Federal Court  Cour fédérale

Date: 20160627

Dockets: T-2090-14
T-1862-15
T-1726-15
T-1234-15
T-1085-15
T-897-15
T-745-15
T-477-15
T-269-15

Citation: 2016 FC 719

Ottawa, Ontario, June 27, 2016

PRESENT: The Honourable Mr. Justice Gascon

Docket: T-2090-14

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1862-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

PARKS CANADA

Defendant

Docket: T-1726-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

LIBRARY OF PARLIAMENT

Defendant

Docket: T-1234-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1085-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-897-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

CANADIAN TRANSPORTATION AGENCY

Defendant

Docket: T-745-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

BANK OF CANADA

Defendant

Docket: T-477-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

CANADIAN FOOD INSPECTION AGENCY

Defendant

Docket: T-269-15

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff, 1395804 Ontario Ltd. (operating as Blacklock's Reporter) [Blacklock], is appealing nine orders issued on March 3, 2016 [the Orders] by Madam Prothonotary Tabib, imposing a stay of proceedings in nine different actions [the Nine Actions] filed by Blacklock against six federal government departments represented by the Attorney General of Canada [the AGC] and three Crown corporations and agencies [together, the Defendants]. In her Orders, Prothonotary Tabib imposed a stay of the Nine Actions pending the disposition of a tenth separate case, *1395804 Ontario Ltd (operating as Blacklock's Reporter) v Canada (Attorney General)*, Court File No T-1391-14 [the Finance Action], opposing Blacklock to the Department of Finance. The Orders issued in each of the Nine Actions are identical.

[2] In its actions, Blacklock alleges copyright violations following the dissemination of various articles within the respective organizations of the Defendants. In her Orders, Prothonotary Tabib concluded that, in the circumstances, a stay of proceedings in the Nine Actions pending the disposition of the Finance Action was the option that best achieved the interests of justice and the just, most expeditious and least expensive determination of the issues in dispute between Blacklock and the Defendants.

[3] In its motions filed pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], Blacklock is asking the Court to overturn and set aside the Orders, and to allow the Nine Actions to proceed to trial. Blacklock contends that Prothonotary Tabib erred in failing to properly apply the factors developed in the case law with respect to stay of proceedings, in concluding that similar issues were raised and similar evidence would be led in the different trials, and in relying on irrelevant considerations such as the risk of contradictory decisions as a ground to order the stays. The Defendants reply that, on all fronts, Prothonotary Tabib's Orders were not clearly wrong and that this Court should therefore not intervene.

[4] Blacklock's motions raise the following issues:

- Should the Orders of Prothonotary Tabib be set aside on the ground that they were clearly wrong?
- If the Orders are set aside, should the Court decide, on a *de novo* basis, that the actions filed by Blacklock be stayed until the Finance Action is determined?

[5] For the reasons that follow, Blacklock's motions are dismissed. I am not persuaded that that the motions meet the high threshold imposed on appeals of a prothonotary's orders issued in the context of case management decisions and that Prothonotary Tabib's Orders are based upon a wrong principle or a misapprehension of the facts. On the contrary, I concur with Prothonotary Tabib that staying the Nine Actions is in the interests of justice in this case. Since I find that the Orders are not clearly wrong, I do not need to review this matter on a *de novo* basis and to deal with the second issue raised by Blacklock's motions.

II. Background

A. *Facts*

[6] Blacklock is a subscription-based news corporation that covers politics, bills and regulations, reports and committees, as well as the Federal Court and public accounts in Canada. It has a reporter-owned and operated newsroom in Ottawa. The general public cannot access Blacklock's articles without a subscription, but single-use or bulk-rate electronic subscriptions for organizations may be purchased.

[7] Blacklock has instituted, within a 17-month span (between June 9, 2014 and November 4, 2015), ten different actions for copyright infringement, namely the Nine Actions and the Finance Action. Seven were initiated against various departments or agencies of the federal government, and three against Crown corporations or agencies, specifically the Canadian Transportation Agency, the Library of Parliament and the Bank of Canada.

[8] Blacklock alleges that the Defendants have unlawfully distributed its articles within their respective departments or agencies and have breached its copyright after having obtained the articles by way of single-use subscriptions or through third-party sources. According to the Defendants, Blacklock employs a pattern of writing misleading or inaccurate articles about an organization with the expectation that these articles would be accessed and shared internally. Blacklock then makes *Access to Information Act* requests for evidence of distribution, and claims damages through various means, including litigation.

[9] Of the ten actions instituted by Blacklock, the Finance Action is the furthest along. It is one of only three actions proceeding as a regular action before the Court (the remaining seven actions being simplified procedures), and it is scheduled for a five-day trial initially set for June 2017 but which has recently been advanced to September 2016. Prothonotary Tabib is case managing all ten actions.

B. ***Prothonotary Tabib's Orders***

[10] In her decisions, Prothonotary Tabib ordered the stay of the Nine Actions until 45 days following the determination of the Finance Action. She also directed that, upon the lifting of the stays and in consultation with each other, the parties shall advise the Court as to their availability for a case management conference to discuss the remaining issues, and a schedule for further steps to be taken. She further ordered that the costs of the motion shall be payable by Blacklock to the Defendants.

[11] In her decisions, Prothonotary Tabib acknowledged that the facts of each case are different as both the alleged copyrighted materials and the specific alleged acts of infringement are distinct to each case. However, she stressed that "commonality and similarities" reside in the defences raised in the ten actions. These common defences are: whether Blacklock owns the copyright in the articles alleged to have been infringed; the novel defence of abuse of copyright; the defence of fair dealing when articles are copied/used for internal government reporting purposes; the proper assessment of damages (whether they be loss of profit apportioned per article or the value of an institutional licence); and the availability of punitive damages.

Prothonotary Tabib also noted that the amounts claimed in the actions filed by Blacklock are modest, ranging from $10,000 to $55,000 when they are specified.

[12] According to Prothonotary Tabib, the commonalities between claims coupled with the modest amounts sought "cry out for some form of streamlining and a search for efficiencies" in the case management of Blacklock's actions. She expressed the view that the "sound administration of limited judicial resources" does not rhyme well with proceeding with ten different trials raising overlapping defences and evidence, "with the attendant risk of contradictory judgments."

[13] Prothonotary Tabib then reviewed the procedural history of the ten actions and the different possibilities explored with the parties to streamline the proceedings. She noted the lack of cooperation between the parties and their failure to open their minds to "creative solutions that might have accommodated both sides' goals." She observed that the only options left were either the stay of all actions pending the determination of the most advanced action (i.e., the Finance Action), or allowing all actions to proceed until the pre-trial conference. Prothonotary Tabib concluded that, in the circumstances, "the stay of the proceedings is the option that best achieves the interests of justice and the just, most expeditious and least expensive determination of the issues."

[14] Prothonotary Tabib dismissed the alternative course proposed by Blacklock, which was to "allow all actions to proceed until the pre-trial conference, and only then to consider how to manage the trials." She indicated that, unless all cases proceed in lock step or are stayed as they

reach the stage of a pre-trial conference, there will be no opportunity to manage how or when the trials are heard. She added that a single, consolidated trial on all issues would likely be lengthy and unwieldy without a concerted effort of the parties to cooperate to narrow issues and simplify evidence. Even in the best case scenario offered under this option, she found that the costs of the trials would still remain out of proportion for the Defendants facing various claims of less than $50,000, that it would effectively delay the determination of even the most advanced actions, and that it would deliver limited cost savings to the Court and to Blacklock.

[15] Prothonotary Tabib further explored the idea of withholding fixing trial dates pending the determination of a "test" case or group of cases. She however dismissed this option, stating that "it would still be wasteful and give rise to an unacceptable risk of contradictory judgments to have four, five or even two different trials proceed almost simultaneously." She remarked that withholding fixing trial dates at a pre-trial conference is effectively a stay of proceedings but one that would be ordered after full costs of preparing for trial have been expended in all cases.

[16] Prothonotary Tabib then explained why, in light of the foregoing, ordering a stay of the Nine Actions pending the determination of the Finance Action is the only solution consonant with the interests of justice. She observed that there is no injustice or prejudice to Blacklock in the "relatively short delay to the other actions" that the stay will occasion, as there is no "on-going harm being suffered by the Plaintiff that would be unnecessarily prolonged by a stay," given that Blacklock's claims are for past damages. She added that the determination of the Finance Action will lead to a significant narrowing of the issues, mentioning the principles of *issue estoppel* with respect to the AGC Defendants. She also noted that the Finance Action is the

most advanced action as well as a regular action allowing for a thorough contestation by the parties. She finally mentioned that "a stay is the only means by which the very real risk of contradictory judgments and a significant waste of the Court's resources can be avoided."

C. *The standard of intervention and the relevant provisions*

[17] It is well established that on appeals under Rule 51, orders of a prothonotary ought not to be disturbed and the Court should not interfere with a prothonotary's discretion unless the impugned order is "clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts," or if "the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case" (*ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [*Pompey*] at para 18; *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 at para 26; *Apotex Inc v Eli Lilly Canada Inc*, 2013 FCA 45 at para 4; *Apotex v Merck & Co*, 2003 FCA 438 [*Merck*] at para 9). Where the decision of the prothonotary falls within one of these two categories, the reviewing judge may then exercise his or her discretion *de novo* (*Seanix Technology Inc v Synnex Canada Ltd*, 2005 FC 243 at para 11).

[18] When an appeal under Rule 51 relates to case management decisions, the test is heightened and becomes even more deferential as prothonotaries who are case managing litigation have "intimate knowledge of the litigation and its dynamics" and should thus be afforded ample scope in exercising their discretion (*J2 Global Communications Inc v Protus IP Solutions Inc*, 2009 FCA 41 [*J2 Global*] at para 16). In such cases, the discretionary decisions of prothonotaries will only be disturbed if they are based on a wrong principle or a misapprehension of the facts "that constitutes a demonstrably clear misuse of judicial discretion" (*Turmel v*

Canada, 2016 FCA 9 [*Turmel*] at paras 10-11; *J2 Global* at para 16; *Merck* at para 12; *L'Hirondelle v Canada*, 2001 FCA 338 [*L'Hirondelle*] at para 11). The Court will only intervene "with an order issued by a case management judge acting in that capacity in the clearest case of a misuse of judicial discretion" (*Constant v Canada*, 2012 FCA 89 at para 12). The underlying principle is that, "in the absence of an error of law or legal principle, an appellate court cannot interfere with a discretionary order unless there is an obvious, serious error that undercuts its integrity and viability"; this is a "high test, one that the case law shows is rarely met" (*Turmel* at para 12).

[19] Rules 383 to 385 establish the principles governing the case management process and specially managed proceedings at the Court. Pursuant to Rule 385(1)(a), a case management judge may "give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceedings on its merits".

[20] As far as stays of proceedings are concerned, judicial officers of the Federal Court of Appeal and of this Court possess the statutory authority to impose a stay of proceedings pursuant to subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the *Federal Courts Act*]. This provision contemplates two possibilities for granting a stay of proceedings, as follows:

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	50 (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire : a) au motif que la demande est en instance devant un autre tribunal;

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[21] Paragraph 50(1)(a) gives this Court the discretion to stay proceedings in situations where a claim filed before the Court is also being proceeded with in another court or jurisdiction. This is not the case here as the Nine Actions and the Finance Action were all filed by Blacklock before this Court. Paragraph 50(1)(b) further grants this Court the discretion to stay proceedings for any other reason, when it is in the interest of justice to do so. In the current case, the motion for a stay of proceeding initially brought by the AGC Defendants was indeed based on this paragraph 50(1)(b) of the *Federal Courts Act*.

III. Analysis

[22] The only question raised by Blacklock's motions is whether the Orders of Prothonotary Tabib were clearly wrong, in the sense that they were based upon a wrong principle or upon a misapprehension of the facts. Blacklock is not claiming that the Orders relate to a question vital to the final issue of the Nine Actions.

A. *Blacklock's submissions*

[23] In support of its appeals, Blacklock essentially relies on the case of *White v Ebf Manufacturing Ltd*, 2001 FCT 713 [*White*], where the Court crystallized (at paragraph 5 of the decision) a series of considerations in determining whether a stay of proceedings should be granted [the *White* Factors]. Blacklock contends that the concept of the "interest of justice"

contemplated by subsection 50(1) of the *Federal Courts Act* is not infinitely malleable and ought to be looked at through the lens of these *White* Factors.

[24] Blacklock faults Prothonotary Tabib for not having conducted a clear and systematic analysis based on an assessment of the *White* Factors. Rather than canvassing the *White* Factors, Prothonotary Tabib indicated in her Orders that the imposition of the stay was "the option that best achieves the interests of justice and that the just, most expeditious and least expensive determination of the issues." Blacklock submits that, by doing so, Prothonotary Tabib wrongly resorted to a pragmatic approach which defers to the economic convenience of the Defendants, understating the prejudice to Blacklock and ignoring the general principle that a stay is an extraordinary remedy to be exercised only in the clearest of cases.

[25] Blacklock further submits that, according to the *White* Factors, the onus is on the moving party to establish both a prejudice to itself and a lack of prejudice to the other party. Where a defendant is incapable of demonstrating the prejudice it will suffer (apart from financial inconvenience or "extra expense") in the absence of a stay of proceedings, its motion must fail. Blacklock claims that the Defendants have adduced no prejudice other than an "extra expense" in having Blacklock proceed simultaneously with the Nine Actions.

[26] Blacklock also pleads that Prothonotary Tabib wrongly based her decisions on the principle that the risk of contradictory judgments militates in favour of granting a stay of proceedings. Blacklock claims that this element is not captured by the *White* Factors and runs counter to the common law principle of *stare decisis*, which limits the jurisdiction of a court to

adjudicate cases and make decisions solely by the precedents of higher courts, as opposed to concurrent decisions made by other judges of that court. Blacklock argues that the "risk" of contradictory judgments within the same jurisdiction is not a recognized legal principle justifying a stay, since decisions of the same court, while persuasive authority, are not binding. Blacklock adds that the *White* Factors and section 50(1) of the *Federal Courts Act* pay special attention to the possibility of different results in different jurisdictions, but do not recognize judicial comity as a ground to support a stay.

[27] Furthermore, Blacklock notes that Prothonotary Tabib's Orders recognized that "the facts upon which liability is alleged to arise are different" in each of the Nine Actions, and that the evidence to be called in each case by both parties will not be identical. Blacklock also contends that Prothonotary Tabib erred in failing to address the question of how *issue estoppel* would potentially apply to the Defendants other than the AGC.

[28] In its submissions, Blacklock further states that this Court's prior decisions in *Marihuana Medical Access Regulations (Re)*, 2014 FC 435 [*MMAR*] and *Canada (Attorney General) v Cold Lake First Nations*, 2015 FC 1197 [*Cold Lake*] provide useful guidance for analyzing the extent of the discretion available to a prothonotary in staying an action, but should nonetheless be distinguished. Blacklock points out that *MMAR* was a case involving 222 different challenges to the *Medical Marijuana Access Regulations*, where the "risk of contradictory judgments" was not a factor invoked to justify the stay. In *Cold Lake*, reference was made to the possibility of "inconsistent outcomes" (at para 20) but Blacklock submits that the procedural circumstances were so specific to the facts of that case as to have no applicability in the present case.

[29] Finally, Blacklock contends that Prothonotary Tabib failed to exercise her discretion sparingly and "in the clearest of cases," and to adopt the judicial restraint built into the exercise of discretion to order a stay. Because the risk of producing contradictory judgments is not a legally valid basis to impose a stay, Blacklock argues that the standalone concern of managing scarce judicial resources was not enough to justify the Orders.

B. ***The Orders of Prothonotary Tabib are not clearly wrong***

[30] I disagree with the arguments put forward by Blacklock and I am not persuaded that Blacklock has demonstrated a "clear misuse of judicial discretion" by Prothonotary Tabib in the issuance of the Orders (*Merck* at para 12; *L'Hirondelle* at para 11).

[31] I do not find that Prothonotary Tabib was clearly wrong in any dimension of her analysis and in the exercise of her discretion to grant a stay of the Nine Actions. There was no misapprehension of facts nor was she wrong in principle in concluding that the interests of justice warranted a stay of the Nine Actions and in relying on the considerations identified in her Orders. On the contrary, Prothonotary Tabib offered an efficient and cost-saving solution for moving along the litigation in the ten actions filed by Blacklock (*J2 Global* at para 16), perfectly in line with the overarching purpose and objectives of effective case management.

[32] Prothonotary Tabib was right to expressly base her decisions on the two governing principles set out respectively in paragraph 50(1)(b) of the *Federal Courts Act* and in Rule 385(1)(a), namely that a stay of proceeding was the best option to act in the "interests of justice" and allowed for the "just, most expeditious and least expensive determination of the issues."

Stated otherwise, Blacklock does not meet the high threshold governing appeals of a prothonotary's decision; this is not one of those rare cases where the prothonotary's findings should be disturbed by the Court.

[33] I pause to remind that prothonotaries have broad discretion to stay proceedings in the interest of justice. This is specifically recognized by Rule 385(1)(a) and paragraph 50(1)(b) of the *Federal Courts Act* and is especially true in the context of case management decisions (*Turmel*; *J2 Global*). Contrary to the situation in *Merck* (at para 13), this is not a situation where Prothonotary Tabib has fettered the exercise of her discretion and where the general principle authorizing a case management judge to give directions necessary for a "just, most expeditious and least expensive" solution has been used to either deny a legal right otherwise provided or to override a specific right granted in the Rules.

[34] More specifically, I find that Prothonotary Tabib did not commit any error in her treatment of the *White* Factors, and that she did not wrongly apply any principle nor misapprehended any facts in her assessment of the interests of justice justifying a stay of proceeding in the Nine Actions.

(1) The *White* Factors

[35] Blacklock's extensive reliance on the *White* Factors is misplaced and misguided.

[36] First, I observe that the *White* decision was issued in the context of a stay of proceedings granted under paragraph 50(1)(a) of the *Federal Courts Act*, not under paragraph 50(1)(b).

Paragraph 50(1)(a) applies to stays where potential adjudications can be made in two different courts or jurisdictions. The *White* decision indeed specifically refers to that situation. This is not the case here. The ten actions filed by Blacklock are all pending before this Court and the stays were sought pursuant to paragraph 50(1)(b), not paragraph 50(1)(a). Prothonotary Tabib was therefore not wrong in principle when she did not specifically mention nor refer to the *White* case in her decisions, as this precedent does not directly govern the stay applications made by the Defendants in the Nine Actions.

[37] The *White* Factors provide guidance where a stay is sought in the context of related proceedings brought in different courts. These factors, as described at paragraph 5 of *White*, are as follows:

> 1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
>
> 2. Would the stay work an injustice to the plaintiff?
>
> 3. The onus is on the party which seeks a stay to establish that these two conditions are met;
>
> 4. The grant or refusal of the stay is within the discretionary power of the judge;
>
> 5. The power to grant a stay may only be exercised sparingly and in the clearest of cases;
>
> 6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
>
> 7. What are the possibilities of inconsistent findings in both Courts?
>
> 8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction;
>
> 9. Priority ought not necessarily be given to the first proceeding over the second one or, *vice versa*.

[38] That is not to say that the *White* Factors cannot be relied on to provide guidance on the exercise of the discretion to stay proceedings in the interest of justice under paragraph 50(1)(b) of the *Federal Courts Act*. However, even assuming that the *White* Factors apply to stays imposed pursuant to the more general provisions of paragraph 50(1)(b), it is well accepted that these factors are not mandatory, and that the Court need not adhere to all considerations outlined in *White*. Furthermore, they are not exhaustive and need to be adapted to the unique context of each case (*MMAR* at paras 17-19).

[39] This was indeed recently confirmed by the Court in both *Cold Lake* and *MMAR*. In *Cold Lake*, a stay of parallel proceedings was granted on four considerations modelled after the *White* case, namely the possibility of inconsistent decisions, the similarity of issues and remedies, prejudice to the parties and the status of each proceeding (*Cold Lake* at paras 19-22). Similarly, in *MMAR*, the Court did not cite the *White* case but simply applied considerations which echoed many of the *White* Factors and were nearly identical to those in *Cold Lake*: whether there is a substantial overlap of issues, whether the cases share the same factual background, whether the stay will prevent unnecessary and costly duplication of judicial and legal resources and whether the stay will result in an injustice to one or more of the parties resisting the stay.

[40] In *MMAR*, the Court was satisfied that a determination of the action furthest along would "clear away some issues" and "save judicial resources," and granted a stay of all other proceedings on that basis (*MMAR* at para 24). The Court did not see any prejudice in this as, realistically, none of the other cases would be heard earlier and each party's situation would remain open to litigation later if necessary. In the *Turmel* case (which decided the appeal of the

MMAR decision), the Federal Court of Appeal confirmed that a stay of proceedings can be granted on considerations of "judicial resources, efficiency and the orderly conduct of multiple proceedings before this Court" (*Turmel* at paras 16-17).

[41] It is thus well settled that the test laid out in *White* is flexible, and the case management judge retains a very broad discretion to determine the weight to be accorded to the various factors depending on the circumstances of each case. As in *Cold Lake* and *MMAR*, Prothonotary Tabib in fact resorted to considerations mirroring many of the *White* Factors to determine that staying the Nine Actions was in the interests of justice. I therefore conclude that, as far as the *White* Factors are concerned, there is nothing clearly wrong in Prothonotary Tabib's Orders.

(2) The elements retained by Prothonotary Tabib

[42] In addition, I find that, even though she did not specifically refer to the *White* case in her decisions, Prothonotary Tabib properly applied the principles enunciated in the Rules and the *Federal Courts Act* as well as stemming from the *White* Factors. In fact, she echoed many of the elements that have been retained by this Court in *MMAR* and *Cold Lake* in support of a stay of proceeding. Properly applying the relevant legal principles, even when not expressly referencing the *White* decision, is certainly not sufficient to satisfy the high threshold for an appeal of a case management decision dealing with a stay of proceedings.

[43] In her Orders, Prothonotary Tabib concluded that it was in the interests of justice to stay the Nine Actions given that 1) the issues raised by the various actions significantly overlapped, 2) a stay would avoid costly duplication of judicial and legal resources, 3) a real risk of

contradictory decisions existed, 4) Blacklock would not suffer prejudice, and 5) proceeding with the ten actions would cause prejudice to the Defendants. I am of the view that each of these five considerations fall well within the discretion of Prothonotary Tabib and that none of them reflects a reliance on a wrong legal principle or a misapprehension of the facts in granting the stays of proceedings sought by the Defendants.

[44] In fact, I am convinced that Prothonotary Tabib was right to take these factors into account in her assessment of the interest of justice at stake in this case and in ensuring the just, most expeditious and least expensive determination of the Nine Actions and the Finance Action.

[45] First, I agree with the Defendants and Prothonotary Tabib that there is a significant overlap of issues and facts between the Nine Actions and the Finance Action, and that this was a proper consideration to retain. This overlap includes the ownership of copyright by Blacklock, the defences of copyright misuse and fair dealing, as well as the proper assessment of damages and the availability of punitive damages. Blacklock tries to distinguish the Finance Action from the other actions because the distributed articles were obtained from a third party and not through its subscription. However, the Finance Action concerns the same pattern of conduct and core issues as the other actions. In addition, the issue of copyright ownership in the Finance Action relates to the defence of abuse of copyright raised in all actions. Lastly, the assessment of Blacklock's actual damages and availability of punitive damages is a recurring theme in all actions.

[46] In *Turmel*, the Federal Court of Appeal acknowledged that a stay can be granted in the interest of justice when proceeding with one action has a significant potential to "reduce the issues in play, clarify those remaining [,] potentially simplify the litigation for the lay litigants" and "save judicial resources," and where there is significant overlap between the various challenges brought (*Turmel* at paras 5 and 17).

[47] Second, Prothonotary Tabib was not clearly wrong in relying on the avoidance of costly duplication of judicial and legal resources in support of her decisions. The Orders considered the judicial resources that would be saved by the stay, such as a multiplicity of pre-trial conferences and likely procedural motions, and several separate trials resulting in weeks of hearings. Prothonotary Tabib further estimated that even a consolidated trial would require at least three weeks and would delay the determination of even the most advanced actions.

[48] There was no wrong principle or misapprehension of facts in singling out this factor to conclude that it was in the interest of justice to stay the Nine Actions. I note that the unnecessary expenditure of resources and the costly duplication of judicial and legal resources were indeed considerations mentioned in both *Cold Lake* (at para 22) and *MMAR* (at para 23). I add that the concern for proportionality voiced by Prothonotary Tabib in the Orders echoes the need for having procedures better balanced with the amounts involved in a proceeding and the costs related to the Court process, which has been expressly recognized and enshrined by the Supreme Court in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*]. In the aftermath of that decision, "favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (*Hryniak* at para 5) certainly bodes well with the interest of justice.

[49] A determination in the Finance Action will either settle all issues or narrow them significantly. Even if it only resolves some of the issues, a stay of proceedings will result in savings because the parties will not need to spend time and money exploring resolved issues. I observe that Blacklock has not provided any case law stating that, when considering the interest of justice in granting a stay, a prothonotary or case management judge cannot consider the reduction of the number of live issues between the parties as a relevant consideration.

[50] Third, I also conclude that the reference to the risk of contradictory or inconsistent decisions does not reflect the use of a wrong principle or a misapprehension of the facts by Prothonotary Tabib. I am of the view that she was entitled to consider this risk of contradictory decisions under her broad discretion as a case management judge. The possibility of contradictory judgments is very real here as the ten cases brought by Blacklock relate to a similar pattern of behaviour, raise the same core issues and rely on related evidence and facts.

[51] I acknowledge that the doctrine of judicial comity only applies to determinations of law and has no application to factual findings where there is a different factual matrix or evidentiary basis between two cases (*Apotex v Allergan Inc*, 2012 FCA 308 [*Allergan*] at paras 43-46; *Eclectic Edge Inc v Gildan Apparel (Canada) (LP)*, 2015 FC 1332 at paras 29-32). Indeed, "the doctrine of comity seeks to prevent the same legal issue from being decided differently by members of the same Court, thereby promoting certainty in the law" (*Allergan* at para 43).

[52] But it was not clearly wrong for Prothonotary Tabib to consider this risk in the context of her exercise of discretion and her assessment of the interest of justice in granting a stay. The

issue is not whether the doctrine of judicial comity could be ultimately invoked in the determination of the various actions. Nor is it whether the doctrine will lead to one action being bound or not bound by another decision. The issue is whether the risk of producing inconsistent judgments can be one of the factors considered in assessing the interests of justice to grant or deny a stay. I find no reason to conclude that considering this element was clearly wrong. Indeed, Blacklock has not provided any authority supporting the proposition that the risk of contradictory decisions cannot be retained as a legally valid consideration in determining whether it is in the interests of justice to impose a stay of proceedings, as contemplated by paragraph 50(1)(b) of the *Federal Courts Act*.

[53] Irrespective of the application of the doctrine of judicial comity, the possibility of contradictory decisions is a consideration recognized in the case law, such as the "potential for inconsistent outcomes" mentioned at paragraph 20 of *Cold Lake*. Furthermore, such considerations are consistent with the goals of case management and the broad discretion granted under paragraph 50(1)(b) of the *Federal Courts Act*. If any of the Nine Actions proceed to trial, they will benefit from the legal principles to be decided in the Finance Action, especially concerning novel legal issues such as abuse of copyright, applying fair dealing to internal government reporting and the allocation of damages.

[54] I emphasize that there are numerous common legal issues raised by the Defendants in the ten actions. The Defendants rely on the doctrine of abuse of copyright as a basis to justify their assertion that Blacklock's actions in a given context amount to copyright trolling. While this matter will be ultimately determined on the facts adduced in each specific case as to whether

there has been copyright misuse, there are nonetheless common underlying legal issues being raised. Similarly, while the questions relating to damages, the value of Blacklock's license for its product and the defence of fair dealing are questions where the factual assessment of the evidence will play a role, they raise comparable underlying legal questions that can be determined and that could be narrowed in the Finance Action.

[55] It is true that decisions of the same court, while persuasive authority, do not constitute binding authority which the Court is obliged to follow (*Allergan* at para 46). But, this does not mean that the risk of inconsistent judgments was not a valid element to consider by Prothonotary Tabib in the exercise of her discretion and her assessment of the "interests of justice" to grant a stay of the Nine Actions. Clearly, the *White* Factors do not exclude factoring this element, even though they do not expressly refer to it.

[56] Fourth, on the issue of prejudice to Blacklock, I again find that no wrong principle has been applied by Prothonotary Tabib nor was there any misapprehension of the facts. There is no evidence of prejudice to Blacklock. The stays do not limit Blacklock's access to the courts and do not prevent it from pursuing all ten actions. The Orders merely postpone further steps pending a determination in the Finance Action. There is also no evidence that any of the Nine Actions could be decided prior to the Finance Action as it was the most advanced, similarly to the situation in *MMAR* (at para 25).

[57] In addition, I agree with the Defendants that Blacklock's arguments to the effect that the value of its media content will continue to erode as the actions are left without judicial

determination and the underlying violations persist have no merit: Blacklock's actions and claims of infringement relate to alleged discrete, past copyright violations dating back to 2013 and 2014. There is no evidence that staying the Nine Actions could diminish the value of Blacklock's content or affect the extent of any past damages suffered.

[58] Once again, this absence of prejudice to Blacklock was a valid consideration retained by Prothonotary Tabib in support of her conclusion that staying the Nine Actions was in the interest of justice. In fact, this point has been magnified since the Finance Action will now be proceeding to trial in September 2016 and not in June 2017.

[59] Fifth, the prejudice to the Defendants is real and I am satisfied that Prothonotoray Tabib did not err in considering it in the exercise of her discretion. The *White* Factors state that "the prejudice must be more than mere inconvenience or extra expense." Assuming that the *White* Factors apply to this case, I am not convinced that the Orders were clearly wrong on this point as the prejudice alleged and demonstrated by the Defendants extends beyond mere extra expenses.

[60] Here, the prejudice does not only reside in an additional amount of money to be incurred by the Defendants. The prejudice lies in the disproportionality between the amounts claimed by Blacklock and the resources needed to defend multiple actions raising similar issues. There is a difference between extra expenses related to a proceeding and this disproportionality. Again, I do not find that Prothonotary Tabib applied a wrong principle or misapprehended the facts when relying on this element.

[61] Blacklock attaches great weight to the extraordinary character of a stay of proceeding and emphasizes, on the basis of the *White* Factors, that "the power to grant a stay may only be exercised sparingly and in the clearest of cases." However, before even getting to this element forming part of the *White* Factors, I note that the overarching principle governing Blacklock's appeals is that this Court should only intervene in discretionary decisions of prothonotaries issued in a case management context in the clearest cases of misuse of discretion (*J2 Global* at para 16). This is not the case here.

[62] I also observe that the "clearest of cases" principle outlined in *White* was not repeated in *MMAR* or *Cold Lake*. In *MMAR*, Mr. Justice Phelan rather stated that "each stay turns on its facts" (*MMAR* at para 19). Indeed, when asked at the hearing before this Court, counsel for Blacklock confirmed that he was not aware of any precedent where a stay of proceeding granted by a prothonotary or a judge was quashed on appeal because such stay had not been granted in the "clearest of cases."

[63] Finally, concerning *issue estoppel*, I do not agree with Blacklock that Prothonotary Tabib speculated on this question. The exact terms of Prothonotary Tabib's Orders state that "at least in the respect of cases where the Attorney General is a defendant, the principles of *issue estoppel* will likely apply to many issues between the parties." This statement clearly indicated that *issue estoppel* could help streamline cases where the AGC is a Defendant, but it did not suggest or imply that this doctrine could apply to the other Defendants.

IV. Conclusion

[64] In these appeals, it is not the merits of Blacklock's actions that are at issue, but whether there was anything clearly wrong with Prothonotary Tabib's Orders staying the Nine Actions. For the reasons detailed above, Blacklock's appeals of Prothonotary Tabib's Orders are dismissed as I do not find that that any aspect of her decisions is based upon a wrong principle or upon a misapprehension of the facts amounting to a clear misuse of her judicial discretion. This is sufficient to dismiss Blacklock's motions.

[65] At the hearing, the Defendants asked for an opportunity to make submissions on costs and the Court's order will provide accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motions for appeal of the March 3, 2016 orders of Prothonotary Tabib are dismissed and the orders are upheld;

2. The parties shall file written submissions on the issue of costs, not exceeding 5 pages, within 7 days of the date of this judgment.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2090-14
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1862-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v PARKS CANADA
AND DOCKET:	T-1726-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v LIBRARY OF PARLIAMENT
AND DOCKET:	T-1234-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1085-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-897-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v CANADIAN TRANSPORTATION AGENCY
AND DOCKET:	T-745-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v BANK OF CANADA

AND DOCKET:	T-477-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v CANADIAN FOOD INSPECTION AGENCY
AND DOCKET:	T-269-15
STYLE OF CAUSE:	1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 2016
JUDGMENT AND REASONS:	GASCON J.
DATED:	JUNE 27, 2016

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