



PARTY FACES COPYRIGHT INFRINGEMENT CHARGES AFTER HANDING PHOTOGRAPHS OF AN ILLICIT NATURE TO THE AUTHORITIES

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PRECIS: The Ontario Superior Court of Justice dismissed a motion for leave to appeal concerning two orders made against plaintiffs to produce photographs in support of their claim of copyright infringement.

In the matter of *Wojtanowska v. Mustard* [2009 CanLII 1154 (ON S.C.)] brought forward by the Ontario Superior Court of Justice, plaintiffs sought damages for copyright infringement with regards to photographs that were given to defendant to be developed and which were subsequently handed to the police authorities due to the illicit nature of the subject matter depicted in the pictures.

The facts are as follows: plaintiffs delivered photographs to defendant, Black Photo Corporation, to be developed. The photographs showed marijuana plants growing in plaintiffs' residence amongst other subject matter of a sensitive, intimate nature. The defendant handed the photographs to the Peel county police and a search warrant was obtained and executed the same day on June 14, 2001. The execution of the search warrant resulted in the discovery and the seizure of the marijuana plants; plaintiffs were subsequently charged and arrested. The charges against plaintiffs were dropped after it was determined that the photos were seized under conditions violating their constitutional rights and therefore the only evidence supporting the charges was deemed inadmissible. The seized materials (the photographs) were ordered to be returned to plaintiffs.

Plaintiffs issued a statement of claim naming defendant for alleged copyright infringement for a total of \$1,375,000 in damages and \$85,694 in special damages. They claimed that defendant breached their copyright in the photographs by using them and by handing them to the police. An examination for discovery was held on March 27 and 28, 2006 and plaintiffs undertook to provide the photographs for which they were claiming copyright and for which they had sole possession of; however, due

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to the sensitive, intimate nature of the photos, plaintiffs then refused to produce said evidence. A motion was brought on June 26, 2008 by defendant that plaintiffs comply with their undertakings and produce the litigious photographs. The judge held that plaintiffs needed to provide the photographs as they had undertook; after which they sought leave to appeal of the decision made on June 26th 2008, which is the subject of this case review.

In order to obtain leave to appeal in Ontario, a plaintiff must meet the test set out in rule 62.02 (4) of the *Rules of Civil Procedure* which can be read as follows:

“62.02 (4) Grounds on which leave may be granted – Leave to appeal shall not be granted unless,

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to be the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.”

The Court found that plaintiffs were not able to meet either of the criteria found under 62.02 (4). Concerning criteria (a), plaintiff brought forward jurisprudence concerning the use of detained original materials which was quickly distinguished by the Court as there is a difference between original materials held by the police and original materials held by a plaintiff. The original materials in this case were photographs which were created by the plaintiffs and that were no longer held by the authorities.

Analysis of plaintiffs’ arguments under criteria (b), that the photos dealt with sensitive matters and were therefore of importance to them, was also not considered since it was logically found that plaintiffs, having sued for use of the photographs by defendant, could not then refuse to produce said photos to defendants for assessment. While it was obvious that plaintiffs were sensitive about others seeing their photographs, defendant can only properly analyse the case against them by viewing and reviewing the pictures.

It was found that plaintiffs’ appeal was without merit and costs were awarded against them for a total of \$12,000; with \$6,000\$ being deferred until trial or settlement with respect to the initial question of copyright infringement.

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