

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170912

Docket: A-25-17

Citation: 2017 FCA 185

**CORAM: STRATAS J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

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

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 12, 2017.
Judgment delivered from the Bench at Ottawa, Ontario, on September 12, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 12, 2017).

STRATAS J.A.

[1] Blacklock's Reporter appeals from the costs order of the Federal Court (*per* Barnes J.): 2016 FC 1400. The Federal Court dismissed its action for breach of copyright and awarded the respondent \$65,000, all-inclusive plus post-judgment interest.

[2] In our view, in awarding costs the Federal Court did not err in law. It correctly identified the legal considerations that could affect its exercise of discretion.

[3] Thus, in order to succeed in this appeal, the appellant has to persuade us that the Federal Court committed palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331. As is well-known, and as the appellant candidly and properly admits, this is a high standard: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46 and *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77.

[4] We are not persuaded that the Federal Court committed palpable and overriding error.

[5] The appellant submits that the Federal Court did not consider whether the issues before it were novel and of public significance. We disagree. The Federal Court considered the issues before it—here, primarily the issue of fair dealing—to be well-settled in the jurisprudence and, thus, neither novel nor of public significance.

[6] The appellant offers a case commentary written after the Federal Court's judgment suggesting otherwise. This does not persuade us that on these particular facts the Federal Court committed palpable and overriding error.

[7] The Federal Court's discretionary costs award was based on the factors set out in the *Federal Courts Rules*, SOR/98-106 and was amply supported on the evidentiary record before it.

The Federal Court considered, among other things, the respondent's success in the litigation and the one-sided nature of the outcome, the appellant's litigation strategy, the existence of a settlement offer, the complexity of the litigation, and the actual costs of the respondent. In relying on these permissible, well-recognized factors and in applying them to the facts before it, the Federal Court did not commit palpable and overriding error.

[8] In argument, the appellant submits that the Federal Court placed inordinate weight on the one-sided nature of the outcome. The appellant submits that the Federal Court said in effect that the case never should have been brought. Even accepting that characterization, under the standard of palpable and overriding error we cannot second-guess the weight the Federal Court accorded to the relevant factors, without more.

[9] Also in argument, the appellant submits that the Federal Court should not have relied upon the appellant's non-acceptance of the respondent's settlement offer because this was a test case designed to settle issues arising in related proceedings. Again, this seems to us to be an issue of weight. Further, to the extent this was a test case, this could have prompted a higher level of activity by the respondent and, thus, would have justified an elevated costs award.

[10] The Federal Court's use of the settlement offer was clearly authorized by Rule 420(2) and was supportable on these facts.

[11] Therefore, we will dismiss the appeal with costs fixed in the amount of \$3,500, all-inclusive.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-25-17

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES
DATED NOVEMBER 10, 2016, DOCKET NO. T-1391-14**

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

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: SEPTEMBER 12, 2017

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.
WEBB J.A.
NEAR J.A.

DELIVERED FROM THE BENCH BY: STRATAS J.A.

APPEARANCES:

Yavar Hameed FOR THE APPELLANT

Sarah Sherhols FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed Law FOR THE APPELLANT
Ottawa, Ontario

Nathalie G. Drouin FOR THE RESPONDENT
Deputy Attorney General of Canada