Date: 20070828

Docket: T-578-05

Citation: 2007 FC 858

Ottawa, Ontario, August 28, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

Z.E.I. MEDIA PLUS INC.
and ZANIN CD/DVD INC.
and JOSEPH LEMME

Respondents

REASONS FOR ORDER AND ORDER

[1] On February 26, 2007, Prothonotary Morneau issued a show-cause contempt order pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), that the defendants Z.E.I. Media Plus Inc. (Z.E.I.), Zanin CD/DVD Inc. (Zanin) and Joseph Lemme were required to appear before a judge of this Court and be prepared to answer to the allegation that they are guilty of contempt of Court.

[2] The acts with which the Defendants were charged were as follows:

> In a decision dated December 22, 2006, the Honourable Mr. Justice de Montigny dismissed the Defendants' appeal of an order of Prothonotary Richard Morneau dated June 30, 2006 requiring the Defendants to produce a more complete and accurate affidavit of documents within twenty-one (21) days of the order. In contravention of the above Court's decisions, the Defendants have deliberately failed to produce a complete and accurate affidavit of documents within the delay.

HISTORY OF THE PROCEEDING

[3] In March 2005, the Plaintiff brought an action to recover the payment of private copying levies allegedly owed by the Defendants on account of their manufacture or importation into Canada, and sale, of blank audio recording media. These levies are payable under Part VIII of the *Copyright Act*, R.S.C. 1985, c. C-42.

[4] The Plaintiff served an affidavit of documents on November 18, 2005, and a supplement on November 22, 2205. The defendants' affidavit of documents was served November 18, 2005. On January 25, 2006, the Collective filed a motion to compel service of a more complete and accurate affidavit of documents, pursuant to Rule 223 of the *Rules*. While not denying that the defendants will not be subject to pay any levies if the CD-Rs are not considered blank audio recording media, the Collective argued it could not determine the exact amount of the Defendants' liability unless it could calculate the number of units of blank audio recording media which have been imported and sold in Canada by each of the Defendants. Z.E.I., Zanin and Mr. Lemme, who is the president of these companies, have always argued on the other hand that a large portion of their products, which they call "blank industrial media", do not fall within the definition of "blank audio recording

medium", and that therefore, Z.E.I. and Zanin's importation and sale of these media cannot be levied as such. This is the crux of the matter to be determined in the main action.

[5] On June 30, 2006, Prothonotary Morneau allowed the Collective's motion and ordered the defendants to provide a better affidavit of documents. In doing so, the Prothonotary endorsed the specific requirements spelled out in the Collective's motion with respect to the documents to be disclosed. He also rejected the Defendants' claim that the issue of liability should be resolved before the plaintiff can seek recovery of private copying levies, and therefore refused the Defendants' bifurcation request under Rule 107 of the *Rules*. Finally, he ordered the case to be specially managed.

[6] On appeal of that decision, I confirmed Prothonotary Morneau's order on December 22, 2006, and explicitly rejected a request made by the Defendants that they be given at least 120 days (as opposed to 21 in the Prothonotary's order) to comply with the terms of the order as it was upheld on appeal. On that specific issue, I wrote (at paragraph 67 of my reasons, which can be found at 2006 FC 1546): "As for the further delay requested by the defendants, I find that it is purely dilatory. The statement of claim was issued more than 18 months ago, and discovery has yet to begin. The defendants have had ample time to prepare a complete affidavit of documents."

[7] That decision of mine therefore left intact the order made by Prothonotary Morneau on June

30, 2006, whereby the Defendants were requested to provide a more accurate and complete affidavit of documents in the following terms:

> 1. The Defendants shall file and serve an accurate and complete Affidavit of Documents within 21 days of this Order. Specifically, and without limiting the generality of the foregoing, the Defendants shall disclose in their Affidavit of Documents:
> A. all documents relevant to the importation of blank audio recording media into Canada by each of the Defendants, such as purchase orders, invoices, shipping documents, customs documents, correspondence with customs brokers, payment journals, etc. from December 1999 to the present or prior to December 1999 for blank audio recording media sold in Canada in or after December 1999;
> B. all documents relevant to the purchase of blank audio recording media in Canada by each of the Defendants, such as purchase orders, invoices, shipping documents, payments journals, etc., from December 1999 to the present; and
> C. documents relevant to the sale of blank audio recording media in Canada by each of the Defendants, such as invoices, purchase orders, shipping documents, inventory lists, sales journals, etc., from December 1999 to the present.
>
> 2. The Defendants shall communicate the documents listed in the new Affidavit of Documents to the Plaintiff and such documents shall be organized in a way so that the Plaintiff can readily ascertain the amounts payable and the information required under the private copying tariffs certified by the Copyright Board.
>
> 3. The Plaintiff's right to cross-examine the deponent of the new Affidavit of Documents to be served and filed is reserved.

[8] Taking the Christmas recess into account, the delay within which the Defendants were to comply with the order of Prothonotary Morneau expired on January 29, 2007. On January 30, 2007, counsel for the Plaintiff sent an email to counsel for the Defendants, advising him that his clients had failed to comply with my December 22 Order. On January 31, 2007, counsel for the Defendants wrote to counsel for the Plaintiff, indicating that some documents would be provided

soon. However, there was no mention in the email of a date when the Defendants planned to comply with the Court's order.

[9] On February 6, 2007, counsel for the Plaintiff wrote to Mr. Justice Hugessen, the case management judge for this matter, to request that a case management conference be held as soon as possible to obtain the Defendants' immediate compliance with my December 22 Order. Counsel for the Defendants was copied on that letter.

[10] On February 8, 2007, Prothonotary Morneau directed that the Plaintiff should proceed by way of a motion in order to address the difficulties raised in the February 6 letter. Following that Direction, the Plaintiff made an *ex parte* motion for an order pursuant to Rule 467 of the *Rules*.

[11] On February 16, 2007, counsel for the Defendants wrote to counsel for the Plaintiff and indicated that their clients were making their best efforts to abide by the order requesting a better affidavit of documents. They wrote:

> With our clients' decision not to appeal the decision of Mr. Justice de Montigny dated December 22, 2006, the judicial gun has been pointed our clients' head to provide the documents requested without delay and our clients are employing their best efforts to do so, being limited however by several factors including our clients' corporate memory. In the timeframe concerned by the Order, our clients' have moved, changed accounting systems and undergone 2 audits by your client and wells (*sic*) as audits by the governmental authorities. Our clients' ability to satisfy the Order on a timely basis is further restricted by the magnitude of the task.
>
> Nevertheless, rest assured that, with the Order being final, our clients fully intend to comply with it in the best possible delays so that this case may move forward. In so far that the Federal Court is of the

> view that, in connection with the matters disputed by the parties, it is reasonable and relevant that these documents be provided to your client at this stage of the proceedings, our clients fully intend to do.

[12] Attached to that letter were 291 "bundles of documents" representing the Defendants' purchases from three manufacturers up to the end of 2006. They also indicated that they anticipated being in a position to disclose "on or before February 20, 2007" their purchases from another manufacturer as well as their clients' sales. Finally, Mr. Chronopoulos added that he would be out of the country from February 21, 2007 to March 12, 2007, and that they should be in a position to disclose their clients' remaining documents shortly thereafter.

[13] Pursuant to that letter, another letter was sent by counsel for the Defendants to counsel for the Plaintiff on February 20th, 2007, disclosing another 145 bundles of documents representing their purchases from a fourth manufacturer up to July 25, 2003. Their purchases of these products since then were to be disclosed upon the return of Mr. Chronopoulos during the week of March 12th, 2007. The letter added:

> Herewith, our clients' also disclose to yours two CDs, one containing a copy of Zanin CD/DVC Inc.'s sales invoices 2 to 25564, the other containing a copy of Z.E.I. Media Plus Inc.'s sales invoices 133380 to 193622. Note that with respect to Z.E.I. Media Plus Inc.'s sales invoices, we are advised that the numbers in several instances skip due to the networking system in place whereby sales data coming from different sources before an invoice is issued resulting in the system skipping numbers, the whole as shall be more fully explained by Z.E.I.'s representatives.

[14] In a further letter dated April 18, 2007, counsel for the Defendants disclosed an additional 1342 bundles of documents in connection with their purchases of CDs from Canadian or foreign sources. With respect to sales invoices, Mr. Chronopoulos wrote:

> In addition to the forgoing (*sic*), since disclosing two CDs in connection with our clients sales with our letter dated February 20, 2007, our clients have looked further into the issue of skipped numbers on the said CDs and determined that the number of skipped invoices on the said CDs do not reflect reality.
>
> We are advised that the program application that was developed by a programmer-consultant to perform the task did not do so in a reliable fashion. We are further advised that after manually reviewing the results and discovering that there was in fact existing invoices skipped on the said CDs, a new program application was conceived in order to reliably process the task which, we understand, has been lengthy, time consuming and is still ongoing.
>
> In the interim, by the presents, our clients disclose to yours 3CDs representing their partial sales, as follows:
>
> 1. Z.E.I. Media Plus Inc.'s sales invoices no. 133374 to 165000;
> 2. Norman Manufactoring Inc.'s, a division of Z.E.I. Media Plus Inc., sales invoices no. 10001 to 10901;
> 3. PCLink's, a division of Z.E.I. Media Plus Inc., sales invoices 32412 to 47000.
>
> CDs containing our clients' remaining sales invoices, insofar that our clients still have records of same, shall be disclosed as soon as possible, as they become available.

[15] Finally, on May 4th, 2007, the Defendants served and filed an Amended Affidavit of Documents along with three CDs completing the disclosure of Z.E.I.'s sales invoices.

APPLICABLE LEGAL PRINCIPLES

[16] The common law principles governing contempt of court have been codified in Rules 466 to 472 of the *Rules*. To establish contempt, the Plaintiff bears the burden of establishing, beyond a reasonable doubt, that there is a valid order of the Court, that the Defendants were aware of that court order, and that they wilfully disobeyed that order. My colleague Justice Hansen succinctly summarized the essential elements of contempt in *Sherman v. Canada Custom Revenue Agency*, 2006 FC 1121, at para. 11:

> A person who disobeys a court order is guilty of contempt: Rule 466(b) of the *Federal Courts Rules*, SOR/2004-283. The party alleging the contempt has the burden of proving the contempt beyond a reasonable doubt: Rule 469. That is, all of the essential elements of the offence of contempt must be proved beyond a reasonable doubt. Where the alleged contempt is the disobedience of a court order, the essential elements are the existence of the court order, knowledge of the order by the alleged contemnor, and knowing disobedience of the order.
>
> See also: *Brilliant Trading Inc. v. Wong*, 2005 FC 1214, at para. 15.

[17] The person alleged to have been in contempt is entitled to a hearing, where the evidence will be presented orally and where he or she will have the opportunity to present a defence. Since the party alleging contempt has the burden of proving such contempt, the Defendant does not need to present evidence to the Court.

[18] While knowledge of the Court's Order or process must be proven so that its breach is committed knowingly or negligently, *mens rea*, in the sense of a specific intent to disobey the Court's process or Order, does not have to be established; it only comes into play as one factor to be considered when determining the sanction. As explained by Prothonotary Hargrave in *Telus*

Mobility v. Telecommunications Workers Union, 2002 FCT 656, (2002), 220 F.T.R. 291, at paragraph 11, "[t]he wilfulness aspect is present only to exclude casual or accidental and unintentional acts of disobedience". The Federal Court of Appeal expanded on the required state of mind of the accused for the Court to find him or her guilty of contempt. In *Merck and Co. v. Apotex Inc.*, 2003 FCA 234, (2003), 241 F.T.R. 160, , at paragraph 60, Justice Sexton (for a unanimous Court) wrote:

> Therefore, the jurisprudence establishes that it is not necessary to show that the alleged contemnor intended, by doing the action, to "interfere with the orderly administration of justice or to impair the authority or dignity of the Court". This is too high a level of intent to require in civil contempt cases. Rather, it is sufficient to find that the Court's intention was clear and that the alleged contemnor knowingly committed the prohibited act.

[19] Once contempt has been established, Rule 472 of the *Rules* provides the various penalties that can be imposed by the judge. It includes imprisonment for a period of less than five years, the payment of a fine, and costs. My colleague Justice Snider recently reviewed the relevant case law and summarized the various criteria that can be taken into account in coming to a sanction:

> A review of the jurisprudence establishes a number of relevant factors to consider in assessing the penalty for contempt. Overall, the penalty should reflect the severity of the law and yet be sufficiently moderate to show the temperance of justice (*Cutter* (*Canada*) *Ltd. v. Baxter Travenol Laboratories of Canada Ltd.*, [1987] 2 F.C. 557, 14 C.P.R. (3d) 449 at 453 (F.C.A.)). Other elements to be considered are the following:
>
> the fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine (*Desnoes & Geddes Ltd. v. Hart Breweries Ltd.*, 19 C.P.R. (4th) 346 at para. 7 (F.C.T.D.));
>
> whether the contempt offence is a first offence (*R. v. de L'Isle* (*1994*), 56 C.P.R. (3d) 371 at 373 (F.C.A.));

> whether the contemnor has a prior record of ignoring Court process (*Desnoes & Geddes*, above at para. 11);
>
> the presence of any mitigating factors such as good faith or apology (*Cutter* (*Canada*) *Ltd.*, above at 454);
>
> any apology and whether it was timely given (*N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management Corp*., [2002] F.C.J. No. 1713 at para. 17 (F.C.T.D.));
>
> deterrence, to ensure that subsequent orders will not be breached (*Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc.* (*1991*), 37 C.P.R. (3d) 8 at 13 (F.C.T.D.));
>
> any intention to wilfully ignore or disregard the order(s) of the Court (*James Fisher and Sons Plc v. Pegasus Lines Ltd. S.A.*, [2002] F.C.J. No. 865 at para. 17 (F.C.T.D.)); and
>
> whether the order has subsequently been found to be invalid (*Coca-Cola Ltd. v. Pardhan* (2000), 5 C.P.R. (4th) 333 at para. 6 (F.C.T.D.), aff'd (2003), 23 C.P.R. (4th) 173 (F.C.A.)).
>
> *Wanderingspirit v. Marie*, 2006 FC 1420 at para. 4

FINDINGS OF FACT

[20] There is no issue as to the existence of a valid order (that of Prothonotary Morneau dated June 30, 2006, confirmed on appeal at 2006 FC 1546), nor as to the fact that the Defendants knew of that Order. At the hearing, Mr. Segal admitted that his clients received a copy of my decision during the Christmas holidays. In any event, it appears that my decision was faxed by the Court to both counsel for the Plaintiff and counsel for the Defendants.

[21] The only question to be resolved is whether the Defendants knowingly or negligently disregarded the Court order. Counsel for the Plaintiff argued that the Defendants have disobeyed the Court order first by not providing a further and better affidavit of documents within the

timeframe set out in Prothonotary Morneau's decision, as confirmed by my December 22, 2006 decision, and secondly, that the documents they have provided are not all relevant and were more or less "dumped" on the Plaintiff, leaving it to the Collective to sort them out and to determine what was relevant and what was not for the purpose of resolving the dispute between the parties.

[22] Counsel for the Defendants, on the other hand, contended that their clients did their best to comply with the Court order but could not do so within a period of 21 days, because it was a massive undertaking to retrieve all the materials referred to in Prothonotory Morneau's order and also because they did not have the technical capacity first to print all the sales invoices for those years and then to discriminate between the information related to "blank audio recording media" and the information that was not so related. Counsel for the Defendants called four witnesses in support of that assertion.

[23] The first witness, Mr. Charles Thibodeau, has worked for the Defendants since 2004 and is Vice President (Finance) for the Sogelem group, of which the defendant companies are part. In this capacity, he deals with everything ranging from employees' wages, accounting and book-keeping, human resources and so on. On the request of Mr. Lemme, he did try his best to extract from the computer all the sales invoices, only to realise that the software used by the companies did not allow him to do so (he could only extract sales invoices one by one). He then went to see a computer consultant, Mr. Eric Tremblay, to develop a program capable of retrieving all the sales invoices from the computer and printing them in bulk, as opposed to one by one. On cross-examination, Mr. Thibodeau confirmed that he was never asked to retrieve all the sales invoices before January of

2007. He also indicated that no attempt was made to retrieve the information in the sales invoices by code of products, and did not know if it would have been possible.

[24] The second witness, Mr. Eric Tremblay, is a computer programmer who works as a consultant for the Defendant companies. He tried for almost a month to develop a program application that would export all Defendant companies' sales records, to no avail. In fact, the application that he came up with provided unreliable and incomplete results, and this is what prompted Mr. Thibodeau to turn to those programmers who had developed the computer software used by the Defendant companies. On cross-examination, he also confirmed that he was never asked to retrieve the information by product codes, but that it is a normal feature of most invoicing software programs.

[25] The third witness was Mrs. Louise Lauzon, who works as executive assistant to Mr. Lemme. She testified at the hearing that the Defendants' purchase records from suppliers exist in paper form, and that she worked almost full-time for three weeks to sift through these records and disclose the Defendants' purchases of relevant media to the exclusion of other products. On cross-examination, she mentioned that she learned of my decision (confirming Prothonotary Morneau's Order) on January 5, 2007 from Mr. Lemme himself, but that she was allowed to take her vacation until January 16. She also said that nobody else went through the boxes of purchase records until her return to work, as she was best able to do that work.

[26] Finally, Mr. Lemme testified on his own behalf and as President of the two Defendant companies. He acknowledged that he was on business trips for most of the period during which a further and more complete affidavit of documents was to be provided, and that he did not involve himself in the process of complying with this order beyond giving directions to Mr. Thibodeau and Mrs. Lauzon. He also said that nothing was done between June and December of 2006, because he was confident of winning the appeal against Prothonotary Morneau's Order.

[27] On the basis of that evidence, I am of the view that the Defendants are in contempt of the Court order. Not only have they not provided the Plaintiff with a better and more complete affidavit of documents within the timeframe ordered by Prothonotary Morneau and confirmed in my December 22, 2007 decision, but they have produced a significant portion of documents that are not relevant to the resolution of the dispute between the parties.

[28] The evidence shows that the Defendants have not taken the Order of Prothonotary Morneau as seriously as they should have. My decision was rendered December 22, 2006, yet they only started implementing it in early January. As for the purchase orders, Mrs. Lauzon really put herself to the task of collecting and selecting the relevant material upon her return from vacation, on the 16th of January, 2007. The evidence that she was the only person who could properly perform that task is far from convincing and at best debatable. As for the sales invoices, there was no attempt to retrieve the information by product codes, and no satisfying explanation as to why the software used by the Defendant companies does not have the capability of retrieving all the documents in a quick and efficient way. In any event, the prudent course of action would have been to start the exercise

as soon as Prothonotary Morneau made his order, or at least to make sure that it could be all completed within 21 days.

[29] Not only was the transmission of documents late (the last CDs containing sales invoices were sent to the Plaintiff on May 4, 2007, some three months after the deadline set out by the Court), but it was not in compliance with the terms of the Order. Paragraph 2 of the Prothonotary's Order stipulates that the "documents shall be organized in such a way that the Plaintiff can readily ascertain the amounts payable and the information required under the private copying tariffs". This is consistent with the purpose of disclosure in advance of trial, which is to assist in the determination of the truth of matters in issue, to narrow these issues, and to expedite trial of the real issues that are outstanding (*Apotex Inc. v. Wellcome Foundation Ltd.* (1993), 51 C.P.R. (3d) 305, 69 F.T.R. 161 (F.C.)).

[30] This obligation imposed on the Defendants should have been no surprise to them, as section 9 of the *Private Copying Tariff, 1999-2000* (as amended) holds that "[e]very manufacturer or importer shall keep and preserve (…) records from which CPCC can readily ascertain the amounts payable and the information required under this tariff". This purpose is defeated by the fact that, at least for the sales invoices, there was no selection made. If, as was contended by some witnesses, only Mr. Lemme, Mrs. Lauzon and maybe a limited number of employees of the Defendants are able to make a distinction between what is a CD and what is not because the description on the invoice is not always clear, one can just imagine how much more complicated it will be for the Plaintiff to ascertain the exact nature of these products listed on the sales invoices. In any event,

Plaintiff should not bear the significant costs associated with sorting through piles of invoices to determine which ones are for the sale of blank audio recording media and which ones are not, especially given the high admitted percentage of irrelevant documents contained therein.

[31] The Defendants also argued that, had their argument on bifurcation carried the day, they would not have had to go through this exercise immediately. But this is a fallacious argument. Whether or not they are to be successful in advancing their thesis that blank industrial media (i.e., those that are not sold to individual consumers for the purpose of reproducing sound recordings) are not covered by the Tariff, the Defendants will at some point have to make a selection and differentiate between their various products. They have never argued, after all, that all of their CDs and CD-Rs are not leviable. The number of documents they may have to produce may be more limited, but they will still have to undertake some kind of sorting out.

[32] For all of these reasons, I find the Defendants to be in contempt of Prothonotary Morneau's Order. As for the sanction, Plaintiff suggests a fine of $2,500 per defendant, to ensure that a clear message is sent and that future Orders of the Court are complied with. In the specific circumstances of this case, I agree with that proposal and consider, in light of the criteria developed in the case law and summarised earlier in these reasons, that such a fine is appropriate and just. The purpose is not to drive the Defendants out of business, but to make sure that Court orders are taken seriously. In coming to that conclusion, I take note of the fact that Mr. Lemme took some steps to abide by the Court Order, and seems to realize the importance of an orderly Court process. It is to be hoped that

the present condemnation will further induce him to get more personally involved in the fulfillment of future Court orders.

[33] As for costs, the normal practice is to award them on a solicitor-client basis to the party seeking enforcement of the Court Order. I see no reason to detract from this practice in the present case. Accordingly, the Defendants shall pay to the Plaintiff its reasonable costs in respect of the show cause hearing and the proceedings before this Court.

ORDER

THIS COURT ORDERS that:

- The Defendants Z.E.I. Media Plus Inc., Zanin CD/DVD Inc. and Joseph Lemme are found to have been in contempt of the Order of Prothonotary Morneau dated June 30, 2006.
- The Defendants Z.E.I. Media Plus Inc., Zanin CD/DVD Inc. and Joseph Lemme shall each pay a fine in the amount of $2,500 within one month of the date of this order.
- The Defendants Z.E.I. Media Plus Inc., Zanin CD/DVD Inc. and Joseph Lemme shall, jointly and severally, pay to the Plaintiff its reasonable costs in respect of the show cause hearing and the proceedings before this Court on April 23, 2007. These costs are to be assessed on a solicitor-client basis and are to be paid within one month of the assessment of such costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-578-05
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DATE OF HEARING:	April 23, 2007
REASONS FOR ORDER AND ORDER BY:	JUSTICE DE MONTIGNY
DATED:	August 28, 2007

APPEARANCES:

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