

## **2024-2025 HAROLD G. FOX MOOT**

### **MOOT PROBLEM**

The following are the 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 for Canada; the reasons and judgment for which are also set out below.

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. The Court of Appeal is not bound by Canadian precedent on standard review, nor is the Supreme Moot Court. Please do not make arguments regarding the standard of review.

The decision of the Court of Appeal is now appealed to the Supreme Moot Court for Intellectual Property Appeals.

All the issues raised in the reasons given by the lower courts may be addressed by counsel for the Appellants or Respondent 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. Both the Appellants and Respondent should be prepared to address the appropriate scope of any injunctive relief or orders.

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

**Date: 20240108**

**Docket: T-951-20**

**Citation: 2024 TCIP 13**

**Ottawa, Ontario, January 8, 2024**

**PRESENT: The Honourable Madam Justice Stock**

**ERNESTO MORALES**

**Plaintiff**

**- and -**

**EMI LLC and BUCK DOLLAIRE**

**Defendants**

**REASONS FOR JUDGMENT**

**Stock, J.**

**OVERVIEW**

[1] The plaintiff, Mr. Ernesto Morales, is a prominent Canadian academic, activist, and business philosopher. In his professional life, he writes and lectures on the topic of ethical investing and is a vocal critic of “greedy corporate culture” and the conventional investment industry. Morales is also an amateur artist and enjoys painting and drawing in his spare time. While Morales has never sold any of his artistic works, he frequently gives paintings to friends and family as gifts and has occasionally exhibited his works at fundraisers.

[2] In this action, Morales has sued his former business partner, Mr. Buck Dollaire, and the business they co-founded together, EMI LLC, alleging copyright and moral rights infringement. The defendant, Dollaire, is a Canadian businessman, philanthropist and investment guru and current owner of the defendant EMI, a Canadian based investment fund.

## **THE FACTS**

[3] Dollaire and Morales were childhood friends, meeting in grade-school in the 1980s. By high school, they shared a love of math and began investing together. As idealistic students, they were fascinated by the concept of “ethical investing”, the practice of using social, moral, or religious values as guardrails for investment strategy.

[4] Their interest in ethical investing continued to grow during the dot-com boom and bust of 2000. While attending business school, Morales and Dollaire cofounded the Canadian Society for Ethical Investment (“CSEI”), a watchdog organization that identifies problematic industries, companies, and funds for Canadian investors to avoid if they wanted to “invest ethically”. Neither Morales or Dollaire remains involved 20 years later, but CSEI has become reputable in providing Canadian investors with “ethical ratings” of companies and funds to guide their investment choices. CSEI’s ratings grade many industries, companies, and investment funds on their environmental, social, geopolitical, or human health impact.

[5] By 2006, Dollaire and Morales had made a small fortune in the stock market and upon deciding to become professional investment managers they co-founded EMI. It was agreed at trial that the name EMI was chosen as an acronym for “Ethically Minded Investing” and

its mandate was to invest its assets under management using strict ethical principles. Morales and Dollaire were co-CEOs, with Morales also serving as President of Investment Strategy and Dollaire serving as President of Investment Operations.

[6] EMI experienced tremendous success in its early years. The global financial crisis of 2008 ravaged many investment funds. Meanwhile, EMI was well insulated due to its avoidance of assets related to petrochemicals and predatory lending. As a result, EMI achieved 2008 returns that were amongst the best of any investment fund in Canada. Almost overnight, Morales and Dollaire went from industry outsiders to all-stars. Money poured into EMI from investors seeking exceptional returns on ethical investments.

[7] Morales and Dollaire touted EMI's 2008 success as proving the viability of ethical investing. Morales became preoccupied with advancing the ideology of ethical investing leaving Dollaire to handle the investments and the management of the business. Morales wrote several books and became a frequent commentator for business news publications and television networks. Using his platform, he praised ethical investing as crucial in incentivising good corporate governance and warned that public investment in unethical companies was a root cause of environmental and social issues endemic to western capitalist societies. Morales even advanced ethical investing through his art. In particular, he painted a mural titled "Greedy Investor" on EMI's boardroom wall. A reproduction is shown below.



[8] The Greedy Investor depicts a dour businessman standing stuck in a river of money while a series of faceless men observe him attentively. It was painted directly on a section of paneling and measures 12 feet tall and 8 feet wide. Morales testified that the Greedy Investor was a critique on unchecked capitalism and was intended to serve as a reminder of EMI's important mandate.

[9] The years that followed were much less fruitful for EMI. The outsized returns became modest and paled in comparison to competitor funds that were not limited to only the most ethical investments. Many investors lost interest in ethical investing and withdrew their funds from EMI.

[10] In 2011, Morales sold his stake in EMI to Dollaire and took a position as a professor at a leading Canadian business school. He wrote extensively and taught courses on business ethics, good governance, and ethical investing. Morales' wealth and reputation made him very popular amongst students, many of whom considered themselves "activists" and fully

subscribed to his ideologies. These activists frequently conducted boycotts and protests demanding corporate change at entities criticized by Morales.

[11] Dollaire continued to run EMI, making modest returns for a small number of clients committed to ethical investing. He focused on identifying new technologies that could impart social or environmental change. Dollaire was an early proponent of cryptocurrency, which he viewed as a tool that could provide economic empowerment to disadvantaged populations. In 2017, EMI's substantial investments in cryptocurrency made Dollaire and his investors quite wealthy.

[12] While Morales and Dollaire had always been ideologically aligned, they now diverged. Morales was vehemently opposed to cryptocurrency, citing its immense energy consumption and use to facilitate criminal transactions. In 2018, he began criticizing Dollaire and EMI publicly for "relaxing their morals" and making "unethical investments in cryptocurrency". CSEI apparently shared these concerns and revoked its endorsement of EMI as a top-rated ethical investment fund, dropping its rating from A+ to A-.

[13] The dispute between Morales and Dollaire continued to escalate. Dollaire accused Morales of being out of touch with the realities of business and contended that the social benefits of cryptocurrency outweighed the potential harms. He also noted that his wealth generated from cryptocurrency allowed him to generously support social causes and further the greater good.

[14] In response, Morales renounced his role in founding EMI and demanded that any references to his involvement be removed from EMI's website and corporate documents. He further demanded that the Greedy Investor be painted over or otherwise removed from

EMI's premises. Morales also called for Canadians to stop investing with EMI until it regained its moral compass.

[15] Dollaire publicly refused Morales' demands. In defiance, Dollaire removed the painted panel containing the Greedy Investor from EMI's boardroom and had it prominently displayed in EMI's office lobby. Beside the Greedy Investor he erected a plaque listing Morales as the co-founder of EMI and identifying him as the painter of the Greedy Investor.

[16] Activists began demonstrating outside EMI's offices, shaming employees and clients and calling for a boycott of EMI. There was no evidence that Morales encouraged these protests, but he acknowledged he was well aware of them and that he may have been able to stop them if he wanted to. During one such protest, several activists pushed past EMI's security and into the EMI lobby. Upon their arrest, it was determined that the activists were students of Morales. The activists admitted they had come to the EMI lobby with cans of pink paint, which they intended to throw on the Greedy Investor in protest. They denied that Morales was aware of their plan.

[17] Not easily deterred, Dollaire took steps to protect the Greedy Investor from further threats of vandalism. He commissioned a digital reproduction of the Greedy Investor. This involved performing a high-definition scan of the sizeable painting to create a pixel-by-pixel data file and then applying the image to a 12-foot by 8-foot canvas, pixel by pixel, using a computer-controlled paint sprayer. The digital reproduction was then displayed in the original Greedy Investor's position in the EMI lobby. The original Greedy Investor was then transferred to Dollaire's private collection for safe keeping.

[18] Unwilling to accept the defendants' continued use of the Greedy Investor, Morales commenced this action.

## **ANALYSIS**

[19] The allegation before the Court is that defendants, Dollaire and EMI, have infringed Morales' copyright and moral rights in the Greedy Investor painting. Morales did not claim any monetary damages. Instead, he seeks an order requiring the defendants to destroy, or deliver up, the Greedy Investor and all reproductions. Alternatively, Morales seeks an injunction prohibiting the defendants from displaying the Greedy Investor or any reproduction in association with EMI's business or, in the further alternative, prohibiting the defendants from identifying Morales as the artist of the Greedy Investor.

[20] For the reasons that follow, I find in favour of the defendants.

### *Copyright Infringement*

[21] Copyright subsists in original artistic works, providing the copyright owner the sole right to reproduce the work or any substantial part thereof. Ownership of copyright is a prerequisite to asserting infringement. The Parties agree, as do I, that the Greedy Investor is an original work attracting copyright protection. However, the defendants assert that EMI, not Morales, is the owner of copyright in the Greedy Investor.

[22] The author of an artistic work is presumed to be the copyright owner unless the contrary is proven. However, subsection 13(3) of the *Copyright Act* creates an exception where a work is created by an employee in the course of their employment. Absent an agreement to the contrary, the employer and not the author is the first owner of copyright.



- [23] Dollaire and EMI argue that the Greedy Investor was created by Morales in the course of his employment, such that copyright vests with his employer, EMI. I agree.
- [24] Morales testified that he painted the Greedy Investor on a long weekend outside of normal business hours, using his own painting supplies that he brought from home. He testified that painting was not one of his duties and that the Greedy Investor was unrelated to his responsibilities associated with investment strategies. The painting wasn't performed at the request of EMI or Dollaire. Instead, Morales argued that the painting was a personal gift to Dollaire to celebrate EMI's success. As corroboration, he produced a personalized greeting card that he gave to Dollaire when the painting was unveiled at a surprise party.
- [25] None of these facts affect my conclusion. It would be sufficient that the Greedy Investor was created on EMI's premises, let alone the fact it was painted directly onto one of EMI's walls. I find that the Greedy Investor was made in the course of employment and that the copyright is therefore owned by EMI. While this finding is sufficient to dispose of the copyright infringement allegations, I will briefly comment on the defences raised.
- [26] The defendants argued that the digital reproduction of the Greedy Investor was within the scope of user rights protected by the *Copyright Act*. First, it was argued that the digital reproduction was permitted as a back-up copy under subsection 29.24(1). Given the realistic threat of vandalism, it is reasonable that Dollaire created the digital reproduction and displayed it to protect and preserve the original. Second, it was argued that the digital reproduction was for private purposes pursuant to section 29.22. The defendants have not used the digital reproduction of the Greedy Investor for any commercial purpose so this defence would have succeeded. While Dollaire's decision to display the Greedy Investor

in EMI's lobby is petty and childish, I find that it is within the user rights provided by the *Copyright Act*.

[27] As a closing remark on the issue of copyright, I find that Morales' copyright allegations are more properly characterized as an alleged infringement of his moral rights. Mr. Morales does not claim he has suffered any damages, and his concern is that he doesn't want the Greedy Investor to be associated with Dollaire and EMI. Indeed, during cross-examination at trial, Morales acknowledged that he would not have authorized the defendants to display the Greedy Investor or its digital reproduction in the EMI lobby for "even an obscene amount of money" and his objective was to no longer be associated with the defendants. I am mindful of the comments from *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, that economic rights and moral rights are distinct and should not be blurred by tilting the balance in favour of the copyright holder at the expense of the owner of proprietary rights in a work. Even if Morales owned the copyright in the Greedy Investor, his concerns should have been addressed via moral rights.

#### *Moral Rights*

[28] Morales asserts that his moral rights of attribution and integrity have been infringed by Dollaire and EMI. He asserts that the digital reproduction violates the integrity of the Greedy Investor as it distorts the original. He also asserts that the display of the Greedy Investor or its digital reproduction in EMI's lobby creates an association with EMI and its investment services. Lastly, he argues that the plaque identifying Morales as the painter of the Greedy Investor violates his moral right to anonymity.

- [29] Moral rights are distinct from copyright in a work. I accept that Morales has moral rights in the Greedy Investor even though copyright vested with his employer, EMI.
- [30] As a threshold issue, Morales comes to Court seeking relief to protect the integrity of his artistic work and prejudice to his honour and reputation. However, he who comes to court seeking equity must come with clean hands. Morales, like Dollaire, has acted in a childish and petty way and I decline to exercise any discretion in his favour.
- [31] Regarding distortion, Morales argues that the digital reproduction fails to accurately reproduce the colours used in the original and entirely omits the brushwork and texture obtained through his use of oil-based paints and painting techniques. The Court heard evidence from an art expert in support of this argument and I accept that, due to the limitations of the computer-controlled paint sprayer, the digital reproduction lacks some minor details and is artistically inferior to the original. However, infringement of the right of integrity also requires the asserted distortion to cause prejudice to the performers honour or reputation. Notwithstanding subsection 28.2(2), the prejudice advanced by Morales is unrelated to the distortion of the digital reproduction. Indeed, Morales argued that he was similarly prejudiced by the display of the original Greedy Investor at EMI. I find that Morales' concern is not properly characterized as prejudice from the distortion, but instead the association of either the original or digital reproduction with EMI and Dollaire. I dismiss the claim that minor distortions present in the digital reproduction violate Morales' rights of integrity of the Greedy Investor.
- [32] I also dismiss the claim that the integrity of the Greedy Investor has been violated through association with EMI. Morales waived any such claim when he painted the Greedy Investor

on EMI's wall, at least implicitly authorizing its association with EMI. It is irrelevant that defendants' morals may no longer align with those of Morales. Allowing a moral rights holder to unilaterally retract proprietary rights granted would tilt the balance too far in favour of rights holders to the prejudice of users.

[33] The claims regarding the right of attribution (or anonymity) must also fail. The right to anonymity is limited to what is reasonable in the circumstances. Through his own actions and public statements, Morales is widely known as the artist that painted the Greedy Investor. It is ironic that his demand for anonymity was made as part of very public criticism of the defendants and followed with highly publicized litigation before this court. Morales' expectation of anonymity is objectively unreasonable.

[34] Furthermore, the right of anonymity is provided by section 14.1 of the *Copyright Act*. This right applies only in connection with an act mentioned in section 3, which sets out the exclusive rights of the copyright owner. As set out above, EMI is the copyright owner and, in any event, has not committed any act that would be an infringement of copyright. The anonymity rights conferred by the *Copyright Act* are not without limitation and do not provide Morales a right to demand anonymity in association with the original Greedy Investor.

## CONCLUSION

[35] For the reasons above, I dismiss the action in its entirety and refuse to grant any injunction or order sought. Costs are awarded to the defendants.

Irene P.O. Stock  
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Judge

**COURT OF APPEAL FOR CANADA**  
**INTELLECTUAL PROPERTY DIVISION**

**Date: 20240930**  
**Docket: A-232-24**  
**Citation: 2024 CAIP 333**

**CORAM: Banks J.A.,**  
**Bonds J.A.**  
**Gold J.A.,**

**BETWEEN:**

**ERNESTO MORALES**

**Appellant**

**- and -**

**EMI LLC and BUCK DOLLAIRE**

**Respondents**

Heard at Ottawa, Ontario, on September 12, 2024.

Judgment delivered at Ottawa, Ontario on September 30, 2024

**REASONS FOR JUDGMENT BY:**

**Banks J.A.**

**CONCURRED BY:**

**Bonds J.A.,**  
**Gold J.A.**

**REASONS FOR JUDGMENT**

**BANKS J.A.**

**BACKGROUND**

[1] This is an appeal by Mr. Ernesto Morales from the Trial Court’s decision in 2024 TCIP 13, dismissing his allegations that Mr. Buck Dollaire and EMI LLC infringed his copyright moral rights.

## COPYRIGHT

- [2] On the issue of ownership, the Trial Judge's finding that the Greedy Investor was painted on EMI's premises was insufficient. The most important factor ought to have been whether painting was within the duties and responsibilities associated with Morales' employment. I find that it was clearly not. Rather, the Greedy Investor was created by Morales in his personal capacity and gifted to Dollaire. While Dollaire has proprietary rights to the Greedy Investor, copyright is owned by Morales.
- [3] Due to her finding on ownership, the Trial Judge failed to fully consider the asserted defences. Had she performed this analysis, she ought to have found they did not provide any exception to a finding of copyright infringement. While sections 29.22 and 29.24 of the *Copyright Act* protect important user rights, the Court cannot extend those user rights as far as the respondents' request in this case.
- [4] Regarding back-up copies, subsection 29.24(1)(a) of the *Copyright Act* permits reproduction if the copy is only used for backup purposes in case the source copy is lost, damaged, or otherwise rendered unusable. While I agree with the Trial Judge that the respondents' reproduction was made to protect and preserve the original, this is not the correct test. The digital reproduction has been displayed in EMI's lobby, which is a use of the reproduction that is not solely for backup purposes.
- [5] Regarding reproductions for private purposes, the Trial Judge again refers to the wrong test. This is understandable as neither party cited precedents setting out the permissible scope of "private purposes". I do not need to decide that question as it is clear to me that

the respondents did not meet their burden in proving this defence applies on the facts of this case.

[6] I question whether sections 29.22 and 29.24 have meaningful application in the context of physical artistic works like paintings or sculptures. I need not decide the point given my findings above, but both sections appear better suited to protect works stored in electronic format.

[7] Similarly, I need not address the Trial Judge's concerns about blurring the lines between economic and moral rights infringement as I have found that the respondents' actions are clear violations of the economic rights provided by the *Copyright Act*.

[8] My finding of copyright infringement is sufficient to order the destruction, or delivery up, of the Greedy Investor reproduction. To address the relief sought with respect to the original Greedy Investor, it is necessary to turn to the issue of moral rights.

## **MORAL RIGHTS**

[9] On the issue of moral rights, the Trial Judge appears to have let her disapproval of Morales' conduct dictate her findings. While moral rights address issues of integrity, honour, and reputation, this must not be conflated with equitable relief. Moral rights were conferred by parliament through the statutory provisions of the *Copyright Act*. They are legal rights not equitable rights and I see no basis for them to be granted or denied based on the exercise of judicial discretion.

[10] While I do not endorse Morales' conduct, departing from the statutory provisions, as the Trial Judge did, risks creating legal precedent that may negatively impact moral rights

holders broadly. Furthermore, where equity is applied it a two-way street. The respondents' conduct appears to be equally problematic and equitable defences would be equally unavailable. The Court must resist creating a tally chart of inequitable conduct and must interpret and apply the statutory provisions as enacted.

[11] Subsection 28.2(1) of the *Copyright Act* provides that the right of integrity is infringed if the author's honour or reputation is prejudiced when a work is (a) distorted, mutilated, or otherwise modified or (b) used in association with a product, service, cause, or institution.

[12] The Trial Judge found that the digital reproduction of the Greedy Investor was modified relative to the original. Having made this finding, it was not open to her to find that there was no prejudice. Subsection 28.2(2) provides that any distortion, mutilation, or other modification of a painting satisfies the requirement for prejudice and there is no residual discretion for a court to find otherwise.

[13] The Trial Judge's findings on "used in association..." are similarly impacted by her exercise of discretion. The proper approach was to focus on the statutory language and whether the association caused or causes any prejudice to Morales' honour and reputation. I disagree that Morales authorizing the Greedy Investor to be displayed in an EMI boardroom waives his right to later claim any prejudice. The Greedy Investor was created as a reminder of the importance of ethical investing. If EMI is no longer investing ethically and is displaying the Greedy Investor more publicly, then Morales may now be suffering prejudice that violates the right of integrity.

[14] It is quite clear that Morales now has a legitimate subjective belief that he has suffered prejudice. As someone who has spent a lifetime focused on the issue of ethics, he clearly



takes such matters very seriously. What is less clear is whether his belief is objectively reasonable. In my view, the best objective evidence is CSEI's decision to revoke its endorsement of EMI. I therefore find that Morales has suffered the necessary prejudice to his honour or reputation. Any prior authorization allowing EMI to associate itself or its ethical investment services with the Greedy Investor must be interpreted narrowly and does not preclude a finding that the respondents' current usage violates Morales' right of integrity.

[15] The moral right of attribution or anonymity is provided by subsection 14.1(1) of the *Copyright Act*. I agree with the Trial Judge that the right to remain anonymous is limited by what is reasonable in the circumstances. However, the *Copyright Act* does not restrict an owner of moral rights from asserting the right of attribution or anonymity against a copyright owner, nor is an act of copyright infringement required.

[16] The plaque identifying Morales as the painter of the Greedy Investor was only erected by Dollaire after Morales had demanded that the Greedy Investor painting be removed from EMI's boardroom. The only conclusion is that this attribution was deliberate and retaliatory. I find that these actions violated Morales' right to anonymity. Under the circumstances, it is certainly reasonable to require the respondents to remove the plaque identifying Morales, allowing him whatever anonymity may remain.

## CONCLUSION

[17] For the above reasons, I allow the appeal and set aside the decision below. I hereby issue an injunction prohibiting the respondents from displaying the Greedy Investor or any reproduction in association with their businesses or services. I further order that the respondents are to (i) deliver up to the appellant, or destroy at their own expense, the digital reproduction and (ii) remove the plaque identifying Morales as the painter of the Greedy Investor. The appellants are awarded costs on this appeal and below.

P. Iggy Banks

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J.A.

**Bonds, J.A.**

I concur.

**Gold, J.A.**

I too concur.