Federal Court of Appeal | Cour d'appel fédérale

Date: 20230713

Docket: A-79-23

Citation: 2023 FCA 159

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

Docket: A-79-23

BETWEEN:

GÉRALD MCNICHOLS TÉTREAULT

Appellant

and

VILLE DE BOISBRIAND, LE QUARTIER FORESTIA INC. and KANATA INVESTMENTS INC.

Respondents

Motion dealt with in writing without appearance of parties

Order delivered at Ottawa, Ontario, on July 13, 2023.

REASONS FOR ORDER BY: DE MONTIGNY J.A.
CONCURRED IN BY: BOIVIN J.A.
LEBLANC J.A.

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REASONS FOR ORDER

DE MONTIGNY J.A.

[1] The respondents brought a motion to strike the appellant's notice of appeal from a decision of the Federal Court (the Honourable Madam Justice Vanessa Rochester) dated February 6, 2023 (2023 FC 168). The respondents submit that the appellant's appeal has no legal basis and is consequently doomed to fail.

[2] The appellant brought an action on March 3, 2020, initially claiming $26,000,000 (which he ultimately amended to $15,836,724) for infringement of the copyright he claims to hold in connection with the development of the plans for a real estate project called “Écopolis du Boisbriand”. A few weeks later, the three respondents filed motions to strike under Rule 221(1) of the *Federal Courts Rules*, SOR/98-106. Associate Judge Alexandra Steele allowed those motions and refused to allow the appellant’s motion to amend his Statement of Claim. In her reasons, Associate Judge Steele concluded that the Amended Statement of Claim was actually a reply to the respondents’ defences and motions to strike, that it was neither reasonable nor proportional, that it was late, that it hardly seemed serious, and that it was contrary to the interests of justice: see Order dated March 3, 2022, in file no. T-326-20, at paras.15–17.

[3] Regarding the motions to strike, Associate Judge Steele assumed the facts in the Statement of Claim to be true and stated that she was satisfied that the appellant had asserted the existence of a literary and artistic work, that he owned the copyright in that work, and that he had not authorized the respondents to reproduce all or part of his work, nor had he consented to this reproduction. However, she stated that she was of the opinion that the appellant had not alleged that the respondents has reproduced all or a substantial portion of the copyright-protected work. She added that even if it were accepted that the respondents had in their possession (or had borrowed) the work *Écopolis du Boisbriand*, there was no material fact to support their having reproduced or plagiarized the work in issue, or even having done something equivalent to copying or authorizing the copying of that work. In fact, what the appellant criticizes the respondents of doing is appropriating an idea, not the expression of the idea, and this cannot

constitute the cause for an action in copyright infringement. That finding is central to the reasons of Associate Judge Steele.

[4] On appeal to the Federal Court, the appellant argued that Associate Judge Steele had been biased, and he repeated essentially the same arguments he had initially advanced. After pointing out that case management judges are entitled to considerable deference given their thorough knowledge of the facts and circumstances of the case before them, Justice Rochester reiterated that an allegation of bias cannot be made lightly, in that it engages the very foundation of our judicial system. Relying on the decisions of the Supreme Court in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 and *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, she concluded that the appellant had not produced any evidence that could allow him to meet his heavy burden to rebut the presumption of judicial integrity and impartiality.

[5] Regarding the merits of the appeal, Justice Rochester carefully examined the arguments advanced by the appellant in reaching her conclusion that he had not clearly identified a reviewable error on the part of Associate Judge Steele. Despite the voluminous documentation that he submitted as part of his Statement of Claim, the appellant failed to allege with any detail how the work, or a substantial portion thereof, had been reproduced. The appellant simply made several vague allegations that the respondents had appropriated his intellectual property, without ever identifying the part of his work that had been copied. At most, he alleged that the respondents had appropriated an idea, namely, the concept of an agricultural component in their project, which is not sufficient to constitute copyright infringement. That is also the case for the

concept of a public market that the respondents incorporated into their housing development: the appellant did not specify anywhere how that concept is protected by copyright or how Associate Judge Steele had erred by not recognizing such protection.

[6] Justice Rochester also considered the appellant's argument that he could have cured the defects in his Statement of Claim identified by Associate Judge Steele if he had been permitted to file his Amended Statement of Claim. In Justice Rochester's opinion, the Statement of Claim, even amended, suffered from the same defects as the original Statement of Claim. She devoted several paragraphs of her comprehensive reasons to this issue and concluded that the appellant had never compared his work with the corpus of published information about the respondents' project to try to establish that they had plagiarized his work. At most, that published information adopted the concept of the appellant's project rather than all or part of his work. She therefore concluded that the appellant had not met his burden of showing that Associate Judge Steele had erred in law or committed a palpable and overriding error.

[7] The appellant is now appealing to this Court, arguing that Associate Judge Steele and Justice Rochester did not characterize what he claims as being a work and did not recognize his copyright. He also alleges that certain facts submitted at the hearing before Associate Judge Steele and repeated by Justice Rochester were incorrect and essentially asks that the factual context be reassessed, disregarding the assessment already done.

[8] Although there is no provision in the *Federal Courts Rules* authorizing the summary dismissal of an appeal, there is no doubt that in the exercise of its plenary jurisdiction to manage

the matters before it, the Court may dismiss an appeal if it is doomed to fail owing to a fatal flaw or the absence of any merit: *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236, at para. 10; *Bernard v. Canada (Attorney General)*, 2019 FCA 144, at para. 33; *Fiederer v. Canada (Attorney General)*, 2022 FCA 102, at para. 8; *Dugré v. Canada (Attorney General)*, 2021 FCA 8, at paras. 22–23; *Lee v. Canada (Correctional Service)*, 2017 FCA 228, at para. 15; *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, at para. 8. This power is essential for ensuring the efficiency and fairness of judicial proceedings and promoting access to justice.

[9] Of course, the standard of review that applies to the appeal whose dismissal is sought must be taken into consideration. Given that the decision to grant or dismiss a motion to strike falls within a judge's discretion, the standards set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 must be applied to the decision. As a result, Associate Judge Steele's findings of law, which were adopted by Justice Rochester, are subject to the correctness standard, while her findings of fact (and findings of mixed fact and law) must be reviewed on the standard of palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, at para. 72; *Canada (Public Safety and Emergency Preparedness) v. Gregory*, 2021 FCA 33, at para. 7; *Smith v. Canada*, 2022 FCA 91, at paras. 12–13 and 15.

[10] However, the appellant did not assert any error of law or any palpable and overriding error of fact that could justify intervention by this Court in either his notice of appeal or his written representations in reply to the respondents' motion. Rather, the appellant simply

reiterated the argument he had advanced before Associate Judge Steele and is essentially asking this Court to reassess the facts and the relevant context while disregarding Associate Judge Steele's findings. In addition, he criticizes Associate Judge Steele and Justice Rochester of failing to characterize what he is claiming as being a work and not recognizing his copyright in the work. In so doing, the appellant is missing the main point of the judgments he is contesting.

[11] As established by Associate Judge Steele and repeated by Justice Rochester, the appellant needed to allege certain material facts in support of his action for copyright infringement. He had to assert not only that a literary and artistic work in which he owned the copyright existed, but also that he had not authorized the respondents to reproduce it in whole or in part. Assuming the facts in the Statement of Claim and the replies to be true, Associate Judge Steele and Justice Rochester acknowledged that the existence of a literary and artistic work and the copyright that the appellant supposedly owned in the work had been asserted. Rather, the defect in the Statement of Claim relates to the existence of the infringing work. Nowhere does the appellant allege that the respondents reproduced his work in whole or in part. Merely referring to press releases, a website or media reports about the respondents' project does not amount to an allegation of prohibited reproduction of a protected work.

[12] It was on this basis, and on the basis of the fact that the appellant criticizes the respondents of appropriating his idea rather than the expression of that idea, that Associate Judge Steele concluded that the action for copyright infringement brought by the appellant was doomed to fail and had to be struck. At the end of a detailed analysis of the arguments submitted by the appellant, Justice Rochester reached the same conclusion:

> [48] What the Plaintiff appears to fail to appreciate is that despite the very large volume of material in his Statement of Claim, Amended Statement of Claim, and attached documentation, he fails to allege with any detail how the Work, or a substantial part thereof, was reproduced. He makes numerous general allegations that "his intellectual property had been misappropriated by the Defendants", but never states that a specific part of the Work was copied beyond a general concept or idea, namely the agricultural component.

[13] The appellant obviously does not agree with those conclusions, and he is perfectly entitled not to. However, such disagreement is not sufficient to justify intervention by this Court, absent an error of law, fact, or mixed fact and law. The appellant having raised no such error, I am of the opinion that the notice of appeal should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
René LeBlanc J.A."

Certified true translation
Melissa Paquette, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-79-23
STYLE OF CAUSE:	GÉRALD MCNICHOLS TÉTREAULT v. VILLE DE BOISBRIAND, LE QUARTIER FORESTIA INC. and KANATA INVESTMENTS INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	BOIVIN J.A. LEBLANC J.A.
DATED:	JULY 13, 2023

WRITTEN REPRESENTATIONS BY:

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