



THE FEDERAL COURT REVISITS THE TEST FOR JOINT AUTHORSHIP UNDER THE *COPYRIGHT ACT*

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PRECIS: In *Neugebauer v. Labieniec* [2009 FC 666 (CanLII)], the Federal Court of Canada dismissed an application to expunge a Certificate of Registration of Copyright issued by the Canadian Intellectual Property Office on July 12th, 2006, in connection with *Gesi puch*, a novel written in Polish. The Registration that is objected identifies the Applicant and the Respondent as the owners and joint authors of the book.

The facts could be summarized as follows: the Applicant, Henry Neugebauer, was born in Poland in 1926 and has lived in Canada since the 1950s. He is a Holocaust survivor, and the book at issue tells his story. Since the Applicant had no writing experience and even less in editing, he called on Polish writer and journalist Anna M. Labieniec, the Respondent.

The parties signed a first agreement in September 2005, providing that Ms. Labieniec, identified as “editor”, would prepare a transcription of the Applicant’s tape-recorded recollections of his Holocaust experiences. The Applicant was referred to as the “author” in this first agreement. Because the language spoken on the tape was difficult to understand, and the story per se, told in a chaotic and non chronological way, the Respondent had to request interviews with the Applicant as well as undertake independent research in order to “fill in gaps” in the material that was given to her. Only then was she able to reconstruct the Applicant’s story, and provide him with a thirty pages long document. A second contract was orally concluded afterwards, under which the parties agreed upon the writing by the Respondent of a book based on the Applicant’s life story. This second agreement was to the effect that the parties were joint authors of the soon to be released novel.

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This literary work, entitled *Gesi puch*, was first published in Toronto in May 2006. The cover displays the names of both parties, the Applicant's name above and slightly larger than the Respondent's. Furthermore, the publishing information appearing on the second page of the volume shows copyrights for Neugebauer as well as Labieniec. The parties were therefore referred to as joint authors on the Certificate of Registration of Copyright issued in connection with the book by the Canadian Intellectual Property Office. Neugebauer took an action to expunge this certificate of registration in order to be recognized as sole author of the book.

Justice Simpson first rejected the Applicant's pretension that the parties' intention, when signing up the first agreement, was to establish the Applicant alone as author of the book, and the Respondent as editor. The judge rather concurred with the Respondent's assertion that this first contract was limited to the transcription of the Applicant's memories and that it had nothing to do with a novel. The Court further found that the Applicant's conduct after the publication of the book undeniably betrayed his initial intention, which was to be considered a co-author. Indeed, it appeared that the Applicant, while promoting the novel in a Toronto bookstore in 2006, introduced himself as co-author, and repeatedly thanked Ms. Labieniec "for writing a beautiful book about him and his lot".

Furthermore, the parties jointly signed the volumes for the readers. Justice Simpson also found very telling the fact the Applicant himself gave the Respondent a copy of the book, a copy in which he had written: "For Ms. Ania for writing beautiful book with thanks, Henry Neugebauer". According to the Court, the parties therefore held themselves out as joint authors during the promotion of their novel.

The Court then addressed the question of whether the Respondent's contribution to the book constituted "authorship" under the *Copyright Act*. Although the word "author" is not defined in the Act, the judge reminded that this notion "conveys a sense of creativity and ingenuity". As for Ms. Labieniec, Justice Simpson stated that she didn't merely edit the Applicant's story, but rather "took the Applicant's disjointed information and created a narrative". Moreover, she expanded his story by including original material which was based on her own imagination and research and not on Neugebauer's personal experiences. According to the judge, the Respondent therefore "contributed sufficient originality and expression to claim authorship of the Book (...)".

As for the question of whether the parties' respective contributions to the book constituted "joint authorship", Justice Simpson first stated that a "work of joint authorship" as defined in Section 2 of the *Copyright Act* was "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors". In light of this statutory definition, the judge held that:

“(…) under the Second Agreement, there was collaboration which contributed towards a unitary whole and (…) the parties intended that their contributions be joined in furtherance of a common design. I have accepted the Respondent’s evidence that the Applicant agreed that they would be joint authors of the Book. I am persuaded that the Respondent is a joint author by the evidence of the bookstore owner who asserted that the Applicant introduced himself to her as the “co-author” of the Book written by the Respondent and by the Applicant’s post-publication conduct.” [emphasis added]

Interestingly enough, the Court reached that conclusion by applying the test for joint authorship established in *Levy v. Rutley* (1871) 6 L.R. 976 (CP), rather than the one introduced by the British Columbia Supreme Court in its decision *Neudorf v. Netzwerk Productions Ltd.* [1999 CanLII 5293 (BC S.C.)]. According to Justice Simpson, the *Neudorf* decision followed American law [for instance *Childress v. Taylor* 945 F2d 500 2d Cir., 1991)], which imposes a requirement that collaborators also intend to regard each other as joint authors. Indeed, the definition of “joint work” found in section 101 of the American Copyright Act specifically provides for this requirement: “A “joint work” is a work prepared by two or more authors with the *intention* that their contributions be merged into *inseparable or interdependent parts of a unitary whole*”, which is not the case under the Canadian *Copyright Act* which is mostly derived in that regard from the U.K. *Copyright Act* of 1912!

However, the *Levy* case, which, according to the judge, still is “the leading authority on the constituent elements of joint authorship under English and Canadian Law”, requires no such shared intention. In that regard one may also refer to the U.K decision *Hodgens v Beckingham* 2003 EWCA Civ 143 (Eng. C.A.; 2003-02-19) Jonathan Parker LJ at paragraph 49 “I reject the submission that [...] requires, as one of the elements of joint authorship, the existence of a common intention as to joint authorship; see also *Brighton v Jones* 2004 EWHC 1157 (Eng. Chan. Div.; 2004-05-18) Park J.

The judge further opinionated that even though the *Neudorf* test has been used at the trial level in Quebec, Ontario and Nova Scotia, “it has not (...) been applied at the appellate level”, and consequently decided to set it aside. Nevertheless, the judge went on by stating that had she followed *Neudorf*, her conclusion on the issue of joint authorship would have been the same. Therefore, one can be lead to wonder why the Federal Court chose not to apply the test since then utilized, if this change was not to affect its final decision. As one can argue that it is precisely to determine if this shared intention of collaboration was present in the case in point that the Court examined the post-publication behavior of the parties, examination even judged “relevant to issue of (...) joint authorship” by Justice Simpson herself...

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