

**Date: 20071221**

**Docket: T-1873-07**

**Citation: 2007 FC 1364**

**Ottawa, Ontario, December 21, 2007**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**MICROSOFT CORPORATION**

**Plaintiff**

**and**

**CARMELO CERRELLI,  
9061-8240 QUEBEC INC., 9069-8697 QUEBEC INC.,  
9126-6411 QUEBEC INC., 9134-7245 QUEBEC INC.,  
9140-1349 QUEBEC INC., 9145-2029 QUEBEC INC.,  
VSOP WEB INC., SYSTÈMES IVORCOM INC.,  
TECHNOLOGIES KUMO INC., MAXIMUS TÉLÉCOM INC.,  
INFODMI CORP., CARMELO CERRELLI (A TRUST),  
CARMELO CERRELLI TRUST, CERRELLI TRUST,  
CERRELLI FAMILY TRUST, CERRELLI CHILDREN TRUST,  
JOHN DOE, JANE DOE AND DOE CO.**

**Defendants**

**SUPPLEMENTAL REASONS FOR ORDER AND ORDER AS TO COSTS**

[1] On November 19, 2007, I granted the plaintiff's motions to validate the execution of the Seizure before Judgement Order and of the Anton Piller/John Doe Order, and to convert the Interim and Mareva Injunction Orders into interlocutory orders. These Orders were initially issued by my

colleague Justice Harrington on October 30, 2007 and were to remain valid only for a period of fourteen days from the date of service.

[2] The plaintiff also asked for its solicitor/client costs incurred for the preparation of these Orders and the presentation of the motions. I concluded as follows:

[37] The defendants clearly acted in bad faith when they continued trafficking in counterfeit copies of Microsoft software and associated material, despite Justice Harrington's judgment, and in avoiding payment of the sums awarded in that judgment. The plaintiff is therefore entitled to a lump sum costs calculated on a solicitor-client basis. The exact amount will be fixed by this Court after considering the parties' representations on this matter.

#### **PARTIES' SUBMISSIONS**

[3] The parties were therefore given a delay to provide further submissions on the issue of costs. The plaintiff claims a total amount of \$415,434.74, including professional services fees and disbursements. It asserts that those costs were reasonable in regards to the complexity of the extraordinary remedies sought and the urgency of the matter. The plaintiff emphasises the defendants' bad faith and the existence of few realistic alternatives, other than extraordinary remedies, available to enforce its rights.

[4] The defendants have not filed any additional submissions on the issue of costs and rely on the representations made in their initial memorandum of fact and law. Their submissions to the effect that solicitor/client costs should not be granted have been overtaken by my earlier decision. They also submitted that they have cooperated in the execution of the Orders. Moreover, the

defendants asserted that the plaintiff's demand for costs is no less than an attempt to recover the costs that were awarded in the file T-1502-00.

### **GENERAL PRINCIPLES ON COSTS**

[5] Costs on a solicitor/client basis are granted exceptionally; a party's conduct has to be reprehensible, scandalous or outrageous. This principle was outlined in a number of cases, such as *Young v. Young*, [1993] 4 S.C.R. 3; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 9 C.P.R. (4<sup>th</sup>) 289; and *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] S.C.R. 405.

[6] Justice Harrington defined a "reprehensible", "scandalous" and "outrageous" conduct in the previous file T-1502-00 (2007 FC 659) as follows:

[16] "Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things, "outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive (see: *Oxford Canadian Dictionary*)

### **AWARD OF COSTS**

[7] The defendants' conduct is tainted with bad faith; as I previously mentioned, they continued counterfeiting copies of Microsoft products, despite Justice Harrington's judgment. The plaintiff has filed a motion for contempt of court regarding this violation. They also avoided the payment of the

sums awarded to the plaintiff in this judgment. Nevertheless, I note the defendants' collaboration with the Anton Piller Order, which certainly facilitated its execution.

[8] Further, the present file is intimately related to the previous court file T-1502-00. As the files rest on substantially similar facts, it is reasonable to think that a significant amount of work was already completed. Indeed, I note that it may be difficult to separate the fees incurred by the plaintiff in file T-1502-00 and those incurred in the present instance.

[9] I also believe that the legal issues were of minor complexity, mainly because they had been assessed in the previous court file. Of course, I agree that the Anton Piller and Mareva Orders are extraordinary remedies that are complex; they necessarily required unique research solely for the purpose of the present proceeding given that they were not sought in the previous court file.

[10] The plaintiff has requested \$257,878.75 on a solicitor/client basis. In light of my observations above, I will award the plaintiff a lump sum payment representing one half of the requested amount. I consider it reasonable to fix the costs on solicitor/client basis to \$128,939.38. The plaintiff can still claim the remaining costs from the contempt of court proceedings.

[11] I will allow the entire amount of \$157,555.96 for disbursements incurred, which includes the experts' fees.

[12] In conclusion, I will award a lump sum of \$286,495.34 in respect of solicitor/client costs and disbursements.

**ORDER**

**THIS COURT ORDERS that** the defendants pay jointly and severally a lump sum of \$286,495.34 to the plaintiff, payable forthwith from the monies frozen according to the Mareva Injunction Order and paid into Court pursuant to the Order to deposit into Court granted on November 9, 2007.

"Yves de Montigny"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1873-07

**STYLE OF CAUSE:** Microsoft Corporation v. Carmelo Cerrelli et al.

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** November 15, 2007

**SUPPLEMENTAL REASONS  
FOR ORDER AND ORDER BY:** de MONTIGNY J.

**DATED:** December 21, 2007

**APPEARANCES:**

Me François Guay FOR THE PLAINTIFF(S)

Me Marc-André Huot

Mr. Neil G. Oberman FOR THE DEFENDANT(S)

Mr. Dany S. Perras

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