

Federal Court



Cour fédérale

Date: 20161221

Docket: T-1391-14

Citation: 2016 FC 1400

Ottawa, Ontario, December 21, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**1395804 ONTARIO LTD., OPERATING AS
BLACKLOCK'S REPORTER**

Plaintiff

and

CANADA (ATTORNEY GENERAL)

Defendant

SUPPLEMENTARY JUDGMENT AND REASONS

[1] On November 10, 2016, I dismissed this action and reserved Judgment on the issue of costs pending further written submissions from the parties. Those submissions have now been received and considered.

[2] The Defendant was wholly successful in its defence to this breach of copyright case and is, accordingly, entitled to its costs. The parties are, however, substantially apart in terms of the

appropriate quantum of recovery. The Defendant asserts alternative claims based, firstly, on its actual costs to defend the action and, secondly, on the Court's Tariff for costs. The Plaintiff argues for a minimal award of \$5,000.00 based on a number of policy-based considerations.

[3] The Defendant seeks costs in the amount of \$115,702.30, based on 70% of the actual value of professional hours expended in the defence of the claim and including disbursements of \$7,020.98. In the alternative, the Defendant seeks costs at the upper end of Column IV of the Tariff plus disbursements, for a total of \$84,584.98.

[4] The Defendant's primary justification for seeking elevated costs is the failure by the Plaintiff to accept an early settlement offer in the amount of \$2,000.00. This amount represents more than double the cost of individual subscriptions for each of the Department of Finance officials who received and read the subject articles over which Blacklock's claimed copyright protection.

[5] I have considered the Defendant's claim based on its solicitor-client Statement of Account but I decline to apply it. There are too many unexplained or insufficiently particularized entries to permit me to assess the reasonableness of this reference and, in any event, this is not a case where the application of the Tariff would leave the Defendant inadequately compensated.

[6] This was not an unduly complex case in terms of evidence or the law. In these circumstances tariff-based costs assessed at the mid-point of Column III are appropriate. In

principle the Plaintiff seems to accept this as a starting point for recovery but it provides little justification for the “nominal costs of \$5,000” it proposes.

[7] The Plaintiff argues that the Defendant unduly complicated and lengthened the case by pleading abuse of copyright. This, however, provides no legal comfort to the Plaintiff. The fact that I chose not to decide that issue is not an indication that the plea lacked merit. This amendment was properly allowed by Prothonotary Mireille Tabib with costs of the motion. There is no sound basis for discounting the Defendant’s claim to costs because the outcome turned instead on the issue of fair use. A reduction in an award of costs on this ground is only warranted where the successful party has advanced a frivolous or specious position: see *Bristol-Meyers Squibb Canada Co v Mylan Pharmaceuticals ULC*, 2013 FC 48 at para 4, [2013] FCJ No 1201 (aff’d. 2014 FCA 231), [2013] FCJ No 1139, and *Sanofi-Aventis Inc v Apotex Inc*, 2009 FC 1138 at para 10, [2009] FCJ No 1626. I also reject the Plaintiff’s argument that this case raised “strong public interest considerations”. Rather, this case was about the Plaintiff’s attempt to recover disproportionate damages without any apparent consideration to the legal merits of the claim or to the costs that it imposed on the taxpayers of Canada.

[8] Any reporter with the barest understanding of copyright law could not have reasonably concluded that the Department’s limited use of the subject news articles represented a copyright infringement. Indeed, the fair dealing protection afforded by section 29 of the *Copyright Act*, RSC, 1985, c C-42, is so obviously applicable to the acknowledged facts of this case that the litigation should never have been commenced let alone carried to trial.

[9] I am also troubled by Plaintiff's attempt to claim an excessive amount of damages beginning with its demand for compensation completely divorced from the Department's limited use of the two articles. In no circumstances would Blacklock's losses have exceeded the cost of individual subscriptions by the six officials who read the articles; yet Blacklock's demanded a license fee equivalent to its bulk subscription rate of over \$17,000.00. This practice appears to be consistent with Blacklock's usual approach which is to hunt down, by Access to Information requests, alleged infringers and then demand compensation based on an unwarranted and self-serving assertion of indiscriminate and wide-spread infringement. The record discloses that in several instances government departments acquiesced for business reasons and paid the full amounts demanded. In this instance the Department appropriately took a hard line and succeeded in its defence.

[10] In my view the award of costs in this case should reflect the Court's concern with Plaintiff's litigation strategy. It must also reflect Blacklock's failure to accept the Department's very reasonable settlement offer in the amount of \$2,000.00. Having failed to conclude this case on those favourable terms Blacklock's has imposed on the taxpayers of Canada substantial additional legal costs.

[11] In accordance with subsection 420(2) of the *Federal Courts Rules*, SOR/98-106, the Defendant is entitled to a doubling of its Tariff costs after the date of its offer including attendances by counsel for the trial. Although the Defendant's settlement offer expired at the commencement of trial the Rule provides for double recovery "to the date of judgment" provided the offer to settle is not withdrawn and does not expire before the commencement of trial.

Recovery for the attendances of two counsel for the trial is appropriate, but for all pre-trial attendances, I allow for only one counsel.

[12] I decline to allow for multiple attendances to prepare supplementary affidavits of documents. Except in special circumstances it is the aggregate event of discovery that is compensable under the Tariff, and not each event in that process: see *Janssen Inc v Teva Canada Limited*, 2012 FC 48 at para 19, [2012] FCJ No 44. Because the amended Statement of Defence was not necessitated by an amendment to the Statement of Claim by the Plaintiff, as required by the Tariff, I will not allow recovery for that step.

[13] I have also made adjustments to the unit values claimed by applying the mid-point value of Column III or by rounding-up to the nearest whole number where necessary. Taking account of the Plaintiff's concerns about disbursements, I have also made a downward adjustment. For greater clarity I have attached as Annex "A" a summary of the amounts allowed for costs plus disbursements of \$6,000.00, all of which is rounded to \$65,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the Defendant shall recover costs from the Plaintiff in the all-inclusive amount of \$65,000.00 plus interest at 2.5% per annum from the date of this Judgment to the date of payment.

"R.L. Barnes"

Judge

Annex "A"

	ITEM	DESCRIPTION	UNITS	Single costs ¹	Double costs
2.	Preparation and filing of all defences, etc.	Statement of Defence – July 2014	6	840	1,680
7.	Discovery of documents	Affidavit of Docs – January 2015	4	560	1,120
8.	Preparation for examination	Korski – February 9, 2015	4	560	1,120
		Halley – February 9, 2015	4	560	1,120
		Korski – December 8, 2015	4	560	1,120
9.	Attending examinations	Korski – 2h x 2 units	4	560	1,120
		Halley – 1.25h x 2 units	2.5	350	700
		Korski – 5.5h x 2 units	11	1,540	3,080
10.	Preparation for conference	Pretrial conference – March 10, 2016	5	700	1,400
		Trial management conference - September 16, 2016	5	700	1,400
11.	Attendance at conference	Pretrial conference – 0.5h x 2 units	1	140	280
		Trial management conference – 20 min x 2 units	0.66	92.40	184.80
12.	Notice to admit	Request to admit facts	2	280	560
27.	Other services	Preparation of agreed facts	2	280	560
13. a)	Counsel fee for preparation	Day 1	4	560	1,120
13. b)	Counsel fee for preparation after the first day	Day 2	3	420	840
		Day 3	3	420	840
		Day 4	3	420	840
		Day 5	3	420	840
14.	Counsel fee at hearing	Day 1 - 6.5h x 3 units	19.5	2,730	5,460
		Second counsel at 50%	9.75	1,365	2,730
		Day 2 - 6h x 3 units	18	2,520	5,040
		Second counsel at 50%	9	1,260	2,520
		Day 3 - 6h x 3 units	18	2,520	5,040
		Second counsel at 50%	9	1,260	2,520
		Day 4 - 6.5h x 3 units	19.5	2,730	5,460
		Second counsel at 50%	9.75	1,365	2,730
		Day 5 - 5.5h x 3 units	16.5	2,310	4,620
		Second counsel at 50%	8.25	1,155	2,310

¹ Calculated at \$140/unit.

25.	Services after judgment		1	140	140
26.	Assessment of costs		4	560	560

Total units at double cost:	208.41	Subtotal	= 59,054.80
Total units at single cost:	5		

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1391-14

STYLE OF CAUSE: 1395804 ONTARIO LTD., OPERATING AS
BLACKLOCK'S REPORTER v CANADA
(ATTORNEY GENERAL)

SUBMISSIONS MADE IN WRITING CONSIDERED AT OTTAWA, ONTARIO

SUPPLEMENTARY JUDGMENT AND REASONS: BARNES J.

DATED: DECEMBER 21, 2016

APPEARANCES:

Mr. Yavar Hameed FOR THE PLAINTIFF

Mr. Alex Kaufman FOR THE DEFENDANT
Ms. Orlagh O'Kelly

SOLICITORS OF RECORD:

Hameed Law FOR THE PLAINTIFF
Barristers and Solicitors
Ottawa, ON

William F. Pentney FOR THE DEFENDANT
Deputy Attorney General of Canada
Ottawa, ON