

Date: 20090119

Docket: A-327-08

Citation: 2009 FCA 11

**CORAM: LÉTOURNEAU J.A.
EVANS J.A.
TRUDEL J.A.**

BETWEEN:

PLUS MEDIA (CANADA) INC.

and

CALVIN XU (a.k.a. QI XU)

Appellants

and

CANADIAN PRIVATE COPYING COLLECTIVE

Respondent

Heard at Toronto, Ontario, on January 19, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on January 19, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 19, 2009)

TRUDEL J.A.

[1] This is an appeal arising from a decision by Mr. Justice O'Reilly (the Judge) dated June 9, 2008 [2008 FC 718].

[2] The respondent, Canadian Private Copying Collective (CPCC), is a non-profit corporation whose mandate [deriving from the *Copyright Act*, R.S.C. 1985 c. C-30] (Act) is to collect and

distribute levies imposed on the importation and sale of blank recording media, such as compact disks. The levies are established by the Copyright Board and are set out in the *Private Copying Tariff, 2005-2007*, Supplement, Canada Gazette, Part I, May 12, 2007 (Tariff).

[3] In the discharge of its mandate, CPCC began an action against Calvin Xu (Mr. Xu), Plus Media Inc. (PM) and Plus Media (Canada) Inc. (PMC) [collectively the defendants in the Federal Court], in order to collect levies allegedly owed by virtue of PM's sale of blank CDs, as well as interest, penalties, and costs. CPCC also sought an order requiring PM, PMC and Mr. Xu to submit to an audit in order to quantify the amount owed under the Tariff. The facts that follow are the genesis of CPCC's action against the defendants in the Federal Court.

[4] In 2003, acting upon information received previously from a third party, CPCC inquired about PM's enterprises by contacting Mr. Xu, PM's sole shareholder. Mr. Xu initially stated that PM had not been importing CD-Rs and eventually changed his statement by saying the exact opposite two years later. Having admitted that PM's activities were caught by the Tariff, PM sent to CPCC a period report and payment levy for the years 2004 and 2005.

[5] Nevertheless, as PM was still in default of its obligations under the Tariff, CPCC made several requests in order to receive revised by-monthly reports from PM, none of which were acknowledged by it.

[6] Faced with PM's silence, CPCC set an audit of the company for October 18, 2005. This audit was postponed twice at PM's request for reasons which were later found to be untrue or deceitful.

[7] The audit was finally scheduled for December 14th, but in vain. Upon their arrival at PM's headquarters, CPCC's auditors were informed that PM was no longer in business and that the premises were now those of PMC. Mr. Xu's wife was the only shareholder and sole director of PMC, which employed Mr. Xu. At the hearing, we learned that PMC had since ceased doing business although it has not been dissolved.

[8] In the Court below, the respondent sought several conclusions. However, the Judge stated, "There is only one issue that is ripe for determination by the Court; that is, should the Court order an audit and, if so, against whom?" (at paragraph 16 of the reasons for judgment).

[9] Having examined the facts, the statutory framework, and the position of the parties, the Judge concluded that an audit was required. He ordered PM, PMC and Mr. Xu to "procure and make available to [CPCC]'s auditors (...) all of the business, accounting and financial records of PM and PMC (...)" (at paragraph 1 of the judgment).

[10] Hence, the present appeal instituted by PMC and Mr. Xu. PM, against which an order had also been made, is not a party to this appeal as it was dissolved on May 8, 2006.

[11] The appellants argue that the Judge erred when making an order against PMC. PMC is a separate corporation from PM. Unlike PM, it does not import or manufacture blank recording media.

[12] The appellants also challenge the Judge's conclusion on costs.

[13] This appeal will be dismissed on both grounds.

[14] Given the circumstances surrounding the dissolution of PM and the creation of PMC, the absence of a clear distinction between the undertakings of the two corporations, and the disappearance of PM's business records while on the premises of PMC, the Judge made no reviewable error in concluding that the evidence on record was "strikingly similar" to the case of *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2006 FC 1284; affirmed 2007 FCA 335, and thus, in issuing an order against PMC.

[15] Similarly, the Judge made no reviewable error in issuing an order against Mr. Xu. There was evidence on record justifying his findings on Mr. Xu's involvement in PM and on his many misrepresentations and those of PMC's employees to circumvent CPCC's efforts to verify PM's compliance under the Act and the Tariff.

[16] As for costs, the Judge exercised his discretion and awarded costs against the defendants in the Federal Court. The appellants argue that the Judge did not hear the defendants' submissions before doing so. However, we note that all parties were seeking their costs in the proceedings below. Therefore, it was incumbent upon the defendants in the Federal Court to expose their position in their pleadings if they felt that an award of costs would be inappropriate under the circumstances. There is no reason to disturb the Judge's conclusion.

[17] Therefore, this appeal will be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-327-08

**APPEAL FROM A DECISION BY JUSTICE O'REILLY OF THE FEDERAL COURT,
DATED JUNE 9, 2008, (2008 FC 718) IN DOCKET T-697-06.**

STYLE OF CAUSE: *PLUS MEDIA (CANADA) INC. v.
CANADIAN PRIVATE COPYING
COLLECTIVE*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 19, 2009

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU, EVANS, TRUDEL
J.J.A.

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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