

Date: 20060214

Docket: T-1402-05

Citation: 2006 FC 137

Vancouver, British Columbia, Tuesday, February 14, 2006

Present: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

**TELEWIZJA POLSAT S.A. and
TELEWIZJA POLSKA CANADA INC.**

Plaintiffs

- and -

**RADIOPOL INC. and
JAROSLAW BUCHOLC**

Defendants

**REASONS FOR ORDER AND ORDER
on the contempt issue**

[1] On December 15, 2005, this Court issued a show-cause contempt order pursuant to Rule 467 of the *Federal Courts Rules, 1998*, that the defendants Jaroslaw Bucholc and a representative of Radiopol Inc., a corporation incorporated pursuant to the laws of Quebec, were required to appear before a judge of the Federal Court in Toronto, Ontario, at 9:30 a.m. on Monday January 30, 2006, to be prepared to hear proof of the acts with

which the defendants are in contempt of Court and to be prepared to present any defence that they may have.

[2] The acts with which the defendants are charged in contempt arise out of an interim injunction issued by Justice Kelen of this Court on August 29, 2005, which enjoined Jaroslaw Bucholc and Radiopol Inc. from decoding the plaintiffs' encrypted subscription programming without authorization and from further infringing the plaintiffs' copyright and trademarks. Furthermore, the defendants were ordered by Justice Kelen to deliver up to the plaintiffs all of the works in which the plaintiffs have copyright or trademark rights that are in their possession, control or custody, or, in the alternative, destroy all such material under oath and under supervision of this Court.

[3] This Court's December 15, 2005 show-cause order specified the acts with which the defendants were charged in contempt were:

(a) After receiving notice of the Order of Justice Kelen, the defendants continued to decode the plaintiffs' encrypted programming signals from the POLSAT 2 International satellite signal without authorization.

(b) After receiving notice of Justice Kelen's order, the defendants continued to infringe the plaintiffs' copyright and trademarks by:

- Reproducing the POLSAT 2 International signal without authorization;
- Editing the POLSAT 2 International signal without authorization;
- Making individual episodes of the plaintiffs' copyrighted television programs available on the web site www.tvpol.com without authorization;
- Using the domain name www.tvpol.com; and
- Using the trademarks TV POLONIA, POLSAT, POLSAT 2 and the applicable logos on the web site www.tvpol.com.

(c) Failing to deliver up to the plaintiffs or destroy under oath and the supervision of the Court, the following items in their possession, control or custody:

- Electronic and hardcopy versions of the plaintiffs' intellectual property, being the television programs decoded by the defendants, their representatives, agents or assigns, reproduced, edited and made available on the web site www.tvpol.com;
- Any and all hardcopy or electronic versions of the plaintiffs' logos, copyrighted material or other trademarks;

[4] Further, this Court's order specified how the plaintiffs were to provide notice of the show-cause order to the defendants. The plaintiffs were to mail a copy of the order to 2221 Walkley Avenue, Montreal, Quebec, which is the location indicated in Radiopol Inc.'s corporate documents to be the place where its head office is situated. In addition, the plaintiffs were to mail a copy of the show-cause order to Box 3223, Station Main, Airdrie, Alberta, which is the place where the RCMP informed the plaintiffs the individual defendant had moved to. Thirdly, the plaintiffs were to provide the defendants with notice of the order by e-mailing a copy of the order to radio@radiopol.com and jarek@radiopol.com.

[5] The defendants did not appear on the return of the show-cause order. The Court was informed that the two mailings of the order to the locations in Montreal, Quebec, and Airdrie, Alberta, were returned to the solicitors to the plaintiffs undelivered by Canada Post.

[6] After considering the affidavit of Tutiiu Roosimagi, a legal secretary employed by the solicitors to the plaintiffs and after considering Ms. Roosimagi's as well as Mr. Gladkowski's answers to the Court's questions on service by e-mail, I am satisfied that

service of the show-cause order was effected on the defendants by this method and that the defendants had notice of that order.

[7] Confirmation that the show-cause order delivered to the two addresses was read at radio@radiopol.com and jarek@radiopol.com, came from two sources.

[8] First, the solicitors to the plaintiffs who had forwarded the show-cause order by e-mail received a delivery status notification indicating that the show-cause order message had been successfully relayed to the two e-mail addresses. As was explained to me, a delivery status notification report is automatically generated by the software tracking system which the solicitors to the plaintiffs have in place.

[9] Second, the solicitors to the plaintiffs received an acknowledgement from Jarek [\[jarek@radiopol.com\]](mailto:jarek@radiopol.com) indicating the message enclosing the show-cause order was delivered and read at least on two occasions, that is, on December 21, 2005, at 2:09 p.m. and on January 11, 2006, at 5:34 p.m.

[10] Mr. Justice Kelen was satisfied, in relation to the motion record relevant to the interim injunction the plaintiffs were seeking, that service by e-mail on the defendants was valid substituted service. At paragraph 9 of his reasons for order (2005 FC 1179) Justice Kelen indicated the e-mail address jarek@radiopol.com was confirmed by Radiopol to be

Mr. Bucholc's e-mail address. He also indicated the e-mail address radio@radiopol.com was the e-mail address listed as the contact e-mail for Radiopol on its website.

[11] Paragraph 466(b) of the Rules provides that a person is guilty of contempt of Court who disobeys a process or order of the Court. Rule 469 stipulates that a finding of contempt shall be based on proof beyond a reasonable doubt.

[12] The plaintiffs' evidence was provided by Boguslaw Pisarek and Tomasz Gladkowski. Mr. Pisarek is President of Telewizja Polska Canada Inc. Mr. Gladkowski is a telecommunications consultant retained by Telewizja Polska Canada Inc. The following facts have been established through their testimony.

[13] Telewizja Polska Canada, Inc. (Polska Canada) is the exclusive Canadian licensee for two producers of television programs carrying on business in Poland: Telewizja Polonia (Polonia) and Telewizja Polsat S.A. (Polsat).

[14] The distribution of Polska Canada's Polish language television programming in Canada commenced in 1997 after Polonia was added by the CRTC to its lists of eligible satellite services.

[15] Polsat is the leading commercial television service in Poland broadcasting Polsat 2 programming 24 hours a day, 7 days a week. It produces Polsat 2 (Polsat 2) which is a television program targeted to Polish speaking communities outside of Poland. Polsat 2's programming includes reality shows, soap operas, crime series, mini-series, talk shows, documentaries, news, sports and music programming. It is the Polsat 2 programming which is the subject-matter of the grant of exclusive licensee in Canada by Polsat to Polska Canada. That grant was made pursuant to an agreement between the two parties entered on June 23, 2005. The Polsat 2 television programming produced by Polsat is broadcast by Polsat via satellite transmission in an encrypted signal form. Polsat is the producer and legal owner of the Polsat 2 signal.

[16] Polska Canada undertook to distribute the signal of the Polsat 2 program via satellite transmission, cable and the internet. It also undertook to ensure legal protection of the Polsat 2 program in Canada through appropriate action including legal action against persons infringing on copyright and related rights of Polsat, particularly against entities illegally transmitting the Polsat program via the internet and/or cable or telecommunication networks.

[17] With respect to television signals, Polska Canada files applications with the CRTC and enters into distribution agreements with Canadian broadcasting distribution undertakings (BDUs) to permit the Polish language television signals to be legally received

by Canadian subscribers of those BDUs. It also distributes the signals for which it is the Canadian licensee via the internet directly to subscribers. At the present time, Polska Canada has not received authorization from the CRTC to operate Polsat 2 in Canada. Its application was made on or about July 28, 2005. As noted, it has agreements with BDUs for programming distribution.

[18] Polska Canada has initiated negotiations with Canadian BDUs to obtain distribution of Polsat 2's programming as soon as the signal is included in the CRTC eligibility list. It is also in the process of developing a website to provide access to the streamed Polsat 2 signal to Canadian-based subscribers via the internet and has already registered its internet domain www.polsat.ca. It already operates a website at www.tvpolonia.com which provides access to the signal of Polonia.

[19] Mr. Bucholc was residing in Montreal and has now moved to Alberta. He is the administrator and the directing mind behind Radiopol Inc. which, as noted, is a Quebec corporation incorporated in 2004 with its head office in Montreal, Quebec. In the timeframe of 1998-99, Mr. Bucholc provided technical services relating to the distribution of television signals via the internet under contract with Telewizja Polska USA, Inc., which is related to Polska Canada.

[20] The defendants, Mr. Bucholc and Radiopol Inc. operate an internet website, www.tvpol.com (the Radiopol site) which is also targeting the Polish speaking television market outside of Poland. Through this site, the defendants sell monthly membership which allows individuals to download individual television program episodes and movies. Tomasz Gladkowski became a subscriber to the Radiopol website which provided him access to the offerings on the Radiopol website. His communications with various facets of Radiopol's operations is by e-mail to four different e-mail addresses maintained by Radiopol Inc.

[21] Mr. Gladkowski testified that virtually all of the programming provided on the Radiopol site is reproduced from the Polsat 2 signal. Without authorization or Polsat and from Polska Canada, the defendants decode the Polsat 2 encrypted subscription programming signal, reproduce it without authorization, edit it and make individual episodes available on a video-on-demand format to the public.

[22] In September 1999, Mr. Bucholc engaged in similar activities with respect to the signal of Polonia which, as noted, Polska Canada also holds the exclusive Canadian licence. On September 23, 1999, the Polska Canada wrote to Mr. Bucholc demanding that the unauthorized broadcast of its licensed material via the internet cease. I was told that Mr. Bucholc, after receiving that cease and desist letter, stopped decoding the TV Polonia signal.

[23] To assist in the testimony to be given by Messrs. Pizarek and Gladkowski, the solicitors to the plaintiffs prepared a book of documents. Mr. Gladkowski was able to view three different menu pages of [www.tvpol.com's](http://www.tvpol.com) program offerings at different times in 2005 and 2006. He confirmed that after Justice Kelen's interim injunction, the Radiopol internet site at www.tvpol.com was still operating with two enhanced programming offerings. One such offering appeared around Christmas of 2005 and is Exhibit K to the plaintiffs' document brief. The second enhanced menu offering came out in early January of this year and is Exhibit Q to the plaintiffs' document brief.

[24] In connection with Exhibit K, Mr. Gladkowski was able to confirm to me that Polsat was the producer and copyright owner of all of the programming displayed on the menu page except programming relating to the film category and to children's programming.

[25] The menu page of www.tvpol.com in Exhibit Q shows a reality TV series and blatantly displays the Polsat logo indicating the programming came from the Polsat 2 signal and was decoded. Further in Exhibit Q, the same can be said of a sports program and another reality TV show.

[26] In Exhibit S of the plaintiffs' document brief, Mr. Gladkowski was able to demonstrate that for the purposes of the offerings by www.tvpol.com programming from the Polsat 2 signal had been decoded by the defendants in such a manner that they were

offering 2009 program clips of episodes or shows available to subscribers at the Radiopol site.

[27] Finally, Mr. Gladkowski was able to confirm by another method the source of www.tvpol.com's program offering. He was able to access www.tvpol.com's source code. That source code shows the programming was supplied as "copyright owner" by Radiopol whose author is said to be Mr. Bucholc.

[28] Based on this evidence, I am satisfied beyond a reasonable doubt the defendants are guilty of contempt by breaching Justice Kelen's interim injunction of August 29, 2005, by which the defendants were enjoined from decoding the plaintiffs' encrypted subscription programming signals without authorization, and from further infringing the plaintiffs' copyright and trademarks.

[29] Section 472 of the Rules provides the remedies which are available on a finding of contempt. That Rule reads:

472. Where a person is found to be in contempt, a judge may order that

(a) the person be imprisoned for a period of less than five years or until the person complies with the order;

(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

472. Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;

b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;

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| (c) <u>the person pay a fine</u> ; | c) qu'elle paie une amende; |
| (d) <u>the person do or refrain from doing any act</u> ; | d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir; |
| (e) in respect of a person referred to in rule 429, the person's property be sequestered; and | e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429; |
| (f) <u>the person pay costs</u> . [<i>emphasis mine</i>] | f) qu'elle soit condamnée aux dépens. |

[30] In *Lyons Partnership, L.P. v. MacGregor*, [2000] F.C.J. No. 341, this Court summarized the relevant factors to be considered in framing a penalty for contempt of Court. In assessing the penalty, the Court should consider the gravity of the contempt, deterrence of similar conduct, any profit made from the contemptuous conduct, whether the contempt offence is a first offence, the contemtor's past conduct and the presence of any mitigating factors such as good faith or apology.

[31] The plaintiffs submit that the appropriate penalty for the defendants is:

- (a) an order that the infringing website be taken down from the internet on the basis that it infringes the plaintiffs' copyright and trademark rights;
- (b) a fine payable by each defendant;
- (c) incarceration of Mr. Bucholc; and
- (d) an order that the plaintiffs' costs be paid on a solicitor-client scale.

[32] In my view, the evidence before me clearly establishes beyond a reasonable doubt::

- (a) That the defendants are wilfully infringing the plaintiffs' intellectual property rights in copyright and trademark by wrongfully appropriating the Polsat 2 signal containing Polsat's copyrighted TV programming, decoding that signal, editing the programming and making individual episodes of Polsat programming available to subscribers on the subscription fees payable on a periodic basis;
- (b) The defendants' operation of its website at www.tvpol.com is the principal tool by which the defendants are infringing the plaintiffs' intellectual property rights and are breaching section 9(1)(c) of the *Radiocommunication Act*. The internet website operated by the defendants can only be characterized as an illegal operation because substantially all of its programme offerings have been appropriated from the plaintiffs.
- (c) There is no element of regret or apology. The defendants have failed to appear before the Court at any stage of the proceedings. They had many opportunities to correct their behaviour. In particular, on March 21, 2005, counsel for the plaintiffs wrote to Mr. Bucholc pointing out the infringing activity at www.tvpol.com. The defendants could avoid litigation if they undertook by March 24, 2005, to cease all unauthorized broadcasting and distribution at the site. They did not respond to that offer. The same offer was renewed on July 13, 2005, with again no response.
- (d) Rather, as counsel for the plaintiffs points out, not only did the defendants not cease and desist but enhanced their operations at their website after Justice Kelen's interim injunction.

[33] Against this factual background, I am of the view the penalties which the plaintiffs seek are clearly warranted. The offending and infringing website at www.tvpol.com should be taken down from the internet because the evidence shows that the dominant and sole reasons for its existence is to appropriate the plaintiffs' property by making available Polsat's Polish language TV programming after decoding by the defendants and making the programming available on a subscription fee basis to Canadian subscribers.

[34] I have no difficulty in awarding to the plaintiffs reasonable costs on a solicitor-client basis. In *CHUM Ltd. v. Stempowicz (c.o.b. Lizard King's Playhouse)*, 2004 FC 611, Mr. Justice Blais endorsed a comment made by Madam Justice Dawson in *Louis Vuitton Malletier, S.A. v. Bags O'Fun Inc.*, [2003] F.C.J. No. 1686, where she said where an application for an order finding contempt of Court is successful, with respect to costs, the normal practice is to award reasonable costs on a solicitor-client basis to the party seeking enforcement of the Court order. This award of costs relates to all motions and proceedings to date.

[35] Plaintiffs seek the imposition of fines payable by each defendant. They point to the Federal Court of Appeal's decision in *Cutter (Canada) Ltd. v. Baxter Travenol Laboratories of Canada Ltd. et al.* (1987), 14 C.P.R. (3d) 449, for the proposition that the quantum should be "appropriate to indicate the severity of the law, and yet sufficiently moderate to show the temperance of justice". The amount of the fines, the plaintiffs suggest, is to be

assessed in such a manner as to reflect the severity of the contemptuous activity as well as the financial means of the contemtor.

[36] In the case at hand, I am very much influenced by Justice Teitelbaum's decision in *Tele-Direct (Publications) Inc. v. Canadian Business Online Inc.*, [1998] F.C.J. No. 1833.

The case before me has several elements resembling those present in the *Tele-direct* case, *supra*: the operation by the defendants of a website on the internet, the reproduction of certain of the plaintiff's material and trademarks on the website, the failure of the defendants to appear before him to explain why and what happened, the lack of evidence of the financial situation surrounding the corporate defendants. He wrote:

¶ 8 I am satisfied that a fair and reasonable fine with regard to the 2 corporate defendants would be \$25,000.00 each.

¶ 9 I say \$25,000.00, because I have no evidence that these corporations are - to use a slang word - flush with money, or that they are virtually bankrupt. I have no evidence at all about the financial situation of these 2 corporate defendants, but basing myself on an average of various cases where corporate defendants are fined, I think that a \$25,000.00 fine for each of them is more than reasonable.

¶ 10 With regard to the individual, Sheldon Klimchuk, I have absolutely no evidence as to his financial situation, but I do have evidence that Mr. Klimchuk purposely, intentionally attempted to circumvent the orders of this Court. And so, I am going to fine Mr. Sheldon Klimchuk, as suggested by the plaintiff, the sum of \$10,000.00. I am going to grant Mr. Klimchuk 90 days from today's date to pay the fine, and in the event that he does not pay the said fine within 90 days, and in the event that Mr. Klimchuk does not satisfy me with evidence that he is unable to pay this said fine - he must do so within the said delay to pay the said fine - he is to be imprisoned for a period of 30 days.

[37] Justice Blais came to a similar assessment of a fine of \$25,000 in *CHUM Ltd.*, *supra*, in circumstances where there was no way to determine from the evidence produced the number of clients that obtained unlawful satellite services.

[38] I am inclined to follow those two cases and impose a fine on the corporate defendant of \$25,000 payable forthwith and a fine of \$10,000 against Mr. Bulchoc payable within five days from the service of these reasons and order.

[39] The plaintiffs seek Mr. Bucholc's incarceration. The plaintiffs recognize what Justice MacKay held in *Merck & Co. v. Apotex Inc.*, 2001 FCT 589, in a case involving a corporate defendant and an individual defendant found guilty of contempt of court. At paragraph 17 of his reasons for order, Justice MacKay was of the view the circumstances before him did not warrant a term of incarceration which was "a penalty to be imposed only in the most egregious cases as a course of last resort, and particularly to ensure future compliance of the Court's orders and judgments."

[40] The plaintiffs submit that this case is most egregious because the defendants':

- (a) clear knowledge of Justice Kelen's interim injunction;
- (b) deliberate flouting of Justice Kelen's injunction;
- (c) conduct in overhauling, redesigning and expanding the infringing website since the issuance of Justice Kelen's interim injunction;

(d) failure to respond to the numerous overtures made by the plaintiffs to resolve the issue and the total failure to accommodate the authority of the Court and its processes.

[41] Plaintiffs argue that in the circumstances, the imposition of incarceration is the only way to ensure future compliance with Court orders. They say the defendant Jaroslaw Bucholc's history of evading service, and connections to foreign jurisdictions, make him a flight risk if he is given a grace period in which to pay a fine or otherwise comply with the contempt order.

[42] I believe Mr. Bucholc's behaviour justifies a term of imprisonment. He is the directing mind of Radiopol Inc. who operates the internet website www.tvpol.com. As the directing mind of Radiopol, he has intentionally breached Justice Kelen's interim injunction, has shown no remorse and continues in his contemptuous ways. Having found him guilty of contempt, I sentence him to six months in jail. However, the execution of the sentence will be suspended if, within five days from the date of the service of this order, the defendants cause the offending website to cease operating which, on the evidence before me, is the only way Justice Kelen's injunction can be respected.

[43] I have taken into account the following cases: *De L'Isle et al. v. The Queen et al.* (1994), 56 C.P.R. (3d) 371; *Canada (Canadian Human Rights Commission) v. Heritage*

Front, [1994] F.C.J. No. 2010; and *Canada (Canadian Human Rights Commission) v. Taylor*, [1980] F.C.J. No. 119.

ORDER

THIS COURT FINDS AND ORDERS:

1. Jaroslaw Bucholc and Radiopol Inc. guilty of contempt of the order of Mr. Justice Kelen dated August 29, 2005;
2. The defendant, Radiopol Inc., shall pay a fine of \$25,000 and the defendant Jaroslaw Bucholc shall pay a fine of \$10,000 within five (5) days from the service of these reasons and order;
3. The defendants are jointly and severally liable to pay the plaintiffs reasonable solicitor-client costs to be taxed forthwith by a taxing officer inclusive of disbursements and GST; such costs to be paid forthwith after taxation; and
4. I sentence Jaroslaw Bucholc to a six-month term of imprisonment which shall be suspended if,
 - (a) within five days from the service of these reasons and order, the defendants take down the internet site at www.tvpol.com;
 - (b) the defendants, at all times, comply with the terms of the permanent injunction issued by this Court on August 29, 2005.

5. In the event the plaintiffs wish to prove that the defendants have not complied with one or more terms of this order, the plaintiffs shall be at liberty to seek a warrant of committal from any Federal Court judge, on an *ex parte* basis or otherwise, as directed by such judge and the defendant Jaroslaw Bucholc shall, upon the Court finding a breach of one or more terms of this order, be committed to jail for six months.

6. In the light of rule 429, these reasons and order, unless otherwise ordered by the Court, shall be served by plaintiffs personally on the individual defendant which shall constitute service on the corporate defendant.

“François Lemieux”

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1402-05

STYLE OF CAUSE: TELEWIZJA POLSAT S.A. and
TELEWIZJA POLSKA CANADA INC.
- and -

RADIOPOL INC. and
JAROSLAW BUCHOLC

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 30, 2006

**REASONS FOR ORDER
AND ORDER:** HON. MR. JUSTICE LEMIEUX

DATED: FEBRUARY 14, 2006

APPEARANCES:

Ms. Julie Thorburn
Ms. Emily Larose

FOR THE PLAINTIFFS

No appearance

FOR THE DEFENDANTS

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FOR THE PLAINTIFFS

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FOR THE DEFENDANTS