Federal Court of Appeal | Cour d'appel fédérale

Date: 20260319

Docket: A-267-24

Citation: 2026 FCA 56

CORAM: **WEBB J.A.**
MONAGHAN J.A.
PAMEL J.A.

BETWEEN:

1395804 ONTARIO LTD., operating as BLACKLOCK'S REPORTER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC)

Intervener

Heard at Ottawa, Ontario, on October 7, 2025.

Judgment delivered at Ottawa, Ontario, on March 19, 2026.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: MONAGHAN J.A.
PAMEL J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] 1395804 Ontario Ltd., operating as Blacklock's Reporter, (Blacklock's Reporter) brought an action against the Attorney General of Canada, acting on behalf of Parks Canada, alleging

that, even though Parks Canada had purchased a subscription to Blacklock's Reporter, Parks Canada used that subscription improperly to access, read and distribute articles contrary to the *Copyright Act*, R.S.C. 1985, c. C-42. The action was discontinued by Blacklock's Reporter on Monday, July 6, 2020. On Sunday, July 5, 2020, the Attorney General served an amended defence and counterclaim on Blacklock's Reporter seeking 10 different declarations, which are set out in the Appendix attached to these reasons. This amended defence and counterclaim was filed on July 7, 2020.

[2] The Attorney General also brought a motion for summary judgment in relation to the declarations that were sought by the Attorney General. The Federal Court ultimately heard the motion, however, it only issued the following two declarations (2024 FC 829):

> 1. It is hereby declared that, having purchased the only type of subscription available, which was allowing the acquisition of the password needed to access articles produced by Blacklock's Reporter, Parks Canada's use of the password in the circumstances of this case constitutes fair dealing under section 29 of the *Copyright Act*.
>
> 2. It is hereby declared that the licit acquisition and use of a password, if it is otherwise a technological protection measure, does not constitute the circumvention of the technological protection measures of the *Copyright Act*.

[3] Blacklock's Reporter has appealed the Judgment of the Federal Court issuing these declarations. For the reasons that follow, I would allow the appeal and set aside the Judgment issuing the declarations on the basis that these declarations lack any practical utility and should not have been made.

I. Background

[4] The protracted history of actions and motions that resulted in the hearing of the Attorney General's motion for summary judgment in relation to the requested declarations is set out in paragraphs 4 to 16 of the reasons of the Federal Court Judge.

[5] Blacklock's Reporter commenced a number of actions alleging copyright infringement by various federal government departments and Crown corporations. The actions were stayed pending the action alleging copyright infringement by the Department of Finance. This "test case" was decided on November 10, 2016 (2016 FC 1255) but it appears that it did not resolve or limit the issues in the other actions.

[6] In the present case, the Federal Court Judge noted that the Attorney General was seeking summary judgment in relation to its counterclaim in the Parks Canada action on the basis that it would help resolve the other outstanding actions. The Federal Court Judge noted that:

> [9] …The AGC sought the dismissal of the parts of [Blacklock's Reporter's] claim that relate to the contention that there was a breach in this case of technological protection measures (TPMs, as per section 41 et al of the *Copyright Act*). The AGC was also asking for an order confirming that the use of articles obtained through a subscription constitutes "fair dealing" in the circumstances of the case: there was therefore no violation of the *Act*, says the AGC. That is because "fair use" is an exception to the TPM provisions. The obtaining of a subscription gives access to a password that can be shared in pursuit of the "fair use".

[7] Despite attempts by Blacklock's Reporter to not have the Federal Court address the declarations sought by the Attorney General, ultimately it was decided that the Attorney

General's motion would be heard. The Federal Court Judge summarized the requested declarations as follows:

> [16] … The motion seeks declarations concerning three distinct matters:
>
> 1. The Terms and Conditions relative to the subscription to gain access to a website in order to have available articles. The subscription is offered and sold by [Blacklock's Reporter].
>
> 2. The use made of articles accessed by Parks Canada, said by [Parks Canada] to constitute "fair dealing" in accordance with s 29 of the *Copyright Act* RSC 1985, c C-42.
>
> 3. Do the activities conducted by Parks Canada, i.e. the sharing of a password required to access articles from [Blacklock's Reporter]'s website, constitute circumvention of technological protection measures taken by [Blacklock's Reporter]?

[8] At the beginning of his analysis, the Federal Court Judge reframed the requested declarations as follows:

> [84] There are three questions the AGC wishes for the Court to specifically opine on and issue declarations. They are:
>
> - There was no binding agreement between the parties, or there was a unilateral mistake on the part of Parks Canada, thus opening the door to rectification;
>
> - Parks Canada did not infringe Blacklock's Reporter's copyright; and
>
> - No circumvention of Technological Protection Measures occurred in this case.

[9] The Federal Court Judge found that the Attorney General had not established that a declaration should be issued for rectification of the contract and therefore no declaration was issued in relation to the rectification issue (paragraph 95 of the reasons of the Federal Court). Neither party referred to this finding in this appeal.

II. The Decision of the Federal Court

[10] The Federal Court Judge conducted a lengthy and detailed analysis of the evidence presented concerning the purchase of the subscription by Genevieve Patenaude, acting on behalf of Parks Canada. By purchasing the subscription, she obtained the password and gained access to the articles posted online by Blacklock's Reporter. There is conflicting evidence between Ms. Patenaude and Tom Korski, the managing editor and an officer and director of Blacklock's Reporter, concerning what was included in the text on the website payment page for Blacklock's Reporter when Ms. Patenaude purchased the subscription.

[11] Ms. Patenaude's evidence was that there was no indication on the form that she filled out that "institutional subscribers who would like to share or distribute content in-house" were to contact a particular individual for "custom bulk rates". Mr. Korski's evidence was that a notification to this effect was added to the text on the website payment page before Parks Canada acquired its subscription.

[12] The reference to "institutional subscribers who would like to share or distribute content in-house" being asked to contact a particular individual for "custom bulk rates" was included in

an email that Ms. Patenaude received after she had purchased the subscription. She stated that she "understood the word 'bulk subscriptions' to mean that if Parks Canada wanted to share the articles widely, beyond the Parks Canada organization, it was required to contact a manager at Blacklock's" (reasons of the Federal Court at paragraph 55).

[13] After reviewing the evidence, the Federal Court Judge accepted the evidence of Ms. Patenaude and found that the only subscription available for purchase by Parks Canada was the single subscription that it purchased.

[14] With respect to technological protection measures (TPMs), the Federal Court Judge highlighted, in paragraph 111 of his reasons, the lack of "evidence of a technical nature". He also noted, in the same paragraph:

> … There is no evidence of the extent of the use of the password associated with the subscription purchased on September 18, 2013. There is no evidence either of what a "password" is and what it was in this case: thus, there was no expert evidence led by either party on what, in this case, constitutes the TPM. The *Act* requires that the TPM be "effective" (in French, "efficacement"). The absence of evidence may well be significant if the facts of this case require an understanding of what a "password" is. What appears clear, however, is that there was no "hacking", whatever that may mean from a technical standpoint. In the context of this case, it is taken as meaning that the password was not discovered by force, whether that be by trial and error or otherwise. In other cases, courts have declined to address issues concerning TPM without a solid evidentiary base (*Wiseau Studio LLC et al v Harper*, 2020 ONSC 2504, 174 CPR (4th) 262; *Allarco Entertainment 2008 Inc v Staples Canada ULC*, 2021 ABQB 340). It follows that this Court must also be circumspect in addressing what appears to be a novel issue, especially in view of [Blacklock's Reporter] having chosen to discontinue its action.

[15] The Judgment ultimately rendered by the Federal Court (other than stating that there was no order as to costs) consisted only of the two declarations noted above.

III. Issue and Standard of Review

[16] Blacklock's Reporter, in its memorandum at paragraph 24, characterized the issues in this appeal as follows:

> a. The applicable standard for review;
>
> b. Whether the Trial Judge erred in finding that Parks Canada's conduct, including the sharing of Blacklock's Articles and the Password, constituted fair dealing pursuant to section 29 of the *Copyright Act*;
>
> c. Whether the Trial Judge erred in [finding] that the Blacklock's Paywall is not a TPM, and that it had not been circumvented within the meaning of section 41 of the *Copyright Act*; and
>
> d. Whether the Trial Judge erred in finding that the illicit acquisition and use of a password to a paywall does not constitute circumvention under section 41 of the *Copyright Act*.

[17] An appeal lies from the Judgment of the Federal Court, not the reasons (*R. v. Sheppard*, 2002 SCC 26, at paragraph 4; *Zoghbi v. Air Canada*, 2024 FCA 123, at paragraph 76). There is no declaration in the Judgment that "the Blacklock's Paywall is not a TPM, and that it had not been circumvented within the meaning of section 41 of the *Copyright Act*", nor is there a declaration that "the illicit acquisition and use of a password to a paywall does not constitute circumvention under section 41 of the *Copyright Act*". Neither of these issues arise from the Judgment that was rendered.

[18] The first declaration that was issued is based on factual findings related to Parks Canada's purchase of the subscription from Blacklock's Reporter. The second declaration is subject to the qualification that the acquisition and use of a password is licit.

[19] The question of whether the declarations sought by the Attorney General should be addressed as a result of the discontinuance of the underlying copyright infringement action was raised before the Federal Court. The Federal Court Judge noted, at paragraph 4 of his reasons that "… Blacklock's Reporter argued that its discontinuance of its action resulted in the motion for summary judgment being without object". At the Federal Court hearing, both parties referred, directly or indirectly, to the decision of the Supreme Court in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (*Daniels*) (paragraphs 72 and 74 of the reasons of the Federal Court).

[20] In *Daniels*, the Supreme Court stated:

> [11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.
>
> [Emphasis added]

[21] Although neither party referred to *Daniels* in their memoranda in this appeal, the Court at the hearing of this appeal raised the issue of whether the two declarations that were ultimately

issued by the Federal Court lacked the requisite utility to justify the granting of these declarations. Both parties addressed this issue in oral argument at the hearing of this appeal.

[22] Given the very limited nature of the declarations that were issued as part of the Judgment, in my view, the issue in this appeal is whether these declarations should have been issued in light of the decision of the Supreme Court of Canada in *Daniels*.

[23] The failure to apply a binding decision of the Supreme Court of Canada, and, as a result, failing to consider a required element of a legal test, is an error of law, reviewable on the standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at paragraph 36).

IV. Analysis

[24] As noted above, in *Daniels* at paragraph 11, the Supreme Court set out the test for when a declaration should be granted and declared that "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties". At the Federal Court hearing both parties, directly or indirectly, referred to *Daniels*. In paragraph 74 of his reasons, the Federal Court Judge responded to the reference to *Daniels*:

> … However, I note that the Supreme Court rather refers to "practical utility", not "practical effect as between the parties". On the basis that it claims that no practical effect as between the parties, [Blacklock's Reporter] considers the matter moot.

[25] There is no further discussion of *Daniels* in the reasons of the Federal Court Judge or why the declarations that were granted will have "practical utility", *i.e.*, "settle a 'live controversy' between the parties".

[26] The first declaration is as follows:

> 1. It is hereby declared that, having purchased the only type of subscription available, which was allowing the acquisition of the password needed to access articles produced by Blacklock's Reporter, Parks Canada's use of the password in the circumstances of this case constitutes fair dealing under section 29 of the *Copyright Act*.

[27] The foundation for this declaration is the factual finding made by the Federal Court Judge that Parks Canada "purchased the only type of subscription available, which was allowing the acquisition of the password needed to access articles produced by Blacklock's Reporter". The declaration then limits the finding concerning the use of the password to "the circumstances of this case". This finding reflected the Federal Court Judge's view of the evidence presented related to the purchase of the subscription by Parks Canada.

[28] Blacklock's Reporter devoted a significant portion of its memorandum to its arguments that, based on the evidence submitted at the Federal Court hearing, the Federal Court Judge made a palpable and overriding error in reaching this conclusion. However, since the underlying copyright infringement action related to Parks Canada's access to and use of the articles was discontinued, no useful purpose would be served by this Court in reviewing the evidence and determining whether a palpable and overriding error was made.

[29] This declaration, based on the evidence that was before the Federal Court, is not relevant in any proceeding related to Parks Canada's access to or use of the articles posted by Blacklock's Reporter. It is far from clear how this declaration, based on the facts related to Parks Canada's purchase of the subscription, would have any practical utility in another action concerning the purchase of a subscription by another government department or that department's access to or use of articles posted by Blacklock's Reporter.

[30] The second declaration is as follows:

> 2. It is hereby declared that the licit acquisition and use of a password, if it is otherwise a technological protection measure, does not constitute the circumvention of the technological protection measures of the *Copyright Act*.

[31] This declaration is predicated on the acquisition and use of a password being licit. If the acquisition and use of a password is authorized, how could such acquisition and use constitute the circumvention of a TPM for the purposes of the *Copyright Act*? The declaration also does not address whether a password is a TPM. Rather, the declaration is only applicable if a password is otherwise a TPM.

[32] It is also far from clear how the second declaration, limited and qualified as it is, would have any practical utility in another action concerning the purchase and use of a subscription by another government department.

[33] Neither declaration settles a "live controversy" between the parties. The first declaration is inextricably linked to the factual findings concerning Parks Canada's purchase of the

subscription and access to and use of articles posted by Blacklock's Reporter. Analyzing the conflicting testimony and reaching a decision on the facts related to the purchase of the subscription by Parks Canada would not resolve any "live controversy" between the parties. The copyright infringement action concerning Parks Canada's access to and use of the articles has been discontinued. Therefore, there is no longer a "live controversy" with respect to Parks Canada's purchase of the subscription or its access to or use of the articles posted by Blacklock's Reporter.

[34] The second declaration does not make any finding concerning whether a password is a TPM. It does not resolve any "live controversy" between the parties. The second declaration is also limited to "the licit acquisition and use of a password". This is simply a generic statement that the authorized acquisition and use of a password by anyone (if the password is a TPM) does not constitute circumvention of a TPM for the purposes of the *Copyright Act*. If the acquisition and use is authorized, it would follow that such acquisition and use should not be prohibited. Such a generic statement does not settle any "live controversy", let alone a "live controversy" between the parties.

[35] Blacklock's Reporter raised an additional issue concerning the determination of what it had argued at the Federal Court hearing was the TPM in issue. At the Federal Court hearing, Blacklock's Reporter argued that Blacklock's Reporter's paywall, and not the password, is the TPM. In paragraph 120 of his reasons, the Federal Court Judge stated that "[t]he paywall is not the TPM". Blacklock's Reporter asserts, in paragraph 26 of its memorandum, that the Federal Court Judge erred in finding that Blacklock's Reporter's paywall was not the TPM. This finding

is not, however, reflected in either of the two declarations that constitute the Judgment. The declaration in the Judgment that was issued in relation to a TPM only refers to a password, if it is otherwise a TPM. The declaration does not make any finding that the password is the TPM that was in issue in relation to the declarations that were sought nor does it declare that the paywall is not the TPM.

[36] As noted above, an appeal lies from the Judgment, not the reasons. Furthermore, the Federal Court Judge's comments concerning whether the paywall is the TPM are not made in the context of an action for copyright infringement as that action was discontinued. They are only made in relation to a counterclaim for certain declarations, all of which are linked to the particular facts related to Parks Canada's acquisition and use of the subscription and password.

[37] Of the 10 declarations that are set out in the counterclaim, 5 refer to a TPM. The declaration sought in paragraph 64 (c) of the counterclaim is a declaration that the terms and conditions of the subscription allowed Parks Canada to distribute the articles without breaching the alleged TPMs. Since the action was discontinued, the identification of the alleged TPMs would have to be found in the counterclaim. There is no allegation in the counterclaim that the paywall is the TPM.

[38] The requested declarations in paragraphs 64 (g), (h), and (i) of the counterclaim all are limited to whether the sharing of the password constituted the circumvention of a TPM. None of these declarations raise the issue of whether the paywall is the TPM.

[39] The final requested declaration (paragraph 64 (j) of the counterclaim) refers to the intention of Parks Canada. The particular TPM is not identified in this requested declaration. This requested declaration is simply that "Parks Canada had no intention of circumventing a technological protection measure when its employees gained access to the articles of [Blacklock's Reporter]". This is limited to the intention of Parks Canada in relation to the circumvention of a TPM, regardless of what is determined to be the TPM. The identification of the particular TPM would therefore not be part of the issue raised by this requested declaration.

[40] Since the action for copyright infringement was discontinued, the only issues between Parks Canada and Blacklock's Reporter arising from the pleadings were the requested declarations set out in the Appendix to these reasons. As noted by the Supreme Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56:

> [43] … Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion….

[41] The declarations sought by Parks Canada in its counterclaim in relation to the circumvention of a particular TPM were limited to the sharing of the password. Following the discontinuance of the copyright infringement action, the only source to determine the issues was the counterclaim and its requested declarations. In essence the action became a reference to the Federal Court to grant specific declarations.

[42] The issue of whether the paywall is the TPM and whether Parks Canada circumvented the paywall does not arise in this proceeding, based on the pleadings. The comment of the Federal Court Judge that the paywall is not the TPM is *obiter dicta* as it not necessary to dispose of the issues arising from the only pleading before the Federal Court (*i.e.*, the counterclaim). In any event, nothing herein should be interpreted as an endorsement or a criticism of this comment.

V. Conclusion

[43] As a result, in my view, there is no practical utility in rendering either declaration as neither declaration settles a "live controversy" between the parties. Therefore, the Federal Court erred in making the declarations. I would allow the appeal and set aside the Judgment of the Federal Court. Rendering the Judgment that the Federal Court should have made, I would dismiss the Attorney General's motion for summary judgment with respect to the requested declarations.

[44] I would grant the parties an opportunity to determine if they can reach an agreement on the costs that should be paid by the Attorney General to Blacklock's Reporter for the hearing in the Federal Court and in this Court. If the parties are unable to reach an agreement on costs on or before April 8, 2026, I would allow:

1. Blacklock's Reporter to make written submissions concerning costs, not exceeding ten pages, on or before April 22, 2026;

2. The Attorney General to make written submissions concerning costs, not exceeding ten pages, on or before May 6, 2026; and

3. Blacklock's Reporter to make written submissions in reply, not exceeding five pages, on or before May 13, 2026.

"Wyman W. Webb"
J.A.

"I agree.
K. A. Siobhan Monaghan J.A."

"I agree.
Peter G. Pamel J.A."

APPENDIX

Excerpt from Counterclaim

64. The Attorney General of Canada ("AGC") counterclaims against [Blacklock's Reporter] and seeks a declaration that:

(a) the terms and conditions of the subscription that was offered and sold by [Blacklock's Reporter] to Parks Canada were and are ambiguous and unenforceable in law or, in the alternative, that such terms and conditions should be interpreted in favour of Parks Canada and encompass an institutional subscription;

(b) that [Blacklock's Reporter] did not provide adequate notice to Parks Canada of the terms and conditions of the subscription at the time Parks Canada purchased the subscription, making such terms and conditions unenforceable in law as against Parks Canada or any individual subscribers;

(c) that the terms and conditions of the subscription sold by [Blacklock's Reporter] allowed Parks Canada or any employee/official of Parks Canada to distribute the articles to other persons within the said organization without breaching copyright or the alleged technological protective measures;

(d) that the use of the articles accessed by Parks Canada constitute fear dealing under the *Copyright Act, R.S.C. 1985, c. C-42* ("*Copyright Act*") and accordingly there is no infringement of copyright in relation to any of the articles provided by [Blacklock's Reporter];

(e) that the subscription sold by [Blacklock's Reporter] to Parks Canada was an institutional subscription and not an individual subscription, allowing each of the employees/officials of Parks Canada to access and further distribute the said articles of [Blacklock's Reporter] within the Parks Canada organization;

(f) that [Blacklock's Reporter] did represent to Parks Canada that it had sold an institutional subscription to them, thereby precluding it now from now asserting a legal position that is contrary to that clear representation;

(g) that by sharing a password required to access articles from [Blacklock's Reporter]'s website, Parks Canada and the employees/officials of that organization did not circumvent a technological protection measure, as per the provisions of the *Copyright Act*;

(h) that the sharing of a password required to access articles from [Blacklock's Reporter]'s website does not constitute a circumvention of a technological protection measure in the circumstances, as per the provisions of the *Copyright Act*;

(i) that Parks Canada employees were permitted under the terms and conditions to share the password required to access articles from [Blacklock's Reporter]'s website and that the sharing of the said password does not constitute a circumvention of a technological protection measure under the terms and conditions;

(j) that Parks Canada had no intention of circumventing a technological protection measure when its employees gained access to the articles of [Blacklock's Reporter];

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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