

Date: February 22, 2019  
Docket: CI 15-01-95374  
(Winnipeg Centre)  
Indexed as: *Albo v. The Winnipeg Free Press et al.*  
Cited as: 2019 MBQB 34

## COURT OF QUEEN'S BENCH OF MANITOBA

### BETWEEN:

FRANK ALBO,	)	<u>Counsel:</u>
	)	
	)	<u>plaintiff,</u>
	)	<u>Dave G. Hill and</u>
	)	<u>Deborah S. Son</u>
	)	for the plaintiff
- and -	)	
	)	
THE WINNIPEG FREE PRESS, A DIVISION OF	)	<u>Jonathan B. Kroft and</u>
FP CANADIAN NEWSPAPERS LIMITED	)	<u>Robert J.E. Prokopanko</u>
PARTNERSHIP AND MANITOBA ASSOCIATION	)	for defendants
OF ARCHITECTS,	)	
	)	
defendants.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	February 22, 2019

### SAULL J.

#### I. INTRODUCTION

[1] The plaintiff, Dr. Frank Albo ("Dr. Albo"), filed a claim for damages against the defendant, the Winnipeg Free Press (the "Press"), for copyright infringement and breach of contract. At the same time, Dr. Albo filed a claim against the Manitoba Association of Architects ("MAA") maintaining that it knew, or ought to have known, about the contract Dr. Albo alleges he had with the Press and that MAA intentionally interfered with his

economic relations by unlawful means. Dr. Albo seeks damages of \$476,673 for breach of contract, a further \$250,000 for infringement of copyright and \$500,000 in punitive damages.

[2] The claim against MAA has since been discontinued. The claim against the Press proceeded to trial before me. These are my reasons for judgment.

## **II. OVERVIEW**

[3] The plaintiff is an architectural historian. He is a resident of Winnipeg. The defendant is a daily newspaper widely circulated throughout Winnipeg and Manitoba.

[4] In 2006, Dr. Albo and the Press had worked together to create a series of articles, later published as a book: Carolin Vesely and Buzz Currie, *The Hermetic Code*, (Winnipeg, Winnipeg Free Press, 2014) (Exhibit "2"). *The Hermetic Code* focused on the architecture of the Manitoba Legislative Building ("MLB"). Although Dr. Albo was not the author of the book, he was the source of most of the information contained in that book.

[5] According to Dr. Albo, in and around October 2011, he discovered that there was a hidden master plan for the architectural development of the City of Winnipeg that dated back to the first two decades of the twentieth century. After conducting research, he revealed that during this time frame the city's elite had sought to transform Winnipeg into a utopia, based upon the international reform philosophy called the City Beautiful Movement. This movement used beautification and monumental architecture as central devices to correct social order and instill moral and civic virtue amongst citizens.

[6] Based on his research into the subject, Dr. Albo developed PowerPoint slide presentations, which he delivered to various public gatherings in Winnipeg. After viewing

one of these presentations, Press staff members became interested in the idea that the influence of the City Beautiful Movement on plans for early twentieth century Winnipeg might be attractive to Press readers. After a number of further presentations and meetings between Dr. Albo and Press staff, Dr. Albo was retained as a paid consultant to assist in a project to publish a series of articles.

[7] Subsequently, the Press published a series of three articles in September 2014. The articles were written by senior Press staff and general features writer Randall Turner ("Turner"), who conducted his own extensive research and numerous interviews with many sources other than Dr. Albo.

[8] The first of the articles discussed, amongst other things, the plans for Winnipeg's architecture at the turn of the twentieth century that Dr. Albo covered in his presentation. However, the articles did not focus on the historical roots of the plans but, rather, moved forward to cover the development of Winnipeg architecture throughout the twentieth century with a look forward to what the future might hold.

[9] After the articles were published, the MAA approached the Press and offered to share the cost of republishing the articles in the form of a coffee table book to commemorate the 100<sup>th</sup> anniversary of MAA. The Press agreed and republished the articles in the form of a book: Randy Turner, *City Beautiful: How Architecture Shaped Winnipeg's DNA*, (Winnipeg, Winnipeg Free Press, 2014) (the "Book") (Exhibit "1").

[10] Dr. Albo takes the position that the Press was not entitled to republish the articles without his consent, and that he did not provide his consent.

[11] Dr. Albo does not claim to be the author of the articles or the Book but claims that his contribution to the articles and/or his contract with the Press nonetheless gave him the right to prevent their republication. While the Press agrees that some of the facts and ideas in Dr. Albo's presentation also appear in the articles, the articles represent Turner's story and writing and are certainly not a copy of any work in which Dr. Albo may claim copyright.

[12] The Press denies that Dr. Albo has the exclusive right to write about the plans for Winnipeg at the turn of the twentieth century. The Press maintains that many others had written on the subject before Dr. Albo and, in fact, Dr. Albo's presentation itself drew heavily, if not entirely, on the works of others.

### **III. FACTS**

[13] At trial, four witnesses were called and 135 exhibits were filed. Dr. Albo testified on his own behalf. The defendants called Press Editor Paul Samyn ("Samyn"), Press Publisher Robert Cox ("Cox") and Turner. In addition, there were numerous questions and answers read in from the Examinations for Discovery. Many of the facts are not in dispute.

[14] It is common ground that Dr. Albo is an architectural historian and leading authority on the architecture and urbanism of the City of Winnipeg. His knowledge of architecture is vast. He holds degrees and distinctions from major universities, including a PhD in the History of Art and Architecture from the University of Cambridge.

[15] In December 2006, Dr. Albo and the Press collaborated on the publication of ***The Hermetic Code***. This book chronicled Dr. Albo's research pertaining to the discovery of coded messages concealed in the design of the MLB.

[16] Dr. Albo's expertise and years of academic research was the basis of the ***The Hermetic Code***. The book remains relatively successful. Dr. Albo claims he received approximately \$241,625 in royalties from the sales of ***The Hermetic Code*** in all four of its editions and has also earned \$257,123 giving Hermetic Code tours of the MLB. Commentary and research on Winnipeg's architecture is a significant source of Dr. Albo's income and he continues to earn revenue as a speaker, as well as from the sale of ***The Hermetic Code***, and from providing Hermetic Code Tours of the MLB.

[17] In October 2011, while researching on the internet, Dr. Albo came across a drawing of a plan for the City of Winnipeg created in either 1912 or 1913 by artist James Henderson (Exhibit "109"). This drawing appeared on the public web page of an art gallery in the Province of Saskatchewan. It reflected partially unrealized plans for the development of the City of Winnipeg that were influenced by the City Beautiful Movement. This sparked the interest of Dr. Albo who undertook research into the influence that the City Beautiful Movement had on Winnipeg planners and architects at the turn of the twentieth century.

[18] In January 2012, and the months following, Dr. Albo taught classes in this area, as well as created and authored several literary and visual productions based on his discovery, research and knowledge (the "Works"). The Works included public lectures, webinars, presentations, classes, remarks, and interviews, which related to a new interpretation of the urban development of Winnipeg.

[19] On September 27, 2013, Dr. Albo delivered a keynote lecture on this subject at the Heritage Winnipeg Ball at the Hotel Fort Garry. The publisher of the Press, Cox, was at this event. Cox and Dr. Albo knew each other as a result of ***The Hermetic Code*** project. This

lecture focused on architectural and city plans for the City of Winnipeg at the turn of the last century and their relationship to the City Beautiful Movement philosophy of architectural and city planning. After Dr. Albo's lecture, Cox approached Dr. Albo and proposed partnering on a new project featuring the Works. From October 2013 onwards, Press employees, including Press Editor Samyn, and Dr. Albo had several email and in-person conversations regarding the Works. On December 10, 2013 and January 7, 2014, Samyn indicated that he wanted to do something "major" using Dr. Albo's Works as a foundation.

[20] As a result of these exchanges, on January 8, 2014, Dr. Albo delivered a two-hour lecture on the Works to senior Press staff, including Turner. The lecture was held in the Press newsroom. The purpose of this presentation was to provide information to the Press to assist in developing a plan for a project. During his presentation, Dr. Albo ran slides and provided oral commentary from slide notes that were not visible to the audience. The slide deck (including the slide notes) was marked in evidence at this trial (Exhibit "7"). According to Dr. Albo, this exhibit is the best record available of his January 8, 2014 presentation. Dr. Albo did not leave a copy of his presentation with any member of the Press.

[21] Following the January 8, 2014 presentation, although no final decision had been made, Samyn assigned Turner to work on the project. Turner then contacted Dr. Albo to arrange a meeting; however, Dr. Albo indicated to him that he would first like to discuss the terms of the arrangement with Samyn.

[22] Between January 20, 2014 and January 30, 2014, Dr. Albo and Samyn exchanged a series of emails discussing Dr. Albo's involvement in the potential project (Exhibit "29"). The relevant portions are reproduced below:

- January 20, 2014 email from Dr. Albo to Samyn:

I received a promising email from Randy today about moving forward with the Heavenly Winnipeg story. Most exciting! Please fill me in on how and in what manner you see my involvement.

- January 21, 2014 email from Samyn to Dr. Albo:

Beyond the rough framework of a project that runs in print and is augmented online, we haven't firmed up its shape or look any further. At this point, I thought it best to turn Randy Turner loose and let him see where his award-winning journalistic eye suggests we go.

In terms of your involvement, I think there would be plenty of opportunity for us to showcase your research, your perspective and your passion throughout the pieces. And by showcasing, I would include video that has you pointing out to our digital audience key features of our buildings or talking in general about architecture.

Obviously, Randy and other writers would be exploring additional avenues of interest. But I think at this point it is fair to say you would have a starring role in this project.

Does that help?

- January 22, 2014 email from Dr. Albo to Samyn:

Thank you for outlining your broad stroke conceptions and ideas. As you know, I am thrilled about the potential of collaborating with the Winnipeg Free Press on another award-winning story. I have always been a vigorous champion of Winnipeg's untapped architectural glory and on this subject we have proven to make a formidable team.

I assumed that my involvement would be remunerated as it would require a considerable commitment on my part to detail the historical and labyrinthine tributaries of this story. A revisionist account of Winnipeg as a 'City of Paradise' could easily become implausible without the right academic guide. In this regard, I was hoping to participate in some capacity as a writer, consultant, or principal editor. While I appreciate the opportunity to showcase my research and passion, I am not in a position to accept unpaid work.

Would you consider an approach that would take this into account? Please let me know. I am ready, willing, and able to launch a new blockbuster!

- January 23, 2014 email from Samyn to Dr. Albo:

I hear what you are saying, but I think we need to be clear that this will be a different project than the Hermetic Code. In other words, we will not be publishing a book for profit, nor will there be any royalties.

What we will be doing is using our print and digital platforms to present for our audience a story about Winnipeg's past and a vision for the future. My hope is that it will be a body of journalistic work that will both inform and engage our city. But unlike the Hermetic Code, it is unlikely to be an initiative that has much of an impact on our bottom line.

In addition to showcasing your research, I think it is fair to say that we need to provide monetary recognition for the research that serves as the foundation upon which our newsroom will build this project. Moreover, I am prepared to come up with an hourly rate to pay for your time as part of interviews, consults and even videos in which you are featured.

Does that seem like the basis for a discussion about dollars and cents?

[emphasis added]

[23] After negotiations by email, on January 28, 2014, Samyn, on behalf of the Press, retained Dr. Albo as a paid consultant to assist with the project. The terms of this agreement (the "Consulting Contract") were as follows:

- a) Dr. Albo would provide advice and information to the Press and Turner regarding Winnipeg's architecture;
- b) Dr. Albo would be paid a lump sum of \$1,500 and an hourly consulting fee of \$75 per hour; and,
- c) Dr. Albo's assistance would be acknowledged.

[24] On January 30, 2014, Samyn contacted Dr. Albo by email to confirm that Turner would be calling him. Dr. Albo responded in an email (Exhibit "36") that same day stating in part:

That said, I think we have a solid basis on which to move forward. I trust that if the series were successful enough to develop it into a book, you would consider a much fuller treatment of this fascinating story with standard industry royalties.

[emphasis added]

[25] It is clear from the evidence that, at the time this last email was sent, the Press had no intention of publishing a book, and, in any event, did not agree to Dr. Albo's suggestion respecting royalties. Dr. Albo admits that nobody from the Press ever told him that he would be paid royalties.

[26] According to Dr. Albo, at this point, based on the representations made by the Press and Turner, Dr. Albo understood that:

- a) He was sharing the Works with the Press for the sole purpose of creating the project;
- b) There would be plenty of opportunity to showcase his research, perspective and passion throughout the project;
- c) He would have a starring role in the project;
- d) The Works would be the foundation for the project; and
- e) The Press would not be publishing a book on the basis of, or in any way involving, the Works.

[27] On February 13, 2014, Dr. Albo met with Turner at Dr. Albo's home. Dr. Albo went over Exhibit "7" with Turner, and Turner interviewed Dr. Albo about the contents. Dr. Albo did not provide a copy of Exhibit "7" to Turner. Turner later deleted or destroyed the notes he took during this interview.

[28] According to Turner, he did not have enough to write a story based on Dr. Albo's input on January 8, 2014 and February 13, 2014. As Turner put it, he was "not remotely close". As a result, Turner embarked on his own research, investigations and interviews.

[29] Although Dr. Albo followed up with Turner in April 2014 to see how the project was progressing, Dr. Albo and Turner had no further substantive communication between February 13, 2014 and May 21, 2014, when Dr. Albo provided some additional notes and information that do not appear in the articles or the Book.

[30] Although there were some additional "fact checking" communications between Dr. Albo and Turner at the end of August 2014, by that time the articles were essentially complete.

[31] On May 26, 2014, Dr. Albo gave a similar presentation to the one he gave on January 8, 2014, this time to the digital media department of the Press who were to develop the project's online content. Turner was not at this presentation. A copy of the May 26, 2014 presentation was marked as Exhibit "8". A copy of the presentation was not left with the Press.

[32] Melissa Tait, who attended the May 26, 2014 presentation, was the member of the digital media department most involved in assembling the photographs for the articles and for developing the videography and photography for the online presentation. Ms. Tait did not write any of the text of the articles or the Book. Dr. Albo makes no claim about the videography done by, or the photographs selected by, the digital team.

[33] Turner testified that between February 13, 2014 and the end of August 2014, he spent over 100 hours on his own in various archives researching for the project. In fact, he

and Ms. Tait won an award for their extensive use of the archives in the preparation of the articles. In addition, Turner conducted extensive literature reviews, internet research and interviews with architects, historians, authors and other people knowledgeable in the area.

[34] Turner also read a number of books when preparing the articles, including: Jim Blanchard, *Winnipeg 1912*, (Manitoba, University of Manitoba Press, 2005); Alan F.J. Artibise, *Gateway City: Documents on the City of Winnipeg 1873 – 1913*, (Winnipeg, The Manitoba Record Society, 1979); Alan F.J. Artibise, *Winnipeg: A Social History of Urban Growth*, (Montreal and London, McGill – Queen’s University Press, 1975); and, James H. Gray, *Red Lights on the Prairies*, Second Printing edition (Ontario, Fitzhenry & Whiteside, 1995).

[35] Those interviewed by Turner included a variety of architects, historians and professors, including: Brent Bellamy; Jim Blanchard; Wins Bridgman; Antoine Predock; Gail Little; Mark Ager; Johanna Hurme; Etienne Gaboury; Mel Michener; Arthur Blankstein; David Penner; Jon Trenholm; Randy Rostecki; Giles Bugailiskis; Susan Algie; Glen Murray; and, Murray Peterson.

[36] Based on this research, and in discussion with a number of the experts he consulted, including Brent Bellamy, Turner developed a “story arc” for the three articles that began at the turn of the twentieth century, encompassed the influence of modernism in Winnipeg in the mid-twentieth century and concluded with the renaissance of Winnipeg architecture over the most recent decade.

[37] On September 6, 2014, the first of the articles titled “*City Beautiful – Part 1: Great Expectations*” was released in print and digital format by the Press. Parts 2 and 3 of the

articles were released in print and digital format on September 13, 2014 and September 20, 2014, respectively.

[38] Dr. Albo was extensively quoted in the first article and was quoted in some of the other articles. He was also featured in a number of the video interviews posted as part of the online presentation.

[39] Dr. Albo made no complaint about the articles or the online presentation when they were published. He did not object to how he was acknowledged or referred to. In fact, he was highly complimentary of the first article, the accompanying online content, and the work that Turner had done as evidenced in an email he sent to Turner on September 6, 2014 (Exhibit "84"), as follows:

Randy,

I want to extend my sincerest congratulations on your fantastic article, brilliantly woven with such care from whorehouses to civic delight – and all that bawdy glory in between!!

A mighty fine job. Thoroughly impressed. A great gift to the Province.

Revel and be proud.

Frank

[40] On September 6, 2014, Dr. Albo sent an invoice for his services to the Press. He was paid the full invoice amount.

[41] Samyn testified that the Press initially had no plans to publish the articles in book form. Although it had published books in the past, the recent books, for the most part, fell short of expectations and lost money. The project also diverted resources from a "shrinking newsroom" that was shifting its focus from print to digital publication.

[42] After the articles were released, the MAA approached the Press about the possibility of turning the articles into a “coffee table book” to commemorate the MAA’s 100<sup>th</sup> anniversary taking place in 2014. The MAA offered to contribute \$35,000 towards the cost. This financial contribution made the Book a viable option. In Samyn’s words, it was a “game changer”. The decision was made to publish the Book.

[43] The text of the Book was virtually identical to the text of the articles, although Turner wrote a few additional paragraphs for the Book about the University of Winnipeg. The photographs and other art in the Book were considerably different than what appeared in the newspaper and online.

[44] The Book was launched December 4, 2014. A book launch event was held by the Press at McNally Robinson to celebrate the release. Dr. Albo was notified and attended the launch.

[45] Prior to the launch, at no time did Dr. Albo raise any complaints about the articles or the Book. He first raised a complaint about the publication of the Book without his consent in an email to Samyn on January 6, 2015 (Exhibit “98”) – a month after the Book launch.

That email read in part:

I have been stewing on this matter for quite some time and I now feel it necessary to broach the matter with you directly. Contrary to our previous correspondence and the understanding upon which I agreed to assist in the City Beautiful project, the WFP has without my consent published it as a book. In the process of our negotiation and on the understanding that my contributions would result in the publication of a book, I asked for royalties to be paid to me, just as they were in the case of the Hermetic Code. In your email of 23 Jan 2014, you advised that “we will not be publishing a book” and, as a result of this clear statement, I did not pursue the standard request for royalties any further. This statement has since been proven to be false.

As you know, the whole idea for this book and its principal content was initiated as a result of my previous research and several keynote addresses I had given on Winnipeg and the City Beautiful, including an event you attended at the Hotel Fort Garry. This project would not have come to life without my contribution and therefore trust we will find a mutually agreeable solution to the unauthorised [sic] use of my intellectual property.

I am prepared to resolved [sic] this issue this issue by revisiting my financial compensation. In the interim, I will be withholding royalty payments on the Hermetic Code.

[46] Samyn responded the same day in the following way (Exhibit "98"):

I can assure you the offer to pay you a generous hourly rate for your assistance in this project was made in good faith as publishing a book was not on our radar screen when we discussed this matter in January 2014. In fact, it was only after the series was published in September that the Manitoba Association of Architects approached us with an [sic] proposal that led to the book.

While we greatly appreciated your assistance -- assistance that is full [sic] credited to you -- it is inaccurate to liken this book to the Hermetic Code as the series Randy wrote was based on a wide variety of sources and research.

I know the Free Press has valued the relationship we have with you. However, I must caution that the Free Press will take seriously any non-payment of obligations and will not negotiate in response to threats of this nature.

[emphasis added]

[47] In response to Samyn's email, Dr. Albo sent a return email (Exhibit "99") stating:

Thank you for your speedy reply. I value my longstanding relationship with the FP as well. I do however feel that the publishing of a book was contrary to our agreement. Would you be amenable to sitting down one on one to resolve this amicably?

[emphasis added]

[48] After this exchange, a meeting between Dr. Albo and Cox was arranged for January 15, 2015, to discuss the matter.

[49] On January 14, 2015, the day before the meeting, Dr. Albo unilaterally cancelled the meeting. Dr. Albo indicated he would reschedule. The Press did not hear from Dr. Albo

again until January 28, 2015, when Dr. Albo's counsel wrote a demand letter to the Press. In the demand letter, Dr. Albo's counsel suggested, among other things, that Dr. Albo "discovered that Winnipeg was part of the City Beautiful Movement" and that he had originated the theory that "Winnipeg was modelled after the City Beautiful Movement". However, both at discovery and at trial, Dr. Albo admitted that these claims are not accurate. He acknowledged that several others had written about the influence of the City Beautiful Movement on Winnipeg before him.

#### **IV. SUMMARY OF ISSUES AND POSITIONS OF THE PARTIES**

##### **A. Breach of Copyright**

[50] Dr. Albo asserts that he had copyright of his Works, which were used as the foundation of the Book. The Works were the product of many years of research and academic expertise, which were assembled into a clearly defined format.

[51] Dr. Albo argues that Part 1 of the Book represents a substantial part of his work wherein he has expressed his skill and judgment and as such, any unauthorized reproduction constitutes copyright infringement. Contrary to s. 27(2) of the *Copyright Act* R.S.C. 1985, c. C-42 (the "*Act*"), the Press sold or by way of trade distributed, exposed or offered for sale the Book which the Press knew or ought to have known infringed Dr. Albo's copyright in the Works.

[52] The Press agrees that its interest in the influence of the City Beautiful Movement on plans for Winnipeg at the turn of the twentieth century "sparked" when Cox attended Dr. Albo's presentation at the Fort Garry Hotel on September 27, 2013. However, the Press

maintains that “much, if not all,” of the content of Dr. Albo’s presentations to them consisted of the reproduction of portions of the work of other authors, artists and photographers.

[53] The Press also relies on the following points:

- Although Dr. Albo may hold copyright in the collection of slides organized pursuant to the provisions of the *Act*, which funds protection for “compilations”, the Press did not publish or republish his slide presentation.
- Although the first chapter of the Book deals with the plans for Winnipeg in the early part of the twentieth century, as does Dr. Albo’s presentation, the overlap in subject matter does not entitle Dr. Albo to a copyright in the text of the Book.
- Dr. Albo does not hold copyright in the oral comments that he provided in his interviews with and conversations with Turner. Even if he did hold copyright in these oral comments, the Press was entitled to use the quotations under the doctrine of “fair dealing”.
- The “narrative arc” of the Book is entirely different than the essence of Dr. Albo’s presentations. The presentations commence with a discussion of the influence of the City Beautiful Movement in Winnipeg at the turn of the century and then proceed to trace the history of the City Beautiful Movement back to ancient times and ultimately the Garden of Eden. The Book, on the other hand, provides a forward-looking narrative that deals with the development of Winnipeg’s architecture and self-image as it evolved through

the twentieth century in three distinct phases – City Beautiful, Modernism and the Renaissance.

### **B. Breach of Contract**

[54] The terms of the Consulting Contract under consideration can be found in one of the several emails between Dr. Albo and Samyn in the latter half of January 2014 (see paras. 22-23 above). In particular, in an email sent from Samyn to Dr. Albo on January 28, 2014 (Exhibit “35”), Samyn wrote:

How about this:

-we will pay you \$1,500 for the research you have done that provides us with the foundation for this project. As part of that fee, you will make available to us any materials (reports, photos, slides, video etc) that we can make use as part of this project.

-we will pay you an hourly rate of \$75 for any consulting/interviews we need to conduct with you as part of this project. That same rate will apply for videos we will produce that involve you talking about the project, showcasing architecture etc.

To this, Dr. Albo responded as follows:

Indeed, this seems reasonable. I look forward to hearing more about the details soon.

[55] Dr. Albo submits that the common law now recognizes a duty of honest performance that requires the parties to be honest with each other in relation to the performance of their contracted obligations (see: *Bhasin v. Hrynew*, 2014 SCC 71 (“*Bhasin*”).

[56] Here the Press breached the Consulting Contract they had with Dr. Albo and failed to act in good faith by using Dr. Albo’s Works beyond the terms of what amounts to a “limited licence” granted by Dr. Albo. This was done without any consent from Dr. Albo and without providing compensation of any kind to him.

[57] The breach is particularly flagrant, as it was the Press that defined the scope of the Consulting Contract by limiting its request for the use of the Works to the project and further confirmed, after a specific request by Dr. Albo, that the press would not “be publishing a book for profit”. Put otherwise, using the Works as the basis of, or in any way, to publish the Book was explicitly excluded from the scope of the contract.

[58] Dr. Albo maintains further that he was denied the opportunity to appropriately showcase his research, his perspective and passion through the project. He was not given a “starring role” in the project, nor did his Works serve the foundation of the entire project. His Works were used to author and publish the Book and this, once again, despite expressed confirmation to the contrary. Moreover, his Works were misappropriated and distorted.

[59] With respect to the breach of contract claim, the position of the Press is that it entered into the Consulting Contract with Dr. Albo pursuant to which it paid him \$1,500 for sharing the research he had previously done, plus an hourly fee for any additional time he spent consulting for the articles. Dr. Albo invoiced the Press in accordance with this agreement and the account was paid in full.

[60] The Press denies that it entered into a contract giving Dr. Albo the right to veto republication of the articles, or requiring the Press to pay Dr. Albo if the articles were republished.

[61] The Press agrees that Samyn told Dr. Albo that he would have a “starring role” in the project he was retained to consult on, but denies that this became part of the contract with Dr. Albo. That said, Dr. Albo was in fact, given a starring role. He was acknowledged as a contributor in the introductory pages of the Book. His photograph was included in the

Book and, his on-camera interviews were included in the online video presentation. He made no complaint about how he was featured when the articles were published.

## **V. DECISION ON LIABILITY**

[62] Dr. Albo testified at some length during which time he presented as an articulate, intelligent and strong-willed individual. At times, he became emotional and even confrontational, especially during cross-examination. There is no question that he feels slighted by the Press who, according to him, treated him unfairly but as to whether this provides him with a cause of action in copyright or contract is another matter.

### **A. Liability for Breach of Copyright**

#### **(i) Relevant Principles of Copyright Law**

[63] Counsel provided me with numerous authorities respecting principles of copyright law that are relevant to this matter. A synthesis of these authorities is provided below:

- a) "... copyright is a creature of statute and the rights and remedies provided by the Copyright Act are exhaustive" (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 ("*CCH*") at para. 9).
- b) Section 3 of the *Act* provides that 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.

- c) "Copyright law protects the expression of ideas ...; it does not protect ideas in and of themselves". It flows from this that a work must also be in a fixed form to attract copyright protection (**CCH** at para. 8).
- d) A person is free to use common source material and ideas to make his or her own work, which may be similar to another (see: **Moreau v. St. Vincent**, [1950] 12 C.P.R. 32).
- e) Copyright only protects "original" works. The copyrighted work must involve an exercise of skill and judgment.
- f) Section 5(1) of the **Act** provides that copyright subsists in Canada, in every original literary, dramatic, musical and artistic work, provided certain conditions are met. It can include lectures. If a lecture is fixed in a material form, it will be protected as a literary work, but a lecture delivered without written notes or other written evidence of the lecture, will not.
- g) The **Act** recognizes that there can be a copyright in the collection and organization of other's works. In this regard, s. 2 of the **Act** defines "compilation" as:
  - (a) A work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof; or
  - (b) A work resulting from the selection or arrangement of data.
- h) A "compilation" takes existing material and casts it in a different form. Although the arranger does not have a copyright in the individual components, he or she may have copyright in the form represented by the "compilation" (**CCH** at para. 33).

- i) In view of the fact that copyright limits protection to the expression or form of ideas, not the ideas themselves "...the originality requirement must apply to the expressive element of the work and not the idea" (**CCH** at para. 14).
- j) In cases where an interview is the target of concern, it is the interviewer who reduces an interview into a fixed material form who acquires copyright in the interview, not the person being interviewed.
- k) Copyright does not cover facts (**Hager v. ECW Press Ltd.**, [1999] 2 F.C. 287 ("**Hager**") and **Maltz v. Witterick**, 2016 FC 524, [2016] F.C.J. 484 ("**Maltz**").
- l) The use of common words and short phrases, which are generic, does not constitute copying (**Tomas v. Boaden Catering Ltd.**, [1995] F.C.J. No. 1778).
- m) Section 27(1) of the **Act** defines when copyright has been infringed: "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."
- n) Section 3(1) of the **Act** defines those things which only the copyright owner has the right to do. The owner has 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.

- o) Sections 29 and 29.2 of the **Act** provide that the reproduction of a work will not be an infringement of copyright if it constitutes "fair dealing":

**Research, private study, etc.**

**29** Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

**News reporting**

**29.2** Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

- p) Where "fair dealing" is raised, "the onus is on a defendant to prove that his or her dealing with a work has been fair. Any act falling within the "fair dealing" exception will not be an infringement of copyright. The "fair dealing" exception, like other exceptions in the Act, is a user's right" (**CCH** at para. 48).
- q) "Research" and "news reporting" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. The words must be considered from the perspective of the user or consumer (**Society of Composers, Authors and Music Publishers of Canada v. Bell Canada**, 2012 SCC 36 ("**SOCAN**") at para. 11, **CCH** at para. 51 and **Warman v. Fournier**, 2012 FC 803 ("**Warman**") at para. 31).

- r) "Research" can include activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. The first step in the "fair dealing" analysis (identifying which category applies) is a low threshold (*SOCAN* at paras. 22 and 27).
- s) "News reporting" by a media outlet includes activities by that outlet which promulgate information recounted elsewhere (*Warman* at para. 31, *CCH* at para. 51, *SOCAN* at para. 11).
- t) Establishing a non-literal copyright infringement requires much more than establishing the copying of an "idea". To find non-literal copying, the Court must be satisfied that there has been substantial taking of the expressive element(s) of the copyrighted work (*Cinar Corporation v. Robinson* 2013 SCC 73 and *Maltz* at paras. 28, 30 and 32).

**(ii) Analysis of Exhibit 103 re: Copyright**

[64] In his testimony, Dr. Albo made extensive reference to Exhibit "103". Exhibit "103" is a chart prepared by him that identifies Works in which Dr. Albo claims copyright and which he claims were copied. The chart identifies 51 instances where it is said that Dr. Albo's Works were copied. As to the specific Works that were allegedly copied from, there are six of them, as follows:

- i. Dr. Albo's presentation to the Press editorial staff on January 8, 2014 (Exhibit "7");

- ii. Dr. Albo's presentation to Turner on February 13, 2014 (Exhibit "7");
- iii. Documents entitled "Portage and Main" and "Notes to Randy" placed in a Dropbox account on May 21, 2014 (Exhibits "13" and "14");
- iv. Dr. Albo's telephone conversation with Turner on May 21, 2014;
- v. The May 22, 2014 email from Dr. Albo to Turner (Exhibit "51"); and,
- vi. Dr. Albo's presentation to the Press on May 26, 2014 (Exhibit "8").

[65] In order to properly assess the validity of the copyright claim, I must first determine if there is a copyright for any of the Works relied upon. If I find that there is a copyright and the material was in fact copied in some manner, I must then go on and determine if the Press has established that they come with the doctrine of "fair dealing".

**(a) Dr. Albo's presentation to the Press editorial staff on January 8, 2014**

[66] In his testimony, Dr. Albo agreed that Exhibit "7" is the "best" record of the presentation he made to the Press editorial staff.

[67] The Press allows that Dr. Albo may hold copyright in the totality of Exhibit "7" as a "compilation". I agree. But even though Dr. Albo had a copyright in the "compilation" because he arranged the photographs and paintings on the slides that constituted Exhibit "7" and arranged the quotations and references in the notes to those slides, it does not mean that Dr. Albo has the right to control the use of any particular component. He would

secure that right were he able to establish to the necessary degree that that particular component was his original work (see: *CCH* at para. 3). I find that he has not done so for the following reasons:

- Dr. Albo makes no claim of copyright in any of the photographs or paintings in Exhibit "7".
- Exhibit "7" in large measure, recites facts from a variety of sources. Facts are not protected by copyright and are available for use by anyone who chooses to write about them.
- It is clear from the cross-examination of Dr. Albo that a great deal of the information that he claimed to own came from the works of other scholars and historians, for example: Alan Artibise (Exhibit "111" page 158) and Jim Blanchard (Exhibit "110").
- As to any extemporaneous statements that may have accompanied the January 8, 2014 presentation, they would not be subject to copyright given that, in order for a work to attract copyright protection, it must be reduced to a fixed, material form (*CCH* at para. 8).

**(b) The February 13, 2014 presentation to Turner**

[68] There is no question that during the February 13, 2014 presentation to Turner Dr. Albo reviewed the slides in Exhibit "7", however, the manner of presentation was different than the formal presentation to the Press staff on January 8, 2014. Dr. Albo was not reading from a script. Rather, he and Turner were sitting together in Dr. Albo's home reviewing the slides during which time Turner was asking questions. The

Press asserts that Turner was asking questions "as an interviewer would". On at least two occasions during cross-examination Dr. Albo agreed with this assertion.

[69] As stated above, although Dr. Albo may very well have copyright in Exhibit "7" as a "compilation", he does not have copyright in the individual elements of the "compilation". Had the Press simply republished Exhibit "7", Dr. Albo would have a claim for copyright infringement but this did not happen.

[70] The law is clear that conversations or answers to oral questions that are not works reduced to a fixed, material form are not copyright protected (*CCH* at para. 8). In fact, where a reporter or interviewer records the answers given by a source, copyright flows to the benefit of the reporter or interviewer, not the subject of the interview, in this case the Press (see: *Hager* at paras. 27 - 30). To my mind, the discussion between Dr. Albo and Turner regarding "DNA" that led to the subtitle of the Book falls into this category especially since, based on the evidence given at this trial and the manner in which it was given, I am unable to conclude who first brought up the DNA metaphor.

[71] The quotations from Dr. Albo that appear in the articles and later the Book came largely, if not entirely, from statements Dr. Albo made during his conversation with Turner on February 13, 2014. It follows that, since Dr. Albo does not hold copyright in these statements, the quotations from Dr. Albo in the articles and later the Book do not infringe any copyright.

[72] Some of the facts and ideas Dr. Albo discussed with Turner are referred to by Turner and his other sources for the article and the Book. Dr. Albo does not hold copyright in such facts or ideas (see: *CCH* paras. 8 and 22).

**(c) Documents entitled "Portage and Main" and "Notes to Randy"**

[73] Dr. Albo testified that both Exhibits "13" and "14" were provided to Turner on May 21, 2014 by uploading them to a Dropbox folder.

[74] Insofar as Exhibit "14" is concerned, Dr. Albo agreed with the suggestion put to him in cross-examination that many of the references found within were not written by him at all but rather had come from third party sources.

[75] With respect to Exhibit "13", it is in essence a copy of the private speaking notes on the bottom of the slides contained in Exhibit "7". My comments above with respect to Exhibit "7" apply equally to this document.

[76] Again, although Dr. Albo may hold copyright in the arrangement of the individual elements of Exhibits "13" and "14" as "compilations", he has not satisfied me that he holds copyright in the individual elements comprising these two documents (see: *CCH* at para. 33 and *Maltz* at para. 26).

**(d) Dr. Albo's telephone conversation with Turner on May 21, 2014**

[77] After an exchange of emails (Exhibit "50") between Dr. Albo and Turner, where Turner was seeking Dr. Albo's help in crafting the lead for the first article, the two spoke on the phone.

[78] Turner testified that during the call Dr. Albo did his best to articulate what Turner was looking for but Turner did not use what Dr. Albo said to him over the phone. Instead, he used an entry from an unpublished autobiography of Michael Hruska that he found (on his own) in the Manitoba Archives.

[79] There is no documentary record of this phone call. It was an extemporaneous conversation that was, at best, another interview. It was in no way a structured, prepared lecture or speech delivered to Turner by Dr. Albo.

[80] I am not satisfied in these circumstances that Dr. Albo has any copyright with respect to the phone call of May 21, 2014. Instead, the copyright would rest with the Press.

**(e) The May 22, 2014 email from Dr. Albo to Turner**

[81] At one point during the course of his research Turner attempted to ascertain the value of the gold leaf on the ceiling of the Bank of Montreal Building, here in Winnipeg, and asked for Dr. Albo's assistance.

[82] In Exhibit "51", Dr. Albo estimated the value of the gold leaf in the bank to be two to three million dollars by 2014 standards. He testified in cross-examination that he had come up with that figure by "doing the math" after receiving certain information from the bank manager.

[83] To my mind, the value of the leaf (even though only an estimate) is a fact. As such, it does not attract copyright protection (see: *Maltz* at para. 29 and *Hager* at para. 44).

[84] Moreover, the authorities are clear that the level of skill and judgment that is required to produce a work that acquires copyright protection must not be so trivial that it involves "a purely mechanical exercise" (see: *CCH* at para. 16). The amortization of the value of the gold leaf in question is, in my view, a purely mechanical exercise.

**(f) Dr. Albo's presentation to the Press on May 26, 2014 (Exhibit "8")**

[85] There is no meaningful difference between Dr. Albo's presentation to the Press on May 26, 2014 (Exhibit "8") and his presentation to the Press on January 8, 2014 (Exhibit

"7"). My determinations above concerning Exhibit "7" (at paras. 66 - 67) apply equally to Exhibit "8".

**(iii) Copying**

[86] By and large, an analysis of whether Turner copied Dr. Albo's Work should focus primarily on Exhibit "7". This is so given the following:

- The other documents and "presentations" marked as Exhibits "8", "13", "14", and "51" were not available until the third and fourth weeks of May 2014 (May 21, 22 and 26);
- Turner submitted an outline for the first article by March 17, 2014 (Exhibit "43");
- Turner submitted a draft of the first article on May 29, 2014 (Exhibit "53");
- Turner did not attend the May 26, 2014 presentation to the digital staff and Melissa Tait in no way contributed to the text that is in issue;
- The documents put into the Dropbox on May 21, 2014 by Dr. Albo and any references in those documents that are not in Exhibit "7" are not found in the articles (Exhibits "15 - 17") or the Book (Exhibit "1").

[87] In any event, Dr. Albo's evidence regarding his copyright claim is problematic in several respects.

[88] In cross-examination he agreed that, save for when he is quoted directly, the Book does not use his words or even similar words to express the ideas and facts that he claims as his own.

[89] In addition, he agreed with counsel's suggestion that he was not making a claim of copying any particular portion of the Book but rather that the entire Book is a product of its author stealing his ideas. If that is the case, even if Dr. Albo's ideas are original ideas, the law of copyright only protects the manner in which ideas are expressed.

[90] Another concern relating to Dr. Albo's claim that the Book is a copy of his work lies in his testimony that the Press only wanted a "snippet" of his research and that they then took "the project in its own direction". In a related vein, he testified that he should have been consulted more about chapters two and three of the Book. He also agreed that if he had written the Book, he would have written it differently than Turner did.

[91] Dr. Albo asserts that the "narrative arc" of the Book was copied from his Works, that is, the documents for which Dr. Albo claims copyright. However, more particularly, it is Exhibit "7" the slide deck presented on January 8, 2014, that provides the fullest narrative from Dr. Albo.

[92] Even on a cursory review of Dr. Albo's presentation and the Book, it is obvious that while they both start at the turn of the twentieth century in Winnipeg, they proceed in opposite directions.

[93] The "narrative arc" of Dr. Albo's slide deck starts from the turn of the twentieth century in Winnipeg and moves back in time to the Garden of Eden.

[94] Chapter One of the Book deals with Winnipeg at the turn of the twentieth century. The focus of this chapter is on its economy, its social problems, its architecture and the influence of the City Beautiful Movement on the future plans for the City. There is no question that reference is made to information included in Exhibit "7". However, there are

also extensive references to archival sources. Moreover, there are multiple references to the writings of various authors, information from interviewers of historians and architects and several articles from various newspapers and journals of the time.

[95] Chapter Two deals with the mood and primarily the architecture of Winnipeg in the 1950's and 1960's otherwise known as the "modernist" period and the architects who created it. The chapter draws heavily on interviews with these very architects.

[96] The third chapter entitled "Our Renaissance" focuses on modern-day architecture in Winnipeg and ponders what the future holds for Winnipeg's architecture.

[97] It is clear that the Works in comparison do not share any features or combination of features to support a conclusion that the Book is even a non-literal copy of any material in which Dr. Albo can claim copyright. That which Dr. Albo described as his original concept is far from the "narrative arc" provided by Turner.

#### **(iv) Fair dealing**

[98] There is no question that the Book quoted some of Dr. Albo's oral comments, primarily from his interview with Turner on February 13, 2014, when they met at Dr. Albo's residence.

[99] I have already ruled that Dr. Albo does not hold copyright in those quotations, however, if I had held otherwise then I would have to determine if the Press was entitled to use those quotations under the doctrine of "fair dealing".

[100] A "fair dealing" analysis implicates two stages.

[101] At the first stage, the Court must determine if the use of the materials falls within either of the "fair dealing" provisions in the *Act*, i.e., if the use of the materials by the Press

constitutes “research” or “news reporting” (see: Sections 29 and 29.2 of the **Act**). As noted in **SOCAN** (at para. 27), the terms “research” and “news reporting” are to be given a broad and liberal interpretation and the threshold for meeting the requirements is low.

[102] The second stage of the analysis requires the Court to consider if the dealing was “fair”. In this regard, in **CCH** (at para. 53) the Supreme Court of Canada set out six factors for the Court to consider in making its determination:

- The purpose of the dealing;
- The character of the dealing;
- The amount of the dealing;
- Alternatives to the dealing;
- The nature of the work; and,
- The effect of the dealing on the work.

#### **The purpose of the dealing**

[103] Provided that the dealing is for one of the allowable purposes of the **Act**, i.e. research, private study, criticism, review or news reporting, it will be considered fair. The Court must undertake an objective assessment of the user’s real purpose (or motive) in using the copyrighted work (**CCH** at para. 54).

[104] Here, the quotations were used by the Press in its research and writing of articles that were later republished as the Book. The publications were for the “purpose” of circulating information to the general public to read and learn about the development of the City of Winnipeg.

### **The character of the dealing**

[105] As to the “character” of the dealing, the Court must consider whether the dealing was fair in the context of the custom or practice of the particular trade or industry i.e. the media industry (see: *CCH* at para. 55). Here, the quotations were obtained by Turner, an experienced journalist and feature writer, who used the quotations to help develop the articles that later were released as the Book. The quotations were used for no other purpose. In my view, therefore, the character of the dealing weighs in favour of fairness.

### **The amount of the dealing**

[106] The “amount” of the dealing must be considered within the context of the purpose of the dealing (see: *CCH* at para. 56). As noted above, Dr. Albo was quoted along with many, many other sources. In fact in this case, one of Dr. Albo’s complaints is that the Press only used a “snippet” of his research and then “took the project in its own direction”. In that circumstance, it can hardly be said that Dr. Albo was quoted too much.

### **Alternatives to the dealing**

[107] Nor is there any indication in this case that the Press acted unfairly by not using an “alternative” to the quotes from Dr. Albo. Dr. Albo was paid for his research and time he spent assisting Turner. In addition, Dr. Albo was clearly seeking exposure himself.

### **The nature of the work**

[108] With respect to the “nature of the work”, in *CCH* (at para. 58) the Supreme Court of Canada stated “... if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law”.

[109] Here Dr. Albo had not published anything himself on the City Beautiful Movement. Dr. Albo was acknowledged by the Press as the source of the quotations within the articles and the Book. The articles and later the Book were publicly disseminated thereby leading to a wider public dissemination of his Work. To my mind, this tips the scales towards finding that the dealing was fair.

### **The effect of dealing on the work**

[110] The last consideration is the effect that the dealing will have on the work. In that regard "if the reproduced work is likely to compete with the market of the original work" that may tend to suggest that the dealing is not fair. That is not the case here. Dr. Albo has no publication on the market that is capable of competing with the Book.

[111] All of these factors, taken together, lead me to conclude that, even if Dr. Albo held copyright in the statements quoted from him, the use of the quotations fall comfortably within the compass of "fair dealing" and would not be an infringement of Dr. Albo's copyright.

### **B. Liability for Breach of Contract**

[112] Within the precinct of contract law, the following principles are of primary concern in the case at bar:

- a) It is basic that in order for there to be a valid contract between parties, there must be an offer, an acceptance and consideration.
- b) As a general rule, agreements are to be construed in such fashion as to effectuate the intentions of the parties as can best be determined from the

“entirety” of the agreement (*BG Checo International Ltd. v. British Columbia Hydro and Power Authority* [1993] 1 SCR 12).

- c) The evidence of the parties’ subjective intentions has no “independent” place in determining the terms of their bargain. Indeed, the goal of contractual interpretation is to ascertain the objective intent of the parties to an agreement (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 49 and 55).
- d) In interpreting a contract, the Court must look to the text of the contract as a whole. If necessary, the text is to be considered in light of the surrounding circumstances “at the time of execution of the contract”. A Court should interpret a contract in a fashion that accords with sound commercial principles and good business sense, and in a manner that avoids a commercial absurdity (*Geoffrey L. Moore Realty Inc. v. The Manitoba Motor League*, 2003 MBCA 71 at para. 26 and *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205).
- e) The test of what the parties agreed to requires an objective determination and, as stated above, the contract must clearly include the requisite elements of offer, acceptance and consideration (*S & J Gareri Trucking Ltd. v. Onyx Corporation*, 2016 ONCA 505 at para. 7).
- f) The common law imposes a duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each

other in relation to the performance of their contractual obligations (*Bhasin* at para. 93).

[113] Dr. Albo alleges that the Press breached their contract with him by using Works in which he held copyright beyond the terms of what he alleges was a "limited licence" that restricted the use of the Works to the newspaper and digital publications. If there is no valid copyright claim then the claim based on the said "limited licence" must fail.

[114] That aside, on the totality of the evidence in this case and for reasons that follow, I am not satisfied that the Press breached the Consulting Contract entered into with Dr. Albo nor did the Press fail to act in good faith in fulfilling its obligations.

[115] The terms of the Consulting Contract were, in their entirety, as stated above at paras. 22 - 23.

[116] I am satisfied that these terms constituted the entire agreement between Dr. Albo and the Press, and the terms were fulfilled by the Press. At the time the Consulting Contract was entered into, Dr. Albo was advised that the nature of scope of the project were not yet certain, that the nature and scope would be determined by the Press and that Turner would be the author.

[117] At no time did the parties discuss, or agree to, a "limited licence".

[118] On January 30, 2014, after Dr. Albo and Samyn agreed on the terms of the Consulting Contract, Dr. Albo sent a further email to Samyn stating in part (Exhibit "29"):

I trust that if the series were successful enough to develop it into a book, you would consider a much fuller treatment of this fascinating story with standard industry royalties.

[emphasis added]

[119] It is implicit in this email that Dr. Albo understood completely that the project being contemplated by the Press was one that would not amount to a full treatment of the subject. At the same time, he was aware, as evidenced in his email exchanges with Samyn leading up to his agreement to the terms of the Consulting Contract, that the direction of the project was uncertain beyond the fact that the end result would be in print and online.

[120] Neither Samyn nor anyone else on behalf of the Press ever agreed to the suggestion of a fuller treatment of the story with royalties.

[121] Dr. Albo asserts that the contract between himself and the Press included other terms beyond those found in the Consulting Contract. He maintains that it was a term of the contract that he would be given an opportunity to "showcase his research, his perspective and passion throughout the project" and further that he would be given a "starring role" in the project. Moreover, he maintains that the Press was bound by contract to give him credit for the Book's title, subtitle and entire narrative arc.

[122] There is no question that Samyn told Dr. Albo that he would have a "starring role" in the project he was retained to consult on, but that does not mean that this became part of the contract with Dr. Albo. That said, Dr. Albo was in fact, given a starring role. He was treated fairly. He was acknowledged as a contributor in the introductory pages of the Book. His photograph was included in the Book and, his on-camera interviews were included in the online video presentation. The articles did in fact showcase Dr. Albo's research, his perspective and passion and he was quoted extensively.

[123] Insofar as the other proposed terms are concerned, I agree with the position taken by the Press that, on a plain reading, the email discussion leading up to the Consulting Contract cannot be objectively and reasonably construed as containing any such promises.

#### **VI. DAMAGES**

[124] In view of my findings and conclusions, that Dr. Albo has not established breach of copyright or a breach of contract, it is unnecessary to consider any issues with respect to what damages should be awarded.

#### **VII. CONCLUSION**

[125] Both actions in copyright and contract are dismissed.

#### **VIII. COSTS**

[126] Costs may be spoken to if not agreed.

  
Richard A. Hull J.