

Federal Court



Cour fédérale

Date: 20160407

Docket: T-646-15

Citation: 2016 FC 387

Ottawa, Ontario, April 7, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CANADIAN STANDARDS ASSOCIATION

Applicant

and

**P.S. KNIGHT CO. LTD. AND GORDON
KNIGHT**

Respondents

SUPPLEMENTAL JUDGMENT AND REASONS

[1] In my earlier Judgement and Reasons in this matter, dated March 8, 2016, reported at 2016 FC 294, I requested further submissions from the parties concerning costs. These are my Supplemental Judgement and Reasons on that outstanding issue.

[2] On March 8, 2016, in *Canadian Standards Association v PS Knight Co Ltd*, 2016 FC 294, I decided that: (1) Canadian Standards Association [CSA] owns the copyright in the 2015

CSA Code, and that there is valid copyright in the 2015 CSA Code; (2) the Defendant, P.S. Knight Co. Ltd. [P.S. Knight] infringed CSA's copyright in the 2015 CSA Code; (3) CSA is entitled to an injunction restraining reproduction, publication and sale of any infringing works by P.S. Knight, as well as delivery-up of any such infringing works; (4) CSA is entitled to statutory damages in the amount of \$5000, with pre-and-post judgment interest, and (5) costs should be awarded to CSA.

[3] The parties were to submit their positions in writing to the Court on the issue of costs by March 22, 2016.

[4] The Applicant, CSA, served and filed its submissions on time; the Respondents, P.S. Knight and Gordon Knight, filed their written submissions late on April 1, 2016.

[5] The Court does not treat lightly the Respondents' failure to comply with the court-ordered deadline to submit their written position on costs. Nonetheless, the Respondents' submissions will be taken into account.

[6] The Applicant requests a lump sum costs award for fees and disbursements in the amount of \$120,000. The total fees incurred by the Applicant exceeded \$238,000, including \$100,000 spent on prosecuting CSA's *quia timet* injunction, which was adjourned on agreement by the parties pending an attempt at mediation (which was unsuccessful) and which subsequently resulted in an expedited hearing, and my judgment on March 8, 2016.

[7] The Applicant requests \$80,000 in fees, or about one third of the total fees incurred. It also requests disbursements in the amount of \$40,000, for a total of \$120,000 for fees and disbursements.

[8] The Applicant submitted a summary of invoices for fees charged, as well as a summary of disbursements covering: (i) photocopying, binding and scanning services (\$2,000); (ii) filing fees, couriers and process services (\$250); (iii) legal research services (\$2,000); (iv) travel and accommodation re: cross-examinations in Calgary (\$3,500); (v) transcript fees (\$2,000); (vi) David Teece expert fees in the injunction motion (\$25,000).

[9] The Applicant submits that its costs request is reasonable for the following reasons:

- a. CSA succeeded on the substantive issues involving copyright ownership and validity of the 2015 CSA Code and infringement of that code by P.S. Knight;
- b. CSA's injunction motion was contested up to the eve of the hearing on the merits, until P.S. Knight agreed to effectively abide by an injunction up to the hearing of the application by giving an undertaking not to sell any alleged infringing copies until a decision of this Court was rendered;
- c. The CSA Code is one of CSA's most important and valuable publications;
- d. P.S. Knight and Gordon Knight advanced complex theories and issues, including a substantial number of authorities for their defences;
- e. P.S. Knight and Gordon Knight admitted that the purpose of their Knight Code was to inflict harm in the marketplace to their competitor, the CSA, and to create a litigation war chest; and

- f. Gordon Knight's post hearing conduct, suggesting that the CSA's disreputable organization colluded with government actors, and that any appeal from my decision should be an easy win.

[10] The Respondents argue that the Applicant should be entitled to costs in the mid-point of Column III of Tariff B, given that:

- a. There are no principled reasons to depart from the normal Rule that a successful party is entitled to costs in the mid-point of Column III of Tariff B;
- b. The matter was not complex;
- c. The Applicant was not completely successful:
 - i. Personal liability of Gordon Knight was denied;
 - ii. The section 53 presumption of ownership was denied;
 - iii. The issue of punitive and exemplary damages was denied;
 - iv. Schedule B of the Applicant's costs submissions merely lists invoices, without detail;
 - v. The Respondents should be awarded costs of the abandoned injunction application of the Applicant under Rule 402 of the *Federal Courts Rules*;
 - vi. The revenue of the CSA Code only represents 1.7 to 2.1% of its total revenue; and
 - vii. The post hearing conduct of Gordon Knight is irrelevant.

[11] While this case may not fall squarely within the decision in *Air Canada v Toronto Port Authority*, 2010 FC 1335, I find that a lump sum award in excess of standard costs assessed in accordance with the middle of Column III, Tariff B, is warranted.

[12] In reviewing the evidence and my reasons for judgment, I have no doubt that the Applicant's injunction application had merit and was made necessary by the threatened activities of the Respondents to infringe the Applicant's copyright in the 2015 CSA Code. The fact that the Respondents gave an undertaking not to sell any infringing copies until a determination by this Court on the merits of the proceeding was instrumental in the injunction application being held in abeyance – it was not abandoned, as suggested by the Respondents.

[13] Moreover, in my view, the novel and unusual defences raised by the Respondents concerning ownership and validity of the copyright in the 2015 CSA Code made this matter unnecessarily complex.

[14] However, I do agree with the Respondents that the post hearing conduct of Gordon Knight, however scornful and derisive, is not a factor to be considered in determining the costs award to the Applicant.

[15] I have also considered the Respondents' arguments regarding the Applicant's split success in this matter. However, given the bulk of the evidence tendered, and the Applicant's substantive success on the real merits of this case, I agree with the Applicant's position that success weighs heavily in the Applicant's favour.

[16] The matter is complex, and the award of a lump sum is preferred for its simplicity, time and effort savings, and will properly compensate the Applicant (*Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9 at para 4).

[17] Accordingly, in my discretion, I award costs based on a percentage of one third (1/3) of the Applicant's actual fees and disbursements in the amount of \$96,336 (or 1/3 of \$289,009).

[18] Finally, while the conduct of the Respondents was certainly questionable and showed little or no regard for CSA's copyright in the 2015 CSA Code, I do not find that in the limited context of this proceeding it amounts to conduct so reprehensible, scandalous or outrageous as to justify solicitor-client costs - such conduct is in fact the subject matter of concurrent proceedings in the Ontario Court, to be decided in a different forum.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Costs of the application shall be paid by the Respondent, P.S. Knight Co. Ltd., to the Applicant in the amount of \$96,336;
2. There shall be no order as to costs against or in favour of the Respondent, Gordon Knight.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-646-15

STYLE OF CAUSE: CANADIAN STANDARDS ASSOCIATION v P.S.
KNIGHT CO. LTD. AND GORDON KNIGHT

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 23, 2016

**SUPPLEMENTAL
JUDGMENT AND REASONS:** MANSON J.

DATED: APRIL 7, 2016

APPEARANCES:

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Mr. David Potter

FOR THE APPLICANT

Mr. Jeffrey Radnoff

FOR THE RESPONDENTS

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