

SUPREME COURT OF NOVA SCOTIA
Citation: *Tremblay v. Beaupré*, 2022 NSSC 219

Date: 20220817
Docket: Hfx No. 505657
Registry: Halifax

Between:

Julie Annie Catherine Tremblay

Plaintiff

v.

Shawn Leonard Beaupré, a.k.a. Shaw Leonard, and White Eagle Spirit Talker
Incorporated

Defendants

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| Decision |
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Judge: The Honourable Justice C. Richard Coughlan

Heard: February 17 and July 12, 2022

Counsel: David G. Coles, Q.C., for the Plaintiff
Jason W. Woycheshyn, Nicholas B. Grant (February 17,
2022), and Daniela Bassan, Q.C. (July 12, 2022) for the
Defendants

By the Court:

[1] Julie Annie Catherine Tremblay commenced an action against Shawn Leonard Beaupré, a.k.a. Shawn Leonard and White Eagle Spirit Talker Incorporated, for breach of contract, unjust enrichment and infringement of her copyright and/or intellectual property rights in *The Language of Spirit*, a book published by Mr. Beaupré, and endeavours related to the book. The Defendants filed a Notice of Defence and move for an order for summary judgment on evidence. Ms. Tremblay opposes the motion.

[2] The evidence before the Court is as follows:

[3] Mr. Beaupré is a Mi'kmaq Aboriginal/Indigenous psychic medium and spirit talker. As early as February 2013 he began making inquiries about self-publishing his life story. The same year, in addition to his personal readings, Mr. Beaupré began putting on live shows and workshops.

[4] On August 12, 2014, Mr. Beaupré conducted a psychic reading at the North End Memorial Library in Halifax, Nova Scotia, where Mr. Beaupré and his partner Bonny Martell met Ms. Tremblay and her family, who were in attendance.

[5] Subsequently, the Tremblay family invited Mr. Beaupré and Ms. Martell to brunch at Stayner's Wharf restaurant in Halifax. Members of the Tremblay family present beside Ms. Tremblay were her father Yvan, mother Renee, brothers Sebastian, Fredrik and Normand and sisters Agatha, and Anne-Marie. During brunch, they discussed a potential book about Mr. Beaupré's life. There is no agreement as to the nature of the discussion. Ms. Tremblay described the discussion in her affidavit deposed to December 9, 2021 as:

5. The day following the move, on November 9, 2014, my family invited the Defendant and his fiancée for brunch with us at Stayner's Wharf in downtown Halifax. Present were Mr. Beaupré, Ms. Martell, my father Yvan, mother Renee, brothers Sebastian, Fredrik and Normand, as well as my sisters Agatha, and Anne-Marie and myself. It was Mr. Beaupré who brought up the previous nights topic of writing a book together. He said he had been looking for someone to write a book with him for a long time and that he was so happy that we could do this together. He said this book was going to be about his life story as well as various topics surrounding spirituality, and how he worked in this field. He said he didn't want to take advantage of me in any way and to be fair to both of us, and as we talked the previous night, we would be co-authors at 50% shares. I recall that he said this applied to royalties based on sales of the book and any public and commercial use related to the book and its stories as well as to our rights in the intellectual property. He really put emphasis

on the point of us being equal in everything that involved writing a book together and reaffirming to all present that this would be a fair partnership.

6. We did not discuss how we would manage money in terms of transfers, cheques or anything of the like to split revenues or expenses. I am for certain sure that I was not offered a price for writing the book, nor a price per chapter or anything like that. Neither was I offered an hourly wage. I did not offer any of those things either. I am certain sure as well that paying me with a trip to Hawaii was not discussed or offered or requested or accepted. He did indicate that he intended we write several books together.

[6] Mr. Beaupré deposed while they may have discussed a book during the brunch, he was certain there was no agreement regarding co-authorship, a sharing of profits or intellectual property rights. According to Mr. Beaupré, Ms. Tremblay was an aspiring writer, she was inexperienced and told him she was looking to get some experience.

[7] In an email to Mr. Beaupré on November 23, 2014, Ms. Tremblay stated “I think I can have your book written, edited, printed, and ready for sale by the end of June 2015.” Mr. Beaupré developed back problems which delayed work on the book. Ms. Tremblay contacted Mr. Beaupré by email on January 10, 2015 inquiring how he was doing and telling him she was working on the book and “I’m getting the hang of it now.”

[8] Ms. Tremblay attended a writer’s workshop in Chicago in March, 2015 which was designed to teach attendees about the publishing process. On March 21, 2015, the following text message exchange took place between Ms. Tremblay and Mr. Beaupré:

Catherine Tremblay
But I’m over here, being your little assistant, your ghost writer lol (that’s what my job is called lol)
Mar 21, 2015, 11:26 PM

Catherine Tremblay
[?]
Mar 21, 2015, 11:26 PM

Catherine Tremblay
Yes
Mar 21, 2015, 11:26 PM

Shawn Leonard
Well my co writer

Your getting credit for writing
Mar 21, 2015, 11:27 PM

Shawn Leonard
We'll talk about payment too
Based on sales
Mar 21, 2015, 11:28 PM

Shawn Leonard
I'm hoping we write many books together
Mar 21, 2015, 11:29 PM

Catherine Tremblay
And a ghost writer doesn't? I was trying to find books for that sort of stuff, about writer with someone/for someone, but it's so hard to find something ah! But I bought a good one today about building platforms I was waiting to get for months
Mar 21, 2015, 11:29 PM

Catherine Tremblay
I always have such a hard time figuring out what the heck my title is lmfao. So co writer is fine with me. And yes, we'll talk about payments and stuff, make an agreement
Mar 21, 2015, 11:30 PM

Shawn Leonard
Yes
Mar 21, 2015, 11:30 PM

Shawn Leonard
Sylvia Browne wrote her books
With Lyndsey Harrison
Mar 21, 2015, 11:30 PM

Catherine Tremblay
I think they said here that a none fiction royalties are.... 8% ? They'll send that power point by email so I'll have more info on that in a couple of days
Mar 21, 2015, 11:31 PM

Catherine Tremblay
And advances when you get a contract, what happens after that is your sales go to paying back your advance until it's all payed off, they you start getting royalties
Mar 21, 2015, 11:31 PM

Catherine Tremblay
So an advance or not advance, it really doesn't matter
Mar 21, 2015, 11:31 PM

Catherine Tremblay
Then**
Mar 21, 2015, 11:32 PM

Catherine Tremblay
Thought you'd like to know how that works
Mar 21, 2015, 11:32 PM

Catherine Tremblay
And yes Shawn! I'm hoping we write lots of books together too. I like doing this. The first one is the little bump on learning how it works but after that, it should get easier
Mar 21, 2015, 11:32 PM

[9] According to Ms. Tremblay, in April 2015, there was a change in the approach to the book and she suggested that she and Mr. Beaupré should meet on a regular basis.

[10] Ms. Tremblay sent portions of her work to Mr. Beaupré for review. For example, on July 17, 2015 she sent him chapter 14 for review. Mr. Beaupré responded "Great Job...I love it :-) keep up the awesome work". On December 15, 2015, Mr. Beaupré texted Ms. Tremblay stating "Good night...Great work Catherine This book will be written before you know it!" On February 2, 2016, Mr. Beaupré texted Ms. Tremblay about her work on the book "Because I want to keep the vision of what we are creating the same...I'm not going to change it! I like it this way".

[11] Ms. Tremblay ordered a book about book contracts on March 1, 2016. The same day she texted Mr. Beaupré stating:

P.S I ordered a book on book contracts, so it should help will all kinds of contracts lol, including publishing contracts with publisher. We're getting closer to mid way, we're gonna have to start thinking about writing one up too

[12] On March 17, 2016, Ms. Tremblay sent the following email to Mr. Beaupré:

Hi Shawn,

I am sending you my thoughts about the book that I am writing at the moment with you.

I always thought and believed that we were co-authors at equal shares. I meet you once a week, for approximately three hours. We converse and record our discussions, and then we are done for the evening; but for me it takes a week, if not more, to listen to the recordings

several times, take notes, and write the chapter. It takes a lot of my time and investment, I have to keep my concentration and ideas on the subject, while having the vision of both the authors and readers in mind. I do a large amount of work, and it is intense.

Since the end of November, we both invested more time, and now at mid-march, we have nine chapters written, including chapter 6 “A Trip to France”, that we will split into two chapters. That is a remarkable achievement in itself. I honestly think that we have a good project together.

Because we are co-authors, I insist on paying my shares for publishing. Whether it being electronically, printed, audio format, video etc; I feel I have my part in responsibilities of the publishing of our book

I thought that fifty-fifty was the ideal formula for the both of us, but I am ready to accept 37.5% of the copyright and royalty rights, as you proposed to me at the time of our meeting last Tuesday. I confirm to you, as I say I would, that that is okay, I accept.

I insist on contributing, like I mentioned above, my 37.5% of the costs on publication with balboa, or any other type of publishing, including audio, video, or internet etc, as we see fit; in future publications as well. For example, balboa charges anywhere from 1’099.00 to 13’999.00, it is normal and makes sense to me that I pay 37.5% of the cost of the publishing package. That both our names be on our publications, that’s fine. It also makes sense that the both of us need to sign together, any agreements regarding the book and its publication of any kind. Regardless of my 37.5% and your 62.5%, we both need to unite and agree to sign future agreements, regarding the publication and promotion of the book.

I understand the subject of our book, and I am capable of growing and evolving as well on it’s subject. I appreciate the spirit world, and also consider writing more books, you and I together. Our first book “White Eagle Spirit Talker” touches on many subjects that my family and I had interests in, before our all meeting. That is how we met, because spirits are also an important part of our lives.

“The Writer’s Legal Companion” my book by Brad Bunnin and Peter Beren, already shows collaboration formulas between co-authors that I will revise again, and see if we can adapt them to our project.

We could get together and also revise them together, what do you think?

Talk soon,

Catherine

[13] Mr. Beaupré and Ms. Tremblay disagreed as to whether they had a contract concerning the book project and copyright interest in the work. Mr. Beaupré emailed Ms. Tremblay on March 29, 2016 stating:

Hello Catherine

Since I have not heard from you, I decided to write you this email as we need to bring this issue of a “contract” between us to closure.

After some reflection over the weekend I came to the conclusion that we clearly have different ways of how we’re going to work together and how we have very different ideas and expectations regarding this book. We tentatively spoke about terms, but you took it as an exact verbal contract. We never did have a verbal contract nor do we have a written one. As of right now, immediately, I am abandoning my book writing project with you. There are no future endeavors with us as well. This is the end of our business relationship.

[14] Ms. Tremblay responded the same day stating:

Hi Shawn,

I am currently driving back from Quebec with my grandfather, for medical and personal reasons my grandfather had to attend to.

In any way, you didn’t respect your share of the contract trying to sell my rights to someone else, and just push me aside. You try to breach our contract to push me away, and take advantage of me. I can clearly see that. You look for a bigger offer, but you face the facts that you will have to respect our copyrights and our work no matter what. If you want to terminate our agreement, we will have to come to a settlement over my rights and my work.

...

Let me get back to halifax, and see how we are going to fix this breach of contract from your part. We have to agree somehow down the road, before the work can be used publicly.

Catherine

[15] Mr. Beaupré’s partner Ms. Martell emailed Ms. Tremblay the same day. In the response, Ms. Martell stated that she and Mr. Beaupré would not be using the material Ms. Tremblay and Mr. Beaupré wrote whatsoever, but rather they were rewriting the book from scratch.

[16] Ms. Tremblay consulted counsel and by letter dated April 5, 2016, David G. Coles, Q.C., wrote to Mr. Beaupré stating:

Please be advised we are the solicitors of Catherine Tremblay.

We are instructed that it was agreed between yourself and Ms. Tremblay that she would transcribe recordings, and take notes of conversations, with you and edit, revise and organize the same into chapters for a book. We are instructed that it was agreed that she would undertake this work in consideration of fifty (50%) percent of all proceeds deriving from the book and that she would have a fifty (50%) percent intellectual property interest in the same.

We are instructed that our client after some discussion with you accepted your proposal to reduce her share of all proceedings, royalties, payments, etc., arising from the book and its publication to thirty-seven and one half (37.5%) percent with her intellectual property right remaining at the fifty (50%) percent level.

Subsequently by March 22 email, you notified our client that you are now dealing directly with a publisher and editor. My client is given to understand that her services are being unilaterally terminated by you with someone else assuming the workload previously undertaken by our client.

We are advised you have already received at least \$40,000 from events at which portions of the chapters have been “published” and relied upon to attract attendees. You have utilized the chapters of the book without the permission of our client and contrary to your agreement taken sole credit. We understand that there are ten (10) events scheduled during the next several weeks which will generate considerable more revenue. We also understand you have, or will, receive a book advance. Our client is entitled to her share of all of these monies.

PLEASE TAKE NOTICE that we require written confirmation from you within five (5) business days of the date of this letter that you will honour your agreement so that our client receives her percentage of all funds.

We understand that without our client’s involvement you were apparently making arrangements with Balboa Press in relation to the intellectual property of the book. It was specifically agreed as between yourself and our client that she would be involved in any discussions with any publishers and/or marketers. Our client maintains that she has an equal interest in that intellectual property and will not consent to any publication pending confirmation that her interests are to be confirmed and payments arising there from accounted for.

We will alert Ms. DeeAnna May, Publishing Consultant, Balboa Press, a division of Hay House, and Anne Bérubé, of our client's assertion of her intellectual property interest in the material comprising "White Eagle Spirit Talker".

Please direct correspondence to the attention of the writer.

[17] Then counsel for Mr. Beaupré responded to the demand on April 6, 2016, denying Ms. Tremblay's claims for credit, royalties, intellectual property, etc., stating the claims were without merit and that Ms. Tremblay was not entitled to anything as alleged or otherwise. Counsel concluded by stating he had authority to accept service of any claim Ms. Tremblay may wish to advance.

[18] In August 2016, Mr. Beaupré hired Renée Hartleib, a self-employed professional writer based in Halifax, to help him write a book about his life as a Mi'kmaq aboriginal/indigenous psychic medium. Starting on September 12, 2016, Ms. Hartleib met with Mr. Beaupré for a series of conversational sessions that usually lasted approximately one hour each. During the sessions, Mr. Beaupré would tell her stories from his life. The conversations were recorded and transcribed. Ms. Hartleib converted the transcriptions into writing that took the form of book chapters. This process took place between September 12, 2016 and January 22, 2018.

[19] Mr. Beaupré wrote book chapters on his own in late 2017 and early 2018. Ms. Hartleib believed that Mr. Beaupré's chapters interrupted the flow of the book and were redundant. Ms. Hartleib suggested it would take her an additional five to six hours to bring the book back to a publishable state. Mr. Beaupré did not accept Ms. Hartleib's offer to further review the manuscript. To the best of her knowledge, Ms. Hartleib never met, spoke to, or communicated with Ms. Tremblay.

[20] Jennifer Dinsmare was hired by Mr. Beaupré around February 3, 2018 to copy edit and proofread the manuscript of *The Language of Spirit*. Mr. Beaupré forwarded the draft of *The Language of Spirit* containing 30 chapters of Ms. Hartleib's writing product and three chapters 27, 28 and 31 which he wrote himself. Ms. Dinsmare returned a completed manuscript to Mr. Beaupré on February 20, 2018. Mr. Beaupré paid Balboa Press on January 30, 2018 to have the book *The Language of Spirit* published.

[21] White Eagle Spirit Talker Incorporated is a body corporate, incorporated on March 22, 2017. Mr. Beaupré is its President and sole director.

Preliminary Issue

[22] For the purposes of the summary judgment motion, the defendants do not challenge the nature or existence of an oral contract between Ms. Tremblay and Mr. Beaupré. They wish the Court to assume a contract exists. The defendants' position on the contractual claims (breach of contract and breaches of the duties of good faith and honest performance) and the claim of unjust enrichment rests on the limitation defence.

[23] Ms. Tremblay submits that by virtue of *Civil Procedure Rule* 13.04(1)(a) for a summary judgment motion the parties cannot assume a material fact has been established rather the judge must find the material fact has been established.

[24] As the summary judgment motion with regard to Ms. Tremblay's contractual and unjust enrichment claims is based on the limitation defence, the material facts for the purpose of the motion deal with whether the applicable limitation period has expired, not the elements of the substantive claims.

[25] A judge does not assume material facts for the purpose of a summary judgment motion; rather a judge goes through the questions set out by Fichaud, J.A. in giving the Court's judgment in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, to determine whether there is a "genuine issue of material fact".

Issues

[26] The issues before the Court are:

1. Whether the applicable limitation period had expired before Ms. Tremblay commenced this action and, consequently, her contractual, and unjust enrichment claims against the defendants should be dismissed.
2. Whether the defendants are entitled to summary judgment on Ms. Tremblay's claim for breach of copyright and intellectual property rights.

Position of the Parties

[27] Mr. Beaupré and White Eagle submit that with regard to the contractual and unjust enrichment claims, the limitation period started to run on March 29, 2016, the day the cancelled project was unambiguously terminated, and that by operation of section 8(1)(a) of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, Ms.

Tremblay had to commence action on the claims by March 29, 2018. The action was not commenced until April 16, 2021, after the limitation period expired.

[28] The defendants submit with regard to the copyright and intellectual property rights claims there is no evidence any of the material from the cancelled project was accessed, let alone reproduced, for the creation of *The Language of Spirit*. Ms. Tremblay has not adduced any evidence to show that any of her material from the cancelled project was used in the “Spirit Talker” television series. There is no genuine issue of material fact in relation to Ms. Tremblay’s copyright or intellectual property claims.

[29] Ms. Tremblay submits that her claims are not governed by section 8(1)(a) of the *Limitation of Actions Act* but rather sections 8(1)(b), 8(3)(b), 9(2) and 2(1)(c) of the *Act* and Mr. Beaupré has failed to establish her claim was not within the limitation period established by section 8(3)(b).

[30] Ms. Tremblay says there is a genuine issue of fact is issue in this proceeding. *Civil Procedure Rule* 13.04(1)(a) requires a judge be satisfied that there is no genuine issue of material fact. For the purpose of a summary judgment motion the parties cannot assume a material fact has been established. The judge must find the material fact has been established. In this case, she says the Court cannot deal with the limitation issue until the terms of the contract are known.

Analysis

[31] Summary judgment on evidence is governed by *Civil Procedure Rule* 13.04 which provides:

13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

- (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
- (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be

granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

[32] The manner in which a judge is to deal with a motion for summary judgment on the evidence was set out in detail by Fichaud, J.A. in giving the Court's judgment in *Shannex*, where he identified five sequential questions to be answered.

First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

Third Question: If the answer to #1 and #2 are no and yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton's* second test: Does the challenged pleading have a real chance of success?

Fourth Question: Should the judge exercise the "discretion" to finally determine the issue of law?

Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[33] In the same judgment Fichaud J.A. stated at para. 36 that each party is expected to put its best foot forward:

"Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine

issue of material fact”, issue of law, and “real chance of success”. Rule 13.04(4) and (5); *Burton*, para. 87.

[34] The evidentiary obligation of parties on a summary judgment motion was set out by Bryson J.A., in giving the Court’s judgment in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50, at para. 15:

Putting one’s best foot forward is an important obligation of parties to a summary judgment motion. A respondent to a summary judgment motion “must lead trump or risk losing” (*Goudie v. Ottawa (City)*, 2003 SCC 14 at para. 32). Assuming there has been adequate time for disclosure, an absence of evidence cannot be overcome by arguing that something might turn up in the future. The Supreme Court emphasized the obligation of the parties in *Canada (Attorney General) v. Lameman*, 2008 SCC 14:

[19] We add this: In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. **A summary judgment motion cannot be defeated by vague references to what may be adduced in the future**, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[35] First dealing with Ms. Tremblay’s contractual and unjust enrichment claims. Is there a genuine issue of material fact, whether or its own or mixed with a question of law?

[36] The three elements which must exist to establish a claim of unjust enrichment are (1) an enrichment of or benefit to the defendant, (2) a corresponding deprivation of the plaintiff, and (3) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10.

[37] In dealing with an application for summary judgment based on an expired limitation period in *Nova Scotia Home for Coloured Children v. Milbury*, 2007 NSCA 52, Roscoe J.A., in giving the Court’s judgment stated:

[20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff’s action is statute barred because the limitation period has expired?

...

[23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule: *Soper v. Southcott*, [1998] O.J. No. 2799 (C.A.) at para. 14; *Gray Condominium Corp. No. 27 v. Blue Mountain Resorts*, [2005] O.J. No. 793 (S.C.J.) at para. 18.

[24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.

[38] Sections 8 and 9 of the *Limitation of Actions Act, supra*, provide:

(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

- (a) two years from the day on which the claim is discovered; and
- (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the defendant; and
- (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

(3) For the purposes of clause (1)(b), the day an act or omission on which a claim is based occurred is

(a) in the case of a continuous act or omission, the day on which the act or omission ceases; and

(b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

9 (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).

(2) A defendant has the burden of providing that a claim was not brought within the limitation period established by clause 8(1)(b).

[39] In this case the basis for any contractual or unjust enrichment claims arose when Mr. Beaupré, in his March 29, 2016 email to Ms. Tremblay, terminated his book writing project with her and ended their business relationship. Ms. Tremblay knew Mr. Beaupré was terminating any contract he had with her, based on her evidence at paragraph 32 of her affidavit deposed to December 9, 2021. She then consulted Mr. Coles who wrote his letter to Mr. Beaupré of April 5, 2016.

[40] The defendants submit these claims are governed by the two year limitation period from discovery set out in section 8(1)(a) of the *Limitation of Actions Act*. Ms. Tremblay submits the fifteen year limitation set out in section 8(1)(b) applies, arguing that these claims rest on a series of acts or omissions concerning the same obligation, pursuant to section 8(3)(b) of the *Act*.

[41] There is no evidence that the contractual or unjust enrichment claims are in respect to a series of acts or omissions concerning the same obligation. Accordingly, in dealing with these claims the limitation period is as set out in section 8(1)(a) of the *Limitation of Actions Act*. Any contractual or unjust enrichment claim, subject to the discoverability rule, would be statute barred as of March 29, 2018.

[42] The test to determine whether a plaintiff has the requisite degree of knowledge to discover a claim is when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 3.

[43] Ms. Tremblay discovered her claim against Mr. Beaupré when he terminated the book writing project and ended their business relationship on March 29, 2016.

At that point, Ms. Tremblay knew the injury, loss or damage was caused or contributed to by an act or omission of Mr. Beaupré.

[44] By April 5, 2016, Ms. Tremblay knew the injury, loss or damage was sufficiently serious to warrant a proceeding. In Mr. Coles's letter of April 5, 2016, he states:

We are advised you have already received at least \$40,000 from events at which portions of the chapters have been "published" and relied upon to attract attendees. You have utilized the chapters of the book without the permission of our client and contrary to your agreement taken sole credit. We understand that there are ten (10) events scheduled during the next several weeks which will generate considerably more revenue. We also understand you have, or will, receive a book advance. Our client is entitled to her share of all of these monies.

The amount of event receipts and other matters set out in the above paragraph show the injury, loss or damage is sufficiently serious to warrant a proceeding.

[45] Based on the evidence Ms. Tremblay knew, or ought to have known by April 5, 2016, that she had sufficient knowledge to draw a plausible inference of liability on the part of Mr. Beaupré.

[46] White Eagle Spirit Talker Limited was incorporated on March 22, 2017, approximately one year after Mr. Beaupré terminated his business relationship with Ms. Tremblay. There is no evidence of any business relation between Ms. Tremblay and White Eagle Spirit Talker Limited or any claim she has against the company. The only liability of White Eagle Spirit Talker Incorporated to Ms. Tremblay would be if Mr. Beaupré assigned, gave or sold entitlements to *The Language of Spirit* to it without Ms. Tremblay's consent or permission; consequently any liability the company would have to Ms. Tremblay arises from her claims against Mr. Beaupré.

[47] The causes of action for breach of contract, including breaches of duties of good faith and honest performance, and unjust enrichment claim arose by April 5, 2016 and were statute barred as of April 5, 2018.

[48] Mr. Beaupré and White Eagle have established there are no genuine issues of material fact, either pure or mixed with a question of law in connection with the claims for breach of contract including breach of duties of good faith and honest performance and unjust enrichment. The claims do not require the determination of a question of law either pure or mixed with a question of fact. The motion for

summary judgment on Ms. Tremblay's claims for breach of contract including breach of duties of good faith and honest performance and unjust enrichment is granted.

Copyright

[49] In the Statement of Claim, Ms. Tremblay claims against Mr. Beaupré and White Eagle Spirit Talker Incorporated for infringement of her copyright and/or intellectual property rights in *The Language of Spirit*. During the hearing, Ms. Tremblay acknowledged the only intellectual property claim she is making is for infringement of copyright.

[50] Copyright is governed by the *Copyright Act*, R.S.C., 1985, c. C-42 (the *Act*). Section 43.1 of the *Act*, establishes a three year limitation period for actions pursuant to it. The book, *The Language of Spirit*, was published on April 18, 2018, and Ms. Tremblay filed her Notice of Action and Statement of Claim on April 16, 2021, less than three years after the book was published. There is no limitation issue concerning the claim for infringement of copyright.

[51] In her affidavit, Ms. Tremblay described the agreement between herself and Mr. Beaupré as: "...we would be co-authors at 50% shares. I recall that he said this applied to royalties based on sales of the book and any public and commercial use related to the book and its stories as well as to our rights in the intellectual property."

[52] Copyright is defined in relation to a work in section 3 of the *Act* as follows:

3(1) For the purposes of this Act, 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 party thereof, and includes the sole right ...

A work which is subject to copyright includes an original literary work.

[53] Section 5 of the *Act* sets out further conditions necessary for copyright to subsist in Canada, including that the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country. Canada is a treaty country.

[54] Section 13(1) of the *Act* provides the author of a work shall be the first owner of the copyright. Ms. Tremblay is the author of the manuscript which is Exhibit O to her affidavit deposed on December 9, 2021.

[55] Copyright infringement is defined in section 27(1) of the *Act* as follows:

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.

[56] It is necessary for the Court to identify the essential elements of the cause of action, in this case infringement of copyright *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3, at para. 36.

[57] The defendants submit the essential elements of a claim of infringement of copyright are as set out in *Culhane v. Croucher (c.o.b. Electrocution Technical Publishers)*, 2009 FC 769, where in giving judgment, Hughes, J. stated at para. 3:

The Statement of Claim as presently drafted is not so deficient as to be struck out without leave, the bare elements of a cause of action are made out, however, much needs improvement including:

- copyright arises when the author is a Canadian citizen or citizen of certain other countries and, when the work is published, it is first published in Canada or certain other countries, this must be pleaded;
- copyright endures for the lifetime of the author plus 50 years, if the author is living this must be pleaded, if deceased then the year of death must be pleaded;
- infringement occurs where a substantial portion or portions of a work have been copied, those portions must be identified;
- if directors or officers of a corporation are named as defendants by reason of their status, the pleadings must set out how, beyond their normal activities as directors or officers, they are implicated in infringement.
- if secondary infringement (section 27(2) of the *Copyright Act*) is pleaded, facts establishing knowledge or a basis for “ought to have known” such as notice or a letter or otherwise, must be pleaded.
- premature or exemplary damages cannot simply be claimed, the basis for such a claim must be pleaded.

[58] Ms. Tremblay submits the essential elements of the cause of action are: (1) there has to be a work published or unpublished; (2) ownership of the copyright; and (3) the defendant has done anything described in section 3(1) of the *Act* without consent of the owner of the copyright.

[59] I find the essential element of infringement of copyright are:

1. The existence of a work which can be subject to copyright;
2. The plaintiff is the owner of the copyright;
3. The work or a substantial part thereof has been produced, reproduced, published or performed by a person other than the owner of the copyright;
4. This has been done without the consent of the owner of the copyright.

[60] It is necessary for a plaintiff to establish all essential elements of any cause of action claimed.

[61] Copyright protects an original mode of expression, not the ideas expressed in a work. There is no copyright in facts or mere factual information: *Maltz v. Witterick*, 2016 FC 524, at paras. 29-32; *Evans v. Discovery Communications LLC*, 2018 FC 1153, at para. 9.

[62] In describing what is necessary to show an infringement of copyright in *Hutton v. Canadian Broadcasting Corporation*, 1992 ABCA 39, Foisy J.A., in giving the Court's judgment stated:

[4] To show infringement of these rights there must be proof of substantial similarity and copying. This is set out in *Francis Day & Hunter v. Bron*, [1963] 2 All E.R. 16 at 27 (H.L.):

Nevertheless, it is well established that "to constitute infringement of copyright in any literary, dramatic or musical work there must be present two element: First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived.

[5] The requirement of substantial similarity must be apparent when viewing the works as a whole. As was recently stated in *Preston v. 20th Century Fox Canada Ltd.* (1990), 33 C.P.R. (3d) 242 at 273 (F.C.T.D.):

Substantial similarity is not to be measured only by the quantity of matter reproduced from a copyrighted work, though that may be a significant factor.... Of more import may be the quality of matter reproduced. At least in the case of literary or dramatic works assessing similarities may depend upon a number of factors.

Although it may be useful to compare components of each work, the overriding requirement for infringement is substantial similarity of the works as a whole and substantial similarity in the modes of expression.

[6] A causal connexion between 2 works is established by proof of copying or inferred from substantial similarity and access. However, an inference of copying can be rebutted by proof of independent creation. The second work does not infringe the copyright of the first if it was created entirely independently. (Emphasis added)

[63] Is there a genuine issue of material fact, whether on its own or mixed with a questions of law?

[64] As set out above, in opposing a summary judgment motion Ms. Tremblay is required “to put her best foot forward”.

[65] An essential element of a claim of infringement of copyright, as set out in section 3 of the *Act*, is that the work or a substantial part thereof has been produced, reproduced, published or performed by a person other than the owner of the copyright. Ms. Tremblay is the author of the manuscript which is Exhibit O to her affidavit disposed on December 9, 2021.

[66] Ms. Tremblay’s affidavit ends with evidence of events which occurred on March 29, 2016, long before the publication of *The Language of Spirit* in 2018. Ms. Tremblay does not mention *The Language of Spirit* in her affidavit. There is no evidence from the plaintiff about *The Language of Spirit*.

[67] The affidavits of Mr. Beaupré and Renée Hartleib set out the process by which *The Language of Spirit* was written as being a collaboration between Mr. Beaupré and Ms. Hartleib. Ms. Tremblay did not file a responding affidavit. Neither Mr. Beaupré nor Ms. Hartleib were cross examined.

[68] There is no evidence that the manuscript Exhibit O or a substantial part thereof was produced, reproduced, published or performed in *The Language of Spirit* or otherwise by Mr. Beaupré or White Eagle Spirit Talker Incorporated. The only evidence is that *The Language of Spirit* was written by way of a collaboration between Mr. Beaupré and Ms. Hartleib.

[69] There is no evidence of an essential element of the cause of action of infringement of copyright that being that the whole or a substantial part of Exhibit O was produced, reproduced, published or performed by Mr. Beaupré or White

Eagle Spirit Talker Incorporated. There being no evidence on this element, Ms. Tremblay has not demonstrated a genuine issue of fact which is material to that essential element.

[70] Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

[71] The Statement of Claim raises a question of law with respect to the essential elements of the cause of action of infringement of copyright and its application to the facts of this case. The answer to the second question is “yes”.

[72] The third question is: “Does the challenged pleading have a real chance of success?”

[73] I have addressed the essential elements of infringement of copyright above. The evidence relied on by Ms. Tremblay does not contain evidence of an essential element of the cause of action. Ms. Tremblay’s claim for infringement of copyright does not have a reasonable chance of success and summary judgment should issue.

[74] Summary judgment is granted on Ms. Tremblay’s claim for infringement of copyright.

[75] If the parties are unable to agree, I will receive written submissions on costs within 30 calendar days of this judgment.

Coughlan, J.