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Date: 20061129

Docket: T-698-06

Citation: 2006 FC 1449

Toronto, Ontario, November 29, 2006

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)

Applicant

and

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Canadian Private Copying Collective (“CPCC”) brings this application under the provisions of subparagraph 34(4)(c)(i) and subsection 88(1) of the *Copyright Act*, R.S.C. 1985

c. C-42. The CPCC seeks payment of \$97,382.25, plus interest, allegedly due from the respondent Gogh Wholesale Inc. (“Gogh”) in accordance with the provisions of the *Private Copying Tariffs*. The monies claimed relate to the importation and sale of blank audio recording media by Gogh between January 1, 2002 and February 28, 2003.

[2] The CPCC further seeks an order directing Gogh to submit to an audit of its business, financial and accounting books and records, and to pay any further amounts owing as may be disclosed by the audit.

[3] Finally, the CPCC requests an order directing that Gogh comply with the reporting requirements and the payment and reporting calendar set out in the applicable copying tariffs, for as long as it remains a manufacturer or importer of blank audio recording media.

[4] Gogh has not filed any materials on this application, and did not appear at the hearing.

The Private Copying Tariffs

[5] In *Canadian Private Copying Collective v. Cano Tech Inc.*, [2006] F.C.J. No. 170, 2006 FC 28, 47 C.P.R. (4th) 350, I reviewed the history, nature and purpose of the *Private Copying Tariffs*, and I repeat that summary here:

[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 *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2004] F.C.J. No. 2115 (QL), 2004 FCA 424, 36 C.P.R. (4th) 289, leave to appeal to the Supreme Court of Canada denied, [2005] S.C.C.A. No. 74 (QL), 235 D.L.R. (4th) vi, 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.

Is the CPCC Entitled to Recover Unpaid Levies of \$97,382.25 Plus Interest from Gogh?

[6] In September of 2004, the CPCC became aware that Gogh might be importing and selling blank audio recording media, without having reported those activities to the CPCC, and without having remitted the levies associated with such activities.

[7] Following an exchange of correspondence between the CPCC and Bernard Tan, the sole director of Gogh, Gogh produced reports for the period between January 1, 2002 and February 28, 2003.

[8] These reports revealed that during this period, Gogh imported and sold 463,725 bulk or generic recordable compact discs (CD-Rs) in Canada. Each CD-R was subject to a levy in the amount of \$0.21, in accordance with the *Tariffs* in effect at the relevant times. To date, no levies have been paid by Gogh with respect to these items.

[9] As a result, based upon the information provided by Gogh itself, I am satisfied that Gogh owes the CPCC the sum of \$97,382.25 for unpaid levies.

[10] Indeed, a review of the correspondence between Mr. Tan and the CPCC discloses that Gogh does not dispute its indebtedness. Rather, Mr. Tan asserts that Gogh is a dormant company, without any assets. Whether or not that is true, it does not relieve the company of its obligations, although as a practical matter, it may make collection on the judgment problematic.

[11] As a consequence, an order will go directing Gogh to pay to the CPCC the sum of \$97,382.25 for unpaid levies for the period between January 1, 2002 and February 28, 2003.

[12] The *Tariffs* also provide for the payment of interest on the late payment of levies. As of November 29, 2006, the interest owing on the unpaid levies, as calculated in accordance with the relevant *Tariffs*, is \$17,642.01, and Gogh is ordered to pay this additional amount to the CPCC.

Is the CPCC Entitled to Audit Gogh?

[13] The *Private Copying Tariffs* impose record-keeping obligations on the manufacturers and importers of blank audio recording media. 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 the amounts payable and the information required under this tariff.

(2) CPCC may audit these records at any time on reasonable notice and during normal business hours.

9. (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) La SCPCP peut vérifier ces registres à tout moment durant les heures régulières de bureau et moyennant un préavis raisonnable.

[14] In this case, it is clear that Gogh never complied with its reporting obligations under the *Tariffs*, until

pressured by the CPCC to do so. Moreover, the information provided by Mr. Tan with respect to Gogh's compliance with its record-keeping obligations has been inconsistent. By way of example, Mr. Tan initially referred to the need to seek out Gogh's archived records in order to prepare the necessary reports, and then later claimed that no such records existed.

[15] Moreover, although Mr. Tan initially consented to an audit on behalf of Gogh, he later refused to go ahead with the audit.

[16] As I observed in *Canadian Private Copying Collective v. Cano Tech Inc.*, above, at ¶ 97:

[G]iven 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.

[17] I am thus satisfied that the CPCC is entitled to audit the books and records of Gogh in order to ascertain whether the company has fully complied with its obligations under the *Tariffs*. Gogh 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*.

Is the CPCC Entitled to a Declaration of Entitlement?

[18] The CPCC also asks for an order declaring that it is entitled to any and all amounts which might be found to be owing to it by Gogh through the audit process, including the costs of the audit, if the conditions stipulated in the *Tariffs* are met.

[19] Justice von Finckenstein was confronted with a similar request on the part of the CPCC in *Canadian Private Copying Collective v. Fuzion Technology Corp.*, [2006] F.C.J. No. 1598, 2006 FC 1284. In refusing the request as premature, he stated that:

¶ 41 The legislation addresses the collection issue. First, it provides that a person manufacturing or importing blank audio recording medium must pay a levy (s. 82(1)). Second, it provides for the designation of a collecting body (s. 83). Third, it allows the designated collecting body to sue for unpaid levies (s. 88). Additionally, it empowers the court to award penalties in appropriate cases (s. 88). However, unlike other statutes that deal with statutorily imposed charges such as taxes or duties (see for instance the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) s. 222) there is no provision for an assessment or a provision that the amount assessed is due upon receipt of the notice of assessment. Any collection of levy under part VIII of the [*Copyright*] *Act* must therefore, rely on the applicable principles of debtor-creditor law. Without the debt being established, I am not prepared to order payment thereof, let alone

the cost of the audit or arrears of interest.

[20] I am of the view that these comments are equally applicable to the present situation, and therefore decline to make the order requested by the CPCC.

Costs

[21] Finally, the CPCC has requested that costs be awarded in its favour at the top end of Column V. In support of this submission, the CPCC points to the fact that Gogh failed to comply with its obligations under the *Tariffs*, that it was admittedly liable for \$97,382.25 in unpaid levies, and that it forced the CPCC to bring this application in order to ensure that the obligations under the *Tariffs* were complied with.

[22] I am satisfied that such an award is warranted on the facts of this case, and order accordingly.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed;
2. Gogh shall pay to the CPCC the amount of \$97,382.25 for unpaid levies, together with pre-judgment interest in the amount of \$17,642.01;
3. The CPCC is entitled to audit the books and records of Gogh, upon providing Gogh with five days written notice. Gogh 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*; and
4. The CPCC is entitled to its costs of this application at the top end of Column V.

“Anne Mactavish”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-698-06

STYLE OF CAUSE: CANADIAN PRIVATE COPYING COLLECTIVE
(CPCC) v.
GOGH WHOLESALE INC.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 28, 2006

REASONS FOR JUDGMENT

AND JUDGMENT: Mactavish J.

DATED: November 29, 2006

APPEARANCES:

Ms. Rosamaria Longo

FOR THE APPLICANT

SOLICITORS OF RECORD:

Canadian Private Copying Collective

FOR THE APPLICANT

Toronto, Ontario

Modified: 2007-01-29


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