Federal Court  Cour fédérale

Date: 20090805

Docket: T-1655-04

Citation: 2009 FC 800

Ottawa, Ontario, August 5, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CANADIAN PRIVATE COPYING COLLECTIVE

Applicant

and

FUZION TECHNOLOGY CORP.
and 1565385 ONTARIO INC.
and MICKEY YEUNG

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] On November 4, 2008, Prothonotary Roger Lafrenière issued an order pursuant to rule 467 of the *Federal Courts Rules*, SOR/98-/706 (Rules), ordering the respondent, Mr. Mickey Yeung (Yeung) to appear before a judge of this Court to hear proof of the act with which he is charged and be prepared to present any defence that he may have with respect to the charge of contempt brought by the applicant, Canadian Private Copying Collective (CPCC).

I. BACKGROUND

[2] CPCC is the collecting body designated under paragraph 83(8)(d) of the *Copyright Act*, R.S. 1985, c. C-42 (the Act) to collect and distribute the private copying levies payable by manufacturers and importers of blank audio recording media (blank discs) to eligible authors, performers and makers of sound recordings. Manufacturers and importers of blank discs are obliged under the law to track and report sales activity to the CPCC. They must also keep records from which the CPCC can readily ascertain, through an audit, the amounts payable under the Private Copying Tariffs (the tariffs).

[3] Fuzion Technology Corp. (Fuzion) was an Ontario company incorporated in August 1997, with a registered office at 250 Steelcase Road East, Markham, Ontario. It was involved in the business of distributing computer hardware as well as trade of blank discs as a service to its customers. It was dissolved effective February 17, 2005. Fuzion had three shareholders. Albert Shum (Shum) acted as president and was the controlling and majority shareholder of Fuzion with 65 percent of the shares of the company. There was a second shareholder by the name of Alex Lau (Lau) who held 20 percent. Later on, Lau sold his 20 percent share to Shum. The third shareholder was Yeung who had a minority interest of 15 percent in the company. Yeung acted as Vice-President of Operations.

[4] In October 2002, Fuzion began reporting imports and sales of blank discs to the CPCC. Fuzion's reports cover the period from July – August 2002 until November – December 2003. The

reports were signed by Yeung himself or another Fuzion employee. In January and February 2003, CPCC's former auditors attended Fuzion's premises but were unable to complete their audit. In the meantime, in or around December 2002 or January 2003, Shum advised Yeung that he intended to leave Canada permanently and planned to close down Fuzion. He had other business interests in China and preferred to pursue them there.

[5] On March 13, 2003, Yeung incorporated 1565385 Ontario Inc. (FTC) and registered the business name of "FTC Computers". On April 1, 2003, FTC bought Fuzion's entire stock of computer goods (including blank discs) for $597,120.84 plus GST on a consignment basis since FTC did not have sufficient funds to pay for the inventory up front (the consignment transaction). Yeung was the sole shareholder and director of FTC at the time of the consignment transaction.

[6] At first, FTC operated from 250 Steelcase Road, Markham, Ontario. Yeung's desire was that when Fuzion ceased operations and FTC was operating fully, Fuzion's suppliers and customers would hopefully not even notice the transition. Over the next few months, invoices sometimes used the hybrid name of "FTC Fuzion Technology". However, all the invoices used the GST number of FTC and not the GST number Fuzion had used. On May 14, 2003, FTC entered into a lease for its own premises located at 81 McPherson Street, Markham, Ontario, for occupancy as of July 15, 2003. On May 31st, 2003, Yeung resigned as a director of Fuzion. FTC effectively moved in their new premises sometime in July 2003. At that time, FTC bought from Fuzion used furniture, equipment and telephone system, as well as a 2002 Dodge Caravan for $20,424.16. FTC was fully operational by the fall of 2003. FTC did not submit any reports to CPCC.

[7] On September 10, 2004, CPCC filed an application under Part VIII of the Act, asking *inter alia* that all three respondents, Fuzion, FCT and Yeung, make available to CPCC's auditors, all of the business, accounting and financial records of Fuzion and FTC (CPCC's application). FTC and Yeung challenged CPCC's application. They took the position that FTC was a completely separate corporation from Fuzion. Since FTC had never imported or manufactured any items covered by the tariffs, it had no obligation to report sales of blank discs to CPCC. Fuzion never appeared or defended itself in the proceedings brought by CPCC. Shum is now said to be pursuing his business interests in China. That said, as aforementioned, Fuzion was dissolved effective February 17, 2005.

[8] On October 25, 2006, the Court granted CPCC's application: *Canadian Private Copying Collective (CPCC) v. Fuzion Technology Inc.*, 2006 FC 1284. Since FTC took physical control of the computer stock of Fuzion following the conclusion of the consignment transaction, Justice von Finckenstein who heard the matter considered at the time that CPCC had the right "to audit the books of a vendor of blank disc[sic] who may be subject to levies" and "[FTC] must now assume responsibility and account for the computer stock that was sold on a consignment basis".
That said, Justice von Finckenstein cautioned that "[t]here may have been legitimate business reasons" for FTC, directed by Yeung, to conclude the consignment transaction and further found that "[t]here [was] also no evidence that this was done to defraud creditors". Thus, Justice von Finckenstein stated in his reasons that he was "prepared to pierce the corporate veil to the extent of allowing CPCC to audit the books of FTC to ascertain whether any of the blank disks[sic] sold by FTC [were] subject to levy under Part VIII of the [Act]" (my underlining). Justice von Finckenstein

further considered that for an order directing Fuzion and FTC to submit to an audit "to be effective", same would also have be directed at Yeung personally. He noted in this regard that Yeung "has the best knowledge as to how the records of Fuzion and FTC were handled and kept". Furthermore, on the particular affidavit evidence before him, Justice von Finckenstein considered at the time that Yeung was principally involved in the "blurring of the boundary of Fuzion and FTC". Thus, the Order had to include Yeung "to ensure his absolute cooperation".

[9] Paragraph 1 of the order dated October 25, 2006 and issued by Justice von Finckenstein (the Order) stipulates:

> Within thirty days of this order the Respondents, Fuzion Technology Corp., 1565385 Ontario Inc. and Mr. Mickey Yeung, shall make available to the Applicant's auditors, for the purpose of an audit, all of the business, accounting and financial records of Fuzion Technology Corp., and 1565385 Ontario Inc., from which the Applicant's auditors can readily ascertain:
>
> i. the amounts payable, and
>
> ii. the information required,
>
> under the Private Copying Tariffs certified by the Copyright Board.

[10] On November 29, 2006, the Court dismissed FTC and Yeung's motion to reconsider the Order, asking the Court to amend the Order and restrict same to the records relating to the blank discs which were the object of the consignment transaction: *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2006 FC 1448. Justice von Finckenstein was of the view then that Yeung's reconsideration motion went beyond the mere correction of clerical errors as he was not willing to consider any new evidence at this time.

[11] On October 25, 2007, the Federal Court of Appeal dismissed FTC and Yeung's appeal of the Order: *1565385 Ontario Inc. v. Canadian Private Copying Collective*, 2007 FCA 335.

[12] On November 4, 2008, an order was made *ex parte* by Prothonotary Lafrenière requiring Yeung to appear before the Court on January 19, 2009 and be prepared to answer the charge of contempt made against him by CPCC. The act with which Yeung is specifically charged under the order is that:

> he, by his conduct, breached the Order of Justice von Finckenstein dated October 25, 2006 by failing to make available to the Applicant's auditors, for the purpose of an audit, all of the business, accounting and financial records of Fuzion Technology Corp. and 1565385 Ontario Inc. within 30 days of the Order of Justice von Finckenstein dated October 25, 2006, or within 30 days of the date of the Judgment of the Federal Court of Appeal dated October 25, 2007 (my underlining) (the charge).

[13] On November 13, 2008, Yeung was personally served with the order to appear.

[14] A hearing was held before me on January 19 and June 16, 2009, in Montreal and Toronto respectively, during which CPCC and Yeung presented their *viva voce* evidence.

II. EVIDENCE ADDUCED AT THE HEARING

[15] All the evidence relevant for this contempt proceeding was adduced on January 19, 2009.

Prosecuting Party

[16] Despite the fact that the charge makes explicit reference to an alleged breach with respect to FTC records, CPCC's counsel made clear in her opening statement that the alleged contempt was really in respect of Yeung's failure to make available to CPCC's auditors the records of Fuzion. It was conceded that no levies are due by FTC to CPCC.

[17] Ms. Alison Thomas (Thomas), forensic accountant and business evaluator with Cole & Partners, the firm presently acting as CPCC's auditors was the only witness heard on behalf of the applicant. Her report of June 24, 2008 was produced at the hearing (Exhibits P-1 and D-2). Apart from Thomas's testimony and report, a number of documents which would have been produced at the hearing by Ms. Monique Perron, who works for Ogilvy Renault, if she had been heard orally, were produced with the consent of counsel (Exhibit P-2). The applicant also produced in evidence the sworn affidavit of Yeung, dated November 12, 2004, which had been filed by FTC and Yeung in relation to CPCC's application, prior to the issuance of the Order (Exhibit P-3).

[18] The following facts have been established by the applicant.

[19] In November 2007, Cole & Partners in Toronto (CPCC's present auditors) were mandated by CPCC to continue the audit that was started in 2003 and to assess whether FTC and Fuzion had accurately reported any sale of imported blank discs to the CPCC in accordance with the applicable tariffs. Relevant documents needed for this audit would include purchase records (including import records), sales records, and inventory records. With said records (including accounting records as

well as source documents, such as vendor invoices and customer invoices), the audit could be satisfactorily completed.

[20] On November 26, 2007, Thomas met with Yeung and his present counsel, Mr. Igor Ellyn (Ellyn), at the premises of FTC. She sought at this occasion relevant information or documents in order to conduct the audit both for FTC and Fuzion for the period of December 18, 1999 to August 2007 (the period covered by audit).

[21] During the audit, FTC and Yeung provided to Thomas all relevant information and documents pertaining to FTC. In passing, Thomas mentioned that during her presence at FTC's premises, for privacy right reasons, she was not allowed to record customer or vendor names and to make copies of documents which could contain said information. However, this did not seem to be a problem to complete her audit and prepare a report. It is not challenged today by CPCC that Yeung was fully co-operative during the audit. Indeed, Yeung and FTC's accountant, Ms. Alice Ma (Ma) guided Thomas through her general assessment of FTC's warehouse.

[22] According to CPCC's own records, levies had been paid by Fuzion to CPCC for the imports of blank discs for the reporting periods of July to August 2002 as well as September and October 2002. Thomas wanted to have complete access to Fuzion's purchase records, sales records and inventory records for the period covered by the audit. However, no documents other than the ones already submitted by Ellyn during litigation on behalf of Yeung and FTC, were provided to Thomas during the course of her audit. Yeung and Ellyn advised Thomas that Shum was the only

person with access to Fuzion's records and that attempts to contact Shum had been unsuccessful. In early December 2007, Thomas attended again the premises of FCT to conduct follow-up procedures and was told that no further progress had been made and that any attempts to contact Shum had been unsuccessful.

[23] As a result of this audit, Thomas submitted her audit report on June 24, 2008 (Exhibits P-1 and D-2) (the Thomas report).

Alleged contemnor

[24] Yeung has denied being in contempt and of having had any wilful intention to breach the Order or to deliberately act in defiance of the authority of the Court. The following facts have been established by the alleged contemnor.

[25] Yeung completed a Bachelor Degree in Science in 1983 in Toronto and thereafter worked as a sales representative in the computer business. After his studies, he returned to Hong Kong where he stayed between 1983 and 1990. Following his return to Canada, Yeung first worked in Toronto for a company named Sun Moon Star, which was based in Taiwan. Shum was doing business with Sun Moon Star. Shum was then working for a company called the E-Prom. Sometime in 1997, Shum asked Yeung to work for him and take a participation in his new company. Fuzion had just been recently incorporated by Shum. Yeung acquired 15 percent of Fuzion's shares. Lau held 20 percent. In turn, Shum held 65 percent of the shares. Later in 2001, Shum bought back Lau's shares in Fuzion. Shum then held 85 percent of Fuzion's shares.

[26] Shum was the president of Fuzion and Yeung's direct boss. Yeung reported to Shum. Yeung received the title of Vice-President of Operations because this would look better with Fuzion's clients. Yeung was basically responsible of the administration of the warehouse. He had no direct implication with the purchase of blank discs. This was Shum's direct responsibility. In 2003, Fuzion employed some 15 persons. The only officer who had the power to sign checks, without a second signature, was Shum himself. Otherwise, two signatures were required, that of Yeung and another employee of Fuzion. Shum was the "purchasing guy" while Yeung was the one "who's doing the administration". Yeung would be signing reports based on the invoices and purchase orders, verify if the accounts were paid, etc. This also meant filing reports with CPCC.

[27] Yeung remembers being present when CPCC's former auditors came to Fuzion's premises in January and February 2003. The auditors came at three occasions. Fuzion's premises were then located at 250 Steelcase Road in Markham, Ontario. Yeung requested Shum to take charge of the audit; however, Shum was too busy to come to Canada. The first two visits, Yeung was entirely cooperative but the auditors also wanted to have copies of the records. At that time, Yeung was instructed by Shum not to provide copies of the requested documents to the auditors until Fuzion had obtained legal advice.

[28] I pause to mention that Yeung explained in the course of his testimony that in December 2002 or January 2003, Shum was in the process of establishing a new business in China. Shum was no longer interested to work in Canada and was thinking to close down Fuzion. Would

Yeung be interested in buying the company? Shum and Yeung continued to have discussions after the last visit of CPCC's auditors in February 2003. Shum and Yeung finally reached a verbal agreement. Fuzion's inventory was transferred on consignment to FTC on April 1st, 2003 for a sum close to $600,000.00 that Yeung could not pay immediately. Yeung would pay back Shum as sales would be made by FTC which had been incorporated by Yeung sometime in March 2003. Both companies had distinct GST numbers. The consignment transaction also included blank discs. The blank discs only represented around 4 or 5% of the acquired inventory, and Yeung remembered that they had been bought in Canada. As part of the deal, Shum had also asked that Fuzion's employees be offered employment.

[29] In May 2003, Yeung resigned as a director of Fuzion. Although FTC hired many of the former employees of Fuzion, still, there were a few employees who continued to work directly for Shum or Fuzion in Toronto. During some three months Fuzion and FTC shared the same premises. However, Fuzion and FTC maintained separate accounting and financial records. FTC moved in July 2003 to their new location on McPherson Street, in Markham, Ontario. At this occasion, they did not take any other records than the customer base, accounts receivable and accounts payable that pertained to FTC. No documents relating to Fuzion's business were taken from the Fuzion's premises. We will see below that in 2004 and 2005 at the least Fuzion's records were physically located at Shum's parents' house and under the control of Shum.

[30] Yeung took numerous steps in 2004 or 2005 following CPCC's application, to obtain relevant documents from Fuzion pertaining to the blank discs which were the object of the

consignment transaction. Yeung directly contacted Shum in China. Shum told him to verify the documents that were in boxes at his parents' house located at 8 Sapphire Drive, Richmond Hill, Ontario. That same day, Yeung went to Shum's parents and took with him 11 boxes of documents (the lent boxes). I pause to mention that the documentary evidence produced at the hearing by Yeung attests that Fuzion remained in operation for a while after the consignment transaction and started to use, in August 2003, a new business address, 8 Sapphire Drive, Richmond Hill, Ontario, that is Shum's parents house (see 13 invoices from Fuzion to FTC, dated April 1, 2003 to March 31, 2004, tabs 13 to 25 of Exhibit D-1).

[31] In making the search in the lent boxes, Yeung was only interested by the documents which pertained to blank discs that were sold in April 2003 to FTC. Yeung did not search or felt obligated at that time to review documents relating to Fuzion's sales or imports of blank discs prior to the consignment transaction. That said, Yeung was able to retrace in the boxes old supplier invoices relating to the blank discs covered by the consignment transaction (see 2003 invoices from FXPRO and Mars Computer Canada Inc. to Fuzion, tabs 8 to 12 of Exhibit D-1). With the help of Ma, Yeung verified this information with FTC's inventory. Sometime in 2005, Shum made arrangements to have the lent boxes picked up at FTC's premises and returned to him. Fuzion was dissolved effective February 17, 2005, that is some 20 months prior to the making of the Order of Justice von Finckenstein which was issued on October 25, 2006.

[32] After the issuance of the Order, several attempts were made by Yeung or his counsel to contact Shum by phone, e-mail and courrier. The testimony of Yeung in this regard is corroborated by the documents produced at the hearing (Exhibit D-1 and D-3).

[33] At that time, Yeung tried to contact Shum at the only telephone number that he had for him in China more than thirty times and was unable to get through, as the line appeared to have been disconnected.

[34] On November 23, 2006, a brief of relevant documents in possession of Yeung and of FTC was prepared and sent to CPCC's counsel. Yeung confirmed that the brief included the documents which had been found in the lent boxes (Exhibit D-1).

[35] On November 26, 2007, following the judgment of the Federal Court of Appeal, a registered letter was sent by FTC and Yeung's counsel to Shum's address in China, but no further response was received from Shum. The letter reads as follows:

> We are the lawyers for FTC Computers and Micky Yeung. We understand that you are the majority shareholder of Fuzion Technology Inc.
>
> 1. We request your prompt co-operation to enable FTC Computers and Mr. Yeung to comply with an Oct. 25/06 Order of the Federal Court of Canada, which require FTC Computers and Mr. Yeung to make available to the auditors of the Canadian Private Copying Collective ("CPCC"), for the purpose of an audit, all of the business, accounting and financial records of Fuzion Technology Corp. and 1565385 Ontario Inc., from which the Applicant's auditors can readily ascertain: i. the amounts payable, and ii. the

> information required, under the Private Copying Tariffs certified by the Copyright Board.
>
> 2. Mr. Yeung and FTC Computers appealed this decision to the Federal Court of Appeal. By Order made on October 25, 2007, the Federal Court of Appeal dismissed the appeal. Therefore, Mr. Yeung and FTC Computers have an obligation to comply with the Federal Court Order of Oct 25-06.
>
> 3. FTC Computers and Mr. Yeung have already forwarded to CPCC all of the documents you previously made available.
>
> 4. However, CPCC wishes to examine further documents and computer records and intends to visit the premises of FTC Computers for this purpose on Nov. 26-07.
>
> 5. Kindly advise promptly where the documents of Fuzion Technology Corp. relating to the purchase of blank audio media are located and when they can be made available for the review of CPCC's auditors.
>
> A copy of the Federal Court's Order and the Federal Court of Appeal's Order are attached. In each case, the Order is at the bottom of the decision of the judge.

[36] On November 26, 2007, a similar request was also sent by e-mail to Shum from Ellyn informing Shum that he was the lawyer for FTC and Yeung and that pertaining to the Order further documents and records were urgently required for Fuzion (Exhibit D-3).

[37] Yeung also tried to contact Shum through numerous e-mails, all of which remained unanswered. The last e-mail sent on January 17, 2008 was automatically returned to Yeung.

[38] Again, the testimony of Shum on these various attempts is corroborated by the numerous documents produced at the hearing (Exhibit D-3).

[39] Finally, during the weekend of January 17, 2009, Yeung once again visited Shum parents' house. Shum's parents were not willing to provide him Shum's personal contact information. Shum's parents also said they did not know about any Fuzion's documents.

[40] It is to be noted that Yeung's contact information has not changed for the past ten years.

III. SUBMISSIONS MADE BY THE PARTIES

[41] On June 16, 2009, counsel presented their oral submissions with respect to this contempt proceeding and referred the Court in a number of authorities. Additional case law and written arguments were also submitted by counsel after the matter was taken under reserve.

Prosecuting Party

[42] CPCC submits that contempt has been proven beyond a reasonable doubt.

[43] The applicant submits that the Order is clear and its validity has been confirmed by the Federal Court of Appeal. The requested records were needed by CPCC's auditors to complete the audit of Fuzion. Yeung knowingly breached the Order by failing to provide all records of Fuzion. That said, while CPCC is aware that Fuzion kept operating for a number of months after the consignment transaction, CPCC is not seeking that Yeung be found in contempt for not providing

Fuzion's documents which pertains to the period after the consignment transaction (ie. April to December 2003).

[44] Despite Yeung's efforts to obtain Fuzion's records from Shum after the Order and up to the date of the hearing, CPCC submits that this is a factor only relevant with respect to sentencing. Under the Order, Yeung, FTC and Fuzion were jointly and severally obliged to provide all of FTC and Fuzion's records. The failure to do so by Yeung constitutes a breach of the Order and thus amounts to contempt. If Yeung could not obtain Fuzion's records from Shum, CPCC submits that Yeung should have instead contacted Fuzion's former suppliers and obtain from them copies of invoices of blank discs for all the years covered by the audit. Moreover, Yeung was careless and negligent in not assuring himself through former Fuzion employees, before the Order was made, that he could have access or obtain Fuzion's records for the period prior to the consignment transaction. Therefore, Yeung did not act diligently in this case.

[45] CPCC does not seek the imprisonment of Yeung. The imposition of a fine of $5,000.00 will suffice to act as deterrent. Reasonable disbursements and costs on a solicitor-client basis totalling $33,806.73 should also be awarded to CPCC.

Alleged contemnor

[46] Yeung submits that the required elements of contempt have not been proven beyond a reasonable doubt.

[47] Yeung submits that he had no intention to contravene the Order or to defy a process of the Court (an offence for which incidentally he is not charged of under an order to appear before a judge). Any breach of the Order is purely technical and not deliberate on his part. Yeung submits that he has not the remote interest in not producing the requested documents of Fuzion and if he had them, he would give them today to CPCC. He is not personally liable for any past debt of Fuzion and there was no amount due by FTC with respect to the blank disks which were the object of the consignment transaction. Yeung submits that he does not have to answer for things done before the Order was issued, in any event, if the conduct of the parties prior to the issuance of the Order must be assessed, it is CPCC who were negligent. Two whole years elapsed between the time the application was made and the Order was issued by the Court. CPCC knew from the first day they made their application that Fuzion was not operating anymore. They failed to move for some *mareva* injunction, interlocutory order or mandatory order requiring that the books and records of Fuzion be immediately delivered pending the adjudication of their application.

[48] Following the issuance of the Order or the Judgment of the Federal Court of Appeal, Yeung submits that he acted in a diligent manner and did everything that could be reasonably done by himself to comply with the Order. Once the Order of the Court was issued, as far as FTC is concerned, Yeung complied with same, without abandoning his right to appeal the Order. Yeung submits that this is not a case of wilful blindness. He had no personal duty or obligation under the law to maintain or keep records. He could not anticipate in advance what would be the Order of the Court. There is no personal fault on his part. Shum is the one to totally blame. Yeung submits that Shum was at all relevant times the main shareholder and controlling mind of Fuzion. The evidence

clearly establishes that, except for the short period of time where Yeung was in possession of some 11 boxes of documents belonging to Fuzion, it was Shum who had possession and control of the requested records. Shum has disappeared and Yeung does not know where he can be now. It has become impossible, and it is still impossible today, for Yeung to personally comply with the Order.

[49] Thus, Yeung submits that he should not be found in contempt, and subsidiary, if found in contempt, a symbolic fine of $1.00 should be imposed. Reasonable disbursements and costs on a solicitor-client basis totalling $25,681.41 should also be awarded to Yeung.

IV. LEGAL PRINCIPLES

[50] Contempt of court can be either civil or criminal (*Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516). In this case, the respondent Yeung is charged of civil contempt.

[51] Rules 466 to 472 of the Rules establish a code governing civil contempt.

[52] Under rule 466 of the Rules, and subject to rule 467 of the Rules, a person is guilty of contempt of Court who:

> (a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;
>
> (b) disobeys a process or order of the Court;

> (c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;
>
> (d) is an officer of the Court and fails to perform his or her duty; or
>
> (e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.
>
> (my underlining)

[53] The charge brought today against the respondent Yeung is having breached of paragraph 1 of the Order issued by Justice von Finckenstein. This offence is specifically contemplated by rule 466 (b) of the Rules and relates in particular to disobedience of an order of the Court.

[54] A finding of contempt is always a very serious matter. Civil contempt is, criminal or quasi-criminal. This is so because "[t]he penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of "public law", because respect for the role and authority of the courts, one of the foundations of the rule of law, and a proper administration of justice are always at issue": *Vidéotron Ltée v. Industries Microlec Produits Electroniques Inc.*, [1992] 2 R.C.S. 1065, at page 1075.

[55] Such legal formalism is not surprising in view of the fact that, in this jurisdiction for instance, rule 472 (a) of the Rules provides that where a person is found to be in contempt, the judge

may order the person be imprisoned for a period of less than five years or until the person complies with the order. Since there is a risk of deprivation of liberty of the individual charged of contempt, the requirements of fundamental justice prescribed by section 7 of the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982*, c.11 (the Charter) apply in the case of contempt proceeding under the Rules (*Frank v. Bottle* (1994), 74 F.T.R 251). With respect to the right guaranteed by section 11 (c) of the Charter of an accused not to be compelled to testify, it already codified by Rule 470 (2). However, as decided by the Supreme Court of Canada in *Vidéotron Ltée*, this right exists even if the rules of procedure of civil contempt in some provincial jurisdictions are silent.

[56] There was some debate between counsel during the hearing on the nature of the offence created by Rule 466 (b),disobeying a process or order of the Court, which was said by the applicant's counsel to be some kind of absolute liability offence (or strict liability offence) where *mens rea* is not a required element. I cannot accept this proposition.

[57] Rule 466 has to be read in conjunction with Rule 472. The fact is that imprisonment is always a potential result of a finding of contempt. We know that imprisonment cannot be imposed for an absolute liability offence since the judgment rendered by the Supreme Court of Canada in *Reference re B.C. Motor Vehicle Act (British Columbia)* s. 94(2), [1985] 2 S.C.R. 486. Thus, rule 466 (b) of the Rules cannot create an absolute liability offence. Otherwise, rules 466 (b) and 472 of the Rules could be the subject of a challenge under the Charter.

[58] That said, a person can certainly be punished for the wilful disobedience of an order of this Court when it is within that person's capacity to comply with same. Where no satisfactory reason is given for non-compliance, that person may be found in contempt under rules 466 (b) and 472 of the Rules and in at least one case of civil contempt heard by this Court, the requisite element of *mens rea* was said to be a necessary requirement of the offence: *Lyons Partnership, L.P. v. MacGregor* (2000), 5 C.P.R. (4th) 157, at para. 5. (In *Lyons*, Justice Lemieux found the defendant in breach of an interlocutory injunction restraining the use of the Barney character pending trial).

[59] Moreover, *mens rea* is currently required by the Courts in the province of Quebec in civil contempt proceedings: *Syndicat des travailleurs d'Olympia (CSN) v. Olymel, s.e.c.*, [2009] J.Q. no. 1142 at paras. 32 to 34 (Que. S.C.) 6; *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at paras. 66 and 67; *Daigle v. Corporation Municipale de la paroisse de St. Gabriel de Brandon* [1991] R.D.J. 249 (Que. C.A.); *Rocques v. Sans*, J.E. 2004-790 (Que. C.A.). In Ontario, the Court of Appeal of Ontario recently re-asserted: "A contempt process – even a civil contempt process – is criminal in nature and requires proof of the contemptuous conduct beyond a reasonable doubt. The conduct must be wilful, deliberate and of a contumacious and egregious nature" (*Anthes v. Wilson Estate*, [2005] O.J. No. 1780, 197 O.A.C. 110, at para. 4).

[60] I am also convinced that intent, which corresponds to the "mental element" in a charge of civil contempt, is a necessary ingredient of any finding of guilt under the Rules. This includes the offence of disobeying a court order or process which is embodied by rule 466 (b) of the Rules. That said, rule 467 (3) of the Rules stipulates that the Court must be satisfied that there is a *prima facie*

case that contempt has been committed. As stated recently by the Federal Court of Appeal: “To so satisfy the Court, the alleging party must show a *prima facie* case of wilful and contumacious conduct on the part of the contemnor” (*Chaudhry v. Canada*, 2008 FCA 173, at para. 6, referring to *Imperial Chemical Industries PLC v. Apotex*, [1989] F.C.J. No. 130; 24 C.P.R. (3d) 176 (F.C.T.D.)).

[61] In The Canadian Oxford Dictionary, Edited by Katherine Barber (Oxford University Press (2001), the words “contumacious” and “wilful” are defined as follows:

> **contumacy** / *n*. stubborn refusal to obey or comply **contumacious** */ adj*. [Latin *contumacia* from *contumax*, perhaps related to *tumēre* swell
>
> **wilful** / *adj*. (also **wilful**) **1** (of an action or state) intentional, deliberate (*wilful murder; wilful neglect; wilful disobedience).* **2** (of a person obstinate, headstrong. **wilfully** *adv*. **Wilfulness** *n*. [Middle English from WILL^2 + -FUL].

[62] Justice Pelletier, as he then was, stated in a similar way in *Mennes v. Warkworth Institution*, 2001 FCT 571, at para. 5, that a show-cause motion “requires proof of a court order or other court process, proof of the respondent’s knowledge of the order or process and proof of a deliberate flouting of the court order or process” (my underlining).

[63] We are now at the second stage of the contempt proceeding. The test mentioned by the Federal Court of Appeal in *Chaudhry*, above, applies equally, except that all the required elements for finding the alleged contemnor in contempt must now be proven by the applicant “beyond a reasonable doubt”. Therefore, the acts constituting the alleged breaches must be intentional or deliberate, or they must arise out of a serious indifference or a contemptuous disregard at the Court.

In that sense, “deliberate” certainly includes any conduct which is fully considered, not impulsive or accidental. In this respect, the “wilful blindness” of the alleged contemnor may also be considered: (*Church of Scientology of Toronto v. Cooper*), [1984] O.J. No. 1400; *Canada (Minister of National Revenue – M.N.R.) v. Iwaschuk*, 2004 FC 1602; *Brilliant Trading Inc. v. Wong*, 2005 FC 1214). This approach is consistent with the case law on civil contempt in various provinces referred to by the parties or consulted by the Court.

[64] Indeed, the resort to a “three-pronged test” to make a finding of civil contempt in the case of a court order or process is firmly established in Ontario: *Bell Express Vu Limited Partnership v. Torroni*, 2009 ONCA 85 and *Hobbs v. Hobbs* (2008), 240 O.A.C. 202, 54 R.F.L. (6th) 1 (C.A.). The test has been summarized the following way by the Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v. G.(N)* (2006), 82 O.R. (3d) 686, at para. 27:

> The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order.

[65] While the test for civil contempt embodies a “wilful and contumacious conduct” on the part of the alleged contemnor (*Chaudhry*, above, at para. 6), it has sometime been said by this Court that the “wilful” element does not automatically equate to a need to establish *mens rea*, as this concept may be understood in the case of criminal contempt: *LifeGear, Inc. v. Urus Industrial Corp.*,

2004 FC 21; *Merck & Co. v. Apotex Inc.*, 2003 FCA 234, at para. 60; *Telus Mobility v. Telecommunications Workers Union*, 2002 FCT 656.

[66] As explained by the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, [1992] S.C.J. No. 37, at para. 55, to establish criminal contempt, it must be proven beyond a reasonable doubt that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). In this respect, when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt. However, if the circumstances leave a reasonable doubt as to whether the breach was or be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public.

[67] That said, I have no doubt that the intention to do or refuse to do what is ordered by a court in a civil proceeding is needed to establish a civil contempt in this jurisdiction or elsewhere in Canada. The particular offence created by rule 466 (b) of the Rules consists of the intentional doing or refusal to do an act which is in fact prohibited or mandated by the Order. The "fault element" (*LifeGear, Inc.*, above, at paras. 22 and 23) or "mental element" will correspond to the proof beyond a reasonable doubt of the "wilful disobedience" of the court order by the alleged contemnor, combined with the "deliberate flouting" of the court order (*Mennes*, at para. 5). Thus, knowledge of the order by the alleged contemnor, and knowing disobedience of the order must both be proved by

the applicant beyond a reasonable doubt: *Sherman v. Canada Custom Revenue Agency*, 2006 FC 1121, at para. 11.

[68] In conclusion on this point, like it has been decided in other jurisdictions, the intention of the alleged contemnor as manifested in its action or inaction is clearly relevant not only for the purpose of determining the appropriate penalty but also in determining whether or not contempt existed (in addition to cases already cited: *Morrow, Power v. Newfoundland Telephone Co.*, 121 Nfld. & P.E.I.R. 334, [1994] N.J. No. 197 at paras. 18 and 19).

Proof beyond a reasonable doubt

[69] At the hearing before the judge, the prosecuting party will be the first to present his evidence of contempt. The alleged contemnor may or may not adduce evidence. This flows from the fact that the prosecuting party bears the ultimate burden to prove beyond a reasonable doubt that there is contempt. As the case may be, the alleged contemnor may wish to testify at the hearing to explain why he or she did not comply with the court order. This is also consistent with the purpose of the hearing which is to permit the alleged contemnor "to present any defence that the person may have": rule 467 (1) (c) of the Rules. Naturally, the prosecuting party can always attack the explanations provided to the Court by the alleged contemnor as being untrue or not constituting valid defence or legitimate excuse for not complying with the court order.

[70] Personal service of the court order to the alleged contemnor, thus proving his actual knowledge of the court order, may permit the court to infer that the breach was wilful and

deliberate. This may be sufficient evidence at the first stage. However, at the actual hearing, such evidence must be measured and weighed with any *viva voce* explanation provided by the alleged contemnor whose credibility must naturally be assessed.

[71] The contemnor's "good faith" should not be mixed or associated with the lack of *mens rea* or wilful intention, which constitute an essential requirement of criminal or civil contempt. For example, the fact that the contemnor believed, on the advice of counsel, that his proposed sale of a product was non-infringing, based on counsel interpretation of the reasons for judgment, is not a valid defence to contempt proceedings following the issuance of an injunction. Therefore, the contemnor should have obtained a direction of the Court before proceeding with the continuation of sales activities until the terms of the judgment were settled. However, in such a case, the contemnor's good faith may be taken in consideration with respect to the imposition of an appropriate sentence: *Merck & Co. v Apotex Inc.*, 2003 FCA 234.

[72] Moreover, the fact that the alleged contemnor considers the court order unjust or invalid is not a legitimate excuse for not complying with the court order. Unless a stay is obtained, the duty of a person bound by an order of a court is to obey that order while it remains in force regardless of how flawed he may consider it or flaw it may, in fact, be. Public order demands that it be negated by due process of the law, not by disobedience: *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129 at para. 90, where the Supreme Court of Canada adopted the rationale of O'Leary J. in *Canada Metal Co. v. Canada Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585.

[73] The law with respect to the holding in contempt of officers and directors of a corporation who is the object of an injunction is summarized by Justice O'Leary in *Canada Metal Co.*, above, at pages 604-605, where he stated:

> The applicants have submitted that where a corporation violates an injunction, the directors and officers of the corporation can be held in contempt of Court and can be attached or otherwise punished for the contempt, without any proof that the particular directors or officers proceeded against did or failed to do anything that was responsible for the said violation. I am unable to agree with that submission. I am not saying that before an officer or director can be committed for a contempt committed by the corporation that it must be shown that the officer aided or abetted the contempt. It may well be that the director or officer could be held in contempt, even though his role in the matter was purely passive: see *Biba Ltd. v. Stratford Investments Ltd.*, [1972] 3 All E.R. 1041, and *Glazer v. Union Contractors Ltd. and Thornton* (1961), 129 C.C.C. 150, 26 D.L.R. (2d) 349. Further, the violation of the injunction may give rise in some cases to a presumption that the director or officer did or failed to do something that caused the breach, any may put that officer or director on his defence. Where, however, it is clear on the evidence that the director or officer did all he could to ensure that the injunction would be abided by and, where the breach occurred without fault on the part of the director or officer, then I am unable to see how that director or officer can be punished for contempt of Court.
> (my underlining)

[74] Evidence of impossibility to comply or due diligence may constitute legitimate excuse for not complying to the terms of an order or injunction: *Nemo Foods Ltd. v. Remi Rivet Fast Foods Ltd. et al.* (1982), 64 C.P.R. (2d) 125; *Regina v. Roussel et al.* (1989), 54 C.C.C. (3d) 203, at pages 213-214 (Que. S.C.); *Morrow, Power,* above, at para. 20; *Kun Shoulder Rest Inc. v. Joseph Kun Violin and Bow Maker Inc.* (1997), 74 C.P.R. (3d) 487, at para. 77 (F.C.T.D.); *Capital Regional District v. Sooke River Hotel Ltd.,* 2001 BCSC 1373, at para. 21; *TG Industries Ltd. v. Williams,*

2001 NSCA 105, at para. 31; *Silver Rill Corn Ltd v. Island View Golf Centre Ltd.*, 2007 BCSC 865, at paras. 17 to 33. Thus, if a person designated in an injunction, including a director or an officer of a corporation, is able to prove that he or she did everything that could be reasonably done or required under the circumstances to comply with the order or injunction, a judge should not find such person in contempt of court.

V. NO CONTEMPT IN THIS CASE

[75] In the case at bar, the Prothonotary issued the order to appear before a judge on the grounds that he was satisfied that Yeung had knowledge of the Order and that the applicant had established a *prima facie* case of contempt that Yeung was in breach of paragraph 1 of the Order. The order to appear had to be personally served to Yeung. This requirement has been satisfied.

[76] We are now at the second stage, that is the contempt hearing itself, which as aforesaid is analogous to the trial of a criminal offence. Again, I reiterate that the act with which Yeung is charged is that, by his conduct, he breached paragraph 1 the Order, by failing to make available to the CPCC's auditors, for the purpose of an audit, all of the business, accounting and financial records of Fuzion and FTC within thirty days of the Order or within thirty days of the judgment of the Federal Court of Appeal dated October 25, 2007.

[77] Moreover, Yeung is not charged of having acted in such a way as to interfere with the orderly administration of justice or to impair the authority or dignity of the Court – rule 466 (c) of the Rules, but of having disobeyed an order of the Court – rule 466 (b) of the Rules. Thus, the issue

today is not whether the three respondents, Fuzion, FTC and Yeung could validly refuse in February 2003 to provide Fuzion's records to CPCC's auditors, but whether Yeung should be found guilty of contempt because he wilfully and deliberately breached paragraph 1 of the Order of October 2006 enjoining Fuzion, FTC and Yeung to provide to CPCC's auditors all relevant records of Fuzion and FTC.

[78] For the reasons hereunder, I find that Yeung is not in contempt of court and is not guilty of the particular offence for which he had been specifically charged under the order to appear before a judge.

[79] Based on the facts proven at the hearing held on January 19, 2009, the applicant has simply failed to establish, beyond a reasonable doubt, that all requisites elements of the test for civil contempt are met in this case, and in particular, that there is a wilful and contumacious conduct on the part of the alleged contemnor, Mr. Mickey Yeung.

[80] Having considered the totality of the evidence adduced by the parties, I have found Yeung's testimony entirely credible. I find that Yeung did not wilfully or deliberately breach paragraph 1 of the Order rendered by Justice von Finckenstein and there is no proof, beyond a reasonable doubt, of contumacious conduct on the part of Yeung. In this regard, the evidence of knowledge of the Order submitted by the applicant is not sufficient in this case to establish, beyond a reasonable doubt, that Yeung wilfully disobeyed the Order in not providing to CPCC's present auditors all records of Fuzion. Any evidence of non-compliance submitted by the applicant must be assessed in light of

Yeung's reasonable explanations at the hearing for not complying to the Order. The credible evidence submitted by Yeung at the hearing is sufficient in this case to cast a reasonable doubt in my mind on the wilful or deliberate character of the breach and on the alleged contumacious character of the breach in question

[81] Based on the totality of the evidence, I find that Yeung's omission to comply with the Order is not deliberate or intentional. I believe Yeung, when he swears under oath, that he did not have actual control or possession of Fuzion's records. The testimony of Yeung at the hearing is entirely consistent with the position that had been taken by FTC and Yeung in relation to CPCC's application and concurs with the facts contained in Yeung's sworn affidavit dated November 12, 2004, which has been produced by the applicant at the hearing before me (Exhibit P-3). Yeung's defence of due diligence and impossibility to comply with the Order must therefore be accepted in the present circumstances.

[82] Yeung has proven before me that the failure to provide all of Fuzion's records, which is the alleged contumacious conduct, was unintentional on his part. Yeung's intention to comply with the Order went far beyond expressing a subjective belief at the hearing that he wanted to comply with the Order or that he had no contumacious intent. His oral evidence, which is corroborated by the documents produced at the hearing as Exhibits D-1, D-2 and D-3, clearly and objectively show that positive acts were taken in the past by Yeung to comply with the Order. This is not a case where a person simply does nothing or takes feeble steps to comply to a mandatory order. Further, there was no wilful blindness on the part of Yeung. I accept, based on Yeung's testimony that his personal

failure to provide Fuzion's records did not arise out of a serious indifference or a contemptuous disregard of the Order.

[83] To sum up, the Court has had the benefit of hearing relevant *viva voce* evidence which serves to clarify Yeung's personal position. This evidence sheds a light on the practical difficulties posed by the Order. It has become evident that full compliance of the Order on the part of Yeung was and is still today physically impossible. Even if this Court were to order Yeung today to comply with the Order, it remains that Yeung would still not be able to provide all of Fuzion's records to CPCC's auditors.

[84] Applicant's counsel forcibly argued at the hearing that the Order created some sort of an "obligation of result" under which all three respondents mentioned in the Order, Fuzion, FTC and Yeung, were jointly and severally obligated to make available to the CPCC auditors, for the purpose specified in the Order, all of the business, accounting and financial records of both Fuzion and FTC, in such a way that each of them could be compelled separately to perform the whole obligation described in the Order, failing which any of them may be found in contempt in case of default. In my respectful opinion, the applicant's reasoning is untenable in law since in a quasi-criminal context such as this contempt proceeding an alleged contemnor cannot be held responsible of the fault of another person, unless complicity is proven beyond a reasonable doubt. The fault must be personally committed by the alleged contemnor. Based on the testimonies I heard and the documents produced at the hearing, there is no personal fault on the part of Yeung. Collusion

between Yeung and Shum to permit Fuzion to escape the Order has not been alleged or proven by CPCC.

[85] Finally, I am satisfied that Yeung gave sufficient priority to the Order in the particular circumstances of this case. Again, I wish to make clear that, based on the credible and reasonable explanations submitted at the hearing by Yeung, I am entirely satisfied that Yeung's physical impossibility to comply with the Order was not the result of some reckless or negligent conduct on his part. According to the objective evidence on record, Yeung and FTC had no property rights in Fuzion's records. Same belonged to Fuzion and were under the control of Shum at the time of the Order was made and after its issuance, up until the present time. Moreover, except to the extent indicated earlier, neither FTC or Yeung can be held liable of the obligation to pay levies on blank media who belonged to Fuzion and which were not actually the object of the consignment transaction.

[86] Therefore, the motion in contempt must be dismissed.

VI. COSTS

[87] In view of the result of this proceeding in contempt, costs should be in favour of Yeung. Yeung's counsel argued at the hearing that this would be an appropriate case to allow his client a lump sum in lieu of assessed costs, based on the bill of costs submitted by him, where costs and disbursements are totalling $25,685.41 (inclusive of all taxes).

[88] In awarding a lump sum in lieu of any assessed costs, the Court should be guided, as much as possible, by the standards established in Tariff B. Only where that would dictate an unreasonable or unsatisfactory result should the Court consider awarding an amount in excess of the tariff (*Dimplex North American Ltd. v. CFM Corp.* (2006), 55 C.P.R. (4th) 202, 307 F.T.R. 153). Indeed, the well-established practice is to award costs on a solicitor-client basis to the party prosecuting the contempt to ensure compliance with a court order (*Merck & Co. v. Apotex Inc*., 2003 FCA 234, 25 C.P.R. (4th) 289 (F.C.A.) at paras. 93-94). The policy underlying the jurisprudence is clear: a party who assists the Court in the enforcement of its orders and in the enforcement of respect for its orders, should not, as a rule, be put out of pocket for having been put to that trouble.

[89] Conversely, where the alleged contemnor is found not guilty of contempt, should he or she be entitled to receive costs on a solicitor-client basis?

[90] In my opinion, the straightforward nature of a case, the reprehensible, scandalous or outrageous conduct of a party, reasons of public interest may justify costs to be awarded on a solicitor-clients basis. The policy reasons for awarding solicitor-client costs to an alleged contemnor who is acquitted of a charge of contempt should be consistent with such principle. Thus, in case of the dismissal of a motion in contempt, there should be no automatic entitlement to costs on a solicitor-client basis. The alleged contemnor should satisfy the judge hearing the matter that the prosecuting party has itself acted in a faulty

manner. Such would be the case if the circumstantial evidence showed some bad faith on the part of the prosecuting party or abusive behaviour in bringing the motion in contempt.

[91] In the oral submissions made at the contempt hearing on June 16, 2009, Yeung's counsel asked this Court to find that CPCC overstepped the purpose for which the Order was made. Thus, it was submitted that it was not open to CPCC to seek to find Yeung in contempt without demonstrating first that they themselves had done everything they could do to obtain the documents requested. CPCC's failure to inform, advise or instruct Thomas regarding the extent of the first part of Fuzion's audit which was conducted in January and February 2003 should therefore be taken into account in assessing CPCC's good faith. At a minimum, an adverse inference should be drawn by the Court from CPCC's failure to provide necessary evidence of the efforts they did make to obtain the documents requested. Furthermore the travel and accommodation expenses incurred by Yeung to attend the contempt hearing in Montreal on January 19, 2009 upon counsel for CPCC's refusal to permit adjournment of the hearing when all of the events of this case occurred in Ontario, should also be taken into account when assessing the costs to be awarded.

[92] In response, counsel for CPCC invoked in her oral submissions that it was not relevant that the audit report of February 2003 was not made available to this Court because the Order is based on the premise that said report was incomplete and that the audit could not be completed. It was not within Thomas' mandate to double-check if the documents provided to CPCC during the February 2003 audit were insufficient. Thus counsel for CPCC submitted that there is no evidence of bad faith on the part of CPCC. If CPCC had been in a position to assess Fuzion's liability, there would

not have been any order to appear issued by Prothonotary Lafrenière. Now there was an order and Justice von Finckenstein accepted CPCC's position that they were not able at the time of the application to assess Fuzion's levy liability. Rather, counsel for CPCC asked that the Court finds that Yeung was not diligent, in that he did not attempt to reach Shum or to provide any other document than those that he had already produced, and that after the Court of appeal's order, he waited at least 30 days to start trying to comply with the decision.

[93] I find CPCC's arguments not compelling and I dismiss same.

[94] The order to appear issued in this case by Prothonotary Lafrenière was made on an *ex parte* basis and it was not binding on the Judge who would hear the *viva voce* evidence submitted by the parties at the contempt hearing. Based on the evidence on record, since May 2003, Yeung was no longer an officer and director of Fuzion. Yeung was added to the Order principally because Shum, the majority shareholder and President of Fuzion, was living in China at the time CPCC's application was made. At the date of the making of the Order, Yeung had his own company FTC, which was always a distinct corporate entity. However, the Court wanted to assure itself that any levy payable under the tariffs to CPCC for blank media sold by Fuzion to FTC could not be escaped through the conclusion of the consignment transaction. Otherwise, he would not have "pierced" the corporate veil.

[95] It is apparent that Yeung would not have been prosecuted in contempt if Fuzion, who incidently was dissolved in 2005, had complied earlier with CPCC's former auditors

request to provide all relevant records to Fuzion. The applicant readily admits that following the issuance of the Order in October 2006, Yeung had made available to their auditors all of the business, accounting and financial records of FTC. With respect to FTC, CPCC's present auditors were entirely satisfied that the blank discs purchased by FTC during the period covered by the audit, including the ones which had been the object of the consignment transaction, all came from Canadian (local) suppliers (Exhibit D-2).

[96] Indeed, the applicant was satisfied after the completion of the audit with respect to FTC, that no amount payable under the tariffs is due by FTC for the period covered by the audit. This evidence, by itself, objectively demonstrated Yeung's respect and compliance of the Court's process and Order. Thus, the institution of this contempt proceeding or the pursuit of further proceedings against Yeung personally comes very close to the outrageous conduct that a court should not tolerate.

[97] No representative of CPCC testified at the hearing. The evidence is silent on the actual reasons or objectives pursued by CPCC in making this motion in contempt. The fact is that Fuzion has been dissolved and has no operations and that FTC is not owing any dues to CPCC. Then, what is the purpose of this continuing audit? Is it still the intention of CPCC to assess or make a claim in the future against Fuzion?

[98] It has been argued by the applicant's counsel that CPCC's auditors could not reach a satisfactory conclusion with regard to the compliance of Fuzion's reporting obligations due to the

unavailability of Fuzion records but it is to be noted that Thomas's report does not specifically refer to what had been previously prepared by CPCC's former auditors for the purpose of the continuation of Fuzion's audit. She testified in chief that normally she would have reviewed the former auditors' report before continuing her own audit, but could not remember if she did in fact review it. However, during cross-examination, Thomas admitted having not checked with CPCC's former auditors what documents or information, if any, had been provided or obtained during the first part of Fuzion's audit which was conducted in January and February of 2003. Moreover, the applicant has not deemed necessary to have CPCC's former auditors testify in this contempt proceeding.

[99] The various elements above all cast serious doubts on the *bona fide* character of the present motion in contempt and on the actual reasons of CPCC in bringing the present contempt proceeding today against Yeung personally and not Fuzion and/or Shum. Why seek today the personal condemnation of Yeung? Is this an act of retaliation or vengeance? Why should Yeung be held liable in contempt of Fuzion or Shum's failure or refusal to make available the requested Fuzion records?

[100] During this proceeding in contempt which was commenced by CPCC more than two years after the Order was made, the applicant has not informed the Court on the steps, if any, that were taken by CPCC to obtain the requested information from Fuzion and/or Shum, and I am entitled to draw an adverse inference from their silence in this respect. It must be remembered that in Canadian law, a contempt order is first and foremost a declaration that a party has acted in a defiance of a

court order. Consequently, as the Supreme Court of Canada has cautioned in *Pro Swing Inc.*, at para. 35: “a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification”. Thus, the utmost good faith is required of the party who takes contempt proceeding against another party.

[101] In the particular circumstances of this case, if anyone had to be charged of contempt, it would be clearly Fuzion or/and its former directing mind, Shum. This is a case, in the Court’s humble opinion, where an alleged contemnor who is an individual with limited financial resources should not have to suffer all the consequences of having to defend and challenge what turns out to be an unfounded and unjustified two-day contempt proceeding. Moreover, an important part of the hearing was held in Montreal, when all the events of this case occurred and the most important witnesses are from the Toronto region, this just added an additional financial burden to Yeung and his counsel.

[102] In conclusion, this case is an appropriate one for the allotment to the respondent Yeung of a lump sum which should include all reasonable disbursements and a fair portion of respondent’s legal costs to defend himself in the contempt proceeding, based on the bill of costs submitted by Yeung’s counsel.

[103] Considering the totality of the particular circumstances of the case, including the degree of success achieved, the value and importance of the case, the responsibility assumed by Yeung’s counsel, the ability of Yeung to pay, the complexity of some legal issues raised

by the parties and the amount of work and research in the caselaw required in this case, I find it fair and reasonable to award to Yeung the total sum of $15,000.00, inclusive of all disbursements and in lieu of any assessed costs, and payable forthwith by the applicant.

JUDGMENT

THIS COURT ORDERS and ADJUDGES that:

1. The respondent Yeung is not guilty of contempt of court.

2. The motion for contempt made by the applicant is dismissed with costs.

3. The respondent Yeung is entitled to costs totalling the sum of $15,000.00 in lieu of any assessed costs and inclusive of all disbursements, and payable forthwith by the applicant.

"Luc Martineau"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1655-04
STYLE OF CAUSE:	**CANADIAN PRIVATE COPYING COLLECTIVE v. FUZION TECHNOLOGY CORP. and 1565385 ONTARIO INC. and MICKEY YEUNG**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Martineau J.
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APPEARANCES:

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