

**Date: 20070119**

**Docket: T-299-05**

**Citation: 2007 FC 7**

**BETWEEN:**

**CATHERINE LEUTHOLD**

**Plaintiff**

**and**

**CANADIAN BROADCASTING CORPORATION**

**and**

**JERRY MCINTOSH**

**Defendants**

**REASONS FOR ORDER**

**MORNEAU P.**

[1] This is a motion by the defendants for the determination of a series of 24 questions grouped into six categories and arising out of the examination for discovery of the plaintiff held on March 23, 2006 where apart from the questions in suit, the remaining of the 550 questions asked of the plaintiff appear to have been answered by the latter.

## **Background**

[2] Plaintiff, a photo-journalist, and the Defendant Canadian Broadcasting Corporation (hereinafter the CBC) entered, on or about October 7, 2002, into a licence agreement (the licence) for the right to use five of plaintiff's still photographs (the Stills) in a CBC documentary for apparently "one broadcast" of that documentary. The Stills pertain to various scenes at and near the site of the terrorists attack on the World Trade Center in New York.

[3] Plaintiff alleges that the CBC made multiple additional unauthorized broadcasts of the said documentary without advising the plaintiff and without compensation. The plaintiff sustain that the defendants would therefore have infringed the plaintiff's rights under the *Copyright Act*, R.S.C. 1985, c. C-42, as amended.

[4] Plaintiff is claiming general damages of \$3,080.71 for each alleged unauthorized broadcasts relying on the same amount that the parties agreed to in the licence for one broadcast.

[5] As indicated, the outstanding questions consist of twenty-four (24) questions classified in six (6) categories.

## **Analysis**

[6] The general applicable principles as to questions to answer and records to produce at an examination for discovery have been essentially laid down by this Court in *Reading & Bates Construction Co. and al v. Baker Energy Resources Corp. and al* (1988) 24 C.P.R. (3<sup>rd</sup>) 66, at 70-72 (F.C.T.D.), where Mr. Justice McNair, in a general six-point review, first defines in points 1 to 3

the parameters that determine whether a question or a document is relevant, and then, in points 4 to 6, sets out a series of circumstances or exceptions in which, on the off chance, at the end of the day, a question need not be answered or a document need not be produced.

[7] With this in mind, I shall now evaluate the propriety of the questions in suit using the categorization followed by the parties.

#### Category 1

[8] This category deals with causation/ damages and contains 17 questions.

[9] I do not read plaintiff's claim in terms of damages or causation as being related to any specific analysis of competition from the CBC or specific reduced demand for the plaintiff's Stills. True, the plaintiff at paragraph 12 of her Reply makes reference to said wording, but said paragraph 12 is there to form part of the allegations of the plaintiff that contrary to what the CBC claims in its Statement of Defence, CBC's use of the Stills would not constitute a fair dealing within the meaning of section 29.2 of the *Copyright Act, supra*.

[10] Here the plaintiff's basis for the quantum of damages is the agreed licence fee.

[11] As argued by the plaintiff, damages for copyright infringement can be awarded "at large" and specific damages need not be alleged or proven. To that effect, the following extract from *Hughes on Copyright & Industrial Design*, Second Edition, Butterworths, par 101 at page 659, is instructive:

In considering an award of damages, it is not necessary to give specific proof of damages, although an award of loss of profit may be given. Damages are at large; where damages are difficult to quantify, such as the value of the taking of only a portion of a literary work, the Court may assess damages on the basis of what might have been reasonable. When only nominal damages are awarded, because there is no proof of specific damages, the award is not necessarily small. Damages for infringement of copyright are generally determined as those which the owner of the copyright may have suffered due to the infringement, such as the licence fee that otherwise would have been charged.

(Footnotes omitted, my underlinings)

[12] I am of the general view that the Defendants are on a fishing expedition and that the questions under this category amount to an extensive inquiry into the plaintiff's financial affairs and business dealings which is neither necessary nor relevant given the above teachings and considering that the third parties involved are largely magazines and not national broadcasters as is the CBC. In addition, the discovery of the Plaintiff has been wide enough to allow eventually the judge at the merits to appreciate, as he might see fit, other elements than the licence in his assessment of the damages claimed.

[13] As to causation, I do not see that further inquiry in that regard need be made.

[14] In a Schedule A attached to her written representations filed against the motion at bar, the plaintiff has addressed specifically all 17 questions under this category. I have reviewed the specific bases for refusal provided therein, as well as a similar schedule put forth by the defendants, and I agree with the plaintiff's position on all questions under this category.

[15] Therefore, based on the foregoing, the questions under this category need not be answered.

[16] However, as agreed by the plaintiff at the hearing, the latter shall provide to the Defendants a redacted copy of the agreement allegedly entered between the plaintiff and Corbis in order to evidence the starting date of that agreement.

#### Category 2

[17] This one question category is entitled Course of dealing. Questions 61 request the plaintiff to provide the name of the agency that would handled the plaintiff's photographs in relation to the usage of the Stills by Newsweek.

[18] I do not see this question as being relevant here since any limits or terms applicable in one licence pertain and are limited to that licence. In addition, I think the Defendants are fishing in hope for potential harmful information to be disclosed. This question, therefore, needs not be answered.

#### Category 3

[19] This category is entitled *Res Gestae*. The one question under this category need not be answered as I am of the view that the wording it used makes the question too vague and too broad to be understood and answered. The same conclusion applies to question 480-484 under category 6.

#### Category 4

[20] The one question under this category entitled liability has now been answered sufficiently. No further answer is required. Same reasoning applies to question 490 under category 6.

Category 5

[21] The two questions under this category entitled Evidence need not be answered for the reasons found in Schedule A of plaintiff.

Category 6

[22] This category has been dealt and denied by what is contained in paragraphs [19] and [20] above.

**“Richard Morneau”**

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Prothonotary

Montréal, Quebec  
January 19, 2007

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-299-05

**STYLE OF CAUSE:** CATHERINE LEUTHOLD  
Plaintiff  
and

CANADIAN BROADCASTING CORPORATION  
and  
JERRY MCINTOSH  
Defendants

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 17, 2007

**REASONS FOR ORDER AND ORDER:** PROTHONOTARY MORNEAU

**DATED:** January 19, 2007

**APPEARANCES:**

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FOR THE PLAINTIFF

Ms. Lyla Simon

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FOR THE DEFENDANTS