



Citation:

Date:

File No: 26809
Registry: Penticton

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

MICHAEL HERMESH

CLAIMANT

AND:

CITY OF PENTICTON

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE J.P. CARTWRIGHT**

Counsel for the Claimant: self-represented
Counsel for the Defendant: Jason Poon
Place of Hearing: Penticton, B.C.
Dates of Hearing: August 23, 2006, November 20, 2006, and February 8, 2007
Date of Judgment: December 28, 2007

[1] Mr. Hermesh, the claimant, sues the Corporation of the City of Penticton ("the City") and the Art Gallery of the South Okanagan ("the Art Gallery") for sums exceeding \$25,000, the monetary limit in this Court. Mr. Hermesh abandons the amount of his claim that exceeds that limit.

[2] Mr. Hermesh seeks damages for breach of contract, and for damages for restoration costs for a sculpture in the sum of \$8,308; damages for failure to return the maquette (similar to a model) of the sculpture amounting to \$5,000; damages for copyright violations valued at \$300 each day, amounting in the claim to \$13,700; shipping costs, travel costs, administrative costs, and expert advice costs amounting to \$5,682; and finally, punitive damages.

[3] In August 2004, the City issued a call for proposals, asking for "outdoor installation art" for the centre of a new traffic roundabout, with a deadline of October 1, 2004. The successful artist would receive up to \$3,500 for materials and \$3,000 for artist fees, payable in instalments in October 2004 and May 2005.

[4] The Call for Proposals reads as follows:

04 ROUNDABOUT 05
CALL FOR PROPOSALS

Project Description: The City of Penticton is seeking installation art proposals for the centre of a new traffic roundabout on the waterfront (see attached specification drawings, photographs and text). This competition is open to all artists who are permanent residents of British Columbia, and available to create temporary works of art in October 2004 and May 2005.

Site Response: Artists are encouraged to propose a pair of sequential installations which respond to the roundabout site in a manner that relates to both its function as a traffic intersection and unique location on the waterfront. Weather conditions over the course of the exhibition period are another important

element, as the first work will be on display from October to January and the second from May to August.

Primary Materials: The centre of the roundabout has been fitted with electrical and water feeds, and these elements along with plant life and wind should be treated as primary materials by interested artists. Other substances such as wood, Styrofoam, rock, cardboard, metal, found objects, and plastic could be considered as secondary or support materials. It is possible that the proposed installations change, grow, or degrade over the exhibition period, so as to underline the temporary quality of this project. Artists are also encouraged to recycle the materials used in the first installation (October to January) in the creation of the second installation (May to August).

Support Services: The City of Penticton and Art Gallery of the South Okanagan will provide the selected artist with access to equipment such as a fork lift, boom truck, and a range of power tools free of charge during the creation period. The Art Gallery of the South Okanagan will also oversee the production and distribution of signage, didactic displays and promotional materials over the course of the exhibitions.

Fee Structure: The selected artist will receive an artist fee of \$3,000 to be paid in two installments following the completion of the proposed installations in October 2004 and May 2005. The selected artist will have up to \$3,500 in material costs for both installations, to be paid upon submission of receipts. The selected artist will receive two return trips from his-her city of residence in British Columbia during the creation period, up to a week of accommodations at local hotel for each creation period, and a commensurate per diem.

Submission Requirements: Artists who are interested in having their proposals considered for the *04Roundabout05* competition should submit a series of pencil drawings or digital images, an artist's statement, curriculum vitae, five slides or j-pegs of previous works, and a SASE for return of these materials. Please note that all proposals will be placed on display in the Art Gallery of the South Okanagan's Project Room in the fall of 2004.

Selection Process: The City of Penticton Public Art Advisory Committee will be responsible for the selection process which will take place in two stages. Three finalists will be selected from those installation proposals received by Friday, September 17th, 2004 at 4:00 pm. Each of the finalists will then be awarded \$350 upon a model, materials budget, equipment requirements and construction time lines to be delivered by September 30th, 2004 at 4:00 pm.

THE WINNIPG [sic] PROPOSAL WILL BE ANNOUNCED ON OCTOBER 4TH, 2004

[5] The Call for Proposals was issued by the City through its Public Art Advisory Committee ("the Committee"). The Committee was formed by the City to advise City

Council on matters relating to the implementation of the City's Public Art Policy. Specifically, the committee administered public art competitions.

[6] The Committee selected Mr. Hermesh, an artist residing in Penticton, in October 2004, as one of the 3 finalists for the competition.

[7] Mr. Hermesh's proposal is best described in his own words. His Proposal is reproduced here, without the section referring to the "Artist's Statement", curriculum vitae, or the construction specifics:

Proposal for the "04 Roundabout 05"

"The Baggage Handler"

The centrepiece of my proposed installation will be a plaster "Man with Baggage" slightly over sized with a suitcase standing in a sea of suitcases supported on steel posts. The suitcases will be the same height as the one held in the hand of the central figure. The suitcase in the central figure will be sculpted in the same fashion as the figure and be closed.

The suitcases in the perimeter of the piece will be actual suitcases sourced from secondary sources such as the Salvation Army or Value Village, but preferably donated by Gallery participants to keep within the "significance context" of the installation. It is hoped that each bag will symbolically contain a degradable article that the donator literally wishes to release. (example: teddy bear, poster etc.) This is the symbolic participation of people releasing "Old Baggage".

The suitcases will be held at the same height as the mans suitcase and held open to various degrees to allow them to hold soil, suitable xeriscape type plants, and release the items contained inside during the second phase of the project.

The area under the suitcases will be planted with wild grasses.

The sculpture will be an experiment in permanence and impermanence and a statement on the integration of organic processes with the processes of conscious intent, and a juxtaposition of the ideas of possession as the act of holding on to, defining and owning objects as compared to a passive observation being a form of ownership. A questioning of what can be possessed, what possesses, what can be owned and what can be discarded.

The central piece will be constructed with welded steel armature, which will be very stable. It will be sculpted in my studio with plaster impregnated by S-1 epoxy. This should work as a medium of some permanence but is not entirely certain. I have used this process to stabilize degraded wood successfully, however this will be the first time I will use it in plaster. I have talked to tradesman in the boat building industry that use S-1 epoxy and they feel that there will be no problem. If it were to degrade in any way – it would degrade in the same way that a stone breaks – into solid cohesive pieces. When dry, S-1 epoxy is completely stable and cohesive. So there should be no clean up problems even if there is breakage. Though I don't believe there will be unless we encounter fairly persistent vandalism.

The suitcases will be degradable or not, depending on the individual suitcase construction. The organic processes of the organic matter contained within them will aid the decomposition of the suitcases. The bags will be welded on an internal platform. When opened a container made from discarded plywood will be placed inside to support the soil and plants and discarded objects.

The sequential nature of the sculpture will be in the suitcases that will remain closed for the winter and opened in the second part of the installation with organic matter (earth) and plants allowed to grow inside. The "baggage" contained within each suitcase will also be "released" or partially "released".

[8] As a finalist, Mr. Hermesh was asked to create a maquette representing his sculpture, together with his time-line and budget. He was paid the sum of \$350 as a "creation fee". The City argues that it is entitled to keep the maquette. Mr. Hermesh testified that maquettes are always returned to the artist, and that the "creation fee" was just that, and not a sale. Mrs. Hermesh testified, and I accept, that Mr. Collins, the curator for the Art Gallery, and Chair of the Committee, told her the maquette would be returned. Accordingly, the claimant has, on the balance of probabilities, succeeded in this issue. The maquette, therefore, will be returned to Mr. Hermesh by the defendants immediately.

[9] On October 21, 2004, Mr. Hermesh won the competition.

[10] He set to work and created The Baggage Handler – a slightly elongated (2.2 metres tall) figure of a nude, middle-aged man, with a forlorn expression. He carried a suitcase, and was surrounded by 24 other suitcases, affixed to metal stands, with concrete bases. The Baggage Handler, due to subsequent media attention, somehow obtained a first name: Frank. As Mr. Hermesh did not object to the name, and also referred to his sculpture as “Frank” during the trial, I will, for ease of reference, refer to the Baggage Handler as “Frank” or “the sculpture”.

[11] Frank was designed to remain outdoors. Mr. Hermesh did not expect the sculpture to endure the elements on a permanent basis. He did, however, expect the durability of his creation to afford an outdoor shelf life of about 8 years.

[12] The piece was made of plaster, soaked with a thin epoxy resin, which penetrated the plaster and then solidified. Mr. Hermesh reinforced the sculpture as well.

[13] Mr. Ed Anderson testified. He is a sculptor with 40 years of experience in sculpting with supported plaster. He testified that Frank was “rock solid”, and would not erode. He pointed out that the process used by Mr. Hermesh was used successfully for other outdoor sculptures. Mr. Anderson said that potentially there could be some surface, cosmetic cracking of Frank, but not structural damage.

[14] The suitcases were solidly affixed to stands. Each stand weighed about 300 pounds. The suitcases were intended to erode. Mr. Hermesh designed special lifters to put the suitcases and stands into place.

[15] Before Frank was publicly installed, the Mayor of the City at that time was made aware that Frank was nude. There were complaints. Mr. Hermesh was requested to cover Frank's genitalia. Mr. Hermesh designed and affixed a square metal plate for Frank. This comically underscored the over-reaction. The situation involving Frank attracted a great deal of media interest. One week later, on January 10, 2005, the City held a special council meeting, and voted to keep the sculpture in the roundabout, as the artist intended – nude.

[16] Mr. Hermesh is now suing for the sum of \$300 for the costs of creating the metal plate. He agreed to provide the plate with the sculpture and did not raise the issue of extra costs then. It is implied that he agreed to amend the sculpture without further fees. This part of his claim is dismissed. However, if the defendants still retain the metal plate, they are to immediately return it to Mr. Hermesh. It is his property, as is all of the sculpture he provided for the roundabout.

[17] All of Mr. and Mrs. Hermesh's contacts with the defendants were through Mr. Collins. As I stated earlier, Mr. Collins was the Director of the Art Gallery, the curator for Mr. Hermesh for Frank, and the Chair of the Committee. He represented, then, the gallery, the artist, and the City.

[18] David Kilmartin, a freelance curator, testified about the duties of a curator. I accept that a curator's duties are to assemble an artist's work for an exhibition, protect all elements of the art and organize a contract for the artist. He testified that a curator's first responsibility is to the artist and to ensure copyright is protected. According to Mr. Kilmartin, many artists are unaware of legal issues including copyright issues. He

asserted that the curator protects and informs the artist. The curator is paid by the exhibiting organization and represents both the organization and the artist with a primary responsibility to the artist.

[19] Mrs. Hermesh manages Mr. Hermesh's business affairs.

[20] Mrs. Hermesh presented Mr. Collins with a proposed contract in early November 2004. Mr. Collins told her he would contact her later about this issue. He never did and there is no signed contract. The contract offered by Mrs. Hermesh is as follows:

WHEREAS Artist Michael Hermesh will create a temporary
Sculpture for the Art Gallery of the South Okanagan (AGSO)
And the City of Penticton

Title: The Baggage Handler: A Ballet with Suitcases

Location: Front and Ellis Street Traffic Roundabout Penticton B.C.

Media: Mixed

Year: 2004 to 2005

SALE: Artist hereby creates the temporary Sculpture for the Art Gallery of the South Okanagan (AGSO) and the City of Penticton at the agreed value of \$3000.00

COSTS: Purchase Price does not include costs of material and other indirect expenses. Expenses such as external labor, small tools that may be required, and transportation costs may be included up to a maximum amount of \$3500.00.

PAYMENT: The Purchaser agrees to send the Artist \$1500.00 upon completion of the first phase of the Sculpture (estimated completion date – first week of December 2004). The remaining \$1500.00 will be paid upon completion of the Second Phase in the Spring (late April – early May) of 2005. Material costs and other indirect expenses will be reimbursed upon submission of invoices with receipt details up to a maximum amount of \$3500.00.

DETAILS: By mutual agreement the sculpture is considered a "temporary" fixture. It will remain the property of the artist Michael Hermesh. Payment made to Michael Hermesh is for rental of the sculpture. As such Michael

Hermesh retains the right to remove the sculpture from the Roundabout by the 30th of September of 2005. Michael Hermesh also retains the right to relocate parts or portions of the sculpture at different times over the period that the sculpture is on display.

REPRODUCTION RIGHTS: Artist retains all copyright rights and rights to reproduce the Work in all forms.

NON-DESTRUCTION: Purchaser will not permit any intentional destruction, damage or modification of the work.

RESTORATION: If the Work is damaged Purchaser will consult Artist before any restoration and must give Artist first opportunity to restore it, if practicable.

WARRANTY: The Artist is obligated to create the work in a professional and craftsman-like manner.

RESPONSIBILITY: The Artist is not responsible for changes in the Sculpture due to climate, humidity, moisture, molds, infestation, stains, warping, shrinkage, expansion, corrosion or any other events that occur over time. The Artist has taken every precaution to make a safe and secure sculpture. The artist is not responsible or liable for any damages caused by persistent malicious vandalism.

[21] Mrs. Hermesh testified that about that time she asked Mr. Collins about insurance coverage for the sculpture. Mr. Collins told her that the Gallery was insured for art located inside the Gallery. Art located outside was, he told her, the City's responsibility. His comments implied that the City had insurance to cover the sculpture. Both Mr. and Mrs. Hermesh testified, and I accept, that Mr. Collins specifically told them not to separately insure the sculpture.

[22] The media attention started with a report in a local newspaper in October 2004. The attention increased when Frank was installed in January 2005 and the censorship issue fuelled the fires. Newspaper reports were picked up by the provincial newspapers – The Sun and The Province, and by Canadian Press. The media coverage extended to other provinces and countries.

[23] Unfortunately, by January 31, 2005, Frank had been vandalized. The ankle was fractured, the left calf was cracked, and the penis was removed. There was damage to the suitcases and the lighting fixtures as well. The media attention increased.

[24] On February 20, 2005, the groin area of Frank had been spray painted green. Employees of the Art Gallery then tried to remove the paint on February 23, 2005. They did so without advising Mr. Hermesh and without his permission. Mr. Hermesh testified that these actions caused more damage to the sculpture.

[25] Mr. Hermesh inspected Frank on February 24, 2005. He discovered additional and significant damage. The legs were badly damaged and the stability of the piece was compromised. It appeared to Mr. Hermesh that the damage was incurred by someone trying to tow the sculpture off the roundabout. The figure was very unstable and would rock with the slightest pressure. The suitcase held by the figure was ripped away.

[26] Mr. Hermesh realized that Frank was a magnet for vandalism and had been made unsafe. Mr. Hermesh, Mrs. Hermesh and a friend stayed with the sculpture overnight, and removed it the next day.

[27] Mr. and Mrs. Hermesh both testified that Mr. Collins threatened them with police action if they removed the sculpture. They did so in any event.

[28] The damage to the sculpture was assessed by Mr. Andrew Todd of Andrew Todd Conservators Ltd. He noted the following:

Condition Report: In our initial condition report we discovered severe surface marks, dirt and grime, scratches and underlying these areas were broken sections with losses in several locations including the penis. These losses to the surface and underlying damage had occurred in various locations including back of hair, neck, chest and arms, pelvis and especially to the legs. The cracks that we noted were determined to be structural with associated flaking of finished surfaces in several locations around both ankles. There were damaged areas at the back of both lower legs, with definite structural damage. All of the damage, to the surface and the resulting structural damage appeared to have been caused by severe impact action. The type of instrument, device or vehicle that caused the damage could not be determined, but the result was enough to cause the sculpture to be rendered structurally unstable.

[29] The cost of repairing the sculpture was \$8,308.

[30] I accept that repairing a sculpture is a much different process than creating the piece. It must be done by an expert, not necessarily the artist. Repairs to artwork require a different set of skills than those used to create the piece.

[31] Mr. Hermesh was paid the sum of \$2,421.38 for materials, and \$1,500 for the first half of the artist fees. He also received the sum of \$350 for creation fees.

[32] Mr. Collins advised the City, through the Committee, that the City was "renting" Mr. Hermesh's art.

[33] On February 24, 2005, the minutes of the Committee indicate that the Committee discussed the vandalism concerns, the possibility of having the statue temporarily removed, and having a mold made and having it bronzed. A motion was passed that the sculpture be temporarily removed to have a mold created and to invite Mr. Hermesh to the next meeting to discuss the vandalism problem. At that point the Committee did not know of the extent or seriousness of the damage. Although nothing turns on it, I

must point out that I do not know how the Committee could arrange to have a mold made without Mr. Hermesh's express consent.

[34] On March 9, 2005, the Committee discussed the developments of the last month. They moved that Mr. Hermesh "be informed that the Marina Way Roundabout Art entitled "The Baggage Handler" cease as the parameter of the competition has been breached and the Committee cannot meet the expectation of the statue security".

[35] Ms. Schneiderat, one of the Committee members, explained this decision. She said the "breach" referred to the fact that Mr. Hermesh removed the statue and tried to impose security terms as a condition precedent to replacing the statue.

[36] Mr. Hermesh has included in his claim a number of matters that can be easily disposed of.

[37] Mr. Hermesh's claim for "expert advice" is a claim to recover his legal fees incurred with respect to this matter. This is not, as I advised him at trial, allowed.

[38] Mr. Hermesh has claimed for costs associated with taking Frank to the conservators on Bowen Island. These include costs of care for Mr. Hermesh's elderly mother so that he could travel to Bowen Island. The part of the claim that includes care for the artist's mother can be dismissed, as it is not a direct consequence from his cause of action, neither in tort or contract.

[39] Mr. Hermesh has claimed for the costs of organizing and preparing for this lawsuit. These administration fees are not compensable and will be dismissed.

[40] This leaves to be decided the issues of:

1. the terms of the agreement between the City and Mr. Hermesh;
2. whether those terms were breached by the City;
3. if so, what damages flow from the breach;
4. specifically, is Mr. Hermesh entitled to the second installment of the artist's fee;
5. specifically, is Mr. Hermesh entitled to restoration costs for Frank;
6. are there copyright violations;
7. if so, what are the damages;
8. should punitive damages be awarded.

[41] The terms of the agreement between the parties, in these circumstances, can be governed by contract law, the law of bailment or a combination of the two.

THE BAILMENT RELATIONSHIP

[42] Having considered the facts in this case, it is clear that the City and Mr. Hermesh agreed that the sculpture was installed temporarily in the traffic circle and the City was, in essence, renting the piece. Mr. Hermesh retained ownership of the work, while the City had rights of possession for the specified time. After the specified term of the project, the sculpture and rights of possession reverted to Mr. Hermesh. The relationship then is one of bailment for reward and therefore governed by the rights and obligations of the law of bailment.

[43] The terms of a bailment relationship can be modified by agreement in contract between the parties. First, however, I will look at the obligations and rights of the parties arising from the law of bailment.

[44] The law of bailment governs a relationship where one party, the "bailee" (and in this case, the City) temporarily holds the property of another, the bailor (in this case, Mr. Hermesh). Bailment is defined as the delivery of a personal chattel on trust, usually on a contract, express or implied, that the trust shall be executed and the chattel will be returned in its original form as soon as the time for which it was bailed has elapsed: *Punch v. Savoy's Jewellers Ltd. et al* (1986), 35 CCLT 217).

[45] The bailor, Mr. Hermesh, is required to prove that any damage claimed occurred during the term of the bailment. This is quite evident.

[46] If the contract between the parties does not set out the level of care, the law of bailment then implies levels of obligation in accordance with the principles of bailment. The degree of diligence turns on the nature of the bailment. At a bare minimum the City is bound by a standard of ordinary negligence and any damage caused to the sculpture while in the City's possession is presumed to be due to the negligence of the City: *Lifestyles Kitchen & Baths v. Danbury Sales Inc.*, (1999) O.J. No. 3097; *Clancey v. Dave Gulliver Cabs Ltd.* (1999) 177 Nfld & P.E.I.R. 152.

[47] The burden of proof then shifts to the City to disprove it was negligent, on a balance of probabilities. Bailees (here, the City), are bound to return the subject of the bailment (here, the sculpture) in the condition in which they received it: *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd.*, (2000) 1 W.W.R. 334.

[48] There is no evidence before the Court to dislodge the presumption that the damage to Frank was due to negligence on the part of the City. At the very least, the

City owes a duty of care to protect the sculpture as it would its own property and return it to Mr. Hermesh in its original condition.

[49] Mr. Hermesh led evidence about security measures the City could have taken to protect his sculpture. He had offered to contribute to the cost of installing a "web cam" which would have afforded the dual benefits of providing publicity for the City (and Mr. Hermesh) and deterring vandals.

[50] Pursuant to the laws of bailment, the City would be liable for damages amounting to the cost of repairs for Frank. However, the terms of a bailment relationship can be modified by agreement in contract between the parties.

THE CONTRACTUAL RELATIONSHIP

[51] In the case at bar, there is a contract between the parties. It does not, however, exempt the City from liability.

[52] The contract between the two parties is formed from the Call for Proposals and the bid submission. Essentially, the Call for Proposals is an offer, and the bid submission is the acceptance of that offer. Thereafter, the parties can go on to amend or expand the terms, by agreement. In this case, Mr. Hermesh submitted a contract that basically restated the call for proposal terms, added his copyright rights, (which he would retain in any event), and specifically addressed responsibility for protecting the sculpture. Mr. Hermesh's contract states: "The Artist (Mr. Hermesh) is not responsible or liable for any damages caused by persistent malicious vandalism."

[53] The City never responded to Mr. Hermesh's contract proposal, and accordingly the parties are only bound by the Call for Proposals as a contract, (and bailment and copyright law). The contract they have is silent as to liability. The City clearly had the opportunity to negotiate with Mr. Hermesh and contract out of liability. If the City was not aware of its obligations previously, it ought to have been alerted to its potential liability when Mr. Hermesh proposed the contract exempting himself from liability.

DAMAGES

[54] As there has been no assignment of risk by the parties, liability for damages will be governed by the rules of bailment, and consequently the City is liable for the repairs to Frank, in the sum of \$8,380 being the sum of the Conservator's fees of \$7,980 and Mr. Hermesh's fees to resculpt parts of the sculpture in the amount of \$400. In addition, Mr. Hermesh is entitled to the costs of transporting Frank to the Conservator's studio on Bowen Island. Those amount to \$1,756. Frank was transported in 2 stages, and I am satisfied these are reasonable transportation costs for Mr. Hermesh and the sculpture.

[55] Mr. Hermesh is also entitled to recover the shipping crate costs of \$250. This crate was required to transport Frank over a long distance. Mr. Hermesh would not have to incur this cost if he were transporting Frank locally.

THE ARTIST'S FEES

[56] The City is liable for the second instalment of artist's fees amounting to \$1,500.

[57] The City had not protected the sculpture as it was required to do, and as a result, the piece was unsteady, unsafe, a hazard and in need of restoration. If it were left outside in its damaged condition, water would have penetrated the eroded epoxy finish,

and caused further damage to the sculpture. Mr. Hermesh had no choice but to remove Frank. The City cannot then refuse to pay the second artist's fee instalment.

COPYRIGHT ISSUES

[58] Pursuant to the *Copyright Act*, R.S.C. 1985, c. C-42. (the "Act"), a person who creates an original work owns "moral rights" in that work. Moral right is distinct from copyright. Moral right is the right to prevent use or treatment of the work in a way that could prejudice the honour or reputation of the author. The relevant sections of the Act are as follows:

s. 14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

s. 28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

s. 28.2 (1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

(3) For the purposes of this section,

(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(b) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

[59] Mr. Hermesh is claiming for damages for breaches of his moral rights pursuant to the *Copyright Act*.

RIGHT OF PATERNITY – ASSOCIATING THE ARTIST WITH THE WORK

[60] Mr. Hermesh claims that the City violated s. 14.1 and section 28.1 of the *Act* by failing to associate his name with his sculpture. Specifically, the City failed to contribute signage identifying Mr. Hermesh as the artist. There is a contractual issue here as well, as the Call for Proposals, which formed the offer in the contract, stated that the City "will oversee the production and distribution of signage..." Mr. Collins wrote to the City on January 13, 2005, regarding Frank and the budget, and stated that other expenses to come in future included the creation of an outdoor sign. The City argues that it never promised a sign on the outdoor art.

[61] There is no doubt that the City failed to properly identify the artist. This became a major issue given the widespread publicity afforded to the sculpture. The piece was frequently photographed, and the artist was often identified in the accompanying article. However, the publicity would have been more effective if the artist had his name visible near the sculpture.

THE ARTIST'S RIGHT TO INTEGRITY OF A WORK

[62] At one point, Mr. Collins taped a newspaper to the hand of Frank, and allowed the Penticton Herald to photograph and publish it. Mr. Hermesh submitted a copy of the newspaper photograph, dated January 14, 2005, as part of his volumes of exhibits.

[63] I am astonished that both the newspaper and Mr. Collins proceeded, according to Mr. Hermesh, without Mr. Hermesh's consent. Mr. Hermesh testified that after the

photograph was published, he was contacted by the paper for his consent. He gave his consent after the fact. This was a breach of his copyright until he gave his consent. He did not pursue damages for this, nor do I assign any.

[64] The City of Penticton entered into a challenge with the City of Kamloops, sponsored by I.C.B.C. The City of Penticton promised to provide Kamloops, if Penticton lost the challenge, with a "replica statue of 'Frank the Baggage Handler'". The challenge was to have fewer motor vehicle accidents. The web page reported that if Penticton lost the challenge, it would supply Kamloops with "its own smaller version of Frank from Penticton—anatomically correct and intact." This was publicized by the media and by the I.C.B.C. website for some time.

[65] Mr. Hermesh objected, quite rightly. The City owned no replica to give away. Nor could the City copy the sculpture. The City did not continue and did not violate Mr. Hermesh's copyright to Frank, by reproducing the sculpture or giving away the maquette. The mention of this on the website does not, in my view, constitute a violation of Mr. Hermesh's copyright. His claim for a "licensing fee" from the City is dismissed.

DAMAGE BY THE CITY EMPLOYEES IN REPAIR

[66] The City employees tried to repair damage to Frank on their own, and without notification to Mr. Hermesh and without his consent. Mr. Hermesh theorizes that this caused more damage to the sculpture. These actions were a violation of his right of integrity according to s. 18.2(2) of the *Act*. However, the steps taken by employees were apparently made in good faith to restore the work, and so their actions might be

saved by s. 28.2(3) of the *Act*. In any event, I have already found that the City is liable to pay for the restoration of Frank, and accordingly any damages caused by City employees are compensable pursuant to the agreement between the parties.

THE SUITCASES – THE ARTIST'S RIGHT TO INTEGRITY

[67] The suitcases affixed to heavy stands were left at the roundabout by Mr. Hermesh. He had specially designed lifters to move these heavy items, and the lifters were left with the Gallery. Due to the breakdown in communication between Mr. Hermesh and Mr. Collins, Mr. Hermesh was prevented, by the City, from retrieving the lifters. The suitcases and stands were moved in front of the Gallery, and then were piled up, haphazardly, until Mr. Hermesh was permitted to retrieve his lifters about 6 weeks later, and then remove the suitcases and stands. Mr. Hermesh claims the curator failed to protect these parts of his art, and allowed them to be piled up, suffering some further more minor vandalism. The City should have properly stored these parts of his exhibition, or allowed Mr. Hermesh access to the lifters so he could safely remove the suitcases. However, I do not have any estimate of cost to repair these parts of his sculpture. I do not think any such estimate would be available, as this part of his sculpture was specifically designed to erode. Allowing this part of his art to be piled up as if it were trash is likely a copyright violation: such repositioning would modify the work to the prejudice of Mr. Hermesh's honour or reputation, contrary to s. 28.2 (1) of the *Copyright Act*.

DEFAMATORY STATEMENTS BY THE CITY

[68] Mr. Hermesh also argues that the City is remiss in that numerous critical quotes from both City Officials and from Mr. Collins were published. I advised Mr. Hermesh, at

trial, that the City could not control the media, nor can I assume the quotes given by the City Officials and by Mr. Collins were accurate just based on reviewing newspaper articles. Mr. Hermesh then pointed out that the curator had a duty to take steps to correct inaccurate information that was published, and to be supportive of Mr. Hermesh's actions such as removing Frank, instead of publicly criticizing Mr. Hermesh. I do not see how Mr. Hermesh's allegations fall into any head of damages other than defamation. This Court does not have jurisdiction in defamation, slander or libel.

[69] Mr. Hermesh raised, in his testimony, a number of other issues, alleging copyright violations. These do not raise copyright issues, in my view, and I will not summarize all these arguments of Mr. Hermesh.

DAMAGES FOR BREACH OF COPYRIGHT

[70] Damages are inherently difficult to assess, in particular for this case. There has been no evidence in law or of industry custom adduced by Mr. Hermesh to support the claim that the missed opportunity due to the lack of attribution of his name to Frank resulted in losses of thousands of dollars.

[71] The *Copyright Act* refers to damages in section 35 (1):

35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

[72] When it is difficult to prove actual damage the Court, doing the best with what it has, should assess damages with the broad objective to reach an equitable result. This

may be a matter of estimation: *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1994) 57 CPR (3d) 129.

[73] Mathematical exactitude is not required and damages may be calculated in a "rough and ready manner", particularly if it is necessary to do so as a result of omissions on the part of the defendants (*Cadbury Schweppes Inc. v. FBI Foods Ltd.* (1999), 83 C.P.R. (3d) 289).

[74] In *Parker v. Key Porter Books Ltd.* (2005), 40 C.P.R. (4th) 80, the plaintiff was awarded \$5,000 as one of the heads of damage. The defendant had published photographs of her work, without her permission and without giving her credit as the artist. The court found the plaintiff lost opportunity to promote her work, and to enhance her reputation.

[75] In *British Columbia Automobile Association v. O.P.E.I.U., Local 378* (2001) BCSC 156, the plaintiff's website was found to be an artistic work, and copied by the defendant. There was no evidence of injury to the plaintiff's reputation, and no evidence of loss of business of the plaintiff. In this case, Sigurdson, J. wrote, "An owner of a copyright does not need to prove damages to be able to enforce its right." The plaintiff was entitled to nominal damages of \$2,500 for damages for both passing off and breach of copyright, where the plaintiff was unable to prove, and the circumstances do not suggest, that there has been substantial damage.

[76] In this case, there is no evidence of loss of business for Mr. Hermesh as a result of the copyright breaches. He is entitled to nominal damages, and following *B.C.C.A. v. O.P.E.I.U.* (supra) those damages are set at \$2,500.

PUNITIVE DAMAGES

[77] Punitive damages are rarely awarded in a claim for breach of contract, one of the issues in this case.

[78] Punitive damages are not compensatory, they are in the nature of a fine, to deter the defendant. The defendant's conduct should, therefore, be extreme, and worthy of condemnation.

[79] The defendant's conduct must be malicious, oppressive, high-handed, and offend the Court's sense of decency: *O'Neill v. McDougall*, (2006) BSCS 180.

[80] I cannot characterize the defendant's behaviour in those terms.

[81] One of the major problems in this situation was that neither Mr. Collins, nor the City, were properly informed as to Mr. Hermesh's basic copyright rights regarding Frank. The City failed to give consideration to protecting the sculpture. Mr. Collins may have given the media erroneous information, and may have said unflattering things about Mr. Hermesh.

[82] However, these omissions and acts do not attract the penalty of punitive damages. Accordingly, I dismiss Mr. Hermesh's claim for punitive damages.

CALCULATION OF THE JUDGMENT

[83] In summary, Mr. Hermesh is entitled to damages as follows:

- \$8,380 for repairs to the sculpture;
- \$1,756 for transportation costs;
- \$250 for shipping crate costs;

- \$1,500 for the artist's fee;
- \$2,500 for copyright breaches.

[84] These damages total \$14,386.

[85] Mr. Hermesh is entitled to court ordered interest on that sum from the date of filing his Notice of Claim, to this date. That amount will be calculated by the Court Registrar.

[86] Mr. Hermesh is entitled to have his maquette returned to him forthwith.

COSTS

[87] Mr. Hermesh has been largely successful in this claim. He will have his costs paid by the defendants. His costs are his filing and service fees, and any other reasonable charges or expenses that directly relate to the conduct of the proceeding.

[88] If the parties cannot agree on those costs, I direct that the matter be brought back before me, for determination as to costs. Either party can ask the Judicial Case Manager to reschedule this matter before me for a brief hearing on this issue.



The Honourable Judge J.P. Cartwright