

**Date: 20080110**

**Docket: A-369-07  
A-370-07**

**Citation: 2008 FCA 9**

**CORAM: RICHARD C.J.  
SHARLOW J.A.  
RYER J.A.**

**BETWEEN:** **A-369-07**  
**APPLE CANADA INC., DELL INC.,  
MICROSOFT CORPORATION (MICROSOFT CANADA CO.),  
SANDISK CORPORATION and SONY OF CANADA LTD.**

**Applicants**

**and**

**CANADIAN PRIVATE COPYING COLLECTIVE (CPCC) and  
RETAIL COUNCIL OF CANADA (RCC)**

**Respondents**

**and**

**CANADIAN RECORDING INDUSTRY ASSOCIATION (CRIA)**

**Intervener**

**BETWEEN:** **A-370-07**

**RETAIL COUNCIL OF CANADA**

**Applicant**

**and**

**CANADIAN PRIVATE COPYING COLLECTIVE  
and**

**APPLE CANADA INC., DELL INC.,  
MICROSOFT CORPORATION (MICROSOFT CANADA CO.),  
SANDISK CORPORATION and SONY OF CANADA LTD.**

**Respondents**

**and**

**CANADIAN RECORDING INDUSTRY ASSOCIATION (CRIA)**

**Intervener**

Heard at Ottawa, Ontario, on January 9, 2008.

Judgment delivered at Ottawa, Ontario, on January 10, 2008.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

RICHARD C.J.  
RYER J.A.

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## **REASONS FOR JUDGMENT**

### **SHARLOW J.A.**

[1] The Canadian Private Copying Collective (“CCPC”) has filed a statement of a proposed tariff for 2008 and 2009 pursuant to subsection 83(8) of the *Copyright Act*, R.S.C. 1985, c. C-42. It seeks the right to collect, among other things, a tariff on digital audio recorders. The applicants object to the attempt by CCPC to seek a tariff on digital audio recorders. They filed motions seeking an order from the Copyright Board that would have prevented that part of the proposed tariff from being considered. In a decision dated July 19, 2007, the Copyright Board dismissed the motions. The applicants have applied to this Court for judicial review of that decision.

[2] All parties agree that the standard of review in these applications is correctness. I agree as well: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427.

[3] The applicants, supported by the intervener, have submitted a number of different legal arguments in support of their challenge to the decision of the Copyright Board, but in my view it is necessary to consider only the principle established in *Canadian Private Copying Collective v. Canadian Storage Media Alliance (C.A.)*, [2005] 2 F.C.R. 654, which is dispositive. I read that case as authority for the proposition that the Copyright Board has no legal authority to certify a tariff on digital audio recorders or on the memory permanently embedded in digital audio recorders. That proposition is binding on the Copyright Board: *Canada v. Hollinger Inc. (C.A.)*, [2000] 1 F.C. 227, at paragraph 30.

[4] It follows that the Copyright Board erred in law when it concluded that it has the legal authority to certify the tariff that CPCC has proposed for 2008 and 2009 on digital audio recorders, and in dismissing the applicants' motions.

[5] I would allow the applications for judicial review, quash the decision of the Copyright Board dated July 19, 2007, and refer the applicants' motions back to the Copyright Board for reconsideration and disposition in accordance with these reasons.

[6] I would award the applicants the costs of their applications, payable by CPCC. The applicant in A-370-07, Retail Council of Canada, has asked for solicitor and client costs. The record discloses no basis for an award of costs on that scale. I would award no costs to or against the intervener.

“K. Sharlow”

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J.A.

“I agree.  
J. Richard C.J.”

“I agree.  
C. Michael Ryer J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-369-07

**STYLE OF CAUSE:** Apple Canada Inc. et al v.  
Canadian Private Copying  
Collective et al

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** January 9, 2008

**REASONS FOR JUDGMENT BY:** SHARLOW J.A.

**CONCURRED IN BY:** RICHARD C.J.  
RYER J.A.

**DATED:** January 10, 2008

**APPEARANCES:**

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Mr. Claude Brunet

FOR THE RESPONDENTS

Mr. Steven G. Mason  
Mr. Barry B. Sookman

FOR THE INTERVENER

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FOR THE INTERVENER

**FEDERAL COURT OF APPEAL**

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**DOCKET:** A-370-07

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**PLACE OF HEARING:** Ottawa, Ontario

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**CONCURRED IN BY:** RICHARD C.J.  
RYER J.A.

**DATED:** January 10, 2008

**APPEARANCES:**

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