

Federal Court



Cour fédérale

Date: 20090811

Docket: T-1620-06

Citation: 2009 FC 820

Ottawa, Ontario, August 11, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

BERNARD DROPSY,

**as representative of CD²I COOPÉRATIVE
DE SERVICES EN DÉVELOPPEMENT
INTERNATIONAL, and as administrator of
WARRINGTON**

Respondent

REASONS FOR ORDER AND ORDER

[1] This proceeding is a hearing for the Respondent to hear proof of an act with which he is charged and which is outlined below, and to be prepared to present any defence that he may have.

Factual Background

[2] On June 29, 2006, a first Requirement for information was served on the Respondent, Bernard Dropsy, as representative of CD²I, in order to obtain:

- a. Le nom de tous les membres faisant partie des personnes ayant investi un montant nominal (membres autres que ceux qui ont transféré un REER ou tout autre placement enregistré à CD²I) à un moment ou à un autre et faisant partie des membres de la coopérative pour les années 2003, 2004 et 2005. Nous aimerions obtenir à leur égard leur adresse ainsi que leur pourcentage de participation pour chacune des années 2003, 2004 et 2005.
- b. Tous les relevés bancaires de tous les comptes bancaires de la coopérative CD²I pour l'année 2005 ainsi que les livres comptables et pièces justificatives expliquant les dépôts et les retraits.

[3] On June 29, 2006, a second Requirement for information was served on the Respondent, as administrator of Warrington Securities Limited (Warrington), in order to obtain:

- a. Relevés bancaires
- b. Chèques retournés par la banque
- c. Grand livre
- d. Journal général
- e. Écritures de régularisation
- f. Chiffriers
- g. Livre des minutes
- h. Caisse-recettes
- i. Caisse-déboursés
- j. Nom de tous les administrateurs de la compagnie
- k. Description des principales activités de la société et services offerts aux clients

[4] A copy of the same Requirement was sent at the address of Warrington in the British Virgin Islands and another at the address of Bernard Dropsy. Copies of all Requirements were also served on the attorneys of CD²I.

[5] Neither CD²I, nor Warrington, nor the Respondent had provided the information requested in the above-mentioned Requirements for information.

Compliance Order

[6] On September 8, 2006, the Applicant filed a motion for an order in compliance based on section 231.7 of the *Income Tax Act*, 1985, c. 1 (5th Supp.) (the Act). On October 9, 2007, Justice Shore of this Court found that the Respondent did not respond to any of the Requests for information:

[31] ... it is clear that, pursuant to subsection 231.2(1), the Respondent is a person who was required to provide information or documents to the Minister. Despite the thirty days provided to comply, the Respondent did not provide any of the requested documents or information and no solicitor-client privilege has been invoked.

[32] For the foregoing reasons, it is appropriate for this Court to exercise its discretion and order that the Respondent provide the information and documents sought by the Minister under the RFIs served on June 29, 2006.

[7] Justice Shore found that the requirements were met for granting an order against the Respondent under section 231.7 of the Act to provide the information and documents sought by the Minister under subsection 231.2(1) of the Act, and issued the following compliance order:

THE COURT ORDERS,

- i. Pursuant to section 231.7 of the *Income Tax Act*, that the Respondent comply with the notice issued by the Minister and shall forthwith, and in any event, not later than thirty days from the date of this Order, provide the Information and Documents

requested by the Minister of National Revenue in the two Requirements to provide documents, dated June 29, 2006.

2. Costs to be borne by the Respondent.

Respondent's failure to comply with part of the order of October 9, 2007

[8] On January 22, 2008, the Respondent complied with the first Requirement for information and provided the Minister with the requested documents.

[9] On May 12, 2008, the Respondent was served with a formal demand to comply with the second Requirement for information within ten days. The Respondent replied that as an officer for Warrington, he could not obtain the requested documents.

Show Cause Order

[10] The Applicant moved to commence contempt proceedings against the Respondent. On April 20, 2009, Mr. Justice Lemieux found that the Order dated October 9, 2007 was clear, that there is *prima facie* evidence that the Respondent has had actual knowledge of the order and that there is *prima facie* evidence of a wilful and contumacious conduct on the part of Bernard Dropsy.

[11] Pursuant to Rules 466(b) and 467(1) of the *Federal Court Rules*, SOR/98-106, Justice Lemieux ordered the Respondent to appear before a Judge of the Court to show cause why he is not in contempt of court under Rule 466 for failing to comply with Justice Shore's compliance order of October 9, 2007. The show cause order charged the Respondent with specific acts as follows and requested that he be prepared to present any defence he may have:

Bernard Dropsy, as an officer of Warrington Securities Limited, a corporation based in the British Virgin Islands, has failed to comply with an order made by this Court on October 9, 2007, ordering him to comply within 30 days of the order with a request for information served upon him on or around June 29, 2006 which ordered him to transmit the Canada Revenue Agency the following documents or information:

Relevés bancaires
Chèques retournés par la banque
Grand livre
Journal général
Écriture de régularisation
Chiffriers
Livres des minutes
Caisse-recettes
Caisse-déboursés
Noms de tous les administrateurs de la compagnie
Description des principales activités de la société et services offerts aux clients

Issue

[12] The issue raised is whether the Respondent, Bernard Dropsy, is guilty of contempt of court beyond a reasonable doubt.

Legislative Provisions

[13] The relevant legislative provisions are found at Appendix A at the end of this document.

Analysis

[14] Paragraph 466(b) of the *Federal Court Rules* provides that a person who disobeys an order or process of the court is guilty of contempt of court. Rule 469 provides that a finding of contempt

shall be based on proof beyond a reasonable doubt. The party, in this case the Minister, charging the alleged contemnor, bears the onus of proving beyond a reasonable doubt the existence of contempt.

[15] Very recently, Justice Luc Martineau in *Canadian Private Copying Collective v. Fuzion Technology Corp. and 1565385 Ontario Inc. and Mickey Yeung*, 2009 FC 800, made a thorough analysis of the legal principles involved in matters of contempt. The pertinent paragraphs can be found from paragraphs 50 to 74.

[16] I agree and make mine his reasoning and will apply it to the case at bar.

[17] On the date of the hearing before the Court, the Applicant submitted evidence that copy of the order Mr. Justice Lemieux dated April 27, 2009 was served personally to the Respondent.

[18] The Order was clear. Evidence also showed that the Respondent has not provided the Minister with the documents indicated in Justice Lemieux's Order.

[19] The Respondent testified and said that he could not produce the requested documents as they were not in his physical possession and he had done "everything possible" to obtain them.

[20] He explained that a letter dated October 31, 2007 (Exhibit R-3) was sent to Warrington Securities Limited in the British Virgin Islands with copy of the order of Justice Shore dated

October 9, 2007 and requested that Warrington make arrangements in order for him to comply with the Applicant's request for information.

[21] The envelope containing the letter was returned with a mention "refused" (Exhibit R-3).

[22] The Respondent also sent on the same date a letter (Exhibit R-2) to Gilbert Aboukrat to the same effect. Mr. Aboukrat was a long-time friend (40 years) and the only contact he had with Warrington. The Respondent asked this person to intervene towards Warrington so that he could comply with the order of Justice Shore. After numerous telephone calls and conference calls, his long-time friend told him not to bother him anymore with that matter.

[23] The Respondent submitted a series of letters between his lawyer and the Applicant's representative (see Tab-2 , Annex 2, Book of Documents of the Respondent) in which he says that he tried to comply with the Order and asked any suggestions or direction as to how he could do more than what he did to comply.

[24] Then, the Respondent referred the Court to Exhibits P-2 to P-7 and said that although he signed some of these documents as a delegated director of Warrington, he had no access whatsoever to the documents required by the Applicant.

[25] He also testified that he knew nothing about Warrington because the only contacts he had with this company was through Mr. Aboukrat. The Respondent never went to the British Virgin

Islands, has no knowledge of its telephone number, fax number or if the company has any employees. He was never appointed officially as a director of the company but was asked by CD²I to become a delegated director of Warrington to protect the interests of the members of CD²I.

[26] Having considered the totality of the evidence submitted, I am of the opinion that the Respondent is credible.

[27] I believe him when he said that the documents required are not in his possession or control and the documents and information required are foreign-based information or documents to which he has no access.

[28] I am also satisfied that the explanations provided by the Respondent for not complying with the order are reasonable.

[29] The efforts and actions taken by the Respondent demonstrates due diligence on his part. I am persuaded by the evidence that the Respondent is faced involuntary with the impossibility to comply with the order.

[30] I am not therefore convinced beyond a reasonable doubt that the Respondent is guilty of contempt of court as charged.

[31] Since there is no evidence of bad faith or abusive behaviour on the part of the applicant in bringing the motion for contempt, the Court grants costs to the Respondent by way of a lump sum in lieu of any assessed costs.

ORDER

THIS COURT ORDERS that:

1. The Respondent, Bernard Dropsy is not guilty of contempt of court;
2. The motion for contempt made by the applicant is dismissed;
3. The applicant shall pay to the Respondent costs in a way of a lump sum of \$2,000 inclusive of all disbursements.

"Michel Beaudry"

Judge

ANNEX A

Relevant Legislation

Income Tax Act, 1985, c. 1 (5th Supp.):

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(3) On *ex parte* application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l’application ou l’exécution de la présente loi (y compris la perception d’un montant payable par une personne en vertu de la présente loi), d’un accord général d’échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s’applique ou d’un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d’une personne, dans le délai raisonnable que précise l’avis :

a) qu’elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu’elle produise des documents.

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

(3) Sur requête *ex parte* du ministre, un juge peut, aux conditions qu’il estime indiquées, autoriser le ministre à exiger d’un tiers la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au présent article —, s’il est convaincu, sur dénonciation sous serment, de ce

qui suit :

(a) the person or group is ascertainable; and

a) cette personne ou ce groupe est identifiable;

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

(5) Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3) ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)a) et b). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

Federal Court Rules, SOR/98-106:

466. Subject to rule 467, 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;

466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance;

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

(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;

c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour;

(d) is an officer of the Court and fails to perform his or her duty; or

d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions;

(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.

e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.

467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

467. (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

(a) to appear before a judge at a time and place stipulated in the order;

a) de comparaître devant un juge aux date, heure et lieu précisés;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

(c) to be prepared to present any defence that the person may have.

c) d'être prête à présenter une défense.

(2) A motion for an order under subsection (1) may be made ex parte.

(2) Une requête peut être présentée ex parte pour obtenir l'ordonnance visée au paragraphe (1).

(3) An order may be made under subsection (1) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

469. A finding of contempt shall be based on proof beyond a reasonable doubt.

469. La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1620-06

STYLE OF CAUSE: **MINISTER OF NATIONAL REVENUE and
BERNARD DROPSY, as representative of CD²I
COOPÉRATIVE DE SERVICES EN
DÉVELOPPEMENT INTERNATIONAL, and as
administrator of WARRINGTON**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: June 17, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: August 11, 2009

APPEARANCES:

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