

Federal Court



Cour fédérale

Date: 20101029

Docket: T-546-09

Citation: 2009 FC 1277

Ottawa, Ontario, October 29, 2010

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)

Applicant

and

DATA MEDIA PRODUCTS INC.

Respondent

AMENDED REASONS FOR ORDER AND ORDER

(SEE RELATED ORDER OF THIS DATE)

[1] The Canadian Private Copying Collective (CPCC) brings this application under subparagraph 34(4)(c)(i) and section 88 of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act) for

unpaid levies, audit costs, interest and a statutory penalty against Data Media Products Inc. (the Respondent). The Respondent has not filed any material and was not represented at the hearing of this application.

[2] The Respondent is an importer and seller of blank audio recording media (Blank Media). Levies are payable on the sale or other disposition of Blank Media at a rate set in a tariff certified by the Copyright Board of Canada. The applicable tariffs in this case are the *Private Copying Tariff, 2005-2007* and the *Private Copying Tariff, 2008-2009* (the Tariffs). The applicable levies are \$0.21 per unit of Blank Media sold in 2007 or 2008, and \$0.29 per unit sold in 2009.

[3] The CPCC commissioned an audit of the Respondent (the Audit) covering the period March 1, 2007 to February 29, 2008 (the Audit Period). The Audit revealed that the Respondent had underreported its sales of Blank Media by approximately 18% and had therefore underpaid its levies. After the Respondent failed to respond to repeated demands for payment, the CPCC commenced the present application on April 6, 2009.

SERVICE

[4] Subsection 130(1) of the *Federal Courts Rules, SOR/98-106* allows service on a corporation in the manner provided for by the rules of the superior court in the province in which service is being effected. In this case, the relevant province is Ontario. Rule 16.03(6) of Ontario's *Rules of Civil Procedure, R.R.O. 1990, Reg. 194* provides that where the head office, registered office or

principal place of business of a corporation cannot be found at the last address recorded with the Ministry of Consumer and Commercial Relations, service may be made by mailing a copy of the document to the corporation at that address.

[5] I am satisfied that an Ontario Corporation Profile Report from the Ministry of Government Services (the successor to the Ministry of Consumer and Commercial Relations) records 959 Gana Court, Mississauga, Ontario as the Respondent's last address. I am also satisfied, based on the evidence of the applicant's investigator, that the Respondent's principal place of business cannot be found at that address and that the CPCC mailed a copy of the Notice of Application to that address. For these reasons, I have concluded that the Respondent has been under served the Ontario Rules.

LEVIES AND INTEREST THEREON

[6] It is noteworthy that under subsection 82(1) of the Act, the levy is payable on the sale or other disposition of Blank Media. Therefore, the CPCC must prove that sales or dispositions have taken place in order to justify the imposition of levies.

[7] Interest is payable on unpaid levies pursuant to section 12 of the Tariffs. It accrues from the day the units of Blank Media were disposed of or sold. Interest is to be calculated daily at a rate equal to one per cent plus the Bank Rate published by the Bank of Canada that was applicable on the last day of the previous month. Interest does not compound.

[8] At all material times, the Bank Rate published by the Bank of Canada varied between 0.5% and 4.75%. Accordingly, the interest rate to be applied to the unpaid levies ranges from 1.5% to 5.75%.

[9] **DELETED**

[10] There is an issue about the calculation of interest in circumstances in which the evidence shows that sales or dispositions have occurred in a certain period of time but exact sale dates are not known. One method of calculation was adopted by Prothonotary Lafrenière in *Canadian Private Copying Collective v. Pacific Royal Enterprises Ltd. et al.* in an order made on March 6, 2009. Therein he said that interest should be calculated by pro-rating the unpaid levies equally over the reporting period and calculating interest on those pro-rated levies. I am asked to use this methodology. However, I am not persuaded that pro-rating is the proper approach. In my view subsection 82(1) of the Act makes it clear that the levy is only payable “. . . on selling or otherwise disposing of . . .” Blank Media in Canada. In the circumstances of this case the only date on which it can be said with certainty that all the Blank Media were sold is the last day of the reporting period. Accordingly I have concluded in paragraph 11(2)(ii) and subsection 11(3) that interest should be calculated from that date.

[11] The Applicant claims levies plus interest on the following units:

1. 28,615 units. These units were sold during the Audit Period and sales dates given in the Audit can be used to calculate interest. The applicable levy was \$0.21 per unit. Accordingly, levies plus interest will be awarded for these units.
2. 51,245 units. These units were in the Respondent's inventory at the end of the Audit Period. This number must be broken into the following three sections:
 - i. 10,600 units. These units were actually sold in 2008 after the Audit Period. Sales dates are available for calculating interest, and the applicable levy was \$0.21 per unit. Levies plus interest will be awarded for these units.
 - ii. 11,775 units. These units were actually sold in 2008 after the Audit Period and the applicable levy was \$0.21 per unit. However, precise sales dates are not available for calculating interest. The evidence shows that these units may have been sold any time between the end of the Audit Period and the end of 2008. Accordingly, levies will be awarded for these units, but interest will be calculated as if all the sales were made on December 31, 2008.
 - iii. 28,870 units. The evidence in this case is not sufficient to establish a levy obligation. Accordingly, no levy is awarded for these units.
3. 310 units. These units were also in the Respondent's inventory at the end of the Audit Period. They were sold in 2009 and the applicable levy was \$0.29 per unit. However, precise sales dates are not available for calculating interest. The evidence shows that these units may have been sold any time between February 1, 2009 and April 21, 2009. Accordingly, levies will be awarded for these units, but interest will be calculated as if all the sales were made on April 21, 2009.

AUDIT COSTS AND INTEREST THEREON

[12] Subsection 9(3) of the Tariffs provides that the CPCC can recover reasonable audit costs from a seller of Blank Media if the audit discloses that the seller has understated amounts due to the CPCC by more than 10%. The Audit disclosed that the Respondent had understated amounts due to the CPCC by approximately 18%. Accordingly, the CPCC will be awarded its audit costs.

[13] Interest is payable on unpaid audit costs pursuant to section 12 of the Tariffs and is calculated in the same manner as interest on unpaid levies. Sentence Deleted. Interest begins to accrue on the day on which the audit costs are due to the CPCC. According to subsection 9(3) of the Tariffs, the audit costs are due 30 days after their payment is demanded.

[14] The CPCC demanded audit costs in the amount of \$6,309.61 on July 2, 2008, so interest on this amount began to accrue on August 2, 2008.

[15] In a letter dated September 2, 2008, the CPCC warned the Respondent that if it did not pay outstanding levies, interest, and \$6,309.61 in audit costs by September 17, 2008, the CPCC would demand the full audit costs of \$9,846.23. However, it appears from the record that the CPCC never wrote again to demand the full amount. CPCC asserts and I accept that filing this application on April 6, 2009 constituted a demand for payment of the full amount. Accordingly, while the full audit costs of \$9,846.23 will be awarded to the CPCC, interest will be awarded as follows:

(i) on \$6,309.61 from August 2, 2008 to May 6, 2009

(ii) on \$9,846.23 from May 6, 2009 to the date of this order

PENALTY

[16] The Applicant seeks a statutory penalty of five times the amount of the unpaid levies, which is the maximum penalty allowed under subsection 88(2) of the Act.

[17] Having taken into account the considerations listed in subsection 88(4) of the Act, I am not satisfied that the maximum penalty is appropriate in this case. However, in view of the Respondent's material under-reporting of sales and the need for deterrence, a penalty of two times the amount of the unpaid levies will be imposed.

COSTS

[18] Litigation costs will be awarded in the amount of \$2,000.

ORDER

THIS COURT ORDERS that

1. The Respondent shall pay to the CPCC:
 - (a) unpaid levies in the amount of \$10,797.80;
 - (b) interest on unpaid levies in the amount of \$431.79 as of December 16, 2009;
 - (c) the CPCC's audit costs in the amount of \$9,846.23;

(d) interest on audit costs in the amount of \$243.12 as of December 16, 2009
as required by the Act and the Tariffs.

2. The Respondent shall pay to the CPCC a penalty in the amount of \$21,595.60 pursuant to subsection 88(2) of the Act, which is equal to two times the amount of the unpaid levies required to be paid by the Respondent pursuant to paragraph 1(a) above;

3. The Respondent shall comply with the reporting requirements and with the payment and reporting calendar set out in paragraph 82(1)(b) of the Act and the Tariffs for so long as the Respondent remains a manufacturer or importer subject to the provisions of Part VIII of the Act and the Tariffs;

4. The Respondent shall pay to CPCC the costs of this Application forthwith in the amount of \$2,000. This amount includes all applicable goods and services taxes.

Sandra J. Simpson
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-546-09

STYLE OF CAUSE: CANADIAN PRIVATE COPYING COLLECTIVE
(CPCC)

And

DATA MEDIA PRODUCTS INC.

PLACE OF HEARING: TORONTO

DATE OF HEARING: DECEMBER 2, 2009

REASONS FOR ORDER: SIMPSON J.

DATED: DECEMBER 16, 2009

APPEARANCES:

MS. JESSICA CAPLAN FOR THE APPLICANT
416-216-2971

NO ONE APPEARING FOR THE RESPONDENT

SOLICITORS OF RECORD:

OGILVY RENAULT LLP FOR THE APPLICANT
TORONTO, ONTARIO

FOR THE RESPONDENT