

CANADA / JUDGMENT

Henni v. Food Network Canada Inc.

2022 BCSC 1711

COURT

Supreme Court of British Columbia

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2022 BCSC 1711 Henni v. Food Network Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Henni v. Food Network Canada Inc.,

2022 BCSC 1711

Date: 20221003

Docket: S134233

Registry: Vancouver

Between:

Andrew John Henni, Jennifer Pearl Butcher, Raphael Cohen, Stephen Anthony Carney, John Pearl Enterprises Ltd.

Plaintiffs

And

Food Network Canada Inc., Cineflix Media Inc./Media Cineflix Inc., Cineflix (Food Factory) Inc., Cineflix (Food Factory 2) Inc., Cineflix (Food Factory 3) Inc., Cineflix (Food Factory 4) Inc., Cineflix (Food Factory 5) Inc., Cineflix (Food Factory 6) Inc., Cineflix (Food Factory USA) Inc., Cineflix (Food Factory USA 2) Inc., Cineflix (Home Factory) Inc., Cineflix (Style Factory) Inc., and Leslie Merklinger

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiffs/Respondents:

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Place and Dates of Hearing:

Vancouver, B.C.

May 12-13, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 3, 2022

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Overview

- [1] The defendants apply for an order pursuant to Rule 12-6(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], that the trial of this action be heard without a jury. The plaintiffs oppose the application. The trial is scheduled for 24-days beginning October 2, 2023.
- [2] The underlying action is primarily a copyright infringement claim that arises out of the plaintiffs' submission of a television show concept called "Food Factories" to the defendant, Food Network Canada Inc. ("Food Network"). The plaintiffs allege that Food Network rejected their submission, but then commissioned a program called "Food Factory", which they say is virtually identical to "Food Factories". The balance of the defendants are the production companies for various seasons of Food Factory, Style Factory, Home Factory, and an individual defendant, Leslie Merklinger.
- [3] In defence of the plaintiffs' claims, the defendants plead the terms of a full and final release of proprietary rights (the "Release") that the plaintiff Andrew Henni executed in favour of Shaw Media Inc. ("Shaw Media") when he submitted the "Food Factories" concept to the Food Network Canada channel. Shaw Media is the parent company to the defendant Food Network. The defendants also say that the plaintiffs' "Food Factories" concept was not original and therefore not subject to copyright protection, and that in any event, they did not copy original aspects of it or otherwise infringe the plaintiffs' copyright.
- [4] The issue on this application is whether the jury notice filed by the plaintiffs in this action ought to be struck. This determination turns on whether construction of the Release is the principal issue in this litigation, or whether the claim is otherwise not suitable for trial by jury because the issues raised are of an intricate or complex character, or require a prolonged examination of documents which cannot be made conveniently with a jury.
- [5] The defendants take the position that the construction of the Release is the principal issue in the litigation such that this action comes within the scope of Rule 12-6(2) and thus must proceed to trial by judge alone. The defendants also say that the issues are unsuitable for a jury under Rule 12-6(5)(a) because they are intricate and complex and will require a prolonged examination of documents that cannot be conveniently done by a jury.
- [6] Conversely, the plaintiffs claim that the construction of the Release is "an ancillary and minor matter" that is not the main or central focus of the trial. In the plaintiffs' view, the trial will not require a prolonged examination of documents or raise intricate or complex issues.
- [7] For the reasons that follow, I grant the defendants' application and order that the trial of this action be heard by judge alone.

Facts

- [8] The plaintiffs are four individuals (Andrew Henni, Jennifer Butcher, Raphael Cohen and Stephen Carney) and a corporate entity, John Pearl Enterprises Ltd. The plaintiffs allege that three television shows--Food Factory, Style Factory and Home Factory--that aired on the Food Network Canada channel and its American counterpart, infringed their copyright in the Demo. The plaintiffs also advance claims for breach of confidence and unjust enrichment.
- [9] The defendant Food Network operates the Food Network Canada channel. Cineflix Media Inc. and its subsidiaries are the production companies that produced different seasons of the television shows Food Factory, Style Factory and Home Factory (collectively the "Cineflix Defendants"). Shaw Media is the predecessor to Corus Entertainment Inc. and the parent company of its wholly-owned subsidiary Food Network.
- [10] The individual defendant, Leslie Merklinger, was at the relevant time the Director of Original Production, Lifestyle Content at Shaw Media. Ms. Merklinger's responsibilities included commissioning Canadian independent producers to develop and produce programs for the Food Network Canada channel.
- [11] The plaintiffs claim that in or about 2009--2010, they developed a concept for a television show about mass production of food items that they titled "Food Factories", that was suitable for broadcast on Food Network Canada channel. The plaintiffs plead that the distinguishing characteristics of their concept include:
- a) "Scenes and descriptions of significant quantities of materials being handled and high speed machinery processing substantial quantities of food goods";
 - b) "Scenes of employees or owners of the plant or company being featured to add a human touch to the program";
 - c) A title that was a "catchy expression which would clearly indicate the main theme of the program"; and
 - d) "More than one food item featured in each show".
- [12] In April 2011, the plaintiffs submitted their concept to the defendant Food Network in the form of a demo reel DVD (the "Demo"). The Demo was 22 minutes long and documented the production of pasta, peanut butter and eggs.
- [13] The Demo was submitted together with the Release. It is not disputed that the Release was signed by or on behalf of the plaintiffs. The Release provides as follows:

Shaw Media Inc.

Submission Release

Title of Project: Food Factories (the "Project")

Submitter (Please print name clearly): Drew Henni.

As an inducement to, and in consideration of, Shaw Media Inc.'s (hereafter "Shaw") willingness to receive for review any and all proposals, ideas, concepts and materials in connection with the Project (whether written or otherwise) submitted to Shaw by Submitter at any time, in any form of communication, before or after the date of this release (collectively, the "Materials"), Submitter agrees as follows (this "Release").

1. Submitter irrevocably releases and discharges Shaw and its affiliates, and their respective shareholders, directors, officers, employees, licensees and assigns (collectively, the "Shaw Parties") from and against any claim, action, loss or expenses arising out of, in connection with, or relating to, Submitter's submission of the Materials and Shaw's use and review of the Materials as contemplated in this Release.
2. Shaw will not use the Materials (except for the review contemplated by this Release) without first negotiating compensation for such use with Submitter, but it is understood and agreed that Shaw may freely use any part of the Materials that it otherwise has a legal right to use without liability to Submitter.
5. Submitter acknowledges and agrees that:
 - (c) There is no relationship of any type created or implied, including any fiduciary relationship, as between Submitter and any Shaw Party, by virtue of the submission by Submitter of the Materials; and
 - (d) Shaw receives numerous submissions of, and commissions the creation of numerous, ideas, treatments, stories, outlines, scripts, teleplays, formats and other material and elements from many parties (collectively the "Shaw Materials"). The Shaw Materials previously created or created in future may be substantially similar to or identical with elements contained in the Materials. Shaw has the unrestricted right to use the Shaw Materials without compensation, obligation or liability to Submitter whatsoever.

[14] In May 2011, Shaw rejected the plaintiffs' Demo. The plaintiffs say that Food Network then went on to commission a "virtually identical" concept--Food Factory--which first aired in September 2012. Food Factory was produced by Cineflix Media, which is the parent company of the Cineflix Defendants. Style Factory and Home Factory are produced by Cineflix (Style Factory) Inc. and Cineflix (Home Factory) Inc., respectively.

Nature of the Claims and Defences in Issue

[15] In their further amended notice of civil claim, the plaintiffs plead claims of copyright infringement under the Copyright Act, R.S.C. 1985, c. C-42, and breach of confidence. The plaintiffs also claim that the defendants have been unjustly enriched. With respect to Ms. Merklinger, the plaintiffs allege that having knowledge of their Demo, she provided substantive and specific instructions for the development of Food Factory to the Cineflix Defendants, and that they used this information to develop Food Factory in a manner that

was virtually identical to the plaintiffs' concept and the Demo.

- [16] The defendants say that the Release is their primary and overarching defence to the plaintiffs' claim. In the defendants' submission, the entirety of the claim against them is precluded or limited by the terms of the Release.
- [17] Aside from the Release, the defendants' response to the claim is in large part predicated on the assertion that the Demo was not original and is thus not capable of being the subject of copyright protection under the Act. The defendants say that as of April 2011, a genre of television programs documenting how products are made already existed. They point to "How It's Made" and "Unwrapped", television shows that the defendants say first aired long before the Demo (as early as 2001), and--like the Demo--have included segments on pasta, peanut butter and eggs. The defendants also take the position that they did not copy the Demo and that the Cineflix Defendants developed Food Factory (and subsequently Style Factory and Home Factory) in complete isolation from and without knowledge of the Demo.
- [18] As the pleadings presently stand, the plaintiffs' claim puts in issue six seasons of Food Factory (128 episodes), two seasons of Food Factory USA (46 episodes), one season of Home Factory (14 episodes) and one season of Style Factory (15 episodes). Each episode is approximately 22-24 minutes long.
- [19] If copyright infringement is established, the plaintiffs claim an accounting and disgorgement of profits that is broad in scope as it relates to all three shows (Food Factory, Style Factory and Home Factory), and 12 corporate defendants. In the defendants' submission, assessing damages in the event that copyright infringement is made out will be complex and require an extensive review and analysis of the corporate defendants' contractual relationships and financial records.

Expected Evidentiary Record at Trial

- [20] The parties presently expect that approximately 24 fact witnesses will testify at trial: five for the plaintiffs and 19 for the defendants. Expert evidence is also expected to be tendered on both liability and damages.
- [21] As to liability, the defendants have served a report of Dr. Tasha Oren, opining on:
- a) the history of the "How It's Made" genre prior to 2010;
 - b) the format, structure, content, style, atmosphere, dynamics and motifs in pre-existing programs (How It's Made and Unwrapped) and the plaintiffs' Demo; and
 - c) the similarities and differences, including both patent and latent elements, between the plaintiffs' Demo, the pre-existing programs (How It's Made and Unwrapped), and the defendants' programs Food Factory, Food Factory USA, Home Factory and Style Factory, respectively.

- [22] The plaintiffs object to Dr. Oren's report on the basis that it is largely irrelevant to the matters in issue in the action, is unnecessary and purports to make findings of fact that are the purview of the trial judge. The defendants say that Dr. Oren's report is intended to assist the court in its consideration of the hundreds of allegedly infringing episodes of Food Factory, Style Factory and Home Factory. However, if the plaintiffs' objection succeeds, the defendants say that the trier of fact will then need to view a substantial number of those episodes to determine the copyright infringement claim.
- [23] This Court expressed a similar view in finding that this case was not suitable for determination by summary trial. In that instance, Justice Tammen noted the following (*Henni v. Food Network Canada Inc.* (11 January 2018), Vancouver S134233 (B.C.S.C.) [Henni January 2018]):
- [14] During the suitability application, some of the video clips were played in court, totally approximately one hour. The defendants propose to play some additional portions during their summary trial application and to make detailed submissions on such things as originality of content, camera angles, formatting and various other matters which go to the ability of the content to be copyrighted. It seems to me that at any trial the trier of fact would need to view the entire body of that evidence and carefully examine it for similarities in order to reach conclusions on those arguments. The video portion of the evidence presentation even on a summary trial could well occupy two full court days.
- [Emphasis added.]
- [24] The defendants have produced thousands of documents in the action, many of which relate to the financial and contractual arrangements between Shaw Media, Cineflix Media and its subsidiaries, and the claim against Ms. Merklinger arising out of her involvement in the development of Food Factory.
- [25] With respect to the claim against Ms. Merklinger, the defendants intend to canvass a significant volume of email correspondence between her and the other defendants to respond to the allegation that she directed the Cineflix Defendants to develop Food Factory (and later Home Factory and Style Factory) in a manner that copied the Demo.
- [26] As to damages, the defendants say that if copyright infringement is made out, an extensive review of financial and contractual documentation will be necessary to conduct a proper assessment of damages. This documentation will also form the factual underpinnings for three expert reports that have been served to date.
- [27] The plaintiffs have served two expert reports from Robert D. MacKay relating to future loss figures and an accounting of the defendants' profits respectively. The latter report concluded that it was not possible to determine the total profits generated by the defendants from the Food Factory shows and that it was unclear from the available documents what profits they earned from production and distribution of the Food Factory shows in Canada. Nonetheless, the plaintiffs assert that Mr. MacKay was able to synthesize the documents relating to the

defendants' worldwide profits into a simple report. The defendants intend to tender a responsive report once Mr. MacKay has provided a complete report.

Legal Principles - Striking Jury Notices

[28] This application is brought pursuant to Rule 12-6(5), which provides as follows:

Court may refuse jury trial

- (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
 - (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
 - (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
 - (ii) the issues are of an intricate or complex character, or
 - (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
 - (b) at any time for an order that the trial be heard by the court without a jury on the ground that the trial relates to a fast track action or to one of the proceedings referred to in subrule (2).

Rule 12-6(5)(a)

[29] Subrules 12-6(5)(a)(i)-(iii) are to be treated disjunctively, not as factors in a holistic assessment of whether the jury notice ought to be struck: *Cochrane v. Insurance Corp. of British Columbia*, 2005 BCCA 399; *Rados v. Pannu*, 2015 BCCA 459 [Rados BCCA]; *Royal Bank v. Shaw*, 2016 BCSC 2285 at para. 27; *Sidhu v. Hiebert*, 2020 BCSC 183.

[30] The party applying to set aside the jury notice faces a high onus to satisfy the court that one of the grounds set out in Rule 12-6(5) is established: *Han v. Cho*, 2008 BCSC 1192 at para. 15; *MacPherson v. Czaban*, 2002 BCCA 518 at para. 17.

[31] Rule 12-6(5) requires a two-step analysis. First, the court determines whether the issues in the case require a prolonged examination of documents, scientific investigation, or are otherwise of an intricate or complex character. If the court finds that prolonged examination of documents or a scientific investigation is necessary, it must then consider whether that examination can be made conveniently with a jury.

- [32] Similarly, if the court determines that the issues are of an intricate or complex character, it must proceed to determine whether the trial should be heard without a jury: *Rados BCCA* at paras. 6-7, citing *Rados v. Pannu*, 2015 BCSC 453 at paras. 34-35 [*Rados BCSC*]; *Sidhu* at paras. 20-22. The court's discretion at the second stage of the analysis is somewhat broader when a finding has been made that the issues in the case are intricate or complex: *Rados BCCA* at paras. 6-7.
- [33] Complexity must be assessed cumulatively with the whole of the trial in mind and with an appreciation of the extent to which factual findings will impact on the weight that may be given to expert reports and guide the assessment of issues such as quantification of damages. The focus of the inquiry is on the character of the issues, not the number of issues in play: *Rados BCCA* at paras. 6-7, citing *Rados BCSC* at para. 34.
- [34] The phrase "cannot be made conveniently with a jury" requires the ability to have a proper trial, including not just an understanding of the evidence as it is elicited, but the ability to retain that understanding throughout the trial to enable a meaningful analysis to be conducted at the end of the day: *Rados BCSC* at para. 36, citing *Wipfli (Guardian ad litem of) v. Britten* (1981), 32 B.C.L.R. 343 at 347, 1981 CanLII 615 (S.C.) [*Wipfli*]; *Lee v. Averbach*, 2019 BCSC 1280 at para. 14.

Rule 12-6(5)(b)

- [35] Rule 12-6(5)(b) provides that an order that the trial be heard by the court without a jury may be made at any time on the ground that the trial relates to one of the proceedings referred to in subrule (2). Rule 12-6(2) provides that "A trial must be heard by the court without a jury if the trial relates to a proceeding referred to in Rule 2-1 (2)". Rule 2-1(2)(c) refers to proceedings where "the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document".
- [36] Whether a trial "relates to" a matter pursuant to Rule 12-6(2) means something more than "touches on or is in any way concerned with" one of the excluded matters. An excluded matter must be the main or central focus of the trial: *Han* at para. 37. If the findings of fact will substantially dispose of the issues to be tried, Rule 12-6(2) ought not to be applied. However, if after the facts are found there remains a genuine question as to the significance of those facts when construing a contract, it will be the "principle question in issue" regardless of the relative length or complexity of the fact-finding exercise: *Nelson Marketing International v. Royal & Sun Alliance Insurance*, 2003 BCSC 439 at para. 20 [*Nelson Marketing*].
- [37] If it is found that the action relates to a matter set out in Rule 12-6(2), then there is no discretion to be exercised and the jury notice must be set aside: *G. Peter Fraser, John W. Horn & Susan A. Griffin, The Conduct of Civil Litigation in British Columbia* (LexisNexis Canada, 2007) (loose-leaf release 40) at §53.3. It is of no consequence that there are other claims raised in this litigation that are not barred by the Rules from being heard by a jury.

Absent severance of those claims, the effect of the fact that one of the claims cannot be heard by a jury is that the whole of the action cannot be heard by a jury: *McNarland v. Yada*, 2003 BCSC 1404 at para. 11.

Analysis

Rule 12-6(2): Contractual Grounds for Striking Jury Notice

- [38] The defendants say that the jury notice ought to be struck pursuant to Rule 12-6(2)(f), or the combined effect of 12-6(2)(j) and 2-1(2)(c), because their principal defence is the Release and whether it bars the plaintiffs' claims. In my view, Rule 12-6(2)(f) does not apply as the pleadings do not raise a claim seeking "the rectification, setting aside or cancellation of" the Release. Whether the jury notice ought to be struck on contractual grounds thus falls to be determined under Rule 12-6(2)(j) and whether this action relates to a matter referred to in Rule 2-1(2)(c), namely whether "the sole or principal question at issue is alleged to be one of construction of" the Release.
- [39] Interpretation of the Release is an exercise in contractual interpretation which requires the court to consider both the words of the release and the objective evidence of the "surrounding circumstances" of the parties thereto: *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 20-21. This engages Rule 12-6(2)(j) by way of Rule 2-1(2)(c). A jury notice may be struck where construction issues arise in respect of a release pleaded in response to the whole of a claim: *Zaworski & Other v. Carrier Lumber Ltd.*, 2004 BCSC 194 at paras. 14-16.
- [40] The defendants concede that construction of the Release is not the sole issue in the action, but do say that it is the principal issue. In the defendants' submission, construction of the Release has always been central to their defence and if that defence succeeds, the action fails. In this way, the defendants characterize the Release as a "silver bullet" that has the potential to dispose of the entirety of the claims brought against them.
- [41] The plaintiffs disagree and say that the Release is only a "minor" issue and has been treated as such by the defendants until this application was brought. In this regard, they point to the Release not being included as an issue for determination at trial in one of the defendants' early trial briefs. The plaintiffs also note that regardless of whether the Release operates to bar their claims, the action will still require a lengthy trial, the majority of which will be dedicated to determining whether the claim of copyright infringement is made out.
- [42] The fact that the defendants' pleadings put interpretation of the Release in issue has been recognized by the Court on two prior occasions: *Henni v. Food Network Canada Inc.* (21 December 2017), Vancouver S134233 (B.C.S.C.) at para. 1; *Henni* January 2018 at para. 3. The likelihood that construction of the Release will factor centrally in the trial is also evident from the positions taken by the parties as to its effect on various aspects of the claim.

- [43] First, there is a dispute as to which of the defendants are covered by the Release. It will therefore need to be interpreted to determine whether some or all of Ms. Merklinger, Food Network and the Cineflix Defendants fall within the meaning of "employees", "affiliates" or "licensees" of Shaw Media respectively under clause 1 of the Release. This will require findings of fact to be made regarding the relationships between Shaw Media and the defendants, and then the interpretation and application of the Release to determine which of the defendants obtain its benefit.
- [44] Second, there is a dispute as to whether the Demo was provided to Shaw Media in circumstances giving rise to an obligation of confidence, which is a key element of the plaintiffs' breach of confidence claim. The plaintiffs say the Demo was communicated in confidence; the defendants point to clause 5 of the Release as negating any obligation of confidence arising in the circumstances of the Demo being submitted to Shaw Media.
- [45] Finally, the plaintiffs acknowledge that a favourable construction of the Release will be a factor in their success at trial. They submit that the Release does not release proprietary rights and, to the extent that it may limit claims, it does not limit those being advanced in this action. The plaintiffs also point to clause 2 of the Release, and say that if Shaw Media did not otherwise have a legal right to use content included in the Demo, then it could not do so without compensation to the Plaintiffs. This is another way in which the interpretation of the Release will factor heavily in this action, particularly in light of the plaintiffs framing one of the overarching issues in the litigation as whether the defendants had a right to use the concept reflected in the Demo, and if not, whether they did so without compensating the plaintiffs.
- [46] I am cognizant that much of the trial will be devoted to the plaintiffs' proof of their copyright infringement claim, and that from their perspective, this is the central issue. Whether or not the defendants copied original elements of the plaintiffs' Demo in their development and production of Food Factory, Style Factory or Home Factory and thereby infringed the plaintiffs' copyright are principle issues of fact and law that will need to be determined at trial. The fact-finding exercise at trial will be lengthy and complex, likely occupying the bulk of the trial. However, this is not determinative of the present inquiry.
- [47] I agree with the defendants that, while proof of the copyright infringement claim is the central issue in the case from the plaintiffs' perspective, the interpretation of the Release and the resulting effect it has on the plaintiffs' ability to succeed on some or all of their causes of action (copyright infringement, breach of confidence and unjust enrichment) will, at the end of the day, be the central issue in the action. Put differently, if the defendants prevail on their interpretation of the Release, the plaintiffs' claims cannot succeed. Conversely, if the plaintiffs prevail on their interpretation of the Release, then they may succeed against the defendants on some or all of their claims.

[48] In that way, this case is akin to Nelson Marketing, where a Master's decision finding that interpretation of an insurance policy was a principal issue in the litigation and striking a jury notice on that basis was upheld on appeal. In so concluding, Justice McEwan approved of the approach taken in Bell v. AXA Pacific Insurance Co., [1997] B.C.J. No. 2026, 1997 CanLII 2487 (S.C.):

[15] In Bell v. AXA Pacific Insurance Co., [1997] B.C.J. No. 2026 (B.C.S.C.), Master McCallum dealt with a case where the parties were at odds over whether the principal issue was the construction of a fire insurance policy, or whether it was the "cause" of the fire. Master McCallum made the following observations:

¶17 This is a case where the principal question at issue is one of construction of the policy of insurance issued by Axa and upon which the plaintiffs rely. The causation issue will undoubtedly be important but it could not be said, in my view, that a finding in favour of the plaintiffs on the causation issue will necessarily resolve the litigation. The defendants are entitled to rely upon the wording of the policy with respect to misrepresentation at last and the issue of construction will become the principal question even in those circumstances. The framers of the rules elected to take from juries trial where the principal question is one of construction of a contract. Ultimately this proceeding will involve as its central theme construction of the policy of insurance issued by Axa to the plaintiffs. As in Watchel, the court will be required to make findings of fact with respect to the cause of the fire. I am not persuaded that resolution of the factual issue involving causation will necessarily resolve the proceeding.

[16] This strikes me as the right way to approach such questions.

[18] I think that to seize upon the phrase "the sole or principal question at issue" as if one must then weigh the issues of fact against the "questions at issue" referred to in Rule 10(1)(b) to determine which should be declared "principal" is to adopt a somewhat flawed analysis. In Bell, Master McCallum asked himself whether the resolution of the causation issue (ie, the issues of fact) would "necessarily resolve the litigation". I think that approximates the proper test, which really must be whether, once the facts are decided, there remain "questions at issue" as to the "construction of an enactment, will, deed, oral or written contract, or other document".

[20] These cases demonstrate that if the findings of fact substantially dispose of the issues to be tried then Rule 39(25) should not be applied. But if, after the facts have been found, a genuine question remains as to the significance of those facts within a Rule(10)(b) issue, it will be the "principle question in issue" within the meaning of the Rule, regardless of the relative length or complexity of the fact finding exercise itself.

[Emphasis added.]

[49] Similarly in this case, even if the plaintiffs are successful in establishing copyright infringement, that will not dispose of the litigation in their favour. The proper construction and application of the Release, including whether it releases proprietary rights and which of

the defendants--if any--it applies to, then comes into play. These issues will remain to be determined after the facts are found with respect to whether copyright infringement is made out. The plaintiffs cannot succeed unless and until the Release is interpreted in their favour so as not to bar some or all of their claims, or not to apply to some or all of the defendants who may be found liable to the plaintiffs. In this way, it is the interpretation of the Release and its application to the facts as found that will determine the litigation.

- [50] When considered from this perspective, it becomes clear that interpretation of the Release is the central issue in the litigation. Neither party can succeed without that issue being resolved largely in their favour. In the result, I am of the view that the principal issue in this case is the construction and application of the Release. As such, the jury notice must be struck pursuant to Rule 12-6(2).

Rule 12-6(5)(a): Difficulty Grounds for Striking Jury Notice

- [51] In the event that I am incorrect in my conclusion that the jury notice must be struck under Rule 12-6(2), I am also satisfied that the issues in this case are not suitable for trial by jury because they are intricate and complex in nature, and will require a prolonged examination of documents that cannot conveniently be made with a jury.

General Principles of Copyright Infringement

- [52] The defendants' application to strike the jury notice under Rule 12-6(5)(a) turns in large part on their assertion that copyright infringement by their very nature are not well-suited to trial by jury. In the defendants' submission, whether the plaintiffs' copyright was infringed is not simply a matter of watching the allegedly infringing episodes and comparing them to the Demo, but instead requires a complex multi-factoral analysis, as set out by the Supreme Court of Canada in *Cinar Corporation v. Robinson*, 2013 SCC 73 [Cinar]. As such, a brief review of applicable principles of copyright infringement is required to inform the analysis.
- [53] Section 27(1) of the Copyright Act provides that it is an infringement for any person to do anything that the owner of the copyright has the right to do, one of which rights is the sole right to produce or reproduce the work or any substantial part thereof in any material form (s. 3(1)).
- [54] Absent direct proof of copying, the plaintiff bears the onus of establishing the elements of infringement (*Pyrrha Design Inc. v. Plum and Posey Inc.*, 2019 FC 129 at para. 121):
- a) similarity - sufficient similarity between the infringing work and the copyright work or of a substantial part of the copyright work; and
 - b) access - evidence of access to the work or a connection between the two works showing that the copyright work is the source for the infringing work.

- [55] The court must also be satisfied that the parties own their respective copyrights: Copyright Act, s. 13(3). Once these elements are established, a prima facie case of infringement is raised, but can be negated by the defendant showing that the infringing work is the result of work from a common source or that it is an independent creation: *Pyrrha* at para. 122; *Phillip Morris Products S.A. v. Marlboro Canada Ltd.*, 2010 FC 1099 at para. 320.
- [56] An infringing work will have copied a substantial part of a copyrighted work. What constitutes a substantial part of a work is matter of fact and degree, and includes both literal and non-literal copying: *Cinar* at paras. 26-27. As a general proposition, a substantial part of a work is a part that represents a substantial portion of the author's skill and judgment: *Cinar* at paras. 25-26. This is assessed holistically and qualitatively by first assessing all of the cumulative similarities between the works, then determining whether the similarities overall form a substantial part of the author's skill and judgment. Non-original elements can form part of the substantial part of the author's skill and judgment where the specific combination of these elements has been copied by the alleged infringer: *Pyrrha* at para. 125-126, 128; see also *Cinar* at paras. 26-43.
- [57] The relevant question is whether the similarities between the works are "a substantial part of the author's skill and judgment". The question is not whether the similarities are visually a substantial part of the work (both non-original and original), but whether the alleged infringer copied a substantial part of the originality of the author's work: *Cinar* at para. 26; *Pyrrha* at para. 132.
- [58] Unlike trademark infringement cases, the substantial similarity analysis in copyright cases is grounded in whether a substantial part of the work has been copied, not whether a layperson could identify the similarities: *Pyrrha* at para. 130. Substantial similarity is to be assessed from the perspective of someone who can assess and appreciate all the relevant aspects of the work. This is the task of the trial judge, possibly assisted by expert evidence on the relevant art, but based on the evidence before them as to the relevant aspects of the work: *Cinar* at para. 51; *Pyrrha* at para. 131.
- [59] Finally, if copyright infringement is made out, the court must determine both damages suffered due to the infringement and also allocate profits between the original and infringing elements as well as each defendant's liability: Copyright Act, s. 35.
- [60] It is evident from the foregoing that determining the copyright infringement claim will require nuanced factual findings and a complex legal analysis. It is not simply a matter of watching a selection of the allegedly infringing programs to determine if they are facially similar.

Rule 12-6(5)(a)(i): Prolonged Examination of Documents or Accounts That Cannot Conveniently be Made With a Jury

- [61] As noted above, Rule 12-6(5)(a)(i) mandates a two-part test in which I must first determine whether the issues in the action will require a prolonged examination of documents or accounts, or a scientific investigation. The fact that there may be numerous or lengthy documents does not necessarily mean that a prolonged examination is required; rather, the court must carefully consider what the evidence will actually be: Rados BCSC at para. 34; Lee at para. 13. However, it is reasonable to infer that the longer the trial and the more prolonged the examination of documents or scientific inquiry will be, the more difficult it will be for a jury to retain a clear understanding of the evidence and its significance to the determination of the issues in the case: Rados BCSC at para. 37.
- [62] The defendants say that the evidentiary record at trial will be voluminous, including:
- a) evidence from at least 24 fact witnesses and multiple expert witnesses;
 - b) hundreds of documents, including email correspondence, spanning approximately seven years relating to the creation and development of Food Factory, Style Factory and Home Factory, both generally and in relation to the claim that Ms. Merklinger provided specific information to the Cineflix Defendants from the Demo that was then used to modify the Cineflix Defendant's concept to mirror the plaintiffs' concept;
 - c) significant contractual and financial documents (licensing and profit-sharing agreements, royalty statements, accounts and budgets) relating to the commercial relationships and right between the various corporate defendants; and
 - d) hundreds (if not thousands) of hours of video footage from How It's Made, Unwrapped and all seasons of Food Factory, Home Factory and Style Factory. This may be attenuated somewhat if Dr. Oren's expert report is admitted, but as noted above, that is not guaranteed given the plaintiffs' objection.
- [63] The plaintiffs say that individual episodes of the defendants' programs are irrelevant given that their claim is framed as whether the defendants copied the same "spin" on the "How It's Made" genre that the plaintiffs put on their concept as reflected in the Demo. In their submission, it is unnecessary to view all episodes of the allegedly infringing programs and that they do not intend to adopt such an approach at trial. In the plaintiffs' submission, even if a prolonged examination of documents is required, it can conveniently be done by a jury as "to the extent that it involves watching TV, it surely can't be suggested that the jurors cannot conveniently watch TV".
- [64] I disagree. In my view, the assessment of whether the Demo was capable of attracting copyright protection and whether the defendants' productions infringed the plaintiffs' copyright will require a more in-depth review and analysis than simply watching the programs to see if they look similar. The analysis prescribed by Cinar requires the trier of fact to determine which aspects of the content in issue is original or unoriginal--which may include matters that are not immediately apparent to a casual observer or layperson--and then determine whether the original parts of the work have been copied.

- [65] While the trier of fact may not need to view every single allegedly infringing episode of Food Factory, Style Factory and Home Factory--especially if Dr. Oren's report is admitted and the parties can come to an agreement for proof of the underlying facts--it is likely that a significant portion of that video footage will still need to be viewed by the trier of fact. I agree with Justice Tammen that this footage will need to be carefully examined with respect to originality of content, camera angles, formatting and other matters that go to the ability of the content of the Demo to be copyrighted, and then for similarities between the Demo and the defendants' productions: Henni January 2018.
- [66] The same can be said in respect of the contractual and financial documents that will form part of the evidence at trial. In my view, these documents will need to be considered in detail to conduct a proper assessment of the plaintiffs' damages if copyright infringement is made out, and to determine the claim against Ms. Merklinger.
- [67] Based on the evidence before me, I am satisfied that the documents that are likely to be adduced into evidence will be voluminous and will require detailed consideration by the trier of fact in order to make the findings of fact necessary to determine the claims advanced by the plaintiffs. It is clear that the evidentiary record to be put before the court will be extensive in terms of documents and video footage of the allegedly infringing programs.
- [68] Further, if the copyright infringement claim is made out, the resulting damages assessment will require the trier of fact to make determinations about revenues, costs and net profits, and then apportion those profits for the multiple Cineflix Defendants. The plaintiffs point to the expert evidence that the parties intend to lead on damages and its potential to simplify the examination and analysis. That may well be the case, though at present, Mr. MacKay appears to have encountered some difficulty in preparing his report. In any event, the evidence underlying the parties' respective expert reports remains voluminous and will need to be adduced into the record at trial to prove the facts and assumptions upon which the experts' opinions are based.
- [69] In the result, I am satisfied on the evidence before me that the trial of this action will involve a prolonged examination of documents.
- [70] Turning to the issue of whether this can conveniently be undertaken by a jury, I agree with the defendants that it would be unrealistic to expect a jury to be in a position to make determinations of fact regarding original and unoriginal elements of patent or latent content in the Demo and then apply those findings to a significant number of hours of footage of three programs, and retain that knowledge through to the end of what is presently a five-week trial.
- [71] I reach the same conclusion with respect to the documents that will be necessary to assess damages and apportion profits if the plaintiffs' copyright infringement claim is made out. The evidence before me suggests that, given the number of different corporate entities involved, the contractual and financial documents that must be examined in respect of this aspect of the claim are likely to be voluminous in nature and will require an in-depth

consideration of detailed information that will be difficult for a jury to engage in within the confines of that process. The potential difficulties that may be encountered by a jury in this regard are highlighted by the complications encountered to date by the plaintiffs' own experts.

- [72] I am satisfied that the prolonged examination of documents, in particular the video footage and financial and contractual documents that will be required to determine the plaintiffs' copyright infringement claim, is not well-suited to a jury. In my view, it will be difficult for a jury to understand the nuances of the video evidence and complex financial documentation to be tendered and retain that understanding throughout the trial so as to enable a meaningful analysis at the end of the day. In the result, I find that the trial of this action will involve a prolonged examination of documents and that this examination cannot be conveniently undertaken by a jury.

Rule 12-6(5)(a)(ii): Issues of An Intricate and Complex Nature

- [73] This subrule requires that I consider whether the issues in this case are of such an intricate or complex nature that they should be heard by a judge without a jury. As noted above, the court's discretion to strike a jury notice is somewhat broader where the issues are found to be intricate or complex in nature: *Rados BCSC* at para. 35; *Rados BCCA* at para. 7.
- [74] The inquiry focuses on the character and interaction of the issues raised in the litigation: *Holland v. Hallonquist* (1968), 63 W.W.R. 207 at 221, 1968 CanLII 936 (B.C.C.A.); *MacDonald (Guardian ad litem of) v. Smith* (1983), 48 B.C.L.R. 285 at paras. 13-14, 1983 CanLII 580 (S.C.). Certain elements, such as anticipated trial length, can suggest that a case is intricate and complex: *Lee* at para. 15. However, the inquiry is ultimately broader and contextual: *Gulamani v. Chandra*, 2009 BCSC 1042 at para. 35, citing *Yewdale v. Insurance Corp. of British Columbia*, [1994] B.C.J. No. 2835 (S.C.).
- [75] Issues in isolation may be appropriate for jury determination, but may combine to create sufficient intricacy or complexity to justify striking a jury notice: *MacDonald* at paras. 13-14. For example, a jury may not be appropriate when "issues cannot be determined on their own and may only be determined after other issues have been resolved, or in themselves be issues on which other issues are dependent": *Naicker v The Great West Life Assurance Company*, 2002 BCSC 443 at para. 25.
- [76] The defendants say that the complexities of the copyright issues in this case make it inappropriate for trial by jury. In this regard, they point to a host of intricate issues that will need to be determined, consistent with copyright law as articulated in the jurisprudence (see e.g. *Pyrrha* at paras. 124-125), including:
- a) whether the Demo was sufficiently original to attract copyright protection;
 - b) are the defendants' programs sufficiently original to also attract copyright protection, thereby negating any possibility of infringement;

- c) did the defendants copy a substantial part of the original, copyrighted elements of the Demo;
- d) if copying did occur, does it constitute infringement of the plaintiffs' copyright;
- e) if copyright infringement is made out, how are the profits allocated between original and non-original elements of the Demo; and
- f) if infringement is made out, which seasons of the defendants' programs and which defendants are liable.

[77] Concepts unique to copyright law such as the protection of expression instead of ideas, originality, and the "substantiality" of the alleged copying, will all need to be considered. The trier of fact will need to determine whether a substantial part of the Demo was copied and whether that part was original. This requires a qualitative analysis and is an issue in respect of which expert evidence is commonly led: *Pyrrha*, at paras. 124-131; *Cinar* at paras. 33, 35-36. As the Federal Court's dicta in *Pyrrha* suggests, assessing substantial similarity is not a matter for the untrained eye:

[131] Substantial similarity is to be assessed from the perspective of someone who can assess and appreciate all the relevant aspects of the work (*Cinar* at para. 51). This is the task of the trial judge, possibly assisted by expert evidence on the relevant art, but based on the evidence available to the judge as to the relevant aspects of the work.

[78] For their part, the plaintiffs say that juries frequently deal with complex issues and that the judge will be able to explain the applicable principles of copyright law to the jury. However, the plaintiffs are unable to point to any instance in which a claim under the Copyright Act has been tried by jury. As the defendants note, copyright claims are not ordinarily tried by jury, and there are no reported cases in this jurisdiction where copyright claims have been found appropriate for a jury trial. In my view, this is illustrative of the complexity of such claims and their resulting unsuitability for determination by way of a jury trial.

[79] Indeed, relatively few copyright claims are brought in this Court. Rather, most copyright claims are brought in Federal Court due to its expertise, expediency, national coverage, and power to expunge, vary, or rectify any copyright register under s. 20(1)(b) of the Federal Courts Act, R.S.C. 1985, c. F-7: David Vaver, *Intellectual Property Law*, 2d ed. (Toronto: Irwin Law, 2011) at 608. All matters before the Federal Court are heard and determined without a jury: Federal Courts Act, s. 49.

[80] Further, in the event that the defendants are found liable for copyright infringement under the Act, the plaintiffs' damages will then need to be assessed. Section 35 of the Act provides that where a person infringes copyright, they are liable to pay damages and also "such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages". Subsection 35(2) then provides that in calculating profits, the plaintiff is required to prove revenues derived from the infringement, but the defendant then must prove "every element of the cost" claimed in respect of those revenues.

- [81] The plaintiffs' expert, Mr. Mackay, has not yet been able to form a complete assessment of the profits earned by Corus Entertainment Inc. and the Cineflix Defendants from production and distribution of Food Factory in Canada, and has not attempted to do the same for Style Factory or Home Factory. The defendants say this is because of complexity. The plaintiffs disagree and say all that is needed from the accounting experts is the defendants' total profit, which can then be apportioned based on the proportion of the plaintiffs' work that is determined to have been copied by the defendants.
- [82] Regardless, the fact that both parties intend to tender expert opinion evidence on damages and the challenges experienced to date by Mr. MacKay in formulating his opinion, are in my view indicative that any such assessment will be intricate and complex in nature. I am satisfied that such an assessment will not be as simple as the plaintiffs contend and that it is likely to require a complex apportionment of net profits from different revenue streams and programs depending on which defendants, if any, are found liable to the plaintiffs and for which cause(s) of action.
- [83] Somewhat similar corporate structures and accounting arrangements were in issue in *Royal Bank of Canada v. Shaw*, 2016 BCSC 2285 [Shaw], where the plaintiff sued on certain guarantees and a mortgage provided by individuals who were principals of film production companies. In that case, the plaintiff's claim was relatively straightforward, while the defendants raised a multiplicity of defences and brought a counterclaim giving rise to issues that included breach of implied and express terms of the guarantees, breach of fiduciary duty, and unjust enrichment: Shaw at paras. 23-24. The defendants filed a notice requiring trial by jury, and the plaintiff applied to have that notice struck under Rule 12-6(5)(a)(ii).
- [84] Following a comprehensive review of the applicable jurisprudence in the commercial context, Justice Voith (as he then was) struck the jury notice. In doing so, he recognized the intelligence of juries and that the onus of a party seeking to strike a jury notice is not easily satisfied, but then concluded as follows:
- [47] However, there has to be a tipping point. That tipping point is reached when the intricacy or complexity of the issues raised by an action actually impede or undermine the efficacy of the trial process and the confidence that the parties can have in the trial's outcome. In this case, this might arise in several ways. There would be a level of factual complexity in recounting or describing the evidence of how various costs were allocated to different production companies. Mr. Shaw's discovery evidence suggests that it may be necessary to turn to hundreds of different spreadsheets to address those allocations.
- [48] The charge to the jury would also be complex; see *Collette v. Cartier Partners Securities Inc.*, 2005 BCSC 501 at para. 31.
- [49] It will be difficult to form questions for the jury; see *Holland v. Hallonquist* (1968), 63 W.W.R. 207 (B.C.C.A.) at 219 para. 41; and *Collette* at para. 3.

- [50] There is little doubt that there would be various alternate questions posed to the jury with the risks that are attendant to that exercise; see Collette at para. 32 and Stephen at para. 19.
- [51] Still further, this is not a case where the primary issues are factual in nature. In cases where the dominant or central issues are legal, the jurisprudence recognizes that there is a benefit in providing a judge somewhat more time for reflection -- that there is greater need for a mature consideration of the matters; see Holland at 219-220, and McDonald v. Inland Natural Gas Co. Ltd. (1966), 57 W.W.R. 87 at 96 (B.C.C.A.).
- [85] Similarly, I am of the view that the intricacy and complexity of the issues raised by the plaintiffs in this case--particularly with respect to their copyright claim and the apportionment of damages if that claim is made out--will impede and undermine the efficacy of the trial process and the confidence that the parties can have in the trial's outcome if it were to proceed as a jury trial. Assessing the plaintiffs' damages under the Copyright Act would also give rise to a level of factual intricacy similar to that in Shaw. Together with the complexity of the liability issues in play in this case, this would require a complex jury charge that may be difficult to formulate into appropriate questions for the jury. Difficulty framing questions for a jury is an indicator of sufficient complexity to warrant striking a jury notice: Rados BCSC at para. 34; Rados BCCA at paras. 6-7.
- [86] In my view, these issues would benefit from the additional time for reflection and deliberation that trial by judge alone provides. In this regard, I agree with Chief Justice McEachern's reasoning in Wipfli at 349-350, where he succinctly articulated the concerns that underpin this inquiry:

This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives. With deference, I also refer to what I said in Henry v. Knickerbocker, B.C.S.C., 12th May 1981 (not yet reported):

"A judge decision this case without a jury would, after hearing the evidence and reviewing his notes or a transcript, assess and consider all the evidence including the many medical reports and the submissions of counsel. He would probably draft and re-draft a judgment several times, and he would make countless calculations to test and verify the reasonableness of his conclusions. Like any conscientious jury, he would agonize over his conclusions, but he would do so at a leisurely pace and he would not be under pressure of time or the personal comfort of himself or others in making the kind of calculations which should be made to test the reasonableness of his conclusions."

- [87] In the result, I find that it would be exceptionally difficult for a judge to be able to adequately instruct a jury with respect to the intricacies of liability in copyright law and the apportionment of damages required under the Act if liability were to be found. I am also not satisfied that a jury, once instructed, would be able to retain and apply such instructions adequately or have the opportunity given the constraints inherent in jury deliberations to give the issues put before them sufficient and reasoned consideration. In the circumstances, I am satisfied that the issues raised in this case are of sufficient complexity that they cannot

conveniently be determined by a jury. I therefore find that the jury notice ought to be struck pursuant to Rule 12-6(5)(a)(ii).

Conclusion

[88] The defendants' application is allowed and the jury notice is struck. Costs of this application shall be in the cause.

"Hughes J."

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