

2016

N.S.C.A. No. 455920  
and 458781

Nova Scotia Court of Appeal

Between:

**Laura MacNutt / PIER101 Home Designs Inc. (3236962)**  
**Appellant**

and

**Acadia University**  
**Respondent**

**T.A. Scott Architecture + Design Limited (3278638 )**  
**Respondent**

**Troy A. Scott**  
**Respondent**

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***APPELLANT'S FACTUM***

***(NS Civil Procedure Rules 90.32)***

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Appellant:

PIER101 Home Designs Inc,  
c/o Laura MacNutt, agent for PIER101  
2428 Ridge Road,  
Wolfville, Nova Scotia  
B4P 2R3

Respondents:

**Acadia University**  
c/o Mr. Jonathan Cuming  
Taylor MacLellan Cochrane  
50 Cornwallis Street  
Kentville, NS , B4N 2E4

**T. A. Scott Architecture + Design Limited**  
c/o Ms. Nadia McPhee  
Brenton Keane  
P.O. Box 6907,  
Saint John, N.B. Canada E2L 4S3

**Troy A. Scott**  
c/o Ms. Nadia McPhee (as above)

# Table of Contents

## Part 1 – Concise Overview

1. Overview.....1

## Part 2 – Concise Statement of Facts

### 2. Facts

1. The Parties.....2

1. Appellant: PIER101 Home Designs Inc.....2

2. Respondent: Acadia University.....2

3. Respondent: Troy Scott.....3

4. Respondent: T.A. Scott Architecture + Design Limited.....3

### 2. Subject Matter

1. PIER101 “works”.....3

2. Creation of PIER101 “works”.....4

3. PIER101 position.....8

### 3. The Decisions Below

1. SCNS Order under appeal (Costs) Hon. Justice J.L. Chipman, Aug. 26<sup>th</sup>, 2016.....8

2. SCNS Order under appeal (Merits) Hon. Justice J.L. Chipman Oct 11, 2016 .....9

Part 3- List of Issues.....10

Part 4- Standards of Review.....11

Part 5- Argument.....11

1. Issue 1.....11

2. Issue 2.....22

3. Issue 3.....23

Part 6- Order or Relief Sought.....29

Exhibit ‘A’ : Copyright Act.....30

## APPELLANT'S FACTUM

### Part 1- OVERVIEW

[1] This appeal concerns breaches of copyrights held by PIER101 Home Designs Inc.

In July and August of 2013, Laura MacNutt, principal designer of PIER101, created a concept design and fixed these ideas in drawings for client, Acadia University, ("Acadia") during the preliminary financing stages of a prospective building project. The authorship of these drawings is undisputed.

[2] PIER101 agreed to provide, for a fee, a presentation drawing to pitch the project to a prospective Hong Kong donor who could fund the project. PIER101 created several options for client review and developed the preferred version in preparation for creating a presentation drawing.

[3] PIER101, in good faith, offered to lend "instruments of service", specifically floor plans and elevations to enhance the pitch. PIER101 retained all rights of all design drawings and waited for results of financing.<sup>1</sup> Acadia presented the PIER101 concept to the Wu family, who financed the project to the tune of \$1.5 million dollars.

[4] Sometime thereafter, the PIER101 drawings ended up in the hands of rival designer, Troy Scott, the Town of Wolfville Planning Dept., published in newspaper and on the internet, and other third parties. PIER101's exclusive rights to publish, copy, broadcast and monetize were stolen. This was not marginal pirating of royalties, but rather theft of PIER101's primary assets.

[5] PIER101 discovered these transgressions in January, 2014, through an illustrated newspaper article<sup>2</sup>, featuring Troy Scott representing and describing PIER101 concept drawings of at a public meeting. The PIER101 logo and identifying text was cropped from the broadcast images. Acadia's unauthorized reproduction, distribution, and publication negated PIER101's ability to earn revenue from PIER101's intellectual property assets.

[6] Acadia succeeded in acquiring a development permit from Town of Wolfville, using 10 pages of PIER101 concept drawings, thereby establishing that the eventual building would have to be substantially similar to PIER101's concept. Further, Acadia hired T.A. Scott Architecture + Design Ltd.<sup>3</sup>, to complete the design process with unauthorized use of PIER101 copyright protected material.

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1 Appeal Books, Part

2 Appeal Books Part 2, vol. 1, **Tab 2**, sec. 11.2.4, p. **98p**

3 Appeal Books Part 2, vol. 1, **Tab 10**, sec. 15.5 p **314**

[7] PIER101 is appealing the lower court's dismissal of claims of copyright infringements, on the basis that the lower court Justice made errors in his findings of fact and consequently errors in the application of the law, in part, as a result of the judge failing to facilitate the principles of natural justice.

[8] PIER101's ability to effectively present the verifiable evidence was compromised by procedural errors which resulted in prejudicial rulings against the applicant.

## **Part 2: FACTS**

### **PARTIES:**

#### **Appellant : PIER101 Home Designs Inc.**

[9] The appellant PIER101 Home Designs Inc., represented by principal designer and recognized agent Laura MacNutt, who was so acting as the self-represented applicant in the lower court matter, and continues to act as the self-represented appellant in appealing the decisions on merits and costs.

[10] Laura MacNutt is a professional designer and artist, who earned two degrees in architecture, including Masters of Architecture. Laura MacNutt has worked as an intern architect, architect, project manager, production designer, and fine arts teacher in several countries before settling back in her native Nova Scotia approximately 20 years ago. Laura MacNutt is currently Chair of the Built Heritage Awards Committee of Heritage Trust of Nova Scotia, and serves on several other charitable boards.

[11] On May 14, 2009<sup>4</sup>, Laura MacNutt incorporated PIER101 Home Designs Inc. (N.S. Limited Company reg. ID # 32369662), ("PIER101"), and conducted a successful building design company with a respectable reputation in the Annapolis Valley region of Nova Scotia. PIER101's scope of services does not require Nova Scotia Association of Architects license or permit and did never knowingly breach NS Architect's Act or any other laws. Neither PIER101 Home Designs Inc. nor Laura MacNutt have ever been charged with unlawful conduct.

#### **Respondent : Acadia University**

[12] The respondent, Acadia University, ("Acadia") is a well known liberal arts university, and arguably the largest employer in Wolfville, Nova Scotia. Acadia developed a client relationship with local designer PIER101 Home Designs when Marcel Falkenham, Acadia's Director of Planning Facilities contacted PIER101 Home Designs Inc. seeking design services for a building addition to their Alumni Hall.

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4 Nova Scotia Joint Stocks <https://rjsc.gov.ns.ca/rjsc/search/viewProfile.do>

[13] The engagement discussions were unusually casual and hasty; Marcel Falkenham indicated a very pressing schedule in which Acadia had to secure financing. Dr. Rod Morrisson, VP of Advancement, was the only other Acadia representative with whom PIER101 engaged during the process of developing preliminary design drawings.

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**Respondent : Troy Scott**

[14] Troy Scott is a Respondent in this matter, in part because of Acadia's conveying PIER101 copyright protected material to Troy Scott, sometime in November 2013. At that time, Troy Scott was an employee of Michael Harvey Architects, Halifax, NS. No Party has provided any record or material evidence of conveyance of PIER101 "works", despite demands for disclosure, though all parties have admitted that such conveyance took place sometime in 2013.

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**Respondent : T.A. Scott Architecture + Design Limited (3278638)**

[15] Troy Scott commenced business as T.A. Scott Architecture + Design Limited (3278638) ("TAS"), on Jan. 1<sup>st</sup>, 2014, the same date he agreed to "Review drawings of ...PIER101", and prepare "a design brief based on PIER101 drawings"<sup>5</sup> for Respondent Acadia.

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**PIER101 "works"**

[16] The PIER101 copyright protected "works", so registered with the Canadian Intellectual Property Office (registration # 1119734, March 9, 2015)<sup>6</sup>, are a package of 10 sheets of drawings, all of which illustrate a conceptual building addition. The concept was created and fixed in drawing form by PIER101 Home Designs Inc. during the months of June-August 2013.

- (i) Page 1<sup>7</sup>, is described as a 'presentation drawing' which is a rendered perspective of the PIER101 conceptualized building. It's purpose is to convey to laymen how the finished product would appear. Though it may be obvious, the creation of a conceptualized building must precede the creation of a "perspectival" representation of that building.
- (ii) The remaining 9 pages of drawings<sup>8</sup> are preliminary building design drawings, referred to as Floor Plans, Elevations, etc.

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5 Appeal Books, Vol. 2 pt ii , **Tab 11**, p **385-386**, "TAS Disclosure of Documents, Ex. A-3"

6 Appeal Books Part 2, vol. 1, **Tab 3**, sec. 11.3.5, p **140**

7 Appeal Books Part 2, vol. 1, **Tab 8**, sec. 113.5, p **221**

8 Appeal Books Part 2, vol. 1, **Tab 8**, sec. 113.5, p **222-230**

[17] These PIER101 “works” are a site specific bespoke solution. The skill and judgment required to produce such works, represents decades of experience, years of formal education, and months of passionate creative labour.

[18] PIER101’s business, like most creative operations, depend upon intangible assets which are not viable, income yielding, nor leverageable assets unless Copyrights are enforceable.

### Creation of PIER101 “works”

[19] PIER101 created and reviewed with Acadia, several versions and variations<sup>9</sup> of a building addition as per Acadia’s expressed desire to have “high visibility” and “build out on the west side”,<sup>10</sup> thereafter PIER101 considered that the addition may be more appropriately sited to the north<sup>11</sup> and thus PIER101 created another concept for Acadia’s consideration, which they “loved”<sup>12</sup> Further, and as per Acadia’s instructions, PIER101 proceeded to develop this approved design for the pending pitch to the Wu Family.

[20] Some of the significant elements of originality inherent in the PIER101 “works” include:

- (i) the compilation of forms;
- (ii) orientation;
- (iii) location;
- (iv) scale;
- (v) general functional layout;
- (vi) relationship of addition to the existing;
- (vii) the overall resulting shape of existing and proposed forms;
- (viii) the degree to which the existing buildings form and style influenced the form and style of the addition.
- (ix) circular landscape feature; and
- (x) incorporation and design of pergola

[21] The concept was not a mere mechanical exercise, nor an obligation of constraints. The concept was a creative solution to a complex matrix of variables, and influenced, but NOT defined, by the style and form of the existing building.

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9 Appeal Books Part 2, vol. 1, **Tab 8**, sec. 113.5, p 552-560

10 Appeal Books vol. 1, **Tab 3**, sec. 11.3.6, p 143-144

11 Appeal Books vol. 1, **Tab 3**, sec. 11.3.6, p 143

12 Appeal Books vol. 1, **Tab 3**, sec. 11.3.6, p 144

[22] The applicable Wolfville “Architectural Guidelines”<sup>13</sup> may inform the style of local design proposals, but they do not define the creative solution. PIER101 has not claimed copyright of any particular style or specific building component, as neither would authors claim copyright on writing style or specific words.

[23] In June, 2013, when Acadia contacted PIER101, (as stated in Paragraph 11), Acadia explained that the building project depended upon first establishing financing through alumni donors. According to Acadia, a likely prospect for a substantial contribution was imminent. Acadia asked if it would be possible to generate a presentation drawing within 2 weeks, to present to the Wu family in Hong Kong, and if it was possible, how much would it cost.

[24] A fee of \$4,000 was negotiated between Acadia and PIER101 for provision of a “presentation” drawing for the sole purpose of securing funds, with a prospective donor.

[25] At no time did Acadia University seek license nor permission verbally nor in writing, to use PIER101 “works” for any other purpose than to secure funding from the Wu family. There was clear inference during the review meetings between Acadia and PIER101, that PIER101 would develop the PIER101 concept at such a time as financing was secured.

[26] PIER101 understood that much of the work required to create a compelling concept on which to base the presentation drawing, would be uncompensated in the event that the project didn't move forward. However, Acadia described the prospect of financing through the Wu family as promising, so PIER101 invested in the speculative work, on the reasonable presumption that PIER101 would continue the design work when the project was funded. It would have been unreasonable to knowingly invest in a project intended for a rival designer's benefit.

[27] No drawings, sketches, or other copyright protected material was conveyed to PIER101 from Acadia regarding the proposed addition.

[28] PIER101 first generated a concept based on Acadia's expressed desire that the addition be built off the west side of the existing building and provide a dramatic presence. PIER101 created several variations, represented in hand drawn sketches and 3-D computer modelling. PIER101 presented these drawings to Acadia and explained that it was possible but there were challenges.

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13 [https://www.wolfville.ca/component/com\\_docman/Itemid,264/alias,576-downtown-architectural-guidelines-1/category\\_slug,planning/view/download/](https://www.wolfville.ca/component/com_docman/Itemid,264/alias,576-downtown-architectural-guidelines-1/category_slug,planning/view/download/)

[29] Over the course of design development, PIER101 considered many options and developed several massing models. Many variables were accounted for in this design decision, including but not limited to:

- (i) structural conditions of existing;
- (ii) functional layout of existing;
- (iii) utilities and services of existing building;
- (iv) interruption during construction;
- (v) parking;
- (vi) site conditions of existing;
- (vii) existing and pending changes to underground services on site;
- (viii) aesthetics of existing building;
- (ix) Town of Wolfville land use by-laws and Architectural guidelines;
- (x) National Building Code and all other applicable codes; and
- (xi) Budget

[30] Acadia resisted the PIER101 concept proposing addition to the north until reviewing the fixed form of drawings created by PIER101.<sup>14</sup> Acadia advised PIER101 that the meeting with the prospective donors, the Wu Family was delayed by approximately 3 weeks. Acadia requested additional features in the presentation drawing, thus PIER101 continued developing drawings.

[31] In order to enhance the prospects of successfully financing the project, PIER101 offered, in good faith, to lend the full set of preliminary “instruments of service” to compliment the “presentation” drawing. The sole purpose of the presentation drawings was to communicate the PIER101 conceptual design to the Wu Family. Layers of building industry information and precise details were eliminated and/or were not yet fully resolved; as such information was not relevant for the purpose of presentation, and in fact, too much information would have compromised the visual impact of the pitch. These augmented preliminary drawings were never intended for scrutiny by, competing designers, building industry professionals or municipal authorities.

[32] PIER101 forwarded the 10 sheets of drawings to Acadia Aug. 13, 2013.<sup>15</sup> Acadia did not acknowledge receipt of the drawings, nor did Acadia or initiate any further correspondence with PIER101. Acadia then exploited the works with no consideration or respect of PIER101's copyrights.

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14 Appeal Books Part 2, vol. 1, **Tab 3**, sec. 11.3.6 p. 144

15 Appeal Books Part 2, vol. 1, **Tab 3**, sec. 11.3.6 p. 146



[33] Acadia University has admitted to reproducing and distributing copies of PIER101 “works”, without PIER101’s knowledge, permission or copyright license, to at least three “third” parties, including :

- (i) Troy Scott <sup>16</sup>& T.A. Scott Architecture + Design Limited (TAS)<sup>17</sup>;
- (ii) Town of Wolfville Department of Planning for Development application<sup>18</sup>;
- (iii) Journalist John DeCoste of the Kings County Register.

[34] On Jan. 1<sup>st</sup>, 2014, Troy Scott, principal of the newly minted company, T.A. Scott Architecture + Design Limited, was contracted by Acadia to prepare a “design brief based on PIER 101 drawings”<sup>19</sup>. A few weeks later, Troy Scott presented PIER101 drawings at a public information meeting, (“PIM”)<sup>20</sup> as part of the development application process in Wolfville, where proposed buildings are presented for public review and feedback. It is the first formal step of the building permit process.

[35] This matter identifies Troy Scott and TAS as Respondents who reproduced and distributed PIER101 “works” to multiple third parties, without PIER101’s knowledge, consent, permission or any copyright license. Troy Scott has acknowledged that he copied and distributed PIER101 “works” to the following parties:

- (i) Landscape Architect Brian Deslopes of Town of Kentville with instructions to create derivative works<sup>21</sup>; and
- (ii) Nova Scotia Association of Architects in an effort to disturb PIER101’s business

[36] Further, TAS prepared derivative works from PIER101 “works”, without notice to, or permission from, copyright holder PIER101, thereby infringing moral and general copyrights of PIER101.

[37] Respondent Troy Scott was known to PIER101 prior to this matter, as having actively attempted to disrupt PIER101’s business in 2013, while he was an employee of Michael Harvey Architects. PIER101 executed a preliminary concept for client Mir 1 Development Inc. PIER101 suspended work and withheld drawings for non-payment of approx. \$12,500.

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16 Appeal Books Part 2, vol. 1, **Tab 2**, sec. 11.2.4, p. 97

17 Appeal Books Part 2, vol. 1, **Tab 3**, sec. 11.3.1 and 11.3.2 , pp. **118 - 129**

18 Appeal Books Part 2, vol. 1, **Tab 2**, sec. 11.2.4, p. 97

19 Appeal Books Part 2, vol. 2, **Tab 11**, sec 16.3 , p. **385**

20 Appeal Books Part 2, vol 1, **Tab 3**, sec. 11.3.1 and 11.3.2, p **118-129**

21 Appeal Books Part 2, vo2. 1, **Tab 11**, sec. 16.4. p. **387**

[38] Meanwhile, Troy Scott appropriated PIER101 preliminary concept drawings and broadcast an email to peers, municipal officials, and others, claiming PIER101 “showed complete incompetence...” and Troy Scott suggested to the client, Mir 1 Developments, that they “turn this file over to the RCMP”<sup>22</sup>. The claims were unprovoked and without merit, nonetheless, PIER101’s reputation was damaged.

[39] PIER101 was forced to place a builder’s lien on client MIR1 developments for payment of past due fees while Troy Scott created derivative works from PIER101 concept drawings for Mir1.

### PIER101 Position: Unauthorized Publication & Reproduction of PIER101 “works”

[40] Following the discovery of the unauthorized publication of PIER101 “works”, in late January 2014<sup>23</sup>, PIER101 attempted to discuss and resolve the matter of copyright infringement with Acadia, who offered various interpretations of the applicant’s copyrights including “...the drawings referred to are not copyright material...” in a letter dated Feb 10, 2014 from Darrell Youden, Acadia University V.P. Administration to PIER101. <sup>24</sup>Mr. Youden concluded that any further correspondence regarding the matter should be addressed to Acadia’s legal counsel at Taylor, MacLellan, Cochrane Lawyers..

[41] PIER101 retained legal counsel who, on or about March 11<sup>th</sup>, 2014 sought copyright license fees of \$20,000 jointly and severally from Acadia and TAS, for use of the 10 sheets of drawings of PIER101 “works”.

[42] On March 14<sup>th</sup>, 2014 Acadia claimed to be entitled to copyrights, incorrectly determining that the PIER101 “works” were created by “in the course of employment”.<sup>25</sup> The applicant has never been an employee by Acadia.

[43] Both Respondents rebuffed PIER101’s license proposition, which would have entitled authorized use of PIER101’s “works” for a fee. PIER101’s legal counsel then demanded that Acadia and TAS Cease and Desist production and reproduction of PIER101 “works”. Once again both parties rebuffed demand.

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22 Appeal Books Part 2, vol. 1, **Tab 2**, sec. 11.2.4, p. 110

23 Appeal Books, Part 2, vol. 1, **Tab 2**, sec. 11.2.4, p. 98

24 Appeal Books, Part 2, vol. 1, **Tab 2**, sec. 11.2.6, p. 104 par. 3

25 Appeal Books, Part 2, vol. 2, **Tab 12**, sec. 16.17, p. 418 last paragraph

[44] PIER101 was advised by legal counsel that enforcement of copyrights would require Supreme Court litigation. Such a proposition would require a significant financial retainer of \$25,000 and was described as extremely expensive and time consuming with no guarantees of an equitable outcome.

[45] PIER101 could not afford to proceed with legal representation and did not feel equipped to proceed with self-represented litigation.

[46] PIER101's work flow declined. In March, 2014, Acadia and TAS actively sought retribution<sup>26</sup> in response to PIER101's efforts to resolve the exploitation of PIER101 "works". Acadia VP Darrell Youden described PIER101 as "entirely vexatious and deliberate to attempt to leverage fees" and prompted Troy Scott "lodge a professional complaint" against PIER101.

[47] Troy Scott suggested that Acadia lodge a complaint against Laura MacNutt to Nova Scotia Association of Architects to "allow the association to question her character and perhaps not allow membership at any level in the future."<sup>27</sup>, and added that "you should also file a complaint with the Better Business Bureau".

[48] PIER101's reputation was adversely affected. PIER101 determined that proceeding with legal action to enforce copyrights, was the only option to recover reputation and earning ability. PIER101 attempted to proceed through small claims court, though matter deemed not within that jurisdiction.

[49] A Notice of Application was filed on Oct 6<sup>th</sup> with NS Supreme Court claiming defamation of Laura MacNutt and copyright infringement of PIER101 "works". An amended Notice of Application was filed Dec 15<sup>th</sup>, 2015, in which claims of defamation were extracted.<sup>28</sup>

[50] This amendment was in response to Acadia's assertion that the original Application would require conversion to Action due to the claim of defamation; In order to avoid prolongation of litigation and significant increase of financial burdens to all parties, Applicant, Laura MacNutt withdrew defamation claims from the application. At that point the matter became strictly one of copyright infringement of PIER101 Home Designs Inc.'s "works".

## The Decisions Below

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26 Supp. Appeal Books Part 2, vol. 5, **Tab 22**, sec. Supp. Sec. 32.8, p **917**

27 Supp. Appeal Books Part 2, vol. 5, **Tab 22**, sec. Supp. Sec. 32.8, p **917**

28 Appeal Books, Part 2, Vol 1. **Tab 1**, p. **75-86**, "Notice of Application" original and amended

[51] On August 26<sup>th</sup>, 2016 Justice Chipman Ordered “the Applicant” to pay costs to respondent Acadia University in the amount of \$17,189.87 and pay respondents T.A. Scott Architecture + Design & Troy Scott \$24,333.60<sup>29</sup>

[52] On October 11, 2016, Justice Chipman issued an Order regarding merits, dismissing the Application which was filed Oct. 6, 2015 and amended Dec 16, 2015 and heard June 1<sup>st</sup> and 2<sup>nd</sup>, 2016.<sup>30</sup>

### **PART 3- ISSUES on APPEAL**

[53] The primary justiciable issue of this appeal raises questions about the interpretation and application of the Copyright Act, C-42. The lower court proceedings failed to address this legal challenge fairly as the principles of natural justice were compromised:

[54] 1. Did the learned Hearing Judge fail to provide a hearing which was in accordance with the principles of natural justice and compliant with the Nova Scotia Civil Procedure Rules?

(a) by failing to provide a pre-trial conference to allow the self-represented applicant an opportunity to identify and resolve issues as to the proceedings, and to introduce the proper conduct of the hearing.

(b) by spontaneously instructing Applicant to produce for cross-examination, expert Benjamin W. Nycum despite absence of notice from Respondent parties.

[55] This appeal also raises the questions of determination of facts:

[56] 2. Did the learned Hearing Judge err in determining the corporate appellant PIER101 Home Designs Inc. (NS reg.# 3236962) was a sole proprietorship and thereby expose agent Laura MacNutt to personal damages in the awarding of court costs?

[57] Primarily, this appeal raises the following questions regarding statutory law:

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29 Appeal Books, Part 1, sec. 4, p 13

30 Appeal Books, Part 1, sec. 5, p 14

- [58] 3. Did the learned Hearing Judge err in his interpretation and application of the Copyright Act?
- (a) in his interpretation and application of the tests for originality and substantial similarities in copyright.
  - (b) in his understanding of the exclusive rights held by the creators of copyright protected material.
  - (c) by failing to give proper legal effect to the facts before him which demonstrated the respondents copied, distributed, published, and created derivative works from the applicant's copyright protected works.
  - (c) by failing to give proper legal effect to opinion evidence of applicant's expert regarding the process of design development.

#### **Part 4 - Standard of Review**

[59] The standards of Review for the legal issue of whether the Learned Hearing Judge failed to direct himself on the provisions of the Copyright Act, is one of correctness.

[60] Whether or not the Learned Hearing Judge failed to consider verifiable facts, is one of palpable and overriding error.

[61] The issue of whether the Learned Hearing Judge incorporated the Principles of Natural Justice involves two standards of review. The Learned Hearing Judge's failure to provide a pre-hearing conference was one of "discretion", however, the standard of "correctness" applies where the Learned Hearing Judge demanded immediate production of the Applicant's expert, without proper notice, pursuant to Nova Scotia Civil Procedure Rules.

#### **Part 5 - Argument**

[62] The basis for appealing the decisions of the lower court, challenges the lack of procedural fairness, and therefore failing to provide a meaningful opportunity for the self-represented Applicant to be heard, regarding the true issue of this matter, namely infringement of the Applicant's copyrights.

**ISSUE 1**

[63] Did the learned Hearing Judge fail to provide a hearing which was in accordance with the principles of natural justice and compliant with the Nova Scotia Civil Procedure Rules?

- (a) by failing to provide a pre-trial conference
- (b) by instructing the Applicant to immediately produce, for cross-examination, expert Mr. Nycum, despite absence of notice from Respondent parties.

[64] The Learned Hearing Judge failed to exercise his duty to reasonably assist the self-represented applicant, in particular, by failing to ensure the inexperienced Applicant was adequately prepared for the proceedings.

[65] The Learned Hearing Judge's assumption that the Applicant's expert would be required for cross-examination was not preceded by Notice from the Respondents, as per NS Civil Procedure Rules, nor was there a request of any kind by the Respondents to call the expert for cross-examination.

[66] The Learned Hearing Judges duty of care, includes appraisal and management of the Pre-trial process as well as the hearing. The unresolved issues raised at Justice Warner's Motion for Directions, on Dec. 8, 2015<sup>31</sup>, required judicial intervention and determinations as there were matters unresolved, in particular the requirements for production of witnesses and experts for cross-examination.

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31 Appeal Books, Part 2, vol. 4, Transcript- Motion for Directions, Kentville NSSC, Dec. 8, 2015, p.

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**Principles of Natural Justice and Compliance to NS Civil Procedure Rules :**

[67] The learned Hearing Judge commenced the hearing acknowledging his failure to provide a pre-application conference, citing prior commitments in Shelburne thus “we didn’t have time for a pre-application conference” because of “time constraints”.<sup>32</sup>

[68] In addition to the unresolved issues, identified at the Motion of Directions hearing, (heard a full 6 months prior), the complexity of this matter, the presence of a self-represented applicant and multiple respondents, presented abundant cause for the presiding judge to ensure that all parties were adequately prepared.

[69] Following the Learned Judge’s explanation for no pre-hearing conference, he advised Ms. MacNutt that the court’s “... either you or your expert will soon take the stand to be cross-examined.”<sup>33</sup> (Extract of the lower court Hearing transcript copied herein on pp.15-17)

[70] The learned Hearing Judge had no cause to presume that the applicant’s expert would be required for cross-examination as there was neither Notice as per Civil Procedure Rule, nor any sort of request from any party or court.

[71] Ms. MacNutt acknowledged that the expert was not present and offered that “I...obviously misunderstood, that if he was required for cross-examination that I would have been advised.”<sup>34</sup> The self-represented litigant’s interpretation that she failed to present the expert was left undisturbed by the Learned Hearing Judge.

[72] Shortly thereafter, The Learned Judge provided a 5 minute recess and instructed the Ms. MacNutt to “call Mr. Nycum, and you know,... get him here”... “we want to ensure that things run as efficiently as possible”.<sup>35</sup>

[73] The Learned Hearing Judge’s supposition that expert Mr. Nycum should be called for cross-examination was not supported by the filed submissions. There was no challenge to the expert’s report, nor notice by opposing parties that Mr. Nycum would be required for cross-examination.

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32 Appeal Books, Transcript -Application Hearing, p. 5, lines 2-5

33 Appeal Books, Transcript -Application Hearing, p. 5, lines 13-16 – p.6, lines 1-3

34 Appeal Books, Transcript -Application Hearing, p. 7, lines 4-6

35 Appeal Books, Transcript -Application Hearing, p. 9, lines 10-12

[74] During Motion for Directions held Dec. 8<sup>th</sup>, 2015 in the lower court, Justice Warner made clear that unresolved issues would be dealt with at a later date<sup>36</sup>, specifically referring to the presentation of witnesses for cross-examination.

[75] Availability of witness does not infer the presentation of witness for cross-examination. Specifically, Justice Warner asserted, "...it may be premature to say...who you require to attend for the purposes of cross-examination" "But I think I'm going to defer for today's purposes a direction as to who will have to be in attendance."<sup>37</sup>

[76] Justice Warner reiterates, "...the starting point will be that all affiants will have to be available for the date of the hearing, but I think we'll have to set a timeline before the date of the hearing when the parties say we do or do not want four, *(for) ibid*, cross-examination X affiant"... "So I'm just deferring that for now".

[77] Further, the learned judge Warner distinguished witness affidavits of fact from expert opinion evidence and made no inferred or definitive directions to provide experts for cross-examination at the hearing.

[78] The Order issued by Justice Warner, on Jan 22<sup>nd</sup>, 2016, regarding Motion for Directions, does not declare that witnesses must be present but rather states: "7. Any person who files an affidavit will be made available for cross-examination at the hearing. "

[79] Availability permits the opportunity but does not obviate the requirement of notice as per N.S. Civil Procedure Rules. Even if the Expert were to be considered a Witness and included in Justice Warner's Order #7 above, Civil Procedure Rules specify the requirement of notice.

**55.06 Reports in an application** (*underlined for emphasis*)

**(3)The party who files an expert's report in an application must arrange to have the expert present at the hearing if another party gives notice that the party disputes qualification or requires cross-examination**<sup>38</sup>

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36 Appeal Books, Part 2, vol. 4, Transcript Motion for Directions Dec. 8, 2015 , p. 33, lines 3-10

37 Appeal Books, Part 2, vol. 4, Transcript Motion for Directions Dec. 8, 2015 , p. 32, lines 14-20 & p 33 1-2

38 [http://courts.ns.ca/civil\\_procedure\\_rules/CPRs\\_in\\_html/Rule\\_55.htm](http://courts.ns.ca/civil_procedure_rules/CPRs_in_html/Rule_55.htm)



[80] The absence of adequate notice for cross-examination of expert, coupled with absence of a pre-hearing conference provided a distinct advantage of opportunism by the experienced learned respondents.

[81] It is incumbent upon the courts to provide, at the very least, an environment which allows the facts of a case to be presented fairly. While it is not possible to account for the lengthy list of deficiencies of self-represented litigants, modest efforts by the courts to advance equity is essential in order to minimize prejudice and opportunism.

[82] The expectations for self-represented litigants to extrapolate procedural protocol and tactical strategies is unreasonable. The self-represented applicant made enquiries, in person, at the Kentville court reception, approx. 2 weeks prior to the Hearing, about what to expect at the Hearing, and was told the presiding Judge would provide directions on the day of the scheduled Hearing.

The following three pages are extracted from the transcript of the introduction on June 1<sup>st</sup> of the 2 day Hearing where Justice Chipman calls for the Applicant's expert.

6 **DISCUSSION AND PRELIMINARY MOTIONS**

1 everything that I have on file so that all the parties can understand and we make sure  
2 the Court isn't missing anything. But if I have that correctly, then either you or your  
3 expert will soon take the stand and be cross-examined.

4 **MS. MACNUTT:** Hm..mm.

5 **THE COURT:** So is that your understanding?

6 **MS. MACNUTT:** It is, Your Honour.

7 **THE COURT:** Okay.

8 **MS. MACNUTT:** And my expert witness is not here, but I could make him  
9 available tomorrow.

10 **THE COURT:** Well, you know, that...it may be that you'll be cross-  
11 examined and it will take the full day, although I kind of doubt that. I mean if you...if you  
12 choose to put yourself on the stand first and not your expert, and it sounds like you're  
13 thinking that way...

14 **MS. MACNUTT:** Hm..mm.

15 **THE COURT:** ...my guess is, and I'll canvass the other lawyer shortly, but  
16 my guess is that might only take us through part of the morning, or perhaps all of the  
17 morning, leaving another half part of the day that I don't want to lose, if you will.

18 **MS. MACNUTT:** Understood.

19 **THE COURT:** So...so, I'm wondering if your expert might be...in fact we  
20 might take a recess ever so shortly and have you contact him and get him on the road

**DISCUSSION AND PRELIMINARY MOTIONS**

7

1 because I assume he's driving from Halifax?

2 **MS. MACNUTT:** That's right, Your Honour.

3 **THE COURT:** Is he available today?

4 **MS. MACNUTT:** I believe he is. I have understood, and obviously  
5 misunderstood, that if he was required for cross-examination that I would have been  
6 advised...

7 **THE COURT:** Okay.

8 **MS. MACNUTT:** ...so clearly that's my error.

9 **THE COURT:** Well, you know, I may be assuming something that's not the  
10 case, but we'll soon find out. The other thing I'd say is just as a matter of Court  
11 decorum, when you speak to the Court you should stand, okay?

12 **MS. MACNUTT:** Yes.

13 **THE COURT:** And no problem, that's fair, but I'll have you stand when I ask  
14 you to speak next. So perhaps, Mr. Cuming, what say you in terms of Ms. MacNutt and  
15 her expert?

16 **MR. CUMING:** Well, certainly it was understood that he would be here...

17 **THE COURT:** Yeah.

18 **MR. CUMING:** ...and be made available for cross-examination.

19 **THE COURT:** Right.

20 **MR. CUMING:** And we would have a great deal of reluctance of having any

8 **DISCUSSION AND PRELIMINARY MOTIONS**

1 of my witnesses take the stand before having the opportunity to...to challenge the  
2 expert, so...

3 **THE COURT:** Sure. All right. And would it be your intention to cross-  
4 examine Ms. MacNutt as well?

5 **MR. CUMING:** Yes.

6 **THE COURT:** Okay.

7 **MR. CUMING:** Yes, My Lord, yes.

8 **THE COURT:** Okay, is that your anticipation of...of the applicant's case that  
9 it is indeed those two witnesses?

10 **MR. CUMING:** Yes, definitely.

11 **THE COURT:** And the expert is Benjie...do you know how to say his...

12 **MR. CUMING:** Nycum.

13 **THE COURT:** Nycum. Okay. All right, and so over to you then, Ms.  
14 MacPhee.

15 **MS. MACPHEE:** I'm of the same understanding as Mr. Cuming. I expected  
16 Mr. Nycum to be here. I'm ready to cross-examine him after cross-examining Ms.  
17 MacNutt.

18 **THE COURT:** Okay, and what's your time estimate on cross-examining Ms.  
19 MacNutt, recognising that Mr. Cuming will go first, and who knows sort of thing that...

20 **MS. MACPHEE:** We actually discussed it...

[83] Providing a pre-hearing conference, in and of itself, does not create prejudice, however, the absence of such a conference, perpetuates the imbalance of proceedings where SLRs are opposed by legally represented parties. The decision of the Learned Hearing Judge to deny a pre-hearing conference promoted prejudice for the inexperienced self-represented applicant.

[84] The learned counsels of the opposing parties acknowledged that they engaged in their own pre-trial conference. Presumably such tactical strategies are usual, however, in the absence of a pre-trial hearing before the Learned Hearing Judge, the inequities between legal professionals and the self-represented litigant were exacerbated.

[85] The striking similarities in a recent Ontario appeals decision, *Watterson v Canadian EMU*, 2016, ONSC<sup>39</sup>, explores the role of a trial judge when procedural irregularities arise, and where one of the parties is self-represented, while the opposing party is legally represented. [underlined and bold font emphasis pre-existed]

[8]....EMU summonsed two witnesses to testify at the trial. The trial judge permitted the witnesses to testify, notwithstanding EMU's failure to deliver a witness list in advance. The trial judge did not ask the defendants if they objected to EMU's calling the witnesses without delivering a witness list before trial, or ask them if they required an adjournment for the purpose of preparing to cross-examine the witnesses.

[86]

[10] Mr. Watterson then indicated, that he had understood that if a plaintiff did not deliver a witness list, it would not be calling any witnesses.

## ISSUES

[18] The appeal raises the following issues:

- a) Did the trial judge deny the defendants procedural fairness, and a reasonable opportunity to make full answer and defence, by:
  - i) permitting EMU to call and examine witnesses without delivering a list of the witnesses in advance, and by failing to advise the defendants that EMU had thereby breached the Rules of Small Claims Court, and by failing to offer them an opportunity to object, or request an adjournment?

[87]

---

39 *Watterson v Canadian EMU*, 2016 ONSC 6744 (CanLII), <<http://canlii.ca/t/gvcff>>

## PARTIES' POSITIONS

[19] The defendants submit that the trial judge made the following errors, which resulted in procedural unfairness to them:

- a) The trial judge permitted EMU's witnesses to testify without requiring EMU to deliver a list of the witnesses in advance, as the Rules of Small Claims Court required. The defendants assert that this took them by surprise, and deprived them of the opportunity to prepare for EMU's evidence, and to respond to it.

[22] Being ignorant of court procedures and the rules of evidence, Mr. Watterson was taken by surprise when EMU was permitted to call witnesses without having delivered a list of its witnesses in advance....

[88]

## ANALYSIS AND EVIDENCE

[26] Where the issue on appeal is one of procedural fairness, the standard of review is correctness.

[2]

- a) Were the appellants denied procedural fairness?

- i) **Permitting EMU to call witnesses without delivering a list of witnesses in advance, and without offering the defendants an opportunity to object or request an adjournment**

[27] Rule 13.03(2) of the Rules of Small Claims Court requires all parties to serve on every other party and file with the court a list of proposed witnesses in advance...

[28] Procedural fairness is denied where a party is taken by surprise and is unable to prepare adequately or call more evidence to address issues at trial.[5] A denial of procedural fairness can amount to a substantial wrong or miscarriage of justice, and warrant setting aside the judgment and ordering a new trial.[6]

[32] Rules 2.01(a) and (b) authorize the court, when faced with an irregularity, to grant such relief **as is necessary to secure the just determination of the real matters in dispute**. It further provides that a proceeding should only be set aside **as necessary in the interest of justice**. Those rules must be interpreted in the light of Rule 1.04(1), which states that the overall objective of the Rules is to "**secure the just, most expeditious and least expensive determination of every civil proceeding on its merits**." [Emphasis added]

[33] What, then, in the circumstances of the present case, was necessary in the interest of justice? As Laskin J.A. stated in *Finlay v. Van Paassen*, in 2010, "the Rules and procedural orders are construed in a way that advances the interests of justice, and ordinarily permits the parties to get to the real merits of their dispute." [9]

[34] In the context of an application for leave to appeal from the Municipal Board, the Divisional Court noted,

There is clear and compelling jurisprudence establishing the considerable deference the court gives to procedural orders and rulings within the tribunal's jurisdiction. **Discretionary procedural rulings and orders generally are not matters for the Divisional Court to address on appeal unless they amount to a denial of natural justice or jurisdictional error.**[10] [Emphasis added]

[35] It is a denial of natural justice not to give a party reasonable notice of the evidence he will have to meet.

[37] The trial judge faced a serious challenge, in the face of Mr. Watterson's obvious unfamiliarity with the rules of procedure and evidence, to maintain the fairness of the trial without compromising his perceived impartiality.[11] No amount of adjudicative assistance will place a self-represented litigant on the same footing as a party represented by capable and experienced counsel. Indeed, substantive impartiality does not contemplate perfect parity, nor require adjudicators to assume the role of representative of one or both of the parties to achieve such parity. In 1999, the Ontario Court of Appeal explained in *Dauids v. Davids*:

**Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability.** Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. **It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case.** In doing so, the trial judge must, of course, respect the rights of the other party.[12] [Emphasis added]

[89]

[38] The Canadian Judicial Council's "Statement of Principles on Self-Represented Litigants and Accused Persons", which are advisory in nature, encourage judges to provide substantive assistance to self-represented parties.[13] The Statement suggests that judges help self-represented litigants by:

- a) Explaining not just the applicable procedures, but also the relevant law and its implications;
- b) Providing self-represented litigants with information to assist them in asserting their rights and raising arguments before the court; and
- c) Ensuring that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented parties.[14]

[39] The rules of fairness require the trial judge to ensure that the procedural rules are followed. When they are not been followed, the trial judge must advise a self-represented litigant who is obviously unaware of his rights, where necessary, of the procedural options available to him. In the

present case, it was clear that Mr. Watterson did not know that where he had not been given notice in advance of EMU's intention to call their witnesses, that he was entitled to request an adjournment to prepare to cross-examine their witnesses or to prepare his own evidence to respond to theirs.

MR. WATTERSON: I understood that to call a witness, you had to give a witness list prior to the court date.

THE COURT: That would be correct. Did you do that?

MR. WATTERSON: No, I did not. And I never received a witness list, either. **I was not aware there would be witnesses.**

[90]

[40] Having regard to Mr. Watterson's obvious lack of knowledge as to his procedural rights, it was incumbent on the trial judge to explain to him that, having regard to EMU's failure to deliver a list of its intended witnesses in advance, the defendants were entitled to request an adjournment. Mr. Watterson could have used that adjournment to prepare a cross-examination of the witnesses, or to prepare his own testimony, or to summons witnesses of his own to testify, in response to the evidence that EMU's witnesses had given.

[91]

[41] In *Toronto-Dominion Bank v. Hylton*, in 2010, the Ontario Court of Appeal ordered a new hearing based on the judge's failure to grant a self-represented litigant's request for adjournment, finding that in order for the court to fulfill its obligation to assist the self-represented litigant and ensure that he could present his case to the best of his abilities, the judge should have granted the request.

[92]

[42] In the present case, the trial judge had an obligation to assist the self-represented litigant, Mr. Watterson, to the extent necessary to ensure that he could present his case to the best of his abilities. He failed to comply with that obligation when he failed to advise Mr. Watterson that he could request an adjournment for the purpose of preparing to cross-examine EMU's witnesses, or for the purpose of summoning witnesses in response to EMU's witnesses or preparing to testify himself in response to their evidence.

[93]

[43] The trial judge failed to give the necessary explanations to Mr. Watterson, on the basis that doing so would be giving him advice as to how to conduct his trial. There is a fundamental distinction between **advising a litigant as to what he should do**, and **providing information to the litigant as to what his procedural rights are and what means are available to him for exercising them**. In failing to provide such information to Mr. Watterson, the trial judge increased the impact on the defendants of permitting EMU to call witnesses without delivering a list of its witnesses in advance. 94]

[94]



[44] By withholding from Mr. Watterson the information he obviously needed, the trial judge gave EMU an unnecessary and unfair advantage from having legal representation. It was reasonable, having regard to the trial judge's silence as to his right to request an adjournment, for Mr. Watterson to interpret the trial judge's question as to whether he would be testifying, as an indication that his only choices were to testify then, or not at all.

[95] The Canadian Judicial Council's "Ethical Principles for Judges" (1998)<sup>40</sup> specifically identifies "the rights of everyone to equal and impartial justice administered by fair and independent judges"; and judges must "uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges."<sup>41</sup>

## **ISSUE 2**

[96] Did the learned Hearing Judge err in determining the corporate appellant PIER101 Home Designs Inc. (NS reg.# 3236962) was a sole proprietorship and thereby expose agent Laura MacNutt to personal damages in the awarding of court costs?

[97] In the Learned Hearing Judge's decision,

[97] The Learned Hearing Judge's erred in fact in a palpable and overriding manner in holding the corporate applicant, PIER101 Home Designs Inc. was a "sole proprietorship" of Laura MacNutt. with result that the judgement, including judgement for costs, was granted against both Laura MacNutt and the applicant, PIER101 Home Designs Inc.

"...The Applicant is styled as Laura MacNutt/PIER101 Home Designs Inc. as the latter is Ms. MacNutt's sole proprietorship."<sup>42</sup>

[98] The limited liability of Incorporated Companies is well established in the Nova Scotia<sup>43</sup> and very clearly a sole proprietorship holds the proprietor personally liable, whereas incorporated bodies afford protection to Directors. PIER101 Home Designs Inc., was incorporated in 2009 and in good standing at the time of the Hearing <sup>44</sup>

40 The document is a product of the Canadian Judicial Council. It is intended "to provide guidance to judges on ethical and professional questions and to better inform the public about the high ideals which judges embrace and toward which they strive." Canadian Judicial Council, ETHICAL PRINCIPLES FOR JUDGES, Stat. 1, Commentary 1, available at <http://www.cjc-ccm.gc.ca/cmslib/general/ethical-e.pdf> (last visited February 28, 2006).

41 Id., Principle 3

42 Appeal Books, Part 1, sec 6 , p. 19 (original numbering : par. [11])

43 <http://nslegislature.ca/legc/statutes/companies.pdf>

44 <http://nslegislature.ca/legc/statutes/companies.pdf>

[98] This proceeding under appeal originally included claims of defamation which may have required Laura MacNutt to act as a personal Applicant, however, once the matter was amended to strictly deal with material produced by PIER101 corporate and involving business relationships with PIER101 and the other parties, there were no claims by Laura MacNutt as an applicant.

[99] PIER101 was not aware that there was a discrepancy as “Laura MacNutt” acts as agent for PIER101, as well as the self-represented litigant, who also happens to have personally created the PIER “works” Despite frequent occasions of personal identifiers throughout the course of this matter, the case explicitly dealt with PIER101 Home Designs Inc. business assets, which were claimed to have been infringed.

[100] Acadia in its Notice of Contest of Dec. 3, 2015, Acadia expressed a shared understanding in the assertions that Acadia did not contract with Laura MacNutt in her personal capacity.<sup>45</sup>

### **ISSUE 3**

**[101]**

Did the learned Hearing Judge err in his interpretation and application of the Copyright Act?

- (a) in his interpretation and application of the tests for originality and substantial similarities in copyright.
- (b) in his understanding of the exclusive rights held by the creators of copyright protected material.
- (c) by failing to give proper legal effect to the facts before him which demonstrated the respondents copied, distributed, published, and created derivative works from the applicant's copyright protected works.
- (c) by failing to give proper legal effect to opinion evidence of applicant's expert regarding the process of design development.

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45 Appeal Books, Part 2, vol. 1, Tab 5, pp 176, par. 7

[102] There is no dispute on authorship of PIER101 “works”, however, positions of the Respondents differed with respect to whether or not copyright subsisted in PIER101 “works”. TAS and Troy Scott admitted that copyright vested in PIER101 “works”, while Acadia denied that PIER101 “works” possessed enough originality to warrant protection by copyright.<sup>46</sup>

[103] The Learned Hearing Judge erred in a palpable and overriding manner in deducing that “none of the Respondents provided her concept drawings to the Kings County Register”<sup>47</sup> where all parties have concurred otherwise, and such evidence was before the Learned Hearing Judge.

[104] Acadia further asserts that if copyright were to subsist, that their provision of copies of PIER101 “works” to the media, T.A. Scott, and Town of Wolfville would certainly suggest copyright infringement. Acadia described the “limited distribution” as having not prejudicially affected the owner of the copyright.

[105] PIER101 contests that distribution for the purpose of publication and broadcasting is the antithesis of “limited distribution” and as PIER101 works were unpublished prior to Acadia’s distributions, there was distinct infringement of the PIER101’s exclusive rights to “first” publish.

[106] T.A. Scott provided conflicting evidence with respect to presenting and copying PIER101 “works”. The Learned Hearing Judge, cited in his decision, Troy Scott’s affidavit evidence<sup>48</sup> “I did not make any copies of the Applicants’ concept drawings and did not display any of their designs at the Presentation” which clearly conflicts material evidence where The Town of Wolfville Public Information Meeting, in which unauthorized copies of PIER101 “works” were projected, without any visible attribution to PIER101.

Marcel Falkenham and Troy Scott presented on behalf of Acadia:

-The addition and renovation is designed to .....<sup>49</sup>

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46 Appeal Books, Part 2, vol 3, Tab 18, p 537 par. 23 -24

47 Appeal Books, Part 1, vol. 1 sec. 6, p. 17 par. 31

48 Appeal Books, Part 1, vol. 1 sec. 6, p. 17 par. 32 (51)

49 Appeal Books, Part 2, vol. Tab 3 Sec. 11.3.2, p. 127 midpage

[107] The Learned Hearing Judge's decision asserts that TAS's emphatic oral testimony "I have never used your drawings" lends strength to his sworn testimony where he likewise swears to have never used PIER101 drawings.

[108] PIER101 respectfully submits that TAS has admitted to having 'used' PIER101 "works" in many instances, and where such uses breach PIER101 's copyrights.

1. presentation of PIER101 "works" at public information meeting for the development agreement of the building project; and
2. distribution of PIER101 works to landscape architects and engineers with instructions to base subsequent work on these works;
3. Contract agreement with Acadia to 'base

[109] All three Respondents have admitted to emailing **copies** of PIER101 "works" to third parties without seeking consent from PIER101, which is primary copyright infringement.

Copyright Act.C-52 (attached: Addendum 'A')

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof . . . .

[110] In considering whether or not copyright subsists in PIER101 "works", the only Party who denies that PIER101 "works" are not copyright protected is Acadia. They assert that the "works" do not meet the threshold of originality and further describe the "works" as the result of mere "mechanical exercise".

[111] Acadia failed to provide relevant authorities and/or case law to conclude that the "works" could be legitimately characterized as a mere "mechanical exercise" and/or void of originality. If Acadia's argument that PIER101's "works" were void of copyright protection, such a threshold would render copyright protection null and void for the majority of building concept designs.

[112] Canadian jurisprudence has dealt with the degree of originality required for copyright to subsist, determining that novelty is not required, however the work must be the result of "skill and judgement" (excerpted below in paragraphs 114 & 119)

In *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.*,<sup>50</sup>

[113] McLachlin, then of the British Columbia Supreme Court, held that:

*The basis of copyright is the originality of the work in question. So long as work, taste and discretion have entered into the composition, that originality is established.*

*Where under Section 27, copyright is deemed to be infringed by any person who, without the copyright owner's consent: does anything that the Act gives the owner the sole right to do (Section 27(1)),*

#### ORIGINALITY

[114] *The thresholds for originality, under the Act, does not mean novelty. As held by Johnson J. in Kilvington Bros. Ltd. v. Goldberg: "But novelty and inventiveness are not the tests of originality in the law of copyright. The test is whether this design is original in the sense that it is the original expression of thought of its originator, that it originated from him and that he did not copy it" 3.*<sup>51</sup>

[115] *COPYING*<sup>52</sup>

*Although the term "copying" is not directly referred to Sections 3(1) and 27(1), it was stated by MacDonnell J. in the case British Columbia v. Mihaljevic: "the case-law has interpreted the statutory provisions in such a way that "copying" is an essential ingredient of infringement" 15*<sup>53</sup>. *The literal reproduction of a work in its entirety, or of a substantial part thereof, as in photocopying for instance, constitutes the primary form of infringement. However, copying goes beyond literal reproduction; the copying needs not be slavish, but similarities between the two works must be such that the first work can be said to be reproduced in the second one*<sup>54</sup>

<sup>50</sup> (1984), 3 C.P.R. (3d) 81 (B.C. S.C.)

<sup>51</sup> (1957), 16 Fox P

<sup>52</sup> CONCEPT OF INFRINGEMENT IN THE CANADIAN COPYRIGHT ACT by Hugues G. Richard\*

<sup>53</sup> (1989), 26 C.P.R. (3d) 184 (B.C.S.C.) at p. 189

<sup>54</sup> *Beauchemin v. Cadieux* (1900), 10 B.R. 255 (Q.C.A.) *Lacoste J.*, at p. 270. *VINCKE (Christian) et al. Problèmes de droits d'auteur dans le monde de l'éducation* (Québec, Editeur officiel, 1974).

[116] Further, PIER101 submits that the test The Learned Hearing Judge relied on for determining substantial similarities of TAS's derivative drawings, was flawed. The opinion of the respondent expert witness provided criticism and scrutiny of the PIER101 "works" as if they were professional architectural design drawings. The PIER101 "works" were explicitly void of detail as they were preliminary and augmented for laymen audience.

[117] The Learned Hearing Judge favoured the respondent's expert opinion which concluded that there were not substantial similarities between TAS 's final design drawings and PIER101's "works". The Learned Hearing Judge did not consider the applicant's expert opinion which identified substantial similarities and further offered his expert opinion that the TAS drawings naturally were highly developed versions of the original concept, as one would expect through design development process.

*In Bemben & Kuzych Architects v. Greenhaven Carnagy Developments Ltd.*,<sup>55</sup>

[118] ...the British Columbia Supreme Court held that: It is clear that an architect retains copyright in architectural drawings and designs of his creation. It is also clear that use of these drawings without consent is an infringement of copyright unless there has been a written assignment of the ownership of the copyright.<sup>56</sup>

*In Oakcraft Homes Inc.- and -Pamela Eckland, Steven Eckland, Tocscana Developments Inc.(2013)*  
Court File No. SC-12-00121276-0000

[119] Of particular interest and relevance are the following comments made by the Quebec Court of Appeal: "Originality is the "foundation stone of copyright", whatever the work may be" The notion of "originality" was reviewed at length by the Supreme Court of Canada in the case of CCH Canadian, supra. The Quebec Court of Appeal quoted lengthy extracts from the Supreme Court decision, acknowledging that for a work to be original, it requires "an exercise of skill and judgment"1. In particular, the Court of Appeal quoted emphasized (by underlining) the following portions of the Supreme Court decision:

I conclude that the correct position falls between these extremes.

For a work to be "original" within the meaning of the Copyright Act,

---

55 (1992), 6 C.L.R. (2d) 261 (B.C. S.C.).

56 This passage was followed in the Alberta case of Alwest Neon Signs Ltd. v. 464460 Alberta Ltd. (c.o.b. Coldwell)

it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.  
[emphasis added by the Quebec Court of Appeal]

## Part 6 - Order or Relief Sought

PIER101 seeks to allow the appeal to set aside the decision and order appealed from and grant judgement against respondents for copyright infringement, with damages in an amount to be assessed by court, or set aside the decision and order appealed from, and direct a new hearing upon terms which are just and equitable.

REFERENCES AND AUTHORITIES		
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	Judicial Assistance to Self-represented Parties: Lessons From the Canadian Experience, Jona Goldschmidt Dept. of Criminal Justice Loyola University Chicago Copyright © 2006	<a href="http://www.americanbar.org/content/dam/aba/migrated">http://www.americanbar.org/content/dam/aba/migrated</a>
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STATUTES	Companies Act, Chapter 81 of the Revised Statutes, 1989 as amended by © 2016 Her Majesty the Queen in right of the Province of Nova Scotia Published by Authority of the Speaker of the House of Assembly Halifax 1990, c. 15, ss. 2, 5-18; O.I.C. 1991-828; O.I.C. 1992-162; 1992, c. 10, s. 34; O.I.C. 1996-562; 1998, c. 8, ss. 16-21; 1999, c. 4, s. 2; 2002, c. 5, s. 5; O.I.C. 2004-138; 2004, c. 3, s. 2; 2007, c. 9, s. 4; 2007, c. 17, ss. 13, 14; 2007, c. 34; 2008, c. 4, ss. 4, 5; 2009, c. 5, s. 2; 2010, c. 8, ss. 106-113; 2011, c. 8, s. 2; 2013, c. 3, s. 2; 2015, c. 6, s. 3; 2015, c. 30, ss. 144-146	<a href="http://nslegislature.ca/legc/statutes/companies.pdf">http://nslegislature.ca/legc/statutes/companies.pdf</a>
	Nova Scotia Business Incorporated Act CHAPTER 30 OF THE ACTS OF 2000 as amended by 2010, c. 35, s. 41; 2011, c. 23; 2014, c. 33, ss. 23-36; 2015, c. 6, ss. 32-40 © 2015 Her Majesty the Queen in right of the Province of Nova Scotia Published by Authority of the Speaker of the House of Assembly Halifax	<a href="http://nslegislature.ca/legc/statutes/novascotia0busine.pdf">http://nslegislature.ca/legc/statutes/novascotia0busine.pdf</a>
	Copyright Act	attached