

**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 RESPONDENT**

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## PART I – OVERVIEW

1. Copyright law provides authors of original works with a limited scope of protection in order to encourage the dissemination of those works to the public. The Appellant seeks to overstep the bounds of these protections by restraining actions of the Respondent that do not engage her copyright or moral rights. This Court should prevent her from doing so.

2. The Respondent, the Canadian Frog Association (“CFA”), is a conservation organization recognized for promoting the wellbeing of frogs. The Appellant, Ann Phibian (“Phibian”), is a prominent artist, who licensed her depiction of a leaping frog to serve as the CFA’s logo. The drawing, “50 Shades of Green,” is brought to life by the elegant and evocative shading style for which Phibian is renowned. It was used in conjunction with the CFA’s many conservation initiatives, including the “Switch and Bait” program, which successfully corrected a devastating population imbalance that was endangering a particular frog species. Phibian, ignoring the program’s success, objected to it for entirely personal reasons and revoked the CFA’s license. The CFA complied, commissioning a graphic designer named Baron Greenback (“Greenback”) to create an entirely different logo. Greenback manipulated a simple tracing with computer software to produce “New Frog,” a generic frog design that now adorns the CFA’s materials. Phibian wrongly claims that the CFA’s actions have infringed her copyright and moral rights in “50 Shades of Green.”

3. Phibian’s allegations of copying fail for two reasons. First, Greenback could not have copied Phibian’s work because he did not have access to it. He never saw “50 Shades of Green” before producing “New Frog,” and the CFA did not instruct him to reproduce Phibian’s work indirectly. Second, “New Frog” does not reproduce a substantial portion of Phibian’s originality in “50 Shades of Green.” Although both images may appear similar on one level, these

similarities are a product of pure coincidence. “New Frog” lacks that which defines a substantial part of Phibian’s originality—her elegant and evocative shading. It is not a copy.

4. Phibian’s moral rights claim also fails. First, Canadian jurisprudence requires objective evidence of prejudice to an author’s reputation. Phibian failed to adduce any such evidence. She could not even prove that her belief of prejudice was reasonable on a subjective standard.

Second, the CFA only used Phibian’s work in association with the “Switch and Bait” program for a brief period, when they were unaware of Phibian’s feelings about the program. To penalize an organization for launching a successful conservation policy on the basis of Phibian’s unexpressed and thus unknowable objection would be absurd. Third, allowing Phibian to claim moral rights in work created by a different person would contradict the plain meaning of the *Copyright Act*. Finally, Phibian’s claim is based on a perceived harm to her reputation as a conservationist. The *Act* ought only to extend moral rights protections to her reputation as an artist.

*Copyright Act*, RSC 1985, c C-42, s 28 [*Act*].

5. The Court of Appeal was correct in concluding that the CFA had not infringed Phibian’s copyright and moral rights. This appeal should be dismissed.

## **PART II – STATEMENT OF FACTS**

6. **The Respondent:** The CFA is a conservation organization recognized for promoting the wellbeing of frogs. Years ago, it embarked on a rebranding campaign, seeking a new logo to advertise its many conservation initiatives. The CEO of the CFA, Theodore Pole (“Pole”), contacted the Appellant about using a piece of her existing art as the CFA’s logo.

*Phibian v The Canadian Frog Association*, 2015 FCIP 122 at para 2, rev’d 2015 FCA 455 [*Trial*].

7. **The Appellant and Her Talent:** Phibian is a renowned artist, admired throughout Canada for creating intricate line drawings using her “elegant and evocative” shading technique.

She shares this artistic passion with a lesser-known commitment to animal conservation, being particularly concerned with the species diversity of frogs. Phibian accepted Pole’s request and licensed the CFA to feature one of her drawings on its promotional material.

*Trial, supra* para 6 at paras 1, 2, 4.

8. The artwork ultimately chosen, “50 Shades of Green,” depicts the shaded image of a leaping frog. This elegant piece began as nothing more than an outline—Phibian simply traced the image of a leaping frog from a painting in the public domain called “One Giant Leap,” which she found in the widely-available “Book of Frogs.” Following this mechanical act of tracing, Phibian spent two days meticulously and diligently shading the frog to create a true masterpiece. Her evocative shading style permeated the end result.

*Trial, supra* para 6 at paras 2-3.

*The Canadian Frog Association v Phibian*, 2015 FCA 455 at para 4 [*Appeal*].

9. **Phibian and the CFA Part Ways:** Phibian’s relationship with the CFA continued without incident for three years, until she abruptly terminated it in response to a newly-introduced CFA initiative. Due to many wet seasons, the population of Ontario Red Back frogs had risen to dangerous levels in the CFA’s controlled-access wetland. Because of this, Eastern Arid-Skinned Frogs were perishing. The CFA introduced the “Switch and Bait” program, which successfully alleviated this devastating imbalance by offering one Red Back frog to any person who would bring in two Arid-Skinned frogs in exchange. Because the Red Back is an integral part of the marine food chain—being a source of food for bass—anglers were able to help reallocate the overpopulated frogs.

*Trial, supra* para 6 at paras 5-6.

10. Unfortunately, Phibian failed to appreciate the program’s success, completely ignoring its positive environmental impact. She focused instead on her own negative feelings about surplus

Red Backs being used as fishing bait. This motivated her to revoke the CFA's licence, after which the CFA agreed to stop using all reproductions of "50 Shades of Green."

*Trial, supra* para 6 at paras 8-9.

11. **The CFA's New Logo:** Following the termination of its licence, the CFA commissioned a local graphic artist, Baron Greenback ("Greenback"), to create a new logo. Greenback was unfamiliar with the CFA. It is uncontested that he had never seen Phibian's "50 Shades of Green" work.

*Trial, supra* para 6 at para 9.

12. Pole gave Greenback a general idea of what the CFA wanted by asking for a shaded drawing of a leaping frog. Greenback consulted his own copy of the evidently popular "Book of Frogs" for inspiration. There, in the public domain, he found a painting of a leaping frog and traced it, just as Phibian had done before. Unlike her, however, he then ran the outline through a digital scanner. Using widely-available photo editing software, Greenback filled the frog with a bland, generic computer-generated shading effect. The finished product, "New Frog," was thereafter used by the CFA on all promotional materials, including those for the Switch and Bait program. Phibian asserted that the CFA's actions had infringed her copyright and moral rights.

*Trial, supra* para 6 at paras 9-11.

13. **Trial Court Decision:** Kermit J. concluded that the CFA's use of "New Frog" infringed Phibian's copyright and moral rights in "50 Shades of Green." Specifically, he found superficial similarities between the two images to be dispositive, emphasizing what was in fact the mere coincidence that both were shaded, leaping frogs. He highlighted the lack of public comment about the CFA's logo change, and the fact that Pole had made mention of a resemblance between the two images. Because he found that the public was likely to confuse the two designs, he concluded that Greenback had copied Phibian's work. Also, in Kermit J.'s view, Phibian's

personal objection to the Switch and Bait program was sufficient to demonstrate that the CFA’s use of “New Frog” and “50 Shades of Green” had infringed her moral rights.

*Trial, supra* para 6 at paras 14-19.

14. **Court of Appeal Decision:** A unanimous Court of Appeal correctly overturned the trial decision. It held that Kermit J. had erred in restricting his analysis to a superficial resemblance between the works. In doing so, Kermit J. had entirely overlooked the evidence of an art expert, who testified at trial that “New Frog” was clearly made by computer—and certainly not through the inspired application of evocative hand strokes. The Court also found that Greenback did not have access to Phibian’s work, making any similarities to it coincidental. Addressing moral rights, the Court found that Kermit J. had erred by failing to apply an objective standard. Despite Phibian’s personal opinion, the Switch and Bait program had achieved a result in line with her devotion to frog species diversity. She had not suffered any damage to her artistic integrity.

*Appeal, supra* para 8 at paras 2-10.

### **PART III – POINTS IN ISSUE**

15. The following two issues are raised in this appeal:
1. Was the Court of Appeal correct in concluding that Phibian’s copyright had not been infringed by the “New Frog” design?
  2. Was the Court of Appeal correct in concluding that there had been no infringement of Phibian’s moral rights at any time?

### **PART IV – ARGUMENTS IN BRIEF**

#### **ISSUE 1: “NEW FROG” DOES NOT INFRINGE PHIBIAN’S COPYRIGHT IN “50 SHADES OF GREEN”**

16. The Court of Appeal correctly concluded that “New Frog” does not infringe Phibian’s copyright in “50 Shades of Green.” Copyright infringement requires access to the protected

work. It is undisputed that Greenback had never seen “50 Shades of Green” before creating “New Frog.” Further, Pole’s instructions to him were far too vague to provide access indirectly. “New Frog” also does not reproduce a substantial portion of Phibian’s original expression in “50 Shades of Green.” The works do share limited similarities—both are shaded, leaping frogs—but these do not comprise a substantial part of Phibian’s originality. Her expression is substantially captured by her evocative shading, which Greenback’s generic, computer-generated image lacks.

*U & R Tax Services Ltd v H & R Block Canada Inc* (1995), 62 CPR (3d) 257 at 268, 56 ACWS (3d) 396 (FCTD) [*U & R*].  
*Cinar Corporation v Robinson*, 2013 SCC 73 at paras 26-27, [2013] 3 SCR 1168 [*Cinar*].

#### **A. Greenback had no access to “50 Shades of Green” before creating “New Frog”**

##### ***i. Infringement requires access to the protected work***

17. Similarity between two works does not by itself serve to establish copyright infringement. The plaintiff must show a “causal connection” to the protected work. This requires that the allegedly infringing author had access to it. If there was no access, then “any similarities, *however strong*, ...must be deemed a coincidence,” and a claim for infringement will fail. Likewise, if the similarities identified stem from each author’s independent use of publicly-available source material, then any inference of copying will be rebutted.

*U & R, supra* para 16 at 269  
*Francis Day & Hunter Ltd v Bron*, [1963] Ch 587 at 623-624, [1963] 2 WLR 868 per Diplock LJ (CA) [*Francis Day*].  
*Gondos v Hardy* (1982), 64 CPR (2d) 145 at 160, 38 OR (2d) 555 (Ont Hcj), emphasis added.  
*Deeks v Wells* (1932), [1933] 1 DLR 533, 1932 CarswellOnt (WLNextCan) (JCPC).  
*Philip Morris Products SA v Marlboro Canada Ltd*, 2010 FC 1099 at para 320, 374 FCR 213, aff’d on copyright issues, 2012 FCA 201 at paras 116-124, 103 CPR (4th) 259.  
*Caron v Association des Pompiers de Montréal Inc et al*, 42 CPR (3d) 292 at 299, 34 ACWS (3d) 488 (FCTD).

##### ***ii. Greenback had no access to “50 Shades of Green”***

18. The Appellant concedes that Greenback did not have direct access to “50 Shades of Green” before creating “New Frog.” Greenback had never seen “50 Shades of Green” and was unfamiliar with the CFA before it contacted him. The Court of Appeal correctly concluded that

Kermit J. erred in ignoring this fact. Due to Greenback’s lack of access, the Court found that infringement could not be established. It concluded that any similarities between the works were the result of pure coincidence, arising from each artist’s independent use of the “Book of Frogs.”

*Factum of the Appellant, Team 6A* at para 43 [*Appellant Factum*].

*Trial, supra* para 6 at para 9

*Appeal, supra* para 8 at para 5.

19. The Appellant asserts that Greenback’s lack of access to “50 Shades of Green” is irrelevant, because the CFA created “New Frog” through Greenback. The argument is that the CFA’s access can be imputed to him. This argument is illogical, and the Appellant cites no authority in support of it. Greenback and the CFA cannot be considered one entity—he was hired as an independent contractor, operating at arm’s length to complete a single task. The CFA exerted no control over the methods Greenback used to accomplish this and hence did not vicariously create “New Frog.” Greenback is its sole creator. The Appellant must establish *his* access to “50 Shades of Green,” directly or indirectly. She has done neither.

*Appellant Factum, supra* para 18 at paras 40, 41.

*671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at paras 47, 55, [2001] 2 SCR 983.

***iii. The CFA’s instructions to Greenback do not amount to access***

20. Access to a protected work need not be direct, but can come about indirectly through intermediary sources. The Appellant relies on *Solar Thomson Engineering Co Ltd v Barton*, where an independent designer was hired to create a replacement of a copyrighted drawing. Although the designer never saw the drawing himself, his instructions consisted of a highly specific description of it. The defendant told him exactly how each of the drawing’s components should be laid out, their shapes, and their scaled dimensions. This level of detail and direction made independent creation impossible and was therefore sufficient to establish access indirectly.

*Francis Day, supra* para 17 at 623-624, per Diplock LJ.

*Solar Thomson Engineering Co Ltd v Barton*, [1977] RPC 537 at 559-560 per Buckley LJ (CA) [*Solar Thomson*].

21. This case is distinguishable. Pole’s request to Greenback provided nowhere near the level of detail and direction given to the independent designer in *Solar Thomson*. Pole merely communicated the vague concept of a shaded, leaping frog in general terms. There are many ways to draw what he described. Greenback could have depicted any frog species, fat or skinny, leaping in any direction. Pole specified shading but did not say it should appear hand-drawn, and he did not refer to the work of Ann Phibian. Most importantly, Greenback was never told to trace a painting from the “Book of Frogs.” These are choices that he made alone. What Greenback produced was not an inevitability, as was the case in *Solar Thomson*, but rather an independent creation arising from his coincidental use of the same public material copied by Phibian.

**B. “New Frog” is not a substantial reproduction of “50 Shades of Green”**

***i. Copyright infringement requires substantial reproduction of the author’s originality***

22. It is an infringement of copyright for a person to do any act that is expressly reserved to the copyright owner. This includes the right to reproduce a work or any *substantial* part thereof. The *Copyright Act* protects only those elements which represent a substantial portion of the author’s original expression. Originality is manifested through the exercise of skill and judgment that is more than trivial. Copyright infringement will therefore only result where a *substantial* portion of an author’s skill and judgment is reproduced. That has not occurred in this case.

*Act, supra* para 4, ss 3(1), 27(1).

*Cinar, supra* para 16 at paras 25-26.

*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 16, 23, [2004] 1 SCR 339.

***ii. The similarities between the two images do not amount to a substantial portion of Phibian’s originality***

23. Determining whether a substantial reproduction has occurred is a qualitative and holistic analysis. The reviewing court must compare the works in their entirety and ask whether the cumulative effect of the similarities between them amounts to a substantial portion of the

originality expressed in the protected work. As the Appellant notes, the “substantiality analysis” cannot be conducted piecemeal. However, this does not mean that certain similarities should not be given less weight depending on their nature and qualitative importance to the protected work.

*Appellant Factum, supra* para 18 at para 28.

*Cinar, supra* para 16 at paras 26, 41.

*Ladbroke (Football) Ltd v William Hill (Football) Ltd*, [1964] 1 WLR 273 at 288, per Hodson LJ, [1964] 1 All ER 465 (UKHL).

24. The similarities between “New Frog” and “50 Shades of Green” relied on by the trial judge do not amount to a substantial portion of Phibian’s original expression. Kermit J. simply asked if the two images looked alike. Courts have cautioned against such a superficial visual comparison, because “originality...tends to lie *in the detail with which the basic idea is presented.*” Similarities that are simple and generic or derive from the same public domain source should be accorded less weight. The frog outlines in this case resemble each other. Both are also shaded. But these similarities are of little consequence—they stem from the mere presence of greyscale shading, a generic artistic concept, and each artist’s copying of coincidentally similar public-domain paintings. The Appellant argues that these elements are substantial because removing them would “drastically alter” the appearance of “50 Shades of Green.” However, the same is true for any element that occupies a large enough section of Phibian’s canvas. If this were an adequate basis on which to find substantial similarity, copyright protection would be dictated by the quantum of a person’s labour. The focus must instead remain on the *qualitative* importance of similarities shared by both works.

*Designers Guild Limited v Russell Williams (Textiles) Limited*, [2000] 1 WLR 2416 at 2423, per Hoffmann LJ, [2000] 1 All ER 700 (UKHL) [*Designers Guild*].

*Collins et al v Rosenthal et al* (1974), 14 CPR (2d) 143 at 148, 1974 CarswellNat 493 (WLNextCan) (FCTD).

*Appellant Factum, supra* para 18 at paras 36-38.

*Cinar, supra* para 16 at paras 26-28.

25. The similarities identified by Kermit J. do not possess sufficient qualitative importance to constitute a substantial taking of “50 Shades of Green.” A substantial portion of an artistic work is that which gives the work its “feeling and artistic character.” In *Bauman v Fussell*, an artist painted the scene of a cock fight depicted in an earlier photograph. Although the painting reproduced the colour and position of the photographed birds, the vigorous style in which they were painted created an entirely different visual effect. Copyright infringement had not occurred because the similarities between the works did not represent the feeling emulated by the photograph. Likewise, it is not the frog outline or simple fact of shading that represent the artistic character of “50 Shades of Green.” Phibian’s elegant and evocative shading are what bring it to life.

*Bauman v Fussell*, [1978] RPC 485 at 487 (CA).

26. The qualitative importance of identified similarities can be further assessed by asking: what are those elements that make the protected work valuable in its intended market? The similarities relied upon by Kermit J. are not what give “50 Shades of Green” its commercial value. The Appellant argues that these aspects allowed the piece to fulfill its purpose as a commercial logo, but Phibian initially intended it as an addition to her artistic repertoire. No one is interested in Phibian’s work simply because it is shaded art. That is not why it hangs in museums. What sets Phibian’s masterpieces apart is the evocative nature of her shading style. This consideration is absent from the trial judgment.

*Édutile Inc v Automobile Protection Association (APA)* (2000), 188 DLR (4<sup>th</sup>) 132 at 142, 6 CPR (4th) 211 (FCA).

*Appellant Factum*, *supra* para 18 at para 38.

### ***iii. The substantiality analysis in this case requires an expert’s perspective***

27. The substantiality analysis requires the court to adopt a perspective that can “fully assess and appreciate all relevant aspects...of the works at issue.” The Appellant argues that a lay

perspective was sufficient in this case, because both images were intended as logos to be viewed by the general public. This is wrong—Phibian’s work was created as a stand-alone piece *before* the CFA contacted her. The intended audience likely included not only the general public but art connoisseurs as well. Limiting the analysis to a lay perspective is therefore not necessarily justified. Moreover, a layperson’s ability to compare relevant aspects of a work using simple visual inspection can be unreliable. A work may also feature elements that impact the visual experience indirectly. These are not fully appreciable to the ordinary observer; yet, they can form an integral part of the work’s original expression. Such was the case here, and the assistance of an expert was therefore required.

*Cinar, supra* para 16 at paras 51, 55.

*Appellant Factum, supra* para 18 at paras 20-25.

Shyamkrishna Balganesh, Irina Manta, & Tess Wilkinson-Ryan, “Judging Similarity” (2014) 100:1 Iowa LR 267 at 289.

28. For expert evidence to be admissible, it must be relevant, necessary to assist the trier of fact, derive from a properly qualified expert, and not run afoul of any exclusionary rule. The Appellant argues that expert testimony was unnecessary and irrelevant because all relevant aspects of the images in this case were “directly observable” from the perspective adopted by Kermit J. This is untenable—Kermit J. merely asked how the general public would perceive each image given that both were shaded, leaping frogs. As established above, these superficial similarities are not representative of Phibian’s original expression. The bulk of her originality is manifested in her distinctive shading style. Praised as “elegant and evocative,” its intricate structure clearly transcends a direct observation of her work, creating an ineffable visual experience. The lay perspective adopted by Kermit J. was incapable of appreciating this dimension of “50 Shades of Green,” despite its extreme relevancy to Phibian’s original expression.

*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 75, [2011] 2 SCR 387.  
*Appellant Factum*, *supra* para 18 at paras 23-24.  
*Trial*, *supra* para 6 at paras 1, 15.

29. In any event, the evidence considered by Kermit J. was not probative of substantiality from a layperson's perspective. It therefore should not have outweighed the testimony of the art expert. Kermit J. concluded that "New Frog" was a copy of "50 Shades of Green" because the general public would likely confuse the two images. However, courts have explicitly held that the public simply mistaking one work for another does not address whether that work substantially reproduces the originality expressed in the other. Further, the evidence before Kermit J. did not prove that public confusion was likely. Just because the CFA hadn't received any comments following its change in logo does not mean that consumers failed to see a difference. It just means that no one mentioned the change, which is unsurprising given the lack of evidence that anyone was asked.

*Trial*, *supra* para 6 at para 15.  
*Rains v Molea*, 2013 ONSC 5016 at paras 43-44, 114 CPR (4th) 161.  
*Designers Guild*, *supra* para 24 at 2425, per Millett LJ.

***iv. The expert's perspective further supports the absence of substantial reproduction***

30. The differences highlighted by the art expert demonstrate that the bulk of Phibian's original expression in "50 Shades of Green" has not been reproduced in "New Frog." The expert emphasized that Phibian's evocative shading, the very thing which encapsulates her skill and judgment, was explicitly absent in Greenback's computer-generated image. The Appellant argues that, in giving due weight to these differences, the Court of Appeal required the images to be identical. This misinterprets the Court's dictum, which stated that "the works were not identical in the eyes of an art expert" simply to rebut Kermit J.'s observation that the works were "virtually identical." Differences between two works are not irrelevant. If their quality is such

that the images, viewed as a whole, are no longer substantially similar, there cannot be infringement. This is what the Court of Appeal concluded in this case.

*Appeal*, *supra* para 8 at paras 2, 4.  
*Appellant Factum*, *supra* para 18 at paras 33-34.  
*Trial*, *supra* para 6 at para 15.  
*Cinar*, *supra* para 16 at para 40.

## **ISSUE 2: PHIBIAN’S MORAL RIGHTS HAVE NOT BEEN INFRINGED BY THE CFA**

31. The Court of Appeal was correct in concluding that the CFA did not infringe Phibian’s moral rights through its limited use of “50 Shades of Green” and its ongoing use of “New Frog.” First, Phibian does not meet the test for infringement of moral rights because she did not adduce objective evidence of prejudice to her honour or reputation – as required by Canadian jurisprudence – nor did she establish that her belief in prejudice was reasonable. Second, the CFA should not be penalized for unknowingly violating Phibian’s preferences through its use of “50 Shades of Green.” Allowing Phibian’s appeal would give artists too much control over the business of licensees. Third, Phibian cannot hold moral rights in “New Frog,” because holding moral rights in the work of another person would be contrary to the plain language and purpose of moral rights in the *Act*. Fourth, moral rights protections should only extend to an artist’s artistic reputation, not parts of an artist’s reputation unassociated with her art. The CFA has not prejudiced Phibian’s honour or reputation through its use of “New Frog” or “50 Shades of Green.” As such, her Appeal should be dismissed.

### **A. Phibian does not meet the test for infringement of moral rights**

#### ***i. Infringement of moral rights requires objective indicia of prejudice***

32. Although Phibian was personally offended by the “Switch and Bait” program, she failed to present any objective evidence of prejudice to her honour or reputation as a result of her

association with the CFA. According to Canadian jurisprudence, objective evidence of prejudice is required to establish an infringement of moral rights.

*Prise De Parole Inc v Guérin, Éditeur Ltée*, [1995] FCJ No 1583 at 8, 104 FTR 104 [*Guérin*].

33. In the foundational moral rights case, *Snow*, the Court held that prejudice to honour or reputation involves “a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at.” However, this statement did not constitute the Court’s acceptance that an author’s subjective belief is sufficient grounds for infringement of moral rights. In *Snow*, the Court did not simply conclude that the artist’s dislike of bows on his geese was dispositive. Rather, the Court relied on objective evidence from well-respected artists and people knowledgeable in the field, to hold that the author’s moral rights were infringed.

*Snow v Eaton Centre Ltd* (1982), 70 CPR (2d) 105 at paras 5-6, 1982 CarswellOnt 1336 [*Snow*].

34. Subsequently in *Guérin*, the Court clarified *Snow*, explicitly stating that prejudice to an author’s honour or reputation requires “an objective evaluation of the prejudice based on public or expert opinion.” The Appellant mischaracterizes *Guérin* by embracing only the subjective element and ignoring the court’s affirmation (and clarification) of the objective element. In *Guérin*, the author’s shock and distress at the modifications to his books was insufficient to show “objectively, as required by Section 28.2(1) of the Act, [that] his work was modified to the prejudice of his honour or reputation.”

*Guérin, supra* para 32 at 8-9.

*Snow, supra* para 33.

*Appellant Factum, supra* para 18 at para 51.

35. Similarly in *Cinar*, the trial judge found that the author’s work had been significantly modified without his knowledge. The author was shocked and upset. As in *Guérin*, the court in *Cinar* held that the evidence did not objectively establish prejudice to honour or reputation.

*Robinson c Films Cinar inc*, 2009 QCCS 3793 at paras 955-958, 2009 RJQ 2261.

*Guérin, supra* para 32 at 8-9.

36. In *Théberge*, the Supreme Court of Canada, took a similar approach to moral rights, reasoning that a distortion, mutilation or modification of a work is only actionable if it is to “the prejudice of the honour or reputation of the author.” The Court specifically observed that “(t)he artist or writer should not become the judge in his own cause on such matters.” Again, the court has indicated that an author’s subjective perspective is insufficient.

*Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34 at para 78, [2002] 2 SCR 336 [*Théberge*].

37. The Appellant cites an exceptional case, *Boudreau*, for the proposition that “(t)he plaintiff’s moral right to integrity was violated even without harm to his reputation.” However, the Court in *Boudreau* offered a very limited discussion of moral rights. In its judgment, the Court did not consider the explicit requirement of prejudice to honour or reputation under s.28.2(1) of the Act. The holding in *Boudreau* stands in stark contrast to that in *Snow*, *Guérin*, *Cinar* and *Théberge* and is contrary to the plain language of the Act. As such, it should not carry weight in this Court’s consideration of Phiban’s moral rights.

*Boudreau v Lin*, [1997] OJ No 3397 at para 53, 57, 150 DLR (4th) 324.  
Act, *supra* para 4, s 28.

38. Despite the dearth of jurisprudence on the issue of moral rights in Canada, the pertinent cases share a common theme: infringement of moral rights requires objective evidence of prejudice. An author’s subjective feelings are not sufficient. A successful claim of moral rights infringement requires proof of prejudice based on public or expert opinion. In the case at bar, the Court of Appeal correctly upheld “the more objective standard” set in *Guérin*. Accordingly, as established in Canadian jurisprudence, Phiban fails to meet the test for moral rights infringement.

*Appeal, supra* para 8 at para 7.

*ii. Even on a subjective standard, the artist must prove that her belief is reasonable*

39. To revive her claim, the Appellant ignores the established objective standard and articulates a subjective standard for establishing moral rights infringement. This standard relies on the “reasonable” belief of an author that her honour or reputation has been prejudiced. To demonstrate reasonableness, the Appellant selectively relies on evidence which paints the “Switch and Bait” program in its worst light. When one considers a more balanced description of the “Switch and Bait” program, it becomes clear that the Appellant’s “apoplectic” reaction to the program was extreme. Neither the public nor the artistic community are likely to share Phibian’s extreme reaction and discount her reputation as a result as a result of her limited association with the “Switch and Bait” program. Prejudice to reputation is not evaluated in the eyes of an author, but through the perception of the public, rendering Phibian’s belief in prejudice highly unlikely and therefore unreasonable.

*Appellant Factum, supra* para 18 at para 54.

*Trial, supra* para 6 at para 8.

40. While Phibian finds the “Switch and Bait” program upsetting, the program has improved population balance in the CFA’s wetland – facilitating the long term conservation goals, shared by Phibian and the CFA. The Appellant characterized the program as “extreme,” however the CFA’s veterinarian deemed increasing the population of Eastern Arid-Skinned frogs “essential.” Phibian’s view of the “Switch and Bait” program is singularly negative. But her personal views are not a reflection of how the public would likely view the program or how the artistic community would view her work’s association with the program. The public, and the artistic community, are capable of evaluating the benefits of the Switch and Bait program in the context of its environmental success. A “miscellany of arguable trivia” about public perception is insufficient to establish prejudice to an author’s reputation.

*Appeal, supra* para 8 at para 8.

*Appellant Factum, supra* para 18 at para 59.

*Trial, supra* para 6 at para 5-6.

*Harrison v Harrison*, [2010] EWPC 3 at para 66, 2010 WL 1990649 (Patents County Court UK).

## **B. Phibian’s approach to moral rights in “50 Shades of Green” would give her undue control over the CFA**

41. Phibian fails to meet the standard for moral rights infringement. However, assuming she met the standard, her appeal should still be rejected because it would provide her (the artist) with an undue level of control over the CFA (the licensee). Upon discovering the “Switch and Bait” program Phibian withdrew the CFA’s license to use “50 Shades of Green.” The CFA followed Phibian’s directive and stopped using her work. The Appellant claims that the use of “50 Shades of Green” was an infringement of her moral rights during the short time before she discovered the program and voiced her disapproval to the CFA. Allowing Phibian’s claim would greatly expand the ability of artists to exercise control of their licensees business. In theory, artists would be able to hold licensees for ransom because of some peculiar affront not discussed during negotiations.

*Trial, supra* para 6 at paras 8-9.

42. The Appellant proposed an alternative to the “Switch and Bait” program: the introduction of a natural predator to cull (kill) Red Back frogs. Phibian’s fanciful idea about how to cull frogs – “natural” mauling by predator – is no more humane than the “Switch and Bait” program. The Appellant’s proposed alternative makes it clear that Phibian did not have a problem with killing frogs, she simply disagrees with the CFA’s method. While Phibian’s contribution of “50 Shades of Green” to the CFA was generous, the CFA should be able to exercise expert judgment and institute the best method for maintaining balance in its wetland.

*Appellant Factum, supra* para 18 at para 59-61.

43. Protection of an author’s moral rights under s. 28 of the *Act* is not intended to allow the author to dictate broader policy initiatives within an organization that licenses their work. Rather, the enforcement of moral rights should attempt to strike a balance “between the right to transform a work for profit or creativity and the right to the integrity of the work which will preserve its cultural or social value.” Preventing the CFA from conducting conservation policy as it sees fit would tip the scales too far in favour of the author. The CFA should not be required to pre-emptively ask permission before launching a conservation initiative nor should it be forced to adhere to Phibian’s unique brand of conservationism. Moral rights are important but should not give an artist the authority to hijack an organization’s ability to conduct its own business.

*Act, supra* para 4, s 28.

Margaret Ann Wilkinson & Natasha Gerolami, “The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright” (2009) 26:2 *Government Information Q* 321 at 328-329 [*Wilkinson*].

### **C. Phibian does not hold moral rights in “New Frog”**

44. Phibian claims that the use of “New Frog” also violates her moral rights as an author. This argument is only relevant if the Appellant is successful in convincing the Court that there has been an infringement of copyright. If “New Frog” is not an infringement of Phibian’s copyright, then it is a new work, and all moral rights associated with the work belong to Greenback.

45. In either case, “New Frog” is not an infringement of Phibian’s moral rights. Canadian copyright law is often described as a “creature of statute” and the *Act* is explicit in stating that an infringement of moral rights is any “act or omission that is contrary to any of the moral rights of the author of a work.” It is clear from the plain language of the statute that the only party intended to claim moral rights in a work is the author of that work. And, here the evidence is unambiguous – Phibian is not the author of “New Frog.”

Emir Aly Crowne Mohammed, “Moral Rights and Moral Rights in Canada” (2009) 4:4 J Intell Prop L Practice 261.  
*Act, supra* para 4, s 28.

46. Courts protect moral rights, because artistic works are an extension of the author’s personality. This special relationship between an artist and her work is reflected in the fact that moral rights cannot be assigned while an artist is alive. But implicit in these special protections is that the artist’s personality was involved in the creation of a work. Phibian played no role in the creation of “New Frog,” a piece of work that an expert says lacks Phibian’s evocative and elegant technique. As such, Phibian has no moral rights over it as an artist.

*Théberge, supra* para 36 at para 120.  
*Act, supra* para 4, s 28.

#### **D. Phibian is only entitled to claim moral rights as an artist, not as a conservationist**

47. Moral rights protections stem from the 1928 revisions to the Berne Convention, requiring all member states to include special copyright protections for artists in the form of moral rights. The Supreme Court of Canada in *Théberge* reasoned that moral rights are necessary because art is “an extension of the author’s personality, possessing a dignity which is deserving of protection.” However, the Court also held that “(t)he artist or writer should not become the judge in his own cause on such matters.” In essence, the Court is suggesting that an artist’s reputation is deserving of protection, but an artist cannot determine the content of her own reputation. The purpose of affording moral rights, is to protect an artist’s objective, artistic reputation. Providing protection to an artist on grounds unassociated with her art would overextend an artist’s ability to ascribe idiosyncratic personality traits to herself and unjustifiably limit the rights of licensees.

*Wilkinson, supra* para 46 at 326.  
Kimberly Hancock, “1997 Canadian Copyright Act Revisions” (1998) 13:1 BTLJ 517 at 519.  
*Théberge, supra* para 36 at paras 78, 120.

48. In the case at bar, Phibian is claiming prejudice to her self-perceived reputation as a conservationist, not to her reputation as an artist. Her claim falls outside the scope of s.28, which

ought only be extended to an artist's honour and reputation as an artist. Phibian's "less well-known" interest in animal conservation is not the reason she is extended special protection under the *Act*. Her elegant and evocative shading technique, applied to a leaping frog, indicate nothing about her political beliefs on conservation. As such, Phibian should not be allowed to subjectively determine her own reputation, well outside the artistic sphere, and demand moral rights protections as a conservationist.

*Act, supra* para 4, s 28.

49. Providing protections to non-artistic elements of an artist's reputation is not only wrong in principle, it is also impractical. Personal beliefs change. To expect licensees to monitor the evolving beliefs of an artist would put an undue burden on them. Granting moral rights protection for non-artistic elements of an artist's reputation requires licensees to hit a moving target of moral beliefs, unassociated with the artwork itself, and dependent on the subjective views of an artist.

#### **PART V – ORDER REQUESTED**

50. The Respondent respectfully requests an order dismissing this appeal and affirming the Court of Appeal's decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 26th day of January, 2016.

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Team No. 5R

Counsel for the Respondent

**PART VI – TABLE OF AUTHORITIES**

<b>AUTHORITY</b>	<b>Pinpoint</b>
<b>LEGISLATION</b>	
<i>Copyright Act</i> , RSC 1985, c C-42.	s. 3(1), 27(1), 28
<b>JURISPRUDENCE</b>	
<i>671122 Ontario Ltd v Sagaz Industries Canada Inc</i> , 2001 SCC 59, [2001] 2 SCR 983.	47, 55
<i>Bauman v Fussell</i> , [1978] RPC 485 (CA).	p. 487
<i>Boudreau v Lin</i> , [1997] OJ No 3397, 150 DLR (4th) 324.	53, 57
<i>Caron v Association de Pompiers de Montréal Inc</i> , 42 CPR (3d) 292, 34 ACWS (3d) 488 (FCTD).	p. 299
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13, [2004] 1 SCR 339.	16, 23
<i>Collins et al v Rosenthal et al</i> (1974), 14 CPR (2d) 143, 1974 CarswellNat 493 (WLNextCan) (FCTD).	p. 148
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73, [2013] 3 SCR 1168.	25-28, 40-41
<i>Deeks v Wells</i> (1932), [1933] 1 DLR 533, 1932 CarswellOnt (WLNextCan) (JCPC).	
<i>Designers Guild Limited v Russell Williams (Textiles) Limited</i> , [2000] 1 WLR 2416, [2000] 1 All ER 700 (UKHL).	p. 2423, 2425

<i>Édutile Inc v Automobile Protection Association (APA)</i> (2000), 188 DLR (4th), 6 CPR (4th) 211.	p. 142
<i>Factum of the Appellant, Team 6A</i> at para 43 [ <i>Appellant Factum</i> ].	20-25, 28, 33-34, 36-38, 40-41, 43, 51, 54, 59-61
<i>Francis Day &amp; Hunter Ltd v Bron</i> , [1963] Ch 587, [1963] 2 WLR 868, per Diplock LJ (CA).	p. 623-624
<i>Gondos v Hardy</i> (1982), 64 CPR (2d) 145, 38 OR (2d) 555 (Ont HCJ).	p. 160
<i>Harrison v Harrison</i> , [2010] EWPC 3, 2010 WL 1990649 (Patents County Court UK).	66
<i>Ladbroke (Football) Ltd v William Hill (Football) Ltd</i> , [1964] 1 WLR 273, per Hodson LJ, [1964] 1 All ER 465 (UKHL).	p. 288
<i>Masterpiece Inc v Alavida Lifestyles Inc</i> , 2011 SCC 27, [2011] 2 SCR 387.	75
<i>Phibian v The Canadian Frog Association</i> , 2015 FCIP 122 at para 2, rev'd 2015 FCA 455.	1-5, 7-11, 14-19
<i>Philip Morris Products SA v Marlboro Canada Ltd</i> , 2010 FC 1099, FCR 213, aff'd on copyright issues, 2012 FCA 201, 103 CPR (4th) 259.	320, 374
<i>Prise De Parole Inc v Guérin, Éditeur Ltée</i> , [1995] FCJ No 1583, 104 FTR 104.	8-9
<i>Rains v Molea</i> , 2013 ONSC 5016, 114 CPR (4th) 161.	43-44
<i>Robinson c Films Cinar inc</i> , 2009 QCCS 3793, 2009 RJQ 2261.	955-958
<i>Snow v Eaton Centre Ltd</i> (1982), 70 CPR (2d) 105, 1982 CarswellOnt 1336 [ <i>Snow</i> ].	5-6

<i>Solar Thomson Engineering Co Ltd v Barton</i> , [1977] RPC 537, per Buckley LJ (CA).	p. 559-560
<i>The Canadian Frog Association v Phibian</i> , 2015 FCA 455.	2-10
<i>Théberge v Galerie d'Art du Petit Champlain Inc</i> , 2002 SCC 34, [2002] 2 SCR 336.	78, 120
<i>U &amp; R Tax Services Ltd v H &amp; R Block Canada Inc</i> (1995), 62 CPR (3d) 257, 56 ACWS (3d) 396 (FCTD).	p. 268-269

<b>SECONDARY MATERIALS</b>	
Emir Aly Crowne Mohammed, "Moral Rights and Moral Rights in Canada" (2009) 4:4 J Intell Prop L Practice 261.	p. 261
Kimberly Hancock, "1997 Canadian Copyright Act Revisions" (1998) 13:1 BTLJ 517 at 519.	p. 519
Margaret Ann Wilkinson & Natasha Gerolami, "The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright" (2009) 26:2 Government Information Q 321.	p. 326, 328-329
Shyamkrishna Balganes, Irina Manta, & Tess Wilkinson-Ryan, "Judging Similarity" (2014) 100:1 Iowa LR 267.	p. 289