

Federal Court



Cour fédérale

**Date: 20210527**

**Docket: T-1656-16**

**Citation: 2021 FC 498**

**Ottawa, Ontario, May 27, 2021**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**JOHN WINKLER AND THE ESTATE OF THERESIA WINKLER  
BY HER ESTATE TRUSTEE, JOHN WINKLER**

**Plaintiffs**

**and**

**NATE HENDLEY AND  
JAMES LORIMER & COMPANY LTD.**

**Defendants**

**JUDGMENT AND REASONS**

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I. Overview

[1] In the early morning of August 24, 1875, eight members of the notorious Donnelly family of Lucan, Ontario, armed with nothing more than clubs, won a pitched street battle against eighteen townspeople intent on revenge. Or did they? This and similar questions arise in this copyright infringement action because the plaintiffs assert the battle was the fictional creation of Thomas P. Kelley in his 1954 book *The Black Donnellys*. They claim Nate Hendley's 2004 book *The Black Donnellys: The Outrageous Tale of Canada's Deadliest Feud* infringes copyright in *The Black Donnellys* and its sequel, *Vengeance of The Black Donnellys*, including by copying Mr. Kelley's fictional events, his creative embellishments of historical events, and his cinematic story-telling style.

[2] Mr. Hendley and his publisher, James Lorimer & Company Ltd, admit Mr. Hendley used Mr. Kelley's books, among other sources, in doing research for his own book. But they argue Mr. Hendley's book is an original literary work not copied from Mr. Kelley's books or any other source. They also say Mr. Kelley's *The Black Donnellys* is factual and argue that having represented it as a work of historical nonfiction, Mr. Kelley and his successors cannot now claim copyright in the persons and events described.

[3] I conclude there has been no copyright infringement.

[4] I agree with the defendants that an author who publishes what is said to be a nonfiction historical account cannot later claim the account is actually fictional to avoid the principle that

there is no copyright in facts. Having presented the Donnellys' street battle and other facts and events as a true historical account based on "unimpeachable sources," Mr. Kelley could not later assert that he was not to be taken at his word. His successors in title are in no better position and similarly cannot argue the facts were actually fictions and therefore subject to copyright protection. The passages in question are not excluded from the assessment of whether there has been copying of a substantial part of Mr. Kelley's books, but substantiality must be determined in relation to the originality of the work that warrants copyright protection. Considering the works, their originality, and the asserted similarities holistically, I conclude Mr. Hendley did not copy a substantial part of either of Mr. Kelley's works.

[5] In reaching this conclusion, I have accepted as admissible the plaintiffs' expert evidence about the history of the Donnelly family, even though it comes from the father of counsel for the plaintiffs. The defendants' concerns about independence due to this familial relationship have considerable merit. However, I find that the low standard established by the Supreme Court of Canada for admissibility and expert independence is met by the plaintiffs' expert report. That said, given my conclusion that the plaintiffs cannot disavow the factual nature of Mr. Kelley's account, this evidence is ultimately of limited impact in the matter.

[6] The plaintiffs' motion for summary judgment is therefore dismissed, the defendants' motion for summary judgment is granted, and the action is dismissed. The parties may file submissions on costs in accordance with the schedule set out at the conclusion of these reasons.

II. Issues

[7] The plaintiffs' Statement of Claim includes claims in copyright infringement, moral rights infringement, passing off, and unfair competition. However, when bringing their motion for summary judgment in respect of the copyright infringement claims, the plaintiffs expressly abandoned the other causes of action. After the parties' materials on the plaintiffs' summary judgment motion had been filed, the defendants brought their own motion for summary judgment seeking dismissal of the action, to be argued on the same materials. No objection was taken to this approach and the parties agree the matter should be fully decided on these motions.

[8] The parties' motions for summary judgment therefore raise the following issues:

- A. Is this matter suitable for summary judgment?
- B. Should the Court admit into evidence on the motions:
  - 1) the transcript of a podcast written by Mr. Hendley; and/or
  - 2) the expert reports of Raymond Leslie Fazakas?
- C. Have the plaintiffs established the defendants infringed their copyright?
- D. If so, what remedies are appropriate?

### III. Analysis

#### A. *This is an Appropriate Case for Summary Judgment*

[9] The Court shall grant summary judgment where there is “no genuine issue for trial with respect to a claim or defence”: *Federal Courts Rules*, SOR/98-106, Rule 215(1). In *Hryniak v Mauldin*, 2014 SCC 7, Justice Karakatsanis described concisely the “no genuine issue for trial” standard:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[Emphasis added; *Hryniak* at para 49.]

[10] *Hryniak* was decided in the context of the summary judgment rule in Ontario’s *Rules of Civil Procedure*, RRO 1990, Reg 194. However, the Federal Court of Appeal has confirmed its relevance to summary judgment motions brought under the *Federal Courts Rules*, while cautioning that its pronouncements should not be imported uncritically so as to amend Rule 215: *Manitoba v Canada*, 2015 FCA 57 at paras 11–17; *Badawy v Igras*, 2019 FCA 153 at para 7. The relevant principles governing summary judgment motions in the Federal Court were helpfully summarized by Justice Fuhrer in *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 at para 42, drawing on the decision of Justice Mactavish, then of this Court, in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at paras 24–41.

[11] In the present case, both parties brought motions for summary judgment and both ask the Court to determine the matter on these motions. Neither party argues there is a genuine issue requiring a trial. To the contrary, by letter to the Court the parties agreed the proceeding could be finally resolved through summary proceedings. While such agreement and submissions are not binding on the Court, they are persuasive, particularly in assessing whether summary judgment is a “proportionate, more expeditious and less expensive means to achieve a just result”: *Hryniak* at para 49; *Federal Courts Rules*, Rule 3.

[12] There are some evidentiary and factual complexities in this matter, notably with respect to the events described in the books about the Donnellys, whether they are true, and the extent to which that matters in the analysis. However, these complexities do not prevent a fair and just determination of this case on its merits. I am satisfied the materials before me permit me to make the necessary findings of fact and apply the law to them. I am also satisfied, given the issues and amounts at stake, the evidence filed, and the parties’ mutual submission that there are no issues requiring trial, that summary judgment is an appropriate method to secure the just, most expeditious, and least expensive determination of the proceeding on its merits: *Federal Courts Rules*, Rule 3.

B. *The Record and Evidentiary Issues*

[13] This action centres around three books: Thomas P. Kelley, *The Black Donnellys* (Richmond Hill: Firefly Books, 1993), first published in 1954; Thomas P. Kelley, *Vengeance of the Black Donnellys* (Richmond Hill: Firefly Books, 1995), first published in 1962; and Nate Hendley, *The Black Donnellys: The Outrageous Tale of Canada’s Deadliest Feud*

(Toronto: Lorimer, 2009), first published in 2004. For ease of reference and to avoid confusion, I will refer to Mr. Kelley's books as *The Black Donnellys* and *Vengeance*, and to Mr. Hendley's as *The Outrageous Tale*. Both *The Black Donnellys* and *The Outrageous Tale* are presented as telling the true story of the infamous Donnelly family, five of whom were killed by a mob in February 1880 after decades of criminal conduct and feuding. *Vengeance* is a more fanciful story, whose predominantly fictional nature can be seen from its subtitle: *Canada's Most Feared Family Strikes Back From the Grave*.

[14] It is undisputed that the plaintiffs now own copyright in *The Black Donnellys* and *Vengeance*. John Winkler is the son and heir of Theresia Winkler, who died in 2016. Ms. Winkler was the sole beneficiary of Mr. Kelley, who died in 1982. Although Mr. Kelley assigned copyright in the books to a third party during his lifetime, this Court confirmed in 2002 that Ms. Winkler would become owner of the copyright in 2007 by operation of section 14 of the *Copyright Act*, RSC 1985, c C-42, known as the "Dickens" provision: *Winkler v Roy*, 2002 FCT 950 at paras 6–7, 57–59, 63.

[15] Neither party filed copies of the complete works in their motion materials, relying instead on excerpts. At the hearing, I questioned my ability to assess whether there had been a substantial taking of *The Black Donnellys* or *Vengeance* by *The Outrageous Tale* without having full copies of the works. With the consent of the defendants, I granted the plaintiffs leave to file a further affidavit attaching the complete books for the Court's review, which was done shortly after the hearing.



[16] In addition to the works themselves, the plaintiffs filed the affidavit of John Winkler, owner of copyright in Mr. Kelley's books; and the affidavit of Raymond Leslie Fazakas, attaching an expert report and a supplementary expert report. Mr. Fazakas' reports provide, among other things, his opinion that *The Black Donnellys* is "almost two-thirds fiction," and that Mr. Kelley fabricated a number of the facts and events about the Donnellys that appear in the book.

[17] The defendants responded with affidavits from Nate Hendley, author of *The Outrageous Tale*; James Lorimer, President of Lorimer, the current publisher of *The Outrageous Tale*; and Louise McLean, a law clerk with counsel for the defendants. Mr. Hendley and Mr. Lorimer both described, among other things, their understanding that *The Black Donnellys* was a factual telling of the Donnellys' story. Mr. Winkler filed a reply affidavit addressing matters in Mr. Hendley's affidavit. Mr. Winkler, Mr. Fazakas, and Mr. Hendley were cross-examined on their affidavits.

[18] Two days before the hearing of the summary judgment motions, the plaintiffs filed a motion seeking leave to file the transcript of an episode of a podcast about the Donnellys written by Mr. Hendley. The defendants object to the filing of the podcast transcript. They also argue Mr. Fazakas' evidence should be ruled inadmissible. For the reasons below, I conclude that the podcast transcript should not be accepted, and that Mr. Fazakas' reports are admissible.

(1) The podcast transcript should not be admitted

[19] In February 2020, the podcast "Canadian True Crime" aired an episode about the Donnelly family that was written by Mr. Hendley. The plaintiffs arranged for a transcript of the

episode to be prepared and sought leave to tender it at the hearing of the summary judgment motions. They argue the podcast “conspicuously leaves out” events they allege in this action Mr. Kelley invented or embellished, such as the street battle described at the outset of these reasons. They seek to use the transcript to undermine Mr. Hendley’s assertion that he believes the events recounted in Mr. Kelley’s book to be factual.

[20] Mr. Winkler swore an affidavit in support of the motion, attaching the transcript as well as some surrounding information and correspondence. Although the motion only seeks leave to tender the transcript, to be receivable evidence on the summary judgment motion, the transcript would have to be presented through an affidavit: Rule 363. I therefore consider the plaintiffs’ motion as effectively a request to file Mr. Winkler’s affidavit with the transcript attached as an exhibit.

[21] The affidavit and transcript were put forward after the date for filing evidence set out in the relevant scheduling order for these motions, after all cross-examinations had been conducted, and after the parties had filed their memoranda of fact and law. In essence, therefore, the plaintiffs seek both an extension of time to file the affidavit and transcript under Rule 8(1) and leave to file further evidence after cross-examinations under Rule 84(2).

[22] In assessing whether to extend the time for filing an affidavit, the Court will consider (i) the reasons for the delay, and (ii) the “intrinsic worth” of the affidavit, judged by its relevance, admissibility, and potential use to the Court: *Altana Pharma Inc v Novopharm Limited*, 2007 FC 1183 at paras 13–22, applying *Mapei Inc v Flextile Ltd*, [1995] FCJ No 180,

59 CPR (3d) 211 (TD) and *Strykiwsky v Stony Mountain*, 2000 CanLII 16155 (FC) at paras 7–9.

The ultimate question for the Court is “how justice may best be done between the parties”:

*Altana* at para 22.

[23] In assessing whether to admit evidence after the conduct of cross-examination, the Court will consider (i) the relevance of the proposed affidavit; (ii) the existence of prejudice to the opposing party; (iii) whether the affidavit will assist the Court; and (iv) the overall interests of justice including whether the evidence was available or could have been anticipated earlier:

*Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1229 at paras 11–12, applying *Pfizer Canada Inc v Rhoxalparma Inc*, 2004 FC 1685 at para 16.

[24] There is clear overlap between these factors. Considering them jointly and cumulatively, I deny the request to file Mr. Winkler’s further affidavit and the attached transcript.

[25] The podcast in question was aired in February 2020, before affidavits were filed and cross-examinations conducted. The plaintiffs’ only explanation for not putting the transcript forward earlier is that Mr. Winkler first became aware of the podcast when reviewing Mr. Hendley’s Facebook page in December 2020, a week before the hearing. There was no suggestion the podcast was hidden or otherwise unavailable earlier. Rather, Mr. Winkler had simply not conducted the investigation that resulted in him becoming aware of the podcast until after all materials had been filed. As is often said, parties to a summary judgment motion have an obligation to put their “best foot forward”: *Miller v Canada*, 2019 FCA 61 at paras 17, 40. In my

view, this includes conducting whatever factual investigations they consider necessary to pursue or defend the motion in a timely manner to permit the facts to be put forward.

[26] More importantly, I consider the proposed evidence to be of little relevance or assistance. This action is about whether Mr. Hendley's book infringes copyright in Mr. Kelley's books under sections 3 and 27 of the *Copyright Act*. How Mr. Hendley may have written about the Donnellys in a different forum, 16 years after his book was first published, has no bearing on that question. The podcast in question tells a shortened version of the Donnellys' story, in narrative form. The evidence does not indicate how long the podcast was, but the relevant portion of the transcript is 18 pages, considerably shorter than both *The Outrageous Tale* and *The Black Donnellys*. As the plaintiffs concede, the podcast does not purport to be an exhaustive account of what is known about the Donnellys or recounted in Mr. Hendley's book. The plaintiffs argue they could have cross-examined Mr. Hendley about why important events were not included, or were recounted differently, in the podcast. However, it is difficult to see how the editorial selections made in preparing the podcast would be particularly probative even of the tangential question of Mr. Hendley's continued belief in the accuracy of Mr. Kelley's book.

[27] Nor do I consider the writing or contents of the podcast to be relevant to, or of assistance to the Court in deciding, the issue of damages. The plaintiffs argue the defendants' good or bad faith, and their conduct during the proceedings, are relevant to their claim for statutory damages: *Copyright Act*, ss 38.1(5)(a)–(b). However, even if Mr. Hendley deliberately omitted from the podcast narrative events that are the subject of this dispute, the plaintiffs were unable to clearly

articulate whether or why this would be an exacerbating or mitigating factor in assessing damages.

[28] My conclusions on the relevance of the podcast transcript also serve to answer the plaintiffs' argument that the defendants had a positive obligation to produce the podcast as part of their discovery obligations under Rules 222 and 226.

[29] In terms of the interests of justice and the prejudice to the parties, I take into account that the plaintiffs should generally be allowed to try to prove their case in the manner they consider appropriate. Conversely, admitting the affidavit and podcast transcript would leave the defendants unable to respond with their own evidence. The plaintiffs did not seek an adjournment of the motions, nor an opportunity to cross-examine Mr. Hendley on the transcript. They simply sought to tender the transcript at the hearing and make argument thereon. In the circumstances of a motion that took months to prepare—all while the podcast was apparently available online—this would not be fair to the defendants.

[30] Considering all of these factors together, I conclude the interests of justice speak against admission of the podcast transcript. The evidence has little intrinsic worth, would be of little assistance to the Court in determining the central issues on these motions, the reasons for its delayed appearance are not convincing, and the defendants should not be required to argue evidence they have not had the chance to respond to. The plaintiffs' motion to tender the podcast transcript and related affidavit is therefore dismissed.

(2) Mr. Fazakas' evidence is admissible

[31] Much of the plaintiffs' case relies on the expert evidence of Mr. Fazakas. Mr. Fazakas is an author, researcher, and retired lawyer. He has a particular interest in and knowledge of the Donnellys, having spent over fifty years as an "avocational researcher" of the family, and having written several books, articles and television documentaries about them. These include *The Donnelly Album* (Willowdale: Firefly Books, 1995), first published in 1977 and written under the name Ray Fazakas. Mr. Hendley referred to *The Donnelly Album* as a source in researching *The Outrageous Tale* and listed it in his bibliography, alongside *The Black Donnellys*, *Vengeance*, and two other books on the Donnellys.

[32] Mr. Fazakas prepared two reports. In the first, he summarized the books referred to in Mr. Hendley's bibliography (other than his own), attached and listed other writings on the Donnellys and on Mr. Kelley's books, and gave his opinion that some 45 passages in *The Black Donnellys* were fictional. This included a side-by-side listing of the passages juxtaposed against passages in *The Outrageous Tale*, often with commentary comparing the two. In his second report, Mr. Fazakas provided further opinion on Mr. Kelley's books and the degree to which they were fictional, the origin of the name "The Black Donnellys," as well as other sources, both fictional and historical, about the Donnellys.

[33] The defendants argue Mr. Fazakas' evidence should not be admitted. They submit Mr. Fazakas is not impartial, independent, and unbiased, and that he has effectively acted as an advocate for the plaintiffs. They therefore argue he is not a properly qualified expert, and his

evidence does not meet the requirements for admissibility set out by the Supreme Court of Canada in *R v Mohan*, [1994] 2 SCR 9 at p 20 and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 19. They point in particular to the fact that Mr. Fazakas is the father of counsel for the plaintiffs, that he effectively initiated this proceeding by drawing the existence of Mr. Hendley's book to the attention of Mr. Winkler and noting similarities with Mr. Kelley's books, and that he was responsible for identifying the allegedly infringing passages in *The Black Donnellys* the plaintiffs now rely on.

[34] As a preliminary matter, the plaintiffs argue the defendants should not be permitted to object to Mr. Fazakas' evidence, since they did not raise the issue until their memorandum of fact and law on these motions despite having received the reports years earlier. I disagree. Regardless of any prior disclosure, the plaintiffs' reliance on Mr. Fazakas' reports for the purposes of their summary judgment motion did not occur until it filed them with its record. It was appropriate for the defendants to object to such evidence in response. Early notice of any such objection is certainly to be encouraged: *R v Docherty*, 2010 ONSC 3628 at para 12. However, I cannot conclude in these circumstances that the defendants waived any right to object by not expressly raising the issue earlier. Nor can the plaintiffs claim to be taken by surprise by the objection, as the family relationship was clearly a potential issue from the outset, and the defendants asked pointed questions about the relationship and Mr. Fazakas' role in the litigation on cross-examination, confirming and expanding their grounds for objection.

[35] Turning to the merits of the objection, Justice Cromwell for the Supreme Court in *White Burgess* set out a two-step inquiry for determining the admissibility of expert evidence. First, the

proponent must establish the threshold admissibility of the evidence based on the four factors set out in *Mohan*: relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert: *White Burgess* at para 23; *Mohan* at p 20. Second, as a discretionary matter, the Court balances the potential risks and benefits of admitting the evidence to decide whether the potential benefits justify the risks: *White Burgess* at para 24; *Mohan* at p 21. These criteria apply to copyright infringement cases as in other intellectual property cases: *Cinar Corporation v Robinson*, 2013 SCC 73 at para 49.

(a) *Step 1 of the White Burgess Analysis: Admissibility*

[36] The defendants argue that Mr. Fazakas does not meet the “qualified expert” requirement of *Mohan*, which engages the expert’s independence and duty to the Court: *White Burgess* at paras 52–53. In discussing this duty, Justice Cromwell adopted the language of Justice Cresswell in *The Ikarian Reefer*, underscoring the importance of expert evidence being, and being seen to be, the “independent product of the expert uninfluenced as to form or content by the exigencies of litigation” and “objective unbiased opinion”: *White Burgess* at para 27, adopting *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (“*The Ikarian Reefer*”), [1993] 2 Lloyd’s Rep 68 (QB) at p 81, aff’d [1995] 1 Lloyd’s Rep 455 (CA) at p 496.

[37] At the same time, the Supreme Court reaffirmed that a mere appearance of bias is not enough to render expert testimony inadmissible, and that the standard is not “whether a reasonable person would consider that the expert is not independent”: *Mouvement laïque québécois v Saguenay (City)* 2015 SCC 16 at para 106. Rather, an expert’s evidence will be inadmissible where their lack of independence renders them “incapable of giving an impartial



opinion in the specific circumstances of the case”: *White Burgess* at para 36, quoting *Mouvement laïque québécois* at para 106. This will be a rare circumstance: *White Burgess* at para 49.

Ultimately, the question is whether the expert is able and willing to carry out their primary duty to the Court to be fair, objective, and non-partisan: *White Burgess* at paras 46, 50.

[38] In making this assessment, the Court is to consider the particular circumstances, the nature of the proposed evidence, and the nature and extent of any connection between the expert and the litigation or a party: *White Burgess* at para 49. The defendants rely in particular on the following passage from the Supreme Court’s description of these concerns, noting Mr. Fazakas’ familial relationship with counsel and his advocacy on behalf of the plaintiffs:

For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[Emphasis added; *White Burgess* at para 49.]

[39] The defendants also point to the 2010 decision of the Ontario Superior Court of Justice in *Docherty*. There, Justice Wein found inadmissible a psychiatric report prepared by the father of defence counsel: *Docherty* at paras 1–4, 14. She noted the public perception of the introduction of such evidence, particularly in a case of manslaughter sentencing, stating that “[t]he apprehension of bias as well as the possibility of a subconscious bias precludes its admissibility”: *Docherty* at para 14. Justice Wein also expressed particular concern over the fact that the psychiatrist’s report did not disclose the relationship with his son: *Docherty* at para 15.

[40] I believe the defendants have satisfied their burden to show there is a “realistic concern” that Mr. Fazakas’ evidence should not be received: *White Burgess* at para 48. The burden is therefore on the plaintiffs to establish on a balance of probabilities that the admissibility threshold is met: *White Burgess* at para 48.

[41] The plaintiffs argue that despite the familial relationship, the evidence shows Mr. Fazakas is aware of his primary duty to the Court, and is able and willing to carry it out. They point to a number of circumstances they say support this conclusion and distinguish the situation from that in *Docherty*. In particular, they argue Mr. Fazakas’ evidence is consistent with his prior writings on Mr. Kelley’s books, even prior to the litigation, indicating that the “acid test” referred to by the Supreme Court of Canada—whether the evidence would be the same regardless of which party retained him—is met: *White Burgess* at para 32. They note that unlike the psychiatrist in *Docherty*, Mr. Fazakas’ report openly discloses that he is the father of plaintiffs’ counsel. The plaintiffs further argue Mr. Fazakas was involved in the matter before his son, who was not the plaintiffs’ original counsel, so the issue should be considered a “choice of counsel” issue rather

than a “choice of expert” issue. Finally, the plaintiffs argue the Court can infer there are no other living experts who could provide the evidence Mr. Fazakas provided.

[42] With respect to the last of these points, in the absence of any evidence the plaintiffs tried and failed to retain another expert, I cannot place reliance on the supposed necessity of having Mr. Fazakas as an expert. Nor do I consider it particularly material whether counsel or the expert was involved first, as the concern over potential bias and an inability to be objective remains the same.

[43] Nonetheless, I am satisfied on balance that Mr. Fazakas’ evidence meets the “not particularly onerous” threshold of admissibility: *White Burgess* at para 49. I am satisfied based on my review of Mr. Fazakas’ evidence, including the transcript of his cross-examination, that despite his relationship with counsel and his connection with the subject-matter, he was aware of his primary duty to the Court, and was able and willing to carry it out: *White Burgess*: at para 49.

[44] I share the concerns raised by Justice Wein in *Docherty* regarding the appearance of having the father of counsel give opinion evidence. However, subsequent to *Docherty*, the Supreme Court in *White Burgess* confirmed the applicable standard is not that of the “reasonable observer”: *White Burgess* at paras 36, 50. While the public perception of the administration of justice remains a relevant consideration, the standard for admissibility is that described above. In addition, the context of this proceeding, in which private parties are disputing copyright infringement, is different than the sentencing at issue in *Docherty*, where public interest considerations take on a heightened importance: *Docherty* at para 14. While it will be rare that

evidence from a relative of counsel will be tendered, and may be rare that it is admitted, I conclude it is not automatically a bar to admissibility in all cases or circumstances.

[45] With respect to the allegation that Mr. Fazakas' reports engage in advocacy, I agree there are aspects of the reports that go beyond Mr. Fazakas' expertise regarding the history of the Donnelly family. I have particular concern with Mr. Fazakas' efforts to address not only what is fact and fiction in *The Black Donnellys* but the degree to which passages in *The Outrageous Tale* are similar to those in *The Black Donnellys*. Mr. Fazakas is not an expert on this issue and the Court does not need expert assistance on it. This included Mr. Fazakas making comparisons between excerpts of the two texts in which he had deleted passages to magnify the apparent similarity. However, while I believe these aspects of his evidence do not assist the Court, I do not believe they disqualify his evidence as a whole or render his reports inadmissible.

[46] The familial relationship is a matter of concern and is a situation that ought be avoided. Overall, however, I conclude that this is not one of the "very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence" given the particular circumstances of this matter and Mr. Fazakas' evidence: *White Burgess* at para 49. I conclude that Mr. Fazakas' evidence meets the *Mohan* threshold of admissibility.

(b) *Step 2 of the White Burgess Analysis: Gatekeeping*

[47] Even where expert evidence meets this basic threshold for presumptive admissibility, concerns about impartiality continue to play a role at the second discretionary "gatekeeping" stage, where the helpfulness of the evidence is weighed against the potential dangers associated

with expert evidence: *White Burgess* at paras 16, 19, 24, 54; *Mohan* at p 21. Justice Cromwell sounded a note of caution in respect of this second stage in jurisdictions where the rules do not permit the weighing of evidence on summary judgment motions: *White Burgess* at para 55. Justice Fuhrer recently concluded that these concerns apply on summary judgment motions brought in the Federal Court under Rule 215: *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 20. If weighing of expert evidence is entirely precluded under Rule 215, this would suggest that Mr. Fazakas' evidence should be admitted based exclusively on the first step of the *White Burgess* analysis.

[48] The question of weighing the expert evidence also arises given the defendants' arguments that, even if admitted, the reports should be given little or no weight both because of the independence issue and because of the limited probative value of the evidence. I need not decide these issues since the outcome on these motions is not ultimately affected by the weight given to Mr. Fazakas' evidence. However, I make the following observations.

[49] First, it is clear that issues of credibility, which can be a central factor in ascribing weight to evidence, should not be decided on a motion for summary judgment: *Rallysport (2019)* at para 42(F); *Newman v Canada*, 2016 FCA 213 at para 57; *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 24, 29. In the present case, there are no credibility issues to resolve. Nor is there any contrary expert evidence tendered by the defendants.

[50] Second, despite the general caution against weighing of evidence on a summary judgment motion, the Federal Court of Appeal has recognized that at least some weighing and

assessing of evidence can occur. In *Canada v 100193 PEI Inc*, the Court of Appeal upheld this Court's decision granting in part a summary judgment motion, finding that there was no basis to interfere with the weight the Court placed on the evidence: *Canada v 100193 PEI Inc*, 2016 FCA 280 at para 32, aff'd 2015 FC 932, lv app ref'd 2017 CanLII 32942 (SCC). Similarly, in *Badawy v Igras*, Justice Manson found he did not need to assess credibility since the evidence, even on its face, was not probative of the material facts and issues, a finding upheld by the Court of Appeal: *Badawy v Igras*, 2017 FC 619 at paras 44–47, aff'd 2019 FCA 153 at paras 3, 7, 10–15. Since probative value can be considered an element of weight, this suggests that at least some form of weighing is permissible on a summary judgment motion: *Magonza* at para 29.

[51] Had I needed to, and to the extent Rule 215 permits me to, weigh Mr. Fazakas' reports to assess their admissibility, I would conclude that such a balancing supports their admission. As outlined above, there are aspects of the reports that are unhelpful, such as Mr. Fazakas' comparisons of the similarity of passages. However, the primary aspect of Mr. Fazakas' opinion on whether information in *The Black Donnellys* is fact or fiction is helpful, although ultimately not determinative, in assessing the issues relevant to whether there has been substantial copying. On the other side of the balance, there are no significant concerns in this case regarding the "risks" identified in *White Burgess* regarding confusion, affrontment to opinion, prejudice, junk science, or a contest of experts: *White Burgess* at paras 16–18.

[52] I conclude Mr. Fazakas' evidence should be admitted. In doing so, I need not invariably accept his opinions. But I shall consider those opinions as given, and do not need to assess either their credibility or competing expert opinion.

C. *The Plaintiffs Have not Established Infringement of Copyright*

(1) General principles: fact, fiction, and copyright protection

[53] Copyright subsists in Canada in every original literary work of which the author is a citizen or resident of a treaty country: *Copyright Act*, ss 2 (“every original literary, dramatic, musical and artistic work”, “treaty country”), 5(1)(a); *CCH Canada Ltd v Law Society of Upper Canada*, 2004 SCC 13 at paras 8, 14. An “original” work is one that involves the exercise of skill and judgment and is not simply copied from another work: *CCH* at paras 16, 23, 25, 28.

[54] Copyright subsists whether an original literary work is one of fiction or nonfiction. The *Copyright Act* makes no distinction between the two. That said, copyright protection does not extend to “facts or ideas” but to the original “expression of ideas”: *CCH* at paras 8, 14–15, 22; *Hager v ECW Press Ltd*, [1999] 2 FC 287 (TD) at para 44; *Maltz v Witterick*, 2016 FC 524 at paras 29–32. This does not mean that literary works on historical or factual subjects are less worthy of copyright protection. It simply means that copyright subsists in the “particular means, method, and manner” in which those facts are presented in the work, rather than in the underlying facts themselves: *Maltz* at para 31; *Hager* at paras 45–46. This originality may include the “structure, tone, theme, atmosphere and dialogue” used in presenting the facts: *Maltz* at para 33.

[55] The principle that there is no copyright in facts is one of long standing. It was affirmed by the Ontario Court of Appeal in *Deeks v Wells*, [1931] OR 818, 1931 CanLII 157 (CA), aff’d [1933] 1 DLR 353, 1932 CanLII 315 (UK JCPC). There, Ms. Deeks alleged that Mr. Wells

infringed copyright in her unpublished historical book titled “The Web” by obtaining the manuscript from the publisher and using it to write his book “The Outline of History,” adopting her general plan and ideas.

[56] The Court of Appeal’s rejection of this claim was based primarily on its conclusion that Ms. Deeks had not established Mr. Wells had access to her unpublished manuscript. However, in concurring reasons Justice Orde noted that even if the work had been published and accessible, Mr. Wells would have been entitled to refer to it in writing his own work:

If the plaintiff’s work “The Web” had already been published and distributed throughout the world as widely, say, as “The Encyclopaedia Britannica,” could an action for an infringement of the plaintiff’s copyright by reason of anything appearing in “The Outline of History” have possibly succeeded, even if it were proved that the defendant Wells had made use of a published copy of “The Web” in writing his book? There can be no copyright in the facts of history or in their chronological sequence. Had “The Web” been published, the defendant Wells was as free to consult and use it in the preparation of his work as the plaintiff was to consult and use “The Encyclopaedia Britannica” or any other publication as a source of information. Infringement of copyright in such cases must, as a general rule, consist of the copying of the words of another in the order in which he has used them. The use of the same historical facts or of the same ideas is not enough.

[Emphasis added.]

[57] The principle that there is no copyright in facts is relevant to the assessment of whether there has been a substantial taking of a work. As copyright means the sole right to “produce or reproduce the work or any substantial part thereof,” any work that reproduces a “substantial part” of a work in which copyright subsists infringes that sole right: *Copyright Act*, ss 2 (“infringing”), 3(1), 27; *Cinar* at paras 1, 25. In *Cinar*, Chief Justice McLachlin described the notion of “substantial part” in terms that relate it directly to the originality of the work:



A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity[.]” [...] What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

[Emphasis added; citation omitted; *Cinar* at para 26.]

[58] In *Maltz*, Justice Boswell considered the relationship between this description of substantiality and the principle that there is no copyright in facts. He concluded that since facts are not protected by copyright, they are not part of a work’s originality. As a result, any facts that may be copied or taken from a copyright work by a defendant should not form part of the assessment of whether a substantial part of the work was taken: *Maltz* at paras 35–36.

[59] As Justice Boswell pointed out, this approach accords with that taken to “historical fiction” by the United States District Court for the Southern District of New York in *Effie Film, LLC v Pomerance*, 909 F Supp 2d 273 (SDNY, Dec 18, 2012) at pp 297–298. It is also consistent with that taken by the England and Wales Court of Appeal (Civil Division) in *Baigent & Anor v The Random House Group Ltd*, [2007] EWCA Civ 247. There, Lord Justice Mummery recognized that while original expression may include not only language but selection, arrangement, and compilation of research material, it “does not [...] extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the Claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or

general hypotheses suggested (whether they are sound or not) or general themes written about”:  
*Baigent* at para 156.

[60] At the same time, *Cinar* cautions that undertaking the substantiality analysis by excluding non-protectable elements at the outset can interfere with the necessary holistic analysis: *Cinar* at paras 34–36. As Justice Phelan phrased it, “a trial judge should not eliminate the non-protected elements of the works and compare the leftover similarities”: *Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129 at para 127. Such non-original elements may “form part of the substantial part of an author’s skill and judgment where the specific combination of these elements has been copied by the alleged infringer”: *Pyrrha Design* at para 128.

[61] *Cinar* also sets out a number of other important guiding principles to assess whether a work copies a substantial part of a copyright work:

- While copyright protects expression rather than facts or ideas, the protection is not limited to the specific words used. Rather, the *Copyright Act* protects against both “literal and non-literal” copying, so long as the copied material forms a substantial part of the infringed work: *Cinar* at para 27.
- A “qualitative and holistic” approach to the assessment should be taken, in which the Court looks at the two works as a whole, rather than a “piecemeal” approach based on isolated passages, to determine whether the defendant has unduly interfered with the plaintiff’s copyright: *Cinar* at paras 35–36.

- The assessment is whether the copying constitutes a substantial part of the plaintiff’s work, rather than the defendant’s work. Thus, the addition of elements in a defendant’s work may be less relevant to the analysis. However, differences may be so great that the work viewed as a whole is not an imitation but a new and original work: *Cinar* at paras 39–40; see also *Maltz* at para 37.
- Ultimately, the assessment is “a matter of nuance, degree, and context”: *Cinar* at para 40, adopting *France Animation, sa c Robinson*, 2011 QCCA 1361 at para 66; see also *Lainco Inc v Commission scolaire des Bois-Francs*, 2017 FC 825 at paras 171–172.

[62] In performing this task, the Court will typically consider a number of factors, including the importance and originality of the material, whether the infringement has diminished the value of copyright, the scope of the copyright protection, whether the defendant intentionally took the material to save time and effort, and whether the material was used in the same or similar fashion: *U & R Tax Services Ltd v H & R Block Canada Inc*, [1995] FCJ No 962 (TD) at para 35; *Maltz* at para 38; *Wiseau Studio, LLC et al v Harper et al*, 2020 ONSC 2504 at paras 161–162. While *U & R Tax* and *Maltz* refer to the “quality and quantity of the material taken” as a factor, the Supreme Court underscored in *Cinar* that the analysis is focused on quality rather than quantity: *Cinar* at para 26.

[63] Before turning to the application of these principles, I will address the unusual context of this action, in which the parties disagree over whether elements of *The Black Donnellys* are historical facts or fictional and original features of Mr. Kelley’s story telling.

## (2) The current context: fact vs fiction

[64] James and Johannah Donnelly came to Canada from Tipperary, Ireland with two young sons. They settled in Biddulph Township in 1847, where they had five more sons and a daughter. After a land dispute developed into a long-running feud, James Donnelly killed his neighbour, Patrick Farrell, in a fight in 1857. He was convicted of murder and served a prison sentence. Some of the Donnelly sons later established a stagecoach line in 1873, which competed with another line run by a man named Flanagan (or Flannigan). The Donnelly sons, as well as James upon his release from prison, had ongoing trouble with the law and their neighbours. In the early hours of February 4, 1880, James, Johannah, their sons John and Tom, and their niece Bridget were murdered by a mob. Their violent end and the trial of their suspected killers were reported widely in Canadian newspapers of the day. After one was acquitted, however, the remaining charges were dropped and no one was ever convicted of the Donnelly murders.

[65] These broad facts are accepted as being part of nineteenth century Ontario history. They are recounted in contemporaneous reports and in a number of books about the Donnellys, of various degrees of scholarship, including *The Black Donnellys* and *The Outrageous Tale*. The plaintiffs take no issue with the inclusion of these facts in *The Outrageous Tale*, and do not argue their inclusion itself shows or contributes to a finding of copyright infringement.

[66] Rather, relying on Mr. Fazakas' reports, the plaintiffs identify a series of 45 passages in *The Outrageous Tale* they say contain facts and events not drawn from the real history of the Donnelly family, but from *The Black Donnellys*. One of these (numbered Item 27 in

Mr. Fazakas' first report) is the phrase "The Black Donnellys" itself, which the plaintiffs allege was a creation of Mr. Kelley. The plaintiffs describe the remaining passages as falling into three categories: (i) events they allege were purely invented by Mr. Kelley; (ii) events that would no doubt have happened but of which there is no historical record, such that the details were invented by Mr. Kelley; and (iii) events that are known to have happened, but to which Mr. Kelley added "embellishments" and style.

[67] Into the first category of allegedly fictional events fall nine passages (Items 2 to 10) that relate to the street battle described in the opening paragraph of these reasons; three passages (Items 17 to 19) about early encounters between James Donnelly and Patrick Farrell (who Mr. Kelley calls John and who I will therefore just call Farrell); two passages (Items 22 and 23) about the Donnellys maiming Flanagan's horses; two passages (Items 43 and 44) in which the Donnellys visit a Biddulph fortune teller known as "Grandma" Bell; and a number of individual passages about other Donnelly crimes (Items 20, 21, and 37 to 40).

[68] The plaintiffs' second category—events that would have happened but of which there is no historical record—covers two passages (Items 13 and 14) about how James and Johannah met; a passage related to James Donnelly's return from prison (Item 29); and a passage about the opening of the Donnelly stagecoach line (Item 30).

[69] The third category, covering real events that Mr. Kelley allegedly embellished, include five passages (Items 11, 12, 24, 25, and 35) about an incident in which the Donnellys fought with Lucan constables at a wedding; two passages (Items 28 and 36) about a mob visiting the

Donnellys in search of a cow; one passage (Item 26) about a constable being shot at; and three passages (Items 31 to 33) relating to the fight in which James Donnelly killed Farrell. Seven further passages in this category relate to individual facts the plaintiffs say are untrue or invented by Mr. Kelley: the height of James Donnelly Jr. (Item 1); the availability of land grants (Item 15); Farrell's former occupation (Item 16); the attitude of William Donnelly's in-laws (Item 34); where Bridget Donnelly slept the night of the murders (Item 41); that those charged for the murders were "ringleaders" (Item 42); and whether a Constable Everett resigned or was fired (Item 45). I note as an aside that this is not a case where identification of small but striking similarities, such as the copying of errors, may provide evidence a defendant had access to and drew from a plaintiff's work: see, e.g., *Deeks v Wells (CA) per Riddell*, JA. Mr. Hendley cited Mr. Kelley's works in his bibliography and confirms they were among the sources he drew from.

[70] The plaintiffs contend that Mr. Hendley's inclusion of these fictional events and fictional aspects of real events amounts to copyright infringement. As they state, "it is Hendley's colourable imitation of the fictional elements of Kelley's work – Kelley's creative embellishments – that form the basis of this action."

[71] The plaintiffs argue, in essence, that *The Black Donnellys* is a work of historical fiction or biographical fiction: it tells a fictional tale against the backdrop of real world events and individuals, adding characters, events, and details to enliven the story for the reader. They argue the taking of these fictional elements is an important part of the substantial taking of *The Black Donnellys* and *Vengeance* by Mr. Hendley in *The Outrageous Tale*. They also allege *The Outrageous Tale* copies Mr. Kelley's "cinematic" style of telling aspects of the story, including

through the choice of certain perspectives, the sequence of events, and in some cases particular language.

(a) *Mr. Kelley's representations regarding the truth of his story*

[72] What makes this case unusual is that *The Black Donnellys* is not presented as a work of historical or biographical fiction. To the contrary, it is presented as a “true crime” story, as *The True Story of Canada's Most Barbaric Feud*. This phrase appears as a description or subtitle on the cover of most of the editions of *The Black Donnellys* shown in the evidence. In the edition of the book filed with the Court, it is not on the cover but is the title of the Introduction.

[73] This assertion of truth is backed up by a number of statements made by the author in the book. At the conclusion of the Introduction, dated April 1953, Mr. Kelley states:

The material for the following pages was gathered from old newspapers, police and court records, as well as other unimpeachable sources and by several trips to the Lucan area.

[74] In various places throughout the book, Mr. Kelley identifies the source of the information he recounts. He refers to personal discussions with descendants and area locals; says that certain events (such as the Donnellys having cut the tongues of Flanagan's horses) remain the subject of debate among those old enough to have known the Donnellys; quotes personal testimony and contemporaneous news articles; and refers to the many historical records he reviewed.

[75] In a number of cases, Mr. Kelley refers to the source of his information being individuals with direct knowledge. For example, Mr. Kelley begins his recounting of the street battle, which

Mr. Fazakas opines is “a fictional fantasy conjured up by Kelley from his imagination,” with the following paragraph:

Inside the coach and ready to be off, were three passengers, a farm implements salesman and two women. One of the latter was destined to live to an unusual age. In later life she settled in British Columbia and before her death related the story of that wild morning to some scribe, who eventually wrote an article on it.

[Emphasis added; *The Black Donnellys* at p 84.]

[76] Similarly, Mr. Kelley provides an eyewitness for the Donnellys’ visit to “Grandma” Bell, which Mr. Fazakas opines is “a fiction made up by Kelley” in its entirety. Mr. Kelley states that his recounting of the story was given by Ms. Bell herself to a reporter: “The old woman, who later told and retold the story to any who would listen, related it to a reporter”: *The Black Donnellys* at p 143. The remainder of the scene is presented in Ms. Bell’s own words, as recounted to that reporter.

[77] Toward the end of the book, Mr. Kelley refers to the “scoop” of having spoken directly to an anonymous “elderly Biddulph inhabitant” who was alive at the time of the murders and whose father was a member of the mob who had killed the Donnellys and relayed his story. He describes this as “[t]he story of a man *who was there!*” [emphasis in original], and one which Mr. Kelley believed “to be absolutely true in every detail”: *The Black Donnellys* at p 155.

[78] This is not to say these incidents necessarily happened, either as Mr. Kelley described, or at all. Rather, it is to note that Mr. Kelley himself indicates that the events and information he describes are not his original creations but facts obtained from reliable sources.



[79] As the defendants emphasize, *The Black Donnellys* has been sold as a work of nonfiction for 65 years. It is published with a Dewey Decimal Classification number that shows it in the “Criminology” category (364) of the “Social sciences” classification (300). It similarly bears a Library of Congress (LC) Classification System number again showing it being in the “Criminology” category (HV6001-7220.5) within “Social Sciences” (H), and in particular in the “Crimes and criminal classes” category (HV6774–7220.5).

(b) *The plaintiffs’ arguments that the identified passages are not “facts”*

[80] Despite the classification of *The Black Donnellys* as nonfiction and Mr. Kelley’s statements about his sources and the truth of the story, the plaintiffs rely on Mr. Fazakas’ opinion to assert that much of it is either mistaken or fictional. They therefore argue that the principle that there is no copyright in facts does not apply.

[81] To his credit, Mr. Fazakas frankly acknowledges that his opinion about the truth of the events in *The Black Donnellys* is generally given “in the negative.” That is, his opinion is based on there being no mention of certain events or individuals referred to by Mr. Kelley in the available historical primary sources. Given the depth of his familiarity with those sources, he concludes it is “fair and reasonable to assume” the events or individuals (i) did not occur or exist, and (ii) Mr. Kelley invented them out of his own imagination.

[82] The defendants dispute that the facts in the identified passages are untrue. In making their arguments regarding the factual or fictional nature of the events and details, both parties pointed to certain primary sources (contemporaneous newspapers and reports), pre-Kelley secondary

sources (accounts of the Donnelly story before Mr. Kelley's works), and post-Kelley secondary sources (accounts after Mr. Kelley's works, which range from plays and novels to websites, essays, and historical works). The plaintiffs point to these to show that the relevant events and details are described in writing for the first time in *The Black Donnellys*. The defendants point to them to show that the principal events are seen in multiple works, including those Mr. Hendley used in his research. With respect to the post-Kelley secondary sources, Mr. Fazakas gives his view that where they include incidents that appear for the first time in *The Black Donnellys*, the later authors copied them from Mr. Kelley's book.

[83] In some cases, Mr. Fazakas' own reports recognize Mr. Kelley is not the source of the alleged fiction or error. In particular, Mr. Fazakas refers to W. Stewart Wallace's *Murders and Mysteries, a Canadian Series* (Toronto: Macmillan, 1931), a pre-Kelley work with a chapter on the Donnelly murders entitled *The Lucan Murders*. Mr. Fazakas identifies a number of factual errors in that chapter, including three that also appear in *The Black Donnellys*. Mr. Fazakas gives his opinion that "Kelley copied these errors into his 1954 book." Despite recognizing that they did not originate with Mr. Kelley, Mr. Fazakas nonetheless lists some of these details as areas where Mr. Hendley copied Mr. Kelley (Items 33, 36). Whether these "facts" are true, or were the creations of Mr. Wallace, is ultimately irrelevant in this action, as Mr. Fazakas' evidence indicates that they were *not* the original work of Mr. Kelley.

[84] Similarly, Mr. Fazakas asserts that the fact that Bridget Donnelly was sleeping upstairs on the night of the murders (Item 41) was "an invention by Kelley." However, he also states that the first journalist on the scene of the murders, J. Lambert Payne, reported in 1926 that Bridget

and Donnelly's son Tom slept upstairs that night. As Mr. Fazakas admitted on cross-examination, Mr. Kelley could have obtained this fact from Mr. Payne or from another source. Again, whether Bridget Donnelly actually slept upstairs on the night of February 3–4, 1880 or not, there is no evidence this detail was an original "invention by Kelley."

[85] In some cases, it is clear Mr. Kelley is wrong. For example, Mr. Kelley states that William Haskett testified at James Donnelly's murder trial (Item 21). Mr. Fazakas confirms, having reviewed archival records including the bench notes of the presiding judge, that Mr. Haskett did not testify at the trial, and I am prepared to accept this. However, one would only know this by consulting the primary sources Mr. Fazakas consulted. Anyone reading *The Black Donnellys* and Mr. Kelley's statements that he had reviewed "police and court records" would understand that Mr. Haskett had testified.

[86] Conversely, in some cases, Mr. Fazakas has overstated what *The Outrageous Tale* says. For example, he suggests Mr. Hendley copied Mr. Kelley's assertion that government land was available in Biddulph in 1847 (Item 15). In fact, Mr. Hendley says nothing about the availability of government land, simply that the tract on which James Donnelly settled was "called 'Government Lot #18'." That phrase does not appear in *The Black Donnellys*, but does appear in a post-Kelley source. Similarly, Mr. Fazakas suggests that Mr. Hendley repeats Mr. Kelley's fiction that William Donnelly served his full nine month sentence for his fight with the police at the wedding (Item 35). However, *The Outrageous Tale* simply states that William was sentenced to nine months in jail, which is agreed to be true, and then described his actions after his release without discussing in detail how long he was in prison.

[87] In most cases, however, the situation is less clear. Mr. Fazakas says that based on his knowledge of the available sources, there is no historical confirmation of the incidents or facts described in Mr. Kelley's book, while Mr. Kelley himself says the incidents were confirmed in documentary records or through oral accounts that might not appear in other sources.

[88] Whether these events or details in *The Black Donnellys* are considered "facts" affects the assessment of whether there has been copyright infringement, since there is no copyright in facts. It is not disputed that *The Black Donnellys* and *Vengeance* are, as a whole, original works. However, as discussed, the assessment of whether there has been copying of a "substantial part" of either book is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*: *Cinar* at para 26. Facts, or other material not original to the author, are not part of the work's originality: *Maltz* at paras 35–36; *CCH* at paras 8, 22. In this case, the plaintiffs' case of substantial copying is built on portions of *The Black Donnellys* they identify as being fictional creations of Mr. Kelley. If those passages are treated as entirely original, the very inclusion of the events in *The Outrageous Tale* might be considered a "non-literal copying" of these passages. If they are considered to relay "facts," then copyright resides only in the specific expression of them: *Maltz* at paras 30–32; *Hager* at paras 45–46.

[89] I conclude that I need not try to determine whether each of the asserted facts and events identified by Mr. Fazakas is historically "untrue," whether they are directly contradicted by the historical record, or whether they might have been derived from sources known only to Mr. Kelley. As I discuss in the next section, I conclude that Mr. Kelley's plausible assertions that

the facts and events in question are true is sufficient to find that they are not protected by copyright.

(3) Originality, facts, and assertions of truth

[90] The parties were unable to point to, and the Court is not aware of, any Canadian cases dealing with a situation in which a work is presented as nonfiction, but the owner of copyright asserts in litigation that much of it is actually fictional and thus original. The situation must therefore be considered based on the *Copyright Act* and the basic principles reflected in it.

[91] As the plaintiffs point out, copyright in Canada is purely statutory law, with rights and remedies exhaustively set out in the *Copyright Act*: *CCH* at para 9; *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 5; *Bishop v Stevens*, [1990] 2 SCR 467 at p 477. Here, it is the statutory terms “original” and “substantial part” that are at issue in particular: *Copyright Act*, ss 2 (“every original literary, dramatic, musical and artistic work”), 3(1), 5(1). These terms must be considered in their grammatical and ordinary sense, harmoniously with the scheme and object of the *Copyright Act*, and the intention of Parliament: *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 32. Part of this statutory context is the basic principle that copyright protection does not extend to facts: *CCH* at para 22; *Cinar* at para 26.

[92] The Supreme Court has noted on numerous occasions that the *Act* seeks to achieve an “appropriate balance between creators’ rights and users’ rights”: *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43 at paras 43–44, citing *Théberge* at paras 30–31; *CCH* at para 48. All provisions of the *Copyright Act* must be interpreted with this balance in mind: *Keatley* at para 46.

In my view, this balance requires that the rule that copyright does not extend to “facts” must include those matters that are plausibly represented to be facts, even if they may subsequently be shown to be untrue. Put another way, permitting a creator to represent something as fact, and thus not subject to copyright, but then sue a subsequent user for infringement by claiming it was not fact, would not respect the needed balance between creators and users.

[93] Looking at the creator’s side of the balance, there is a need to obtain a “just reward” for a creator: *Théberge* at para 30; *CCH* at para 23. Rewarding a creator for holding a work out as nonfiction—presumably to make it more attractive to the purchasing public—and then withdrawing that representation after another author has produced their own work goes beyond a “just reward” for the creative efforts of an author. It would also be an unusual outcome if the extent to which a historical work is protected by copyright, and the resulting reward to its creator, were inversely proportional to its accuracy.

[94] On the user’s side of the balance is “the public interest in promoting the encouragement and dissemination of works”: *CCH* at para 23; *Théberge* at para 30. The encouragement of the creation of works includes the notion expressed by Justice Orde in *Deeks v Wells (CA)* that writers should generally be permitted to consult and rely on prior nonfiction works as a source of information. There would be an adverse impact on the ability to do so if an author could not rely on those works without independently verifying their truth, or if a copyright infringement claim could be brought by an earlier author who reverses their position on the truth of the facts.

[95] Not every work of history depends solely on research confirmed through primary sources, nor should it have to. *The Outrageous Tale* is a case in point. It was prepared to be part of the “Amazing Stories” series presented originally by a publisher known as Altitude Publishing Canada Ltd, which presented nonfiction stories that “appeal to our sense of drama and human interest.” Based on Altitude’s Author Guidelines for the series, the book was not designed to be an academic treatise, but a brief, gripping, and readable account of a true Canadian tale. There is value in the “encouragement and dissemination” of such works that would be hindered if the authors of such works were required to effectively confirm the veracity from primary sources of every fact presented in a nonfiction narrative before being able to rely on the author’s statement that it is true. Mr. Hendley was entitled to consult *The Black Donnellys* and use the information contained in it in preparation of his work, on the understanding that the information was presented as a version of history, even if there may be other versions of history, and even if Mr. Kelley’s version of history may be less historically accurate than other versions.

[96] The foregoing conclusion is also supported by the difficulties inherent in using copyright law as a forum to attempt to dictate which version of history is “true.” As the defendants note, copyright is about the rights associated with the creation of works and “is not a tool to ensure accuracy in research or to resolve historical debate.” While the Court is frequently called upon to determine which competing version of events has been established in accordance with the rules of evidence, copyright law and notions of originality are ill suited to deciding which of two or more historical accounts based on different sources is “accurate” or “true” from a historical perspective. This concern is highlighted in the circumstances in which this action arises, as the

plaintiffs proffered no information regarding Mr. Kelley's research methods or records, and he could not be subject to examination regarding his stated sources.

[97] I therefore conclude that where an author presents a work as historically factual, they cannot complain in a copyright infringement action that a subsequent author has taken them at their word and relied on the facts they presented as being true. In other words, an author cannot seek to disprove their own historical account and thereby purport to claim copyright over the "facts" contained in it on the basis that those facts are not true.

[98] While I come to this conclusion independently, I note that it accords with views expressed by Professor Teresa Scassa in an article discussing the notion of "facts" in copyright: T. Scassa, *Original Facts: Skill, Judgment, and the Public Domain* (2006) 51 McGill LJ 253, 2006 CanLIIDocs 98. Written in the wake of the Supreme Court's decision in *CCH*, the article considers the scope of the "no copyright in facts" principle affirmed in that case.

[99] Professor Scassa addresses three types of "facts" (or information): (i) information knowable only through the exercise of considerable skill and judgment (such as scientific facts); (ii) information that is valuable only because of how it is selected or arranged; and (iii) "[i]nformation that is not necessarily 'true'": Scassa at pp 264–268. This third "not necessarily true" category includes "filtered or mediated" facts such as news, biographies, and histories that are "put forth as truth but are coloured by perspective." Referring to the United States Supreme Court's decision in *International News Service v Associated Press*, 248 US 215, 39 S Ct 68 (1918) and two more recent American cases, *Nash v CBS Inc*, 899 F.2d 1537



(7th Cir 1990) and *Hoehling v Universal City Studios Inc*, 618 F.2d 972 at p 978 (2s Cir 1980),

Professor Scassa makes the following observations:

In this statement [from *International News Service*], Justice Pitney seems to accept that it is not essential that the information excluded from copyright protection be objectively true. Objective truth is not the basis for excluding the information from copyright protection. It is certainly the case that some information reported from the front lines would be verifiable and true, but it is also likely that some information might actually be erroneous, some might be presented in a highly selective manner, which gives a less than accurate overall picture of events, and some might be downright false-produced as part of the inevitable propaganda machinery of war. Yet it fits the definition of “information presented as having objective reality,” regardless of whether it actually has objective reality. This approach to facts is pragmatic, as it would likely be too difficult to engage in an analysis of what bits of information are fact, which are fiction, and which aggregates of fact amount to fiction or partial fiction because they are so selective.

[...]

This American case law recognizes that “facts” do not have to be true or even verifiable to be excluded from copyright protection.

[Emphasis added; Scassa at pp 267–268.]

[100] From the Canadian perspective, Professor Scassa refers to the reasons of Justice Orde in *Deeks v Wells (CA)*, and to the decision of the Judicial Committee of the Privy Council affirming the Court of Appeal’s decision. Although that case did not deal with the truth of facts, Professor Scassa concludes that the decisions “take the position that in fact-based works of writing, copyright infringement can arise only through the copying of the writing, but not the underlying facts”: Scassa at p 276; see also *Maltz* at paras 29, 39. She argues that the reason for not protecting facts, even where there has been authorial effort to gather them, is that there is a public good in having them in the public domain. She concludes that when information is “put

forward as ‘having objective reality,’ it should fall into the public domain so it can be tested, challenged, verified, or disproved”: Scassa at p 277.

[101] I also note that while I reach the foregoing conclusion based on the Canadian approach to the balance inherent in the *Copyright Act*, the result is consistent with the approach taken in the United States. There, the rule is that an author who holds out a work as nonfiction cannot later claim that aspects of it were actually made up. This rule, formerly known as “copyright estoppel,” was recently reaffirmed and renamed the “asserted truths” doctrine: *Corbello v Valli*, 974 F.3d 965 (9<sup>th</sup> Cir 2020) at pp 979–985 citing, among others, *Nash* and *Hoehling*.

[102] The plaintiffs effectively argue it was not open to Mr. Hendley to take Mr. Kelley’s assertions regarding the factual nature of his account at face value. They say this for two reasons.

[103] First, they point to commentary on *The Black Donnellys* that questioned its accuracy, arguing that it was unreasonable, and even disingenuous, for Mr. Hendley to nonetheless continue to rely on the assertions of truth made in the Introduction to and text of *The Black Donnellys*.

[104] I find that this does not affect the situation. Other authors certainly questioned the reliability of Mr. Kelley’s account and presented other versions of the family’s history. This included Mr. Fazakas in publications written prior to this litigation. However, this does not change the fact that the author himself held the work out as nonfiction and as a historically accurate version of events. This was done clearly and with specific reference to the reasons that

the reader could rely on the information, including reference to unimpeachable sources and first- and second-hand eyewitness accounts. I do not believe an author who has represented their work as nonfiction can point to other authors' refutations of the accuracy of their work to justify later protecting their work as fictional. Their successors in title are in no better position.

[105] *The Black Donnellys* has been continuously published as nonfiction throughout its 67-year publication history. This includes after others criticized its accuracy. It also includes the period during which copyright has been owned by the plaintiffs and during which Mr. Hendley wrote his book. Indeed, Mr. Hendley's affidavit indicates that he downloaded an e-book version of *The Black Donnellys* in July 2020, and it remains identified as a "true story" with the author's introduction identifying his "unimpeachable sources." Again, a copyright claim is not the place to assess or attempt to resolve criticisms of the quality of historical research or writing. The fact that others have pointed out flaws in the accuracy of Mr. Kelley's work does not entitle him, or his successors, to copyright protection over the matters he represented as factual.

[106] Second, the plaintiffs note that claims of truth may themselves be used as a literary device. They point to Jonathan Swift's *Gulliver's Travels*, which was presented as the true experiences of Lemuel Gulliver, and *The Blair Witch Project*, a horror film that purported to show real footage of supernatural events. The plaintiffs argue the claims in *The Black Donnellys* are of this nature and would be understood as such by the reasonable reader.

[107] I do not believe this assists the plaintiffs in this case. There may be cases where a claim of truth is simply implausible. Clearly, in the case of Mr. Gulliver, the assertion of truth is a

literary device whose plausibility falls rapidly with the appearance of the Lilliputians. In the case of *Blair Witch*, the plaintiffs concede that filmgoers did not really believe it was true. In any case, even accepting that such a literary device may be used in a fictional work, this is very different from claims of factual accuracy in a work plausibly presented as nonfiction. The existence of such fictional rhetorical claims does not result in all works of nonfiction, or all claims of factual accuracy, being inherently suspect.

[108] Nor is *The Black Donnellys* presented in such a way that it cannot be reasonably believed as a work of history. As the plaintiffs note, the Donnelly family are certainly presented as being “larger than life,” and the story-telling style is certainly dramatic and engaging. But there is nothing in the described events that beggars belief to the extent it must be presumed to be historical fiction. Indeed, other subsequent authors apparently concluded that the same incidents now described by the plaintiffs as fictional were part of the Donnellys’ history, while publishers and libraries continue to catalog the book as nonfiction. This belies the plaintiffs’ claim that the book on its face shows that it would be unreasonable to rely on Mr. Kelley’s assertion of accuracy.

[109] In assessing the claim of infringement, I will therefore consider *The Black Donnellys* as it is presented: as a work of nonfiction. Since what constitutes a “substantial part” is determined in relation to the originality of the work warranting protection of the *Copyright Act*, this will affect the substantiality assessment: *Cinar* at para 26; *Maltz* at paras 35–36. This is not to say that the passages in question, or even the underlying facts, are excluded at the outset: *Cinar* at para 36;

*Pyrrha Design* at para 127. It is simply to recognize that in making the assessment, the originality in the work, and the scope of copyright protection, are central to the exercise.

[110] For clarity, the foregoing does not apply to *Vengeance*, which is clearly a work of fiction set against the backdrop of the Donnelly murders. In the Introduction, after referring to *The Black Donnellys*, Mr. Kelley describes the work in the following terms:

This book, *Vengeance of the Black Donnellys*, is not a factual account, nor does the writer claim it to be. Instead, it is fiction written around a series of actual happenings; some of which give proof to the old saying that “truth is stranger than fiction.” Along with some self-created characters, it has been necessary for the writer to change certain dates and give fictitious names to a number of people to avoid embarrassment to relatives, near and distant, who still enjoy the warmth of old sol. This I have tried most faithfully to do.

*Vengeance of the Black Donnellys* is fiction and meant to be fiction. However, the real truth is that this book is based on so much fact – so many of the occurrences mentioned in it actually did happen – that despite all changes and efforts to fictionalize them, it is possible that a few old-timers around Lucan – who are familiar with the strange aftermath of the Donnelly feud, will be able, in the following pages, by putting two and two together, to read between the lines.

[111] While making the fictional nature of *Vengeance* clear, Mr. Kelley underscores the factual nature of *The Black Donnellys*. *Vengeance* is presented as a ghost tale told in the Lucan graveyard where the Donnellys’ real tombstone is. The tale is told by an old man (whose identity I will not spoil) to an American couple who are visiting the site because they read *The Black Donnellys*. In a number of places, the fictional ghost story is juxtaposed against elements of the true story of the Donnellys, including incidents described in *The Black Donnellys*.

(4) Substantial taking: *The Black Donnellys*

[112] While the plaintiffs' case relies principally on the fictional nature of the identified events in *The Black Donnellys*, they also argue that *The Outrageous Tale* copies the manner in which many of the scenes are depicted, including particular turns of phrase, and the "cinematic" storytelling style used by Mr. Kelley.

[113] As noted above, the assessment of substantiality is a holistic one, and not one that should be undertaken "piecemeal" based on isolated passages: *Cinar* at paras 35–36. However, given the manner in which the plaintiffs have presented their case, it is necessary to review the passages they put forward to consider whether, in cumulative effect, they amount to a substantial copying.

(a) *Passages limited to the copying of the allegedly fictional facts*

[114] With respect to some of the identified passages in *The Black Donnellys*, the only concern raised by the plaintiffs is that Mr. Hendley repeated in *The Outrageous Tale* a fact that appears in *The Black Donnellys*. While the plaintiffs did not categorize their arguments in this manner, many of the passages can raise no material argument about the copying of the particular means of expression of the facts in question.

[115] In my assessment, these passages are Items 1 (James, Jr's height); 13 (Johannah meeting James at the Clonmel County Fair); 14 (Johannah handing James a shillelagh in a fight); 15 (the land James settled on being "government" land); 16 (Farrell's former occupation); 19 (the

poisoning of Farrell's cows and burning of his barn); 20 (the killing of Robert McLean's animals and burning of his barn); 21 (Liam Haskett having testified at James' trial and his barn having been burned upon James' release); 22 (John Purtell having been present at an incident); 28 (a mob having ransacked the Donnelly home); 32 (Farrell having handled an axe during the fight leading to his death); 33 (the timing of Farrell's death); 34 (Nora Kennedy's family being against her marriage to William); 35 (William serving a nine-month prison sentence); 36 (other charges against the mob who attacked the Donnelly farm); 37 (crimes against other community members); 38 (burning of Blake's barn); 39 (crimes against William Casey); 40 (assault of Flanagan by Tom); 41 (Bridget sleeping upstairs); 42 (those charged with murder being the ringleaders); and 45 (the resignation of Constable Everett).

[116] At the risk of repetition, in identifying these passages in this way, I do not exclude them from the assessment of substantiality. I simply note that the underlying facts in the passages are not protected by copyright, and that Mr. Hendley's means of expressing those facts bears no material similarity to Mr. Kelley's.

[117] I discuss below the remaining passages identified by the plaintiffs, namely Items 2–10, 11–12, 17–18, 23–25; 26–27; 29–31; and 43–44.

(b) *The street battle (Items 2–10)*

[118] Both *The Black Donnellys* and *The Outrageous Tale* describe a battle between members of the Donnelly clan and Flanagan, the owner of a rival stagecoach line. The Donnellys were said to have attacked Flanagan's barn, destroying his stagecoaches and maiming his horses. Seeking

revenge, Flanagan went after the Donnellys, with some 17 other townspeople joining him.

Flanagan and several others were armed with shotguns. Both books describe the fight at some length, *The Black Donnellys* over about eight pages, *The Outrageous Tale* over about five. The plaintiffs argue that *The Outrageous Tale*'s account of the fight copies language, sequence, and style from *The Black Donnellys*. They point in particular to nine passages that are highlighted by Mr. Fazakas in his first report.

[119] I begin by noting my agreement with the defendants that the way Mr. Fazakas presents these passages in his report raises concerns. For example, Mr. Fazakas represents the first passage (Item 2) as follows:

| <i>The Black Donnellys</i>  | <i>The Outrageous Tale</i>   |
|---|--|
| “John Flannigan ... reached the road. The gun at hip level .... Before he had gone twenty paces, there were seventeen men at his heels ... a few of them carried ... shotguns ....” | “Weapon in hand, Flanagan stepped onto the road ... About 17 men joined Flanagan as he trod down the Roman Line to the Donnelly farm.” |

[120] However, the relevant paragraphs in the books are actually written as follows:

| <i>The Black Donnellys</i>  | <i>The Outrageous Tale</i>   |
|---|--|
| “John Flannigan, scowling, broad and determined, pushed his way through the crowd and reached the road. The gun at hip level, he began a steady advance towards the Donnelly barn – a grim picture of Canadian pioneer vengeance. Before he had gone twenty paces there were seventeen men at his heels, nearly all of them hastily armed with clubs, though a few of | “Weapon in hand, Flanagan stepped onto the road. The crowd let out a cheer, sensing a golden opportunity to attack the hated Donnellys. About 17 men joined Flanagan as he trod down the Roman Line to the Donnelly farm. A larger group, consisting of small boys, old men, and women, followed the posse at a distance.” |



|   |  |
|---|--|
| them carried the shotguns they had brought with them from their homes. One practical and far-sighted man carried a rope.” |  |
|---|--|

[121] An assessment of whether a substantial part of a work has been copied is not to be undertaken based on isolated passages: *Cinar* at para 35. Still less is it to be conducted based on isolated words taken out of the context of the passages in which they appear. While language choices matter, a fair assessment of whether there has been a substantial taking considers the entire context rather than picking out occasional words in an effort to show greater linguistic similarity. In the passages reproduced below, the full passages are set out, rather than the edited versions presented by Mr. Fazakas, and I consider the full context in my assessment.

[122] In the foregoing passage, the linguistic similarity—references to Flanagan, the gun, the road, the 17 men—are all important parts of the factual aspect of the event. There may be a vast number of ways in which to recount facts: *Hager* at para 45. However, it would be difficult if not impossible to describe an event in which Flanagan, carrying a shotgun, went down the road with 17 men without using those terms. Here, the lack of copyright in “facts,” whether actually factual or simply asserted to be factual, becomes particularly important. If these descriptions of a fight were found in two works of fiction, there would be a stronger case that copying these elements contributed to a substantial taking. In a work of nonfiction, these factual elements are not part of the work’s originality.

[123] The plaintiffs’ Item 5 also shows the problems with taking selected words out of their context. In this item, Mr. Fazakas and the plaintiffs compare a reference to a group of onlookers

in *The Black Donnellys* (“A score of others followed the marchers from the comparative safety of the board sidewalks – cautious and curious individuals who wished to see all, but take no part in the impending battle”) to one in *The Outrageous Tale* (“Several paces back, a group of onlookers held their breath”). However, in addition to the evident language differences, the onlookers in *The Black Donnellys* are following behind the marchers and are described after Flanagan first steps onto the road. Those in *The Outrageous Tale*, on the other hand, appear behind William and James Donnelly, and are not mentioned until after Flanagan confronts the Donnellys. The mere existence of onlookers described as part of the retelling of a presumed historical street battle does not in itself indicate copying.

[124] I do not propose to reproduce the remainder of the street battle scenes in their entirety, either as presented by Mr. Fazakas or as they appear in the two books. Overall, having reviewed the two sections in the respective books, I cannot conclude that there is much material copying at all beyond the factual elements of the street battle.

[125] The plaintiffs point to some particular elements of the scene, such as the order in which the Donnellys are named as they appear out of the barn; reference to James Donnelly’s age at this juncture; and animal metaphors used by each (“the fury of wild beasts at bay,” an expression actually attributed by Mr. Kelley to a Detective McKinnon in *The Black Donnellys*, and “like a pack of wolves” in *The Outrageous Tale*). I agree there are some small elements outside the scope of the underlying historical facts that could be considered copying of the mode of expression in *The Black Donnellys*. I will consider these as part of the overall assessment of substantial taking. However, even within the narrow context of the descriptions of the street

battle, they do not amount to a significant portion of the originality in this part of *The Black Donnellys*.

[126] The plaintiffs also argue *The Outrageous Tale* takes the sequencing of the battle, including the sequence of changes to the frame of reference (the view of Flanagan; the view of the Donnellys; the view of the onlookers). I agree such elements may be part of the original expression of particular facts, even in the historical context. However, when one sets aside the chronological accounting of the events, which is not itself an original approach to recounting a historical event, I cannot read *The Outrageous Tale* as having taken a particular sequencing or set of scenes independent of the underlying facts.

[127] Nor can I accept the plaintiffs' argument that *The Outrageous Tale* copies the use of a "cinematic style" from *The Black Donnellys*. It is difficult at best to define a particular "style" of describing a street fight, and I do not believe Mr. Kelley can claim copyright over describing the scene in a "cinematic" style. In any event, having reviewed the two depictions of the scene, I do not believe Mr. Hendley can be taken to have adopted the same writing style as Mr. Kelley. Mr. Kelley makes liberal use of dialogue, exclamatory sentences, and rhetorical questions in recounting the battle, while Mr. Hendley uses none of these. Clearly, both authors seek to engage the reader and describe the battle scene in a gripping way. However, I cannot conclude this is a "style" to which one author can claim copyright.

(c) *Fights at and after a wedding (Items 24–25 and 11–12)*

[128] The Donnellys were engaged in an altercation with police constables at a wedding in 1876. William Donnelly was later arrested for his role in the event. The plaintiffs assert Mr. Hendley copied Mr. Kelley’s depiction of both events, including his fictionalizations. With respect to the fight at the wedding itself, the plaintiffs take issue with the fact that Mr. Hendley’s description, like that in *The Black Donnellys*, refers to the noise of the party; that it happened upstairs at a hotel; the depiction of the fight; and the fact that the Donnellys returned to the wedding after the fight.

[129] Having read the two descriptions of the scene, I conclude that most of the similarities pointed to by the plaintiffs fall in the category of “facts” in which there is no copyright, even though the plaintiffs assert they are fictional. I note in this regard that again, Mr. Kelley provides a specific indication that he is not the source of the facts described, stating that it is “men who were in the lobby and bar of the hotel” who provided the description of officers arriving, going upstairs, being heard in an altercation, and then being thrown down the stairs. Given that the primary elements of the fight are presented as factual by Mr. Kelley, his successors cannot claim now he made it up to avoid the rule that there is no copyright in facts.

[130] With respect to William Donnelly’s subsequent arrest, the plaintiffs point to the following paragraphs depicting the incident in the two books:

| <i>The Black Donnellys</i>   | <i>The Outrageous Tale</i>  |
|--|---|
| “After a furious struggle, during which he fought his way out of the | “William struggled his way out of the house and into the yard. But, |

|  |  |
|--|--|
| house and into the front yard, William Donnelly was finally handcuffed, carried to a wagon and taken to the Lucan jail.” | <p>outnumbered and outgunned, the Donnelly was overwhelmed and forced to the ground, where he was handcuffed and subdued.</p> <p>William was tossed in jail, charged with shooting at Constable Bawden.”</p> |
|--|--|

[131] Leaving aside the underlying facts as set out in *The Black Donnellys*—that there was a physical altercation that started in the house and then continued outside, that William Donnelly was controlled by the police and handcuffed, and that he was taken to jail—there remain some similarities in the expression of the event in the two books. *The Outrageous Tale* uses some of the same language used in *The Black Donnellys*, and expresses the scene in a similar way. However, this is tempered by the recognition that the foregoing passages are only brief passages within a broader recounting of the events at and after the wedding.

(d) *The first fight between James Donnelly and Farrell (Items 17–18)*

[132] Mr. Hendley states, as does Mr. Kelley, that James Donnelly had a fistfight with Farrell in 1856. The plaintiffs first point to the fact that both authors say that James Donnelly told his kids to watch him in the fight before it began (*The Black Donnellys*: “Now boys, watch your father and learn”; *The Outrageous Tale*: “He winked at his boys and told them to watch carefully”). Leaving aside the factual aspect of the statement in *The Black Donnellys*, I see little copying of the expression of those facts.

[133] The description of the fight as a whole is even more dissimilar, the only parallel being that James Donnelly is described as having won the fight. There is no copyright in the outcome of this fight, which is presented as a fact.

(e) *Flanagan destroying his horses (Item 23)*

[134] After Flanagan’s horses were maimed (an event first recounted by Wallace), both books say he humanely destroyed them before confronting the Donnellys in the street battle. The plaintiffs say the depiction of these scenes shows copying by Mr. Hendley:

| <i>The Black Donnellys</i>  | <i>The Outrageous Tale</i>   |
|---|--|
| <p>“John Flannigan secured a shotgun and a box of shells, from the small locked room he used as an office. He had been in the habit of taking the gun with him on his daily trips, for the past several months, just in the event he ran into some trouble with the Donnellys. Now he found he had plenty of it on his hands. Cursing a blue streak he readied himself for the first step, to handle the immediate problem. Revenge could wait a few minutes. Shotgun in hand, one by one, he put his horses out of their misery – the gun reports roaring loudly in the morning silence of the village.”</p> | <p>“Flanagan, meanwhile, reached into a closet in his house. He removed a shotgun and several shells, and then walked outside. As he stood before the barn door, Flanagan chambered two rounds in his weapon. He snapped the shotgun shut and went into the barn. Breathing heavily, he approached the stalls where his wounded horses were running in circles, maddened with pain. Aiming the weapon at both animals in turn, he gunned them down, one after the other. He then did a quick examination of his dead horses – their tongues had been sliced apart.</p> <p>The sound of the shotgun drew more neighbours to Flanagan’s barn. [...]”</p> |

[135] Leaving aside the underlying facts (Flanagan took a shotgun and shells, and killed his horses), there is some similarity in the expression of those facts between the two passages. They each use an expression to note that the horses were killed one at a time (“one by one” or “one

after the other”). While arguably a fact, I consider highlighting this to be part of the expression of the facts. They also both conclude with reference to the sound of the gun being heard. I will consider these similarities in the overall assessment, while also noting the differences in the accounts: *Cinar* at para 40.

(f) *Shooting at Constable Everett (Item 26)*

[136] Robert Donnelly shot at Constable Sam Everett from behind a woodpile as the officer returned to his home one evening in 1878, an assault that resulted in a two-year prison sentence for Robert. The plaintiffs again say Mr. Hendley’s depiction of the event is copied from Mr. Kelley’s, which fictionalizes several aspects of the real shooting incident. I conclude again that essentially the only similarity between the two sections of the books, which cover several paragraphs, is that they describe the same event (Robert Donnelly shot at Constable Everett three times, the constable shot back and hit Robert, and the constable took him into custody). While the plaintiffs assert that the number of shots, the return of fire, and Robert’s injury are all fictitious, they are presented as fact in *The Black Donnellys*. There is no material similarity in how these facts are depicted in the two books.

(g) *James Donnelly’s return from prison (Item 29)*

[137] After serving a seven-year prison sentence for Farrell’s murder, James Donnelly returned to Lucan. The plaintiffs put the day of his return in the category of an event that must have happened but about which there is no historical record. Both *The Black Donnellys* and *The Outrageous Tale* recount this occurrence over the course of about three pages. *The Black*

*Donnellys* describes James Donnelly's arrival on the stagecoach; his trip to a bar; a discussion with the bartender; the arrival of his sons by horse-and-wagon; the disappearance of villagers in fear; and the eyewitness account of a young boy, who recalled the event later in life "to a reporter." *The Outrageous Tale* describes Johannah and the Donnelly children waiting for the arrival of the stagecoach, with much of a page devoted to describing each child; James Donnelly's arrival; the family celebrating; James Donnelly picking up his daughter; and the family parading down the streets of Lucan, with nervous farmers whispering to each other.

[138] In short, other than the fact that James Donnelly returned, and that his family greeted him, there is little similarity in the two counts. The terms "rowdy" and "husky" are used in reference to the sons in both accounts, and as the plaintiffs note, both authors refer to grey having appeared in James Donnelly's hair during his time in prison. However, overall, the nature, tenor, expression, and even content of the two scenes are significantly different. The plaintiffs argue with reference to *Cinar* that it is the "cumulative effect" of the scenes that must be considered: *Cinar* at para 36. However, even taking a generous view of the cumulative effect, the two scenes are largely dissimilar. Thus other than the choice to refer to the scene of James Donnelly's return as part of the family's story and the few similarities mentioned, there is little to contribute to a substantial copying.

(h) *Inauguration of the Donnelly Stagecoach Line (Item 30)*

[139] The plaintiffs similarly say that the Donnellys did begin to run a stagecoach line, but that the historical record provides no detailed description of its inauguration prior to *The Black Donnellys*. They claim Mr. Hendley's depiction of the event is copied from Mr. Kelley's:



| <i>The Black Donnellys</i>   | <i>The Outrageous Tale</i>   |
|--|--|
| <p>“For two years William and James Jr. drove coaches on the Exeter to London run, with Lucan the midway point. Then in May 1873, the two brothers bought out the McFee line.</p> <p>It was a gala day, that May eighteenth, for the parents as well as the bad boys of Biddulph, when the Donnelly coachline was inaugurated, though enthusiasm seemed to be strictly a family matter. Curiosity, more than anything else, brought the hundred or more who gathered to witness the heralded first run “taking off at noon sharp from the Dublin House.” Old Johannah, arrayed in her best finery – some get-up that might have been popular about the time Brian Boroihme beat back the Danes at Clontarf – made one of her rare appearances in Lucan. She embraced her two sons, wished them luck, beamed at the assembly and told them that she hoped they would make it a point to do all their traveling “only in Donnelly coaches.””</p> | <p>“May 24, Queen Victoria’s birthday, was a holiday in the Dominion of Canada. And while the Donnelly clan had little regard for British royalty, Victoria Day 1873 was an occasion to celebrate all the same. The day marked the launch of the family’s new business.</p> <p>Earlier in the year, William and James Jr. had bought out their boss, Hugh McFee, and taken over his stagecoach company. The brothers were now entrepreneurs. On May 24, decked out in their finest clothes, the Donnellys watched proudly as William positioned himself on the wooden driver’s seat at the front of the stagecoach. William had grown a moustache to complement his long hair, and it gave him the roguish air of a stage actor. He held onto the reins of the horse in front of the coach and tipped his hat at his parents. Jim and Johannah beamed with pride. Their dream of a better life in Canada seemed to be paying off.”</p> |

[140] Mr. Kelley’s description of the event goes on to refer to William driving the coach for the initial trip, with James and Johannah Donnelly as the first two passengers. Mr. Hendley’s continues to describe the coach itself, and the coach setting off on the inaugural run with an unidentified “clutch of passengers.”

[141] Beyond the fact that there was an inaugural run of the stagecoach line, which is not only presented as fact in *The Black Donnellys* but the plaintiffs accept is true, there are a few similarities in how that first run is portrayed. Both authors choose to describe the event within their narrative of the Donnellys, which may be viewed as an element of “selection” of facts. There are also a few linguistic and stylistic similarities in the events: the brothers “bought out” the McFee stagecoach line; the family wore their finest clothes; and one of the parents “beamed” (albeit at the assembly in one case and with pride in the other). These similarities must be considered in the context of the passage as a whole, and together with the significant differences in the accounts, as part of the overall assessment of substantial taking of *The Black Donnellys*.

(i) *Drunkenness of Donnelly and Farrell the day of Farrell’s death (Item 31)*

[142] James Donnelly killed Farrell at a community event on June 25, 1857 after a dispute turned into a fight. The plaintiffs contend Mr. Hendley copied Mr. Kelley’s reference to the two men drinking at the event, and to Farrell accusing James Donnelly of being a criminal. I note that as Mr. Hendley points out, even the *Globe and Mail* in 1880 described as a fact that both men had been drinking, as does Mr. Fazakas’ book, *The Donnelly Album*. Mr. Kelley’s and Mr. Hendley’s respective descriptions of that drinking have little in common. As for the accusation, it is described in *The Black Donnellys* through a quotation coming directly from Farrell that leads directly to the fight. *The Outrageous Tale*, on the other hand, states that “[Farrell] denounced Jim Donnelly as a common thief and his family as a bunch of criminals” and William intervening before the fight subsequently breaks out between the two older men. That some form of accusation preceded the fatal fight is in my view a “fact” presented as such by

Mr. Kelley (and indeed by Mr. Fazakas in *The Donnelly Album*), and no claim of copying can arise from Mr. Hendley's recounting of that fact in a completely different manner.

(j) *Fortune telling with Grandma Bell (Items 43 and 44)*

[143] Both *The Black Donnellys* and *The Outrageous Tale* recount an event in which four of the Donnellys visited Grandma Bell to have their fortunes read, and she saw the Donnellys' deaths written in her tealeaves. The plaintiffs primarily argue that Mr. Hendley's inclusion of the event itself amounts to copying Mr. Kelley's fictitious invention. In addition, the plaintiffs take issue with the manner in which this event is recounted, claiming similarities in the account constitute copying contributing to a substantial taking of *The Black Donnellys*.

[144] The fortune-telling event takes place over about one and a half pages in *The Black Donnellys* and about three in *The Outrageous Tale*. I will not reproduce those passages in their entirety, but note that the plaintiffs point specifically to:

- the authors' introduction of the event by reference to the date ("It was on a night late in November 1879" in *The Black Donnellys*; "One fall evening in 1879" in *The Outrageous Tale*);
- their presentation of the participants ("old Jim Donnelly, along with Tom, John and Mike" in *The Black Donnellys*; "Old Jim Donnelly led the pack, with Michael, John, and Thomas in tow" in *The Outrageous Tale*);

- their account of the prediction of death (“I see death for all of you – soon and terrible!” in *The Black Donnellys*; “she foresaw violent death stalking the Donnelly clan” in *The Outrageous Tale*);
- their description of payment (“Mr. Donnelly threw a coin on the table” in *The Black Donnellys*; “He took out a few coins and tossed them on Grandma Bell’s kitchen table” in *The Outrageous Tale*);
- their account of the Donnellys’ departure (“They laughed at me; oh, how they shouted and laughed” in *The Black Donnellys*; “The group made their way out of Grandma Bell’s shack, singing and laughing raucously” in *The Outrageous Tale*); and
- their description of the moon (“There was blood on the moon that night and I could see it all plainly” in *The Black Donnellys*; “The big November moon was blood red” in *The Outrageous Tale*).

[145] As discussed above, Mr. Kelley’s entire account of the event is presented as having been retold by Grandma Bell herself to a “reporter” many years later. The full scene is presented in quotation marks as Grandma Bell’s words in retelling the story. Again, when presented as nonfiction, Mr. Kelley is representing that he is simply reproducing the words of a third party and is not the original author of the words in question. This includes with respect to the prediction, the payment, the laughter, and even the colour of the moon. Beyond the inclusion of these factual elements in *The Outrageous Tale*, there is not a significant degree of copying evident in a review of the scenes in the two books as a whole.

(k) *The Black Donnellys (Item 27)*

[146] I end my review of the specific passages with the plaintiffs' allegation that Mr. Kelley coined the term "The Black Donnellys" to describe the family, and that Mr. Hendley's use of the term contributes to the copying of a substantial part of *The Black Donnellys*. Mr. Fazakas gives his opinion that the term was never applied to the family in their lifetimes, pointing to the historical record and the concurring opinion of other writers. He describes the name as being "the most important invention" Mr. Kelley made to create the legend of the family.

[147] As the plaintiffs point out, the definition of "work" in section 2 of the *Copyright Act* provides that a "*work* includes the title thereof when such title is original and distinctive." At the same time, this does not make the title a separate work. Rather, it forms only part of the work as a whole: *Francis, Day & Hunter Ltd v Twentieth Century Fox Corp Ltd et al*, [1939] 4 DLR 353, 1939 CanLII 276 (UK JCPC) at pp 359–360.

[148] The defendants argue "The Black Donnellys" is not distinctive as either a title or term, citing various other works that use the phrase to refer to the Donnelly family, including Stompin' Tom Connors' 1969 song "Black Donnelly's Massacre"; a 2003 essay by Joseph Geringer titled "The Black Donnellys: Canada's Tragic Roustabouts"; a 2008 column by Max Haines titled "The Black Donnelly's Story Begins"; a 2017 movie titled "Black Donnellys," and a 2020 book by Keith Ross Leckie titled *Cursed! Blood of the Black Donnellys*. The plaintiffs respond with Mr. Winkler's statement that the only book using the term in its title was Mr. Leckie's, and that it is no longer published under that title after he wrote to the publisher.

[149] In my view, the defendants' references to later works using the Black Donnellys expression are of limited relevance. Unlike in the trademark area, I question whether a title can cease to be part of a work for copyright purposes by "losing" distinctiveness based on subsequent use of the same or similar titles in later works. The requirement that a title be "distinctive" under the *Copyright Act* does not engage the same issues as it does in trademark law: see, e.g., *Trademarks Act*, RSC 1985, c T-13, ss 2 ("distinctive"), 6(5), 12(3), 18(1)(b); *Francis, Day & Hunter* at p 359.

[150] However, I need not decide whether *The Black Donnellys* is distinctive as a title, as the *Copyright Act* definition also requires that the title be "original." This again raises the issue of the source, and the stated source, of the term "The Black Donnellys." While Mr. Fazakas says the term originated with Mr. Kelley in a 1947 magazine article, Mr. Kelley states in *The Black Donnellys* that the term was used to refer to the Donnelly family during their lifetimes. He recounts its use by, at least, "the surrounding countryside" in 1879; in an "Old Song" about the Donnellys that he reproduces; by a cattle drover in 1865; by James Carroll in recounting a story in later life to a reporter; by John Flannigan in 1875; and even by mothers silencing their unruly children. It appears that Mr. Hendley concluded the same, noting in *The Outrageous Tale* that "[s]oon the family was known around the township as the 'Black Donnellys' – as in black-tempered, black-Irish, and Blackfoot." Having asserted in publishing his work that the expression was in widespread use in the nineteenth century, I conclude that Mr. Kelley and his successors cannot subsequently claim their title was "original and distinctive" when another author adopts the moniker in the title or body of a later work.

[151] In any event, “to copy the title constitutes infringement only when what is copied is a substantial part of the work”: *Francis, Day & Hunter* at pp 359–360. By Mr. Fazakas’ count, the term “The Black Donnellys” appears at least 28 times in *The Black Donnellys* in addition to the title. I accept that its repetition underscores an important theme in *The Black Donnellys* that the Donnellys were feared and notorious in their community. As the defendants note, however, the phrase “Black Donnellys” is used by Mr. Hendley only in the title of his book (currently published under the name *Black Donnellys: The Outrageous Tale of Canada’s Deadliest Feud*, omitting the initial *The*) and in one passage in the body of the book, reproduced in the prior paragraph. It also appears in the bibliography to *The Outrageous Tale* in the names of Mr. Kelley’s books, and in a brief author’s note at the end. While the title may be qualitatively important in the determination of whether there is a substantial taking, the issue remains whether there has been a substantial taking of the work as a whole, rather than simply a substantial portion of the title.

(1) *Assessment of substantial taking in The Black Donnellys*

[152] I have concluded that the matters presented in *The Black Donnellys* as historical events are to be considered as facts in which there is no copyright, regardless of their objective historical truth. In respect of these matters, originality lies only in Mr. Kelley’s means of expressing the underlying facts, and in such matters as selection and arrangement of the facts. I have reviewed *The Black Donnellys* and *The Outrageous Tale* as a whole, and have considered the passages relied on by the plaintiffs in the context of the whole, including elements such as the structure, tone, theme, atmosphere and dialogue. On my assessment, few of these elements as represented in *The Black Donnellys* were copied in *The Outrageous Tale*, either in terms of

quantity or, more importantly, quality. The few areas in which similar phrasing or characterizations may arise are not particularly important or original aspects of the telling of the Donnellys' story in *The Black Donnellys*.

[153] As to the additional factors that may be relevant to the substantial taking analysis, the material is used "in the same or similar fashion," in that both works are books that give gripping nonfiction accounts of historical events. However, there is little evidence that any similarity between *The Black Donnellys* and *The Outrageous Tale* derives from an intentional taking by Mr. Hendley to save time and effort. While Mr. Hendley intentionally limited his research to secondary sources including *The Black Donnellys*, he did so in respect of the underlying facts, rather than the expression of those facts. Mr. Hendley has, in essence, told the same historical tale in a different way. Nor is there any evidence to suggest that the few similarities between the works have diminished the value of copyright in *The Black Donnellys*.

[154] Taking these factors together and considering the matter holistically, I conclude that the plaintiffs have not established that Mr. Hendley's *The Black Donnellys: The Outrageous Tale of Canada's Deadliest Feud* reproduces a substantial part of Mr. Kelley's *The Black Donnellys*. I therefore find that there has been no copyright infringement of that work. I conclude that there is no genuine issue requiring a trial with respect to infringement of *The Black Donnellys*, and that I am able to make the necessary findings of fact and law to reach this conclusion. The plaintiffs' motion for summary judgment is dismissed with respect to *The Black Donnellys* and the defendants' motion for summary judgment is granted.



(5) Substantial taking: *Vengeance of the Black Donnellys*

[155] The plaintiffs point to three aspects of *The Outrageous Tale* they say demonstrate a substantial taking of *Vengeance*. The first is again the name “The Black Donnellys” applied to the Donnelly family. The discussion regarding the phrase above has equal application in this context. While *Vengeance* is a work of fiction, this does not make the use of “The Black Donnellys” in the title and contents of the book original to the author when it previously appeared in a work of nonfiction, referenced in *Vengeance*, in which the author disavowed its originality. In *Vengeance*, Mr. Kelley repeats the origin story of the name—Farrell referring to the Donnelly sons as being “as black in sin as their father!”—that is presented as true in *The Black Donnellys*. In any case, as noted above, while the term appears frequently through *Vengeance*, the name appears only in the title and one passage in the body of *The Outrageous Tale*.

[156] The second aspect is several of the same references to events that are depicted as factual in *The Black Donnellys* and that are also mentioned in passing in *Vengeance*. This includes brief mentions of the street battle, government land grants, and the crimes against Robert McLean and William Haskett, as well as a longer passage repeating the tale of Grandma Bell. In each case, the events are cited as part of the real history of the family, juxtaposed against the fictional ghost tale. I do not consider that repeating these events that are identified as factual in *The Black Donnellys* in a work of fiction takes them out of the realm of “facts” in which there is no copyright. These passages also represent a very small portion of *Vengeance*, both quantitatively and qualitatively, and are represented very differently in *The Outrageous Tale*.

[157] The third aspect is the inclusion in *The Outrageous Tale* of a reference to Joe McIntyre. In *Vengeance*, Joe McIntyre is described as being the brother of Christina McIntyre, a “sweetheart” of Tom Donnelly. Over the course of two pages, the tale is told that Christina’s family did not approve of the relationship and she was sent to London, while Joe remained resentful and formed part of the mob that killed the Donnellys, personally cutting off Tom Donnelly’s head. He is said to have been tormented by the murder and haunted by a prophecy made by Johannah, to the extent that he ultimately took his own life.

[158] Although not addressed in Mr. Fazakas’ reports, Mr. Winkler’s reply affidavit states that Mr. McIntyre is a fiction created by Mr. Kelley. Christina McIntyre was a real person, about whom Mr. Kelley had written another book. However, she was an only child.

[159] The fictional Mr. McIntyre appears briefly in *The Outrageous Tale* in the following passage:

It was said that many of the men involved in the Donnelly massacre died unusual deaths. Indeed, one vigilante, named Joe McIntyre, went mad with grief and committed suicide. Before he hung himself, he allegedly confessed to cutting off Tom Donnelly’s head.

[*The Outrageous Tale* at p 116.]

[160] Unlike the events in *The Black Donnellys*, those in *Vengeance* are not presented as nonfiction. The principle that there is no copyright in facts has no application. I find the inclusion in *The Outrageous Tale* of the character of Joe McIntyre, with his name, involvement in the murders, and fate, amounts to a non-literal copying of the passage in *Vengeance*.

[161] However, considering this copying together with the others asserted, in the context of *Vengeance* as a whole, and taking a qualitative and holistic approach, I conclude that there has been no copying of a substantial part of *Vengeance*. In the words of *Cinar*, the “differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work”: *Cinar* at para 40. It follows that there is no infringement. Again, I conclude that there are no genuine issues requiring a trial with respect to the claim of copyright infringement of *Vengeance*, and that I can make the necessary findings of fact and law to reach this conclusion. This element of the plaintiffs’ summary judgment motion is also dismissed, and the defendants’ summary judgment motion is granted.

D. *Remedy and Costs*

[162] As there are no genuine issues for trial with respect to the issue of copyright infringement, the defendants’ summary judgment motion seeking dismissal of the action is granted and the action is dismissed. For the same reasons, the plaintiffs’ summary judgment motion seeking relief for copyright infringement is dismissed. Given these conclusions, I need not address the parties’ submissions as to the appropriate remedies for the claimed copyright infringement, including statutory damages.

[163] The parties asked for the opportunity to address costs in subsequent submissions. In the circumstances, I am prepared to grant that opportunity despite the expectation that parties to a motion be prepared to speak to costs at the hearing: *Notice to the Parties and the Profession: Costs in the Federal Court*, April 30, 2010. I encourage the parties to discuss the issue and to

reach an agreement on costs. If no agreement can be reached, the parties may make written submissions on the following basis:

- The defendants may file written submissions on costs, in letter format, not to exceed three pages single-spaced, within two weeks. The defendants may attach a bill of costs as an appendix.
- The plaintiffs may file written submissions on costs, in letter format, not to exceed three pages single-spaced, within two weeks of receipt of the defendants' submissions or, if none are filed, the expiry of the time for doing so. The plaintiffs may attach as an appendix a bill of costs and/or a submission, not to exceed one page, addressing specific line items in the defendants' bill of costs (if filed).
- The defendants may file reply submissions, in letter format, not to exceed one page single-spaced, within five days of receipt of the plaintiffs' responding submissions. The defendants may attach as an appendix a submission, not to exceed one page, addressing specific line items in the plaintiffs' bill of costs (if filed).
- The parties may consent to extend the foregoing dates, provided all materials are filed by July 9, 2021, or they may address the Court further.

#### IV. Conclusion

[164] The principal argument advanced by the plaintiffs is that Mr. Hendley infringed copyright by including in *The Black Donnellys: The Outrageous Tale of Canada's Deadliest Feud* facts and events that, while presented by Mr. Kelley as true historical facts, have

subsequently been shown to be untrue and thus to be original literary creations of Mr. Kelley. In my view, such facts fall within the rule that there is no copyright in facts, regardless of whether their objective truth is later questioned or even disproved. The reasons behind the rule, and the fundamental balance that anchors the *Copyright Act*, dictate this result.

[165] Having reached this conclusion, the copying alleged by the plaintiffs in *The Black Donnellys: The Outrageous Tale of Canada's Deadliest Feud* does not amount to reproduction of a "substantial part" of either *The Black Donnellys* or *Vengeance of the Black Donnellys*. As Chief Justice McLachlin noted in *Cinar*, the *Copyright Act* does not protect every "particle" of an original work, or "any little piece the taking of which cannot affect the value of [the] work as a whole": *Cinar* at para 25, quoting D Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed (Toronto: Irwin Law, 2011) at p 182. Having declined to recognize that copyright extends to facts that are presented as facts but asserted in litigation to be fictions, my review of the works as a whole and the passages put forward by the plaintiffs leads me to conclude that the alleged copying amounts to no more than a few isolated particles of Mr. Kelley's works. This does not constitute copyright infringement, and the plaintiffs' action must be dismissed.

**JUDGMENT IN T-1656-16**

**THIS COURT'S JUDGMENT is that**

1. The plaintiffs' motion to tender new evidence in the form of a podcast written by the defendants is dismissed.
2. The plaintiffs' motion for summary judgment is dismissed.
3. The defendants' motion for summary judgment is granted, and the plaintiffs' action is dismissed.
4. If unable to agree on costs, the parties may make submissions thereon in accordance with the reasons given.

\_\_\_\_\_  
"Nicholas McHaffie"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1656-16

**STYLE OF CAUSE:** JOHN WINKLER AND THE ESTATE OF THERESIA WINKLER BY HER ESTATE TRUSTEE, JOHN WINKLER v NATE HENDLEY AND JAMES LORIMER & COMPANY LTD

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 9, 2020

**JUDGMENT AND REASONS:** MCHAFFIE J.

**DATED:** MAY 27, 2021

**APPEARANCES:**

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Melissa Dimilta FOR THE DEFENDANTS  
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