

Date: 20071025

Docket: A-525-06

Citation: 2007 FCA 335

**CORAM: SEXTON J.A.
SHARLOW J.A.
RYER J.A.**

BETWEEN:

1565385 ONTARIO INC. and MICKEY YEUNG

Appellants

and

CANADIAN PRIVATE COPYING COLLECTIVE (CPCC)

Respondent

Heard at Toronto, Ontario, on October 25, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on October 25, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on October 25, 2007)

SHARLOW J.A.

[1] The appellants are the subjects of an order made by Justice von Finckenstein (2006 FC 1284) relating to the enforcement of the auditing rights of the respondent Canadian Private Copying Collective (CPCC) under Part VIII of the *Copyright Act*, R.S. 1985, c. C-42. The object of the audit is to ascertain the liability of Fuzion Technology Corp. (“Fuzion”) and the appellant 1565385 Ontario Inc., carrying on business as “FTC Computers (“FTC”), for levies payable on the importation of blank compact discs.

[2] There is evidence that Fuzion imported blank compact discs for sale but the appellant Mr. Yeung, a shareholder and director of Fuzion, failed to provide CPCC on request with sufficient records to quantify the liability. The uncertainty as to the liability of Fuzion was exacerbated by evidence about certain transactions between Fuzion and FTC after CPCC's audit efforts failed. In particular, there is evidence that (1) Fuzion consigned blank compact discs to FTC, (2) Fuzion transferred its assets and undertaking to FTC, (3) FTC carried on the business formerly carried on by Fuzion, and (4) FTC sold blank compact discs in a manner that made it unclear whether the seller was Fuzion or FTC. Mr. Yeung was at all material times one of the directing minds of both corporations. He was aware of CPCC's audit requests and the details of all dealings between Fuzion and FTC, and is in a position to ensure that all of the information required by CPCC is provided by Fuzion or FTC or both.

[3] In making the order under appeal, Justice von Finckenstein considered all of the evidence referred to above. The order reads as follows:

THIS COURT ORDERS that:

1. Within thirty (30) days of this order the Respondents, Fuzion Technology Corp., 1565385 Ontario Inc. and Mr. Micky [*sic*] 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;

2. If the audit reveals any amounts payable and demand therefore is made by the Applicant and no payment is made by the Respondents within 30 days of such demand, the Applicant may bring this matter back before this court on 10 days notice;
3. Any renewed application under paragraph 2 above, may be accompanied by affidavit evidence, based on the results of the audit, demonstrating the outstanding levy debt, interest due thereon and the cost of the audit;
4. I shall remain seized of this matter and will hear, if necessary, the renewed application referred to in paragraph 2 above; and
5. The Applicant shall have their costs in this matter from the Respondents.

[4] FTC and Mr. Yeung seek to have the order varied in three respects.

[5] First, the appellants argue that paragraph 1 of the order should be limited to the business, accounting and financial records relating to the blank compact discs consigned by Fuzion to FTC. We are not persuaded that Justice von Finckenstein was obliged to restrict the terms of his order in that fashion. Given the absence of a clear distinction between the enterprises of the two corporations, Justice von Finckenstein made no error in making an order that gives CPCC the tools to determine how many blank compact discs owned or sold by either Fuzion or FTC during the relevant period had been imported by either corporation.

[6] Justice von Finckenstein indicated that in this aspect of the order he was “piercing the corporate veil”. We would not adopt that expression as a justification for paragraph 1 of the order. In our view, paragraph 1 is sufficiently justified by the failure of Fuzion to provide CPCC with the

audit information when it was first sought, combined with the later transactions that obscured the relevant facts.

[7] In oral argument, counsel for the appellants also submitted that this proceeding should have been dismissed entirely against Mr. Yeung. We have considered that argument even though it was not in the appellants' memorandum of fact and law. The evidence is that Mr. Yeung was instrumental in frustrating the audit at the outset. Given that evidence, we are not persuaded that Justice von Finckenstein erred in imposing a personal obligation on Mr. Yeung to co-operate with the audit to the extent set out in paragraph 1 of the order.

[8] Second, the appellants argue that paragraph 2 of the order should be varied to make it clear that FTC and Mr. Yeung are not responsible for the payment of any levy for which Fuzion is liable. The order contemplates that this matter will be returned to the Federal Court to determine any liability, if the parties are unable to settle the matter. We have no basis for determining at this stage whether any party to these proceedings has, or should be absolved of, any liability.

[9] Third, the appellants argue that the award of costs should be amended so that Fuzion alone is liable for the costs of CPCC, and CPCC is liable for the costs of FTC and Mr. Yeung. An award of costs in the Federal Court is a matter of discretion, and will not be disturbed in the absence of an error of law or principle. We see no basis for disturbing the costs award.

[10] This appeal will be dismissed with costs.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-525-06

(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE von FINCKENSTEIN, DATED OCTOBER 25, 2006. FEDERAL COURT FILE NO. T-1655-04.)

STYLE OF CAUSE: 1565385 ONTARIO INC. and MICKEY YEUNG
v. CANADIAN PRIVATE COPYING
COLLECTIVE (CPCC)

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 25, 2007

**REASONS FOR JUDGMENT OF
THE COURT BY:** (SEXTON, SHARLOW & RYER JJ.A.).

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

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