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JANUARY 2014

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THE ROBINSON CASE: THE FINAL CHAPTER

BERNARD LAROCQUE and JONATHAN LACOSTE-JOBIN

with the collaboration of Jérôme Bélanger, articling student

LAST DECEMBER 23, THE SUPREME COURT OF CANADA PARTIALLY OVERTURNED THE DECISION OF THE COURT OF APPEAL OF QUÉBEC IN THE CASE OF *CINAR CORPORATION V. ROBINSON*[1] AND REINSTATED MOST OF THE CONCLUSIONS OF THE SUPERIOR COURT OF QUÉBEC.

BACKGROUND

In the 1980s, Claude Robinson ("Robinson") developed a project for a television series entitled "The Adventures of Robinson Curiosity" ("Robinson Curiosity"). He partnered with Pathonic to whom he had presented his project. His copyright was registered shortly afterward and Productions Nilem Inc. ("Nilem"), of which he was the sole shareholder, was named owner of the copyright.
In 1986, Pathonic partnered with Cinar so that Cinar could represent Pathonic's interests in the United States. Cinar's directors, Micheline Charest and Ronald Weinberg, were provided with a copy of all of the documents for the Robinson Curiosity project. However, the project never saw the light of day.

In parallel with Robinson's activities, during the 1990s, a producer with France Animation, Christophe Izard, presented a project for a televised series whose main character was named Robinson Sucroë ("Sucroë"). Cinar was involved as early as 1992 in the production of this project, and, as of 1993, in the writing and co-script writing under contracts with France Animation.

Robinson continued his work on his Curiosity project during 1994. In August 1995, Cinar registered copyright to the Sucroë project which was first broadcast in September 1995. Robinson immediately noticed similarities between the Sucroë project and his Curiosity project.

In July 1996, Robinson and Nilem Inc. brought an action for damages and an injunction against Cinar, Charest, Weinberg, France Animation, Izard and other European partners, including Ravensburger and the BBC, alleging plagiarism of their work.

DECISION OF THE SUPERIOR COURT OF QUÉBEC

After 83 days of trial, Justice Claude Auclair concluded that the defendants had had access to the Robinson Curiosity project and work during the 1980s.

The judge found that even though the Robinson Curiosity work had not been completed, it was nevertheless an original work because it was sufficiently developed and advanced. There were many similarities between the characters and drawings of Sucroë and the original Robinson Curiosity project, despite some misleading changes. According to the Court, a layperson would have been convinced of the similarity, which gave rise to a presumption of infringement that was not rebutted by the defendants.

The Court found the defendants solidarily liable and that Cinar and its two directors, Charest and Weinberg, had violated their obligations of good faith and loyalty. Therefore, Charest and Weinberg could not hide behind the corporate veil to escape their liability.

[1] 2013 SCC 73.

The injunctions issued applied against the BBC preventing it from broadcating Sucroë. The Court also ordered that the copies be returned, followed by their destruction within 60 days.

As for the damages, Justice Auclair ordered the defendants to pay a total of $5,224,293, detailed as follows:

- $607,489 in compensatory damages for pecuniary loss;
- $1,716,804 in loss of profits (50% of the profits earned by the Sucroë project, given the plaintiffs' partnership with Pathonic);
- $400,000 for the psychological harm suffered by Robinson;
- $1,000,000 in punitive damages;
- $1,500,000 for costs on a solicitor-client basis, since the defendants tried to exhaust the plaintiffs in their conduct of the proceeding.

COURT OF APPEAL'S DECISION

The Court of Appeal allowed the appeal in part. It upheld the trial judge's decision on the infringement of Robinson's work, finding that there was no error in the trial judge's reasoning. The Court also affirmed the liability of Cinar and of Weinberg, both personally and in his capacity as liquidator of the estate of the deceased, Micheline Charest as well as of Izard.

However, the Court of Appeal reduced the damage award to a total of $2,736,416. As for the loss of profits, the Court set aside the awards against Weinberg and Izard because only Cinar and France Animation benefited from the use of the Sucroë work. The Court also set aside the award of $1,117,252 relating to the musical rights, based on the finding that the Robinson Sucroë musical work was original and dissociable from the Curiosity project. According to the judgment, there was therefore no violation of Robinson's copyright in this respect.

Finally, according to the Court of Appeal, the psychological harm suffered by Robinson was a bodily injury of a non-pecuniary nature for which compensation was limited by the cap set by the Supreme Court of Canada.[2] Since the present value of this cap was $242,700, the Court awarded 50% of this amount, or $121,350, in light of the circumstances and the seriousness of the psychological harm.

The Court of Appeal also reduced the amounts awarded in punitive damages and assessed them individually at $100,000 for Cinar and $50,000 each for Weinberg, Charest and Izard. It further declared that these awards were not solidary.

As for costs, the Court of Appeal upheld the trial judge's decision, but did not allow the solicitor-client costs incurred in the appeal proceedings.

THE SUPREME COURT'S DECISION

In a unanimous judgment the reasons of which were written by Chief Justice McLachlin, the Supreme Court upheld the judgment of the Court of Appeal on the issue of the defendants' liability. It stated that one must determine the cumulative effect of the copied features of the Curiosity project in deciding whether they amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole. To determine whether a substantial part has been copied, one must conduct a qualitative and holistic assessment of the similarities between the works, taking into account the relevant resemblances and differences. In the absence of a palpable and overriding error in both the trial judge's and Court of Appeal's assessment of the facts, the Supreme Court refused to intervene and affirmed the defendants' liability.

[2] According to the trilogy of cases, i.e. *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229, *Thornton v. Board of School Trustees of School District No. 57* [1978] 2 S.C.R. 267, and *Arnold v. Teno* [1978] 2 S.C.R. 287, which set this cap at $100,000 in 1978.

On the assessment of damages, the Court noted that the Court of Appeal could not intervene unless there was a palpable and overriding error in fact by the trial judge and reassessed each head of damages. It set the amount to which Robinson and Nilem was entitled at $4,379,293. With respect to the loss of profits, the Supreme Court found that the trial judge had committed no error in allowing the amount for the soundtrack to the work on the basis that it was indissociable from the work itself, and reinstated the holding of the trial judgment on this point. However, it found that this award must not be solidary since its aim was the disgorgement of the profits illegally obtained by each of the defendants personally. Accordingly, Charest, Weinberg and Izard were not personally bound to disgorge the profits since they did not benefit therefrom.

As regards the non-pecuniary damages, the Supreme Court held that the application of the cap on claims should not be extended beyond those stemming from bodily injury. In this case, the non-pecuniary damages suffered by Robinson did not stem from a bodily injury. It should rather be characterized as psychological suffering stemming from material injury, i.e. the infringement of his copyright which is equivalent to a breach of his property rights. The Court reinstated the trial judgment and confirmed that Robinson was entitled to the amount of $400,000 under this head.

The Court also confirmed that punitive damages cannot be awarded on a solidary basis. However, it found that, while the Court of Appeal was correct in reassessing the amount thereof, it did not give sufficient weight to the gravity of the defendants' conduct. In the Court's view, the amount of $500,000 achieved an appropriate balance between the overarching principle of restraint that governs the awarding of such damages and the need to deter conduct of such gravity. It apportioned the liability for these damages, awarding $200,000 against Cinar and $100,000 against each of Weinberg, Charest and Izard.

COMMENTS

This decision finally brings to a close this dispute between the parties which has lasted nearly 18 years, and largely upholds the trial judge's analysis of the case.

The judgment will certainly have a significant impact on subsequent case law not only on copyright, but also on other areas of the law, particularly the characterization of psychological damages based on their source and the refusal to apply the cap on non-pecuniary damages for psychological harm stemming from material prejudice. The judgment will also guide the courts in the awarding of punitive and exemplary damages and on the principles of solidarity applicable thereto.

BERNARD LAROCQUE

514 877-3043
blarocque@lavery.ca

JONATHAN LACOSTE-JOBIN

514 877-3042
jlacostejobin@lavery.ca

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE DAMAGE INSURANCE GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

LÉA BAROT-BROWN 514 878-5432 lbarotbrown@lavery.ca
ANNE BÉLANGER 514 877-3091 abelanger@lavery.ca
MARIE-CLAUDE CANTIN 514 877-3006 mccantin@lavery.ca
LOUISE CÉRAT 514 877-2971 lcerat@lavery.ca
LOUIS CHARETTE 514 877-2946 lcharette@lavery.ca
DANIEL ALAIN DAGENAIS 514 877-2924 dadagenais@lavery.ca
SOPHIE DE SAUSSURE 514 877-3066 sdesaussure@lavery.ca
MARY DELLI QUADRI 514 877-2953 mdquadri@lavery.ca
BRIAN C. ELKIN 613 560-2525 belkin@lavery.ca
JULIE GRONDIN 514 877-2957 jgrondin@lavery.ca
JEAN HÉBERT 514 877-2926 jhebert@lavery.ca
ODETTE JOBIN-LABERGE, AD. E. 514 877-2919 ojlaberge@lavery.ca
JONATHAN LACOSTE-JOBIN 514 877-3042 jlacostejobin@lavery.ca
MAUDE LAFORTUNE-BÉLAIR 514 877-3077 mlafortunebelair@lavery.ca
BERNARD LAROCQUE 514 877-3043 blarocque@lavery.ca
CLAUDE LAROSE, CRIA 418 266-3062 clarose@lavery.ca
JEAN-FRANÇOIS LEPAGE 514 877-2970 jflepage@lavery.ca
JEAN-PHILIPPE LINCOURT 514 877-2922 jplincourt@lavery.ca
ROBERT W. MASON 514 877-3000 rwmason@lavery.ca
MARTIN PICHETTE 514 877-3032 mpichette@lavery.ca
MARIE-HÉLÈNE RIVERIN 418 266-3082 mhriverin@lavery.ca
IAN ROSE 514 877-2947 irose@lavery.ca
JEAN SAINT-ONGE, AD. E. 514 877-2938 jsaintonge@lavery.ca
VIRGINIE SIMARD 514 877-2931 vsimard@lavery.ca
EVELYNE VERRIER 514 877-3075 everrier@lavery.ca