

SUPREME COURT OF NOVA SCOTIA

Citation: *Trout Point Lodge Limited v. Automattic Inc.*, 2020 NSSC 212

Date: 20200731

Docket: HFX409679

Registry: Halifax

Between:

Trout Point Lodge Limited, Vaughan Perret, Charles Leary

Plaintiffs

v.

Automattic Inc., a Delaware Corporation

Defendant

Decision on Summary Judgment Motion

Judge: The Honourable Justice Darlene Jamieson

Heard: July 18, 2019, in Halifax, Nova Scotia

Written Submissions: August 26, 2019, September 4 and 9, 2019

**Decision on Additional
Affidavit Evidence:** October 25, 2019

**Date for Additional
Affidavit Evidence and
Submissions from Plaintiffs:** November 15, 2019

Counsel: Ms. Laura Veniot and Mr. Ben Hoskins, for the Plaintiffs
Ms. Nancy Rubin QC and Ms. Sarah Walsh, for the Defendant

By the Court:

Introduction

[1] This is a motion for summary judgment on the evidence pursuant to *Civil Procedure Rule 13.04* brought by Automattic, Inc. (“Automattic” and “the Defendant”) in relation to claims brought by Trout Point Lodge Limited, Vaughan Perret and Charles Leary (collectively “the Plaintiffs”).

[2] The Plaintiffs commenced this action on November 28, 2012. On August 30, 2017, the Plaintiffs filed a fourth Amended Notice of Action and Statement of Claim. The action brought by the Plaintiffs against the Defendant includes claims of defamation, promissory estoppel, copyright infringement, fraudulent misrepresentation, breach of agreement/contract and breach of duty of honesty in contractual dealings. Automattic seeks summary judgment in relation to all alleged claims except the claim in defamation.

[3] In Automattic’s Amended Motion of Motion filed June 25, 2019, it seeks summary judgment in relation to the Plaintiffs’ claims:

- that a binding contract existed between the Plaintiffs and the Defendant, including any contractual claim of bad faith, or breach of duty of honesty in contractual relations;
- of fraudulent misrepresentation on the part of the Defendant;
- that the Defendant is liable to the Plaintiffs for breach of the doctrine of promissory estoppel;
- of copyright infringement against the Defendant on the merits of this claim, or in the alternative, an Order granting summary judgment on the evidence with respect to the Plaintiffs’ claim for copyright infringement on the basis that it is barred by limitations;
- dismissing the Plaintiffs’ copyright infringement claim as a result of the Plaintiffs’ abuse of process.

Background

[4] Automattic is a Delaware Corporation based in San Francisco. It owns and operates a blog web-hosting service, *WordPress.com*, that hosts blog content on its

servers located in the United States. It provides a platform for others to create and post blog content.

[5] Trout Point Lodge Limited (“Trout Point”) is a Nova Scotia Corporation that, during the times in question, owned and operated Trout Point Lodge, a restaurant and resort near Yarmouth, Nova Scotia. Mr. Charles Leary and Mr. Vaughan Perret are the principals of the Corporation. The assets and the Lodge were sold on January 31, 2018. The company remains in existence and Mr. Leary and Mr. Perret are Trout Point’s managing partners. They currently work and reside in Europe.

[6] The Plaintiffs’ pleadings allege various entries and content on a blog at *www.Slabbed.wordpress.com* owned by Douglas Handshoe contained defamatory comments and included images in contravention of the Plaintiffs’ copyright. Mr. Handshoe’s blog was hosted on Automattic’s WordPress server until February 11 of 2012. Two images remained on a separate media server until April and December of 2012.

Litigation History with Mr. Handshoe

[7] The Plaintiffs’ litigation history with Mr. Handshoe is lengthy. They obtained default judgment against Mr. Handshoe on December 12, 2011. Damages were assessed by the Honourable Justice Hood in her decision at *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245. She also enjoined Mr. Handshoe from disseminating statements about the Plaintiffs and issued a mandatory injunction requiring Mr. Handshoe to remove the defamatory comments, statements and depictions. The resulting Order is dated February 2, 2012, and states:

... I order a permanent injunction to issue against the Defendant, Douglas K. Handshoe, restraining him from disseminating, posting on the Internet or publishing, in any manner whatsoever, directly or indirectly, any statements or comments about the Plaintiffs, Trout Point Lodge, Charles L. Leary and Vaughan J. Perret. This injunction shall include the publication, circulation and promotion on the blog named *Slabbed*, and any similar or other publications. For further particularity, the Defendant shall not publish or cause to be published or otherwise disseminate or distribute in any manner whatsoever, whether by way of the Internet or other medium, any statements or other communications which refer to the Plaintiffs by name, depiction or description.

I also order a mandatory injunction to issue against the above-named Defendant regarding continued publication in any manner whatsoever, whether by way of the Internet or other medium, any statements or other communications which refer to the Plaintiffs by name, depiction or description. All such material is hereby ordered to be immediately removed from publication.

[8] The decision, in a second proceeding against Mr. Handshoe, is found at *Trout Point Lodge Ltd. v. Handshoe*, 2014 NSSC 62. In that case, the Honourable Justice Coady found that Mr. Handshoe had continued to defame the Plaintiffs, notwithstanding the prior injunction, and awarded further damages for defamation and statutory, as well as punitive, damages for copyright infringement.

[9] On January 3, 2017, the Circuit Court of Hancock County, Mississippi, U.S.A. denied Mr. Handshoe's Motion to Strike the December 9, 2015, enrollment of the Nova Scotia judgment arising from Justice Coady's decision. Mr. Handshoe had previously challenged the enforcement of Justice Hood's decision, and both the District Court and on September 5, 2013, in the United States Court of Appeal, Fifth Circuit (729 F.3d 481 (5th Cir. 2013)) held that the defamation judgment invoked the *Speech Act* protections and refused to allow the judgment to be enforced.

Timeline of Communications between the Plaintiffs and Automattic and their Litigation History

[10] In May of 2011 Automattic received an email from Mr. Leary and Mr. Daniel Abel, Esq., advising it of an Unmasking Order issued by Justice Muise in the matter *Trout Point Lodge Limited v. Louisiana Media Company, LLC*, Yar. No. 328248, ordering Automattic to provide information to identify the anonymous blogger and certain anonymous commenters. After informing the affected user (Mr. Handshoe), Automattic provided the information to Mr. Leary.

[11] During the period of May 2011 to December 2012, Mr. Leary corresponded with an employee of Automattic, Ryan M., concerning the Unmasking Order, removal of the *Slabbed* blog content from Automattic's servers and alleged copyright infringement in relation to specific images. The entire sequence of email exchanges have been filed with the Court. There were no other interactions between the parties. The email exchanges represent the entirety of the evidence as to what transpired between the parties.

[12] The Plaintiffs claim that the various email exchanges between Mr. Leary and Automattic formed a binding contract whereby Automattic agreed to remove the disputed blog from its service. They further claim Automattic has breached this alleged contract.

[13] The Plaintiffs also advance claims for breach of a duty of honesty in contractual relations and bad faith, as well as promissory estoppel and an

alternative claim in tort of fraudulent misrepresentation. They further claim Automattic has “breached the Plaintiffs’ copyright protection.”

[14] In addition to the lengthy litigation history with Mr. Handshoe, described above, this matter has also had a lengthy history. The Notice of Action and Statement of Claim in this matter was issued on November 28, 2012, against two defendants, Automattic and Douglas K. Handshoe. Contemporaneous with the present action, the Plaintiffs commenced an Application in Court against Mr. Handshoe, filed on January 23, 2013, which resulted in the reported decision *Trout Point Lodge Ltd. v. Handshoe*, 2014 NSSC 62, as noted above.

[15] The pleadings in the present matter have been amended a number of times. On February 17, 2016, the Plaintiffs brought a Motion for leave to amend their pleadings for a third time to add various allegations relating to claims of promissory estoppel, copyright infringement, breach of honesty in contractual dealings and fraudulent misrepresentation and to add Ryan M., an employee of Automattic, as a party. The Honourable Justice Lynch granted the Motion. On appeal, the Order adding Ryan M. was set aside (*Automattic, Inc. v. Trout Point Lodge, Ltd.*, 2017 NSCA 52).

[16] There was a Fourth Amended Statement of Claim filed on August 30, 2017, which is the current pleading. Automattic filed an Amended Notice and Statement of Defence in response on October 18, 2018, and, by consent, a further Amended Notice and Statement of Defence on April 10, 2019.

[17] On November 15, 2017, the Plaintiffs brought a Motion to strike various paragraphs of the Defendant’s Defence and requesting an anti-suit injunction enjoining the Defendant from continuing with a Demand for Arbitration. By Order dated December 7, 2017, the Honourable Justice Wright granted the Motion, in part, finding that Nova Scotia’s jurisdiction was not ousted by the Terms of Service referenced in the Notice of Defence and also directing the Defendant to withdraw its Demand for Arbitration.

Evidence on the Motion

[18] In support of the Motion for Summary Judgment, Automattic filed two affidavits of Jenny Zhu, Policy and Legal Manager for Automattic, sworn on December 28, 2018, and March 17, 2019; an affidavit of Holly Hogan, Associate General Counsel for Automattic, previously filed in this matter and sworn on July 18, 2017; and two Solicitors’ Affidavits of Sarah Walsh, sworn on January 3, 2019, and June 25, 2019.

[19] In response to the Summary Judgment Motion, the Plaintiffs filed three affidavits of Vaughan Perret, a principal of Trout Point, one sworn on March 7, 2019, and two sworn on July 5, 2019, and also two affidavits of Charles Leary, Managing Director, Officer, Director and Shareholder of Trout Point, previously filed in this matter, and sworn on July 20, 2017, and September 18, 2017.

[20] During the hearing of this Motion for Summary Judgment, Automattic sought to adduce additional evidence in the form of a supplemental affidavit of Jenny Zhu. Further written submissions were filed by the parties and, by decision of October 25, 2019 (*Trout Point Lodge Ltd. v. Automattic Inc.*, 2019 NSSC 317), leave was granted to Automattic to file the supplemental affidavit of Ms. Zhu, sworn on August 8, 2019.

[21] There was no cross-examination on the affidavits.

Issues:

[22] The following issues are to be determined by this Court:

- (1) Should summary judgment be granted, and the Plaintiffs' claims against Automattic be dismissed in relation to:
 - (a) the claim of contract and the claims of breach of a duty of honesty in contractual relations, bad faith and breach of the doctrine of promissory estoppel;
 - (b) the alternative claim of fraudulent misrepresentation.
- (2) Should summary judgment be granted, and the Plaintiffs' claims against Automattic be dismissed in relation to the claim of copyright infringement?
 - (a) Is Automattic an Internet Service Provider and pursuant to the provisions of the Canadian and U.S. copyright legislation, thereby, immune for any copyright infringement by the blog creator ?
 - (b) Should the Plaintiff's copyright infringement claims against Automattic be dismissed because the applicable limitation periods have expired?
 - (c) Should the claims of copyright infringement be dismissed as an abuse of process?

Positions of the Parties

[23] Automattic claims that summary judgment should be granted in relation to all claims except the claim in defamation. They say that there are no material facts in dispute. They say none of the elements are present that are necessary to form a contract. They further assert that the Plaintiffs' ancillary contractual arguments of breach of duty of honesty in contractual relations and bad faith must fail, as no contract existed between the parties. They further argue promissory estoppel does not create a cause of action and, as an equitable defence, fails along with the failure to form a contract. In relation to the claim of fraudulent misrepresentation, Automattic argues it must fail, as there was no factual misstatement.

[24] With regard to the claim of copyright infringement, Automattic submits that whether United States or Canadian copyright law applies, that on the facts in this matter, the Plaintiffs claim of copyright infringement fails and the Court need not make a determination as to choice of law. Automattic asserts, as a host, it has immunity for copyright infringement by blog creators in both Canada and the United States. Automattic further states that the copyright infringement claims are out of time and statute-barred pursuant to both the statutory regimes in Canada and the U.S. and that the claim is an abuse of process for re-litigation.

[25] The Plaintiffs take the position that the email exchanges between the parties formed a binding contract. In relation to the claim of fraudulent misrepresentation, they say Ryan M., on behalf of Automattic, fed lies and half truths to the Plaintiffs, inducing them to refrain from taking legal action against Automattic. The Plaintiffs say that their claim of breach of duty of honesty in contractual dealings/bad faith is ill suited to summary judgment and say that Automattic accepted money from Mr. Handshoe in order to assist him in avoiding compliance with the Nova Scotia Court Order and injunction issued by Justice Hood. They say Automattic aided and abetted Mr. Handshoe to flout the Order and these actions should constitute *prima facie* evidence of bad faith.

[26] The Plaintiffs say they have alleged promissory estoppel as an alternative claim. They say the parties were in a legal relationship when the Plaintiffs threatened to sue Automattic and Automattic assured the Plaintiffs if they obtained a Court Order they would remove the blog. They say they relied on Automattic's representations to their detriment and, therefore, the claim of promissory estoppel has a real chance of success.

[27] They also say, whether Automattic's conduct is characterized as fraud, breach of contract, bad faith or breach of promissory estoppel, Automattic's unapologetic "disregard for Justice Hood's Order is not only actionable, but is also contemptible, and ought to be treated with the utmost seriousness by this honourable Court."

[28] In relation to the claim for copyright infringement, the Plaintiffs say there is no expert evidence before the Court speaking to American copyright law and how the provisions of the *Digital Millennium Copyright Act*, 17 USC 512 ("DMCA") have been treated by American courts. They say it would not be appropriate for this Court to make findings of fact with regard to American law without expert evidence and the opportunity for the Plaintiffs to adduce rebuttal expert evidence.

[29] The Plaintiffs say there are two instances of copyright infringement and they relate to a photo taken by Ashoka, the copyright of which was transferred to Mr. Leary in December, 2012 (Exhibit B to Mr. Perret's affidavit sworn on March 7, 2019) and the Trout Point photo (Exhibit C to Mr. Perret's affidavit). The Plaintiffs say that Justice Coady found Mr. Handshoe had infringed the Plaintiffs' copyright in *Trout Point Lodge Ltd. v. Handshoe*, 2014 NSSC 62, with respect to the exact two photos. The Plaintiffs say that Automattic authorized the use of the copyrighted photos. They say, by February 2012, Automattic was legally obligated to remove the blog as a result of Justice Hood's Order and did so in part. They say that Automattic knew Mr. Handshoe had been ordered by the Court to remove the entirety of the *Slabbed* blog from the Internet; nevertheless, it continued to host photos which were part of the blog and two of which were copyrighted. They say this amounts to a degree of control not ordinarily present in mere conduit situations and, therefore, Automattic authorized the use of the photos for the purposes of the Canadian *Copyright Act*, RSC, 1985 c C-42.

[30] The Plaintiffs take issue with Automattic's claim that it is an internet service provider pursuant to the legislation. They say that *WordPress* blogs contain advertisements and, therefore, are not content neutral. They say this is a material fact in issue. They further say that Automattic is not disengaged from content, as it is concerned with blog content. An example, they say, is Automattic's September 18, 2011, email to Mr. Handshoe advising that republishing content without permission of its copyright holder or continuing to publish material that results in *Digital Millennium Copyright Act* ("DMCA") notices, will result in permanent blog

suspension and that publishing such material is a direct violation of Automattic's Terms of Service.

[31] The Plaintiffs say that s. 31.1(1) of the Canadian *Copyright Act* does not apply here because Automattic engages with its material in a more substantial way than a true Internet service provider and here had actual knowledge of the blog.

[32] The Plaintiffs say the copyright infringement was discovered and also ceased in 2012. They say the three-year limitation period cannot possibly have expired because the second amended Notice of Action was filed on May 23, 2013, and, at a Motion before Justice Lynch, the Court found that the material facts underlying the copyright action had been pleaded as of that date. The Plaintiffs say the Court of Appeal agreed with Justice Lynch's decision.

[33] In relation to Automattic's position that the copyright infringement claim is an abuse of process because the Plaintiffs already hold a judgment against Mr. Handshoe for copyright infringement, the Plaintiffs say they have recovered nothing from Mr. Handshoe on that judgment. They further say the copyright infringement claim against Automattic does not violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. They say hearing the matters together would not have saved any resources as there are different considerations to be applied in each case. A finding of infringement against Mr. Handshoe would not necessarily have meant a finding of infringement on the part of Automattic, as Automattic has raised defences as a "host" that are not available to Mr. Handshoe. They further say they are not asking the Court to make a finding that is inconsistent with the decision against Mr. Handshoe and they further say finality is not a concern.

Analysis

The Applicable Law

[34] The purpose of summary judgment motions is to put an end to claims or defences that have no real prospect of success, as was stated by our Court of Appeal in *Burton Canada Co. v. Coady*, 2013 NSCA 95 (N.S.C.A.):

[22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. 'Summary' is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other

cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[Emphasis added]

[35] Where summary judgment is appropriate, the considerable costs of a trial of the claim or defence are saved, as are court resources. While dealing with a very different Ontario *Rule of Civil Procedure*, the Supreme Court of Canada said that summary judgment rules should be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. Justice Karakatsanis, for the unanimous Court, said in *Hryniak v. Mauldin*, 2014 SCC 7:

1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity . . .

. . .

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[Emphasis added]

[36] I am mindful of the above comments as I proceed to consider the arguments advanced in this matter.

[37] This Motion for Summary Judgment on evidence is brought pursuant to *Civil Procedure Rule 13.04*, which states:

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

- (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

13.04(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

13.04(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

13.04(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

13.04(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

13.04(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

- (a) determine a question of law, if there is no genuine issue of material fact for trial;
- (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[38] There is no dispute amongst the parties as to the analytical framework to be applied on motions for summary judgment on the evidence pursuant to *Rule 13.04*. The framework was set out in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, where Fichaud, J.A. stated:

[34] I interpret the amended Rule 13.04 to pose five sequential questions:

First Question: Does the challenged pleading disclose a ‘genuine issue of material fact’, either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42] or go to trial.

The analysis of this question follows *Burton*'s first step.

A “material fact” is one that would affect the result. A dispute about an incidental fact - *i.e.*, one that would not affect the outcome - will not derail a summary

judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 (CanLII), para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

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

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind — whether material fact, law, or mixed fact and law.

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

Nothing in the amended Rule 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is no, then summary judgment issues to dismiss the ill-fated pleading.

Fourth Question: If the answer to #3 is yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42] or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates *issue estoppel*, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate *issue estoppel*; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] "**Discretion**": The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option *whether or not to determine the full merits* — i.e. the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss *Shannex's* summary judgment motion. The *Civil Procedure Rules* do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.

[36] "**Best foot forward**": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

...

[42] Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions. Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:

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

[39] Farrar, J.A. in *Baypoint Holdings Ltd. v. Royal Bank of Canada*, 2018 NSCA 17 distilled the above to the following five questions:

1. Does the challenged pleading disclose a "genuine issue of material fact, either pure or mixed with a question of law"?
2. Does the challenged proceeding require the determination of a question of law, either pure, or mixed with a question of fact?
3. Does the challenged pleading have a real chance of success?

4. Did the judge exercise the “discretion” to fully determine the issue of law?
5. If the motion under Rule 13.04 is dismissed, should the action be converted to an application, and if not, what direction should govern the conduct of the action? (paras. 34-42)

Genuine Issue of Material Fact

[40] What is a material fact? This question has been answered in various cases, including in *Burton, supra*, where Saunders, J.A., described material facts as “important factual matters that anchor the cause of action or defence.” Further, at para. 87(8), the Court defined “material fact” as a fact that is essential to the claim or defence and “genuine issue” as an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. In *Shannex, supra*, Fichaud, J.A., described a “material fact” as “one that would affect the result.”

[41] The moving party has the onus to show by evidence there is no genuine issue of material fact. Automattic says there are no material facts in issue.

[42] The Plaintiffs claim that the following material facts are in issue:

- (1) Whether or not Automattic continued to host the *Slabbed* blog after February 11, 2012. They say that this fact is material to all causes of action alleged against Automattic;
- (2) Whether Ryan M. (on behalf of Automattic) knew that his misrepresentations to the Plaintiffs were false, whether he had no belief they were true, or whether they were made recklessly. They say Ryan M.’s mindset and subjective intentions are relevant to fraudulent misrepresentation and bad faith in contractual dealings;
- (3) Whether Ryan M.’s misrepresentations were designed to induce action on the part of the Plaintiffs. They say this fact is material to fraudulent misrepresentation and bad faith in contractual dealings;
- (4) Whether Automattic’s role with respect to the blog was “only” to provide ‘the means of telecommunication’ for the purposes of s. 2.4 of the *Copyright Act*. They say this is relevant to the issue of copyright infringement; and
- (5) Whether Automattic’s role was to “solely” provide “digital memory” to Mr. Handshoe for the purposes of s. 31 of the *Copyright Act*. They say this is relevant to the issue of copyright infringement.

[43] As the Court said in *Shannex, supra*, on a motion for summary judgment each party is expected to put their best foot forward with evidence and legal submissions on all of the questions, including the “genuine issue of material fact”, issue of law, and “real chance of success”.

Issue Number One

[44] Should summary judgment be granted, and the Plaintiffs’ claims against Automattic be dismissed in relation to:

- (a) the claim of contract and the claims of breach of a duty of honesty in contractual relations, bad faith and breach of the doctrine of promissory estoppel;
- (b) the alternative claim of fraudulent representation.

Breach of Contract Claim

[45] The Plaintiffs claim an enforceable contract was entered into as a result of the exchange of email correspondence between Mr. Leary and a representative of Automattic, being Ryan M.

[46] The Plaintiffs outline their claims of breach of contract, bad faith, breach of duty of honesty in contractual dealings and fraudulent misrepresentation at paras. 9 through 36 of the Statement of Claim. They further outline their claim of copyright infringement in paras. 37 to 40 and paras. 109 to 120.

[47] The contact between the parties consists solely of email/written correspondence. There were no face-to-face meetings and no telephone calls. There was no personal interaction at all. There are no conflicting affidavits concerning the communications between the parties. There is no dispute that the complete evidentiary record is comprised of the email correspondence. I find that there is no genuine issue or dispute of material fact in relation to the contractual claim and answer question one of the *Shannex* test in the negative.

[48] Therefore, I move to question two of the *Shannex* test being whether a determination of a question of law is required. The answer is yes. The question of law is whether a contract was formed based on the email exchanges between the parties. Question three of the *Shannex* test asks whether the pleading has a real chance of success. Given the entire record of communication between the parties is in writing, a trial judge would not necessarily be in a better position than me to

determine whether the facts support a contract. I find that in relation to the claim of contract, the pleading has no real chance of success. In applying the law of contract to the undisputed facts, I find, for the reasons stated below, that the evidence does not support the Plaintiffs' allegation that a contract was formed between the parties. I have read the entire exchange of email/correspondence between the parties and can find no evidence the parties entered into a binding contract.

[49] Justice Saunders in *Coady v. Burton Canada Co.*, *supra*, discussed what is meant by a real chance of success:

44 The phrase "real chance" should be given its ordinary meaning — that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:

Is there a reasonable prospect for success on the undisputed facts?

the answer would be yes.

Does the claim for breach of contract have a real chance of success?

[50] In the prior Yarmouth proceeding against Louisiana Media Company, LLC, a motion was made by Trout Point Lodge for an order directing Automatic to provide information leading to the identity of anonymous posters on the *Slabbed* blog. Justice Muise's Order issued May 20, 2011, states as follows:

Automatic, Inc. is hereby ordered to provide any and all information leading to the true identity of the following *wordpress.com* users: Telemachus, Sop81_1, unSlabbed.

This is to include, but is not limited to, registration information, email addresses of the users, IP address information, and/or any communication between automatic and the users.

[51] The Order was amended on May 27, 2011, to add an additional *WordPress.com* user, "whitmergate". Justice Muise noted in his oral decision that Automatic had no part in what appeared in the blogs and that it only provided the service.

[52] On June 2, 2011, Mr. Leary of Trout Point wrote to Ryan M. at Automatic indicating he would send the Amended Order of Justice Muise concerning the unmasking and also stated "for publications that the court views as *prima facie* defamatory, beyond giving us identifying information will Automatic remove

them from publication? These include imputations of criminal activity as well as homophobic, anti-gay speech?”

[53] Ryan M. of Automattic responded on June 2, 2011, providing the information required by the Order and stating, in relation to the request to remove the publication: “Respectfully, we request a final judgment regarding this material and specific instructions from the Court utilizing explicit URLs requesting removal of the content. Alternatively, you can seek a U.S. Court Order for their removal.”

[54] The Plaintiffs state, at paras. 10 and 11 of the Fourth Amended Statement of Claim as follows:

10 On August 18, 2011, the Plaintiffs wrote to Ryan M., notifying him that the Defendant, Automattic, was a potential co-defendant in their action against Douglas Handshoe for hosting Handshoe’s defamatory blog for defamation and other causes of action, including intentional infliction of mental suffering.

11 On August 20, 2011, Ryan M., wrote to the Plaintiffs that, provided the Plaintiffs did not add Automattic Inc., as a Defendant in that proceeding, that Automattic would remove the *Handshoe* blog upon being provided with a Canadian court order finding the content of the *Handshoe* blog defamatory and an order requesting the blog be removed.

[55] The August 18, 2011, email appears in several places including Exhibit E, p. 72, of the affidavit of Ms. Zhu. The Plaintiffs claim this email constitutes an offer. I have reproduced the email content in its entirety below:

The person responsible for *Slabbed.wordpress.com* continues to make defamatory publications at that URL, including publications determined by the justice of the Nova Scotia Supreme Court to be **prima facie** defamatory.

A transcript of Justice Muise’s decision is attached.

We have also recently filed a Notice of Action and Statement of Claim against Doug Handshoe, the publisher of the blog “*Slabbed*”.

We have previously given you, Automattic Inc., notice that defamatory writings and homophobic hate speech are published at *Slabbed.wordpress.com*. Defamatory publications include imputations and accusations of criminal and unethical activity under malicious.

We are again asking that Automattic, Inc. remove the offensive material from publication. Failure to do so after notice from us may be sufficient for us to add Automattic as a defendant in the action against Mr. Handshoe.

We would be more than happy to provide a list of the offending posts.

[56] I note the email does not set out any causes of action other than a reference to defamation. The Plaintiffs then ask for removal of the “offensive material” and indicate failure to do so “may be sufficient” to add Automattic as a Defendant. This is not language of an offer proposing an agreement. It is a request to a third party to undertake something – the removal of material.

[57] The Plaintiffs state that an August 20, 2011, email from Ryan M. of Automattic, represents Automattic’s acceptance of the offer, with a condition. However, review of the August 20 email indicates Ryan M. is simply responding to the August 18 email. There is no offer and acceptance contained in these emails. There is an exchange of information. Ryan M. states what is required by Automattic: “You must provide a court order finding the content to be defamatory and specifically requesting its removal.” Ryan M. further advises that *WordPress.com* is an Internet Service Provider “protected by section 230(c) of the *U.S. Communications Decency Act* which states that Internet service providers are not held liable for content (such as allegedly defamatory, offensive, inaccurate, or harassing content...”

[58] The Plaintiff’s claim that in this August 20, 2011, email was an acceptance and also a condition, being the provision of a court order. They say the Plaintiffs accepted this counteroffer by forbearing to add Automattic as a party to the action, and taking steps to obtain the order required by Automattic.

[59] Contrary to the Statement of Claim, Ryan M. does not mention being added as a Defendant. Nowhere does he state, as the Plaintiffs allege, that provided the Plaintiff does not add Automattic Inc., as a Defendant in the proceeding, that Automattic would remove the *Handshoe* blog. Those words do not appear in the email. Automattic was simply explaining to the Plaintiffs what steps they had to take in order to request removal of the content from its servers. One would expect this is something Ryan M. would do on a regular basis in his position as a Terms of Service Enforcement Lead. In addition, he points out that, as an Internet Service Provider, Automattic is not liable for alleged defamatory content in blogs.

[60] On August 23 there is further correspondence between the parties concerning a motion for a Takedown Order. Then on August 25, 2011, Mr. Leary indicates the Takedown Order/injunction is being heard the following day and states:

Tomorrow, we are also going to be seeking to prevent the publisher of the *Slabbed* blog from future defamatory and harassing posts. To date, there are well over 30 posts and comments considered defamatory. Will you require a new order

each time new defamatory material appears, or is there language you would like to see in the order that would cover future publications?

[61] Ryan M. of Automattic responded the next day stating:

If the order requires us to remove the blog, we will do so after notifying the affected user.

[Emphasis added]

[62] Again, the words in these email exchanges are simply responses to inquiries being made of Automattic by Mr. Leary. He asks whether Automattic would require a new Order each time new defamatory material appeared and if there was language Automattic would like to see in the Order. There was no language of offer nor acceptance. In addition, Ryan M. clearly states, “If the order requires us to remove the blog”. The Order obtained by the Plaintiffs was not directed to Automattic.

[63] The alleged contract is based solely on written communications. The purely subjective intentions of the parties are not pertinent or relevant (Justice Fichaud, *Halifax Regional Municipality v. Canadian National Railway Co.*, 2014 NSCA 104.)

[64] In *Apotex Inc. v. Allergan*, 2016 FCA 155, Justice Stratas of the Federal Court of Appeal set out the four essential elements necessary in the formation of a contract. These are not controversial and are found throughout the case law.

-I-

21. First, the court must find on the evidence before it that, objectively viewed, the parties had a mutual intention to create legal relations.

22. The test is whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and in accepting it, intended to enter into legal relations...

-II-

25. Second, like all other agreements, a settlement agreement must satisfy the requirement that there be consideration flowing in return for a promise.

-III-

26. The court must also find, as an objective matter, that the terms of the agreement are sufficiently certain ...Where the parties ‘express themselves in such a fashion that their intentions cannot be defined by the court... the agreement will fall for lack of

certainty of terms’: John McCamus, *The Law of Contracts* (Toronto: IrwinLaw, 2005) at page 91. Another way of putting this is that the court must be satisfied that the parties were objectively *ad idem* or were objectively of a common mind.

-IV-

30. An agreement does not rise until there is matching offer and acceptance on all terms essential to the agreement: *Olivieri*, above at para 32...

[65] Justice Stratas stated, at para. 32, that in determining what terms are essential and what terms are not, “the court is to view the specific facts of the case objectively in light of the practical circumstances of the case and ask whether the parties intended to be legally bound by what was already agreed to or, in other words, whether an “honest, sensible business [person] when objectively considering the parties’ conduct would reasonably conclude that the parties intended to be bound or not” by the agreed-to terms: ...”.

[66] In the present case the emails, viewed objectively, do not indicate there was a mutual intention to create legal relations. A reasonable bystander observing the parties, through the emails exchanged, would not conclude they intended to enter into legal relations. Further, the language in the correspondence does not support the Plaintiffs’ position that there was consideration, being forbearance from adding Automattic to the action against Mr. Handshoe.

[67] The correspondence does not support the parties agreeing to the essential terms of the agreement alleged. The Plaintiffs allege the offer and acceptance are contained in the August 18 and 20 email exchange with Ryan M. The language in these emails does not contain language of an intention to be legally bound. The correspondence does not contain language of acceptance – a willingness to enter into a contract on the terms offered.

[68] The email correspondence is not sufficiently clear and certain to form a contract. There was no matching offer and acceptance on terms essential to an agreement. The correspondence does not support a finding of a meeting of the minds between the parties. The correspondence illustrates that Automattic simply responded to queries advanced by Mr. Leary. As indicated above, I have reviewed the entirety of email exchanges between Mr. Leary and Automattic and can find no language in the correspondence that can be said to evidence the elements required for finding that the parties entered into a contract.

[69] I find the Plaintiffs’ contractual claim does not have a real chance of success. The Plaintiffs have not shown on the undisputed facts that their claim of a

contract being formed has a real chance of success. Therefore, summary judgment is granted to Automattic in relation to the Plaintiff's claim of breach of contract. Without the necessary elements of a contract being present, there can be no breach of contract claim.

[70] The Plaintiffs say the actions of Automattic are contemptuous, claiming they violated Justice Hood's Order and aided and abetted Mr. Handshoe to violate the Order. In oral submissions, Ms. Veniot acknowledged that this is not a contempt of court motion, but said she felt it necessary to use the language of contemptuous actions on the part of Automattic because the Plaintiffs believe what happened was very serious and should be viewed as such. My role is to determine the issues placed before the court, being Automattic's motion for summary judgment. There is no contempt motion before the court and, therefore, I will not comment on whether Automattic's action or inaction could constitute contempt. However, I note the following with regard to the Plaintiffs' arguments.

[71] Automattic states it was never provided with a Court Order directing it to take any action in terms of removing the content, nor is it aware of any such order having been issued. As pointed out by Automattic, at paras. 61 and 62 of its brief, in relation to the Unmasking Order issued by Justice Muise, the Plaintiffs were specific in stating in their brief what they were seeking "The order is to be directed at a third party and not the Defendant" ... "The Plaintiff therefore asks this Honourable Court for an order instructing Automattic, Inc. to provide all documents or electronic information...". The Unmasking Order was directed to Automattic and the requested information provided by Automattic. However, no such Order was issued to Automattic requiring it to remove the *Slabbed* blog nor any of its content.

[72] The Order requested by the Plaintiffs and issued by Justice Hood on February 7, 2012, is directed at Mr. Handshoe – not Automattic. The wording of the Order states that a permanent injunction is to issue against Mr. Handshoe and directs that the Defendant shall not publish or cause to be published ... and orders a mandatory injunction against the Defendant. Automattic is not mentioned.

[73] The Plaintiffs directed me to the Supreme Court of Canada decision in *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 SCR 824, in support of their position that a non-party such as Automattic is bound by an injunction such as that issued by Justice Hood. The Supreme Court was commenting on the fact that non-parties can be the subject of injunctions; they need not be directed solely at parties to an action. In that case the non-party, Google, had been made the subject of an interlocutory injunction to enjoin Google from displaying any part of the datalink

websites on any of its search results worldwide (para. 17). The Court stated at para. 28:

Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this court said in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2SCR 1048 (S.C.C.) injunctions may be issued 'in all cases in which it appears to the court to be just a convenient that the order should be made ... on terms and conditions the court thinks just'... *MacMillan Bloedel* involved a logging company seeking to restrain protesters from blocking roads. The company obtained an interlocutory injunction prohibiting not only specifically named individuals, but also 'John Doe, Jane Doe and persons unknown' and 'all persons having notice of the order' from engaging in conduct which interfered with its operations at specific locations ...

[74] This is not the case here. There was no court injunction issued that required Automattic to remove content from the blog it was hosting on its servers. The Plaintiffs' arguments in this regard add nothing to its defence of this Summary Judgment Motion.

[75] In addition, on January 31, 2012, Mr. Handshoe (prior to Automattic's receipt of the Order of Justice Hood) advised Automattic that he would be contesting any further Canadian court orders under the:

US SPEECH Act which prohibits enforcement of foreign libel and defamation judgements and that I intend to fully protect and assert all my due process rights under the law in the US District Court. Along those lines I request that Automattic inform me immediately should any foreign court order be served on it regarding Slabbed so that neither I nor my commenters and readers are deprived of our 1st Amendment rights via deprivation of due process. Please also be advised that I'm in the process of changing web hosts for my self hosted site *Slabbed.Org* and intend to be on the new site within seven days when the domain is transferred.

[76] It was one week later on February 7, 2012, that Automattic provided Mr. Handshoe with a copy of Justice Hood's Order. On the same day Mr. Handshoe responded that he intended to file an action under the *Speech Act* the next day in the U.S. District Court for the Southern District of Mississippi seeking to have it rendered unenforceable in the U.S., as repugnant to the U.S. Constitution. On February 8, 2012, Mr. Handshoe advised Automattic that he had consulted with his lawyer who pointed out that the court order was not directed at WordPress but was directed at Mr. Handshoe personally. He again repeated he would be filing an action under the *Speech Act* and confirmed he was in the process of moving *Slabbed.org* to a new host.

[77] On February 9, 2012, Mr. Handshoe advised Automattic that he had filed a speech action in the U.S. District Court on February 8, 2012. A copy of the action dated February 8, 2012, was sent to Automattic on February 10, 2012. It claims that the Canadian lawsuit is repugnant to the Constitution and laws of the United States and Mississippi including (para. 21) because the defamation law applied by the Canadian court did not provide as much protection for freedom of speech as the First Amendment to the United States Constitution would provide. It further states at para. 22, if the law of the United States and of Mississippi had been applied in the Canadian defamation lawsuit, Handshoe and Jane Doe would not have been found liable. Ultimately the U.S. Court of Appeals (Fifth Circuit) determined Justice Hood's decision and Order were not enforceable.

[78] Again, in the circumstances set out above, I find that the Plaintiffs' arguments claiming violations of Justice Hood's Order add nothing to their defence of this summary judgment motion.

The Plaintiff's Claim of Bad Faith and Breach of Honesty in Contractual Dealings

[79] The Plaintiffs argue this claim arises because they say Automattic accepted money from Mr. Handshoe in order to assist him to avoid compliance with the Court Order and injunction issued by Justice Hood. This is in reference to Mr. Handshoe purchasing a guided transfer package from Automattic to transition his *Slabbed* blog from Automattic's *WordPress.com* to a new Internet host. They say there are facts in issue including the subjective intentions of Ryan M. and that Automattic admits to assisting Mr. Handshoe to flout Justice Hood's Order.

[80] On February 10, 2012, Automattic advised Mr. Handshoe that they would like to facilitate moving *Slabbed* content off WordPress. They indicate that once the transfer was done that they would clear all of the *Slabbed* information from the WordPress servers and requested that he not republish this information on their service. Mr. Handshoe responded the same date saying that he wished to have a guided transfer but that he understood Automattic was overwhelmed by demand asking if there was a way they could facilitate the transfer that he would happily pay. He indicated that once the transfer had taken place and all prior posts and related media were in *Slabbed.org* he had no objection to them removing the information from the servers. On that same day Automattic advised that tech support would be in touch, which they were, and by early morning on February 11 Automattic advised Mr. Handshoe that "You're all moved over."

[81] As all of the interactions between the parties took place by email correspondence, which is before the Court, I find that there is no genuine issue of material fact. There is a question of law: can there be bad faith/breach of honesty in contractual dealings when I have determined there was no contract formed and the claim of breach of contract has no real chance of success ?

[82] The Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, recognized a duty of honesty in contractual performance. However, it is predicated on there being a contract.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

...

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

...

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While ‘appropriate regard’ for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

...

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a

simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.

The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, 'Good Faith in Contractual Performance', at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, per Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

[Emphasis added]

[83] Given my finding that there is no real chance of success in relation to the Plaintiffs' claim in contract, there can be no finding of bad faith in contractual dealings or of breach of honesty in contractual dealings. During oral submissions, counsel for the Plaintiffs agreed that if the breach of contract claim was determined to have no real chance of success, then the bad faith in contractual dealings or breach of honesty in contractual dealings claims also would have no real chance of success.

[84] I conclude that without the possibility of a contract arising from the email exchanges, these claims do not have a real chance of success. Therefore, summary judgment is granted in relation to the claims of bad faith/breach of honesty in contractual dealings.

Fraudulent Misrepresentation

[85] The Plaintiffs submit that their claim of fraudulent misrepresentation is the clearest instance of tortious conduct on the part of the Defendant. They say Ryan M., on behalf of Automattic, "fed lies and half truths to the Plaintiffs, inducing them to refrain from taking legal action against Automattic when they otherwise would have done so." They submit there is a real chance of success in proving the tort of fraudulent misrepresentation.

[86] In the Plaintiffs Fourth Amended Statement of Claim, the claims of "breach of contract, bad faith, breach of duty of honesty and contractual dealings, fraudulent misrepresentation" are described together in paras. 9 through 40. The Plaintiffs do not specifically identify each of the above claims and describe, for example, the material facts on which they rely specific to fraudulent misrepresentation. I assume all of the material facts plead relate to each of the

claims including fraudulent misrepresentation. The pleading does not stipulate whether their claim is based in tort. However, as noted above, in the Plaintiff's brief they describe the claim of fraudulent misrepresentation as the "tort of fraudulent misrepresentation."

[87] The Plaintiffs say fraudulent misrepresentation occurred in at least two instances: when Ryan M. stated that Automattic would remove the *Slabbed* blog on receipt of a Court Order, and secondly, when Ryan M. stated that Automattic did in fact remove the *Slabbed* blog.

[88] The Plaintiffs submit that there are material facts in issue in relation to their fraudulent misrepresentation claim including:

- (c) Whether Ryan M. (on behalf of Automattic) knew that his misrepresentations to the Plaintiffs were false, whether he had no belief they were true, or whether they were made recklessly.
- (d) Whether Ryan M.'s misrepresentations were designed to induce action on the part of the Plaintiffs.

[89] I am mindful that in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, our Court of Appeal cautioned that, in determining whether the evidence is sufficient to support the pleading, the motion judge must not draw inferences or weigh evidence:

23 The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.

24 The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.

25 This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:

[87] . . .

10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.

11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

[90] As indicated previously, the entirety of the communications between the parties consist of email communications which are before the Court. The emails are clear in what Ryan M. stated concerning the Plaintiffs' request that Automattic remove the *Slabbed* blog:

June 2, 2011 - Ryan M. wrote to Mr. Leary (Zhu affidavit at page 67):

Respectfully, we request a final judgment regarding this material and specific instructions from the court utilizing explicit URLs requesting removal of the content. Alternatively, you can seek a US court order for their removal."

August 20, 2011 - Ryan M. wrote to Mr. Leary (Zhu affidavit at page 105):

You must provide a court order finding the content to be defamatory and specifically requesting its removal. WordPress is an internet service provider. We are based in the US, as are all of our servers. As such we are protected by section 230(c) of the *US Communications Decency Act* which states that internet service providers are not held liable for content (such as allegedly defamatory, offensive, inaccurate, or harassing content) that is posted on the sites they host for their users.

August 26, 2011 - Ryan M. wrote to Mr. Leary (Zhu affidavit at page 109):

If the order requires us to remove the blog, we will do so after notifying the affected user.

September 7, 2011 - Ryan M. states (Zhu affidavit at page 115):

WordPress.com is in no position to arbitrate disputes or make judgment on such claims. As per [HTTP://en.support.wordpress.com/disputes](http://en.support.wordpress.com/disputes), please provide us with a Court Order including the court's decision regarding this particular content; if any content is found to be defamatory or illegal by a court of law, it will be removed immediately from our service. Any court order, should you obtain one, must be sent to the following email address ...".

[*Emphasis added*]

[91] On reading the entries together and in sequence, Automattic advised the Plaintiffs there must be a Court Order and it must be directed to Automattic.

[92] The emails are also clear as to what Automattic told the Plaintiffs concerning the exodus of the *Slabbed* blog and their response, expressing concern about the redirect:

February 8, 2012 - Ryan M. wrote to Mr. Leary (Zhu affidavit at page 145):

As the court order is not directed to word press.com directing us to remove the information but instead is directed to the authors, we respectfully will not enter into the disagreement and request that you resolve this dispute between yourselves and the blogger and/or his counsel. Under Section 230(c) of the *United States Communications Decency Act*, *WordPress.com* is not considered to be the author or publisher of the material in question and as an internet service provider cannot be held liable for such content.

You mention in a previous email the copyrighted materials have been posted to the blog; if you would like those taken down please file a *DMCA* request for them and we will respond to that accordingly by disabling the content.

February 10, 2012 - Ryan M. stated (Zhu affidavit at page 149):

We are currently negotiating with the owner of the blog to move the blog permanently away from our service. If you have any questions please let us know but we would request patience while we provide the user the courtesy of an orderly transition away from *WordPress.com*.

February 11, 2012 - Ryan M. stated at 2:46 PM (Zhu affidavit at page 151):

The *Slabbed* blog is no longer on *WordPress.com*. Thank you for your patience.

February 11, 2012 - Mr. Leary wrote to Ryan M. at 7:16 p.m. (Zhu affidavit at page 152):

You are redirecting to *Slabbed.org*, which contains all of the defamatory and harassing material, subject of the Court Order. Please discontinue the Automattic redirect, which is facilitating access to the material prohibited by the Order. This goes against the spirit of the Order as well as Automattic's assurances to the plaintiffs.

[*Emphasis added*]

[93] The elements necessary for a finding of fraudulent misrepresentation were referenced in *Gallagher Holdings Limited v. Unison Resources Inc.*, 2018 NSSC 251. At para. 393, Justice Moir quoted from the Court of Appeal decision in *Grant v. March*, (1995) 138 NSR(2d) 385, stating:

393 At para. 20 of *Grant*, Justice Saunders quotes from *Cheshire & Fifoot* (6th ed.) at p. 241, including: '... a fraudulent statement is a false statement which, when made, the representor did not honestly believe to be true.' Justice Saunders also provides at para. 21, DiCasteri's (3rd ed) list of elements applicable in a case of repudiation for fraud, which are similar to those later framed in *Bodzan* and *Amertek* for fraudulent misrepresentation:

- (1) the defendant made a false representation to the plaintiff;
- (2) the defendant

- a. knew the representation was false;
 - b. had no belief in the truth of the representation; or
 - c. was reckless as to the truth of the representation;
- (3) the defendant intended that the plaintiff should act in reliance on the representation;
- (4) the defendant (sic) did act on the representation; and
- (5) the plaintiff suffered loss by doing so.

[94] Both the Plaintiffs and Automattic point to the above list of elements of fraudulent misrepresentation. The elements of the tort of fraudulent misrepresentation are also found in the Ontario Court of Appeal decision in *Amertek Inc. v. Canadian Commercial Corp.*, (2005), 76 O.R. (3d) 241, at paragraph 63. where the Court set out the above list as well.

[95] As stated by Fridman in *The Law of Contract in Canada*, 6th ed, 2011 fraud has effects both at common law and in equity, and gives rise to remedies under the law of tort and the law of contract. This is not a case of fraudulent misrepresentation inducing a party to enter into a contract. The Plaintiffs claim that representations of Automattic meet the elements for the tort of fraudulent misrepresentation, also known as the tort of deceit.

[96] The entirety of the communications between the parties was in writing, as is evidenced by the email history. I find that there is no genuine issue of material fact in relation to the Plaintiff's claim for fraudulent misrepresentation.

[97] The next question to ask in the *Shannex* test is whether the challenged pleading requires a determination of a question of law, either pure or mixed with a question of fact; it does. The question of law to be determined is whether the communications between the parties amount to fraudulent misrepresentation. I now turn to the third question being: does the pleading have a real chance of success? I find the pleading in relation to fraudulent misrepresentation has no real chance of success for the following reasons.

Did Automattic make a false representation to the Plaintiffs? Did Automattic make a false representation knowing the representation was false; having no belief in the truth of the representation; or being reckless as to the truth of the representation?

[98] The Plaintiffs say fraudulent misrepresentation occurred in at least two instances: when Ryan M. stated that Automattic would remove the *Slabbed* blog on receipt of a court order, and secondly, when Ryan M. stated that Automattic did in fact remove the *Slabbed* blog.

[99] The email communications do not support Automattic having made a false representation to the Plaintiffs. Automattic provided information and responses, based on its procedures, to Mr. Leary, as requested. It is not necessary to consider whether Automattic knowingly made or was reckless as to the truth of the representation because on the evidence there was no false representation.

[100] I will first address what Automattic said in the correspondence with regard to removal of the *Slabbed* blog. Automattic advised Mr. Leary that he “must provide a court order finding the content to be defamatory and specifically requesting its removal” (August 20, 2011). It further advised: “If the order requires us to remove the blog, we will do so after notifying the affected user” (August 26, 2011). There is no false representation in these emails. No Court Order was ever issued directing Automattic to remove the content from the *Slabbed* blog.

[101] The Plaintiffs say that despite being advised that the blog had been removed, Automattic assisted Mr. Handshoe in moving the blog to another location on the Internet and also continued to host copyrighted images for 11 months. As noted above, Automattic advised they were negotiating with the owner to move the blog away from the service and that they were asking for patience while they provided the courtesy of an orderly transition. The blog was moved to a new host; however, there was a redirect put in place by *WordPress.com*. Automattic did not hide the fact that the blog was being moved and that they were providing an orderly transitioning of the blog. They specifically stated this in the emails to the Plaintiffs. Again, there was no false representation. In addition, the redirect was immediately known by the Plaintiffs as they wrote to Automattic on the same day, February 11, 2012, expressing concern over the redirect being in place and asked Automattic to discontinue the redirect. The Plaintiffs wrote again on February 16, 2012, expressing their dismay about the redirect:

You are re-directing to his url *Slabbed.org*, which contains libellous & threatening publications. Automattic also aided Handshoe in moving his blog to a new host in an organized fashion, including all defamatory publications.

I am writing to ask that you immediately cease all redirects to Handshoe’s current web site. We are already extremely unhappy with Automattic furtherance of his defamation despite our agreement. We do not want to have to carry this further in California courts.

[102] In short, Automattic told the Plaintiffs what it was doing, which was arranging an orderly transition of the blog. They then advised the blog was no longer on *WordPress.com*. Plaintiffs counsel, during oral submissions, conceded that this was technically correct. How can there be a fraudulent misrepresentation

when the statement Automattic made is “technically correct” and all of the communications between the parties were in writing? This technically correct statement does not amount to a false statement. Automattic did not hide the fact that the blog was being hosted elsewhere, as is evidenced by the Plaintiffs’ email taking issue with the re-direct to another host on the same day they learned the blog was no longer on *WordPress.com*.

[103] The Plaintiffs also say that Automattic misrepresented that the *Slabbed* blog had been removed because it continued to host two copyrighted images which they say constituted an important part of the *Slabbed* blog. They say that Ryan M.’s statement that “the *Slabbed* blog is no longer on *WordPress.com*” is a half truth and that he had hoped to satisfy the Plaintiffs so that they would refrain from adding Automattic as a Defendant to the Plaintiffs’ action against Mr. Handshoe.

[104] Ms. Zhu, Policy and Legal Manager of Automattic, stated in her affidavit, sworn on March 17, 2019, that although the written content was completely removed, images are stored and accessed differently than written content. In essence there was a media library on a separate server from the server for the blog site itself. She said that when the blog site was moved from *WordPress.com* to a new host server, all of the written words were moved over to the new host company, but because of the nature of the way files are stored, the images with no written blog content continued to reside in the media library after the redirect of the blog site.

[105] Further, in her affidavit sworn on August 8, 2019, she states:

During the material time in 2012, Automattic did not know of any decision of a court of competent jurisdiction to the effect that the person who stored the work (Handshoe) infringed copyright by making the Ashoka Photo and the Trout Point Photo available.

Automattic did not have actual knowledge that the Trout Point Photo or the Ashoka Photo at their specified URLs infringed the claimant’s copyrights, nor was Automattic aware of facts or circumstances from which infringing activity was apparent. Upon receiving notice in the form of the *DMCA* complaints, Automattic expeditiously removed the material at the originating media file location within one day.

[106] Ms. Zhu also stated in her affidavit, sworn on March 17, 2019:

A blog owner can upload images, videos, and audio files to a ‘media library’. Once the image, video, or audio file is in the media library, the user can decide

whether to insert the item into the blog site itself. So, for example, a user can upload a variety of images to the media library, then type a post to the blog, and then insert images from the media library into the blog post. The original image files themselves still reside in the media library but are visible on the blog post.

[107] This evidence is not disputed.

[108] The evidence indicates the Plaintiffs were aware of the *DMCA* takedown notice procedure for alleged copyright infringement by at least September 2011 when Automattic directed Mr. Leary to submit a *DMCA* notice if he would like to report copyright infringement in relation to another photograph.

[109] There is no dispute concerning the fact that when *DMCA* notices were sent to Automattic by the Plaintiffs they immediately disabled the ability of Mr. Handshoe to access the photographs. The email correspondence between the parties indicates that, on April 4, 2012, Mr. Leary sent a *Digital Millennium Copyright Act* (“*DMCA*”) takedown notice to Automattic with respect to the Trout Point photo, over which the Plaintiffs claimed copyright. As required, this notice of copyright infringement was sent to Mr. Handshoe by Automattic. Automattic then, on April 5, 2012, disabled access to the image. On December 13, 2012, Mr. Leary submitted a further *DMCA* complaint for the Ashoka photo and did so again on December 15, 2012. On December 13, 2012, Automattic informed Mr. Leary that the takedown notice had been received and they had disabled access to the material identified in the complaint as infringing. Mr. Handshoe was provided with an opportunity to formally challenge the removal, which he did not. After receiving the further *DMCA* complaint on December 15, 2012, although the image had been removed, Automattic suspended what remained of the *Slabbed* blog.

[110] The blog was located on a new host as of February 11, 2012, while the media files, without any content, remained on a server dedicated to media images. For example, the blog site had a web address of *slabbed.wordpress.com* and the images which ended in “.*files.wordpress.com*”. Perhaps it would have been clearer if Automattic had said to the Plaintiffs that it stored photographs/images on a separate server from the blog content and that, while the *Slabbed* blog was no longer on *WordPress.com*, images were still stored on a server.

[111] Failing to advise that the media images did not move with the blog content does not equate to a fraudulent misrepresentation. Based on the email exchanges between the parties, there is no clear evidence of a false representation. There was, at most, an oversight on the part of Automattic. The Plaintiffs may have

misunderstood the statements of Automattic but that does not make them false statements. In addition, the Plaintiffs immediately knew that the blog had not been completely removed from the Internet but was being redirected. They immediately knew the content of the blog was being hosted elsewhere on the Internet. In addition, when the Plaintiffs provided Automattic with *DMCA* takedown notices in relation to the two photographs over which the Plaintiffs claimed copyright, Automattic disabled the images expeditiously.

[112] There is no basis on the evidence to conclude that there was a fraudulent misrepresentation. As Justice Saunders said at para. 22 of *Grant, supra*, “Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.” Here there is no clear and convincing evidence of fraudulent misrepresentation. Therefore, there is no need for me to address any of the elements beyond the first element, being whether a false representation or statement was made by Automattic to the Plaintiffs. It is clear from email exchanges there was no false representation.

[113] In any event, there was clearly no reliance on the email statements of Automattic, as the Plaintiffs knew immediately that the *Slabbed* blog was being redirected to another host. The Plaintiffs say they refrained from suing Automattic based on Ryan M.’s representations. They say they amended their Statement of claim against Mr. Handshoe on September 1, 2011, but refrained from adding Automattic. There is no evidence the Plaintiffs acted on the statement and suffered loss. The statement that the blog was no longer on *WordPress.com* took place in February 2012, five months after the Plaintiffs had amended their Statement of Claim.

[114] In relation to the claim of fraudulent misrepresentation, I find that there is no genuine issue of material fact. There is a question of law being whether the written communications amount to fraudulent misrepresentation. On the third question from *Shannex*, being whether the pleading has a real chance of success, I find that it does not, as the communications do not support there being a false representation(s). Summary judgment is granted to the Defendant in relation to the Plaintiff’s claim of fraudulent misrepresentation.

Promissory Estoppel

[115] The Plaintiffs say their claim of promissory estoppel also arises from the alleged promise to remove the *Slabbed* blog from Automattic’s service upon receipt of a Canadian Court Order declaring the content of the blog defamatory (para. 14 of the Plaintiff’s Fourth Amended Statement of Claim). The Plaintiffs say

in their brief that the allegation of promissory estoppel is an alternative to their main causes of action, being fraudulent misrepresentation and breach of contract. They say the parties were in a legal relationship when the Plaintiffs threatened to sue Automattic. They further say that Automattic then assured the Plaintiffs, through emails dated June 2, 2011, and August 20, 2011, that if the Plaintiffs could obtain a court order requiring the *Slabbed* blog's removal, Automattic would remove the blog. The Plaintiffs say they relied on Automattic's representations to their detriment.

[116] At para. 19 of the Fourth Amended Statement of Claim the plaintiff set out their claim for promissory estoppel as follows:

In the alternative, the Plaintiffs state that the Defendant promised to remove the *Slabbed* Blog from their service upon receipt of a Canadian Court Order declaring the content of the blog defamatory and ordering injunctive relief requiring the blog be removed. Relying on the Defendant's promise, the Plaintiffs obtained a Canadian Court Order declaring the content of the *Slabbed* Blog defamatory and ordering the requisite injunctive relief. The Plaintiffs state that the Defendant failed to remove the blog as promised and are liable to the Plaintiffs for breach of the doctrine of promissory estoppel.

[117] I have before me the complete written record of communications between the parties. There were no other interactions between the parties. There is no genuine issue of material fact. There is a question of law to be determined: do the written communications between the parties constitute promissory estoppel? Question number three from the *Shannex* test is: Does the pleading in relation to promissory estoppel have real chance of success? The first part of this question is: Given that I have determined the pleadings in relation to the claims in contract have no real chance of success, in the circumstances of this matter, does the claim for promissory estoppel stand alone?

[118] The requirements for promissory estoppel were established by the Supreme Court of Canada in *Maracle v. Travelers Indemnity Co. of Canada*, [1994] 2 SCR 50, at para. 13:

13 The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354, Ritchie J. stated [at p. 615, S.C.R.]:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course

of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, 51 B.C.L.R. 273, 49 C.B.R. (N.S.) 257, 47 N.R. 379, 146 D.L.R. (3d) 577, at p. 647 [S.C.R.]. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[119] Therefore, the party relying on promissory estoppel must establish that the other party has: [1] by words or conduct, [2] made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that: [3] in reliance on the representation, [4] he acted on it or in some way changed his position. [T]he promise must be unambiguous but could be inferred from circumstances. To find a promissory estoppel there must be an unambiguous promise or assurance given by one party to another.

[120] *In Adelaide Capital Corp. v. Offshore Leasing Inc.* (1996), 149 N.S.R. (2d) 281, [1996] N.S.J. No. 98 (N.S. C.A.), at para. 52, the Court set out the five essential features of promissory estoppel outlined by Fridman in *The Law of Contracts*, Third Edition, (pages 128 - 136), which are as follows:

- (1) There must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made ...
- (2) There must be a clear promise or representation made by the party against whom the estoppel is raised, establishing his intent to be bound by what he has said ...
- (3) There must have been reliance, by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised
- (4) The party to whom the representation was made must have acted upon it to his detriment ...
- (5) The promisee must have acted equitably

[*Emphasis added*]

[121] Justice Smith, in *Kahle v. Ritter*, 2002 CarswellBC 177, also highlighted the need for a legal relationship to exist. She stated at para. 37:

37 A promissory estoppel involves one party in a legal relationship making a representation to another party in that relationship which leads the other party to believe that the first party will not insist on his strict legal rights. The second party's reliance on that representation results in the second party altering his legal position on the strength of that promise. The party who made the representation is

then barred from going back on the promise so long as it is inequitable to do so: *Central London Property Trust Ltd. v. High Trees House Ltd.* (1946), [1947] K.B. 130 (Eng. K.B.). The promise must be a clear and unambiguous intention to affect the legal relationship between the parties and thus binding on the promisor: *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 (S.C.C.); *Conwest Exploration Co. v. Letain* (1963), [1964] S.C.R. 20 (S.C.C.). Should the promise be broken, the reliance must be detrimental to the person relying upon it: *Pentagon Construction (1969) Co. v. United States Fidelity & Guaranty Co.*, [1977] 4 W.W.R. 351 (B.C. C.A.); *John Burrows Ltd., supra*

[*Emphasis added*]

[122] One must approach the question of whether a promise was made from the perspective of what a reasonable party would understand from the conduct of the other: see, e.g. S.M. Waddams, *The Law of Contract*, 5th ed., (Canada Law Book Inc.: Toronto, 2005) at p. 103. In my view, a reasonable person in the circumstances of these parties would not understand that Automattic, by the words in Ryan M.'s emails, were in a legal relationship, nor that Automattic, by the words it used, made a clear promise to the Plaintiffs that on receipt of a Court Order, it would remove the blog completely from the Internet.

[123] The Plaintiffs' position is that the parties were in a legal relationship when the Plaintiffs threatened to sue Automattic. The language in the Plaintiffs' August 18, 2011, email saying, "We are again asking that Automattic remove the offensive material from the publication. Failure to do so after notice from us may be sufficient for us to add Automattic as a Defendant in the action against Mr. Handshoe" does not support the creation of a legal relationship with Automattic. In addition, the Automattic email of June 2, 2011, indicating, in response to questions from the Plaintiffs, that Automattic required a final judgment and specific instructions from the Court utilizing explicit URLs requesting removal of the content does not support there being a legal relationship. Further the August 20, 2011, email clearly indicates that Automattic required a Court Order finding the content to be defamatory and specifically requesting its removal which was also reiterated in Automattic's August 26, 2011, email which stated "if the order requires us to remove the blog, we will do so after notifying the affected user."

[124] The e-mails read together indicate Automattic advised that on receipt of a Court Order directed to them, they would, after advising Mr. Handshoe (presumably so that he could challenge the action if he wished), remove the content as directed by the court. The Plaintiffs must establish that Automattic has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The Plaintiffs have failed to establish such a promise was made. In addition, the emails between the parties do not

support the Plaintiffs claim that they represent there was a legal relationship existing between the parties.

[125] Having found the uncontested evidence does not support there being a legal relationship, nor a clear promise or representation by Automattic, it is not necessary to proceed to consideration of the remaining elements of promissory estoppel.

[126] In their written submissions the Plaintiffs state that promissory estoppel can be an independent cause of action. The Defendant, Automattic, in its written submission took issue with this position. During oral submissions Plaintiffs counsel stated that they were not relying on Promissory Estoppel as an independent cause of action. Regardless, there is no need for me to determine whether promissory estoppel can be used as a sword as well as a shield/whether it can create a cause of action. In the present case, there was no legal relationship between the parties and there were no words or conduct giving rise to a promise or assurance which was intended to affect the parties' legal relationship.

[127] In conclusion, in relation to the Plaintiffs claim of promissory estoppel, I find there was no legal relationship between the parties and no promise was made by Automattic with an intent to be bound. Therefore, the Plaintiffs' pleading has no real chance of success. Summary judgment is granted to Automattic in relation to the Plaintiffs' claim of promissory estoppel.

Issue Number two

- (2) Should summary judgment be granted, and the Plaintiffs' claims against Automattic be dismissed in relation to the claim of copyright infringement?
 - (a) Is Automattic an Internet Service Provider and pursuant to the provisions of the Canadian and U.S. copyright legislation, thereby, immune for any copyright infringement by the blog creator?
 - (b) Should the Plaintiff's copyright infringement claims against Automattic be dismissed because the applicable limitation periods have expired?
 - (c) Should the claims of copyright infringement be dismissed as an abuse of process?

CLAIM OF COPYRIGHT INFRINGEMENT

[128] The Plaintiff's copyright claims are set out at paras. 37 to 40 and 109 to 120 of the Fourth Amended Statement of Claim. The Plaintiffs Copyright claims relate to two photographs known as the Ashoka Foundation photograph (bearing Canadian Copyright Register registration number 1106083) and the Trout Point Lodge photograph (bearing registration number 1106084). The Ashoka photo is of Mr. Leary and Mr. Perret. The Trout Point Lodge Photo is of the Lodge itself. The Plaintiffs confirmed a photo by National Geographic is not in issue.

[129] The Plaintiff's plead the Canadian *Copyright Act*, RSC 1985, c 42 applies. Automattic, in it's Amended Statement of Defence dated April 10, 2019, pleads the substantive law of the United States applies.

The Defendant's Position

[130] Automattic says because it and its servers are located in the United States and the Plaintiffs are in Canada, the court must consider the test of which jurisdictions statute governs. Automattic argues in determining which jurisdictions' legislation applies, the Canadian case law requires a determination of whether or not a real and substantial connection exists. This depends on the facts and the weight to be given to any one factor and will vary in the circumstances. Automattic argues that the factors favour the U.S. as having the most real and substantial connection in the circumstances of this matter. However, Automattic also takes the position that the Plaintiff's breach of copyright claims are bound to fail under either the Canadian or the U. S. statutory regimes.

[131] Automattic takes the position that it is not necessary to enter into such a determination as Automattic is exempt from liability under either Canadian or U.S. legislation.

The Canadian Copyright Act

[132] Automattic argues that hosts and Internet Service Providers are exempt under the Canadian statutory regime pursuant to s. 2.4(1) by telecommunication and 31.1(1) network services and (4) hosting. They argue Automattic is an innocent disseminator protected under these provisions.

[133] Automattic says by virtue of its very nature, it is an Internet Service Provider and not the content creator and that it is exempt from liability with respect to copyright infringement in relation to the two images on the *slabbed* blog.

[134] Automattic points to the Supreme Court of Canada decision in *Society of composers, Authors and Music Publishers of Canada (SOCAN) v. Canadian Association of Internet Providers*, 2004 SCC 45 which says:

I conclude the Copyright act, as a matter of legislative policy established by Parliament does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet..."

[135] The Supreme Court in *SOCAN*, *supra* said the following regarding s 2.4(1)(b):

92 Section 2.4(1)(b) shields from liability the activities associated with providing the means for another to communicate by telecommunication. "The means", as the Board found, "... are not limited to routers and other hardware. They include all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur" (at p. 452). I agree. So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, *i.e.* whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within s. 2.4(1)(b). The appellants support this result on a general theory of "Don't shoot the messenger!".

[136] Automattic claims the exemptions in ss. 2.4(1)(b) and also in 31.1 are a final answer to the Plaintiff's claim. They say as an Internet Service Provider it is exempt under the sections, that the rights and remedies under the Act are exhaustive and that the Plaintiffs have no real chance of success.

The U.S. Digital Millennium Copyright Act

[137] Automattic says the Plaintiffs copyright claims are similarly unsustainable if the law of the United States applies. In relation to the *Digital Millennium Copyright Act (DMCA)*, Automattic states that it is a service provider under the *DMCA* and service providers are not liable for transmitting information that might infringe a person's copyright. However, the *DMCA* provides that if an Internet Service Provider is given proper notice it must take down the infringing materials.

[138] Automattic states that under the *DMCA* it must remove or disable the infringing material or it loses its safe harbour. It argues that it did so and that it acted expeditiously in accordance with s. 512 of the Act.

[139] They further say that even if the court were to decide they were not an innocent intermediary under Canadian and U.S. copyright law, the Plaintiffs' claims still fail because Automattic took expeditious steps to remove the copyright material on receipt of the notices from the Plaintiffs.

[140] Automattic received a *DMCA* notice from Mr. Leary on December 13, 2012, concerning the ASHOKA photo and also received a further *DMCA* notice on December 15, 2012, concerning the same photo. The photo was disabled on December 14, 2012. After receipt of the December 15, 2012, *DMCA* notice despite the image having already been removed, Automattic suspended what remained of the *slabbed* blog altogether.

[141] The Trout point *DMCA* notice was received in April of 2012. Within one day of its receipt the photo was disabled by Automattic. Automattic says there was no written content concerning the Plaintiffs hosted on *WordPress.com* after February 11, 2012.

The Plaintiffs' Position

[142] The Plaintiffs say the Canadian *Copyright Act* applies. They say there has been no expert evidence adduced as to the content of American copyright law and that the court is not equipped to interpret and apply American law. They say it would not be appropriate for this Court to make any findings of fact with regard to American law without expert evidence and an opportunity for the Plaintiffs to adduce rebuttal expert evidence.

[143] In the Plaintiffs brief they, therefore, focus on the Canadian *Copyright Act*. They take issue with the characterization that Automattic was an Internet Service Provider. They say Automattic does not provide people with access to the Internet, it provides a blogging service available on the Internet.

[144] They further say that Automattic's content is not neutral as it has advertisements. Mr. Leary states in his affidavit that the Trout Point Lodge blog on WordPress contained advertisements. They say this is a material fact in issue and without discovery examination they are unable to confirm whether Automattic earns money by posting these ads. They say this is important as it goes to whether Automattic can really be characterized as content neutral.

[145] They further say Automattic was far more engaged in content as it had actual knowledge of the content of the blog and that it chose to continue to host part of the blog (photos) for in additional 11 months after it received Justice Hood's Order. They say Automattic engaged with the material in a more substantial way than Internet providers. They say because Automattic knew that Mr. Handshoe had been ordered by Justice Hood's decision and Order to remove the entirety of the *slabbed* blog from the Internet and Automattic continued to host photos, which were part of the blog, for Mr. Handshoe, that this amounts to a degree of control not ordinarily present in mere conduit situations. The Plaintiffs say, therefore, that Automattic authorized the use of the copyrighted photographs for the purposes of the *Copyright Act*.

[146] The Plaintiff's claim actual knowledge of content makes a difference. The Plaintiffs refer to the Supreme Court of Canada decision and *SOCAN, supra*, at paras. 99 through 101 in support of this position:

99 While lack of knowledge of the infringing nature of a work is not a defence to copyright actions generally (J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), pp. 21-4 and 21-5), nevertheless the presence of such knowledge would be a factor in the evaluation of the "conduit" status of an Internet Service Provider, as discussed below.

100 The Internet Service Provider, acting as an intermediary, does not charge a particular fee to its clients for music downloading (although clearly the availability of "free music" is a significant business incentive).

101 I conclude that the *Copyright Act*, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a "conduit", as found by the Board, include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious. We are told that a large on-line service provider like America Online delivers in the order of 11 million transmissions a day.

[147] The Plaintiffs say that s. 31.1 is similar enough to s. 2.4(1)(b) that Automattic who engaged with its material in a more substantial way than a true Internet service provider (by having actual knowledge of the content of the blog) may also attract liability under s. 31.1.

Which Copyright Law Applies (Canada or the U.S.)?

[148] First of all, there is the question of whether Canadian or U.S. copyright law applies. Automatic acknowledges it has attorned to the jurisdiction of the court of Nova Scotia and that Nova Scotia has territorial competence.

[149] The Supreme Court of Canada said in *Society of composers, Authors and Music Publishers of Canada (SOCAN) v. Canadian Association of Internet Providers*, 2004 SCC 45, at paras. 60 through 63, the Canadian *Copyright Act* will only apply if there is a real and substantial connection between Canada and the communication in question. The Court said the determining connecting factors in assessing the jurisdiction of Internet copyright are the location of the content provider; the host server and intermediary; and the end user.

60 The "real and substantial connection" test was adopted and developed by this Court in *Morguard Investments Ltd.*, *supra*, at pp. 1108-1109, *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), at pp. 325-6 and 328, and *Tolofson*, *supra*, at p. 1049. The test has been reaffirmed and applied more recently in cases such as *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90 (S.C.C.), at para. 71, *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78 (S.C.C.), *Unifund*, *supra*, at para. 54, and *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72 (S.C.C.). From the outset, the real and substantial connection test has been viewed as an appropriate way to "prevent overreaching ... and [to restrict] the exercise of jurisdiction over extraterritorial and transnational transactions" (La Forest J. in *Tolofson*, *supra*, at p. 1049). The test reflects the underlying reality of "the territorial limits of law under the international legal order" and respect for the legitimate actions of other states inherent in the principle of international comity (*Tolofson*, at p. 1047). A real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.

61 In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute.

62 Canada clearly has a significant interest in the flow of information in and out of the country. Canada regulates the reception of broadcasting signals in Canada wherever originated; see *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.). Our courts and tribunals regularly take jurisdiction in matters of civil liability arising out of foreign transmissions which are received and have their impact here; see *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 8 C.P.R. (4th) 1 (Alta. C.A.); *World Stock Exchange, Re* (2000), 9 A.S.C.S. 658 (Alta. Securities Comm.).

63 Generally speaking, this Court has recognized as a sufficient "connection" for taking jurisdiction, situations where Canada is the country of transmission

(*Libman*, *supra*) or the country of reception (*Canada v. Liberty Net*, *supra*). This jurisdictional posture is consistent with international copyright practice.

[*Emphasis added*]

[150] The Plaintiffs did not address Automattic's real and substantial connection argument. The Plaintiffs pleaded the Canadian *Copyright Act* and take the position it applies.

[151] To determine whether or not a real and substantial connection exists requires consideration of the facts relating to the location of the content provider, host server and intermediary and end user. As the court has said the weight to be given to any one factor will vary depending on the circumstances. (*SOCAN*, *supra* at para. 51).

[152] The following illustrates that if I were to consider this issue of the applicable copyright statutory regime, I would have to weigh facts to determine the real and substantial connection and, therefore, this is not a matter for summary judgment. Weighing evidence is best left for the trial judge who will have a complete record.

[153] Automattic argues that the content creator was Mr. Handshoe, a U.S. resident. They say the original content providers of the copyrighted work were Ashokan Foundation (a U.S. entity) and Mr. Perret. They say the photographs were subsequently assigned and registered with the Canadian intellectual property database and given registration numbers within the Canadian regime. They say the situs or location of the content provider with respect to the images is, therefore, mixed.

[154] Automattic further says that the host for the *slabbed* blog was Automattic for a period of time in 2011 to 2012. Its servers are located in the United States and says "therefore the situs of the host servers and intermediary in this case is the United States."

[155] In relation to the location of the users, Automattic says "if these are considered to be the viewers and commenters on the *slabbed* blog, for the majority of the time the *slabbed* blog was hosted by Automattic, 93% of views were located in the United States, 3% of the views came from Canada, and the remaining views from elsewhere." They say the IP addresses of viewers who made the comments on the *slabbed* blog were all located in United States.

[156] With regard to the location of users, Automattic says "if these are considered to be the viewers and commenters on the *slabbed* blog..." However, the Plaintiffs accessed the Blog in Canada. I would have to weigh all of the evidence before me

in the circumstances of this matter in order to make a determination as to who is the user – what weight should be given to the fact that the Plaintiffs accessed the blog from Canada and also had their own Trout Point Lodge blog on WordPress and what weight should be given to the evidence indicating that the majority of persons accessing the blog were located in the United States?

[157] How much weight should be given to the location of the content providers. Automatic argues the original owners of the two photos were Ashoka (a U.S. entity) and Mr. Perret, therefore, the situs of the content providers is mixed-both U.S. and Canada? The affidavit of Mr. Perret indicates the copyright in the Ashoka photo was assigned to Mr. Leary on December 13, 2012. What weight should be given to situs of the copyright ownership as of this date? The Plaintiffs allege the effects of the infringing conduct manifested in Nova Scotia. What weight, if any, should be given to this location of impact allegation?

[158] As noted above, the Nova Scotia Court of Appeal in *Hatch Ltd. v Atlantic Sub-Sea Construction and Consulting Inc*, *supra*, outlined the prohibition on weighing evidence in a summary judgment motion.

[159] The very nature of determining ‘real and substantial connection’ in order to answer the legal question of which statute applies, requires weighing evidence which is inappropriate on a summary judgment motion. Automatic did not strenuously argue the above but focused on its position that it is not necessary to decide the issue with finality because they say the Plaintiff’s breach of copyright claims fail under either regime, because Automatic is exempt from liability regardless of which legislation applies. In this regard, Automatic states at paras. 14 and 30 of its brief:

14 ... While Automatic states that, considering the legal test and the evidence, the law of the United States should be applied to the copyright claims, ultimately, in Automatic’s submission on this motion, the Plaintiff’s breach of copyright claims are bound to fail under either regime (either that of Canada or the United States), therefore, it is not necessary for this Court to reach a final conclusion with respect to the issue of choice of law on this point.

30. However, given that there are no issues of material fact and there are issues of law, for the purpose of summary judgment, Automatic submits that this court does not need to decide the issue of jurisdiction with finality, but need only satisfy itself that the pleading has no chance of success.

Do both the Canadian *Copyright Act* and the United States *DMCA* provide a Safe Harbour to Automatic ?

[160] Automattic says there is no need for me to weigh evidence and determine choice of law because regardless of which copyright regime governs, Automattic is an innocent disseminator with a safe harbour under both the Canadian *Copyright Act* and the United States *DMCA*. They say Automattic is exempt from liability under both jurisdictions' legislation.

[161] Copyright is a statutory creature. The legislation governs rights and remedies and is exhaustive. I will first examine whether Automattic has a safe Harbour under the U.S. legislation.

[162] In accordance with the *Shannex* test, I first ask whether there is a genuine issue of material fact, either pure or mixed with a question of law.

U.S. *DMCA*

[163] The Plaintiffs take the position that Canadian law applies and did not address Automattic's argument under the provisions of the *DMCA*.

[164] The Plaintiffs say it would be inappropriate for this court to make findings of fact with regard to American law without expert evidence and an opportunity for the Plaintiffs to adduce rebuttal expert evidence. They refer to *Das v. George Weston Limited*, 2018 ONCA 1053, at para. 67, where the court said "a court requires expert evidence to decide issues involving the content of foreign law".

[165] Our *Civil Procedure Rule 54.04(1)* addresses proof of the law of a foreign state:

54.04 Proof of law of foreign state

- (1) The law of a foreign state may be proved in either of the following ways:
 - (a) reference to official publications of legislation, judicial decisions, and authoritative sources;
 - (b) expert opinion, introduced in accordance with Rule 55 - Expert Opinion and the rules of evidence.
- (2) The law of a foreign state is presumed to be the same as the law of Nova Scotia, unless a party gives notice by a pleading that the law of a foreign state is in issue and proves that that law is not the same as the law of Nova Scotia.

[166] As noted previously, the Plaintiffs plead the Canadian *Copyright Act* and Automattic plead the *DMCA*. Automattic provided an official publication of the *DMCA*, and Canadian caselaw referencing the two statutory regimes. No U.S. caselaw was provided relating to the interpretation of the applicable *DMCA* provisions. No expert evidence was adduced.

[167] Automattic submits that in the event the copyright issue is governed by the law of the United States, being the *Digital Millennium Copyright Act (DMCA)* then Automattic, as a service provider, is entitled to safe harbour under s. 512 of that Act. Automattic points to s. 512(c) as providing safe harbour protection to online service providers for online storage provided the online service providers comply with the takedown notice regime. They further say that the limitations on liability apply to transitory digital network communications, system caching and information residing in systems or networks at the direction of users. In this regard they point to s. 512(a).

[168] In approaching the question of whether Automattic is entitled to safe harbour under the *DMCA*, I must determine whether there is evidence before me that satisfies the subsections of the provision and whether there are any material facts in dispute in relation to such evidence.

[169] Under s. 512 there are four safe harbours. The first is a transitory digital network communications category (s. 512(a)); the second is a system caching category (s. 512(b)); the third is a category of hosting where information resides on systems or networks at the direction of users (s. 512(c)); and the fourth is an information location tools category (s. 512(d)). Each of these safe harbours is function based.

[170] Section 512 imposes obligations on the service provider before they are able to invoke the protections of these four safe harbours. First of all, Automattic must meet the definition of service provider in s. 512(k) which states:

(k) Definitions

(1) Service provider

(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

[171] Automattic says it is an Internet service provider and being an intermediary that does not add to content that it fits under the U.S. legislation’s exemption for liability. The definition of service provider is cast broadly in s. 512. I note that there are some indicators pointing to Automattic being a service provider. They include:

- (a) Ms. Zhu’s affidavit of January 3, 2019, states that Automattic “owns and operates a free blog web hosting service... Powered by full open-source word press software.” It further says “Automattic it is an Internet service provider and intermediary; it does not itself create blog content hosted on its site.”
- (b) Tab A of Ms. Zhu’s January 2019 affidavit describes Automattic as running a blog and website hosting service.
- (c) Mr. Leary’s affidavit of September 18, 2017, refers to *WordPress.com* as an Internet service provider. Paragraph 8 “In December of 2009, Trout Point started using *WordPress.com* as the Internet service provider (the “*Trout Point* blog”). My understanding is that *WordPress.com* blogs are owned by the Defendant, Automattic.”
- (d) At para. 33 of the affidavit of Ms. Zhu’s March 2019 affidavit, it would appear dream host recognized Automattic as an Internet service provider in that they said “need to contact *DMCA* agent of *word press.com*... For content hosted on their network”. Exhibit L

[172] The Plaintiffs did not address the *DMCA* but only the Canadian *Copyright Act*. They do say at paras. 92 to 94, that they dispute Automattic is an Internet Service Provider. They say it does not provide access to the Internet, it provides blogging service available on the Internet. They also say at para. 94 that Automattic provides advertisements meaning its content is not neutral.

[173] However, regardless of whether I could find there was undisputed evidence of whether Automattic is a Service Provider under the broad definition in s. 512, there are still threshold requirements in the legislation that are problematic for Automattic’s Motion for Summary Judgment.

[174] It would appear that service providers might offer numerous services and, therefore, could fall under multiple of the four safe harbours. However, on my reading of s. 512(i), it contains a threshold requirement that must be met before a service provider can be considered eligible for one of the four safe harbours. It is a prerequisite that is applicable to all four of the safe harbours. It states:

512 (i) Conditions for Eligibility

- (1) Accommodation of technology. – The limitations on liability established by this section shall apply to a service provider only if the service provider
 - (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and
 - (B) accommodates and does not interfere with standard technical measures.
- (2) Definition. – As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and –
 - (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
 - (B) are available to any person on reasonable and nondiscriminatory terms; and
 - (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

[Emphasis added]

[175] Therefore, Automattic, who seeks the benefit of safe harbour under s. 512, must have:

adopted and reasonably implemented, and informs subscribers and account holders of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider system or network who are repeat infringers.

[176] Has Automattic adopted such a policy? There is no specific repeat infringer policy of Automattic before this Court. The most that I have is a one line statement in the Terms of Service, s. 8, which says:

8. Copyright infringement and DMCA Policy. As Automattic asks others to respect its intellectual property rights, it respects the intellectual property rights of others. If you believe that material located on or linked to by *WordPress.com* violates your copyright, you are encouraged to notify Automattic in accordance with Automattic's *Digital Millennium Copyright Act (DMCA) Policy*. Automattic will respond to all such notices, including as required or appropriate by removing the infringing material or disabling all links to the infringing material. Automattic will terminate a visitor's access to and use of the Website if, under appropriate circumstances, the visitor is determined to be a repeat infringer of the copyrights or other intellectual property rights of Automattic or others. In the case of such termination, Automattic will have no obligation to provide a refund of any amounts previously paid to Automattic. (Zhu affidavit, sworn December 28, 2018, Exhibit A)

[Emphasis added]

[177] Does this mean the required policy exists? Does this one line satisfy the threshold requirements in s. 512(i)(1)(A)? If so what are the terms of Automattic's repeat infringer policy? It is not clear to me that Automattic has reasonably implemented such a policy. The *DMCA* does not define "adopted" or "reasonably implemented."

[178] It is unclear to me how Automattic defines a repeat infringer. Who is a repeat infringer? I do not see any definition in the legislation of repeat infringer. Does "repeat" mean 3, 5 or 10 times? Does the service provider determine who is a repeat infringer or is this a determination for a court? Can allegations or *DMCA* take down notices alone lead to someone being a repeat infringer?

[179] Automattic has not defined what it means by the "appropriate circumstances", terminology used in its reference to repeat infringers in its Terms of Service and also found in s. 512(i)(1)(A). What level of evidence is required in order for Automattic to make a determination that the appropriate circumstances exist to determine a user to be a repeat infringer. The phrase "appropriate circumstances" is not defined in the legislation.

[180] There is simply insufficient evidence before me, of a policy that meets the requirements of the provisions contained in s. 512 (i)(1)(A)? I am unable to make a determination as to whether the one line reference in the Terms of Service is sufficient to inform subscribers and account holders of such a policy, as is required. Further, it is not clear to me, without legislative definitions what the above references in the subsection mean. I do not have any legislative history before me, nor any American case law interpreting the provisions.

[181] Counsel for the Plaintiffs take the position that expert evidence would be required in relation to U.S. case law. They say “the party alleging the application of foreign law must plead and rely on that law, and adduce expert evidence as to its content” In relation to the terminology contained in the provisions of s. 512 that are not defined in the legislation, I agree that expert evidence would be most helpful to determine how American courts have approached statutory interpretation of these various legislative provisions.

[182] Section 512(i)(1)(B) contains a further threshold requirement which states: “(B) accommodates and does not interfere with standard technical measures.” The subsection defines “standard technical measures” as technical measures that are used by copyright owners to identify or protect copyrighted works and

- (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
- (B) are available to any person on reasonable and non-discriminatory terms; and
- (C) do not impose substantial costs and service providers are substantial burdens on their systems or networks.

[183] There is an insufficient record before me to make a determination as to whether Automattic has met the threshold requirements of s. 512. I cannot answer the *Shannex* question of whether there are material facts in issue mixed with questions of law, because there is an insufficient record before me. Suffice it to say that there is an insufficient record before me in order to come to any conclusion under s. 512, either on the facts or the law.

[184] It is insufficient for Automattic to simply say it is a service provider who is merely serving as a conduit and, therefore, entitled to safe harbour. Despite filing a further affidavit of Ms. Zhu on August 26, 2019, Automattic did not adduce sufficient evidence to meet these threshold requirements. Nor did it put before the Court sufficient information for me to apply the provisions of the *DMCA*, given the questions of statutory interpretation I note above.

512 (b) System Caching

[185] In the Zhu affidavits sworn on March 17 and August 8, 2019, she describes the process of system caching used by WordPress. Ms. Zhu’s March 20, 2019, affidavit describes Caching and at para. 23 says that they use a “cache system”.

Paragraph 27 says “this caching system is an automatic process and a function of the way files and blogs are stored and accessed through proxy servers...”

[186] She described that Automattic and *WordPress.com* use a network of proxy servers, that are physically located closer to the user, to help speed up web traffic and wait times for website visitors. Proxy servers use a cache system which allows the proxy server to pull up the information even faster for users. She indicated that when a proxy server receives a request for information it looks in the local cache to see if the information is available, and, if so retrieves it from the local cache. She further indicated that if the information is not present in the cache, the file is retrieved directly from the source (*WordPress.com*'s main server), returned to the user, and a copy is placed in the proxy servers local cache storage for quick access later.

[187] As it is clear that Automattic uses system caching, even if Automattic were able to get past the threshold requirements for safe harbours outlined above (s. 512(i)), it would still have to meet the safe harbour system caching category requirements to be afforded protection under that category.

[188] For example, s. 512(b) refers to “temporary storage.” What does temporary storage on the system or network mean? 512(b)(1) states:

(b) System Caching

- (1) Limitation on liability. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which
 - (A) the material is made available online by a person other than the service provider;
 - (B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and
 - (C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

[*Emphasis added*]

[189] Ms. Zhu states in her August 26, 2019, affidavit the following, in relation to the timing of system caching by Automattic:

11. Each server, intermediate proxy server, and the ultimate viewers own computer browser might all have cached material as part of the standard operating network that allows web users to retrieve web content more quickly than obtaining it each time directly from the original server. In addition to reducing the bandwidth requirements, caching reduces the wait time on requests for the same information. Each of these caches can store material for a period of time after it has been deleted from the source. Automattic controls only its server(s) a network of proxy servers.
12. When automatic removes an image in response to a *DMCA* notice, that causes the image to be removed immediately both from Automattic's server and its network of proxy servers, including the cache. Otherwise, an image would remain in our caches until it is determined to be inactive, which is determined by the amount of time Automattic specifies in the cache instruction at the time the image was stored in the cache. This ranges from 20 to 40 days.
13. After that, it is possible that the images could have been present in the cache of the intermediate proxy or in a viewers browser cache on his or her individual computer (unless the viewer had explicitly cleared the Internet browsers cache), but neither of these caches is controlled by Automattic.

[190] In her March 2019 affidavit Ms. Zhu states at para. 25:

Because of the cache storage system, even when the *slabbed.word press.com* blog site was suspended on December 15, 2012, certain media files could still be accessed by repeat visitors who were served by a cache that still had the media file. The cache was automatically purged after several weeks or months...

[191] The phrase 'temporary storage' is not defined in the legislation. There were no arguments made before me as to what temporary storage means and whether Automattic's statement of "20 to 40 days" or "after several weeks to months" meets the requirement of "temporary storage" in the cached category of safe harbour. No evidence of legislative history nor any U.S. caselaw to assist in interpreting 'temporary storage' was placed before me. In these circumstances, I am not prepared embark on this statutory interpretation in relation to this U.S. legislation, when U.S. courts may have interpreted this provision.

[192] In addition, section 512(b)(2) sets out conditions including that:

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1) (A) to prevent or unreasonably impair the intermediate storage to which the subsection applies;...

[Emphasis added]

[193] Ms. Zhu states in her August 26, 2019, affidavit at para. 19 that:

... Automattic's directions related to its caching-such as using header information to dictate length of caching-are specified in a manner consistent with industry practice. Automattic's directions related to its caching lend themselves to automated reading and execution, and are read and executed. Specifically, Automattic includes header information images for caching, and those headers are read and followed in a manner that determines the length of caching.

[194] While the affidavits of Ms. Zhu describe the system caching process, they do not provide sufficient information to meet the provisions of s. 512(b), system caching safe harbour. In addition, without the legislative history, U.S. Caselaw and perhaps expert evidence, I am unable to determine the meaning of certain undefined terms in the legislation.

[195] The onus is on Automattic to show by evidence that there is no genuine issue of material fact, either pure or mixed with a question of law. It has not done so. As the above illustrates there is an incomplete record before this court and therefore, there are material facts in issue mixed with questions of law concerning whether Automattic is entitled to safe harbour under the *DMCA*. Given that the record is incomplete, I am of the emphatic view that this issue must be left for the trial judge to determine. In light of my conclusion that I am unable to determine whether Automattic has safe Harbour under the *DMCA*, it is not necessary to consider whether it has safe harbour under the Canadian *Copyright Act*. Clearly, a determination of choice of law is necessary, which requires weighing evidence which I am not entitled to do on a summary judgment motion.

[196] Automattic also says that the Plaintiffs' copyright "claim fails because in each instance either the Plaintiffs were not the copyright holder or Automattic took expeditious action to remove the images upon receiving proper notice, in accordance with the *DMCA*." It is unclear how compliance with the *DMCA* would

assist Automattic, given my findings. It does not matter whether Automattic gave proper notice under the *DMCA* because I am unable to determine which statute applies without weighing evidence, which I am not entitled to do on a summary judgement motion.

[197] In addition, with reference to the Plaintiffs not being the copyright holder, it would appear this assertion relates to the National Geographic photo which the Plaintiffs have confirmed is not in issue. For the Ashoka photo there is no dispute it originated with Ashoka. The uncontested evidence before me illustrates that the copyright interest was assigned to Mr. Leary on December 13, 2012, (Mr. Perret affidavit sworn on March 7, 2019, exhibit B) which is the same day that the *DMCA* take down notice was sent to Automattic. The copyright was registered in the Canadian Copyright Register on July 7, 2013. For the Trout Point Lodge photo, there does not appear to be any dispute that it originated with Mr. Perret (Affidavit of Mr. Perret sworn on March 7, 2019). On April 4, 2012, Mr. Leary sent a *DMCA* notice to Automatic. On July 8, 2013, the Trout Point Lodge photo was registered on the Canadian Copyright Register (Affidavit of Mr. Perret sworn on March 7, 2019, exhibit C). Automattic did not advance any arguments that there was an issue with ownership in relation to the Ashoka or Trout Point Lodge photos.

Should the Plaintiff's copyright claims against Automattic be dismissed because the applicable limitation periods have expired?

[198] Automattic says that the substantive law of United States applies but it is not necessary to make a definitive ruling on choice of law because the limitation period for bringing a claim of copyright infringement in both countries is three years and has expired under both statutory regimes. They say the copyright infringement claim is barred in each country. They say the copyright infringement claim was not commenced until the Third Amended Statement of Claim which was filed pursuant to an order to amend the pleadings in September of 2016. They say prior to this the two photographs at issue are only mentioned as part of the actual matrix of the Plaintiff's claims for breach of contract and defamation. They say the requisite factual elements of copyright infringement were not pleaded nor did the pleadings reference the applicable legislation nor seek a remedy for infringement as is mandatory under the *Civil Procedure Rules*.

[199] Automattic says the question is when exactly the cause of action was "commenced" for the purposes of the statutory limitation period. They say the minimal facts necessary to plead a claim in copyright were not pled until filing of the third amendment of the Statement of Claim (September 2016), which was out of time. They argue that even if the date of when the motion was filed, being

February 17, 2016, is used, the copyright claims are out of time because the limitation periods expired on April 4, 2015, and December 13, 2015.

[200] Automattic argues that the decision of Justice Lynch in granting the Plaintiffs' motion to amend its Statement of Claim regarding copyright and other claims, which was later upheld by the Court of Appeal, is not the final answer to the limitation period issue on this motion. They say the two proceedings are different. They say the context in which the appeal decision was made was under *Civil Procedure Rule 83.11* where the limitation period was an ancillary issue at the discretion of the motion judge who only had to consider certain criteria under the rule. They say the present motion is different because it compels the court to squarely consider statutory limitation periods and whether the claim of copyright infringement was commenced within the mandatory timeframe under the statute.

[201] They further say that the Chambers judge did not make any definitive finding regarding the expiry of the limitation period. They point to excerpts from Justice Lynch where she says she's not deciding the limitation period that will apply. Justice Lynch said:

The Defendant indicates that there's a question in this case as to what law is applicable, the substantive law as well as the limitation period. And they are asking for this motion to be adjourned until that matter has been determined.

There's no motion before this court to determine that issue. That has not been filed at that time. I'm not deciding obviously the substantive law that will apply. I'm not deciding the limitation period that will apply. (Transcript, p 76, 19-22)

[202] They say the appeal decision only authorizes the claim to be made and that it made no final ruling on the merits of any limitation defence. They refer to paragraph 32 of the Court of Appeal decision which states:

... It did not matter what law governed the causes of action or if the limitation period had expired. The motion judge was satisfied that the material facts for the causes of action were already pleaded and the sought after amendments merely better describe the causes of action...

[203] The Plaintiffs say that Justice Lynch found that the material facts underlying the allegation of copyright infringement had been pleaded in the May 23, 2013, Second Amended Notice of Action and allowed the amendment simply to clarify the claim of copyright infringement. They say Justice Lynch did not consider whether the material facts had been pleaded within the three-year limitation period, rather she simply found the material facts had been pleaded. They say the Court of Appeal agreed with Justice Lynch.

[204] With reference to the *Shannex* test and the issue of whether the limitation period has expired, Automattic says there are no genuine issues of material fact when the pleading history is considered against the backdrop of the *Copyright Act* and the *DMCA*. While the parties agree on the timelines as to when the pleadings were filed, what they do not agree upon is whether, given the decision of the Court of Appeal, in upholding Justice Lynch's decision, there still a live issue as to whether the limitation period has expired for the copyright infringement claims.

[205] While Justice Lynch did not decide the limitation period that would apply, whether from the Canadian or U.S. legislation, nor the length of the limitation period she did decide that the pleadings as of May 23, 2013, were capable of supporting a claim for copyright infringement. Justice Lynch said as follows at p. 77 of the transcript:

The grounds that they are looking to add are as outlined in the submissions already contained in the statement of claim, the second amended statement of claim. They're just not named. The grounds for them is in there for promissory estoppel, for copyright infringement, for the breach of honesty in contractual dealings, and fraudulent misrepresentation, but they're not enumerated as such....

[206] The Court of Appeal (2017 NSCA 52) upheld Justice Lynch's decision stating:

31 Similarly, I am satisfied, as was the motions judge, that the pleadings, including the Response to Demands for Particulars which were filed, are broad enough to include the claims of copyright infringement and breach of honesty in contractual dealings.

32 As a result, it did not matter what law governed the causes of action or if the limitation period had expired. The motions judge was satisfied that the material facts for the causes of action were already pleaded and the sought after amendments merely better described the causes of action. Therefore, she exercised her discretion in allowing the amendment. In doing so she correctly interpreted the *Civil Procedure Rules*.

[*Emphasis added*]

[207] What the prior motion decision did was say that the choice of law issue was not before the court and, therefore, neither was a determination of the applicable limitation period. Simply put, the court allowed the Plaintiffs to amend a claim that had already been advanced in their May 23, 2013 pleading.

[208] The Court of Appeal said the material facts underlying the copyright infringement claim were pleaded in the Second Amended Statement of Claim, dated May 23, 2013. Automattic says the limitation periods for the copyright

infringement claims relating to the two photographs expired on April 4, 2015, and December 13, 2015. They say regardless of which legislation applies (Canadian or American) the limitation period is three years. On Automattic's own timelines the limitation periods for the copyright infringement claims cannot have expired. The timeline between May 23, 2013 and April and December of 2015 is far less than 3 years. Automattic's claim for summary judgment in relation to their submission the limitation periods for the copyright claims have expired, cannot succeed based on the decision of the Court of Appeal upholding Justice Lynch's motion decision.

[209] As the choice of law question remains to be determined, so does a determination on the applicable limitation period. Having the applicable legislation of the jurisdiction before him or her and the findings of Justice Lynch (upheld by the Court of Appeal), the trial judge can definitively make a decision concerning the limitation period issue raised by Automattic. Without prejudging the outcome, it certainly seems to me that the starting point is that the claim for copyright infringement was advanced on May 23, 2013, given Justice Lynch's finding that the pleading of that date was broad enough to include claims of copyright infringement.

Should the claims of copyright infringement be dismissed as an abuse of process?

[210] Automattic says the Plaintiff's copyright infringement claims are an abuse of process. They say the copyright claims involving the two photographs at issue have already been litigated to judgment in a separate proceeding against Mr. Handshoe. They reference *Rule 88* and say abuse of process has been found where the litigation before the court is held to be an attempt to re-litigate a claim which the court has already determined. They say this violates the principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

[211] Automattic submits that the Plaintiffs had an opportunity to litigate the copyright infringement claims against them in the prior proceeding involving Mr. Handshoe and they chose not to do so. They say that the Plaintiffs are not satisfied with the result against Mr. Handshoe and have now set out on a course to repackage their lawsuit against Automattic to advance new theories, assertions and causes of action, including copyright infringement. They say there have been no new claims or evidence advanced that were previously unavailable at the time of the copyright decision involving Mr. Handshoe.

[212] They say it would be manifestly abusive for the Plaintiffs to claim twice and potentially recover twice in respect of the same photographs on the Slabbed Blog

that have already been the subject of a final binding judgment. They say allowing the Plaintiff's copyright infringement claim to proceed would bring the administration of justice into disrepute.

[213] The Plaintiffs say that all of the cases cited by Automatic on abuse of process are distinguishable. They say the finding of infringement on the part of Mr. Handshoe would not necessarily have meant a finding of copyright infringement on the part of Automatic. Automatic has raised several defences as a host which were not available to Mr. Handshoe. They submit neither consistency nor finality are of concern in this matter and say they are not asking the court to make any finding that is inconsistent with the decision against Mr. Handshoe. They further say the Plaintiffs have not engaged in any abusive behaviour.

[214] *Civil Procedure Rule 88* states:

88.01 Scope of Rule 88

- (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
- (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
- (3) This Rule provides procedure for controlling abuse.

88.02 Remedies for abuse

- (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
 - (a) an order for dismissal or judgment;
 - (b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;
 - (c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;
 - (d) an order to indemnify each other party for losses resulting from the abuse;
 - (e) an order striking or amending a pleading;
 - (f) an order expunging an affidavit or other court document or requiring it to be sealed;
 - (g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;
 - (h) any other injunction that tends to prevent further abuse.

[215] The Supreme Court of Canada had the following to say about abuse of process in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63:

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice...

...

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per Goudge J.A.*, dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice...

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an

independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-348):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[Emphasis added]

[216] In considering Automattic's motion that the copyright claims are re-litigation and, therefore, an abuse of process, I start with the first question from the *Shannex* test: Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law? The litigation record between the parties is before me, including the pleadings and prior court decisions involving Mr. Handshoe. There is no genuine issue of material fact. There is a question of law, being – are the Plaintiffs' claims an abuse of process, representing re-litigation which in the circumstances violates such principles as judicial economy, consistency, finality, and the integrity of the administration of justice?

[217] The next question is – Does the challenged pleading have a real chance of success? I address this question in the context of the defence of abuse of process. This is not a question about the merits of the copyright claim but a question about whether the claim could violate the integrity of the legal system as an abuse of process.

[218] While the copyright claims against Automattic and the previous claims against Mr. Handshoe arise out of the same factual background, on review of the pleadings they appear to be different. The Plaintiffs are not seeking damages from Automattic for the actions of Mr. Handshoe. They have not claimed vicarious liability. While there is similar language in both Statements of Claim this does not in and of itself equate to an abuse of process. The Plaintiffs are seeking damages from Automattic as the host of the blog, for its alleged action or inaction in relation to the two photographs on the *slabbed* blog. For example, they say at para. 113 of the statement of claim:

Automattic, knowing that its WordPress user Douglas Handshoe was a serial infringer of copyright, published and distributed that creative work on the Internet from its WordPress servers, including telecommunication of the creative work

into Canada, where it was downloaded. It was published and distributed from URLs...

[Emphasis added]

[219] The Plaintiffs, in para. 113 above, are alleging knowledge and conduct specific to Automattic in its role of hosting the blog on its servers. Similarly at para. 117 the Plaintiffs allege Automattic itself violated provisions of the Canadian *Copyright Act*. In addition, at para. 119 the Plaintiffs' allegations include that Automattic "authorized" certain acts contrary to ss. 3 and 27 of the *Copyright Act*.

[220] While it may have been preferable to bring both actions together as they arose out of the same factual circumstances, failure to do so does not automatically result in an abuse of process. It is possible their being heard together may have resulted in some judicial economy. However, as to consistency and finality, I see no issue of possible inconsistencies. Justice Coady, after default judgment was entered, assessed damages against Mr. Handshoe. He did not make any findings in relation to Automattic's role in this matter.

[221] The facts in this matter are not similar to those of *Elite Trucking Limited v Johnson*, 2005 NSSC 254, where the issue involved joint tortfeasors and vicarious liability, or *CUPE, supra*, where there was an attempt to re-litigate an employee's criminal conviction before an arbitrator.

[222] The Plaintiffs were self represented when the claim was filed against Mr. Handshoe and also when judgement was entered and damages assessed in relation to the copyright claims. I have not seen any evidence indicating the Plaintiffs have engaged in abusive conduct.

[223] Automattic has not met its onus under the *Shannex* test. After review of the pleadings in both matters and the prior court decisions, I find that Automattic's claim for summary judgment on the basis of abuse of process must fail.

Conclusion

[224] In conclusion, summary judgment is granted to Automattic in relation to the Plaintiffs' claims:

- that a binding contract existed between the Plaintiffs and the Defendant, including the claims of bad faith, or breach of duty of honesty in contractual relations;
- of fraudulent misrepresentation on the part of the Defendant; and

- for breach of the doctrine of promissory estoppel.

[225] Automattic's summary judgment motion is denied in relation to the Plaintiffs' claims of copyright infringement against the Defendant, including with respect to the assertion that the Plaintiffs' claim for copyright infringement is barred by limitations, and with respect to the assertion the Plaintiffs' copyright infringement claim is an abuse of process.

Costs

[226] Automattic has been both successful and unsuccessful on its Motion for Summary Judgment. In addition, there are other cost considerations, including that the filing of additional affidavit evidence of the Plaintiffs resulted in an adjournment of the motion and also the fact that Automattic sought to introduce additional affidavit evidence at the hearing, which was ultimately allowed. Given the mixed success and the fact that both parties have sought late admission of affidavit evidence, no costs are awarded on this motion.

Jamieson, J.