

Federal Court



Cour fédérale

Date: 20100323

Docket: T-79-07

Citation: 2010 FC 328

Ottawa, Ontario, March 23, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

**BLUE MEDIA GROUP INC.,
COMPUTER ULTRA CORPORATION and
COMPUTER ULTRA DISTRIBUTION INC.**

Defendants

and

Docket: T-1241-09

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

**BURN N LEARN INC., c.o.b. blankmedia.ca and
THOMAS RICHER, c.o.b. Bits N PCs Computer and blankmedia.ca and
HEATHER RICHER, c.o.b. Bits N PCs Computer and blankmedia.ca**

Defendants

REASONS FOR ORDER AND ORDER

[1] In these two files, the Defendants asked for the same relief against the Plaintiff for essentially the same reasons. The Order sought is a form of gag order preventing the Plaintiff from contacting the Defendants' customers, who may have evidence relevant to this litigation, without first securing the Defendants' consent or an order from this Court.

[2] The CPCC is a body created by statute to collect and administer charges due on the sale of blank media (a blank CD or tape is an example). These charges are set forth in a tariff. The Defendants have been sued for failure to collect and remit these charges on blank media sold.

[3] As a result of pre-trial disclosure, the Defendants, with a fair degree of reluctance and obfuscation, finally produced the names of the customers who may have purchased items to which the tariff applied.

[4] The Plaintiff wrote to a number of these customers advising them of the existence of the litigation and outlining that they may have evidence relevant to that litigation. The Plaintiff then asked the customers to maintain the evidence and to make it available to the Plaintiff if necessary.

[5] The Defendants have objected to this form of contact with their customers alleging that it amounts to intimidation of the customers and undermines the business relationship with the respective Defendants.

[6] The Defendants concede that the letter itself is not improper but describe it as a sinister motive to the Plaintiff – to destroy their business before the matter ever proceeds to trial.

[7] The Plaintiff justifies the letter, both on its non-offensive terms and on the grounds of necessity, due to the destruction of some of the Defendants' documents. This document destruction was said to be part of a regular document clean-up and not for some ulterior motive.

[8] The Order sought is unusual and is akin to an injunction. As such, the principles applicable to injunctive relief are relevant to this motion. The motions have been argued on that basis. The elements of the tripartite test set forth in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 are discussed below.

I. SERIOUS ISSUE

[9] Other than saying that the Defendants have a defence and therefore this part of the tripartite test is met, the Defendants concede that they cannot point to any precedent or statutory provision which justifies or supports the type of relief sought here.

[10] It is not surprising that no such precedent exists because the nature of the order sought offends the long established principle that “there is no property in a witness”, as Lord Denning said in *Harmony Shipping Co. v. David*, [1979] 3 ACC E.R. 177 at p. 181 (CA).

[11] There is no suggestion that the Plaintiff has breached the implied undertaking on discovery, that matters disclosed may only be used for purposes of that litigation. In fact, the Plaintiff's letter is clearly directed at securing evidence for the trial.

[12] Therefore, on this first part of the test, the Defendants fail. On those grounds alone, this motion should be dismissed; however, the Court will comment on the remaining parts of the tripartite test.

II. IRREPARABLE HARM

[13] The Defendants cannot establish harm, much less irreparable harm. Evidence from one Defendant expressing his fears and an affidavit from the Defendants' counsel is not sufficient evidence to establish this prerequisite. There is no evidence of loss or change in sales or customers' complaint or anything else one would expect to see in a commercial case alleging that commercial harm has occurred or is reasonably likely to occur (as in this case, the relief is analogous to a *quia timet* type injunction).

III. BALANCE OF CONVENIENCE

[14] Any suggestion that the Plaintiff is engaged in a fishing expedition has been dealt with by Prothonotary Milczynski.

[15] The Order sought would interfere with the Plaintiff's ability to conduct its pre-trial and trial activities without the interference from the Defendants.

[16] The burden of proof rests with the Plaintiff, the litigation must be conducted in accordance with the usual rules and done so efficiently. The Defendants' interest in isolating its customers must give way to the needs for proper and effective litigation. The rights of the Plaintiff on this point trump any interest of the Defendants.

[17] Therefore, the motions are dismissed with costs.

ORDER

THIS COURT ORDERS that the motions are dismissed with costs.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 15, 2010

REASONS FOR ORDER AND ORDER: Phelan J.

DATED: March 23, 2010

APPEARANCES:

Mr. Randy Sutton

FOR THE PLAINTIFF

Mr. Orié Niedzwiecki

FOR THE DEFENDANTS

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FOR THE DEFENDANTS