

COPYRIGHT

INFRINGEMENT

Application by applicant, on behalf of class members, seeking injunctive relief, statutory damages, damages for the infringement of moral rights, aggravated damages, punitive damages and costs for infringement of copyright, moral rights contrary to *Copyright Act*, R.S.C., 1985, ch. C-42, ss. 27, 28.1 — Respondent operated website, www.afterlife.co/ca, posting obituaries, photographs which were authored, taken by applicant, other class members — Doing so without permission of applicant, other class members — Respondent's website database of obituaries; claiming to contain 1,141,790 obituaries "in Canada" — Respondent reproducing on its website obituaries, accompanying photos from websites of Canadian funeral homes, newspapers — Terms of service on respondent's website asserting that respondent owning copyright — Website including advertising for third party businesses, sales of flowers, virtual candles on same page as obituary, which generating profits for respondent — Applicant, who lost her father, discovered that respondent's website displaying her father's obituary, photograph along with options to buy flowers, virtual candles on same page—all without her permission — Submitting that respondent causing people who viewed obituary on website to believe that she had consented to its use, that she was profiting — Described her outrage, mortification that others would think she sought to profit from her father's death — Applicant's description of her reaction upon discovering father's obituary on respondent's website echoed by many other class members who had similar experiences after loved one passing — Respondent not participating in present proceedings [heading p. 4] — Applicant submitting that respondent breached copyright, moral rights by reproducing obituaries, by modifying content of many obituaries, by adding sales of virtual candles, by posting advertisements for range of products — Whether respondent infringing copyright, moral rights of class members when it reproduced obituaries, and/or photographs on domain (afterlife.co/ca) without permission; whether class members entitled to injunctive relief as against respondent; whether monetary relief can be measured on aggregate, class-wide basis and, if so, what is amount of aggregate monetary relief; whether punitive and/or aggravated damages should be awarded against respondent and, if so, in what amount — Given that respondent not taking part in proceedings, application analogous to default judgment — Applicant having to establish infringement, entitlement to relief sought on balance of probabilities — Evidence establishing that applicant, other class members personally authoring obituaries, taking photographs of deceased persons both of which falling within term "original work" under Act, as interpreted by Supreme Court of Canada — Postings on respondent's website providing evidence that respondent reproduced original works; evidence provided establishing that applicant, class members not giving respondent permission to do so; that some class members asking respondent to remove their original works but respondent only partially complying — Respondent shutting down website after present application launched — Respondent infringing applicant's, class members' copyright in original works [38] under Act, s. 27(1) — As for moral rights under Act, s. 28.2, recent case law highlighting existence of both subjective, objective aspect to test for establishing moral rights infringement — Evidence establishing that respondent associating original works with product or service by adding sale of ads, flowers, candles to pages displaying obituaries — Clearly original works used in association with these products — Evidence provided of class members detailing emotional impact of respondent's conduct on them — Although Act, s. 28.2 addresses prejudice to honour or reputation, case law establishing that both subjective, objective element to establishing that author's honour *or* reputation has been prejudiced — Despite that applicant sincere in belief that both honour, reputation prejudiced, no objective evidence such as public opinion or expert evidence provided establishing this — Therefore, respondent not infringing moral rights of applicant, class members — In

accordance with Act, s. 34, injunction warranted in present case to stop respondent from continuing to infringe class members' rights in original works — However, wide injunction under Act, s. 39.1 not warranted here — Under Act, s. 34, damages constitute remedy for infringement — Available evidence showing that approximately two million infringements occurring — Aggregate damages appropriate in this case given that assessing individual damages of class members would be impractical among other reasons — Applicant electing award of statutory damages – Relevant factors in Act, s. 38.1(5), such as respondent's good or bad faith, considered in present matter, fully supporting award of statutory damages — Therefore, applicant's submission that \$10,000,000 just, appropriate amount of statutory damages in particular circumstances accepted — Regarding aggravated damages, applicant seeking award of not less than \$10,000,000 for aggravated damages to compensate her, class members for intangible injuries, such as distress, humiliation, caused by respondent's conduct — Given potential size of class, pro-rated distribution of any amounts recovered, none of class members would be adequately compensated; therefore, aggravated damages in amount of \$10,000,000 also justified, awarded — Finally, request for punitive damages rejected — Such damages intended not to compensate but to punish; remaining exceptional; awarded only where compensatory damages, other remedies, not sufficient to denounce infringing conduct — While respondent's conduct high-handed, reprehensible, representing marked departure from standards of decency, high threshold for imposition of punitive damages not met in present case — Application allowed.

THOMSON V. AFTERLIFE NETWORK INC. (T-38-18, 2019 FC 545, Kane J., reasons for judgment dated May 1, 2019, 28 pp.)