

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130418

Docket: A-330-12

Citation: 2013 FCA 95

Present: NOËL J.A.

BETWEEN:

CATHERINE LEUTHOLD

Appellant

and

**CANADIAN BROADCASTING CORPORATION
and JERRY MCINTOSH**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 18, 2013.

REASONS FOR ORDER BY:

NOËL J.A.



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REASONS FOR ORDER

NOËL J.A.

[1] The Canadian Broadcasting Corporation (CBC) and Jerry McIntosh (the respondents) bring a motion to obtain security for cost in the amount of \$50,000.00 from Catherine Leuthold (the appellant) pursuant to Rule 416 of the *Federal Courts Rules*, SOR/98-106, on the basis that she resides outside of Canada. In response, the appellant asks this Court to exercise its discretion under Rule 417 to deny the motion, because she is impecunious and her case has merit.

[2] The appellant resides in the United States. She is self-employed as a gardener on a seasonal basis (Affidavit of Catherine Leuthold, Appellant's Motion Record, p.1, paras. 4 and 5). She also

occasionally licenses photographs which she takes (*ibidem*). Her average yearly taxable income is less than \$15,000.00 US and her assets are of limited value (Affidavit of Catherine Leuthold, Appellant's Motion Record, p.2, paras. 6 and 8; Exhibit CL-1, Appellant's Motion Record, p.5; Exhibit CL-2, Appellant's Motion Record, p.60).

[3] The respondents chose not to examine the appellant on her affidavit or produce rebuttal evidence, leaving the question whether the financial state of the appellant would prevent her from posting the claimed security to the Motions Judge. After having considered the evidence, I am satisfied that the situation is such that requiring the appellant to post the claimed security would lead to the discontinuance of her appeal.

[4] In these circumstances, Rule 417 allows the Court to refuse to order that security be given even though the appellant resides outside Canada if she further demonstrates that her case has merit.

[5] In the underlying action before the Federal Court, the appellant claimed damages in the amount of \$21,554,954.25 for what she challenges are a series of unauthorized communications of her photographs to the public. The photographs in question capture images of the World Trade Center on September 11, 2001. They were communicated to the public by the CBC as part of a documentary film meant to portray how the attack on the World Trade Center unfolded (the Production). At issue before Scott J. (the Federal Court judge) was the scope of a license given to the CBC for the use of the appellant's photographs and the number of instances where the appellant's copyrights in these photographs would have been infringed.

[6] The Federal Court judge held that there had been unauthorized communications of the photographs but only on six occasions, and limited the award to \$19,200.00 US.

[7] Amongst the questions in issue on appeal is whether a communication to the public for purposes of the *Copyright Act*, R.S.C. 1985, c. C-42 takes place when the photos are transmitted to the broadcasting distribution undertakings or on each occasion when the broadcasting distribution undertakings retransmit the photographs to the public (Amended Notice of Appeal, Appellant's Motion Record, pp. 85 and 86, paras. II and III). The number of instances when the appellant's copyright was infringed turns on this question (Motion Record, Reasons, p. 62, para. 105).

[8] While I do not believe that the appellant can seriously envisage obtaining an award of the magnitude which she claims, I am unable to conclude that the issue raised on appeal cannot lead to an award that is more favourable to the appellant. To that extent, I am satisfied that the appeal has been shown not to be without merit and I exercise my discretion so as to allow it to proceed.

[9] The motion is accordingly denied. No costs having been sought by the appellant, none are awarded.

“Marc Noël”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-330-12

STYLE OF CAUSE:

CATHERINE LEUTHOLD v.
CANADIAN BROADCASTING
CORPORATION and JERRY
MCINTOSH

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

Noël J.A.

DATED:

April 18, 2013

WRITTEN REPRESENTATIONS BY:

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Alain Dussault

FOR THE RESPONDENTS

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