

Date: 20071026
Docket: A-369-07
Citation: 2007 FCA 338

Present: RICHARD C.J.

BETWEEN:

**APPLE CANADA INC., DELL INC.,
MICROSOFT CORPORATION (MICROSOFT CANADA CO.),
SANDISK CORPORATION, and SONY OF CANADA LTD.**

Applicants

and

**CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)
and RETAIL COUNCIL OF CANADA (RCC)**

Respondents

Docket: A-370-07

BETWEEN:

RETAIL COUNCIL OF CANADA

Applicant

and

**CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)
and APPLE CANADA INC., DELL INC.,
MICROSOFT CORPORATION (MICROSOFT CANADA CO.),
SANDISK CORPORATION, and SONY OF CANADA LTD.**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 26, 2007.

REASONS FOR ORDER BY:

RICHARD C.J.

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REASONS FOR ORDER

RICHARD C.J.

[1] The Canadian Recording Industry Association (CRIA), representing its major members, EMI Music Canada, SONY MG MUSIC (CANADA) INC., Universal Music Canada Inc., and Warner Music Canada Co. has applied, in writing, pursuant to Rule 369 of the *Federal Courts Rules* for an Order granting CRIA leave to intervene in the application for judicial review

(the “Application”) in respect of the decision of the Copyright Board (the “Board”) dated July 19, 2007 in Board File: Private Copying 2008-2009 (the “Decision”) by:

- (a) submitting a memorandum of fact and law in this application; and,
- (b) presenting oral argument at the hearing of the application.

[2] The parties to this judicial review proceeding have agreed that files A-369-07 and A-370-07 should be consolidated and heard together and that the hearing should be expedited. This Court has ordered that the hearing will take place on an expedited basis on January 9, 2008 for a duration of one day.

[3] In dealing with this motion, I have considered the relevant factors set out in *C.U.P.E. v. Cdn. Airlines Int. Ltd.*, [2000] F.C.J. No. 220.

[4] CRIA asserts that its sole purpose in intervening is to assist the Court in determining whether a digital audio recorder (DAR) should be classified as an audio recording medium under Section 79 of the *Copyright Act*.

[5] CRIA claims that it has a different perspective and desires to make arguments that are different from those that will be made by the parties.

[6] The Retail Council of Canada takes the position that CRIA may have a useful, new and different perspective to bring upon these proceedings, provided that it is strictly confined to the three major issues before the Court.

[7] The applicants Apple Canada Inc., Dell Inc., Microsoft Corporation (Microsoft Canada Co.), Sandisk Corporation and Sony of Canada Ltd., by letter, consent to the order requested by CRIA believing the applicable test to have been satisfied by CRIA.

[8] The CPCC takes the position that CRIA has not met any of the factors set out by this Court in *CUPE*, that CRIA has no particular expertise to offer in resolving the legal questions before the Court and that the Court can hear and decide the three questions in issue in this case without CRIA's intervention.

[9] The CPCC also alleges that CRIA's proposed intervention raises a number of issues that are not relevant to the determination of many of the issues properly before the Court.

[10] CRIA wants to address seven issues. These are set out in paragraphs 58 to 64 of the Henderson affidavit in support of the motion to intervene.

[11] However, I am of the view that any submissions by CRIA as an intervenor would not be necessary or useful with respect to any issues other than the three main issues before this Court. CRIA may have a useful, new and different perspective to bring to bear upon these proceedings, provided that it is confined to the three major issues before the Court.

[12] Therefore, I am prepared to allow the motion to intervene on the following basis.

[13] CRIA shall address only the three major issues before this Court, namely whether the Board erred in its decision in holding that:

- a) It is not settled law that a digital audio recorder is not a medium as this word is used in the definition of “audio recording medium” in section 79 of the *Copyright Act*;
- b) Examining for the first time the issue of whether a digital audio recorder is a “recording medium” cannot threaten the integrity of the process before the Board or the finality of its decisions, be unfair or oppressive or offend anyone’s sense of fair play and decency [the *res judicata* issue]; and
- c) A digital audio recorder is an ‘audio recording medium’ if it is later established that it is ordinarily used by individual consumers to reproduce sound recordings.

[14] The intervention by CRIA is subject to the following conditions:

- 1) The intervenor shall be bound by the record and may not introduce any new evidence.
- 2) CRIA shall be permitted to file a memorandum of fact and law not to exceed 15 pages. The memorandum shall be served and filed within 14 days of the date of this order. Any responding memorandum by any of the parties shall be served and filed within 14 days of the date of service of CRIA’s memorandum and shall not exceed 15 pages. There will be no reply.

- 3) CRIA shall be permitted no more than 20 minutes of oral argument with no right of reply.
- 4) CRIA shall be added to the style of cause as an Intervenor.

“John Richard”
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-369-07

STYLE OF CAUSE: APPLE CANADA INC., DELL INC.,
MICROSOFT CORPORATION
(MICROSOFT CANADA CO.),
SANDISK CORPORATION, and
SONY OF CANADA LTD.

and

CANADIAN PRIVATE COPYING
COLLECTIVE (CPCC) and RETAIL
COUNCIL OF CANADA (RCC)

A-370-07

RETAIL COUNCIL OF CANADA

and

CANADIAN PRIVATE COPYING
COLLECTIVE (CPCC) and APPLE
CANADA INC., DELL INC.,
MICROSOFT CORPORATION
(MICROSOFT CANADA CO.),
SANDISK CORPORATION, and
SONY OF CANADA LTD.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Richard C.J.

DATED: October 26, 2007

WRITTEN REPRESENTATIONS BY:

Barry B. Sookman,
Steven G. Mason

FOR THE PROPOSED
INTERVENOR

Howard P. Knopf

FOR THE RESPONDENT RETAIL
COUNCIL OF CANADA

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Claude Brunet
Louis Gratton

FOR THE RESPONDENT
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COLLECTIVE

SOLICITORS OF RECORD:

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FOR THE PROPOSED
INTERVENOR

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Ottawa, Ontario

FOR THE APPLICANTS APPLE
CANADA INC., DELL INC.,
MICROSOFT CORPORATION
(MICROSOFT CANADA CO.),
SANDISK CORPORATION and
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