QB File No. CI 12-01-79879

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

MARTIN GREEN,

plaintiff,

- and -

HIEP TRAM, ARLENE SKULL, DEB WOLOSHYN, WALLY STEWART, JOHN ANCHAN, AND THE UNIVERSITY OF WINNIPEG.

defendants.

MOTION BRIEF OF MARTIN GREEN
Re: Motion to Strike Amendment

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Brief on MOTION TO STRIKE AMENDMENT

1. The originating Statement of Claim in this action was filed on September 20th 2012, and the defendants responded with their Statements of Defence in the following month. The defendants Tram and Skull ("the schoolteachers") are represented by Aikins MacCaulay and are not involved in this motion. The defendants Woloshyn, Anchan, Stewart and the University of Winnipeg ("the professors") are represented by Darcy and Deacon and filed their Statement of Defence on October 23rd.

2. On or shortly after February 19th 2013, the Plaintiff received from Mr. Meronek of Darcy and Deacon a copy of an Amended Statement of Defence, of which he had been previously unaware. The Plaintiff noted that the Amendment had been filed on the 14th of January 2013, without his consent or notification.

3. Except for clerical errors, pleadings may be amended only with the consent of parties or by order of the court.

Court of Queen's Bench Rules **[TAB 1]** at Rule 26

4. The amendment in question is clearly one of substance and not clerical. The plaintiff accordingly, on February 27th 2013, filed the present Motion to Strike the Amendment.

Defendant's Amended Statement of Defence at para 24

5. In order for the court system to function fairly and efficiently it is necessary that:

a) parties may be held accountable for breaking the rules;
b) parties are discouraged from bringing motions that they are not likely to win; and,
c) even on motions where one side is sure of success, both parties have an incentive to settle their differences outside court.

The first two conditions are met when the successful party is awarded costs on a motion. This is the same system used in the well-known game of Scrabble to ensure that players follow the rules. When player challenges the validity of an opponent's word, the play is "adjudicated" by means of a dictionary look-up. The losing party forfeits a turn. This system encourages parties to play legal words, and at the same time discourages challenges that have little chance of success.

Scrabble Word Game Playing Rules **[TAB 2]** at Rule 8

6. It is interesting that in Scrabble, there is no provision for the "amicable" resolution of word disputes. The dictionary look-up is an accepted and even dramatic aspect of gamesmanship and there is no need to introduce special rules to discourage its invocation, even when the word is obviously wrong or has been played inadvertently.

7. The court system is different from Scrabble in that the hearing of a motion is much more time-consuming and expensive than a simple dictionary look-up, and as such ought not to be encouraged for mere technical or accidental violation of minor rules. The *Scrabble* protocols deal admirably with requirements 5(a) and 5(b) listed above; they do not unfortunately address item 5(c) It is highly desirable that parties settle minor disputes without having to go before a judge; the question is, just how is this to be encouraged? It seems there is no obvious answer which fits all circumstances.

8. Suppose a Party A fails to file its Affidavit of Documents within the required time limit after the close of pleadings. Party B then moves for an order compelling production.Before the matter can be heard, Party A produces its Affidavit and asks Party B to withdraw the motion. Party B refuses, and the matter goes to court. In deciding whether costs ought to be awarded, the Court will surely be interested in knowing *inter alia*:

a) whether Party B requested production prior to filing his motion; and if so,
b) whether Party A responded to those requests; and if so,
c) whether Party A provided any reasons for its failure to file, or any timetable whereby it intended to file;
d) whether Party B offered to withdraw the motion in exchange for partial costs; and if so,
e) whether Party A responded to that offer with a reasonable counter-offer.

How is the Court to weigh all these and other circumstances in awarding costs?

9. While it is clear that no hard-and-fast rule can cover all cases, the Plaintiff submits that *Scrabble* nevertheless offers a useful guiding principle: that of incentive. In other words, desirable conduct occurs when both parties know that any award of costs will be adjusted according to the Court's assessment of the merits of their behavior.

10. The Plaintiff believed that having caught the Defendants "with their pants down", so to speak, the matter would be settled between the parties without the need for a court hearing. The normal expectation would have been a modest cash settlement in favor of the Plaintiff in exchange for consent to allow the amendment to stand. The only question in the Plaintiff's mind would have been the amount of settlement he could extract from the Defendants under the circumstances.

11. The Plaintiff is therefore perplexed as to why the Defendants have chosen to argue the motion before the court. The plaintiff believes he has an "open and shut" case on strictly legal grounds. Furthermore the Plaintiff understands that according to the Queens Bench Rules, tarrifs on a successful motion are calculated on a stepwise basis, and while it is not perfectly clear to the Plaintiff what the calculation would yield on the

present motion, he estimates a “ballpark” figure of $1500. The Plaintiff must therefore assume that in opposing this motion, counsel intends to ask the Court to reduce or even withold any award of costs on the basis that the Plaintiff is undeserving. For this reason, we present the following overview of the circumstances.

Queen’s Bench Rules **[TAB 3]** at Rule 78

12. This is hardly the case of an unintentional breach such as a missed deadline. It was surely a conscious decision on the part of opposing counsel to file the amendments without seeking consent. There was in fact some urgency in having the amendments entered into the record quickly, as we shall see below.

13 During the months of November and December the Plaintiff attempted on several occasions to initiate email correspondence with Mr. Meronek of Darcy and Deacon, mostly on matters related to Discovery. Mr. Meronek was in general unresponsive to those overtures.

Supplementary Affidavit of Martin Green

14. On January 7th 2013 Mr. Meronek filed a Montion for Summary Judgement on behalf of the professors. As a consequence, the Plaintiff was forced to cancel the Examination for Discovery of the University which had been scheduled for the following week.

15. When Mr. Meronek subsequently served the Plaintiff with his Motions Brief, he included with it a copy of his Amended Statement of Defence. It was only then that the Plaintiff learned that the professors had filed those amendments five weeks earlier.

16. In their Motions Brief counsel argues that “the Plaintiff’s removal from the practicum occurred independently and prior to his suspension from the Faculty of Education”. This is supported by reference to the amended para. 24 of the Statement of Defence, and it is in fact the reason for the amendment. In the original para 24, the professors had claimed that the removal from the practicum was a consequence of his suspension from the Faculty.

Defendant’s Brief on Motion for Summary Judgement at para 31

17. The Plaintiff therefore submits that the Defendants deliberatley chose to enter their amendments into the record without consent because they needed them in place in order to support their Motion for Summary Judgement, which in turn they needed to have in place in order to prevent the Plaintiff from proceeding with discovery.

18. In these circumstances there was no recourse available to the Plaintiff other than the filing of a motion to strike the amendment. The only question remaining is whether the Parties made reasonable efforts to settle the motion out of court. In fact there were certain efforts made in this direction, but for reasons that are not entirely obvious those efforts have not been entered into evidence.

19. In his original Affidavit, the Plaintiff restricted himself to a recital of the bare facts. This was appropriate considering the simplicity of the case on its legal merits.

20. The Plaintiff submits that if they intended to argue that it was the Plaintiff's intransigence that has brought them before the Court, they ought to have entered evidence to that effect when they filed their Affidavit. They did not do so.

21. Had the Defendants filed such evidence, the Plaintiff would then have been entitled to file a Rebuttal Affidavit with his own account of what took place in negotiations. The Plaintiff submits that since the Defendants didn't ante up, the Plaintiff had no reason to raise.

22. The Plaintiff submits that if the Defendants intended for the Court to consider his intransigence in awarding costs, there would have been an onus on them to introduce evidence accordingly in their Affidavit. Since they failed to do so, the Plaintiff submits that the Court ought not to consider those circumstances one way or another in adjusting the costs to which the Plaintiff would otherwise be entitled according to the Tarrifs. In so arguing here, the Plaintiff makes no admissions or counterclaims as to his intransigence or otherwise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May 2013.

Martin Green, Plaintiff