

## ONCE UPON A TIME, THERE WAS A MANUSCRIPT...

By

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### INTRODUCTION

When one begins to read a book, the first pages regarding publication are, more often than not, completely overlooked by the reader. Rarely do we think about what the author must have done to have the book published, or what rights he or she may have over the manuscript in the future. Copyright ownership can be the object of much debate and discussion, especially in view of the often unclear boundaries set out in the Canadian *Copyright Act*<sup>1</sup> or in contract between parties concerning such right.

In *Turgeon v. Michaud*<sup>2</sup>, the Quebec Court of Appeal recently ruled on an appeal from a judgement of the Superior Court of Quebec concerning the transmission of copyright further to contractual agreements between the heirs of a well-know businessman, an author who was commissioned to write the deceased's biography and the publishers of the manuscript.

### THE FACTS

Pierre Michaud (hereinafter "Michaud") was one of the heirs of his great-uncle, Paul-Hervé Desrosiers, (hereinafter "Desrosiers"). Desrosiers had founded a home renovation business which is known today under the trade-mark and trade-name Réno-Dépôt. In 1993, Michaud mandated a communications firm, Lefebvre Demosthène et als Inc. (hereinafter "Lefebvre"), to find a person to write Desrosier's biography. Lefebvre commissioned Pierre Turgeon, (hereinafter "Turgeon"), a well reputed writer and historian, to write the biography of Desrosiers. The object of the biography was to promote the business by enabling people to know more about its founder and how he built such a commercially successful enterprise.

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<sup>1</sup> R.S.C. 1985, c. C-42 (hereinafter the "*Copyright Act*").

<sup>2</sup> Published in French only at J.E. 2003-1299 (Q.A.C. #500-09-006404-982, May 15, 2003, Dussault, Morrisette, Letarte J.J.A.). Also available at [www.jugements.qc.ca](http://www.jugements.qc.ca).

Turgeon and Lefebvre, on behalf of Michaud and Réno-Dépôt, negotiated a written agreement which foresaw, amongst others, a timeline for completing the manuscript and the financial compensation for Turgeon, including advances on future royalties for the sale of the book. It was also agreed in the contract that Michaud and Reno-Dépôt reserved the right not to publish the manuscript. Although there was no specific clause concerning the ownership of copyright in the manuscript, there was nonetheless a paragraph in the agreement that confirmed Turgeon as the owner of all derivative rights, such as the right to adapt the work for cinematic or theatrical purposes, etc.

Turgeon was also given access to Desrosiers' personal files, as there was very little public information concerning the businessman. Through Michaud, Turgeon was also put in contact with various persons who knew Desrosiers and who could therefore provide information on his life and work.

The timeline set out in the initial agreement between the parties was not respected. Turgeon, who had already been paid in accordance with the provisions of the initial contract, agreed to continue his work for an additional amount of money and a new timeline. Turgeon finally remitted a completed version of the manuscript in September 1995. At this time, Turgeon and Lefebvre, again on behalf of Michaud and Réno-Dépôt, also entered into a publishing contract with Sogides Ltée (hereinafter "Sogides"). A clause in the contract provided that Turgeon assigned his copyrights and his derivative rights in and for the manuscript to the publisher Sogides. Sogides was bound to publish the manuscript within a "reasonable delay" after its completion.

In October 1995, Lefebvre and Sogides informed Turgeon that his manuscript was unacceptable and Turgeon agreed to re-work the document. A revised version of the manuscript was eventually provided by Turgeon in February 1996. In June 1996, despite the fact that the manuscript was now acceptable to Sogides, Lefebvre advised Turgeon that the book would not be published.

In July 1996, Turgeon entered into a publishing agreement with Lanctôt Éditeur Inc., (hereinafter "Lanctôt"), another publishing house. In September 1996, Michaud and Réno-Dépôt sought and obtained an injunction, on both a provisional and interlocutory basis, to prevent the book from being published. In March 1998, the Quebec Superior Court issued a permanent injunction against Turgeon and Lanctôt.

## **THE SUPERIOR COURT JUDGEMENT**

In issuing the permanent injunction in 1998, the Trial Judge held that Michaud and Réno-Dépôt were entirely in their right to refuse to publish the manuscript. In the learned Judge's view, the initial agreement between the parties was a

contract for services, whereby Turgeon was mandated to write a book for the sole benefit of the heirs to the Desrosiers succession<sup>3</sup> and Réno-Dépôt.

The Trial Judge also concluded that Turgeon had assigned his rights for the first publication of the manuscript. According to the Judge, there is no requirement that such an assignment be explicit in the agreement, but that it could reasonably be inferred from the document signed by the author that such right was assigned. He further concluded that the contract between Turgeon, Lefebvre and Sogides did not terminate the first agreement, but rather that it was an addenda to the initial contract for services. Consequently, the Trial Judge ruled that Sogides could not proceed to publish the manuscript until such time as it had received authorisation from Michaud and Réno-Dépôt, through their agent Lefebvre.

The Judge also ruled that Turgeon could not publish the manuscript without the express consent of Michaud and Réno-Dépôt, since he had collected confidential information concerning Desrosiers prior to writing the manuscript, and that was included in the biography. Relying the principles of *Lindsey v. LeSueur*<sup>4</sup> and the relevant provisions of the *Civil Code of Quebec*<sup>5</sup>, the Trial Judge ruled that Turgeon had an obligation of confidentiality and the information he had gathered concerning Desrosiers and Réno-Dépôt could not be used for any purpose other than the manuscript he was commissioned to write. The Judge nonetheless limited Turgeon's implied confidentiality obligation to the information he had obtained from the heirs to the Desrosiers succession or persons designated by them.

Turgeon and Lanctôt appealed the Trial Judge's judgement.

## THE COURT OF APPEAL JUDGEMENT

On appeal from the Superior Court decision, Turgeon first argued that the Trial Judge had erred in concluding that Michaud and Réno-Dépôt had the exclusive right to authorise publication of the manuscript: at the very most, they had a right of first refusal to proceed to publish the Desrosiers biography.

The Court rejected Turgeon's argument, ruling that the initial contract provided for an assignment of Turgeon's right to publish the manuscript. In accordance with s. 13(1) *Copyright Act*, the author of a work is the first owner

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<sup>3</sup> The Trial Judge ruled that the principles set out in the Supreme Court decision *Morang v. LeSueur*, (1911) S.C.R. 95 (S.C.C.), did not apply to this case. In *Morang v. LeSueur*, the Supreme Court had ruled that there was an implicit obligation for an editor, who has accepted to publish a work, to do so within a reasonable delay. The Trial Judge distinguished the facts in both cases, ruling that the agreement between Turgeon and Lefebvre, clearly provided that there was no obligation to publish the literary work.

<sup>4</sup> (1913) 29 O.L.R. 648 (O.C.A.).

<sup>5</sup> S.Q., 1991, c. 64 (hereinafter the "*Civil Code*"), s. 1434.

of the copyright in and for said work, save for certain specific exceptions, such as the assignment of whole or part of the copyright. By reading s. 3(1) and 13(4) *Copyright Act*, the right of publication of the manuscript of the Desrosiers biography could therefore be assigned as long as the requirements of the *Act* were met:

*Copyright in works*

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 part thereof, (...)

*Ownership of copyright*

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

*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. (...)

(our underlines)

The Court interpreted the original agreement between Turgeon and Lefebvre as providing that Turgeon remained the owner of all copyrights in the manuscript, including all derivative rights, save and except for the right to publish the literary work in suit, i.e. make it accessible to the public. The Court of Appeal ruled that, although it may be practically impossible to exploit a literary work without the right to publish same, it does not preclude an author from assigning such right to publish the work. In fact, the assignment of the right to publish a work constitutes an assignment of future rights, which is permitted by s. 1374 *Civil Code*.

Turgeon further pleaded that any assignment of whole or part of copyright must be expressly made in writing and that he had therefore not agreed to any such assignment. The Court of Appeal once again rejected this argument, stating that s. 13(4) *Copyright Act* does not require that the written assignment of copyright be explicitly formulated. The Court refers to several authors who have written on the subject of copyright assignment, and the consensus is that the intention of the parties is the key to determining the existence and scope of the assignment. There is no particular form that such assignment must take in order to be considered valid and binding; rather, the Courts will determine the intention of the parties having regard to all the surrounding circumstance of the case.

The Court of Appeal therefore concluded that the clause in the original agreement that gave Lefebvre, (and therefore Michaud and Réno-Dépôt), the exclusive right to not publish the manuscript was in fact the assignment of Turgeon's right to publish said manuscript. Consequently, the assignment of rights from Turgeon to Sogides in the publishing agreement was null and void since said rights had already been assigned by virtue of the first agreement between Turgeon and Lefebvre. The Court ruled that the Trial Judge was right in ordering the issuance of a permanent injunction based on the terms and conditions of the original agreement between the parties.

Turgeon's second argument on appeal rested on his contention that the original for services did not specifically provide that the information he would obtain to write the biography was confidential; this would therefore enable him to have another manuscript published without Michaud and Réno-Dépôt's consent.

The Court disagreed with Turgeon's position, stating that the Trial Judge had correctly ruled that if Turgeon could not publish the manuscript he had written for Michaud and Réno-Dépôt, he could not publish any other document containing the same information. In other words, Turgeon was also precluded from doing indirectly what he could not do directly. The Court of Appeal concluded that the original agreement contained an implied confidentiality obligation for Turgeon. However, the Court confirmed that this obligation did not extend to information about Desrosiers and Réno-Dépôt that was in the public domain, but only to the information that Turgeon had gathered from Michaud and other sources that he had been permitted to access for the purposes of writing the biography.

The Court of Appeal therefore dismissed Turgeon and Lanctôt's appeal, with costs against Turgeon.

## **CONCLUSION**

This case took approximately seven years to reach the Quebec Court of Appeal. Much of the parties' time, effort and funds could have likely been saved if the original agreement been more explicit as to the scope of the assignment of the author's rights. The saga of the manuscript therefore ends as the *Copyright Act* and the case law foresees it should end. However, even after all this time, the story of a successful businessman and his business still remains to be told...

## **SUMMARY**

COPYRIGHT – ASSIGNMENT - RIGHT TO PUBLISH

ONCE UPON A TIME THERE WAS A MANUSCRIPT...

The Canadian *Copyright Act* provides that any assignment of whole or part of a copyright must be in writing. However, partial assignments of rights in writing can be the object of much debate and interpretation. Alexandra Steele provide a case summary of a recent Quebec Court of Appeal decision regarding such a debate over the right to publish the manuscript between the author of a manuscript, and the heirs of a well-known businessman who had commissioned the writing of his biography.

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