

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** 2703203 *Manitoba Inc. v. Parks*, 2007 NSCA 36

**Date:** 20070403

**Docket:** CA 263242

**Registry:** Halifax

**Between:**

Ross Parks, Parrcom Atlantic Concepts Incorporated and Lloyd Smith

Appellants

v.

2703203 Manitoba Inc.

Respondent

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**Judge:** The Honourable Justice Jamie W. S. Saunders

**Appeal Heard:** November 21, 2006

**Subject:** Copyright. Infringement. Passing-off. Interference with contractual relations. Confusion. Standard of review. Sufficiency of evidence in proof of damages. General damages. Punitive damages.

**Summary:** The respondent created and then franchised a publication called *Coffee News*, trademarked in both Canada and the United States and published in 50 countries. Each publication had the exact same format, colour and style, comprising a border of advertising surrounding written content in the centre. Copies of the publication were distributed by individual franchisees to restaurants, coffee shops, convenience stores, etc. Certain of the appellants entered into franchise agreements with the respondent, and then through a pattern of sustained, deliberate deception established a new competing publication, *Flying Cow*. Through a fortuitous event the respondent learned of the appellants' activities and sued, claiming both injunctive relief and damages for a variety of alleged misconduct including: breach of contract; breach of fiduciary obligation; infringement of copyright; passing-off; conspiracy; interference with contractual relations; trademark violations; unlawful use of confidential and strategic business information; and violation of non-competition agreements.

At trial the appellants were found jointly and severally liable and ordered to

pay general and punitive damages totalling \$239,000. The trial judge also granted injunctive relief to restrain the appellants from carrying on various activities, and characterized the appellants' conduct as "a strategy of lies and deceit . . . to keep (the respondent) . . . in the dark as to the true extent of (their) involvement."

The appellants appealed.

**Held:** Saunders, J.A. (dissenting only on the extent to which general damages ought to be reduced, as reflected in [72] - [101] of his reasons) dismissed the appeal on liability, finding no reversible error in the trial judge's findings that copyright infringement and passing-off were both established, thus entitling the respondent to provable damages. Further, on this record, it would be impossible to assign a fair and accurate figure for damages claimed on account of intentional interference with contractual relations, but such a void was immaterial because other general damages that could be linked to the appellants' tortious conduct, were quantifiable.

Saunders, J.A. would have significantly reduced the trial judge's award of general damages on account of the respondent's failure to provide evidence to support their calculation or connection to the appellants' actions.

Punitive damages were also reduced. The trial judge erred in law in failing to conduct the proper "rationality" test for punitive damages as directed by the Supreme Court of Canada in **Whiten v. Pilot Insurance Co.**, [2002] 1 S.C.R. 595.

Cromwell, J.A. (Oland, J.A. concurring) agreed with Saunders, J.A.'s reasons and conclusions on all issues but one. Except in one minor respect, Cromwell and Oland, JJ.A. would not disturb the judge's assessment of general damages finding that in light of the record and the manner in which the case was presented, the award of general damages achieved the requisite objective of a broadly equitable result and so should not be disturbed.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 42 pages.**