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PUNITIVE DAMAGES GAIN MOMENTUM IN NOVA-SCOTIA'S COURT OF APPEAL

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In *2703203 Manitoba Inc. v. Parks*, 2007 NSCA 36 (2007-04-03), the Nova Scotia Court of Appeal almost entirely affirms the trial decision, thereby growing the list of copyright infringement cases leading to punitive damages.

The respondent *2703203 Manitoba Inc.* franchises *Coffee News*, a trademarked publication. Each franchisee is responsible for selling advertisement and arrange for the printing and distribution of the paper in its allocated geographical area. The appellant *Parks* and his company, *Parrcom*, acquired several franchises and eventually developed the *Flying Cow,* a competing publication identical in design to *Coffee News*. *Jean Daum*, *2703203's* president, chief operating officer and sole director, put and end to the franchising contracts soon after discovering the situation. The trial judge found the appellants jointly and severally liable for copyright infringement and for the torts of passing-off and interference with contractual relations. He awarded $139,000 in general damages, $100,000 in punitive damages and $10,000 for costs (see *2703203 Manitoba Inc. v. Parks*, 2006 NSSC 6 (Nova-Scotia Superior Court, 2006-01-06)).

Parks first points out that the impugned copyright belongs to Ms *Daum* and that no proof she assigned it to *2703203* was produced. The court rejects this ground of appeal, accepting the argument that the respondent would have been ready to face the issue had it been raised at trial. As for the existence of copyright, the Court is satisfied that the trial judge's reliance on principles set out in British *Columbia Jockey Club* v. *Standen*, 1983 B.C.J. No. 1769 and in *The Modern Law Of Copyright* (London: Butterworths, 1980) resulted in the "sweat of the brow" and the "skill and judgement" tests being applied, even though their latest incarnation by the Canadian Supreme Court in *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, [2004] 1 S.C.R. 339 was not referred to.

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On the passing-off issue, the Court can see no palpable and overriding error in this mixed question of facts and law. The issue was pleaded around the common law tort of passing-off rather than on s.7 of the *Trade-marks Act*, R.S.C. 1985, C. T-13. The strong findings made against the appellants amply support this tort's components: goodwill attached to the product by virtue of its "get-up" and misrepresentation (whether intentional or not) resulting or likely to result in damages by reason of confusion as to the product's source.

The Court agreed with the appellant *Parks* that the proof was insufficient to establish the tort of interference with contractual relations, but considered that the general damages awarded where intended to bring relief to the respondent's other grievances. Therefore, the respondent's failure to support a claim for additional damages on the ground of interference with contractual relations has no impact on the outcome of the appeal.

Under the general damages head, the Court arbitrated a $4,000 uncertainty in the proof at the respondent's expense and qualified the respondent's decision to write-off other franchisees' fees as a creative way to save her business rather than as a self-inflicted loss. The split occurred over some other parts of the respondent's proof: the majority held has proven all damage assessments left unchallenged at trial while the minority went on to re-asses them based on the proof on record.

Finally, the generality of the remedies available under s. 34(1) of the *Copyright Act*, R.S.C. 1985, c. C-42 and the approval of punitive damages in copyright infringement cases signaled by Federal Court of Appeal in *Lubrizol Corp. v. Imperial Oil Ltd* (1996) 197 N.R. 241 convinced the court that punitive damages are available in copyright infringement cases, although they should remain exceptional. It agreed with the trial judge that the present case called for some, but went on to reduce them to $40,000 for the trial judge erred in law by restricting the analysis under the proportionality principle (one of the 10 principles set out in *Whiten* v. *Pilot Insurance Co.*, [2002] 1 S.C.R. 595) to the appellants' blameworthiness.

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