

Federal Court



Cour fédérale

Date: 20100128

Docket: T-107-06

Citation: 2010 FC 102

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

**J & E MEDIA INC., J & E MEDIA INC.,
MEDIA DISTRIBUTORS CANADA INC.,
2069152 ONTARIO LTD., 1477034 ONTARIO LTD.,
1657523 ONTARIO LTD., JACK HAGOP AYRANIAN,
ARAXIE BILAWÉJIAN AND JOVAN FEBRUARY**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Moving Defendants, J & E Media Inc. (J&E USA), J & E Media Inc. (J&E Canada), Media Distributors Canada Inc. (MDCI), Jack Hagop Ayranian (Ayranian) and Araxie Bilawejian (Bilawejian) apply by way of Notice of Motion for summary judgment pursuant to Rules 213 to 218 of the *Federal Court Rules* (the *Rules*) and for declarations pursuant to Rule 220 of the *Rules*. Specifically, the Moving Defendants seek:

- a. an order granting summary judgment dismissing all claims against the Defendant Media Distributors Canada Inc. (MDCI) because those claims present no genuine issues for trial;
- b. an order declaring this court has no jurisdiction to award damages for the alleged civil conspiracy set forth in the Statement of Claim;
- c. an order declaring section 82 of the *Copyright Act* only empowers the court to award damages against those entities which are found to have either manufactured or imported into Canada for sale blank audio recording media (Products);
- d. an order declaring as a matter of law the Court's authority to "lift the corporate veil" only allows the court to impose liability on those who own and control a corporation found to have engaged in improper conduct, and does not allow the court to impose liability on third parties which neither own nor control that corporation;
- e. an order granting summary judgment dismissing the claims against the Moving Defendants related to Products imported into Canada and sold by the co-defendants, because those claims present no genuine issues for trial;
- f. an order granting the Moving Defendants such further and other relief as counsel may advise and this Honourable Court may deem just, including that ancillary relief described in the draft order included in the Moving Defendants' motion materials.

[2] This Motion arises in a lawsuit commenced by the Plaintiff seeking an order that certain of the Moving Defendants be found jointly and severally liable for damages equal to unpaid levies owed under the *Copyright Act* (the Act). The Plaintiff asks the Court to lift the

corporate veil and find some or all the Moving Defendants personally liable for the unpaid levies of the corporate entities they control given their involvement in a conspiracy and actions to avoid levy payment obligations under the *Act*.

[3] The Plaintiff essentially alleges the events and actions listed below.

- a. The Moving Defendants, Ayranian and Bilawejian, established J & E Canada. J & E Canada acquired blank recording media from J & E USA, a company owned and operated by Ayranian in California. J & E Canada did not pay private copying on the importation of the blank media.
- b. The Plaintiff demanded J & E Canada pay private copying levies on April 20, 2005.
- c. The Moving Defendants, Ayranian and Bilawejian, ceased operations under J & E Canada and Bilawejian established MDCI. Within weeks J & E Canada's employee, Matthew Boyce, began selling blank media from MDCI premises which had been those of J & E Canada. The Moving Defendants paid J & E USA from the J & E Canada proceeds leaving in excess of \$420,000 in unpaid private copying levies.
- d. MDCI did not pay private copying levies on sales of blank media claiming it acquired the blank media from two independent third party suppliers the co-defendants, 2069152 Ontario Ltd. and 1657523 Ontario Ltd. operated by Jovan February who was the principal of another defendant company, 1477034 Ontario Ltd. (collectively referred to as the February companies). February is an associate of Matthew Boyce and had dealings with the Moving Defendants Ayranian and Bilawejian. The February companies occupied an office in the J & E Canada/MDCI

premises. The February companies had an agreement to acquire blank media from J & E USA and provide it to J & E Canada and later MDCI. The blank recording media was supplied at prices lower than the private copying levies would permit. Sales of unpaid levies through MDCI give rise to at least \$900,000 in unpaid levies.

[4] The Plaintiff seeks to hold MDCI liable for unpaid private copying levies as a successor company to J & E Canada and also liable for levies on blank media subsequently sold by MDCI. The Plaintiff contends the corporate veil should be lifted in order to hold Ayrarian and Bilawejian responsible for the corporations' liabilities.

[5] The Plaintiff also seeks to have the Moving Defendants found jointly liable for unpaid liabilities by reason of a conspiracy and actions taken amongst the Defendants to avoid paying levies due on imported blank media under s. 82 of the *Act*.

[6] The Moving Defendants state that MDCI neither manufactures nor imports blank media into Canada and is not liable for private copying levies under s. 82 of the *Act*. They argue the February companies are solely responsible for payment of private copying levies and the Moving Defendants are not liable for the February companies' obligations. The Moving Defendants submit the Plaintiff's corporate veil argument must fail because neither Ayrarian nor Bilawejian control or have any interest in the importing February companies.

[7] Further, the Moving Defendants submit there is no evidence of a conspiracy.

[8] Finally, the Moving Defendants argue the Court does not have jurisdiction to award damages for a tortious common law conspiracy as it is a provincial tort matter and there is neither a statutory grant by Parliament nor other existing body of law giving this Court jurisdiction.

[9] The Moving Defendants submit they are entitled to summary judgment dismissing the claim against MDCI and also dismissing the claim against Ayrarian and Bilawejian. They also seek declarations of law that would essentially support dismissal of the Plaintiff's lawsuit against them.

Legislation

[10] This motion involves consideration of *Federal Courts Rules* and sections 82 and 88 of the *Copyright Act*.

[11] The *Federal Courts Rules*, (SOR/98-106) (the rules have since been amended), provide:

215. A response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

216. (1) Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment

215. La réponse à une requête en jugement sommaire ne peut être fondée uniquement sur les allégations ou les dénégations contenues dans les actes de procédure déposés par le requérant. Elle doit plutôt énoncer les faits précis démontrant l'existence d'une véritable question litigieuse.

216. (1) Lorsque, par suite d'une requête en jugement sommaire, la Cour est

accordingly.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

(4) Where a motion for summary judgment is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the usual way or order that the action be conducted as a specially managed proceeding.

220. (1) A party may bring a

convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

a) le montant auquel le requérant a droit, elle peut ordonner l'instruction de la question ou rendre un jugement sommaire assorti d'un renvoi pour détermination du montant conformément à la règle 153; b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) Lorsque, par suite d'une requête en jugement sommaire, la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon générale, si elle parvient à partir de l'ensemble de la preuve à dégager les faits nécessaires pour trancher les questions de fait et de droit.

(4) Lorsque la requête en jugement sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou les questions litigieuses qui ne

motion before trial to request that the Court determine

- (a) a question of law that may be relevant to an action;
- (b) a question as to the admissibility of any document, exhibit or other evidence; or
- (c) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.

sont pas tranchées par le jugement sommaire soient instruites de la manière habituelle ou elle peut ordonner la tenue d'une instance à gestion spéciale.

220. (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :

- a) tout point de droit qui peut être pertinent dans l'action;
- b) tout point concernant l'admissibilité d'un document, d'une pièce ou de tout autre élément de preuve;
- c) les points litigieux que les parties ont exposés dans un mémoire spécial avant l'instruction de l'action ou en remplacement de celle-ci.

[12] Sections 82, 83(8) and 88 of the *Act* provide:

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and

(b) shall, in accordance with subsection 83(8), keep

82. (1) Quiconque fabrique au Canada ou y importe des supports audio vierges à des fins commerciales est tenu :

a) sous réserve du paragraphe (2) et de l'article 86, de payer à l'organisme de perception une redevance sur la vente ou toute autre forme d'aliénation de ces supports au Canada;

b) d'établir, conformément au paragraphe 83(8), des états de compte relatifs aux activités visées à l'alinéa a) et aux activités d'exportation de ces

statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

(2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.

supports, et de les communiquer à l'organisme de perception.

(2) Aucune redevance n'est toutefois payable sur les supports audio vierges lorsque leur exportation est une condition de vente ou autre forme d'aliénation et qu'ils sont effectivement exportés.

with respect to collections, ss. 83(8) provides:

83(8) On the conclusion of its consideration of the proposed tariff, the Board shall...

(d) designate as the collecting body the collective society or other society, association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86,

83(8) Au terme de son examen, la Commission :

d) désigne, à titre d'organisme de perception, la société de gestion ou autre société, association ou personne morale la mieux en mesure, à son avis, de s'acquitter des responsabilités ou fonctions découlant des articles 82, 84 et 86.

with respect to recovery, ss. 88 provides:

88. (1) Without prejudice to any other remedies available to it, the collecting body may, for the period specified in an approved tariff, collect the levies due to it under the tariff and, in default of their payment, recover them in a court of competent

88. (1) L'organisme de perception peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice

jurisdiction.

(2) The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84.

(3) Where any obligation imposed by this Part is not complied with, the collecting body may, in addition to any other remedy available, apply to a court of competent jurisdiction for an order directing compliance with that obligation.

(4) Before making an order under subsection (2), the court must take into account

(a) whether the person who failed to pay the levy acted in good faith or bad faith;

(b) the conduct of the parties before and during the proceedings; and

(c) the need to deter persons from failing to pay levies.

(2) En cas de non-paiement des redevances prévues par la présente partie, le tribunal compétent peut condamner le défaillant à payer à l'organisme de perception jusqu'au quintuple du montant de ces redevances et ce dernier les répartit conformément à l'article 84.

(3) L'organisme de perception peut, en sus de tout autre recours possible, demander à un tribunal compétent de rendre une ordonnance obligeant une personne à se conformer aux exigences de la présente partie

(4) Lorsqu'il rend une décision relativement au paragraphe (2), le tribunal tient compte notamment des facteurs suivants :

a) la bonne ou mauvaise foi du défaillant;

b) le comportement des parties avant l'instance et au cours de celle-ci;

c) la nécessité de créer un effet dissuasif en ce qui touche le non-paiement des redevances.

Analysis

[13] Under the *Copyright Act* authors and performers were exclusive holders of their creative works. The technological ease and widespread use of copying media, particularly for the recording of music, infringed the creators' copyrights. In 1998 the *Act* was amended

to adapt to the growing trend of copying creative works onto blank recording media. A compromise was struck that allows copying copyrighted music for private use onto blank media in return for a levy on all blank media manufactured or imported into Canada. Those proceeds are redistributed to eligible authors and performers. *Canadian Private Copyright Collective v. Z.E.I. Media Plus Inc. and Zann CD/DVD Inc. and Joseph Lemme* 2006 FC 1546 paras. 4 – 6.

[14] The process of setting tariffs and collecting the levy was described by Madame Justice Anne Mactavish in *Canadian Private Copying Collective and 9087-0718 Québec Inc.* 2006 FC 283 at paragraphs 7 - 10:

“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.

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*.

Levies collected by the CPCC are then distributed to eligible collective societies for redistribution to the rightsholders themselves.

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.”

[15] The substantive issue here is whether summary judgment should be awarded. The Federal Court of Appeal has expressed a need for caution in granting summary judgment.

[16] Contested facts, credibility issues and the need for inferences giving rise to issues at trial preclude resort to summary judgment to decide disputed cases. In *MacNeil Estate v. Canada*, [2004] 2004 FCA 50 paras. 32-33 & 37, the Federal Court of Appeal stated “that without *viva voce* evidence, a motions judge faced with a genuine issue for trial cannot properly assess credibility or sift through and weigh the evidence.” The Court continued that Rule 215 only requires that responding party put their best foot forward and that when there is an issue of credibility or where a serious question of fact or law turns on drawing inferences, the case should not be decided on summary judgment, but should go to trial.

[17] Finally, the test on motions for summary judgment was summarized by Mr. Justice Allen Linden in *Premakumaran v. Canada* 2006 FCA 213, [2007] 2 F.C.R. 191 at para. 8:

The defendant brought in a motion for summary judgment, seeking to dismiss the appellant’s claims under Rule 213 of the *Federal Court Rules*, which permit s the Court to do so where there is no “genuine issue for trial”. The test to be applied by the Motions Judge is whether the case is so doubtful that it “does not deserve consideration by the trier of fact at a future trial”. One need not show that the plaintiff “cannot possibly succeed”, only that the case is clearly without foundation”. (emphasis added)

Serious Questions of Fact

[18] The Moving Defendants and the Plaintiff advance conflicting evidence to support their submissions for and against summary judgment. They point to different facts and inferences to be drawn from those facts to support their arguments. The Plaintiff and

Moving Defendants do not agree on what evidence is to be considered, what inferences may be drawn and whether the evidence warrants lifting the corporate veil of the various defendant corporations.

[19] The Moving Defendants argue the Plaintiff's claims against MDCI should be dismissed because s. 82 of the *Act* limits the obligation to pay private copyright levies to the first entity to dispose of imported blank media. They also submit the evidence does not support any finding of involvement or control by Ayranian and Bilawejian in the February companies to support a lifting of the corporate veil of the defendant companies.

[20] In my view the Plaintiff has shown this case involves issues of credibility and serious questions of fact that are best left for trial.

Questions of Fact

[21] The facts alleged by the Plaintiff and demonstrated in their evidence include numerous questionable coincidences between J & E Canada and MDCI including:

- a. J & E Canada ceased operations upon receiving a demand for payment of unpaid private copyright levies and MDCI began operating shortly afterwards in the same business;
- b. the MDCI principal, Bilawejian, as well as MDCI's senior employee, had been at J & E Canada in similar capacities;
- c. the same supplier, the February companies, supplied J & E Canada and MDCI;
- d. MDCI carried on business in the same premises as J & E Canada;

- e. There was a similar pattern of non-payment of private copyright levies by J & E Canada and MDCI.

[22] The Plaintiff also provided evidence of business dealings linking individual defendants, Ayranian and Bilawejian with February. The evidence of February, as owner or operator of the third party companies, figures prominently in the debate. Did he, as the Moving Defendant's argue, conduct an independent operation using his companies to import blank media and sell to J & E and later MDCI with sole responsibility for non-payment of the private copying levies? Or did he in concert with the Moving Defendants, as the Plaintiff contends, operate a scheme designed to assist J & E Canada and MDCI to avoid payment of the levies?

[23] Much turns on Mr. February's credibility which can only be decided upon the hearing of evidence at trial.

[24] These facts give MDCI the appearance of a successor company to J & E Canada. When one adds the involvement of the February companies, it may be the lot is trying "to blur the boundaries" between the companies in a similar manner found by Mr. Justice Konrad von Finckenstein in *Canadian Copyright Collective v. Fuzion Technology Corp.*, 2006 FC 1284 at para. 27. The facts relating to this corporate changeover and the relationships between all the parties are the subject of much dispute and cannot be resolved

in summary judgment. These are serious questions of fact that must be answered by a trier of fact at trial.

Lifting the Corporate Veil

[25] The Moving Defendants argue the Plaintiff's claims against MDCI should be dismissed because s.82 of the *Act* limits the obligation to pay private copyright levies on the first entity to dispose of blank audio recording media imported or manufactured and MDCI never imported or manufactured blank media.

[26] Lifting the corporate veil is justified when a corporation "is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party." *Lockharts Ltd. v. Excalibur Holdings Ltd.* [1987] N.S.J. No. 450, 83 N.S.R. (2d) 181.

[27] In *Canadian Copyright Licensing Agency (c.o.b. Access Copyright) v. Apex Copy Centre*, 2006 FC 470, Mr. Justice Robert Barnes suggests lifting the corporate veil to root out the puppetmaster who uses a puppet corporation to cloak his actions.

[28] Thus, if a fraudulent use of the February companies as a "puppet" were to be found on the facts, the corporate veil might be lifted and MDCI may be liable for the actions of the February companies if a degree of control of the latter entities can be proven. Similarly, Ayranian and Bilawejian may face issues of liability if, through MDCI or through February, they in fact control the importing companies.

Serious Question of Law

[29] The Moving Defendants submit this Court does not have jurisdiction to award damages for a tortious common law conspiracy as it is a provincial matter of civil rights. They submit there is neither any statutory grant by Parliament nor other existing body that gives this Court jurisdiction.

[30] The issue of conspiracy advanced by the Plaintiff has already been considered in this lawsuit. Prothonotary Morneau heard and approved a motion by the Plaintiff to amend its Statement of Claim to include an allegation of conspiracy by the Moving Defendants to avoid payment of the private copyright levies. In his reasons given on February 18, 2008 he stated:

Considering that the affidavit evidence and excerpts of examinations produced by the Plaintiff sustain sufficiently at this stage the gist of the proposed amendments which are that the proposed defendants Bilawejian, Ayrarian and February (the Proposed defendants) not only were the directing minds behind the existing, but eluding, corporate defendants, but have in their individual capacities engaged in a concerted effort to import and dispose of blank media in Canada without paying the required levies. I am of the view that the proposed amendments plead with sufficient clarity the requirements of the alleged conspiracy thesis to allow the Proposed defendants to plead in response to it in an intelligent manner (see *Niagara Falls (City) v. Mingle*, 1998 CarswellOnt 3895, page 7, paragraph 18). Will the conspiracy thesis fall by the wayside when the case is heard on the merits? This is another issue altogether.

[31] The Defendants appealed the Prothonotary's Order. On May 21, 2008 Mr. Justice James Hugessen dismissed the appeal stating in part:

Counsel's argument on the appeal consisted primarily of an attack on whether or not the plaintiff had succeeded in proving the existence of the alleged conspiracy.

That is not the test.

It was enough for the plaintiff to show that the new allegations were not spurious or to put it another way were not doomed to failure.

The Prothonotary found that the "gist" of the new alleged cause of action was supported by the evidence produced by the plaintiff.

This was not an error of law.

The plaintiff may or may not succeed at trial in proving the new cause of action.

[32] On July 8, 2009 Prothonotary Morneau issued an Order setting out the issues at trial as agreed to by the Parties. It included as an issue:

If the Court has not already determined this issue, does the Federal Court have jurisdiction to award damages for a civil claim of civil conspiracy, and if so, was there an actionable conspiracy in this case?

[33] Considering the foregoing, I am of the view that the issue of conspiracy has been considered and the question was determined to be a matter for trial.

[34] There is another reason why the conspiracy issue should go to trial. The Moving Defendants contend the Court has no jurisdiction to entertain a claim for damages for civil conspiracy when not brought pursuant to the *Competition Act* (R.S.C. 1985, c. C-34). They submit the claim of civil conspiracy is founded on tort law which is a matter for the provincial superior courts and which the Federal Court has no jurisdiction.

[35] The Moving Defendants state this issue was decided in *Kealey v. Canada*, 2003 FCT 754 which involved an allegation federal Ministers of the Crown conspired to falsify the

plaintiff's records. Such a claim clearly falls outside the jurisdiction of this Court. However, the case at hand is significantly more nuanced and involves further and additional elements such that *Kealey* is not of particular assistance.

[36] The Moving Defendants also refer to *Eli Lilly and Co. v. Apotex Inc.*, 2002 FCT 1007. Prothonotary Aronovitch considered that had Apotex been maintaining claims for damages in respect to contract and tort violations they would have been outside the Court's jurisdiction. However, she went on to state "the facts relating to the supply agreement and the alleged conspiracy to breach the agreement are not pleaded for the purpose of enforcing the contract."

[37] In this action, the claim relates to the enforcement of the *Act* rather than enforcement of a contract. The claim of conspiracy is advanced by the Plaintiff for the purpose of establishing a violation of the *Act* and seeking relief provided therein.

[38] In *Blacktop Ltd. v. Artec Equipment Co.*, [1991] F.C.J. No. 1046 Mr. Justice Paul Rouleau examined subsection 20(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which reads:

(2) Industrial property, concurrent jurisdiction – the Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography, referred to in paragraph (a). (emphasis added)

Justice Rouleau confirmed the provision "...confers jurisdiction on the Court where a right to relief exists." It is to be noted that s. 88 of the *Act* contains provisions for relief with respect to copyright violations.

[39] Based on the foregoing, the question of whether or not the Plaintiff may advance a claim of conspiracy among the Defendants to avoid paying private copying levies as part of their case for proving a violation of the *Act* is a serious question of law. It is best addressed at trial.

Procedure for Pure Questions of Law

[40] The Moving Defendants seek declarations:

- a. that this court has no jurisdiction to award damages for the alleged civil conspiracy set forth in the statement of claim;
- b. that section 82 of the *Copyright Act* only empowers the court to award damages against those entities which are found to have either manufactured or imported into Canada for sale blank audio recording media (Products);
- c. that as a matter of law the court's authority to "lift the corporate veil only allows the court to impose liability on those who own and control a corporation found to have engaged in improper conduct, and does not allow the court to impose liability on third parties which neither own nor control that corporation;

[41] While the Court's jurisdiction may entertain pure questions of law to be heard under the Summary judgment Rule, the Rules also provide a procedure for deciding such questions.

[42] Rule 220 provides a party may bring a motion before trial to request the Court determine a relevant question of law in an action. The mechanism provided for Rule 220 is a two-step process. The Court must first consider a motion that questions of law be determined before trial. If the Court grants an order the questions of law will be answered, then the Court holds a further hearing and decides the questions of law. *Perera v. Canada*, [1998] 3 F.C. 381, 158 D.L.R. (4th) 381.

[43] In the case at hand, the Moving Defendants seek a declaration of law by the Court in the course of a single hearing. However, it is only on consent of the parties that the Rule 220 procedure may be collapsed into a single hearing: *Way v. Canada* (1993), 63 F.T.R. 24 (T.D.). The Plaintiffs have not consented to addressing questions of law in a single motion.

[44] Since the Moving Defendants have not followed the procedure provided for by Rule 220 and existing jurisprudence, I decline to decide on the Moving Defendants' request for declarations on the basis of pure questions of law.

Conclusion

[45] I find the Moving Defendants have not established the Plaintiff's claim against the Moving Defendants is so doubtful that it "does not deserve consideration by the trier of fact at a future trial." I conclude there are serious questions of fact, issues of credibility, scrutiny of possible inferences and a serious question of law that are all better left for a trial.

[46] The Moving Defendants' motion for summary judgments and declarations of law is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Moving Defendants' motion for summary judgment and declarations is dismissed,
2. Costs are in the cause.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-107-06

STYLE OF CAUSE: CANADIAN PRIVATE COPYING COLLECTIVE and
J & E MEDIA INC. ET AL.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 30, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: JANUARY 28, 2010

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