

**IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS**

BETWEEN:

**ANN PHIBIAN**

Appellant

— and —

**THE CANADIAN FROG ASSOCIATION**

Respondent

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**FACTUM OF THE APPELLANT**

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## **PART I – OVERVIEW**

[1] This case is about a large organization infringing upon the rights of an individual artist by copying her unique work and using said copy it in a manner directly contrary to her wishes. The Appellant, Ann Phibian (“Phibian”), seeks to overturn the Court of Appeal’s decision, which vacated a finding of copyright infringement and moral rights infringement against the Respondent, the Canadian Frog Association (“CFA”).

[2] This appeal raises two issues. The first is whether the CFA infringed Phibian’s copyright by substantially reproducing “50 Shades of Green.” The second is whether the CFA’s use of that reproduction in association with its “Switch and Bait” program infringed Phibian’s moral rights.

[3] On the first issue, the Appellant submits that Phibian’s copyright was infringed. The “New Frog” design used by the CFA is substantially similar to Phibian’s work. Both works are shaded outlines of frogs and are virtually identical. The only ascertainable difference between the works is the hand-feel of the shading. As this distinction can only be perceived by an art expert, it is inconsequential. The extensive similarities between the two works, coupled with the evidence establishing that the artist of “New Frog,” Baron Greenback (“Greenback”), had countless chances to access Phibian’s work, is sufficient to establish copyright infringement.

[4] On the second issue, the Appellant submits that the CFA infringed Phibian’s moral rights of integrity and paternity. “New Frog” and “50 Shades of Green” are virtually identical works. The CFA replaced “50 Shades of Green” with “New Frog,” using the latter to promote its Switch and Bait program. In doing so, the CFA omitted to clarify that Phibian is not the artist of “New Frog.” Additionally, Phibian’s subjective belief that use of her work and the “New Frog” reproduction in association with the Switch and Bait program prejudices her honour and reputation is reasonable in the circumstances, as the program is contrary to her life’s purpose of protecting frogs.

## PART II – STATEMENT OF FACTS

### A. Factual Background

[5] Ann Phibian is a dedicated animal conversationalist with a life-long passion for protecting her favourite animal, frogs. The CFA is a conservationist organization with a mandate to protect the well-fare of frogs. In this regard, Phibian and the CFA are ideologically-aligned. Thus, when the CFA asked Phibian to design a logo to assist them in their frog conservation efforts, she agreed.

*Ann Phibian v The Canadian Frog Association*, 2015 FCIP 122 at paras 2, 18 [Trial Court Judgement].

[6] The CFA licensed Phibian’s “50 Shades of Green” for use as their logo. Both parties agree the drawing is original. Phibian consulted a book of frog paintings, *Book of Frogs*, to create the drawing. Phibian outlined a leaping frog from one of the paintings, Lilly Autobahn’s “One Giant Leap.” It was common ground at trial that the copyright in “One Giant Leap” had expired. After outlining the frog silhouette, Phibian applied her characteristic shading to it in “excruciating detail.” The shading technique Phibian used to create “50 Shades of Green” is well-known as a distinguishing hallmark of her work as a preeminent Canadian artist.

*Trial Court Judgement, supra* para 5 at paras 1, 3, 13.

[7] The CFA licensed “50 Shades of Green” from Phibian for three years. The CFA used “50 Shades of Green” as a logo on its printed materials, advertising, website, and branded merchandise. The CFA also featured the logo prominently on pamphlets delivered door-to-door in the neighbourhood around a controlled access wetland owned by the CFA.

*Trial Court Judgement, supra* para 5 at paras 4, 7.

[8] A new project initiated by the CFA brought their relationship with Phibian to an end. The CFA introduced a “Switch and Bait” program in order to deal with an imbalance in populations of two species of frogs, the Ontario Red Back and the Eastern Arid-skinned frog, in its wetland. Any individual who provided the CFA with two Arid-skinned frogs would receive one Ontario Red

Back in exchange. Phibian voiced “forceful objections” to the program based on its popularity with anglers, who commonly traded-in Eastern Arid-skins for Ontario Red Backs with the intention of using the latter as fishing bait. The use of “50 Shades of Green” to promote a program so contrary to her principles made Phibian “irate” and “beyond apoplectic.” As a result, she demanded the CFA stop using her work for any purpose. The CFA removed all reproductions of Phibian’s work from their materials.

*Trial Court Judgement, supra para 5 at paras 6-9, 17-18.*

[9] When Phibian terminated her relationship with the CFA, the CFA commissioned an artist from the neighbourhood surrounding its wetland, Baron Greenback, to create a new logo design. The CFA’s CEO, Theodore Pole, specifically requested Greenback produce “a shaded line drawing sketch of a leaping frog—a frog taking a giant leap.” Using the same book as Phibian, Greenback also outlined the silhouette of a leaping frog. He too shaded the frog, using a computer program to give it a hand-drawn shading effect. At the material time, Greenback was aware that Phibian and the CFA had worked together, although he denies having seen “50 Shades of Green.”

*Trial Court Judgement, supra para 5 at paras 9-10.*

[10] Greenback’s “New Frog” design is a shaded line drawing of a leaping frog as per Pole’s instructions, and thus possesses the same features as Phibian’s “50 Shades of Green.” Pole admitted the similarities between Phibian’s design and Greenback’s “New Frog” were “striking.” Despite the admitted resemblance, the CFA used “New Frog” in its promotional materials, including those for the Switch and Bait program. When “New Frog” replaced “50 Shades of Green,” the public did not comment on any changes to the CFA’s promotional material. Consequently, Phibian commenced a claim against CFA, seeking remedies for copyright infringement and moral rights infringement. Since it was the CFA, and not Greenback, that had reproduced Phibian’s design, Greenback is not named a party to the action.

*Trial Court Judgement, supra* para 5 at paras 10, 12, 14.

### *B. Procedural History*

[11] The trial judge, Kermit J., found in Phibian's favour. Kermit J. held that "New Frog" was a copy of "50 Shades of Green." A review of the similarities between the two works indicated they were "virtually identical," and that "New Frog" emulated Phibian's "typical and characteristic evocative shading." As a result, the public was likely to view the two works as interchangeable. Furthermore, given that "New Frog" and "50 Shades of Green" were effectively the same work, the use of "New Frog" in association with the CFA's Switch and Bait program jeopardized Phibian's honour and reputation and infringed her moral rights.

*Trial Court Judgement, supra* para 5 at paras 4, 14-15, 17-19.

[12] The Court of Appeal overturned the trial judge's finding of liability against the CFA. Fen J.A., writing for the Court of Appeal, noted that the trial judge failed to take into account evidence from an expert who had testified that "discernable differences" existed as between the hand-drawn "50 Shades of Green" and the computer-generated "New Frog." As a result, Fen J.A. held that Greenback's work was not a substantial taking from Phibian's work. Furthermore, Fen J.A. found that Greenback had no access to "50 Shades of Green" and could not have copied the work.

*Ann Phibian v The Canadian Frog Association, 2015 FCA 455* at paras 3-6 [*Court of Appeal Judgement*].  
*Cinar Corporation v Robinson, 2013 SCC 73* at paras 51-52 [2013] 3 SCR 1168 [*Cinar*].

[13] With regards to moral rights infringement, Fen J.A. noted that the trial judge erred by focusing on the "heart-felt" reaction of Phibian to the use of her artwork in connection with the Switch and Bait program, while neglecting to consider whether this reaction was reasonable. Fen J.A. agreed that Phibian's reaction was "certainly understandable in the circumstances," but ruled that it was not reasonable for two reasons.

*Court of Appeal Judgement, supra* para 12 at para 7.

[14] First, Phibian's disagreement with the Switch and Bait Program alone was insufficient to prejudice her honour or reputation. Second, the goals of the Switch and Bait program promoted Phibian's goals of frog conservation. Fen J.A. also held that there was no continued use of "50 Shades of Green" in association with the Switch and Bait program, only the different "New Frog."

*Court of Appeal Judgement, supra* para 12 at paras 8-10.

### **PART III – POINTS IN ISSUE**

[15] The present appeal raises two issues:

- (1) The Court of Appeal erred in finding that the CFA did not infringe the copyright attached to "50 Shades of Green" under subsection 27(1) of the *Copyright Act*.
- (2) The Court of Appeal erred in finding that the use of "New Frog" in association with the Switch and Bait program did not infringe Phibian's moral rights of integrity and paternity under sections 14.1, 28.1 and 28.2(1)(b) of the *Copyright Act*.

### **PART IV – ARGUMENTS IN BRIEF**

#### **ISSUE 1: "NEW FROG" INFRINGES THE COPYRIGHT ATTACHED TO "50 SHADES OF GREEN"**

[16] Copyright includes the "sole right to produce or reproduce a work or any substantial part thereof in any material form whatever." According to subsection 27(1) of the *Copyright Act*, copyright infringement occurs whenever any person has, "without the consent of the owner of the copyright, [done] anything that by this Act only the owner of the copyright has the right to do."

*Copyright Act*, RSC 1985, c C-42, ss 3, 27(1).

[17] The Court of Appeal held that the CFA did not infringe Phibian's copyright, as Greenback had no access to "50 Shades of Green" and did not produce a work identical to Phibian's in the eyes of an art expert. The standard of review to be used on questions of law is the standard of correctness, while that for questions of fact is "palpable and overriding error." As explained below,

the Court of Appeal erred in its approach to the issues of access, substantial similarity and the admission of expert evidence. Applying the correct approaches to these issues, the trial judge's finding of copyright infringement should be restored.

*Court of Appeal Judgement, supra* para 12 at paras 2-6.  
*Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] 2 SCR 235.

*C. There is Sufficient Evidence to Presume Greenback had Access to "50 Shades of Green"*

[18] In *Rains v Molea*, the Ontario Superior Court of Justice held that to prove infringement, the plaintiff must demonstrate that the defendant used the plaintiff's work as the source for his or her work—the so-called "causal connection"—but direct evidence of access is unnecessary. The court will presume access if there is substantial similarity and a reasonable possibility of access.

*Rains v Molea*, 2013 ONSC 5016 at para 7, 231 ACWS (3d) 787 [*Rains*].

[19] As noted by the trial judge, and consistent with *Rains*, the evidence demonstrates that Greenback had a reasonable possibility of access to Phibian's work:

- (a) Phibian's design has been widely disseminated; the CFA used it for three years in advertising, printed materials, pamphlets, online materials, and merchandise.

*Trial Court Decision, supra* para 5 at paras 4, 7.

- (b) The design was ubiquitous in Greenback's neighbourhood, where the CFA distributed pamphlets bearing "prominent reproductions" of Phibian's design "door-to-door."

*Trial Court Decision, supra* para 5 at para 7.

- (c) The design was already widespread *when* the CFA approached Greenback, since Phibian's work was on the CFA website and pamphlets "at the same time" the CFA approached him.

*Trial Court Decision, supra* para 5 at para 9.

- (d) Phibian's other popular line drawings, carrying the same intricate shading style used in "50 Shades of Green," have hung in major Canadian museums for decades.

*Trial Court Decision, supra* para 5 at para 1.

[20] To see Phibian's shading style, all Greenback needed to do was go a major museum featuring Phibian's work. To access "50 Shades of Green," he needed only to visit the CFA's website or pick up one of the many pamphlets already distributed in his neighbourhood. It is reasonable to assume he would have done just that, since Greenback was familiar with the CFA and knew Phibian had worked with them. A reasonable artist in his situation would have tried to become familiar with both the organization and the designs it had previously commissioned, particularly if he or she knew their work was to replace that of a well-known artist.

*Trial Court Decision, supra* para 5 at para 1.

[21] The evidence indicates that Greenback had a reasonable possibility of access. This possibility, coupled with the evidence of substantial similarity, is sufficient to presume Phibian's work was the source for "New Frog." Thus, the Court of Appeal erred in applying a test requiring direct evidence of access. The correct approach is to first determine whether there was a reasonable possibility of access coupled with substantial similarity, which there was, and then to determine whether the defendants had led evidence to rebut the presumption of access, which they had not.

*Rains, supra* para 18 at para 7.

*D. Even if the Court Does Not Presume Access, Pole's Instructions were Sufficient to Create a "Causal Connection"*

[22] The UK case *Solar Thomson Engineering Co* (followed by the Federal Court in *Rucker Co v Gavel's Vulcanizing Ltd*, and, by our count, at least twelve other times in the United Kingdom and Australia) holds that a causal connection can be found even without access to a copyrighted work. Where someone instructs another to replace a copyrighted work, and in doing so makes it inevitable that the copyrighted work will be reproduced, a "sufficient causal link" exists.

*Solar Thomson Engineering Co v Barton*, [1977] RPC 537 at 560 (Eng CA).  
*Rucker Co v Gavel's Vulcanizing Ltd*, [1985] FCJ No 1031 at paras 55, 57, 36 ACWS (2d) 366.

[23] Pole provided Greenback with specific instructions making it almost inevitable Greenback would reproduce a substantial part of Phibian’s work. Pole instructed Greenback to draw “a shaded line drawing sketch of a leaping frog—a frog taking a giant leap.” This is a precise description of Phibian’s “50 Shades of Green.” These instructions gave Greenback little latitude in what he created, ensuring that he would indirectly reproduce Phibian’s work even if he lacked access to it.

*Trial Court Decision, supra* para 5 at para 9.

[24] Pole’s instructions to Greenback are sufficient to create the necessary causal connection between Greenback and “50 Shades of Green.” The CFA should not be allowed to escape liability for copyright infringement simply because it instructed Greenback to reproduce the copyrighted work. To say otherwise would go against the purpose of the *Copyright Act*, which is in part to “foster creative innovation.” Artists will be less likely to create new works if they know someone can escape liability by instructing someone else to infringe a work instead of doing it personally.

*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 23, [2004] 1 SCR 339.

*E. Greenback Took a Substantial Part of the Appellant’s Work*

[25] The Court of Appeal held that since “50 Shades of Green” and “New Frog” were not identical, there was no substantial taking from Phibian’s work. This approach to assessing substantiality is incorrect. The proper approach is to look qualitatively and holistically at two works to determine whether they are sufficiently *similar*. Any differences between the works are irrelevant where the defendant copied a substantial part of the plaintiff’s original work.

*Cinar, supra* para 12 at paras 26, 39.

[26] The copied features in Greenback’s design constitute a substantial part of the Phibian’s work. Both Pole, the CEO of the CFA, and the trial judge found the similarities between the works to be striking, with the trial judge ruling that the two works were “virtually identical.” Each work

consisted solely of an outline and shading, and, viewed holistically, Greenback's combination of outline and shading is essentially indistinguishable to Phibian's.

*Trial Court Decision, supra* para 5 at paras 10, 14.

[27] Moreover, although the *Copyright Act* only protects “original...expressions of ideas,” nothing about Phibian's outline and shading is generic or unoriginal. Both parties agree that Phibian's work is original. Phibian did not simply add a bit of shadow to a random outline of a frog. Rather, she used her judgement to find a silhouette of a leaping frog in an old book of frog paintings. Then, in “excruciating detail,” she created the features of the frog with her signature shading style. This combination—this careful choice of an outline coupled with intricate shading—created an original expression. By using a virtually identical outline and style of shading, Greenback took a substantial part of Phibian's original expression.

*Cinar, supra* para 12 at para 24.

*Trial Court Decision, supra* para 5 at para 13.

[28] The difference in the evocativeness of the shading, uncovered only by the art expert, is therefore irrelevant. Greenback's design is virtually identical to Phibian's in the choice of outline and shading—original elements which represented a substantial part of the skill and judgment exercised by Phibian. Thus, the works are substantially similar. The point of dissimilarity does not make the existence of extensive similarity any less conclusive.

*F. The Expert Evidence Should Not Have Been Admitted*

[29] In determining if a substantial part has been copied, the proper perspective is that of “intended audience for the works at issue.” The occasional role of expert evidence is to uncover, *where necessary to assist the trier of fact*, patent or latent similarities that are difficult for a judge to appreciate. The expert's testimony in the instant case was not necessary.

*Cinar, supra* para 12 at paras 49, 51.

[30] The trial judge was right to ignore expert evidence, as no external assistance was required in assessing the similarity between Phibian's and Greenback's designs. The general public made up the intended audience for either work. Expert evidence was only necessary, therefore, if a member of the public could not appreciate the patent and latent similarities between the works.

[31] A member of the public does not need the help of an expert to uncover the similarities between shaded outlines of frogs. An expert might be necessary to compare, for example, a Jackson Pollock with another drip painting, but not to compare simple drawings of frogs. Since few original artistic works are simpler than a frog drawing, to say expert evidence is necessary in this case is to say that expert evidence would almost always be necessary. A judge's opinion would almost never suffice and would almost always need to be replaced by an expert's.

[32] Therefore, the art expert's opinion was not necessary and should not replace the opinion of the trial judge. The trial judge did not need assistance to uncover the similarities between the works. Since the Court of Appeal reversed the trial judge's decision entirely based on the fact the expert evidence was ignored, the trial judge's finding of substantial similarity should be restored.

*Court of Appeal Judgement, supra* para 12 at para 4.

## **ISSUE 2: THE CFA INFRINGED PHIBIAN'S MORAL RIGHTS TO "50 SHADES OF GREEN"**

[33] Moral rights confer on an artist rights beyond the economic rights traditionally protected by Canadian copyright law. Moral rights function to "treat the artist's oeuvre as an extension of his or her personality, possessing a dignity that is deserving of protection." Thus, a remedy following moral rights infringement provides recourse against those who present the work differently from the way the author originally intended.

*Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 15, [2002] 2 SCR 336 [Théberge].  
David Vaver, *Intellectual Property Law*, 2d ed (Toronto: Irwin Law, 2011) at 203 [Vaver].

[34] Moral rights are statutorily enshrined in the *Copyright Act*. Section 14.1 of the *Copyright Act* sets out two types of moral rights: the right of paternity and the right of integrity. As set out by section 28.1, infringement of either the moral right of paternity or integrity follows an act or omission that the *Copyright Act* considers to be contrary to the author's moral rights.

*Copyright Act, supra* para 15 at ss 14.1, 28.1.

[35] The CFA's use of "50 Shades of Green" and "New Frog" engages Phibian's moral right of integrity under subsection 28.2(1)(b). Subsection 28.2(1)(b) sets out two conditions for infringement of this subset of moral rights. First, an artistic work must be "used in association with a product, service, cause, or institution." Second, this use must be prejudicial to the author's honour or reputation. Both conditions are met on the facts of Phibian's case, as discussed below.

*Copyright Act, supra* para 16 at ss 14.1, 28.2(1)(b).

*G. The Use of "New Frog" in Association with the Switch and Bait Program Infringes Phibian's Moral Right of Integrity*

[36] The first condition for infringement of the moral right of integrity requires the work in question be used in association with a product, service, cause, or institution. The Court of Appeal held that there was "no continued use of '50 Shades of Green' by the CFA, only the different 'New Frog' work." As a result, the Court of Appeal ruled Phibian's right to integrity was not infringed.

*Copyright Act, supra* para 16 at s 28.2(1)(b).  
*Court of Appeal Judgement, supra* para 12 at para 9.

[37] The Court of Appeal erred in its analysis of whether "New Frog" and "50 Shades of Green" are different works by not giving sufficient weight to evidence that demonstrates "New Frog" is effectively a copy of "50 Shades of Green." As the trial judge noted upon review of "50 Shades of Green" and "New Frog," there are marked visual similarities between the two works: both are shaded line drawings of a leaping frog. Furthermore, evidence indicates that the public did not differentiate between the two designs when "New Frog" supplanted "50 Shades Green." The Court

of Appeal erred by dismissing this evidence, and by failing to consider evidence that demonstrates that even Pole, the CFA's CEO, was "struck" by the visual similarities between the two works.

*Trial Court Judgement, supra* para 5 at paras 10, 14-15.

[38] In contrast, the trial judge recognized the interchangeability of "50 Shades of Green" and "New Frog." In addition to noting the clear visual similarities between the two works, Kermit J. gave sufficient weight to external evidence (the reactions of Pole and the public) supporting the finding that "New Frog" is a copy of "50 Shades of Green." Kermit J. ultimately held that since Phibian's honour and reputation were put in jeopardy by the wrongful use of "50 Shades of Green," "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 [emphasis added]." This is the correct approach. The use of "New Frog" effectively constitutes the use of "50 Shades of Green." Therefore, the continued use of "New Frog" in association with the Switch and Bait program infringes Phibian's moral right of integrity.

*Trial Court Judgement, supra* para 5 at para 12.

#### *H. Phibian Held a Subjective Belief her Reputation or Honour Was Prejudiced*

[39] The second condition for infringement of the moral right of integrity under subsection 28.2(1)(b) requires the work in question be used in a manner that prejudices the artist's honour or reputation. The trial judge and Court of Appeal agreed that a fundamental aspect of the test for prejudice is whether the artist in question held a subjective belief that his or her work was used in a manner that resulted in prejudice to his or her honour or reputation.

*Court of Appeal Judgement, supra* para 12 at para 7.

*Trial Court Judgement, supra* para 5 at paras 17-18.

[40] Phibian held a demonstrable subjective belief that her reputation and honour were prejudiced by the CFA's use of "New Frog" in relation to its Switch and Bait program. At trial,

Kermit J. recognized Phibian is a “life-long environmentalist and lover of frogs,” who felt that the Switch and Bait program led to the death of her favourite animals. As a result, the trial judge concluded that Phibian genuinely believed that having her work associated with the program prejudiced her honour and reputation. The Court of Appeal accepted the trial judge’s findings. Accordingly, the subjective element of the test for prejudice is met.

*Trial Court Judgement, supra* para 5 at paras 17-18.

*Court of Appeal Judgement, supra* para 12 at para 7.

*I. The Correct Standard to Determine Prejudice is the Artist’s Subjective Belief*

[41] The Court of Appeal erred by applying the incorrect test to determine whether the CFA’s use of Phibian’s work resulted in prejudice to her honour or reputation. The Court of Appeal stated that to determine prejudice, the artist’s reaction must be one “expected from the artist on the Clapham omnibus.” The Court of Appeal articulated this more objective standard based on the precedent from *Prise de Parole Inc v Guérin, Éditeur Ltée*. While the Federal Court in *Prise de Parole* held that “[the prejudice] concept has a highly subjective aspect that in practice only the author can prove,” it also held that an objective evaluation of the alleged prejudice is required, to be determined based on testimony from the public or expert opinion.

*Court of Appeal Judgement, supra* para 12 at para 7.

*Prise de Parole Inc v Guérin, Éditeur Ltée*, 104 FTR 104 at paras 24-26, [1996] FCJ No 1427 [*Prise de Parole*].

[42] In contrast, in *Snow v Eaton Centre*, the Ontario High Court of Justice held that prejudice can be determined solely based on the artist’s subjective judgement, so long as it is reasonably arrived at. In *Snow*, the Ontario High Court of Justice weighed Snow’s opinion, as a well-respected artist, heavily to determine that his concern for his reputation was reasonable. Similarly, Kermit J. placed great emphasis on Phibian’s perception of prejudice to her honour and reputation. The more

subjective standard used in *Snow*, and by Kermit J. in the present case, is preferable to the Court of Appeal's more objective standard for three reasons.

*Snow v Eaton Centre*, 70 CPR (2d) 105 at paras 5-6, [1982] OJ No 3645 [*Snow*].

[43] First, the purpose of moral rights supports the use of a subjective standard to determine prejudice. Moral rights are inherently individualistic. In *Théberge*, the Supreme Court of Canada recognized that moral rights adopt a “more elevated and less dollar and cents view of the relationship between an artist and his or her work.” Per *Théberge*, the purpose of moral rights is to protect an artist's work as “an extension of their personality.” There is no one better placed than the artist to determine whether a work that is effectively an extension of them has been used prejudicially against their honour or reputation. Thus, sufficient weight must be given to an artist's view as to whether prejudice has occurred.

*Théberge*, *supra* para 33 at para 15.

[44] Second, statutory interpretation principles support the conclusion that Parliament intended prejudice be determined using a more subjective standard. There is a strong presumption against tautology in legislation: Parliament “does not speak in vain.” Applying this presumption to the text of subsection 28.2(1) makes it apparent that Parliament intended “honour” to have a distinct meaning from “reputation.” “Reputation” suggests something that is external and is adjudged by others. In contrast, in light of the presumption against tautology, the ordinary meaning of “honour” suggests a sense of morality that is self-adjudged and based on internal self-perception.

*Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para 37, [2002] 2 SCR 559.

Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 51, 54-55, 167.

[45] An ordinary meaning of “honour” centered on subjective moral ideals is supported by the dictionary meaning of the word. For example, the Concise Oxford English Dictionary defines honour as “a clear sense of what is morally right.” Professor Dennis Lim has similarly advocated for an interpretation of “honour” that is self-determined and associated with subjective ideals.

Professor Lim's comments pertain to moral right provisions in Australia's copyright legislation, which are nearly identical to Canada's. Therefore demonstrating prejudice to the honour component of subsection 28.2(1) should only require an artist's subjective belief that his or her art has been used in a manner that violates his or her personal moral principles. This approach better reflects legislative intent as adduced from the purpose and textual meaning of section 28.2(1).

Angus Stevenson & Maurice Waite, eds, *Concise Oxford English Dictionary*, 12th ed (Oxford: Oxford University Press, 2011) at 684.

Dennis Lim, "Prejudice to Honour or Reputation in Copyright Law" (2007) 33:2 *Monash U L Rev* 290 at 296.

[46] Furthermore, the cases that have applied a more objective standard to determine prejudice have involved prejudice in the context of subsection 28.2(1)(a) of the *Copyright Act*, which requires "modification" to a work. This is true of *Prise de Parole*. It is also true of *Théberge*, where the Supreme Court stated an artist "should not become the judge in his own cause on such matters." Additionally, the Supreme Court's comments in *Théberge* do not explicitly endorse an objective standard for prejudice. Rather, they clarify that judicial review of moral rights infringement is necessary, complete with a "full record" upon which a trial judge can determine breach.

*Copyright Act*, *supra* para 16 at s 28.2(1)(a).

*Théberge*, *supra* para 33 at para 78.

*Prise de Parole*, *supra* para 41 at para 24.

[47] In contrast, Phibian's claims to the moral right of integrity are made pursuant to subsection 28.2(1)(b), which requires a use of the work in association with a certain product or service. The distinction is an important one, because it is conceptually more difficult to demonstrate that prejudice has occurred following the "modification" of a work, as opposed to the "use" of a work in association with something reprehensible to the artist. Putting bow-ties on geese and claiming that the modification has prejudiced one's reputation or honour, as in *Snow*, is an entirely different proposition than using one's art in a context that is inherently objectionable to the author's morals.

Although an objective test may be necessary to demonstrate prejudice to one's reputation or honour under subsection 28.2(1)(a), subsection 28.2(1)(b) should not require one.

*Snow, supra* para 42 at paras 1-4.  
*Copyright Act, supra* para 16 at ss 28.2(1)(a)-28.2(1)(b).

[48] Given the highly individualistic nature of moral rights, and the meaning of honour in section 28.2(1), this court should recognize that the test for prejudice to an artist's honour is met when the work in question is used in association with a cause that clearly conflicts with the artist's morals. Accordingly, the Court of Appeal erred in placing too much emphasis on its objective assessment regarding prejudice, and not giving enough weight to Phibian's perspective.

*J. Phibian's Reputation or Honour Was Objectively Prejudiced*

[49] In the alternative, if this court affirms the objective standard for prejudice used by the Court of Appeal, the Court of Appeal nonetheless erred in applying this standard to the facts of Phibian's case. The Court of Appeal's reasons for holding that Phibian did not meet the objective standard were two-fold; each shall be addressed in turn.

[50] First, the Court of Appeal observed that the CFA has in place many other programs beyond the Switch and Bait program to promote its conservation agenda. Given Phibian's long-standing relationship with the CFA, the Court of Appeal found that the use of Phibian's work in association with one program out of many was insufficient to prejudice her honour or reputation.

*Court of Appeal Judgement, supra* para 12 at para 8.

[51] The Court of Appeal mischaracterizing subsection 28.2(1)(b) by holding that it was unreasonable for Phibian to disallow the CFA's continued use of "50 Shades of Green" on the basis of the Switch and Bait program alone. Subsection 28.2(1)(b) explicitly stipulates that moral rights may be infringed when a work is used in association with "a product, service, cause, or institution." There is no requirement that prejudice to an artist's honour or reputation occur on the

basis of use that is associated with the institution as a whole. Use of a work in association with a single impugned product, service, or cause is sufficient. “50 Shades of Green” was used “prominently” in the promotion of the Switch and Bait program, a program that is completely antithetical to Phibian’s beliefs. Given this context, it is reasonable for Phibian to view the continued association of her work with this program as prejudicial to her honour and reputation.

*Copyright Act, supra* para 15 at s 28.2(1)(b).  
*Trial Court Judgement, supra* para 5 at paras 17-18.

[52] Furthermore, the Court of Appeal erred by placing too much emphasis on Phibian’s three-year working relationship with the CFA. When Phibian originally entered into a licensing agreement with the CFA, their mandate was to “promote the well-fare and ethical treatment of frogs.” However, the Switch and Bait program directly facilitates the death of frogs, which is inconsistent with the CFA’s mandate. Any reasonable person in Phibian’s circumstances, with a fundamental desire to protect frogs, would have terminated their relationship with the CFA upon the introduction of a program so diametrically opposed to their principles.

*Ibid* at paras 2, 7, 18.

[53] The Court of Appeal’s second objection regarding the objective element of the test for prejudice relates to the implementation of the Switch and Bait Program. The Court of Appeal held that Phibian’s reaction was not objectively reasonable because the long term goals of the Switch and Bait program—balancing frog populations in the CFA’s wetland—accorded with Phibian’s objectives for “conservation and wildlife management.”

*Court of Appeal Judgement, supra* para 12 at para 8.

[54] The Court of Appeal erred by mischaracterizing the factual record. Phibian is an avowed animal lover with a particular affinity for frogs. The trial evidence indicates that Phibian’s objections to the Switch and Bait program arose specifically because it was “contrary to her life’s purpose of promoting and protecting frogs,” not because it was contrary to her desire for wildlife

conservation, as the Court of Appeal presumed. The Court of Appeal erred by replacing Phibian's actual objectives (frog protection) with their own interpretation of what Phibian's objectives were (conservationism), and assessed the reasonableness of Phibian's reaction to the Switch and Bait program in light of those latter objectives.

*Court of Appeal Judgement, supra* para 12 at para 7.  
*Trial Court Judgement, supra* para 5 at para 18.

[55] The correct question to ask is whether Phibian's reaction to the Switch and Bait program, given her desire to protect frogs, is reasonable in the circumstances. On the evidence, Phibian's reaction was reasonable. In fact, the Court of Appeal itself noted that Phibian's reaction was "certainly understandable *in the circumstances* [emphasis added]."

*Court of Appeal Judgement, supra* para 12 at para 7.

[56] The CFA implemented the Switch and Bait program in a manner that results in the death of frogs. When Phibian voiced "forceful objections" to the program, the CFA did not elect to either alter or discontinue the program. Thus, it was reasonable for Phibian, a lifelong lover of frogs, to believe that the use of her work in association with a program that ultimately results in the killing of her favourite animal prejudiced her honour and reputation. In *Snow*, the Court held that Snow was reasonable in his assertions that wrapping geese in ribbons prejudiced his reputation. This court should recognize that Phibian's belief that having her work associated with the killing of frogs is offensive to her artistic and moral integrity is far more reasonable in the circumstances.

*Snow, supra* para 42.  
*Trial Court Judgement, supra* para 5 at paras 5, 17.

*K. The CFA Implicitly Attributed "New Frog" to Phibian, Infringing her Moral Right to Paternity*

[57] The Court of Appeal also erred by ruling Phibian's moral rights were not infringed while failing to consider whether the CFA infringed Phibian's moral right to paternity. The right of

paternity specifies an artist has the right, where reasonable, to be associated with a work as its author, and the right to remain anonymous.

*Copyright Act, supra* para 16 at ss 14.1, 28.1.  
*Vaver, supra* para 33 at 211.

[58] As the Federal Court recognized in *Harmony Consulting Ltd v GA Foss Transport Ltd*, “misattribution of a work can be an infringement of the author’s moral rights.” The CFA implicitly misattributed “Green Frog” to Phibian, by omitting to clarify that she is not the author of the work.

*Harmony Consulting Ltd v GA Foss Transport Ltd*, 2011 FC 340 at para 290, [2012] FCJ No 1131 [*Harmony Consulting*].

[59] The context in which “New Frog” replaced “50 Shades of Green” supports a finding that the CFA misattributed “New Frog” to Phibian. When Phibian terminated her relationship with the CFA, they purposefully requested Greenback draw a new logo matching the very description of “50 Shades of Green.” The CFA then proceeded to distribute “New Frog” in association with its Switch and Bait program, despite Pole’s admittance that the two works were visually alike.

*Trial Court Judgement, supra* para 5 at paras 9-10.

[60] The CFA had originally used Phibian’s “50 Shades of Green” as its logo for three years; Phibian’s working relationship with the CFA was well-known in the CFA’s neighborhood. Given the visual similarities between “50 Shades of Green” and “New Frog,” the CFA knew, or ought to have known, that by disseminating “New Frog” in these circumstances, the public would assume “New Frog” was attributable to Phibian. To avoid moral rights infringement, they could have either publicized the termination of their relationship with Phibian, or explicitly clarified the work was not Phibian’s. These expectations are not onerous to fulfill, yet the CFA did neither. Through this omission, the CFA infringed Phibian’s moral right to paternity.

*Trial Court Judgement, supra* para 5 at paras 5, 9.

**PART V – ORDER REQUESTED**

[61] “50 Shades of Green” is an original work, which has been copied and replaced by the virtually identical “New Frog.” The visual similarities between the two works are readily apparent, and are supported by external evidence. Furthermore, these visual similarities, when considered alongside the evidence demonstrating that Baron Greenback had ample opportunity to access Phibian’s work, are sufficient to establish copyright infringement. The Court of Appeal erred first by disregarding the similarities between the two works, and by assessing the test for copyright solely on the basis of direct evidence of access, and not indirect evidence of access.

[62] The use of “50 Shades of Green” and “New Frog” in association with the Switch and Bait program infringes Phibian’s moral rights of integrity and paternity. The Court of Appeal erred first by failing to acknowledge that “New Frog” and “50 Shades of Green” are interchangeable, and second by failing to give sufficient weight to Phibian’s subjective belief that her honour and reputation were prejudiced. Furthermore, the Court of Appeal misapplied the test to determine whether Phibian’s reaction to the Switch and Bait program was reasonable by mischaracterizing both the requirements of subsection 28.2(1)(b) and the facts of the case.

[63] The Appellant respectfully requests this Honourable Court allow the appeal, set aside the Judgment of the Federal Court of Appeal, and restore the decision of the Trial Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 11<sup>th</sup> day of January, 2016.

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Team No. 2  
Counsel for the Appellant

## PART VI – TABLE OF AUTHORITIES

### LEGISLATION

*Copyright Act*, RSC 1985, c C-42.

### JURISPRUDENCE

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*Prise de Parole Inc v Guérin, Éditeur Ltée*, 104 FTR 104, [1996] FCJ No 1427.  
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*Rucker Co v Gavel's Vulcanizing Ltd*, [1985] FCJ No 1031, 36 ACWS (2d) 366.  
*Snow v Eaton Centre Ltd*, 70 CPR (2d) 105, [1982] OJ No 3645.  
*Solar Thomson Engineering Co v Barton*, [1977] RPC 537.  
*The Canadian Frog Association v Ann Phibian*, 2015 FCA 122.  
*Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34, [2002] 2 SCR 336.

### SECONDARY MATERIALS

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