, Mr. Gottschalk told him that his goal in the audit was to find out where Cano Tech got its blank recording media, so that he could get more contracts from the CPCC to audit those companies, providing a steady stream of business for his company.

[51] Mr. Gottschalk vehemently denies ever saying any such thing. I find it improbable in the extreme that a professional individual such as Mr. Gottschalk would tell a complete stranger that his primary goal in conducting an audit on behalf of a client was to generate more business for his company. Thus I prefer the evidence of Mr. Gottschalk to that of Mr. Khoja on this point, and find that no such statement was ever made by Mr. Gottschalk.

[52] Indeed, these and other statements by Mr. Khoja, a number of which have been shown to be untrue, lead me to the conclusion that wherever the evidence of Mr. Khoja conflicts with that of Mr. Gottschalk, I prefer the evidence of Mr. Gottschalk.

[53] Mr. Khoja concluded his March 10 letter by stating that Cano Tech did not manufacture or import CDRs, but rather purchased them from local suppliers for resale. Mr. Khoja acknowledged that Cano Tech did manufacture custom length VHS cassettes.

[54] On cross-examination, Mr. Khoja stated that the reason that he did not supply the documents requested in Mr. Gottschalk's March 3rd letter was because he did not feel that the auditor had a right to take the copies of documents off the Cano Tech premises, based on privacy considerations. As was noted earlier, I have found that Mr. Khoja's actions in making copies of the documents for Mr. Gottschalk make it clear that he had implicitly consented to Mr. Gottschalk retaining possession of the documents.

[55] Mr. Khoja also stated that he had concerns that CPCC was sharing the information obtained from Cano Tech with third parties. Cano Tech has since described the audit as being a "fishing expedition", designed to obtain evidence to be used against third parties. In this regard, Cano Tech points to a demand letter written by the CPCC to one of Cano Tech's suppliers just four days after the audit, advising that it had come to the attention of the CPCC that the company imported and sold blank audio recording media. The letter demanded that the company submit all outstanding reports and payments to the CPCC.

[56] I do not accept Cano Tech's argument that the CPCC audit was a 'fishing expedition'. As it admitted in its own reports, for years Cano Tech had manufactured and sold blank audio recording media that were subject to levies, without reporting these sales to the CPCC, and without remitting the necessary levies. Indeed, Cano Tech only acknowledged these sales when it was specifically asked to do so by the CPCC.

[57] Armed with the knowledge that Cano Tech had not complied with its obligations under the *Private Copying Tariffs*, the CPCC was nevertheless prepared to settle with Cano Tech, conditional upon it being satisfied that Cano Tech had fully and honestly reported its leviable sales. I am satisfied that this was

the purpose of the audit, and that it could not in any way be considered to be a fishing expedition.

### The Audit Report

[58] Mr. Gottschalk issued his report on April 19, 2004, without having received any of the documents requested from Cano Tech. In his report, Mr. Gottschalk indicated that many of the standard documents that he needed to verify the accuracy of the reports filed by Cano Tech were not readily available during his visit to the Cano Tech premises on February 9, 2004, including, in particular, the payments journal.

[59] Although he was unable to complete the audit, the information that he was able to obtain from Cano Tech led Mr. Gottschalk to have serious concerns with respect to the accuracy of the reports that the company had provided to the CPCC. As was mentioned earlier, Mr. Gottschalk explained on cross-examination that Mr. Khoja initially claimed that Cano Tech did not deal in CDRs at all, but that after Mr. Gottschalk began uncovering evidence of transactions involving CDRs, Mr. Khoja changed his story, stating that Cano Tech did indeed deal in CDRs, albeit in small quantities.

[60] As Mr. Gottschalk noted, the invoices that he found at the Cano Tech premises related to hundreds of thousands of CDRs, which could hardly be considered to be a small quantity, especially for a company the size of Cano Tech.

[61] Mr. Gottschalk's report further indicated his concern that although the CDRs appear to have been purchased from a numbered company in Canada, they were in fact shipped to Cano Tech directly from the United States. Moreover, in at least one case, payment for the CDRs was made to Cambridge Mercantile in the United States, rather than the Canadian numbered company. This gave rise to questions as to who the importer of the CDRs really was.

[62] Mr. Gottschalk also indicated that Mr. Khoja had given conflicting information with respect to the types of VHS tapes handled by Cano Tech. Moreover, Mr. Gottschalk observed that in one case, a purchase order referred to VHS tapes, whereas the Bill of Lading for what appeared to be the same transaction referred to CDRs. As a consequence, there were concerns that leviable imports of CDRs may have been disguised as levy-free VHS imports.

[63] Cano Tech continues to deny that it ever imported blank CDRs into Canada, or that it has disguised CDR imports as imports of non-leviable videotapes. However, no business records have been provided by Cano Tech to confirm these statements, and the cross-examination of Mr. Khoja on his affidavit raises serious questions as to the veracity of this claim.

[64] As a result of its inability to complete the audit of Cano Tech, the settlement negotiations between the CPCC and Cano Tech broke down, and the CPCC then began this application to enforce its rights under the *Private Copying Tariffs*.

### Issues

[65] Cano Tech raises a number of issues in response to the CPCC's application. In its memo of fact and law, Cano Tech argued that the *Private Copying Tariffs* were unconstitutional as an illegal tax. However as a consequence of the decision of the Federal Court of Appeal in *Canada (CPCC) v. Canadian Storage Media Alliance*, above, this argument has now been abandoned.

[66] The remaining issues raised by Cano Tech are:

1. Is the CPCC entitled to recover unpaid levies of \$79,791.47, plus interest, from Cano Tech?
2. Are the audit provisions of the *Private Copying Tariffs* ultra vires the *Copyright Act*?
3. Are the audit provisions of the *Private Copying Tariffs* a violation of section 8 of the *Canadian Charter of Rights and Freedoms*? and
4. Did the CPCC violate Cano Tech's rights under Section 8 of the *Charter* by filing documents taken from Cano Tech in Court, where they are available to the public?

### Is the CPCC Entitled to Recover Unpaid Levies from Cano Tech?

[67] Cano Tech says that it first came to the attention of the CPCC as a result of information obtained by the CPCC from VVW, one of Cano Tech's customers. Cano Tech points to section 10 of the various *Tariffs*, which state that the CPCC shall treat in confidence all material obtained from manufacturers or

importers, unless the manufacturer or importer consents, in writing, to the information being treated otherwise.

[68] There is no evidence before the Court that VVW ever consented to the use of the information obtained from it in this proceeding.

[69] Cano Tech argues that the CPCC's investigation was therefore based upon its improper use of the information obtained from VVW. As a consequence, Cano Tech says, this application should be dismissed. In the alternative, and at a minimum, all of the evidence obtained from VVW, and subsequently from Cano Tech, should be struck from the record.

[70] I do not agree.

[71] In this case, the information obtained from VVW was that VVW had purchased blank audio recording media from Cano Tech. In accordance with section 10 of the relevant *Tariff*, that information is confidential. As a result, the CPCC would not be able to tell others where VVW bought its blank audio recording media.

[72] That said, I do not read the confidentiality provisions of the *Private Copying Tariffs* as precluding the CPCC from acting on information that it receives from reporting companies.

[73] In this case, the CPCC did not disclose any information that it had received from VVW when it wrote to Cano Tech. All that the CPCC said was that it had come to its attention that Cano Tech imported and sold blank audio recording media.

[74] As a consequence, I am not persuaded that there has been any improper conduct by the CPCC in this regard that would warrant either the summary dismissal of this application or the exclusion of the evidence obtained from Cano Tech.

[75] Cano Tech further argues that the CPCC acted in bad faith when it insisted on payment of levies that would have otherwise been exempt under the Zero-rating Program, but for the inadvertent failure of Cano Tech to file the necessary paperwork.

[76] According to Cano Tech, the CPCC continued to act in bad faith in withdrawing its settlement offer unless Cano Tech consented to continue an invasive audit that had little to do with Cano Tech's alleged failure to pay the relevant levies. In such circumstances, Cano Tech says, the CPCC should be estopped from demanding payment in relation to any item that would not be subject to a levy pursuant to the Zero-rating Program.

[77] In this regard, Cano Tech relies on the provision of subsection 88(2) of the *Copyright Act*, which provides that:

**88. (2)** The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84.

**(2)** En cas de non-paiement des redevances prévues par la présente partie, le tribunal compétent peut condamner le défaillant à payer le montant de ces redevances et ce dernier les répartit conformément à l'article 84.

... ..

(4) Before making an order under subsection (2), the court must take into account the following factors:

(4) Lorsqu'il rend une décision relativement au paragraphe (2), le tribunal tient compte notamment des facteurs suivants :

(a) whether the person who failed to pay the levy acted in good faith or bad faith;

a) la bonne ou mauvaise foi du défaillant;

(b) the conduct of the parties before and during the proceedings; and

b) le comportement des parties avant l'instance et au cours de celle-ci;

(c) the need to deter persons from failing to pay levies.

c) la nécessité de créer un effet dissuasif en ce qui touche le non-paiement des redevances.

[emphasis added]

[78] I do not accept Cano Tech's arguments in this regard. There is no evidence before me that would establish any bad faith on the part of the CPCC. Having neglected or failed to enter into a Zero-rating

Agreement with the CPCC, Cano Tech was liable to remit levies on blank audio recording media manufactured or imported by it. The fact that Cano Tech was allegedly ignorant of its obligations in this regard is no defence.

[79] It seems to me that far from acting in bad faith, the CPCC's offer to forgo the levies otherwise payable and to allow Cano Tech to retroactively enter into a Zero-rating Agreement is evidence of a good faith attempt to resolve this matter. In the circumstances, the imposition of a condition on the settlement allowing the CPCC to verify that the information provided by Cano Tech was truthful seems to me to be entirely fair and reasonable, as is evidenced by the fact that this term was initially agreed to by Cano Tech.

[80] Indeed, to the extent that there was bad faith in this case, the bad faith was on the part of Cano Tech.

[81] Taken at its highest, Mr. Khoja's own evidence indicates a remarkable lack of diligence on his part in determining what his company's obligations were under the *Private Copying Tariffs*. That said, the evidence before me casts significant doubt on the veracity of Mr. Khoja's claim that he was unaware of his company's obligations in this regard.

[82] Mr. Khoja had admittedly been aware of the levy program for several years. Mr. Gottschalk's investigation unearthed evidence that strongly suggested that leviable transactions were being disguised in Cano Tech's records as non-leviable transactions. This in turn suggests that there was indeed an awareness of the fact that levies were payable on these transactions, and an intent to avoid payment.

[83] Indeed, the uncontradicted evidence of Mr. Gottschalk is that when he uncovered evidence that Cano Tech was in fact dealing in CDRs, Mr. Khoja said "You got me".

[84] I also do not accept Cano Tech's characterization of the audit as an invasive one that had little to do with its alleged failure to pay the relevant levies. The purpose of the audit was to verify that Cano Tech had fully and accurately reported all the leviable transactions in relation to its importation and sale of blank audio recording media. This was directly related to Cano Tech's alleged failure to pay the relevant levies.

[85] As a consequence, subject to Cano Tech's remaining arguments, I am satisfied that the CPCC is entitled to recover unpaid levies of \$79,791.47, plus interest, from Cano Tech.

Are the Audit Provisions of the *Private Copying Tariffs Ultra Vires* the *Copyright Act*?

[86] Cano Tech also submits that the audit provisions of the *Private Copying Tariffs* are *ultra vires* the *Copyright Act*, and that, as a consequence, all of the evidence obtained by the CPCC as a result of the audit should be declared inadmissible and stricken from the record.

[87] In this regard, Cano Tech points to the fact that there is no grant of any audit power contained anywhere in the *Copyright Act* in relation to the private copying levy. The audit provisions are found solely in the *Tariffs*.

[88] By way of example, the 2003 *Tariff* states that:

9. (1) Every manufacturer or importer shall keep and preserve for a period of six years, records from which CPCC can readily ascertain amounts payable and the information required under this tariff. (1) Le fabricant ou importateur tient et conserve pendant une période de six ans les registres permettant à la SCPCP de déterminer facilement les montants exigibles et les renseignements qui doivent être fournis en vertu du présent tarif.

(2) CPCC may audit these records at any time on reasonable notice and during normal business hours. (2) La SCPCP peut vérifier ces registres à tout moment durant les heures régulières de bureau et moyennant un préavis raisonnable.

[89] As I understand Cano Tech's argument, it says that in seeking unfettered access to all of its records and inventory, the February 9, 2004 audit went beyond the verification of Cano Tech's records, and far exceeded the enabling portions of the *Copyright Act*. According to Cano Tech, the 'audit' was, in fact a full-scale search of the Cano Tech premises.

[90] Further, Cano Tech says, by photocopying and taking numerous documents, without its consent the CPCC unlawfully seized Cano Tech property.

[91] As a result, Cano Tech says that the audit provisions of the *Private Copying Tariffs* are *ultra vires* the rights provided to the CPCC in the *Copyright Act*, and "should be struck". Cano Tech further argues that all of the evidence obtained as a result of the audit should be declared to be inadmissible, and stricken from

the record.

[92] I do not accept these arguments.

[93] In order to determine whether the audit provisions of the *Private Copying Tariffs* are *ultra vires* the *Copyright Act*, it is necessary to start by examining the relevant provisions of the enabling legislation itself.

[94] Paragraph 82(1)(b) of the *Copyright Act* requires that every manufacturer or importer of blank audio recording media must keep statements of account, and to furnish these to the collecting body, which in this case, is the CPCC.

[95] The *Copyright Act* also confers certain powers on the Copyright Board of Canada with respect to the establishment of *Private Copying Tariffs*. In this regard, sub-paragraph 83(8)(a)(ii) empowers the Board to impose such terms and conditions related to the levies as the Board considers appropriate.

[96] The imposition of a right on the part of a collecting body to verify the information provided by manufacturers or importers of blank audio recording media, by means of audit, is a term or condition related to the levies imposed by the Board in accordance with the provisions of sub-paragraph 83(8)(a)(ii) of the *Copyright Act*. As a consequence, the audit provision is not *ultra vires* the *Act*.

[97] Indeed, given that the levy scheme is based upon self-assessment and self-reporting of the information required to calculate the levies due under the *Tariff*, the effectiveness of the scheme requires that there be some means of verifying the accuracy and completeness of the information provided.

[98] It should be noted that even without the specific enabling language of sub-paragraph 83(8)(a)(ii) of the *Copyright Act*, there is an implied power to audit reports provided in accordance with the tariff system.

[99] In this regard reference should be made to the decision of the Supreme Court of Canada in *Maple Leaf Broadcasting Ltd. v. Composers, Authors and Publishers Association of Canada*, [1954] S.C.R. 624. In this case, the Court noted that even though the *Copyright Act*, as it then stood, did not expressly grant an audit power to the Copyright Board, once the Board acts within its powers in fixing a levy (as is admittedly the case here), then it follows that it must be within the powers of the Board to prescribe the manner in which the amounts due are to be ascertained or verified.

[100] As a consequence, I am satisfied that the audit provisions of the *Private Copying Tariffs* are *intra vires* the *Copyright Act*.

[101] Based upon Mr. Gottschalk's description as to what happened on February 9, 2004, I am also satisfied that he did not go beyond attempting to verify Cano Tech's records as they related to the importation or manufacture, and sale, of blank audio recording media.

[102] For the reasons previously given, I am also satisfied that there was no seizure of any of Cano Tech's documents, and that any photocopies of documents that were removed from the Cano Tech premises were taken with the knowledge and implied consent of Mr. Khoja.

#### **Do the Audit Provisions of the *Private Copying Tariffs* Violate Section 8 of the *Charter*?**

[103] Cano Tech submits that the audit of its records by the CPCC was essentially a warrantless search. Relying on the decision of the Supreme Court of Canada in *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, Cano Tech says that any such warrantless search will be presumed to be unreasonable. According to Cano Tech, the onus should be on the CPCC to demonstrate that it is unfeasible or unnecessary to obtain prior judicial authorization for such a search.

[104] As a consequence, Cano Tech says, such searches violate section 8 of the *Canadian Charter of Rights and Freedoms*, which provides that "everyone has the right to be secure against unreasonable search and seizure".

[105] It should be noted that the *Southam* case involved quasi-criminal proceedings, whereas in this case we are dealing with a regulatory or administrative scheme, one that cannot result in criminal sanctions being imposed. The *Southam* case is thus distinguishable on its facts from the present situation.

[106] In the criminal or quasi-criminal context, a warrant is required prior to a search or seizure in order to ensure that the individual's reasonable expectation of privacy is protected. The same reasonable expectation of privacy does not exist where a regulatory scheme is involved: *R. v. McKinlay Transport* [1990] 1 S.C.R. 627 at ¶ 27 and 31.

[107] As Peter Hogg notes, in the case of regulated businesses, the expectation of privacy is attenuated by the obligation to comply with the sort of administrative inspections that are an integral part of regulatory regimes. That is, a proprietor's expectation of privacy must adjust so as to accommodate the requirements of the regime: *Constitutional Law of Canada*, Loose-leaf Ed. (Toronto: Carswell), at pp. 45-31, 45-32.

[108] In this case, the *Private Copying Tariffs* attach reasonable conditions to the audit power conferred upon the CPCC. That is, the *Tariffs* require that audits must be conducted on reasonable notice, and during business hours. In these circumstances, I am satisfied that when properly carried out, audits done by the CPCC do not constitute an unreasonable search and seizure pursuant to section 8 of the *Charter*.

[109] Moreover, for the reasons already articulated, I am satisfied that in this case, Cano Tech consented to the audit of its records on February 9, 2004, and further, that Mr. Khoja impliedly consented to the removal of copies of the documents in question by Mr. Gottschalk. As a consequence, on the facts of this case there was no search imposed on Cano Tech, nor was there a seizure carried out by Mr. Gottschalk.

**Did the CPCC Violate Cano Tech's Rights under Section 8 of the *Charter* by Filing Documents Taken from Cano Tech in Court, Where They Are Available to the Public?**

[110] Cano Tech submits that its Section 8 *Charter* rights were also violated when confidential documents taken from the company were filed in this Court, where they are accessible to the public. In support of its contention that its section 8 rights have thus been violated, Cano Tech relies on the decision of this Court in *Gernhart v. Canada*, [2000] 2 F.C. 292.

[111] *Gernhart* involved a provision in the *Income Tax Act* which provided that when the taxpayer appealed a tax assessment, the Minister of National Revenue was required to transmit to the Tax Court copies of all of the taxpayer's tax documents. The Court held that, in those circumstances, the provision in question permitted an unreasonable seizure. In coming to this conclusion, the Court considered the fact that requiring that all of the documents be filed with the Court resulted in a potentially enormous intrusion into the taxpayer's legitimate privacy interest, whereas there was no countervailing governmental interest served by having all of the documents filed with the Court, whether or not they were to be used in the proceeding.

[112] In my view, *Gernhart* is readily distinguishable from the present case on a number of different bases.

[113] In *Gernhart*, the Minister conceded that filing all of the documents obtained from the taxpayer in Court where they would be publicly accessible, whether the Minister intended to rely on them or not, served no useful purpose. In contrast, in the present case, the only documents that have been filed with the Court are ones which are relevant to the CPCC's application.

[114] Moreover, it would significantly impair the CPCC's ability to enforce its rights if it was unable to file documentation with the Court obtained from a manufacturer or importer of blank audio recording media in order to demonstrate that the company in question is in default of its obligations under the provisions of the relevant tariff.

[115] Further, whereas the records in issue in *Gernhart* involved personal income tax information, which is obviously highly sensitive personal information, what we are dealing with here are business records generated in the course of carrying out a regulated activity, namely the manufacture or importation of blank audio recording media. As was previously noted, engaging in a business in a regulated sphere of activity will result in a diminished reasonable expectation of privacy. On this basis alone, the *Gernhart* decision is readily distinguishable from the present case.

[116] Indeed, the fact that the business information in question is not particularly sensitive is, in my view, confirmed by the fact that it does not appear that at any time during this proceeding did Cano Tech make any effort to obtain a confidentiality order, so as to protect the confidentiality of the information in question.

[117] In these circumstances, Cano Tech has not succeeded in persuading me that the filing of documents obtained from Cano Tech in this court violates Cano Tech's rights under section 8 of the *Charter*.

Conclusion

[118] For these reasons, the CPCC's application is allowed.

**Costs**

[119] Cano Tech argues that even if the application is successful, the CPCC should be denied its costs, given its egregious conduct in this matter. I have already found that the CPCC acted in good faith in this matter. In the exercise of my discretion, I am satisfied that the CPCC should be entitled to its costs of this Application.

ORDER

THIS COURT ORDERS that:

1. Cano Tech shall pay to the CPCC unpaid levies in the amount of \$79,781.47;
2. The CPCC will be entitled to continue its audit of Cano Tech, upon providing Cano Tech with five days written notice. Cano Tech is directed to take all reasonable steps to facilitate the audit, and to provide any document, record or information from which the CPCC can ascertain the amounts payable and information required under the provisions of the *Private Copying Tariffs*;
3. Should the audit disclose that the amounts due to the CPCC have been understated by Cano Tech, or that Cano Tech failed to report levies that should have been paid, Cano Tech shall, within 30 days of the CPCC's demand for payment, pay to the CPCC any and all additional levies to which the CPCC is entitled;
4. In accordance with the provisions of the *Private Copying Tariffs*, Cano Tech shall, within 30 days of the CPCC's demand for payment, pay to the CPCC the reasonable costs of the audit, if the audit discloses that the amounts due to it have been understated by Cano Tech by more than 20% in either of the January-February 2000, or March-April 2000 accounting periods, or by more than 10% in any other accounting period;
5. Cano Tech shall pay to the CPCC any outstanding interest on all amounts owing to the CPCC, in accordance with the applicable *Tariff*;
6. Cano Tech shall henceforth comply with the reporting and payment requirements set out in the applicable *Tariff*, for as long as Cano Tech remains a manufacturer or importer subject to the provisions of Part VIII of the *Copyright Act* and the *Private Copying Tariffs* certified thereunder;
7. The CPCC is entitled to its costs of this Application.

"Anne Mactavish"

JUDGE

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**DOCKET:** T-1238-04  
**STYLE OF CAUSE:** CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)  
Applicant  
  
-and-

CANO TECH INC.

Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 6, 2005

**REASONS FOR ORDER:** MACTAVISH J.

**DATED:** JANUARY 13, 2006

**APPEARANCES:**

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Orie Niedzwiekci FOR RESPONDENT

hghhgj

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Modified: 2006-11-01

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