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The Role of Good Faith in Avoiding Contempt of Court

Many counsel have undoubtedly been asked by their clients what remedies are available in the face of an opposing party who opts not to comply with a court order. In Ontario, a party may bring a motion for a contempt order to enforce an order requiring a party to do an act (or abstain from doing an act) other than the payment of money. While certain litigants may be enticed by the option of seeking incarceration or additional fines from their adversary due to their non-compliance, the recent case of *N-Krypt International Corp. v. Zillacomm Canada Inc. et. al.* serves as a reminder that counsel should carefully consider whether a contempt proceeding truly advances their client's best interest.

In this case, the Defendant brought a motion pursuant to Rule 60.11 for an order that the Plaintiff was in contempt of Court for failing to comply with the consent Order of Justice Gilmour. The Order required Plaintiff to, among other things, to hold a shareholders' meeting by March 7, 2016, produce audited financial statements at least 10 days before the shareholders meeting, and to produce specified documents at the shareholders' meeting.

The Defendant took the position that the Plaintiff failed to comply with its obligations to produce the audited financial statements and other documents. The Plaintiff did not dispute that it had not yet complied with the Order. However, the Plaintiff took the position that it was not in contempt of court because it acted in good faith and retained an auditor to conduct an audit in accordance with the Order. Unfortunately, the auditor had advised the Plaintiff that the audited financial statements would not be available until the end of July 2016.

In this decision, Justice Charney summarized the three elements which must be established on the criminal standard of proof, beyond a reasonable doubt, before a court may make a finding of civil contempt:

i. The Order clearly and unequivocally stated what should and should not be done;
ii. The party alleged to have breached the Order had actual knowledge of it; and

iii. The party allegedly in breach intentionally did the act that the Order prohibited or intentionally failed to do the act that the Order compelled.

The Court further noted that the contempt power is a discretionary one. The Court also acknowledged that the Supreme Court has confirmed that Courts should discourage its routine use to obtain compliance with court orders – that is, the contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort". Finally, the Court acknowledged that it retained the discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith.

In this case, Justice Charney concluded that the Plaintiff had acted in good faith to comply with the Order. Consequently, he concluded that:

> While it is clear that N-Krypt has not complied with para. 2 of the Order requiring it to produce audited financial statements by February 26, 2016, I am satisfied on the evidence before me that N-Krypt has acted in good faith and with due diligence to obtain these statements. This is an unusual case because N-Krypt's ability to comply with the Order and deliver the financial statements as subject to third parties (the auditors) ability to prepare them.

Ultimately, Justice Charney exercised his discretion and declined to make a finding of contempt in the circumstances.

This case illustrates the high standard that must be met in order for a finding of contempt to be established. Even where a party is clearly not in compliance with a Court order, the Court maintains the discretion to not make a finding of contempt based on the particular circumstances.

Before counsel commence contempt proceedings, they ought to consider whether the ultimate goal of compliance could be obtained in any other more efficient and less expensive manner, particularly since any fine awarded as a sanction for contempt goes to the Provincial Treasurer rather than the moving party.