

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140627

Docket: A-543-12

Citation: 2014 FCA 174

**CORAM: PELLETIER J.A.
DE MONTIGNY J.A. (*ex officio*)
MAINVILLE J.A.**

BETWEEN:

CATHERINE LEUTHOLD

Appellant

and

**CANADIAN BROADCASTING
CORPORATION ET AL**

Respondent

Heard at Montréal, Quebec, on February 25, 2014.

Judgment delivered at Ottawa, Ontario, on June 27, 2014.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**DE MONTIGNY J.A. (*ex officio*)
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This appeal is the companion to *Leuthold v. Canadian Broadcasting Corporation*, 2014 FCA 173, in which this Court dismissed Ms. Leuthold's appeal from the decision of the Federal Court ordering the Canadian Broadcasting Corporation (the CBC) to pay her approximately US \$20,000 as damages for infringement of her copyright in certain images. Notwithstanding the fact that she was the successful plaintiff, Ms. Leuthold was ordered to pay the CBC double costs because she recovered less than the amount of CBC's Rule 420 offer to settle. These reasons deal

with Ms. Leuthold's appeal from the costs order. For the reasons that follow, I would dismiss the appeal with costs.

[2] The material facts are straightforward. Ms. Leuthold's claim against the CBC was for approximately US \$20 million. Early in the litigation, the CBC made a formal offer to settle Ms. Leuthold's claim for US \$ 37,500 plus costs plus interest to the date of the offer. Ms. Leuthold did not accept the CBC's offer and went to trial where she was awarded US \$19,200 damages and \$168.74 by way of disgorgement of profits arising from the infringing acts. After allowing for currency conversion, Ms. Leuthold's total recovery is substantially less than the amount of the CBC's offer. At the conclusion of trial, the Trial Judge asked for further submissions on the issue of costs. After having heard from the parties, the Trial Judge ordered Ms. Leuthold to pay double costs pursuant to Rule 420(2), and fixed costs at the high end of column 3. Ms. Leuthold appeals from this order.

[3] An order of costs is a discretionary order and should not be disturbed unless the court below has erred in principle or the costs award is plainly wrong: see *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at paragraph 247.

[4] Ms. Leuthold argues that the Trial Judge erred in ordering double costs because the CBC's offer contained no element of compromise, and because Ms. Leuthold's recovery was so near the amount of the offer so as to make it inequitable to order double costs.

[5] It is not disputed that the CBC's offer to settle met the formal requirements of Rule 420.

[6] While we do not have the details of the components of CBC's offer to settle, we know that Ms. Leuthold accepted the sum of US \$2,500 for one network broadcast of the documentary containing the images in which Ms Leuthold held the copyright. The CBC admitted to having broadcast the images without authorization on 6 occasions. A reasonable approach to constructing an offer of settlement in these circumstances would have been to assume that Ms. Leuthold would recover the original licence fee for each unauthorized broadcast. The total for the six unauthorized broadcasts would be US \$15,000. The difference between US \$15,000 and US \$37,000 plus costs plus interest is, to my mind, a reasonable compromise.

[7] Ms. Leuthold also argues that since her recovery was so near to the CBC's offer, the Trial Judge should have exercised his discretion to not order double costs. The Trial Judge considered that Ms. Leuthold's failure to accept the CBC's offer reflected her assessment that she would do better than the offer of settlement. Ms. Leuthold was free to make that determination but she must also accept the consequences if she is wrong.

[8] I agree with the Trial Judge's comments on risk assessment. I might add that in this case, Ms. Leuthold developed a very technical argument in support of an amount which she could never have negotiated in the course of business. No one, under any circumstances, would have paid Ms. Leuthold twenty million dollars for the right to broadcast her images six times over a national network. In assessing her risk, Ms. Leuthold was bound to consider if the position she was taking made commercial sense. Had she done so, she might have viewed the CBC's offer in a different light. As a result, I do not believe that the fact that Ms. Leuthold recovered an amount in the general area of the CBC's offer is of any assistance to her.

[9] Ms. Leuthold then argues that the Trial Judge, had he decided not to award double costs, should have awarded her costs as the successful litigant. Ms. Leuthold, unfortunately, is engaged in wishful thinking. The Rules provide for the making of a formal offer of settlement with cost consequences if the offer is not accepted. That is what happened here. It does little good to argue after the fact that no effect should be given to Rule 420.

[10] Ms. Leuthold argues that the law is clear that costs are not to be used to penalize a party, nor are they to be punitive or crippling in nature. She argues that an award of costs of some \$80,000 is punitive and a penalty for a person whose gross annual income is approximately \$20,000 per year.

[11] I agree with Ms. Leuthold's statements of principle but those principles have to be applied in light of the objective sought to be achieved through Rule 420, which is to deter parties from incurring costs and inflicting them on others by creating a financial incentive to compromise their claims. The incentive, in the case of the double costs rule, is the avoidance of a penalty. I do not think it is contentious to say that doubling the costs a party would otherwise have to pay, or imposing costs on a modestly successful party, is a penalty. As a result, it does not assist Ms. Leuthold to say that costs should not operate as a penalty. Costs should not operate as a penalty unless the Rules specifically intend them to do so.

[12] Ms. Leuthold argues that, having regard to her financial circumstances, an order for costs of \$80,000 is punitive. It is true that an impecunious claimant with a meritorious claim should not be prevented from bringing his or her claim by an order for security for costs, or advance

costs : see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 36 and following. However, once a matter has proceeded to trial and judgment has been rendered, a party's impecuniosity is not a relevant factor in the assessment of costs. The person entitled to costs has had to incur the costs of proceeding to trial and has the right to be compensated within the limits prescribed by the Rules of Court. Issues of enforceability are distinct from issues of entitlement.

[13] Finally, Ms. Leuthold argues that an order of costs ought not to be such as to bring the administration of justice into disrepute. Once again, this is an argument based on impecuniosity. The sad fact of the matter is that litigation produces winners and losers; that is why it is such a blunt tool in the administration of justice. But justice is not served by allowing persons who have imposed costs on others by pursuing or defending a claim which lacks merit to avoid the consequences of their behaviour. Such a policy would be more likely to bring the administration of justice into disrepute than the result in this case.

[14] The arguments raised by Ms Leuthold have not persuaded me that the Trial Judge acted on a wrong principle or that his decision is clearly wrong. In my view, his decision is correct. I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree

Yves de Montigny J."

"I agree

Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-543-12

STYLE OF CAUSE: CATHERINE LEUTHOLD v.
CANADIAN BROADCASTING
CORPORATION ET AL

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REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A. (*ex officio*)
MAINVILLE J.A.

DATED: JUNE 27, 2014

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