IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Miller Lake Learning Services Inc. v. Latta, 2009 NSSM 59

Claim No: SCCH 310113

BETWEEN:

Name Miller Lake Learning Services Inc. — **Claimant/ Defendant by Counterclaim**

Name Kimberley Latta and Bedford Learning Centre Inc. — **Defendants/ Claimants by Counterclaim**

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

DECISION ON STAY OF PROCEEDINGS

Dates of Hearing: June 2, July 20, 22, 29 and 30, September 21, 22 and 23, October 26, 2009.

Date of Decision: December 28, 2009

Mervyn Valadares, Solicitor for the Claimant and Gordon FitzGerald, Agent for the Claimant.

Kimberley Latta and Richard Latta in person and on behalf of Bedford Learning Centre Inc.

(Erratum: For the purposes of recording, the text of the original decision dated December 28, 2009 has been revised to correct several typographical, grammatical and/or syntactical errors. None of the findings therein, the Order of the same date nor any other determination have been affected by these revisions.)

(1) This decision follows an application by the Defendants/Claimants by Counterclaim to stay these proceedings in light of the commencement of an action in the Supreme Court of Nova Scotia (S.H. 318198) on October 13, 2009. A concurrent notice was filed in the Small Claims Court seeking a stay of these proceedings so the matter may proceed at Supreme Court.

(2) For the reasons stated herein, I dismiss the application for a stay of proceedings as it relates to Miller Lake Learning Services Inc. It is sufficient to state at the outset that the issues involving this claim and the claim against Toby Humphreys can be conveniently severed and heard independent of the other. As the Supreme Court action does not in any way refer to the original Claimant, Miller Lake Learning Services Inc., it has not been shown that the matter should be discontinued. This finding alone would be sufficient to end the inquiry, although I will comment on the application of the law in this matter. For other reasons, I have ordered the matter stayed and to be heard before another Adjudicator.

(3) In light of the plethora of issues raised in the various pleadings, it is appropriate to review a partial history of the proceedings to date. Regrettably, what had commenced as a seemingly straightforward though understandably contentious matter of contract has turned into an inexplicable and unnecessary quagmire of procedural and other frustrating delays irrelevant to the resolution of this matter. I will address my findings in some of these matters further in this decision.

(4) It is worthy of mention that the Defendants had been advised by a solicitor, Charles D. Lienaux, from before the first night of the hearing on June 2, 2009, until approximately October 14, 2009. He appeared in Court on behalf of the Defendants until Ms. Latta advised the Court she is proceeding on behalf of herself and Bedford Learning Centre. I recommended at the hearing of this application, notwithstanding the outcome, that she retains new counsel without delay.

(5) **The Pleadings**

(6) This action was commenced by Miller Lake Learning Services Inc. on April 20, 2009. In the Notice of Claim prepared and signed by Toby Humphreys, the Claimant alleges breach of contract from the purchase of the rights to offer Exceeding Reading, a reading program for children and adults experiencing learning difficulties. She alleges neither the personal nor corporate defendants owned the copyright to the materials as was required. The Claimant seeks $20,000 in damages, the purchase price of her agreement.

(7) Ms. Latta filed a Defence and Counterclaim dated May 11, 2009, presumably on behalf of both Defendants although the Defence only refers to herself personally. A number of its salient points are summarized below.

(8) She claims she is the original author of Exceeding Reading and “has every right to license, certify, and authorize its use.” The $20,000 included not only the license agreement but the Fall River Learning Center. Further, she states, the Bedford Learning Center and Kim Latta have lived up to the terms of the agreement; a claim for a return of the materials and a counterclaim for unpaid royalty fees of $3600.

(9) In her statement, she concludes with a request for Bedford Learning Center to “make amendments to the Defence and file a counterclaim for damages at a later date upon awaiting further legal advice.”

(10) While her Defence and Counterclaim seeks relief for Bedford Learning Center, it is clear Ms. Latta was filing a Defence for herself personally as well as the corporate defendant.

(11) A document was filed on May 29, 2009 entitled "Amendment to Defence". The document contains no style of cause, a signature or even a date. It claimed as follows:

"We are also asking for enforcement of the signed agreement between Bedford Learning Center (defendant) and Miller Lake Learning Services (plaintiff), or as an alternative, an order from the court barring Toby Humphreys and Miller Lake Learning from future operation of Miller Lake Learning Services under violation of the signed agreement between Bedford Learning Center and Miller Lake Learning Services."

(12) On the first night of the hearings, I informed the parties, Mr. Lienaux in particular, that this paragraph appears to be seeking injunctive relief which is beyond the jurisdiction of the Small Claims Court. The potential claims for a declaration of an infringement of copyright were also beyond this Court's jurisdiction. Mr. Lienaux submitted that Small Claims Court could hear the matter and, in any event, the Defendants did not wish the matter to be heard in Supreme Court. I ordered the matter would proceed without a finding on whether an infringement took place and, further, I could not order any injunctive relief or other equitable remedy.

(13) Both parties agreed this Court does not have jurisdiction to decide infringement of copyright. The nature of this claim is the interpretation of the License Agreement between the parties. If both parties agree that this matter requires such a determination, they should make a joint motion to adjourn this matter.

(14) On June 24, 2009, a second unsigned, undated document was filed on behalf of both Kimberley Latta and Bedford Learning Center Inc. entitled "Amendment to Counterclaim".

"(The Defendants) would like to amend our counter claim against Toby Humphreys and Miller Lake Learning Services Inc. The defendants counterclaim as damages all legal costs incurred to defend allegation by Spell Read which have arisen from the plaintiff's breach of her nondisclosure contract by providing false information to Spell Read about the defendants' learning program which has greatly lengthened the Defence of this claim (Claimants)."

(15) When the matter resumed, Mr. Valadares objected to the amendment as being beyond the jurisdiction of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 (as amended), and filed a brief on the matter. Mr. Lienaux filed a memorandum as well. After hearing submissions, I ruled the claim invalid as a result of the clear language of s. 15(2) of the Procedures and Forms Regulations:

" No agent or barrister fees of any kind shall be awarded to either party."

(16) I directed Mr. Lienaux that any amendments to the pleadings should be performed in the usual way as required under the Civil Procedure Rules, that is, with the amendment underlined and included in the pleadings, to which he agreed.

(17) On July 22, 2009, Mr. Lienaux sought to file an Amended Defence and Counterclaim. Mr. Valadares objected to its introduction at this stage of the proceeding. I entertained a motion on this matter allowing the amendments, even though much of the pleadings contain evidence

rather than material facts. The document runs five pages and part of a sixth and contains 41 paragraphs. The amended version was filed on July 27, 2009. The amended document contained the following statement: “Amended July 27, 2009 pursuant to decision of Adjudicator Gregg Knudsen dated July 22, 2009”.

(18) My decision was simply to allow the filing of the Defence and Counterclaim, not to change or vary the documents. That statement should be struck.

(19) Mr. FitzGerald filed a Defence to Counterclaim dated July 28, 2009.

(20) **This Application**

(21) Before reviewing the background to this application, it is appropriate to consider the purpose of the *Small Claims Court Act* which provides the basis for the decision in this matter:

> **2** It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

(22) It is also important to note that any commentary on this motion will not involve an assessment of the credibility of the witnesses or a determination of the prospect of liability, or otherwise, of this matter.

(23) As noted at the outset, this matter has taken a great deal of time, a total of eight nights of evidence, a telephone conference and a separate night for this motion. Further, some 92 exhibits have been introduced. The delays in large measure are the result of the conduct of the case by Mr. Lienaux. One of the primary concerns for him appears to be the cross examination of Sarah Arnold, a witness called to compare the similarities to the Exceeding Reading Program and another, SpellRead PAT. She is an instructor of these reading programs and has experience and familiarity with the Spell Read Program. Her evidence has gone on for five evenings, four of them under cross examination. Mr. Lienaux’s correspondence suggested he was still not finished.

(24) Ms. Arnold is not an expert witness and has not been qualified as such. Her employer is not a party to this proceeding. Her family had been involved with the backing of the Spell Read program. Mr. Lienaux did raise significant issues of credibility and any weight I would have given her evidence would have reflected both of these factors. Several times Mr. Lienaux has accused Mr. Valadares, solicitor for the Claimant, of redacting e-mails from Ms. Arnold. I could not find any evidence of that. At one point, he attempted to have her restate a significant amount of evidence she gave previously in chief, allowing her to reinforce the evidence Claimant’s counsel introduced.

(25) He made numerous requests by e-mail - a procedure grossly over used by both sides’ representatives despite my repeated admonishments - requesting me to order Ms. Arnold to produce all manner of documents when no subpoena had been issued for their production. He

has asked the Court to direct what documents I thought the witnesses should introduce. There have been subpoenas issued subsequently.

(26) He also sought to introduce lengthy periodical articles without bibliography and not in any way relevant to this matter. I had previously disallowed a partial article consisting of several pages which were not in sequence and had no citation or foundation. His rationale was that the articles and theories were used to impeach Ms. Arnold's evidence and then sought to admit many of them even after I ordered him not to. Much of the evidence had scant if any relevance to any of the pleadings.

(27) When directed to refer to his prepared notes and questions, he replied that he was not able to prepare any questions in time as he was making photocopies for the hearing.

(28) There were other procedural issues raised, several times he raised a possible motion for non-suit. I advised him that even with the Claimant's evidence not finished, I would not be prepared to grant that motion. He proposed to raise an issue of general damages.

(29) I had ordered numerous times for both parties to exchange documents in an effort to streamline the evidence to be admitted. The relationship between the parties counsel is such that this is not possible. As a result, I conducted a case conference on October 8, 2009, in an effort to address some of these procedural issues. At that time, I raised the issue of defamation as pleaded in the counterclaim.

(30) During the conference call, I ordered the Defendants to either file an application to stay the proceedings or amend the pleadings to strike that paragraph. If they chose to transfer the matter to Supreme Court, I would review the pleadings and make the appropriate order. (As she was not on the conference call, I clarified at the hearing for Ms. Latta's benefit that it is necessary to review the applicable law). On October 13, 2009, she provided the Court a copy of a document entitled Application for Dismissal of Proceedings. In fact, what is being sought is a stay of proceedings with a view to allow the matter to continue in the Supreme Court since, as noted, a separate action has already been commenced in Supreme Court concurrently.

(31) **Defamation Claim**

(32) The Defendants claim for defamation can be found in paragraph 40 of the counterclaim:

"Kimberley Latta claims general damages from Toby Humphreys for defaming her reputation and the reputation of the ER (Exceeding Reading) Program by falsely representing to Miss Arnold and Kaplan/SR that Bedford Learning Center Inc. and Kimberley Latta sold parts of the Spell Read teaching program to Miller Lake Learning Services Inc. and Toby Humphreys so they could be taught for profit as part of the ER Program."

(33) Section 10(c) of the *Small Claims Court Act* provides as follows:

10 Notwithstanding Section 9, no claim may be made under this Act……..

(c) for defamation or malicious prosecution;

(34) Such an application is made pursuant to section 15 of the *Act* and the Civil Procedure Rules and has received judicial interpretation.

(35)
(36) **The Law**

(37) **S**ection 15 of the *Small Claims Court Act* provides as follows:

"15 The Court does not have jurisdiction in respect of a claim where the issues in dispute are **already** before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19."

(38) The Small Claims Court action was commenced prior to the institution of the Supreme Court action. Consequently, resort must be had to the cases dealing with such concurrent applications.

(39) The most commonly cited case on this issue is *Llewellyn Building Supplies Limited v. Nevitt* (1987), 80 N.S.R. (2d) 415, a decision of Justice Haliburton then sitting as a Judge of County Court of District Number Two. The essence of his decision can be found at page 417:

"In Nova Scotia, under our *Civil Procedure Rules*, the pleading of a claim for set-off is preserved by rule 14.20. Under the provisions of Rule 16, it is clear that a counterclaim encompasses claims being advanced by a defendant, whether arising out of the same transaction or whether arising as a set-off out of entirely separate matters (16.01(1)).

The *Civil Procedure Rules* apply insofar as they may be adapted to that purpose to proceedings in the Small Claims Court.

Considering the provisions of Civil Procedure Rule 16 and s. 25 of the *Small Claims Court Act*, it is clear that the Adjudicator is entitled to examine the claim and the counterclaim and any other actions between the same two parties which may be pending at the same time before his court, and that as directed by s. 25 of the *Small Claims Court Act*, he will try them as one, unless, in his discretion, he deems it advisable to order that the two claims be severed and tried separately. So, while s. 25 of the *Small Claims Court Act* specifically authorizes him to join two claims, similarly rule 16.03(d) permits him to "order the counterclaim to be excluded or tried separately."

It will be apparent, then, that the Adjudicator of the Small Claims Court must exercise his judicial discretion as to the most effective and convenient way for the matter before him to proceed. He must bear in mind the objective of the Small Claims Court procedure; which is to provide a cheap, effective and relatively speedy method of adjudicating civil disputes. It is his duty in exercising his discretion to ensure that specious or frivolous allegations raised by a defendant in the pleadings before him not be permitted to subvert the purposes of the *Act* and of his court. He must be mindful of the right of a plaintiff to choose the forum in which his action will be heard. He must consider whether the issues raised in the claim and the counterclaim can be conveniently severed and be heard in that fashion without adding unnecessary or unreasonable expense to the proceedings, or whether the most "judicious" method of dealing with the issues before him would be to have the whole proceeding consolidated in an action which is outside his jurisdiction and which would, therefore, involve the proceedings being commenced in another court."

(40) The references to the Civil Procedure Rules are in fact those in effect in 1972. Current references in the 2009 Rules can be found as follows:

4.08 (1) A defendant may counterclaim against a plaintiff for any claim the defendant has against the plaintiff.

and further:

37.01 A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.

37.05 A judge may separate parts of a proceeding for any of the following reasons:
(a) a party joined a party or claim inappropriately;
(b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
(c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

(41) The new rules, in the same manner as their predecessor, inform the procedures under the *Small Claims Court Act*. I find the words of Justice Haliburton equally applicable. In summary, I find Rule 37.05 permits an Adjudicator to sever a counterclaim from the main proceeding when it is not appropriate to be joined or the benefit of separating the party or claim outweighs the advantage of leaving them joined.

(42) In the case of *American Home Assurance Company et al. v. Brett Pontiac Buick GMC et al.*, (1991), 105 N.S.R. (2d) 425, Saunders J. (as he then was) stated as follows:

In **Canadian Imperial Bank of Commerce v. Ria-Mar Fisheries Limited**, (1985), 71 N.S.R. (2d) 446 (T.D.), Mr. Justice Kelly applied the test for a stay of proceedings as laid down in **St. Pierre et.al. v. South American Stores (Garth and Chaves)**, Limited et.al. (1936) 1 K.B. 382. There Scott, L.J., said mere inconvenience to the defendant would not be enough to deprive the plaintiff from bringing his action. He went on to express a two-fold test for granting a stay:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and
>
> (b) the stay must not cause an injustice to the Plaintiff. On both the burden is on the defendant." (at p. 398).

While inconvenient, there is no evidence before me of any "prejudice" to the applicants. The defendants' claims are authorized by statute and so cannot amount to an abuse of process: **Northeast Building Supplies Limited v. Ridgeway Investments Limited**, (1989), 90 N.S.R. (2d) 373.

It is also an important consideration that these claimants have opted to have their cases decided expeditiously in the Small Claims Court. In **MacDonnell v. Willton**; **Hall v. Chisholm**, (1986), 70 N.S.R. (2d) 76, Hall, L.J.S.C. refused to transfer proceedings from Truro to Sydney as to do so would delay the hearing. At p. 77 he wrote:

> " Certainly, to the parties, an early trial date is a most significant consideration so that their claims may be disposed of as soon as possible. It is an important factor in any litigation. It seems to me that it would be unreasonable for me to grant an application that would cause a further delay of at least nine (9) months and possibly a year or even more in the conclusion of the proceedings by transferring the trials to Sydney."

(43) Justice Saunders goes on to state:

> (44) Section 15 provides:

(45)

(46) "The court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with subsection (2) of Section 19."

I do not regard Section 15 as a means by which a defendant could thwart any action taken against it by simply deciding to sue as a plaintiff in the Supreme Court. Such an attempt to oust the jurisdiction of the Small Claims Court would be attributing a meaning to words which would defeat the purpose of the legislation. In other words it would be the very abuse of process about which these applicants have complained.

The words in Section 15 should be given their plain meaning. The word "already" must refer, in my respectful view, to proceedings previously commenced in either the County Court or the Supreme Court. In all cases the court may consider the pleadings to ensure that they are properly prepared, motivated and show a legitimate cause of action. There is no evidence that these actions, previously commenced in the Small Claims Court were abusive, or launched with any mala fide intent.

(47) In applying the law to the circumstances, I find the original claims between the Miller Lake Learning Services Inc., the Defendants Kimberley Latta and Bedford Learning Center Inc. are severable, and specifically, they have not met the test in the cases cited by Justice Saunders.

(48) **Details of Supreme Court Pleadings**

(49) The Defendants in this action commenced an action in Supreme Court. Again, the pleadings are lengthy, consisting of 81 paragraphs and almost ten pages. As with the Statement of Defence and Counterclaim for the Small Claims Court Action, many of the paragraphs are irrelevant. It is noteworthy that while the intention of my ruling was to simply give the Defendants the opportunity to correct their pleadings and if necessary, commence a separate action for defamation, they have in fact expanded the scope of the pleadings.

(50) Paragraphs 46 to 51 of their Statement of Claim provides the details of the Small Claims Court Action. The initial Small Claims Court Claim is described as having been filed by Toby Humphreys. Throughout the Statement of Claim, there is no mention of Miller Lake Learning Services Inc., but for paragraph 4 which essentially describes the identity of Toby Humphreys. The remainder of the claim has no reference whatsoever to the Claimant.

(51) Paragraph 52 goes on to state the reasons for commencing the action in Supreme Court rather than Small Claims Court. In paragraph 52, ten separate reasons were given for commencing the action in Supreme Court, some have been already addressed at Small Claims Court and others, largely awards of damages, are being raised for the first time. As noted, these are all claims being made against Toby Humphreys in her personal capacity.

(52) Three separate issues were raised in the pleadings pertaining to the conduct of

the hearing, one of which I have addressed below. The proper place for raising these issues is on appeal of this decision to the Supreme Court. This has not taken place. I have already addressed the issues in this decision or commented on these issues the night of the hearing.

(53) In severing claims under Civil Procedure Rule 37.05, an Adjudicator must be mindful of the effect of *res judicata*. This doctrine is significant as stated by Beveridge, J.A. in the unreported decision of *Kameka v. Williams*, 2009 NSCA 107 at pp. 5-6:

The respondent is correct to acknowledge the significance of the doctrine of *res judicata*. It is a common law principle dating back hundreds of years. As G. Spencer Bower observed in his original text, *The Doctrine of Res Judicata* (London: Butterworth & Co., 1924) at 218 *et seq*, it is a doctrine that, if not founded upon Roman law, is fortified and illustrated by it. The doctrine's long standing existence was commented on by Binnie J., in giving the judgment of the court in, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:

[20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553,at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68.
The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario CivilProcedure* (loose-leaf), vol. 3 Supp., at 21 § 17 *et seq*.
Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for
the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

(54)

(55) His Lordship goes on to hold:

There have been numerous cases where a plaintiff has successfully brought a claim in a Small Claims Court, or other court of limited jurisdiction, for property damage arising from a motor vehicle accident and, as a consequence, barred from bringing a subsequent action in a superior court for damages for personal injury arising out of the same accident.

(56) He discusses the decision of Justice Grant in *Gough v. White*, (1983), 56 N.S.R. (2d) 68:

After having found special circumstances to exist, thereby permitting the plaintiff to proceed in Supreme Court, Grant J. found the Small Claims Court not to be a court of competent jurisdiction. He wrote:

[30] I find the Small Claims Court is not a Court of competent jurisdiction such as to place its judgment in these circumstances to estop the plaintiff's action on a defence of *res judicata*. I find that to do so would permit a grave injustice to be done. To be a court of competent jurisdiction I find it must not only be competent to determine the issues but must also be competent to grant the appropriate relief.
Here it cannot do so….
[33] The comments of Grant J. about the jurisdiction of the Small Claims Court must be considered to be *obiter*. If the Small Claims Court was somehow not a court of competent jurisdiction, there would have been no need to make any finding of special circumstances. If not a court of competent jurisdiction, the

doctrine of *res judicata* would have no application whatsoever. The suggestion that the Small Claims Court was not a court of competent jurisdiction was not followed by Kelly J. in *Shanks v. J.D. Irving Ltd. (c.o.b. Irving Equipment),*
[1985] N.S.J. No. 119, nor by Roscoe J., as she then, was in *Big Wheels, supra*. In my view, there is no basis to conclude that the Small Claims Court is not a court of competent jurisdiction to hear and decide allegations of negligence.

It is clear that certain issues decided in Small Claims Court may result in issue estoppel if raised in subsequent proceedings. I do not feel the issues in this claim, namely the interpretation of the Licensing Agreement will have any impact on a claim of defamation. As noted, certain issues involving a claim for general damages have been raised but only against Ms. Humphreys. The law does not recognize a claim for general damages for a breach of contract in matter of this sort. Reference is made to the case of *ITT Industries of Canada Ltd. v. Provincial Data Services Ltd.*, 1993 CanLII 5329 (NB C.A.). The Court stated as follows:

"While general damages have occasionally been awarded in breach of contract actions, there is often a personal factor involved. For example, poor workmanship causing "real physical inconvenience and frustration" may result in an award of general damages (**Raynard v. O'Blenis** (1978), 21 N.B.R. (2d) 425). Also, when a vacation falls short of its advertised glamour (**Jarvis v. Swans Tours Ltd.,** [1973] 1 All E.R. 71) or when a breach of contract causes mental distress (**Bohemier v. Storwal International Inc.** (1982), 40 O.R. (2d) 264 general damages may be awarded.

In purely commercial contracts, however, an award of general damages is uncommon. General damages are sometimes confused with the situation where it is difficult to precisely value the loss and, thus, quantify the special damages. In such cases, if the loss is attributable to the breach and not too remote, the court must, however difficult it is to assess the damages, make an award. Although the award may amount to an estimate, the lack of mathematical precision does not disentitle a plaintiff to compensation. But such damages are special damages. "

(57) The contract between the parties is of the latter type described by the New Brunswick Court of Appeal. It is a purely commercial agreement and in my view, any damages experienced by either party, as they relate to the contract are special damages.

(58) In reviewing the case law and exercising my discretion, I must now consider the requirements espoused by Justice Haliburton in the *Llewellyn* case and the requirements of Civil Procedure Rule 37.05. The Claimant chose to proceed in Small Claims Court. The issues raised in the Amended Counterclaim were made in the Small Claims Court. It was not until I indicated to both counsel that the *Small Claims Court Act* specifically excludes an action in defamation that an action was commenced at Supreme Court. The main issue in the original claim concerns the issue of what was sold under the license agreement. In applying the balance of convenience test prescribed by Justice Saunders, I find that severing the claim would not create prejudice for the Defendants in any proposed action against Toby Humphreys. They are still able to be heard in full at Supreme Court with the benefit of all pre-trial disclosure procedures and their concurrent enforcement provisions. Following our discussions the night this motion was heard, I am confident Ms. Latta is aware that costs can be awarded against the Defendants/Claimants by Counterclaim, herself and

Bedford Learning Centre. I find that to prolong the resolution of the hearing on the principal contract will create prejudice to the Claimant. As noted by Justice Saunders, the Claimant has chosen the Small Claims Court as the forum of choice in hopes of a speedy resolution. Furthermore, the issues are sufficiently distinct and, as a result their final resolution will not result in any significant issues of *res judicata* such that would prejudice the rights of either party.

(59) It is important to bear in mind, the allegation under both the Counterclaim at Small Claims Court and the main action at Supreme Court make no mention whatsoever of any liability involving Miller Lake Learning Services Inc. In my view, the Counterclaim in its current form is extraneous to the main claim of liability under the contract. They are not inextricably bound.

(60) If I am wrong in this analysis, as Ms. Humphreys has not been named in or actually commenced an original claim on her own in accordance with the *Small Claims Court Act*, I find she is a non-party rendering any application for severance of the Counterclaim against her unnecessary. The *Small Claims Court Act* does not permit a third party proceeding, accordingly a claim against another party can only be commenced with a fresh claim and an order of the adjudicator to hear those claims concurrently. The procedure is described in sections 19 and 25:

19 (1) A claim before the Court shall be commenced in the county in which

(a) the cause of action arose; or

(b) the defendant or one of several defendants resides or carries on business,

by filing a claim in the form prescribed by the regulations, accompanied by the prescribed fee, with the prothonotary of the Supreme Court in the proper county.

25 Where an adjudicator is satisfied that there are two or more claims before the adjudicator which would be best dealt with together, the adjudicator may in his discretion hear the claims at the same time.

(61) No such claim was either filed by or against Ms. Humphreys. No application to hear them concurrently has ever been brought. If it is necessary for me to do so, I find under rule 37.05(a) that Toby Humphreys is a party that was joined inappropriately. Furthermore, as the claim against her personally is now before the Supreme Court, I have no jurisdiction to hear any matter against her.

(62) I order the entire counterclaim against Toby Humphreys struck.

(63) In order to properly sever these actions, the most effective means is to strike those paragraphs from the Amended Statement of Defence and Counterclaim relating firstly to defamation. Accordingly, I strike paragraph 40. As paragraphs 36 and 37 are collateral to these claims, I order those struck as well.

(64) In addition, it is appropriate to strike any paragraphs seeking claims from Toby

Humphreys in her personal capacity and allegations about Ms. Humphreys in support. Accordingly, I strike paragraphs 27 – 31, 33 – 35 and 41.

(65) Paragraph 39 is amended by striking the phrase “and Toby Humphreys”.

(66) **Small Claims Court as a Court of Record**

(67) In paragraph 52 (i) of the Statement of Claim, Ms. Latta alleges that:

“No proper record of the Claim has been kept by the Small Claims Court (“the Court”) contrary to the requirements of s. 3 of the Small Claims Court Act of Nova Scotia (the Act)”.

(68) Section 3(1) of the Act states as follows:

There shall be in the Province a court of law and **of record** to be called the Small Claims Court of Nova Scotia, hereinafter called the "Court".

(69) This was not the first time the issue was raised. On October 7, 2009, in one of many e-mails sent directly to me by Counsel, Mr. Lienaux stated as follows:

(70)

Dear Mr. Knudsen,

(71) In the course of researching the jurisdiction of the Court yesterday I reviewed the provisions of the Act. S. 3 provides as follows:

"There shall be in the Province a court of law and of record to be called the Small Claims Court of Nova Scotia..."

No record has been kept of the proceedings in this matter and I am wondering what legislation permits the Court not to keep a record of its proceedings as mandated by its empowering legislation. I am unable to locate any legislation, regulations or case law which permit the Court not to keep a record of its proceedings. I assume that there must be some legislation that I am missing and I am writing to inquire accordingly. If that is not the case then these proceedings are defective and void ab initio. Given the gravity of this matter this issue should be resolved before any further steps are taken.

Could you please advise me at your convenience of the basis in law upon which the Court determined that no record of this proceeding would be kept?

(72) Thank you.

(73) This is clearly improper to raise in this context. In noting his objection, he was advised accordingly:

“Are you making a motion, raising an objection or simply making an inquiry?

If the latter, it is improper to address such matters to the Adjudicator.

Reference is made to s. 32(4) of the *Small Claims Court Act*. As mentioned several times in the hearing, the "record" is not a recorded transcript but a Summary of Findings submitted by the Adjudicator upon receiving a notice of appeal. That Summary acts as the factual account for the

> purposes of the Supreme Court and the parties when hearing the Appeal. (You may recall s.32 replaced the former "Stated Case" provisions.). This finding results in a written decision and order against which the right to appeal is available. It is the practice under which all Small Claims Court matters proceed. The procedure has received comment by the Nova Scotia Supreme Court in several recent cases.
>
> The process is consistent with the intent of the Act and not defective.

(74) As noted, the proceedings were not recorded, as is consistent with the practice among all Small Claims Court Adjudicators in this province. That is the only comment I shall raise about the substance of the pleadings for the Supreme Court Action. The proper forum to address this should be on appeal.

(75) **Charles Lienaux's Suspension and Status as Agent**

(76) In setting dates for the resumption of this matter, Mr. Lineaux advised in an e-mail of September 24:

I have commitements (*sic*) during the week of October 5 but would be available to come back to court to resume the hearing in any of the three following weeks in October so that we can get back to this as soon as possible. Like Mr. Valadares I have commitments in November so if we don't finish in October then we will be pushed off into December. In the circumstances every effort should be made to finish the matter in October.

(77) Beginning November 1, Mr. Lienaux was scheduled to serve a suspension from practice imposed upon him by the Nova Scotia Barristers' Society. (see *Nova Scotia Barristers' Society v. Lienaux*, 2009 NSCA 11 affirming *Nova Scotia Barristers' Society v. Lienaux*, 2008 NSBS 2); This date was apparently finalized following the Supreme Court of Canada's denial of his application for leave to appeal, which came down on September 17, 2009. I advised both counsel as follows:

"I was not aware Mr. Lienaux had yet to serve his suspension until learning earlier this week of the Supreme Court of Canada's decision on leave. Whether or not the matter is concluded in October, there remains the possibility of further correspondence from the Court with counsel at any time thereafter. Accordingly, I direct Mr. Lienaux to **forthwith** provide the Court in writing the effective date and duration of his suspension. If available, he is to provide a true copy of the suspension notice issued by the Nova Scotia Barristers' Society containing the name and address of the Receiver appointed by the Society. If it is not available, he is to provide a copy of that additional information **forthwith** upon receipt. This is to be sent to me in care of the office of the Small Claims Court Clerk."

(78) Mr. Lienaux's reply of October 5, 2009 provided:

"Dear Mr. Knudsen,

The only information which I can provide you at this time is that my suspension commences on November 1, 2009 and ceases on November 30, 2009. No notice has been published. No receiver will be appointed.

I assume that the Society will publish a suspension notice at their discretion some time before the

suspension is to be served. That does not prohibit my appearing in the Small Claims Court.

As I indicated in my previous correspondence the suspension does not affect my role in this proceeding. I have never been counsel of record in this case. I only play a limited role in the assistance of the Lattas in the trial.

Like Mr. Fitzgerald I am permitted under the Act to represent the Lattas at the hearings and in the proceeding as **their agent**. (emphasis mine)

The reason why I have interceded to receive correspondence from Mr. Valadares is to prevent threats such as were communicated by exhibit C-36 which is a direct violation of article 4.10(a) of our code of ethics. Correspondence from the Court can be directed to me during the suspension without its terms being violated."

(79) In support of this assertion, he provided a copy of an excerpt entitled "Guidelines for Suspended or Disbarred Members or those permitted to resign" where it clearly authorizes a suspended lawyer to "provide services as an agent where permitted by statute (such as Small Claims Court)". However, a member is required to advise the principal in writing among other things that he is not acting as a lawyer, and:

"In addition, any Court, administrative tribunal must be informed that you are appearing as an agent not as a lawyer."

(80) This is the first record I can find of Mr. Lienaux's acting as agent for Ms. Latta or Bedford Learning Center. His indication at the outset was of a limited retainer on the Defendants' behalf. Ms. Latta did sign the pleadings. Until he was discharged, Mr. Lienaux conducted all examinations of witnesses, made all motions and all correspondence was prepared by him. In one situation, he provided his solicitor's undertaking to retain original exhibits to be returned when Court was concluded. He argued an application on behalf of his clients for legal fees as costs and in her original Defence, Ms. Latta sought leave to amend their pleadings after receiving "legal advice". In none of his correspondence prior to September 24th did Mr. Lienaux indicate he was her agent.

(81) I had intended to deal with his status prior to the resumption of the hearings. During our conference call, I invited Mr. Lienaux and Mr. Valadares to submit briefs on this issue by October 16. However, Ms. Latta proceeded on behalf of herself and Bedford Learning Centre before the issue could be argued and decided. However, as no application is before this Court, the record will indicate he was her agent until otherwise decided.

(82) This is very troubling for several reasons, most notably its impact on Ms. Latta's right to solicitor client privilege.

(83) Solicitor-Client Privilege

(84) The law has long recognized the sanctity of solicitor-client privilege. As

Dickson, J (as he then was) stated in *Solosky v. The Queen* [1980], 1 S.C.R. 821 at pp. 833-834:

> As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in Re Director of Investigation and Research and Shell Canada Ltd., at pp. 78-9:
>
> ... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him. (emphasis mine)

(85) The rationale behind this principle has been has been discussed in many sources, including the Nova Scotia Barristers' Society's Code of Professional Conduct:

> Guiding Principles
> In a lawyer-client relationship
>
> (a) the lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them; and
> (b) the client must feel completely secure and entitled to presume that, unless there is an agreement or understanding with the lawyer to the contrary, all material disclosed to and matters discussed with the lawyer will be kept secret and confidential.

(86) The Supreme Court of Canada has found this to be both a substantive right and one of evidence. The law has repeatedly upheld this protection in civil, criminal and Constitutional cases. Any legally authorized infringement on this privilege is strictly construed. The relationship of agent and principal offers no such right.

(87) When asserting this right, the Court and Counsel both recognize the importance of the relationship, one which is not easily or lightly dismissed. The right of privilege is the property of the client and not the lawyer. I regret that I did not have the foresight on the night of the hearing to question Ms. Latta on the extent of her understanding of this issue. The Court can only hope Ms. Latta was given full opportunity to understand the impact of Mr. Lienaux's claiming he was her agent. As noted, I have erred on the side of caution in this proceeding and treated the relationship as solicitor-client and not waived, but this is a practical matter only. It is not determinative of their relationship. If necessary, that is for this or another Court to decide on another day.

(88) Mr. Lienaux compares his status to that of Mr. FitzGerald. Mr. FitzGerald's role throughout this proceeding has been that of an agent as he is not legally able to appear in any other representative capacity. Mr. Lienaux came to Court as a practising barrister. The Court presumes a practising barrister appears as the client's counsel unless clearly and unequivocally stated. There was no such statement. Indeed, his conduct throughout this matter has suggested the opposite.

(89) Mr. Valadares has stated many times that he has not contacted Ms. Latta

directly assuming Mr. Lienaux was representing Ms. Latta.

(90) Mr. Lienaux has indicated that he has withdrawn and Ms. Latta is representing herself and Bedford Learning Centre. Yet on two separate occasions since then, he has attempted to continue in this role, once when he sought to deliver documents to the Defendants personally which were required to be delivered to Court and the other when he appeared in Court the night of the hearing and consulted with the Lattas during the hearing. It is clear he has not completely severed the relationship.

(91) Mr. Lienaux's conduct is at best, ambiguous. If he had intended to act as Agent, one would expect in the face of clear direction from the Society that he would have made a point of advising the Court and opposing Counsel, unequivocally and in writing. He did not do this. Indeed, I do not find any such statement was made to this Court.

(92) In the circumstances, it is appropriate to confirm in an Order that Kimberley Latta is self-represented and appearing as agent for Bedford Learning Centre Inc. replacing Charles D. Lienaux. Further, I order that Mr. Lienaux is unable to appear as either Agent or Counsel for the Defendants for the balance of this proceeding in Small Claims Court without leave of the Court.

Agent and Counsel

(93) It is appropriate to comment on the status of an agent and a lawyer appearing in Small Claims Court.

(94) Section 16 of the *Act* provides as follows:

16 A claimant or a defendant may appear at a hearing in person or by agent and may be represented by counsel.

(95) The *Small Claims Court Act* does not provide a definition of what constitutes an agent. Civil Procedure Rules 33.09 and 34.03 provide guidance.

(96) The appointment of an agent enables the Court to properly identify the individual who is acting on behalf of a corporate party. I do not suggest that the appointment of an agent at Small Claims Court necessarily requires the person to be an officer of the corporate party as required by the Civil Procedure Rules. This can be determined on a case by case basis. However, in all cases, advising the Court of the proper representative of a corporate party is necessary.

(97)

(98) While the Small Claims Court is designed for self-represented litigants, sometimes parties do choose to be represented by Counsel. Likewise, it is common to have lawyers appearing on their own behalf or on behalf of any entities in which they are involved. The presumption in most cases is that a lawyer is appearing as counsel for one of the parties. If he or she intends to act in a different capacity, then notice to

the Court should be provided, preferably in writing and before the commencement of the hearing. Otherwise, the Adjudicator, the opposing parties and perhaps even their client may be misled as to the nature of the relationship. I think this an appropriate expectation to place on any practising lawyer appearing in Small Claims Court.

(99) **Disposition**

(100) In my view, this matter as amended should be allowed to continue at Small Claims Court. It has been needlessly lengthy and become bogged down in unnecessary details. There have been inordinate delays. As a result, the hearing of evidence which commenced on June 2, 2009, over six months ago, has yet to be completed. I am not unmindful that most of the evidence of the Claimant has been tendered. However, I think this matter would be best served with a "fresh start" so all evidence can be heard contemporaneously. The procedural issues are addressed by this decision and Order with the more complex issues and those within its jurisdiction to be heard before the Supreme Court. This will enable the Adjudicator to hear evidence, and where necessary ask questions of his or her own. If she has retained new counsel, this will enable Ms. Latta's solicitor an opportunity to prepare.

(101) I believe the matter should be reheard at Small Claims Court before another Adjudicator, and reluctantly, I shall order accordingly. I encourage the Small Claims Court Coordinator office to set this matter down as expeditiously as possible.

(102) **Summary**

(103) In summary, I order the following:

- The motion for a stay or dismissal of the Claim between Miller Lake Learning Services and Kimberley Latta and Bedford Learning Center Inc. is denied. The Counterclaim against Toby Humphreys is severed so that it may be tried at Supreme Court.

- The Amended Statement of Defence and Counterclaim is amended by striking paragraphs 27 – 31, 33 – 35, 36-37, 40 and 41 and the statement "Amended July 27, 2009 pursuant to decision of Adjudicator Gregg Knudsen dated July 22, 2009";

- Kimberley Latta will appear in person on her own behalf and as agent for Bedford Learning Center Inc.

- Charles D. Lienaux is discharged as Agent for the Defendants and may not appear as either Agent or Counsel for the Defendants for the duration of this proceeding without prior leave of the Court;

- The matter is adjourned for rehearing before another Adjudicator.

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(1) An order shall be issued accordingly.

Dated at Halifax, NS,
on December 28, 2009;
(Revised January 19, 2010)

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Gregg W. Knudsen,
Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)