

Federal Court



Cour fédérale

Date: 20180307

Docket: T-60-16

Citation: 2018 FC 269

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ANDREW COLLETT

Plaintiff

and

**NORTHLAND ART COMPANY
CANADA INC. AND BREMNER FINE ART
INCORPORATED**

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The plaintiff, Mr. Andrew Collett, is a professional photographer who creates works of natural photography. Mr. Collett has sold prints of his photographic works, in different formats, throughout Canada and the United States, either directly or through wholesalers and galleries.

[2] The defendants, Northland Art Company Canada Inc. [NAC Canada] and Bremner Fine Art Incorporated operating under the name of Northland Art Company [Northland], are in the business of acquiring and selling prints of Canadian artwork to consumers and resellers.

[3] Mr. Collett established a business relationship with Northland in the summer of 2011, providing prints of his works for the purposes of resale. The relationship began to break down in 2012 following a change in Northland's ownership. Mr. Collett now brings this action alleging the defendants have infringed copyright and moral rights in his photographic works. Mr. Collett seeks statutory damages pursuant to section 38.1 of the *Copyright Act*, RSC, 1985, c C-42 [the Act] in the amount of \$20,000 for each of the alleged copyright infringements, damages for the infringement of his moral rights in the amount of \$60,000, aggravated and punitive damages in the amount of \$100,000, and injunctive relief.

[4] The defendants deny Mr. Collett's allegations and seek to have the claim dismissed with costs.

II. Procedural History

[5] Mr. Collett filed a Statement of Claim on January 12, 2016. By Order dated June 20, 2016, Prothonotary Martha Milczynski granted Mr. Collett leave to amend the Statement of Claim and add Bremner Fine Art Incorporated as a defendant to the action. On September 30, 2016 Mr. Collett brought a motion for Summary Judgment.

[6] On December 6, 2016, Justice Ann Marie McDonald issued an Order adjourning the motion for Summary Judgment at the request of the defendants and issued an interim injunction against the defendants. The Order also directed the defendants to serve and file responding material not later than December 16, 2016. The defendants did not meet this deadline.

[7] The motion for Summary Judgment was heard on January 17, 2017 and subsequently the parties, at the suggestion of the Court, pursued mediation in a dispute resolution conference on April 10, 2017. Those efforts were unsuccessful. In Order and Reasons dated June 29, 2017 I reluctantly accepted the defendants' responding material for filing, found that copyright subsisted in the works identified in the Amended Statement of Claim [the Works], and further found that Mr. Collett was the owner of the copyright and moral rights in the Works. A summary trial was ordered to address the issues of infringement and remedies.

III. Background

A. *General*

[8] The parties agree that in 2011 Mr. Collett began to supply printed copies of his work to the defendant Northland. At that time Northland was owned and operated by a Mr. Paul Bremner.

[9] The evidence indicates Mr. Bremner sold Northland to Mr. Nicholas Tamburi in or about September 2012. After the change of ownership Mr. Collett continued to supply printed copies of his photographic work to allow Northland to fulfill purchase orders.

[10] Mr. Collett reports that his relationship with Northland began to deteriorate and that between February 2013 and August 2013 he did not provide any prints of his Works to Northland. Between August 2013 and November 2013, Mr. Collett again supplied prints to fulfill Northland's purchase orders. However, in or around November 2013 Mr. Collett reports the relationship finally ended: he advised Mr. Nicholas Tamburi that Northland was no longer authorized to distribute, offer for sale or sell any of his Works.

[11] The Works at issue include six different pieces of Mr. Collett's photographic work and his "Website Home Page" and "Bio Page":

1. "Spirit of our Land" created on July 10, 2006;
2. "Inspiration" created on October 15, 2007;
3. "Fall Along the Oxtongue" created on October 1, 2007;
4. "Algonquin" created on June 13, 2007;
5. "Morning Paddle" created on June 27 2009;
6. "Winter Blues" created on January 6, 2008;
7. "Website Home Page" and "Bio Page" created on or about September 9, 2009.

[12] Mr. Collett's undisputed evidence was that prior to August, 2013 all of the prints he supplied to Northland were framed and in one of three formats; (1) on stretched canvas; (2) mounted on board; or (3) mounted onto acrylic. In August 2013 he began supplying unframed prints on paper. He stated that between August 2013 and the termination of the relationship with Northland he provided a total of 316 prints on paper. Aside from the claims relating to his

website, the infringements Mr. Collett alleges in this action all relate to reproductions of his works in a print on paper format.

[13] The Amended Statement of Claim makes reference to two additional Works, “The Awakening” and “Pine Cliff”. No evidence was led to support the claims of infringement in respect of either of these Works and they will not be mentioned further.

IV. Issues

[14] In the motion for Summary Judgment Mr. Collett established that: (1) copyright subsisted in the Works; and (2) he owns the copyright and moral rights in the Works. The following issues remain to be addressed:

1. Are the defendants jointly and severally liable if infringement is found?
2. Were Mr. Collett’s copyright and moral rights in the Works infringed?
3. If Mr. Collett’s copyright or moral rights were infringed, what remedies are to be granted?

V. Analysis

A. *Are the defendants jointly and severally liable if infringement is found?*

[15] The parties do not dispute that the defendant, NAC Canada, is a separate and distinct entity from Northland. It is also not in dispute that the defendant NAC Canada was incorporated under the *Canada Business Corporations Act*, RSC, 1985, c C-44, in March 2016. The Statement

of Claim alleging infringement was filed in January 2016 and there are no allegations of infringement that postdate NAC Canada's incorporation. An obvious question in these circumstances is whether NAC Canada can be held liable for the alleged infringements.

[16] Mr. Collett's counsel has urged the Court to impose liability, jointly and severally, upon both defendants. In support of this position Mr. Collett relies on: (1) the *viva voce* evidence of Mr. Daniel Tamburi to the effect that NAC Canada was a subsidiary of Northland; (2) Mr. Daniel Tamburi's statement that "in my eyes it's all the same company"; (3) the shared corporate premises; and (4) the elements of common ownership and management.

[17] There might be circumstances where a parent corporation may be liable for the actions of a wholly owned subsidiary on the basis that the parent is the alter ego of the subsidiary (Kevin McGuinness, *Canadian Business Corporations Law*, 3rd ed vol 1 (Toronto: LexisNexis, 2017) at para 7.117, citing *Gregorio v Intrans-Corp* (1994), 18 OR (3d) 527, 115 DLR (4th) 200 (Ont CA)). There might also be circumstances where, applying a theory of "group enterprise," a corporation may be held jointly liable for the actions of another (*Teti and ITET Corp v Mueller Water Products*, 2015 ONSC 4434 at para 21). Neither theory of liability was advanced in this matter. In any event it is not at all clear whether either theory could support holding a corporation liable for events that occurred prior to its incorporation.

[18] While the factual circumstances Mr. Collett has highlighted are noted, those circumstances alone cannot support the imposition of liability on a corporation that did not exist

at the time the alleged harmful activity was undertaken. NAC Canada shares no liability for any of the infringement claimed in this proceeding.

B. *Were Mr. Collett's copyright and moral rights in the Works infringed?*

[19] Subsection 3(1) of the Act provides that, in relation to a work, copyright “means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever,” and also includes the sole right to authorize such acts. Subsection 27(1) of the Act provides “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.”

[20] Subsection 14.1(1) of the Act provides that “[t]he author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”

[21] Section 28.1 provides that “[a]ny act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer’s performance is, in the absence of the author’s or performer’s consent, an infringement of those rights.”

[22] Section 28.2 provides that an author’s right to the integrity of a work is infringed “only if the work or the performance is, to the prejudice of its author’s or performer’s honour or reputation, (a) distorted, mutilated or otherwise modified; or (b) used in association with a

product, service, cause or institution.” The jurisprudence recognizes that an author’s right to the integrity of a work includes not only a highly subjective aspect, which the author of the work must establish, but also an objective element requiring evaluation of the prejudice to that author’s honour or reputation based on public or expert opinion (*Maltz v. Witterick* 2016 FC 524 at para 49, citing *Prise de parole Inc. v Guérin Éditeur Ltée* (1995), 66 CPR (3d) 257, 104 FTR 104 (TD), appeal dismissed (1996), 73 CPR (3d) 557, 206 NR 311 (FCA).

(1) The Work “Morning Paddle”

[23] Mr. Collett’s evidence was to the effect that between November 2013 and early 2014—after he had advised Northland through Mr. Nicholas Tamburi that Northland was no longer authorized to distribute, offer for sale or sell any of his Works—Northland advertised, made and sold unauthorized prints of the Work “Morning Paddle” on the defendants’ website. He stated that Mr. Darling, a former Northland employee, who had come to work for Mr. Collett, brought this to his attention. He further stated he asked Northland on a number of occasions to remove the Work from the website but Northland refused to do so.

[24] Mr. Collett also stated that in January 2014 Northland displayed and offered his Works for sale at various tradeshows. In his oral evidence he generally identified these Works as including “Algonquin”, “Morning Paddle” and “Winter Blues”. These Works were in a print on paper format. Mr. Collett’s evidence was that these prints were unauthorized prints of his Works and were not inventory left over from their prior business relationship.

[25] Mr. Collett stated that a significant percentage of the purchase orders received from Northland between August and November 2013 were accompanied by tag numbers indicating the specific customer Northland was ordering the print for, that the prints he supplied were to fulfill specific purchase orders, and that Northland did not maintain surplus stock of his Works in any format. He stated that Northland had no reason to stock his Works as he delivered authorized prints on demand. He testified that any surplus prints on paper Northland held at the end of their relationship would have been minimal and insufficient to satisfy orders from, for example, trade shows.

[26] On cross-examination Mr. Collett acknowledged that as many as 131 of the 316 prints on paper, representing all of the Works he supplied Northland between August and November 2013 were sold without reference to a tag number and these Works could have gone into Northland inventory. He further acknowledged that any returned orders from identified customers may have gone into Northland inventory.

[27] I find Mr. Collett's evidence to be credible and corroborated by both the affidavit and oral evidence provided by Mr. Darling. I do not find Mr. Nicholas Tamburi's claim that Northland had "hundreds of prints left in stock that it [p]urchased from Collett" when it ceased dealing with Mr. Collett to be at all credible.

[28] Despite my misgivings about Mr. Tamburi's evidence on this point, I am unable to conclude that Northland infringed Mr. Collett's copyright in "Morning Paddle" by advertising prints for sale on its website between December 2013 and February 2014.

[29] Mr. Collett acknowledges not all prints on paper he sold Northland were identified for specific customers. I have reviewed the purchase orders included at Exhibit "C" to Mr. Collett's reply affidavit and it is evident that a number of copies of "Morning Paddle" were ordered without an associated tag number. Similarly Exhibit "D" of Nicholas Tamburi's affidavit identifies three copies of this Work being advertised for sale at a reduced rate in January 2014. This is consistent with Mr. Tamburi's claim that as a result of the termination of their relationship, Northland was disposing of a limited number of authorized copies of Mr. Collett's work held in inventory.

[30] There is no specific evidence that would allow me to conclude Northland was seeking orders for large quantities of "Morning Paddle" by including the Work on the Northland website in the three months following the termination of the business relationship.

[31] Similarly, while there is a general allegation of Works being displayed at tradeshow in January 2014 the evidence that these Works included "Morning Paddle" is limited to a very general statement in Mr. Collett's oral evidence that "[...] they started showing up on the walls of their booths at shows. So we'd see, oh, Morning Paddle, or Algonquin Moose."

[32] In the circumstances, I am unable to conclude that the evidence has established, on a balance of probabilities, that Northland infringed Mr. Collett's copyright in "Morning Paddle" between December 2013 and February 2014.

(2) The Work “Spirit of Our Land”

[33] Mr. Collett’s evidence is that in the fall of 2015 he discovered Northland had sold 50 prints of “Spirit of Our Land” to Funding Innovation, a prospective customer of Mr. Collett’s. He stated that none of these prints were supplied by him and that he did not authorize the production of the prints. Rather, he alleges Northland made unauthorized copies of “Spirit of Our Land” from an original print.

[34] Mr. Collett further states that Northland:

1. participated in a trade show in August 2015 where unauthorized prints of “Spirit of Our Land” were displayed and orders solicited;
2. posted an unauthorized copy of “Spirit of Our Land” on their website and advertised unauthorized copies for sale; and
3. hid or removed Mr. Collett’s signature from at least fifty unauthorized prints of “Spirit of Our Land”—those sold to Funding Innovation—and replaced his signature with that of another photographer, a Mr. Anthony Randall.

[35] Mr. Collett also stated that the unauthorized copies produced by the Defendants were necessarily of lower resolution and inferior quality to his authorized prints. He stated that inferior copies of his work in the marketplace threatens the integrity of his work and is damaging to his reputation.

[36] Mr. Chris Carter, an officer with Funding Innovation, confirms that Funding Innovation purchased 50 prints of a Work called "Spirit of Our Land," attributed to Anthony Randall, from Northland. He also states that remaining copies of this Work were returned to Northland after Mr. Collett raised concerns about Anthony Randall's authorship of the Work. Mr. Anthony Randall has provided evidence confirming he was not the author of the Work.

[37] Mr. Nicholas Tamburi's evidence was that the scanning of "Spirit of Our Land" and the placement of Mr. Randall's signature on the Work was done in error by a graphic designer employed by Northland, Ms. Elisabeth Hrycyna. Mr. Tamburi's evidence in respect of the alleged infringing activity was generally evasive and argumentative. His oral evidence was also contradictory in a number of areas. I did not find Nicholas Tamburi's evidence on this issue to be either persuasive or credible.

[38] Ms. Hrycyna did not appear at the summary trial for reasons that are unclear. Her failure to attend was not pursued by Northland. She did however provide an affidavit in support of the Summary Judgment motion. In that affidavit she stated Nicholas Tamburi provided her with a digital copy of "Spirit of Our Land" and instructed her to reproduce prints from it and to place Anthony Randall's signature on the prints. Northland did not seek to cross-examine her on the affidavit.

[39] I accept Ms. Hrycyna's evidence and find on a balance of probabilities that Northland intentionally reproduced "Spirit of Our Land" and attributed the Work to Anthony Randall. I am

also satisfied on a balance of probabilities that unauthorized copies of “Spirit of Our Land” were displayed at a tradeshow in 2015 and the Work was offered for sale on the Northland website.

[40] Reproducing “Spirit of Our Land” without Mr. Collett’s authorization infringed his copyright in the Work. Attributing the reproductions to Anthony Randall infringed Mr. Collett’s moral right “to be associated with the work as its author”.

[41] Having concluded an infringement of moral rights has been established for this Work under section 28.1 of the Act, I need not consider whether the inferior quality of the Northland prints also infringed Mr. Collett’s right to the integrity of the Work as contemplated by section 28.2.

(3) The Works “Inspiration” and “Fall Along the Oxtongue”

[42] Mr. Collett alleges that in early December 2015, he learned the defendants were engaged in infringing activity with respect to the Works “Inspiration” and “Fall Along the Oxtongue”. Specifically he states the Defendants:

1. made and sold unauthorized prints through “Service Plus Rewards” an employee and referral source appreciation program operated by TD Bank;
2. supplied unauthorized prints of “Fall Along the Oxtongue” that were being offered on the Ticketmaster e-rewards website; and

3. authorized the Service Plus Rewards and Ticketmaster e-rewards websites to reproduce the Works “Inspiration” and “Fall Along the Oxtongue” on their websites without Mr. Collett’s knowledge or authorization.

[43] Mr. Daniel Tamburi’s evidence was to the effect that he was unaware of any relationship between Northland, Service Plus Rewards or Ticketmaster and that he believed that any relationship must have arisen during Mr. Bremner’s ownership of Northland. Mr. Darling, who testified he had worked for Northland in 1989 and returned in 2008 where he was employed as a warehouse manager, a national account manager and for a short time in 2013 as the Vice-President of Operations, stated he had no knowledge of Service Plus Rewards or Ticketmaster as customers of Northland. He states “as the warehouse manager I pretty much knew every customer.”

[44] The Service Plus Rewards site does refer to Northland in its description of the Work “Inspiration.” But this alone is insufficient to establish, on a balance of probabilities that there has been an intentional infringement of Mr. Collett’s copyright. The evidence also fails to establish that the prints being offered on the rewards sites are prints on paper, the format that Mr. Collett alleges Northland used in infringing his copyright. Furthermore the evidence fails to establish on a balance of probabilities that Northland authorized the reward websites to reproduce his work.

[45] Infringement of Mr. Collett’s copyright and moral rights in the Works “Inspiration” and “Fall Along the Oxtongue” has not been established on a balance of probabilities.

(4) The Work “Algonguin”

[46] Mr. Collett states that after learning in early December 2015 that the Works “Inspiration” and “Fall Along the Oxtongue” were being offered on reward websites, he discovered his work “Algonquin” had been reproduced on Northland’s website and was being offered for sale. Mr. Daniel Tamburi states that inclusion of the work on the website in 2015 was an error and it was removed despite having “some of his prints left in stock”.

[47] Daniel Tamburi’s claim to still have Collett prints in stock as late as December 2015 is a bald assertion. It is not supported by evidence to show Collett prints remained in stock more than two years after the business relationship between Northland and Mr. Collett had ended. His evidence that Northland still had prints of Mr. Collett’s Work in stock in December 2015 was also inconsistent with evidence he provided in both examination in chief and cross examination to the effect that Northland, in December 2015, had not sold or promoted Andrew Collett’s Work “for a couple of years”.

[48] I am satisfied the evidence supports a finding that the reproduction of “Algonquin” on Northland’s website infringed Mr. Collett’s copyright in the Work. However there is no evidence of actual sales of “Algonquin.” There is also no evidence relating to the quality of any reproduction of this Work, and as a result I am not satisfied that an infringement of Mr. Collett’s moral rights in this Work has been established.

(5) The Works “Winter Blues”, “Website Home Page” and “Bio Page”

[49] Mr. Collett states that the defendants have reproduced the entirety of his “Website Home Page” and “Bio Page” on their website to create the false impression that Northland continues to represent him and to promote the sale of unauthorized prints of his Works. He further states that in doing so the Defendants have reproduced “Winter Blues” without authorization.

[50] Mr. Daniel Tamburi’s evidence was to the effect that any link to Mr. Collett’s web page was accidental and he alleged that the Northland website had been hacked.

[51] The evidence that Mr. Collett’s website had been linked to the Northland site is uncontroverted, as is the evidence that the link was neither removed nor disabled until 2015. The evidence of the Tamburi brothers on this issue was confused, evasive and in many respects incredible. I am satisfied on a balance of probabilities that Northland continued to maintain a link to Mr. Collett’s website knowing it was not authorized to do so. In doing so Northland infringed Mr. Collett’s copyright in the “Website Home Page” which included a reproduction of the image “Winter Blues” and the “Bio Page”. A breach of moral rights has not been demonstrated in the evidence.

C. *What Remedy?*

[52] Having found infringement of the copyright and moral rights in the Work “Spirit of Our Land” and an infringement of copyright in the Works “Algonquin”, the “Website Home Page”

which included a reproduction of the image “Winter Blues”, and the “Bio Page” I will now address remedies.

[53] Mr. Collett seeks a declaration that his copyright and moral rights in the Works have been infringed by the defendants. A declaration will issue that Northland has infringed Mr. Collett’s copyright and moral rights in “Spirit of Our Land”, and infringed his copyright in “Algonquin”, the “Website Home Page” which includes a reproduction of “Winter Blues”, and the “Bio Page”.

[54] Mr. Collett also seeks a permanent injunction against the defendants. While I have not found NAC Canada liable for infringement in this matter, in light of the evidence that the two corporate defendants are “all the same company” I am satisfied that an injunction against both is warranted. The interim injunction granted by Order of Justice McDonald, dated December 6, 2016, shall be made permanent.

[55] Mr. Collett also seeks: (1) statutory damages pursuant to section 38.1 of the *Copyright Act* in the amount of \$20,000 per Work infringed; (2) \$60,000 for the infringement of moral rights; (3) aggravated, punitive and exemplary damages in the amount of \$100,000; (4) pre and post judgment interest at the maximum allowable rate; and (5) costs on the highest scale.

(1) Statutory Damages

[56] Subsection 38.1(1) of the *Copyright Act* states the following:

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

[...]

Dommages-intérêts préétablis

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

[...]

[57] In written and oral submissions Mr. Collett has elected an award of statutory damages and seeks the maximum amount with respect to the infringement of each of the Works.

[58] In assessing statutory damages the Act identifies, at subsection 38.1(5), the following factors for consideration where infringement is for commercial purposes:

Factors to consider	Facteurs
(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including	(5) Lorsqu'il rend une décision relativement aux paragraphes (1) à (4), le tribunal tient compte notamment des facteurs suivants :
(a) the good faith or bad faith of the defendant;	a) la bonne ou mauvaise foi du défendeur;
(b) the conduct of the parties before and during the proceedings;	b) le comportement des parties avant l'instance et au cours de celle-ci;
(c) the need to deter other infringements of the copyright in question;	c) la nécessité de créer un effet dissuasif à l'égard de violations éventuelles du droit d'auteur en question;

[59] I am satisfied that the infringements in this circumstance were for commercial purposes, however there is no evidence before me of the profits, if any, generated as a result of the infringing activity. In the circumstances I am required to arrive at a reasonable assessment of statutory damages in all of the circumstances, "in order to yield a just result" (*Telewizja Polsat SA v Radiopol Inc*, 2006 FC 584 at para 37).

[60] The factors set out in subsection 38.1(5) of the Act are all aggravating to some degree in relation to Northland.

[61] First, Northland's bad faith conduct in respect of the Work "Spirit of Our Land" was flagrant and deliberate. It involved the unauthorized production of the Work, the intentional attribution of the Work to another artist and the sale of 50 copies of the unauthorized Work into the very marketplace that Mr. Collett relies upon in the pursuit of his business. The bad faith

conduct in respect of the remaining infringing activity was not nearly as egregious as that demonstrated in respect of the Work “Spirit of Our Land,” but it similarly reflects intentional conduct and a disregard for the rights of the copyright holder.

[62] Second, during these proceedings Northland also failed to comply with filing timelines imposed by this Court and there was a failure to ensure the timely payment of costs ordered by Justice McDonald.

[63] Third, in light of the evidence showing the apparent ease with which copyright infringement of this type can be—and in this case has been—accomplished using modern technology, there is a clear and compelling need to deter the defendants from further infringements of Mr. Collett’s Works.

[64] Finally I note the Order of Justice James Russell in *Lorenz v Northland Art Company Canada Inc et al*, T-376-17 [*Lorenz*] where, in circumstances that are strikingly similar to those in this case, summary judgment was granted and Justice Russell stated “the inference is unavoidable that the Defendants knew what they were doing was wrong and used a false name to avoid detection.”

[65] Having regard to all these circumstances and the factors set out above I assess the award of statutory damages at the maximum of \$20,000 for infringement of the Work “Spirit of Our Land.” I assess statutory damage awards of \$10,000 for the infringement of the Work “Algonquin”, \$7,500 for infringement of the “Website Home Page” which includes a

reproduction of “Winter Blues”, and a further \$7,500 for infringement of the “Bio Page”.

Northland is therefore ordered to pay a total of \$45,000 in statutory damages pursuant to section 38.1 of the *Copyright Act*.

[66] I recognize that subsection 38.1(5) requires the Court to consider “all relevant factors” when exercising its discretion to award statutory damages. To that end I have considered, in addition to the factors highlighted above, the factors of denunciation and retribution. However, in the present circumstances I feel these factors are better addressed by a separate award of punitive damages as discussed below.

(2) Moral Damages

[67] Northland’s conduct in producing inferior versions of “Spirit of Our Land” in a significant quantity, attributing that Work to another artist and then selling the inferior product into the very marketplace in which Mr. Collett carries on business violated his moral rights in that Work.

[68] In *Lorenz* Justice Russell awarded \$10,000 for infringement of moral rights in substantially similar circumstances. I am satisfied that Mr. Collett is entitled to an amount of \$10,000 for the infringement of his moral rights.

(3) Punitive Damages

[69] An election by the owner of copyright to seek statutory damages does not affect any right that the copyright owner may have to exemplary or punitive damages (*Copyright Act*, subsection 38.1(7)).

[70] Punitive damages may be awarded against a defendant where the impugned conduct represents a “marked departure from ordinary standards of decent behaviour;” the objective of punitive damages is to punish a defendant (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 36 [Whiten]).

[71] Punitive damages should only be awarded where all other damages have been taken into account and the Court concludes those damages are “inadequate to accomplish the objectives of retribution, deterrence and denunciation” (*Whiten* at para 123).

[72] In my view, a punitive damages award is required in these circumstances to appropriately address the objectives of retribution and denunciation. The factors to be considered when considering punitive damages were summarized by Justice Boswell in *Microsoft Corporation v Liu*, 2016 FC 950 [Liu] at para 27:

The relevant factors to be considered whether an award of punitive damages should be made were noted by this Court in *Yang*, where Justice Snider stated:

[47] [...] As summarized by the Nova Scotia Supreme Court in 2703203 *Manitoba Inc. v. Parks*, 47 C.P.R. (4th) 276 at para. 38 (rev'd in part 57 C.P.R. (4th) 391(N.S.C.A.)), the relevant factors to consider are as follows:

- Whether the conduct was planned and deliberate;
- The intent and motive of the defendant;
- Whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- Whether the defendant concealed or attempted to cover up its misconduct;
- The defendant's awareness that what he or she was doing was wrong; and
- Whether the defendant profited from its misconduct.

[73] The infringing activity in this case was planned and deliberate. It was motivated by profit. It was not limited to a single incident or occurrence. Northland was well aware of its infringing activity and sought to conceal the activity by attributing Mr. Collett's Work to another photographer. In short, Northland and its managers and officers demonstrated complete disregard for Mr. Collett's legitimate interests in protecting his copyright.

[74] I am satisfied, having considered the nature of the conduct, and having concluded the quantum of statutory and moral damages awarded are insufficient to adequately address the objectives of retribution and denunciation which are warranted in this case, that a punitive damage award is appropriate.

[75] Mr. Collett seeks punitive damages in the amount of \$100,000. In *Liu* Justice Boswell notes at para 28 that "This Court in recent years has awarded punitive damages against individual defendants in amounts ranging from \$15,000 to \$100,000". Although Northland is a

corporate defendant I believe the upper and lower ends of the range identified in *Liu* are of assistance in this case.

[76] The amount sought by Mr. Collett falls within the upper end of the range and is in my opinion excessive. However, in light of Northland's conduct, and in the interests of denunciation and retribution, a substantial award is nonetheless warranted. I am of the opinion that punitive damages for the infringements in the amount of \$25,000 is appropriate in this case.

(4) Interest

[77] Mr. Collett shall have pre- and post-judgment interest. Pre-judgment interest is to run from March 2015, the date Ms. Hrycyna's evidence establishes she was instructed to produce unauthorized copies of "Spirit of Our land", and is to be calculated on the basis that the cause of action arose in Ontario in accordance with subsection 36(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Post-judgment interest is to run from the date of this Judgment, and is also to be calculated on the basis that the cause of action arose in Ontario in accordance with subsection 37(1) of the *Federal Courts Act*.

(5) Costs

[78] Mr. Collett has sought costs "on the highest scale" and has submitted a draft bill of costs setting out actual fees inclusive of disbursements and HST in the amount of \$49,463.32. The draft bill also sets out costs based on Column V of Tariff B, again inclusive of disbursements and HST, in the amount of \$18,003.32.

[79] While Northland's conduct in defending this matter has complicated and lengthened the proceeding I am unable to characterize that conduct as reprehensible, scandalous or outrageous and thus costs on a solicitor-client basis are not warranted (*Liu* at para 40).

[80] An award of costs in the fixed amount of \$20,000 inclusive of disbursements and taxes is appropriate in this case.

JUDGMENT IN T-60-16

THIS COURT'S JUDGMENT is that:

1. The plaintiff's claim is successful in part.
2. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company has infringed Mr. Collett's copyright and moral rights in "Spirit of Our Land," and infringed his copyright in "Algonquin," the plaintiff's "Website Home Page" which includes a reproduction of "Winter Blues," and his "Bio Page."
3. The defendants themselves and their officers, directors, agents and employees, and anyone acting under their control shall be permanently restrained from:
 - a. Reproducing, without the plaintiff's expressed written consent, any of the plaintiff's Works, or a substantial part thereof;
 - b. Reproducing, without the plaintiff's expressed written consent, any other Work created by the Plaintiff, or a substantial part thereof, whether or not such Work exists as of today;
 - c. Selling, distributing, exposing for sale, or offering for sale, without the plaintiff's expressed written consent, any copies of the plaintiff's Work;
 - d. Authorizing, assisting, or directing others with respect to the plaintiff's Work.
4. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff the amount of \$45,000 as statutory damages under section 38.1 of the *Copyright Act*, RSC 1985 c. C-42.

5. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff the amount of \$10,000 for infringement the plaintiff's moral rights.
6. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff the amount of \$25,000 as punitive damages.
7. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff costs in the fixed amount of \$20,000 inclusive of disbursements and taxes.
8. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff pre-judgment interest calculated in accordance with subsection 36(1) of the *Federal Courts Act*, RSC, 1985, c F-7 and the applicable Ontario law.
9. The defendant Bremner Fine Art Incorporated operating under the name of Northland Art Company shall forthwith pay to the plaintiff post-judgment interest calculated in accordance with subsection 37(1) of the *Federal Courts Act*, RSC, 1985, c F-7 and the applicable Ontario law.

“Patrick Gleeson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-60-16

STYLE OF CAUSE: ANDREW COLLETT v NORTHLAND ART COMPANY
INC. AND BREMNER FINE ART INCORPORATED

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 6, 2017

JUDGMENT AND REASONS: GLEESON J.

DATED: MARCH 7, 2018

APPEARANCES:

John Simpson

FOR THE PLAINTIFF

Robert Grad

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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Toronto, Ontario

FOR THE PLAINTIFF

Grad Law Professional Corporation
Toronto, Ontario

FOR THE DEFENDANTS