

Federal Court



Cour fédérale

Date: 20130131

Docket: T-2090-10

Citation: 2013 FC 109

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, January 31, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

DORIS TREMBLAY

**Plaintiff/
Defendant to Counterclaim**

and

ORIO CANADA INC.

**Defendant/
Plaintiff by Counterclaim**

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is a motion for summary trial brought under sections 213 to 219 of the *Federal Courts Rules*, SOR/98-106 (the Rules). The plaintiff and defendant to counterclaim alleges that he owns the copyright in a computer program called “SAM” and submits that the defendant and plaintiff by counterclaim infringed his copyright by allowing it to be copied and modified and by

installing it, selling it and distributing it to its clients, contrary to the *Copyright Act*, RSC 1985, c C-42 (the Act).

[2] The plaintiff and defendant to counterclaim is seeking a declaration that (i) he owns the copyright in the developments and improvements made to the SAM software between April 2006 and June 2009 (the “modified SAM” program); (ii) the defendant infringed his copyright by allowing and authorizing a third party to copy the source code of the modified SAM program, which was then further modified by the third party (the “reworked modified SAM” program); and (iii) the defendant infringed his copyright by possessing and selling the modified SAM program and installing it on its clients’ computers since August 2009. By this motion, the plaintiff and defendant to counterclaim is also seeking an order from this Court ordering the defendant and plaintiff by counterclaim to delete and destroy its copies of the reworked modified SAM program and enjoining it from selling and installing it.

[3] The defendant and plaintiff by counterclaim, on the other hand, submits that it owns the copyright in the modified SAM program. As plaintiff by counterclaim, it is seeking a summary judgment in its favour and an order dismissing the plaintiff’s motion, declaring that it owns the copyright in the modified SAM program and its modules and ordering the plaintiff and defendant to counterclaim to hand over to it the modified SAM program and its complementary modules within five (5) days of the date of service of the judgment. In the alternative, the defendant and plaintiff by counterclaim is seeking an order declaring that it holds a licence to use the modified SAM program and its modules, authorizing it to sell them and reproduce them freely for an unlimited time.

Factual background

[4] Generally, the facts in this case are admitted by the parties. Doris Tremblay is the plaintiff and defendant to counterclaim in this motion (the plaintiff). He is an information technology consultant operating under the name of Service Informatique Professionnel, an unincorporated information technology consulting business. Orio Canada Inc. (Orio) is the defendant and plaintiff by counterclaim (the defendant) in this case. The defendant is a corporation whose primary activity is selling an appointment management software tool for the auto mechanics industry called SAM (Service Appointment Monitor). François Gagné is the president of the defendant company (Affidavit of François Gagné, Response to Notice of Motion, Tab 2). In April 2006, the defendant reached a verbal agreement with the plaintiff to have him do some work on the SAM program (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, p 153).

[5] An initial preliminary version of the SAM program was developed in 2002-2003 by the brother of François Gagné, president of the defendant company. However, François Gagné considers himself to be the designer and creator of the SAM program, having designed the original characteristics essential to the development of the software (Affidavit of François Gagné, para 3). A second version of the SAM software was developed by third party company Openpole in 2005-2006, at the defendant's request (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, p 151).

[6] In April 2006, the defendant wanted to continue developing the SAM program with another programmer, which led to the business relationship between the plaintiff and the defendant following an oral agreement for these services. For this purpose, the third party company Openpole provided the source code for the SAM program to the plaintiff's employee Julie Gaudreault (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, p 154).

[7] The plaintiff and his employees, Julie Gaudreault in particular, provided information technology services to the defendant by working on the SAM program from April 2006 to June 2009 (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, pp 154-55). The new version of the source code as programmed by the plaintiff and his employees, the "modified SAM" program, is almost twice the size of the original version of SAM, going from 412 files, 224 folders and 1,273 pages to 669 files, 286 folders and 2,453 pages (Summary Trial Motion Record, Affidavit of Doris Tremblay, p 21). The plaintiff also added complementary modules, at François Gagné's request ([TRANSLATION] "Display", "Email", "Fuel", "Estimator", "Roadmap", "Shop Equipment" and "Estimate Tool") (Response to Notice of Motion for Summary Trial, Affidavit of Julie Gaudreault, Tab 12).

[8] The plaintiff billed the defendant at an hourly rate for the programming work performed on the SAM program. The plaintiff received more than \$73,000 for the work performed from April 2006 to June 2009 (Amended Defence and Counterclaim, para 22).

[9] The plaintiff's and defendant's business relationship ended in June 2009. At that time, the complete source code of the modified SAM program was on the defendant's server in Blainville (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, p 168). In July 2009, the defendant began working with another company, Groupe Énode (Énode), to continue developing the software. The defendant provided a copy of the source code of the modified SAM program to Énode and gave it access to the server in Blainville (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, pp 169 and 171). This company allegedly carried on with the development using the modified SAM program as a jumping-off point, thus creating the "reworked modified SAM program". The plaintiff states that he did not authorize the defendant to make a copy of the source code of the modified SAM program (Summary Trial Motion Record, Affidavit of Doris Tremblay, p 22).

[10] The defendant has been selling copies of the reworked modified SAM program and installing them on its clients' computers since August 2009. This software includes a substantial part of the source code developed by the plaintiff and his employees (Summary Trial Motion Record, Defendant's Admission, p 145; Exhibit MAD-3 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné on March 26, 2012, pp 204-05). The plaintiff was served with a formal demand by the defendant on July 21, 2009, to hand over the source code of the modified SAM program (Amended Defence and Counterclaim, para 35). The defendant was also served with a formal demand by the plaintiff on December 18, 2009, and on June 10, 2010, to cease its activities in relation with the SAM software.

[11] An order by Prothonotary Morneau, dated December 7, 2011, was issued in this file allowing the plaintiff to amend his statement to include the fact that the defendant had allowed Énode to make a copy of the modified SAM program, a fact that came to light during the examination for discovery of the president of the defendant company. The Court also ordered the parties to agree on a draft protection order to ensure that certain documents be produced under seal (namely, the defendant company's invoices to its clients from May 2006 to November 2011) (*Tremblay v Orio Canada Inc.*, 2011 FC 1437, [2011] FCJ no 1793 (QL)).

Issues

[12] This case raises three issues:

- a. Who owns the copyright in the modified SAM program?
- b. Has the copyright in the modified SAM program been assigned?
- c. Has the copyright in the modified SAM program been infringed?

Relevant legislative provisions

[13] The provisions of the Act that are relevant to this dispute, as well as the relevant Rules relating to summary judgments and trials, are reproduced in the Annex to this judgment.

Parties' submissions

Plaintiff's submissions

[14] The plaintiff alleges that he developed a full version of the source code that was copied, used and installed by the defendant without his authorization. The plaintiff submits that because he owns the copyright, there has been a clear infringement of his rights under sections 3 and 27

of the Act. The plaintiff notes that the defendant is not denying that the copyright exists—instead it is claiming to be the owner of the copyright. The plaintiff specifies that paragraph 34.1(1)(b) of the Act sets out a presumption of ownership in his favour.

[15] The plaintiff also notes that his employees did the development work on the original SAM program that led to the modified SAM program and that they are therefore the authors of the program and are presumed to be the owners of the copyright, unless the contrary is proven. Under subsection 13(3) of the Act, the plaintiff himself, as the employer, owns the copyright in the work performed by his employees. The plaintiff claims that he has never assigned his copyright in the modified SAM program because, under subsection 13(4) of the Act, no such assignment to the defendant would have been valid unless it had been in writing and signed by the plaintiff. The plaintiff submits that the requirement that an assignment be in writing is a substantial legal requirement (citing *JL De Ball Canada Inc v 421254 Ontario Ltd* (1999), 179 FTR 231, 5 CPR (4th) 352).

[16] The plaintiff argues that the president of the defendant company is not a programmer and does not possess the skills necessary to translate any ideas he may have into code. According to the plaintiff, only his employees, who are programmers, can be the authors of the modified SAM program, and the instructions of the defendant company's president, François Gagné, were merely requests expressing the result he was seeking (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, p 155; Book of Authorities for the Motion, see Normand Tamaro, *Loi sur le droit d'auteur*, 8th ed, Scarborough, Carswell, 2009 at pp 359-74, Tab 10 [Tamaro]; Book of Authorities for the Motion, John McKeown, *Fox on*

Canadian Law of Copyright and Industrial Design, 4th ed, Toronto, Carswell, pp 17-2 to 17-7, Tab 9 [*Fox*]).

[17] The plaintiff also submits that the case law clearly establishes that the author of a computer program is the programmer, not the person who has the original idea (citing *Hanis v Teevan* (1998), 81 CPR (3d) 496, 162 DLR (4th) 414 (OCA) at para 49 [*Hanis*] and *Matrox Electronic Systems Ltd v Gaudreau*, [1993] RJQ 2449 (QL) (CSQ) at paras 27-30 [*Matrox*]).

[18] With respect to the issue of copyright infringement, the plaintiff alleges that his copyright has been infringed in two ways: (i) the act of allowing and authorizing a third party company, Énode, to copy the source code; and (ii) the act of possessing, selling and installing the version of the SAM program developed from the copy made by Énode.

Defendant's arguments

[19] According to the defendant, this is a simple case that does not require lengthy legal arguments. Its submissions are limited to a single page.

[20] The defendant claims that it is the sole owner of all the rights associated with the SAM program, which was already operational in 2006 and installed at several dealerships, and that the plaintiff was aware that the defendant's sole objective in relation to the SAM program was to sell it. The defendant states that at the outset of its relationship with the plaintiff, the latter assigned up front all rights in future developments of the SAM program.

[21] According to the defendant, the oral agreement of April 2006 between it and the plaintiff was formalized in writing in a number of bids. The defendant alleges that, in drafting his bids, the plaintiff knew that the defendant's use of the SAM program was commercial rather than personal (Response to Notice of Motion and Counterclaim, Exhibit BS-1 of the Affidavit of Brigitte Sauvageau, Examination of Doris Tremblay, Tab 4, p 11). The defendant submits that the written clause in the bids constitutes an assignment of any rights the plaintiff could have claimed.

[22] The defendant notes that the plaintiff knew several of its clients, having implemented corrections himself directly on their servers. The defendant claims to be the sole owner of the copyright in the modified SAM program and its modules.

[23] In the alternative, the defendant submits that the plaintiff granted it a licence or marketing rights with respect to the SAM program and its modules. The defendant notes that from April 2006 to June 2009, during their business relationship, the plaintiff neither demanded any royalties nor indicated to the defendant that any would be required in the future.

Analysis

A. Motion for summary trial

[24] The provisions relating to summary trials were added to the Rules in 2009. The Court set out some of the general principles governing summary trials in *Teva Canada Ltd v Wyeth LLC*, 2011 FC 1169 at paras 28-36, 99 CPR (4th) 398, rev'd on other grounds by 2012 FCA 141, 431 NR 342 [*Teva*] and *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at

paras 33-39, 373 FTR 306 [*Wenzel Downhole*]. The plaintiff bears the burden of demonstrating that a summary trial is appropriate (*Teva*, above, at para 35). In deciding whether a file lends itself to a summary trial, a judge may consider, among other things, the complexity of the matter, its urgency, the cost of taking the case forward to a conventional trial in relation to the amount involved (*Inspiration Management Ltd v McDermid St. Lawrence Ltd* (BCCA) (1989), [1989] BCJ no 1003, 36 BCLR (2d) 202), whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort and whether the summary trial will result in litigating in slices (*Wenzel Downhole*, above, at para 37, citing *Dahl v Royal Bank*, 2005 BCSC 1263 at para 12, 46 BCLR (4th) 342).

[25] Because the facts underlying this case are uncontested, the credibility of the parties is not at issue, and the documentary evidence presented by the parties, such as the affidavits and other documents produced in the ordinary course of business, is sufficient to allow the Court to reach a conclusion (*Teva*, above, at para 32).

[26] At the beginning of the hearing before this Court, the parties confirmed their desire to proceed by way of a motion for summary trial. The plaintiff submits and the Court agrees that the facts are clear and that the dispute between the parties is limited and restricted to the legal effects of those facts. According to the plaintiff, the Court can render a judgment based on the facts already before it. The plaintiff is of the view that a summary trial would permit a judgment on the merits to be reached more quickly and less expensively, which is important to the parties, whose resources are limited. The Court also notes that this case is limited in time (2006 to 2009)

and limited to the software at issue (the modified SAM program). The Court is of the view that the circumstances of this case lend themselves to a motion for summary judgment in accordance with Rules 213 to 219.

B. The issue of who owns the copyright in the modified SAM program

[27] First, the Court notes that copyright law is statutory; its rights and remedies are therefore found in the Act (*CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 at para 9, [2004] 1 SCR 339 [*CCH*]). Although it is possible to register one's copyright, it is not necessary to do so in Canada: the author merely needs to be Canadian, or a citizen of any other signatory of the *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886, and the work needs to have been first published in such a country, if publication is relevant.

[28] Section 3 of the Act sets out the content of copyright, including, *inter alia*, the sole right to produce or reproduce the work in question. Section 5 of the Act lists the types of works in which copyright may subsist, specifying that the work must be an "original literary, dramatic, musical [or] artistic work". Although the Act does not define the term "original", the Supreme Court of Canada considered this issue in *CCH*, above. Noting that the existing case law on the subject was contradictory, the Supreme Court of Canada held that an "original" work originates from an author and is not copied from another work, and must be "the product of an author's exercise of skill and judgment. The exercise of skill and judgment must not be so trivial that it could be characterized as a purely mechanical exercise" (*CCH*, above, at para 25).

[29] The case law also states that copyright “protects the expression of ideas in these works; it does not protect ideas in and of themselves” (*CCH*, above, at para 8). A work must therefore be in a fixed material form to attract copyright protection, as indicated, for example, by the definition of “computer program”. The definition of a literary work in section 2 of the Act also expressly includes computer programs, and a computer program is defined as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result”. In this case, it is clear and uncontested by the parties that copyright exists in the modified SAM program. The issue is who owns it.

[30] Paragraph 34.1(1)(b) of the Act sets out a presumption that, in any civil proceedings in which the defendant puts in issue either the existence of copyright or the title of the plaintiff to it, the author shall be presumed to be the owner of the copyright unless the contrary is proven. Furthermore, section 13 of the Act sets out the elements relevant to the ownership of copyright. Under subsection 13(1), the author of a work is the first owner of the copyright. However, under subsection 13(3), where “the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright”. Subsection 13(4) states that the owner of a copyright may assign the right or grant any interest in the right by licence, but only through a written and signed document.

[31] The Act does not define the term “author”. As indicated in *Fox*, above, at page 17-2, “There is no copyright in an idea, but only in the form in which the idea is ultimately expressed, whether it is a written production or a picture. The author is the person who has clothed the idea with form.” [Emphasis added.]

[32] The issue is therefore to determine who exercised his skill and judgment to express an idea, to fix it in material form (*CCH*, above, at paras 8 and 25; *Fox*, above, at p 17-7). In *Tamaro*, above, at page 364, the author indicates that [TRANSLATION] “it does not suffice to act as secretary; one must effectively participate in the creation of the work and not merely its expression under someone else’s dictation.” The author adds the following with respect to the particular cases of programmers receiving instructions, at page 372:

[TRANSLATION]

However, it must be understood that, strictly speaking, a concept is an idea. Thus, the Court held in a case involving telecommunications software that the person who supplies the ideas and a general concept to programmers in the form of notes is not the author for copyright purposes. The authors are instead the programmers who express the ideas and the concept in programming language. In accordance with accepted copyright principles, the authors are those who use their skills to fix the work in a tangible form: *Hanis v Teevan*.

[Citations omitted; emphasis added.]

[33] In this case, as mentioned above, the existence of copyright in the SAM program is uncontested. Moreover, there is nothing significant in the evidence indicating that the modifications made to the SAM program by the plaintiff were trivial, unoriginal or purely mechanical, unlike in *Harmony Consulting Ltd v GA Foss Transport Ltd*, 2011 FC 340, 386 FTR 171, aff’d by 2012 FCA 226, 435 NR 200, in which an expert had testified that the modifications made by the programmer were exceptionally simple and therefore not protected by copyright.

[34] As for the modified SAM program, in light of the case law stating that the author is the one who clothes the work with form and not the one who has the idea without making it concrete, I must find that it is the plaintiff, through his employees, who is the author for the purposes of this case. Mr. Gagné, President of the defendant company, openly admitted that he was not a programmer and that he could not have done the work himself (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, pp 152, 153, 155, 159 and 160). No affidavit has been filed by the defendant describing the precise nature of the instructions given to the plaintiff. Furthermore, the defendant has not provided specific arguments on the issue of ownership of the copyright. Both its oral and written submissions are limited to the sole issue of the assignment of rights or the grant of a licence. Therefore, in light of the case law and the evidence in the docket, it is clear that the plaintiff (through the work of his employees) is the author of the modified SAM program.

C. Has there been an assignment of copyright?

[35] Given the previous finding that the plaintiff owns the copyright in the modified SAM program because of his programming work, the issue at the heart of this dispute is whether the copyright has been assigned in this case. The Court must consider the clause that the plaintiff has included in his bids to the defendant (a copy of which, dated April 12, 2007, has been filed in evidence, Exhibit BS-2 of the Affidavit of Brigitte Sauvageau, Response to Notice of Motion for Summary Trial, Tab 5, p 3). The clause reads as follows:

[TRANSLATION]

Any development done for Orio Canada Inc. shall become the exclusive property thereof and may not therefore be marketed or reused by Service Informatique Professionnel or any other party.

[36] More specifically, the issue raised is whether this clause, included by the plaintiff in his bids, constitutes an assignment of his copyright to the defendant under subsection 13(4) of the Act.

[37] Subsection 13(4) of the Act reads as follows:

Assignments and licences

13. (4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Cession et licences

13. (4) Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

[Emphasis added.]

[38] The writing and signature requirements in this subsection have remained unchanged since its adoption in 1921 and its coming into force in 1924 (SC 1921, c 24; SC 1923, c 10, s 5). The purpose of this subsection has been considered in *Mensys Business Solution Centre Ltd v Drummond (Municipalité régionale de comté)*, [2002] RJQ 765, [2002] JQ no 169 (QL) [*Mensys*], in which Justice Mercure made the following statement:

[TRANSLATION]

29 The following principles can be gleaned from the case law and doctrine regarding the substantial requirement that assignments of copyright be made in writing:

- a complete lack of writing is fatal in that it prevents the person claiming to be the assignee from proving the assignment. An oral assignment is invalid;
- the writing requirement is a substantial requirement and not merely an evidentiary or procedural rule;
- the writing need not explicitly mention the assignment. It suffices that it be signed by the author and that the intention to assign the copyright may be reasonably inferred from the text of the writing;
- testimonial evidence is admissible to help the Court interpret the writing and decide whether it constitutes an assignment of copyright;
- the writing may be drafted and signed after the assignment of the copyright.

...

38 The purpose of the signed writing requirement set out in subsection 13(4) is to protect the first owner of copyright, but certainly not third parties by allowing them to evade copyright infringement suits more easily.

[Citations omitted; emphasis added.]

[39] The signed writing requirement is a substantial legal requirement and not a mere rule of evidence, as indicated in *Motel 6, Inc v No 6 Motel Limited and John Van Edmond Beachcroft Hawthorne*, [1982] 1 FC 638 at para 26 [*Motel 6*]:

26 I quite accept the proposition of counsel for the plaintiff that section [13(4)] is a substantial legal requirement and not a rule of evidence. Therefore, the assignment itself need not necessarily be produced if the evidence establishes that it existed and conformed to that section. The evidence, however, falls far short of establishing on a balance of probabilities that an assignment in writing ever existed, much less one that was signed by . . . or of establishing who the assignee might have been. It has merely established the possibility of at least the three equally consistent conclusions to which I have already referred. Evidence, which merely raises this type of speculation without weighting the scale in favour of the actual existence of an assignment conforming to the statute, is not sufficient to satisfy the requirements of section [13(4)].

[40] The plaintiff also relies on *Amusements Wiltron inc v Mainville* (1991), [1991] JQ no 2574, 40 CPR (3d) 521 [*Wiltron*], in which Justice Macerola of the Superior Court of Quebec wrote the following at paragraphs 37 to 39:

[TRANSLATION]

37 Wiltron cannot claim to own the copyright in this poker game because no assignment of copyright was made in writing.

38 The company therefore held a precarious right in this game, analogous to a licence conferring no interest in the copyright, and it must live with the consequences of this.

39 Despite the friendly relationship between Mr. Halwacks and Mr. Kraml, Wiltron should have had a confidentiality agreement signed that included a non-competition clause and an assignment of copyright. . . .

[41] In short, subsection 13(4) of the Act, which governs the assignment of copyright and the granting of licences, does not require any particular wording as a condition of validity; instead it sets out a copulative condition: writing and a signature.

[42] During his cross-examination on the clause in question, the plaintiff clearly admitted that he had included that clause in various contracts [TRANSLATION] “for exclusivity reasons, to protect against competition”. He stated that his intention was that it be applied to all contracts received from the defendant company (Orio) (Exhibit BS-1 of the Affidavit of Brigitte Sauvageau, Examination of Doris Tremblay, Tab 4, p 14). Although the plaintiff argued that the wording of the clause made it more akin to a non-competition clause than a copyright assignment, the Court is not persuaded by the plaintiff’s argument.

[43] First, the Court notes that the clause falls under the heading [TRANSLATION] “Ownership” and indicates that any development done for Orio (the defendant) [TRANSLATION] “will become the exclusive property” of Orio (the defendant) and may not be [TRANSLATION] “marketed or reused by Service Informatique Professionnel or any other party”. Upon examination, the plaintiff admitted that he was granting marketing rights to the defendant (Exhibit BS-1 of the Affidavit of Brigitte Sauvageau, Examination of Doris Tremblay, Tab 4, p 16).

[44] The Court is of the view that the wording of this clause amounts to an assignment of the copyright to the defendant. Given that copyright is a right of ownership (section 3 of the Act), the use of the terms [TRANSLATION] “ownership” and [TRANSLATION] “exclusive property” can only be referring to the copyright. Furthermore, this [TRANSLATION] “exclusive” property for the benefit of Orio, the defendant, echoes the exclusive nature of copyright as defined in section 3 of the Act. Similarly, the clause at issue mentions that the “property” in question may not be marketed by the plaintiff, Service Informatique Professionnel. In short, there is a written document in this case that demonstrates the plaintiff’s intention to assign its rights to the

defendant company. However, this written document is not signed, as subsection 13(4) of the Act requires.

[45] As explained above, copyright is a creature of statute, and subsection 13(4) requires not only that an assignment of copyright be in writing to be valid, but also that the writing be signed.

[46] During the hearing before this Court, counsel for the plaintiff pointed to the absence of the plaintiff's signature on the bid. The defendant, on the other hand, emphasized the fact that, upon examination, the plaintiff had admitted to having included the clause at issue on his own initiative in all bids submitted to the defendant, thereby granting it the right to market the software:

[TRANSLATION]

Q There you are, ownership:

[TRANSLATION]

“Any development done for Orio Canada Inc. shall become the exclusive property thereof and may not therefore be marketed or reused by Service Informatique Professionnel or any other party.”

Did you take the initiative of inserting that clause?

A Yes.

Q Why?

A Because it's an annotation that has been used in earlier contracts, for exclusivity, to protect against competition.

Q Did it apply to all contracts you received from Orio Canada?

A Yes, the established bids, there, yes, of course.

...

Q Did that mean that you were not granting it marketing rights?

A No.

Q No. It included marketing rights, correct?

A Yes.

(Exhibit BS-1 of the Affidavit of Brigitte Sauvageau, Tab 4, pp 14 and 16)

[47] According to the defendant, this admission is equivalent to a signature (Hearing transcription notes of January 8, 2013, at pp 128-29). Even if it is true that the plaintiff's admission reflects his intention, it is difficult for this Court, in light of the wording of subsection 13(4) of the Act, to conclude that the plaintiff's intention, as clear as it seems, may be used to get around the Act's copulative requirements of writing and a signature. Parliament does not refer to the concept of intention at subsection 13(4) of the Act but expressly requires writing and a signature to render an assignment of copyright valid. The case law has repeatedly confirmed that this is a substantial condition that is required for the assignment to be valid (*Motel 6; Mensys*, above).

[48] In this case, the Court has no choice but to find that a signature is lacking. Although the parties have confirmed before this Court that the plaintiff submitted other bids to the defendant that include the same clause, there is nothing in the evidence to support a finding that the bids submitted after April 2007 were signed. Furthermore, the defendant has not filed any other evidence before this Court that could stand in for a signature (*Milliken & Co v Interface Flooring Systems (Canada) Inc*, [1998] 3 FC 103, 143 FTR 106).

[49] Had it not been for the absence of the plaintiff's signature, there would have been an assignment of the copyright under the Act, but in the circumstances, the Court can only find that, pursuant to subsection 13(4) of the Act, the plaintiff did not assign his copyright in the modified SAM program. Accepting the defendant's argument and making the opposite finding solely on the basis of the plaintiff's testimony would render meaningless the requirement imposed by

Parliament. This finding may appear rigid, but it complies with the formal requirements of the Act. It was not enough for the representative of the defendant company (François Gagné) to avoid explicitly dealing with the issue of copyright with the plaintiff simply because, [TRANSLATION] “in [his] head, it was very clear” (Summary Trial Motion Record, Exhibit MAD-2 of the Affidavit of Marie-Anick Décarie, Examination of François Gagné, p 162 [p 50, line 4 of the examination]).

[50] The defendant submitted, in the alternative, that it had paid fees to the plaintiff and that the latter had never claimed any royalties. However, just because the defendant paid the plaintiff for his work does not mean that the defendant owns the copyright, and just because the plaintiff did not claim any royalties does not mean that he does not own the copyright.

[51] That said, and although the evidence in the record does not support a finding that the plaintiff assigned his copyright in accordance with the conditions set out in subsection 13(4) of the Act, the Court is nevertheless of the view, on the basis of the record and the evidence, that the plaintiff granted an implied licence of use to the defendant with respect to the modified SAM program. This conclusion is dictated by the following reasons.

[52] First, the Court notes that this case rests on one key, determinative factor: the plaintiff authored the clause at issue, and it was the plaintiff, not the defendant, who included it in the bids. Next, the evidence shows that the plaintiff included this clause repeatedly in all of his bids to the defendant and that this was his usual practice. The plaintiff confirmed this upon examination by explaining that the purpose of the clause was to allow the defendant to market

the modified SAM program. The evidence also shows that the plaintiff knew that the modified SAM program would be installed at car dealerships. The plaintiff even travelled to some of these dealerships himself on occasion. The Court also notes that the plaintiff was paid for his work (*Céjibé Communication Inc v Construction Cleary (1992) Inc.*, [1998] AQ no 3520).

[53] Therefore, in light of the evidence, the Court finds that the plaintiff granted the defendant an implied licence to use the modified SAM program. It has been recognized in the case law that an implied licence can be inferred from the parties' conduct and need not be made in writing (*Silverson v Neon Products Ltd* (1978), 39 CPR (2d) 234 (BCSC); *Cselko Associates Inc v Zellers Inc* (1992), 44 CPR (3d) 56 (Ont Ct Gen Div)). The Court is of the view that this is the case here.

[54] The Court will therefore briefly address the copyright infringement issue raised by the plaintiff.

D. Copyright infringement

[55] For there to be infringement under section 27, the Act requires that something be done without the consent of the owner of the copyright in question.

[56] Section 27 of the Act reads as follows:

PART III	PARTIE III
INFRINGEMENT OF COPYRIGHT AND MORAL RIGHTS AND EXCEPTIONS	VIOLATION DU DROIT D'AUTEUR ET DES DROITS MORAUX, ET CAS

TO INFRINGEMENT

D'EXCEPTION

INFRINGEMENT OF COPYRIGHT

VIOLATION DU DROIT
D'AUTEUR*General**Règle générale*

Infringement generally

Règle générale

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

Secondary infringement

Violation à une étape ultérieure

(2) It is an infringement of copyright for any person to

(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une œuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication alors que la personne qui accomplit l'acte sait ou devrait savoir que la production de l'exemplaire constitue une violation de ce droit, ou en constituerait une si l'exemplaire avait été produit au Canada par la personne qui l'a produit :

(a) sell or rent out,

a) la vente ou la location;

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

b) la mise en circulation de façon à porter préjudice au titulaire du droit d'auteur;

(c) by way of trade distribute, expose or offer for sale or

c) la mise en circulation, la mise ou l'offre en vente ou en

rental, or exhibit in public,

location, ou l'exposition en public, dans un but commercial;

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas a) à c);

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas a) à c).

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

...

[Emphasis added.]

[57] As indicated above, the evidence in the record shows that the plaintiff implicitly consented to the defendant's use of the modified SAM program and granted it a user licence. It follows that the plaintiff's claim that his copyright was infringed under section 27 of the Act for lack of consent on his part cannot be accepted, since there was consent on his part.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

- 1) The plaintiff owns the copyright in the modified SAM program;
- 2) The plaintiff did not assign his copyright in the modified SAM program to the defendant;
- 3) The plaintiff granted an implied user licence to the defendant authorizing it to use the modified SAM program;
- 4) The plaintiff's copyright has not been infringed by the defendant;
- 5) Given the result, each party shall bear its own costs.

“Richard Boivin”

Judge

Certified true translation
Francie Gow, BCL, LLB

Annex

The relevant provisions of the *Copyright Act* in this case are the following:

INTERPRETATION	DÉFINITIONS ET DISPOSITIONS INTERPRÉTATIVES
Definitions	Définitions
2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.
...	[...]
“computer program” « programme d'ordinateur »	« œuvre littéraire » “literary work”
“computer program” means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;	« œuvre littéraire » Y sont assimilés les tableaux, les programmes d'ordinateur et les compilations d'œuvres littéraires.
...	[...]
“literary work” « œuvre littéraire »	« programme d'ordinateur » “computer program”
“literary work” includes tables, computer programs, and compilations of literary works;	« programme d'ordinateur » Ensemble d'instructions ou d'énoncés destiné, quelle que soit la façon dont ils sont exprimés, fixés, incorporés ou emmagasinés, à être utilisé directement ou indirectement dans un ordinateur en vue d'un résultat particulier.
...	[...]
PART I	PARTIE I
COPYRIGHT AND MORAL RIGHTS IN WORKS	DROIT D'AUTEUR ET DROITS MORAUX SUR LES ŒUVRES
COPYRIGHT	DROIT D'AUTEUR
Copyright in works	Droit d'auteur sur l'œuvre
3. (1) For the purposes of this Act,	3. (1) Le droit d'auteur sur l'œuvre

“copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;

b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;

c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;

d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique — autre qu'une carte géographique ou marine, un

plan ou un graphique — créée après le 7 juin 1988;

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

i) s'il s'agit d'une œuvre musicale, d'en louer tout enregistrement sonore;

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

j) s'il s'agit d'une œuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur.

and to authorize any such acts.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

...

[...]

OWNERSHIP OF COPYRIGHT

POSSESSION DU DROIT D'AUTEUR

Ownership of copyright

Possession du droit d'auteur

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

13. (1) Sous réserve des autres dispositions de la présente loi, l'auteur d'une œuvre est le premier titulaire du droit d'auteur sur cette œuvre.

(2) [Repealed, 2012, c. 20, s. 7]

(2) [Abrogé, 2012, ch. 20, art. 7]

Work made in the course of employment

Œuvre exécutée dans l'exercice d'un emploi

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his

(3) Lorsque l'auteur est employé par une autre personne en vertu d'un contrat de louage de service ou d'apprentissage, et que l'œuvre est exécutée dans l'exercice de

employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

Assignments and licences

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Ownership in case of partial assignment

(5) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.

cet emploi, l'employeur est, à moins de stipulation contraire, le premier titulaire du droit d'auteur; mais lorsque l'œuvre est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, en l'absence de convention contraire, est réputé posséder le droit d'interdire la publication de cette œuvre ailleurs que dans un journal, une revue ou un périodique semblable.

Cession et licences

(4) Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

Possession dans le cas de cession partielle

(5) Lorsque, en vertu d'une cession partielle du droit d'auteur, le cessionnaire est investi d'un droit quelconque compris dans le droit d'auteur, sont traités comme titulaires du droit d'auteur, pour l'application de la présente loi, le cessionnaire, en ce qui concerne les droits cédés, et le cédant, en ce qui concerne les droits non cédés, les dispositions de la présente loi recevant leur application en conséquence.

Assignment of right of action

(6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.

Exclusive licence

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

...

PART III

INFRINGEMENT OF COPYRIGHT AND MORAL RIGHTS AND EXCEPTIONS TO INFRINGEMENT

INFRINGEMENT OF COPYRIGHT

General

Infringement generally

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Secondary infringement

(2) It is an infringement of copyright for any person to

Cession d'un droit de recours

(6) Il est entendu que la cession du droit d'action pour violation du droit d'auteur est réputée avoir toujours pu se faire en relation avec la cession du droit d'auteur ou la concession par licence de l'intérêt dans celui-ci.

Licence exclusive

(7) Il est entendu que la concession d'une licence exclusive sur un droit d'auteur est réputée toujours avoir valu concession par licence d'un intérêt dans ce droit d'auteur.

[...]

PARTIE III

VIOLATION DU DROIT D'AUTEUR ET DES DROITS MORAUX, ET CAS D'EXCEPTION

VIOLATION DU DROIT D'AUTEUR

Règle générale

Règle générale

27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

Violation à une étape ultérieure

(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une œuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication

alors que la personne qui accomplit l'acte sait ou devrait savoir que la production de l'exemplaire constitue une violation de ce droit, ou en constituerait une si l'exemplaire avait été produit au Canada par la personne qui l'a produit :

(a) sell or rent out,

a) la vente ou la location;

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

b) la mise en circulation de façon à porter préjudice au titulaire du droit d'auteur;

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

c) la mise en circulation, la mise ou l'offre en vente ou en location, ou l'exposition en public, dans un but commercial;

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas a) à c);

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas a) à c).

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

[...]

...

PART IV

PARTIE IV

REMEDIES

RECOURS

CIVIL REMEDIES

RECOURS CIVILS

Infringement of Copyright and Moral Rights

Violation du droit d'auteur et des droits moraux

...

[...]

Presumptions respecting copyright and

Présomption de propriété

ownership

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and

(b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

Where no grant registered

(2) Where any matter referred to in subsection (1) is at issue and no assignment of the copyright, or licence granting an interest in the copyright, has been registered under this Act,

(a) if a name purporting to be that of

- (i) the author of the work,
- (ii) the performer of the performer's performance,
- (iii) the maker of the sound recording, or
- (iv) the broadcaster of the communication signal

is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author, performer, maker or broadcaster;

34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

a) l'œuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;

b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.

Aucun enregistrement

(2) Dans toute contestation de cette nature, lorsque aucun acte de cession du droit d'auteur ni aucune licence concédant un intérêt dans le droit d'auteur n'a été enregistré sous l'autorité de la présente loi :

a) si un nom paraissant être celui de l'auteur de l'œuvre, de l'artiste-interprète de la prestation, du producteur de l'enregistrement sonore ou du radiodiffuseur du signal de communication y est imprimé ou autrement indiqué, de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur;

(b) if

(i) no name is so printed or indicated, or if the name so printed or indicated is not the true name of the author, performer, maker or broadcaster or the name by which that person is commonly known, and

(ii) a name purporting to be that of the publisher or owner of the work, performer's performance, sound recording or communication signal is printed or otherwise indicated thereon in the usual manner,

the person whose name is printed or indicated as described in subparagraph (ii) shall, unless the contrary is proved, be presumed to be the owner of the copyright in question; and

(c) if, on a cinematographic work, a name purporting to be that of the maker of the cinematographic work appears in the usual manner, the person so named shall, unless the contrary is proved, be presumed to be the maker of the cinematographic work.

b) si aucun nom n'est imprimé ou indiqué de cette façon, ou si le nom ainsi imprimé ou indiqué n'est pas le véritable nom de l'auteur, de l'artiste-interprète, du producteur ou du radiodiffuseur, selon le cas, ou le nom sous lequel il est généralement connu, et si un nom paraissant être celui de l'éditeur ou du titulaire du droit d'auteur y est imprimé ou autrement indiqué de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être le titulaire du droit d'auteur en question;

c) si un nom paraissant être celui du producteur d'une œuvre cinématographique y est indiqué de la manière habituelle, cette personne est présumée, jusqu'à preuve contraire, être le producteur de l'œuvre.

The following provisions of the *Federal Courts Rules* relating to summary judgments are relevant to this case:

SUMMARY JUDGMENT AND SUMMARY
TRIAL

JUGEMENT ET PROCÈS SOMMAIRES

Motion and Service

Requête et signification

Motion by a party

Requête d'une partie

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

213. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heures, date et lieu de l'instruction soient fixés.

Further motion

Nouvelle requête

(2) If a party brings a motion for summary judgment or summary trial, the party may not bring a further motion for either summary judgment or summary trial except with leave of the Court.

(2) Si une partie présente l'une de ces requêtes en jugement sommaire ou en procès sommaire, elle ne peut présenter de nouveau l'une ou l'autre de ces requêtes à moins d'obtenir l'autorisation de la Cour.

Obligations of moving party

Obligations du requérant

(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.

(3) La requête en jugement sommaire ou en procès sommaire dans une action est présentée par signification et dépôt d'un avis de requête et d'un dossier de requête au moins vingt jours avant la date de l'audition de la requête indiquée dans l'avis.

Obligations of responding party

Obligations de l'autre partie

(4) A party served with a motion for summary judgment or summary trial shall serve and file a defendant's motion record not later than 10 days before the day set out in the notice of motion for the hearing

(4) La partie qui reçoit signification de la requête signifie et dépose un dossier de réponse au moins dix jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

of the motion.

Summary Judgment

Jugement sommaire

Facts and evidence required

Faits et éléments de preuve nécessaires

214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

214. La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

If no genuine issue for trial

Absence de véritable question litigieuse

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

215. (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Genuine issue of amount or question of law

Somme d'argent ou point de droit

(2) If the Court is satisfied that the only genuine issue is

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Powers of Court

Pouvoirs de la Cour

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou

may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

Summary Trial

Motion record for summary trial

216. (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including

(a) affidavits;

(b) admissions under rule 256;

(c) affidavits or statements of an expert witness prepared in accordance with subsection 258(5); and

(d) any part of the evidence that would be admissible under rules 288 and 289.

Further affidavits or statements

(2) No further affidavits or statements may be served, except

(a) in the case of the moving party, if their content is limited to evidence that would be admissible at trial as rebuttal evidence and they are served and filed at least 5 days before the day set out in the

d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

Procès sommaire

Dossier de requête en procès sommaire

216. (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie compte se fonder, notamment :

a) les affidavits;

b) les aveux visés à la règle 256;

c) les affidavits et les déclarations des témoins experts établis conformément au paragraphe 258(5);

d) les éléments de preuve admissibles en vertu des règles 288 et 289.

Affidavits ou déclarations supplémentaires

(2) Des affidavits ou déclarations supplémentaires ne peuvent être signifiés que si, selon le cas :

a) s'agissant du requérant, ces affidavits ou déclarations seraient admissibles en contre-preuve à l'instruction et leurs signification et dépôt sont faits au moins cinq jours avant la date de l'audition de la

notice of motion for the hearing of the summary trial; or

(b) with leave of the Court.

Conduct of summary trial

(3) The Court may make any order required for the conduct of the summary trial, including an order requiring a deponent or an expert who has given a statement to attend for cross-examination before the Court.

Adverse inference

(4) The Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence.

Dismissal of motion

(5) The Court shall dismiss the motion if

(a) the issues raised are not suitable for summary trial; or

(b) a summary trial would not assist in the efficient resolution of the action.

Judgment generally or on issue

(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court

requête indiquée dans l'avis de requête;

b) la Cour l'autorise.

Déroulement du procès sommaire

(3) La Cour peut rendre toute ordonnance nécessaire au déroulement du procès sommaire, notamment pour obliger le déclarant d'un affidavit ou le témoin expert ayant fait une déclaration à se présenter à un contre-interrogatoire devant la Cour.

Conclusions défavorables

(4) La Cour peut tirer des conclusions défavorables du fait qu'une partie ne procède pas au contre-interrogatoire du déclarant d'un affidavit ou ne dépose pas de preuve contradictoire.

Rejet de la requête

(5) La Cour rejette la requête si, selon le cas :

a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;

b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.

Jugement sur l'ensemble des questions ou sur une question en particulier

(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou

is of the opinion that it would be unjust to decide the issues on the motion.

sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

Order disposing of action

Ordonnance pour statuer sur l'action

(7) On granting judgment, the Court may make any order necessary for the disposition of the action, including an order

(7) Au moment de rendre son jugement, la Cour peut rendre toute ordonnance nécessaire afin de statuer sur l'action, notamment :

(a) directing a trial to determine the amount to which the moving party is entitled or a reference under rule 153 to determine that amount;

a) ordonner une instruction portant sur la détermination de la somme à laquelle a droit le requérant ou le renvoi de cette détermination conformément à la règle 153;

(b) imposing terms respecting the enforcement of the judgment; and

b) imposer les conditions concernant l'exécution forcée du jugement;

(c) awarding costs.

c) adjuger les dépens.

Trial or specially managed proceeding

Instruction ou instance à gestion spéciale

(8) If the motion for summary trial is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary trial, to proceed to trial or order that the action be conducted as a specially managed proceeding.

(8) Si la requête en procès sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

General

Dispositions générales

Right of plaintiff who obtains judgment

Droits du demandeur obtenant jugement

217. A plaintiff who obtains judgment under rule 215 or 216 may proceed against the same defendant for any other relief and may proceed against any other defendant for the same or any other relief.

217. Le demandeur qui obtient un jugement au titre des règles 215 ou 216 peut poursuivre le même défendeur pour une autre réparation ou poursuivre un autre défendeur pour toute réparation.

Powers of Court

Pouvoirs de la Cour

218. If judgment under rule 215 or 216 is refused or is granted only in part, the Court may make an order specifying which material facts are not in dispute and defining the issues to be tried and may also make an order

(a) for payment into court of all or part of the claim;

(b) for security for costs; or

(c) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or summary trial or by any cross-examination on them and providing for their use at trial in the same manner as an examination for discovery.

Stay of execution

219. On granting judgment under rule 215 or 216, the Court may order that enforcement of the judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third party claim.

218. Si le jugement visé aux règles 215 ou 216 est refusé ou n'est accordé qu'en partie, la Cour peut, par ordonnance, préciser les faits substantiels qui ne sont pas en litige et déterminer les questions à instruire, ainsi que :

a) ordonner la consignation à la Cour d'une somme d'argent représentant la totalité ou une partie de la réclamation;

b) ordonner la fourniture d'un cautionnement pour dépens;

c) limiter la nature et l'étendue de l'interrogatoire préalable aux questions non visées par les affidavits déposés à l'appui de la requête en jugement sommaire ou en procès sommaire, ou par tout contre-interrogatoire s'y rapportant, et permettre leur utilisation à l'instruction de la même manière qu'un interrogatoire préalable.

Sursis d'exécution

219. Au moment de rendre un jugement en application des règles 215 ou 216, la Cour peut ordonner de surseoir à l'exécution forcée du jugement jusqu'à la détermination de toute autre question soulevée dans l'action ou dans une demande reconventionnelle ou une mise en cause.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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