Written by
Kevin Sartorio and **Corey Willard**

Cinar's arguments marooned by Canadian Supreme Court

A landmark decision of the Supreme Court of Canada has set new precedents for evaluating whether a substantial part of a creative work has been copied, the use of expert witnesses and damages for copyright infringement

On 23rd December 2013 the Supreme Court of Canada released another decision with significant importance for Canadian copyright law in *Cinar Corporation v Claude Robinson* (2013 SCC 73).

The artist and plaintiff, Claude Robinson (and his company), sued Cinar Corporation and others over children's television show *Robinson Sucroë*, which first aired in 1995 and which bore significant similarities to a children's television show that had been conceived and developed by Robinson, called *The Adventures of Robinson Curiosity*.

Over the course of several years, Robinson had tried to get his show produced, but his efforts to attract funding and partnership were unsuccessful. Cinar Corporation was among those to which he had pitched his ideas and disclosed his characters, storyboards, scripts, synopses and promotional materials in the mid to late 1980s.

At trial, the defendants were found to have infringed Robinson's work and he was awarded more than C$5 million in damages and costs. The Quebec Court of Appeal upheld most of the trial judge's findings of infringement, while reducing some of the monetary relief awarded at trial.

The Supreme Court of Canada affirmed the trial judge's findings of infringement and allowed a considerable increase in the monetary relief awarded to Robinson by the Quebec Court of Appeal. The Supreme Court of Canada's unanimous decision was written by Chief Justice McLachlan.

On the question of infringement, Cinar Corporation argued that the trial judge had erred by using a holistic approach to determine whether its children's programme reproduced a substantial part of Robinson's work (Canadian copyright law protects only against the unauthorised reproduction of a substantial part of another's work). Cinar Corporation argued that the trial judge should have applied the following three-step approach:

- Determine what elements of Robinson's work were original, within the meaning of the Copyright Act.
- Exclude non-protectable features of Robinson's work (eg, ideas, elements drawn from the public domain and generic elements commonplace in children's television shows).
- Compare what remained after this weeding-out process to Cinar's programme *Sucroë*.

Only then, it argued, should the judge have determined whether a substantial part of Robinson's work had been reproduced.

This approach is similar to the abstraction-filtration-comparison approach used in the United States to assess substantial copying in the context of computer software infringement, which has also been discussed in Canadian copyright disputes.

While not excluding the possibility that such an approach could be useful in some circumstances (eg, computer software disputes), the chief justice stated that it would not be appropriate in many cases. She concluded that Canadian courts should generally continue to adopt a qualitative and holistic approach to assessing substantiality: "The approach proposed by the Cinar appellants would risk dissecting Robinson's work into its component parts. The 'abstraction' of Robinson's work to the essence of what makes it original and the exclusion of non-protectable elements at the outset of the analysis would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson's work is individually original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson's skill and judgment expressed in his work as a whole."

Cinar Corporation also argued that the trial judge had erred by basing the bulk of his findings regarding infringement on evidence tendered by a semiologist. This expert offered evidence at trial that there were latent similarities in how the two works at issue used atmosphere, dynamics, motifs, symbols and structure to convey meaning, which helped to establish a greater degree of copying than might at first have been apparent.

For expert evidence to be admitted at trial in Canada, it must be relevant, be necessary to assist the trier of fact, not offend any exclusionary rule and involve a properly qualified expert.

Cinar Corporation argued that the semiologist's evidence was not necessary in this case because the similarity between two television shows could be assessed by a lay person, and thus also by a trial judge without expert assistance.

In the chief justice's view, while the perspective of a lay person in the intended audience for the works at issue was useful, the question always remained as to whether a substantial part of the plaintiff's work had been copied. Further, this question should be answered from the perspective of "a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue".

The trial judge was found to have been faced with the difficult task of comparing a sprawling unrealised submission for a television show to a finished product that had aired on television. These were found by the chief justice to be works that could not easily be compared side by side without the assistance of an expert. The works at issue were also confirmed to have had both patent and latent similarities for which the expert evidence was useful and thus necessary.

In the end, findings of infringement and substantial taking were affirmed. Significant monetary relief was awarded, including both pecuniary and non-pecuniary damages, profits, punitive damages and solicitors' costs.

Kevin Sartorio is a partner and **Corey Willard** an associate at Gowling Lafleur Henderson LLP