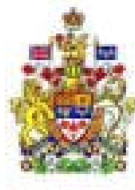
Federal Court of Appeal  Cour d'appel fédérale

Date: 20100610

Docket: A-627-08

Citation: 2010 FCA 151

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

9038-3746 QUEBEC INC., 9014-5731 QUEBEC INC.,
ADAM CERRELLI, CARMELO CERRELLI

Appellants

and

MICROSOFT CORPORATION

Respondent

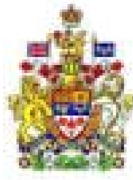
Heard at Montréal, Quebec, on June 7, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2010.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

The questions on appeal

[1] Carmelo Cerrelli (the appellant) pleaded guilty to two charges of contempt of court arising at two different dates out of different acts. The violations for the first date occurred between October 31, 2006 and May 11, 2007 and on October 31, 2007 for the second date. The impugned acts consisted of a breach of a permanent injunction issued against the appellant, his corporations and Adam Cerrelli. The charges read:

a. disobeying paragraph 13 of Harrington J.'s Judgment by:

(i) selling 7 counterfeit copies of software bearing the trade-mark MICROSOFT; and
(ii) possessing for the purpose of selling and distributing 545 counterfeit units of software bearing the trade-mark MICROSOFT;
amounting to passing-off, trade-mark infringement, and depreciation of goodwill contrary to sections 7(b), 7(c), 19, 20 and 22 of the *Trade-marks Act*; and

(b) disobeying paragraph 12 of Harrington J.'s Judgment by possessing for the purpose of selling and distributing 88 counterfeit units of software amounting to a breach of section 27(2)(d) of the *Copyright Act*.

[2] He appeals against the legality and the severity of the sentence imposed by Beaudry J. of the Federal Court (judge). The judge ordered that the appellant pay a fine of $50,000 for each offence, within 120 days from the date of his order, failing which the appellant would have to serve a term of imprisonment of sixty (60) days.

The appellant's grounds of appeal

[3] In his written submissions, the appellant submits that the judge:

a) exercised his discretion in a vacuum, omitting to consider the facts that were presented to him during the hearing;

b) erred in fact by failing to appreciate the appellant's financial circumstances;

c) determined the sentence in total absence of proof of the appellant's *mens rea*;

d) misinterpreted and misapplied the law and jurisprudence jointly submitted by him and the respondent;

e) erred in principle when considering similar facts and situations in his determination of the sentence; and

f) issued a decision which violates the appellant's right to liberty under section 7 of the *Canadian Charter of Rights and Freedoms* (Charter).

The standard of review applicable

[4] The standard of review is not in dispute. It was established by the Supreme Court of Canada in *R. v. M. (C.A.).*, [1996] 1 S.C.R. 500. At paragraph 90, the standard is thus summarized:

> Put simply, absent an error in principle, failure to consider a relevant factor or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[5] This standard is applicable in the present instance because, "in contempt cases, the usual principles of sentencing apply": see *Canada v. Canadian Liberty Net*, [1996] 1 F.C. 787, at page 801 (F.C.A.).

Whether the judge determined the sentence in total absence of the appellant's mens rea

[6] There is no merit in this ground of appeal. The appellant pleaded guilty. A guilty plea is an admission that the charge is well founded in fact and in law. It is an acknowledgement that the material as well as the intentional elements of the offence charged were present in the acts committed: see subsection 606(1.1) of the *Criminal Code*. The appellant cannot at the sentencing level argue as a mitigating factor that he did not have the required *mens rea*.

Whether the judge made errors in principle, failed to consider a relevant factor or overemphasized appropriate factors

[7] It is not necessary to consider all the appellant's grounds of appeal. In his contempt order, the judge enumerated the decisions, evidence, submissions and jurisprudence that be considered as well as the legislation applicable in the circumstances, namely Rule 472 of the *Federal Courts Rules*. The judge proceeded to render judgment by means of a short speaking order which makes no explicit assessment of the aggravating and mitigating factors and does not indicate the weight that he gave them. Without ruling out entirely the possibility of dealing with a contempt of court sentence by means of a speaking order, it would have been much more helpful if reasons for order had been issued or if the speaking order had been more detailed.

[8] In any event, all the material that was before the judge is before us and we are in a position to determine whether it was open to the judge to pass the sentence that he did.

[9] As for the appellant's complaint that, in imposing a custodial sentence, the judge misinterpreted the law applicable to first offender, there is no merit to the argument. The judge did not impose a sentence of imprisonment. He imposed fines.

[10] In addition, there is no firm rule that a first offender on a contempt of court cannot receive a custodial sentence. As Harrington J., who issued the permanent injunction pointed out, the appellant "proved himself time and time again to be a liar and a scofflaw". His conduct "both before and during these proceedings has been dismissive of law and order, and [his] failure to provide

appropriate records, despite court order, demonstrates the necessity of deterring other infringements of the copyrights in question".

[11] Harrington J. also found that the appellant "had little regard for truth at discovery at trial" and that "his behaviour was reprehensible, scandalous and outrageous". It was clear for Harrington J. that the appellant and his corporations "acted in bad faith" and were "caught up in a web of deceit which amply demonstrates their utter disregard for the process of this Court".

[12] That the appellant showed a total disregard for the law and a malicious and selfish contempt for the courts is evidenced in the following two facts.

[13] The appellant's flouting of the court's permanent injunction came after he was condemned to pay $500,000 (jointly with corporate defendants) in statutory damages, $100,000 in punitive damages, $1,410,000 in costs plus the Canadian equivalent of US $175,715.23.

[14] Obviously, money sanctions did not amount to sufficient individual deterrence.

[15] Moreover, shortly after Harrington J.'s decision, the appellant transferred his residential property to his sister for $1.00 who in turn transferred it to the appellant's wife for $750,000. Again, this behaviour of the appellant evidences his intent to defeat the Court's order to pay damages and costs to the respondent.

[16] All these facts were before the judge when he considered what would be an appropriate sentence in this case. They certainly tend to show that the appellant was not a first offender as regards court orders.

[17] After the appellant's manoeuvre to transfer his residential property so as to avoid the payment of damages and defeat the Court's order, I find it beyond reason that he would now claim that the fines are too heavy and that the judge failed to consider the appellant's capacity to pay the fines imposed.

The fitness of the sentence

[18] Contempt of court is a serious offence. It is a challenge to the judicial authority whose credibility and efficiency it undermines as well as those of the administration of justice. It is even a more serious offence when, as in this case, the unlawful acts are motivated by greed and, in addition to a challenge to the judicial authority, they also amount to violations of the law, i.e. the *Trade-marks Act* and the *Copyright Act*.

[19] The sentence imposed in circumstances like the present one must be such as to deter the offender from repeating his unlawful behaviour as well as other persons who would be tempted to commit the same kind of offences.

[20] The appellant has not convinced us that the sentence is demonstrably unfit.

[21] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-627-08

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE BEAUDRY OF THE FEDERAL COURT DATED NOVEMBER 26, 2008, NO. T-1502-00.)

STYLE OF CAUSE:	9038-3746 QUEBEC INC., 9014-5731 QUEBEC INC., ADAM CERRELLI, CARMELO CERRELLI v. MICROSOFT CORPORATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 7, 2010
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	NOËL J.A. TRUDEL J.A.
DATED:	June 10, 2010

APPEARANCES:

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François Guay	FOR THE RESPONDENT

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