

Federal Court



Cour fédérale

Date: 20090306

Docket: T-1170-04

Vancouver, British Columbia, March 6, 2009

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Plaintiff

and

PACIFIC ROYAL ENTERPRISES LTD.,
MTI - MOBILTECH INTERNATIONAL INC.,
474692 B.C. LTD., WILSON KAM and
PERRY CHENG ALSO KNOWN AS YAO CHUNG CHENG

Defendants

ORDER

UPON MOTION in writing dated October 21, 2008 on behalf of the Plaintiff, the Canadian Private Copying Collective (the CPCC) pursuant to Rule 369 of the *Federal Courts Rules*, for an Order pursuant to Rule 210 of the *Federal Courts Rules*, granting the Plaintiff default judgment against the Defendants and seeking:

(a) a declaration that the Defendants, Pacific Royal Enterprises Ltd., and 474692 B.C. Ltd., have failed to report and pay to the Plaintiff the private copying levies certified by the Copyright Board of Canada, in accordance with the provisions of Part VIII of the *Copyright Act*, on account of the importation into Canada, and the sale or other disposition in Canada of blank audio recording media;

(b) an Order directing the Defendants, Pacific Royal Enterprises Ltd., and 474692 B.C. Ltd., to pay to the Plaintiff the private copying levies owed pursuant to the private copying tariffs certified by the Copyright Board since December 18, 1999 (the Private Copying Tariffs) in the following amounts:

(i)	Pacific Royal Enterprises Ltd.:	\$1,554,734.23
(ii)	474692 B.C. Ltd.:	\$2,037,028.28

(c) an Order directing the Defendants, Pacific Royal Enterprises Ltd. and 474692 B.C. Ltd., to pay to the Plaintiff the unpaid interest (as of October 21, 2008) owed on the late payments of the private copying levies, calculated in accordance with the Private Copying Tariffs as follows:

(i)	Pacific Royal Enterprises Ltd.:	\$ 278,760.06
(ii)	474692 B.C. Ltd.:	\$ 281,952.33

- (d) an Order that the individual defendant, Perry Cheng, also known as Yao Chung Cheng, be jointly and severally liable with Pacific Royal Enterprises Ltd. and 474692 B.C. Ltd. for unpaid levies in the amount of \$3,591,762.51, and interest in the amount of \$560,712.39 on account of the import and sale by the Defendants, Pacific Royal Enterprises Ltd. and 474692 B.C. Ltd. of blank audio recording media;
- (e) an Order directing the Defendants, Pacific Royal Enterprises Ltd., 474692 B.C. Ltd. and Perry Cheng, also known as Yao Chung Cheng to pay to the Plaintiff an amount equal to five (5) times the amount of the private copy levies due by them hereunder pursuant to section 88(2) of the *Copyright Act*;
- (f) post-judgment interest on all monetary relief granted herein pursuant to section 37 of the *Federal Courts Act*; and
- (g) the Plaintiff's costs relating to the action;

AND UPON reading the motion record filed on behalf of the Plaintiff;

The Plaintiff seeks an order that judgment be granted as against the Defendants, Wilson Kam and MTI Mobiltech International Inc., for \$3,591,762. 51, inclusive of interest and costs. Since the relief requested is on consent, judgment will be issued accordingly.

The Plaintiff also seeks various relief against the Defendants, Perry Cheng (Cheng), Pacific Royal Enterprises Ltd. (Pacific), and 474692 B.C. Ltd. (474692). By Order dated March 16, 2006, the Statements of Defence of the said Defendants were struck, and the Plaintiff was granted leave to apply *ex parte* for default judgment. Since Cheng, Pacific and 474692 continue to be in default, the only issue to be determined on this motion is whether the Plaintiff has adduced sufficient evidence to support its claim against them. Based on the affidavits of Laurie Gelbloom sworn October 10, 2008, Derek Malcolm sworn October 14, 2008, and Wilson Kam sworn September 19, 2008, I am satisfied that the relief requested by the Plaintiff in the notice of motion should be granted.

Section 82 of the *Copyright Act* requires persons who import blank media into Canada, for the purposes of trade, to pay a levy to the Plaintiff when the blank media is sold or otherwise disposed of. The Plaintiff seeks a declaration that Pacific and 474692 (Corporate Defendants) have failed to report and pay to the Plaintiff the private copying levies certified by the Copyright Board of Canada, in accordance with the provisions of Part VIII of the *Copyright Act* (Levies), on account of the importation into Canada, and the sale or other disposition in Canada of blank audio recording media. While Pacific reported the sales of some blank media to the Plaintiff in 2003 and 2004, the affidavit evidence before me clearly establishes that Pacific's reporting forms were not accurate in that they did not disclose the full extent of the import and subsequent sale. Moreover, based on the evidence of Mr. Kam, I am satisfied that the Corporate Defendants routinely failed to report the sale of blank media that they imported into Canada and sold from 2001 to 2004. The Plaintiff is therefore entitled to a declaration as requested.

The Plaintiff seeks an order requiring the Corporate Defendants to pay private copying levies owed pursuant to the private copying tariffs certified by the Copyright Board since December 18, 1999. The affidavit evidence filed by the Plaintiff, and in particular admissions made by Mr. Kam during his examination for discovery, establishes that Pacific either directly, or with 474692, imported blank media into Canada between May 2001 and July 2004 in the following quantities: 21,484,442 CD-R 100 Mb, 5,836 CD-R Audio, and 33,425 Minidisks. The evidence also establishes that Levies were not paid by Pacific on at least 7,381,731 CD-R 100 Mb at the rate of \$0.21 per unit, and 1,836 CD-R Audio and 4,100 Minidisks at the rate of \$0.77 per unit. Pacific is therefore liable under the *Copyright Act* and the Private Copying Tariffs for Levies in the amount of \$1,554,734.23.

Based on the Mr. Kam's evidence, 474692 imported into Canada during the same period of time blank media, consisting of 9,577,943 CD-R 100 Mb, 4,000 CD-R Audio, and 29,325 Minidisks, and failed to pay levies on any of units. Using the same levy rate as above, 474692 is liable to the Plaintiff under the *Copyright Act* and the Private Copying Tariffs for Levies in the amount of \$2,037,028.28.

Section 12 of the *Private Copying Tariff* states that interest is owed on any amount that is not paid by its due date. Upon reviewing the Plaintiff's submissions, I agree that, in the absence of any sales information being produced by the Corporate Defendants, interest should be calculated by pro-rating the unpaid Levies equally over the reporting periods and in accordance with the Bank Rate published by the Bank of Canada. I conclude that Pacific is liable to the

Plaintiff for unpaid interest as of October 21, 2008 owed on the late payments of the private copying levies in the amount of \$278,760.06. The liability of 474692 for unpaid interest as of October 21, 2008 is fixed at \$281,952.33.

The Plaintiff submits that Cheng should be jointly and severally liable with Pacific and 474692 for unpaid levies and interest. I agree. The corporate veil can be pierced when a Court concludes that it is necessary to do so in the presence of "fraud or improper conduct" and where corporate structures are being used improperly to conceal the identity of the real interests involved.: see *Canadian Copyright Licensing Agency (c.o.b. Access Copyright) v. Apex Copy Centre*, 2006 FC 470 (CanLII), 2006 FC 470, [2006] F.C.J. No. 575 (T.D.) (QL); *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2006 FC 1284 (CanLII), 2006 FC 1284, [2006] F.C.J. No. 1598 (T.D.) (QL), aff'd [2007] F.C.J. No. 1410 (C.A.) [*Fuzion*]). The facts set out at paragraph 25 of the Plaintiff's written representations amply establish that Cheng acted with fraudulent and improper purpose so as to seek to evade the payment of Levies under the *Copyright Act*. Based on Mr. Kam's evidence, I conclude that Cheng expressly set out and directed his companies to use every available means, including misrepresentation and fraud, to frustrate the Plaintiff's legitimate statutory rights. Accordingly, this is an appropriate case to pierce the corporate veils of the Corporate Defendants and find the individual Defendant personally liable for the amounts owed by the corporations.

The Plaintiff also requests that the Defendants be ordered to pay an amount equal to five times the amount of the levies owed, taking into account the bad faith demonstrated by the

Defendants throughout the course of their dealings with the Plaintiff. Subsection 88(2) of the *Copyright Act* allows the Court to order a person who fails to pay the private copying levy to pay an amount not exceeding five times the amount of the levy to the collecting body. In making such an order, the Court is required to consider whether the person who failed to pay acted in good or bad faith, the conduct of the parties before and during the proceedings, and the need to deter persons from failing to pay levies. The facts in this case are strikingly similar to those reported in *Canadian Private Copying Collective v. First Choice Recording Media Inc.*, (2008), 66 C.P.R. (4th) 441 (*First Choice*). Mr. Justice James Hugessen concluded in *First Choice* that an appropriate case had been made for a quintuple penalty order because the defendants had demonstrated throughout their dealings with the plaintiff an intention to avoid their obligations under the *Copyright Act* and to frustrate the plaintiff's statutory right to collect levies totaling over \$5,000,000. I see no reason why a similar sanction should not be imposed on the Defendants. The Defendants' misconduct was flagrant and repeated over a number of years. Moreover, a substantial penalty is required to deter others who would deliberately flout their legal obligations.

THIS COURT ORDERS AND ADJUDGES that:

1. Judgment be granted to the Plaintiff as against Wilson Kam and MTI Mobiltech International Inc. for \$3,591,762.51, inclusive of interest and costs.

2. The Defendant Pacific Royal Enterprises Ltd. shall pay to the Plaintiff private copying levies owed pursuant to the *Copyright Act* and the Private Copying Tariffs, in the amount of \$1,554,734.23.
3. The Defendant Pacific Royal Enterprises Ltd. shall pay to the Plaintiff, interest pursuant to the Private Copying Tariffs in the amount of \$278,760.06, calculated as of October 21, 2008, plus further interest calculated to the date of judgment.
4. The Defendant 474692 B.C. Ltd. shall pay to the Plaintiff, private copying levies owed pursuant to the *Copyright Act* and the Private Copying Tariffs, in the amount of \$2,037,028.28.
5. The Defendant 474692 B.C. Ltd. shall pay to the Plaintiff, interest pursuant to the Private Copying Tariffs in the amount of \$281,952.33, calculated as of October 21, 2008, plus further interest calculated to the date of judgment.
6. The Defendant Perry Cheng, also known as Yao Chung Cheng, be jointly and severally liable with Pacific Royal Enterprises Ltd. and 474692 B.C. Ltd. for the unpaid levies and interest owed by the corporate Defendants, Pacific Royal Enterprises Ltd. and 474692 B.C. Ltd. in the amount of \$3,591,762.51 plus interest in the amount of \$560,712.39, calculated as of October 21, 2008.

7. Each of Pacific Royal Enterprises Ltd., 474692 B.C. Ltd. and Perry Cheng, also known as Yao Chung Cheng, (the Pacific Royal Defendants) shall pay to the Plaintiff an amount equal to five (5) times the amount of the private copying levies due by them as outlined respectively in paragraphs 2, 4 and 6 of this order, pursuant to section 88(2) of the *Copyright Act*.

8. The Plaintiff is granted post-judgment interest on all monetary relief granted as against Pacific Royal Enterprises Ltd., 474692 B.C. Ltd. and Perry Cheng, also known as Yao Chung Cheng, pursuant to section 37 of the *Federal Courts Act*.

9. The Plaintiff is granted costs of this action as against Pacific Royal Enterprises Ltd., 474692 B.C. Ltd. and Perry Cheng, also known as Yao Chung Cheng, to be assessed in accordance with Column III of Tariff B.

"Roger R. Lafrenière"

Prothonotary