

# 2015-2016 HAROLD G. FOX MOOT

## MOOT PROBLEM

SEPTEMBER 28<sup>th</sup>, 2015

1. The following are reasons and judgment of the Trial Court of Canada, Intellectual Property Division. The decision of the Trial Court was subsequently overturned by the Court of Appeal; the reasons and judgment for which are also set out below.
2. Both Courts have jurisdiction over all issues raised in their respective decisions. The standard of review adopted by the Court of Appeal is also correct and not the subject of appeal.
3. The decision of the Court of Appeal is now appealed to the Supreme Moot Court for Intellectual Property Appeals.
4. All of the issues raised in the reasons given by the lower courts should be addressed by counsel for Ann Phibian or The Canadian Frog Association in their submissions. Arguments not referenced in the reasons of the lower courts may be advanced by counsel in their submissions, but only if they relate to the issues identified in the lower courts' decisions.
5. Issues around costs and interest are not to be addressed.

**TRIAL COURT OF CANADA,**  
**INTELLECTUAL PROPERTY DIVISION**

**Date: 20150914**

**Docket: T-883-15**

**Citation: 2015 FCIP 122**

**Ottawa, Ontario, this 14<sup>th</sup> day of September, 2015**

**PRESENT: The Honourable Justice Kermit**

**BETWEEN:**

**ANN PHIBIAN**

**Plaintiff**

**and**

**THE CANADIAN FROG ASSOCIATION**

**Defendant**

Heard at Ottawa, Ontario, on September 8 – 10, 2015.

Judgment delivered at Ottawa, Ontario, on September 14<sup>th</sup>, 2015.

**REASONS FOR JUDGMENT**

**KERMIT, J.**

[1] The plaintiff, Ann Phibian (“Phibian”), is a pre-eminent Canadian artist. Her intricately shaded line drawings have been popular in Canada for decades and hang in many major museums. Phibian’s delicate technique has been praised as being elegant and evocative.

- [2] Less well-known than Phibian's artistic career is her life-long interest in animal conservation and, in particular, her concern for the habitat and species diversity of frogs. It was therefore a natural fit for Phibian to assist the well-known Canadian conservation group the CFA (Canadian Frog Association). The CFA generally promotes the well-fare and ethical treatment of frogs, salamanders and the like. As part of a CFA rebranding itself, Theodore Pole, the CEO of the CFA, approached Phibian to ask if she would allow one of her shaded line drawings to be used on their website and other promotional materials. The particular black and white shaded drawing Phibian provided to the CFA for this purpose was a work entitled "50 Shades of Green".
- [3] As she explained in her evidence, Phibian created the 50 Shades of Green work by first consulting a particular painting called "One Giant Leap". The painting was included in an old book titled the *Book of Frogs*, containing the work of the naturalist painter Lilly Autobahn. Phibian outlined the silhouette of a leaping frog image from the "One Giant Leap" painting and then spent a weekend applying her pencil shading skills in excruciating detail. It was common ground at the trial that Lilly Autobahn had died over 100 years earlier and that any copyright in the "One Giant Leap" painting in the *Book of Frogs* had expired.
- [4] With an appropriate license from Phibian, the "50 Shades of Green" drawing was used by the CFA to promote its activities and as a logo on its printed materials, advertising and branded swag.
- [5] This course of events lasted for approximately three years but came to a tumultuous end due to a new project carried out by the CFA. One of the long-standing activities of the CFA was the "Frog Pound", a large, controlled access wetland that the CFA owned and

was home to a number of species of frogs. Unfortunately, a series of extremely wet years had led to the overpopulation of the Ontario Red Back frog and a precipitous decline in numbers of the Eastern Arid-Skinned frog in the CFA wetland. The chief veterinarian at CFA deemed it was essential to increase the Eastern Arid-Skinned frog population in the wetland.

[6] To deal with the imbalance in populations of frogs in its wetland, the CFA decided to introduce the so-called “Switch and Bait” program. Any person who brought in two Arid-Skinned frogs for the Frog Pound would be provided with an Ontario Red Back frog in exchange. This program turned out to be very popular with anglers since the Ontario Red Back frog is known to be excellent bait for bass and there was no other legal way to obtain this type of bait in the province. The populations of the two species of frogs were starting to be brought back into balance at the Frog Pound.

[7] Like its many other conservation and research programs, the CFA Switch and Bait program was both advertised on CFA’s website and described in CFA pamphlets, all alongside prominent reproductions of Phibian’s “50 Shades of Green” artwork. The pamphlets were handed out door-to-door in the neighbourhood around the wetland.

[8] Her evidence at trial was that when she became aware of the Switch and Bait program, Phibian became irate. She vehemently objected to the CFA handing over defenceless frogs to be used as bait by anglers. When she became aware that her “50 Shades of Green” artwork was being used in the promotion of the Switch and Bait program she became, in her words, “beyond apoplectic”. Phibian immediately informed the CFA that the licence to her artwork was terminated, and demanded that the CFA stop using her work for any purpose.

[9] The CFA was concerned and agreed to the requests made by Phibian. In particular, the CFA agreed to remove all reproductions of Phibian's "50 Shades of Green" frog design from their materials, including CFA website and pamphlets. However, at the same time, the CFA approached a neighbourhood graphic artist, Baron Greenback ("Greenback"), and asked him to create a new leaping frog design for the CFA. Greenback was apparently not familiar with the CFA and he had never seen the Phibian "50 Shades of Green" artwork. He did admit that he knew at the time that Phibian had worked with the CFA. The evidence of Pole, the CEO of the CFA, was that Greenback was told by Pole that the CFA was looking for "a shaded line drawing sketch of a leaping frog – a frog taking a giant leap".

[10] The CFA was pleased with the resulting artwork supplied by Greenback, referred to in evidence as the "New Frog" sketch. This was not surprising as even Pole of the CFA admitted to being struck by the similarities between the "New Frog" sketch and the "50 Shades of Green" sketch. These similarities were explained at trial by the evidence from Greenback as to how he came up with his artwork. He indicated that he owned a copy of the *Book of Frogs* and decided to start with a leaping frog from a painting in that book. He outlined the frog in pen and paper and then scanned in the image. Greenback then ran the digitized image through the "Shady Shading" standard "effect" supplied with the ubiquitous PhotoStore software. By using that automatic digital image manipulation, Greenback had created a digital image that gave a hand-drawn shading effect to the traced outline of the leaping frog.

[11] The CFA, with all appropriate assignments and waivers from Greenback, took the "New Frog" artwork and ran with it. The CFA included the "New Frog" on all its promotional

material, including its website and pamphlets advertising the Switch and Bait program. The “50 Shades of Green” artwork was effectively replaced by the “New Frog” sketch.

[12] The result is that the CFA claims to have made the requested change to its use of the “50 Shades of Green” artwork. However, the further result is that Phibian now comes to this court seeking remedies for copyright infringement and moral rights infringement. The questions before the court are whether the “New Frog” design infringes Phibian’s copyright in the “50 Shades of Green” artwork and whether the CFA has infringed Phibian’s moral rights by using the copied design, “in association with a product, service, cause or institution” so as to prejudice Phibian’s honour or reputation.

[13] Both parties agree, as do I, that Phibian’s work “50 Shades of Green” is an original creative artistic work and therefore copyright subsists in the artwork (see *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16).

[14] Further, it is apparent, by reviewing the two artworks, and from the admitted “similarities” between the two (evidence of the CEO of CFA), that the “New Frog” is a copy of the “50 Shades of Green” design. The outlines of the respective frogs are virtually identical and both frogs are shaded. There was evidence before this court that when the original artwork of Phibian was replaced by the Greenback drawing there were virtually no comments received by the CFA from the public about any changes made to the CFA promotional or advertising material.

[15] In my view, the public is likely to view the two works as being virtually the same and I find that a substantial part of Phibian’s work has therefore been copied by the “New Frog” design and the use of that design by the CFA is an infringement of Phibian’s

copyright. The CFA sought to replicate Phibian's original artwork and replicate it they did. By doing so, CFA infringed Phibian's copyright and are therefore found to be liable.

[16] The second issue before this Court relates to moral rights infringement. Moral rights infringement is set out in sections 28.1-28.2 of the *Copyright Act*.

[17] Phibian's evidence is that she has been a life-long environmentalist and lover of frogs. There is no doubt as to her strong objection to the use of her "50 Shades of Green" artistic work by the CFA in association with the Switch and Bait program. She stated her objection forcefully to the CFA at the time the program was launched and repeated her strong views in her evidence during the trial.

[18] Phibian felt that the Switch and Bait program resulted in the death of her favourite animals - a certain outcome when the frogs were used by anglers as bait. Her view is that this was contrary to her life's purpose of promoting and protecting frogs. As a result, I must find that Phibian's honour and reputation were put in jeopardy by the use of the "50 Shades of Green" image in association with the Switch and Bait program. The same holds true for the harm to Phibian due to the use of the copied "New Frog" image in association with the Switch and Bait program.

[19] For all the above reasons, I find in Phibian's favour and find that her copyright in the "50 Shades of Green" work has been infringed, along with her moral rights, as a result of the use of the "New Frog" design in connection with the Switch and Bait program.

**COURT OF APPEAL**

**Date: 20150924**

**Docket: T-883-15**

**Citation: 2015 FCA 455**

**Ottawa, Ontario, this 24<sup>th</sup> day of September, 2015**

**CORAM: FEN J.A.,  
MARSH J.A.,  
BOGG J.A.**

**BETWEEN:**

**THE CANADIAN FROG ASSOCIATION**

**Appellant**

**and**

**ANN PHIBIAN**

**Respondent**

Heard at Ottawa, Ontario, on September 22<sup>nd</sup>, 2015.

Judgment delivered at Ottawa, Ontario, on September 24<sup>th</sup>, 2015.

REASONS FOR JUDGMENT BY:

FEN J.A.

CONCURRED BY:

MARSH J.A.

BOGG J.A.

## **REASONS FOR JUDGMENT**

### **FEN, J.A.**

- [1] The decision of Justice Kermit has come before this Court on appeal. The appellant the Canadian Frog Association (“CFA”) argues that the Trial Judge erred in concluding as he did on the two issues before him and therefore seeks to overturn that decision. For the reasons outlined below, this Court considers it necessary to correct errors found in the decision below and to reverse the findings of infringement made by Kermit, J.
- [2] The first issue is whether the “New Frog” design infringed the copyright that attached to the “50 Shades of Green” artwork created by Ann Phibian. Was there a “substantial taking” from the first work in the new work? The Trial Judge adverted to the two works being “virtually identical”, but this is not a complete answer to the issue.
- [3] The question of whether a substantial part of Phibian’s work has been copied must be answered “from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects – patent and latent – of the works in issue” (*Cinar Corporation v Robinson*, 2013 SCC 73 at para 51). Two pieces of art may, to the untrained eye, appear substantially similar however, to the art cognoscenti, the same two pieces of art may be easily distinguishable. As the Supreme Court of Canada stated in *Cinar* at para 52, a judge may need to consider aspects of the works that “only an expert can detect.”
- [4] In the case below, Justice Kermit completely ignored the evidence of a witness at trial who was an art expert of some renown. The expert found that there were easily decipherable differences between the hand-drawn “50 Shades of Green” work by Phibian

and the computer software-generated “New Frog” design produced by Baron Greenback (“Greenback”). The Phibian work included her typical and characteristic evocative shading, according to the art expert. The work was immediately recognizable as a “Phibian”. In contrast, the expert evidence indicated that the Greenback work reflected the generic and automated shading that came from the computer program. The two works were not identical in the eyes of an art expert. Kermit, J. failed to take into account this evidence from the art expert, directly on point. As such, the trial judge erred in concluding that the “New Frog” was a substantial taking from Phibian’s work.

[5] Further, Greenback had no access himself to the original “50 Shades of Green” artwork. He could not, in that sense, be found to have copied the work. From the evidence, although scant, it would appear that the *Book of Frogs* was likely a common reference book (both Phibian and Greenback having had copies). Greenback’s use of a common reference book and the PhotoStore program were not acts of copying but were acts open to anyone and not subject to copyright.

[6] For the above reasons, the finding of copyright infringement against CFA cannot stand.

[7] On the issue of moral rights infringement, the Trial Judge below erred in focussing exclusively on the emotional reaction of Phibian to the use of her artwork in connection to the Switch and Bait program. Although the heart-felt reaction of Phibian is certainly understandable in the circumstances, the question of moral rights infringement must be considered in a broader context. The specific reaction of the artist must be considered in the context of the reaction expected from the artist on the Clapham omnibus. The desirability of a more objective standard was referenced in *Prise de Parole Inc v Guérin*,

*Éditeur Ltée* (1995), 66 CPR (3d) 257 and should have been followed by the Trial Judge below.

[8] It is clear that the CFA is a renowned and respected agency. Phibian herself worked contentedly with the CFA for many years. The CFA has many programs other than the one to which Phibian took exception. In that context, the fact that the CFA had a single program with which Phibian disagreed is not sufficient to find prejudice to her honour or reputation. Moreover, the long term goals of the Switch and Bait program were in line with even Phibian's objectives for conservation and wildlife management – frog populations in the CFA wetland were being brought into balance due to the introduction of the program by the CFA.

[9] Therefore, on an objective standard there was no prejudice to Phibian's honour or reputation as a result of her artwork being connected to the CFA, even if the CFA had a program that Phibian did not particularly like. Of course, in view of the findings above as to the differences between the two artworks in question, there is a lessened concern around issues of reputation. There is no continued use of the "50 Shades of Green" work by CFA, only the different "New Frog" work. Although there were suggestions in the trial evidence that the public did not see any particular change in branding when the "New Frog" was introduced by the CFA, this does not alter the fact that the artistic works were different from one another.

[10] The lack of prejudice to Phibian means that the allegations of moral rights infringement must fail.

[11] For the above reasons, I would allow the appeal and hold that the CFA is not liable to Phibian.

**MARSH, J.A.**

I concur, Ann Phibian has not cleared the requisite legal hurdles.

**BOGG, J.A.**

I concur.