

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Nichols v. Lavoie*, 2025 NSSC 252

**Date:** 20250822  
**Docket:** *Ken*, No. 528228  
**Registry:** Kentville

**Between:**

Shawna and Brian Nichols

*Plaintiffs*

v.

Maita Lavoie and Viewpoint Realty Services Inc.

*Defendants*

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| <b>Motion to Strike Statement of Claim</b> |
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**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** March 5, 2025, in Windsor, Nova Scotia

**Counsel:** Andrew Christofi, for the Plaintiffs  
Liza Myers, for the Defendants

**By the Court:****Introduction**

[1] When the Plaintiffs, Shawna and Brian Nichols, listed their home for sale, they signed a Seller Designated Brokerage Agreement naming the Defendant, Maita Lavoie, as their real estate agent and the Defendant, Viewpoint Realty Services Inc., as their designated brokerage. After the Nichols sold their home, the buyers sued them for failing to disclose a water leak in the Property Disclosure Statement (“PDS”). The trial took place before the Honourable Justice C. Richard Coughlan. Coughlan J. found the Nichols liable in negligent misrepresentation and breach of collateral warranty (the PDS forming part of the agreement of purchase and sale between the Nichols and the buyers): *Sproule v. Nichols*, 2024 NSSC 26. The Nichols then pursued the present action against Ms. Lavoie and Viewpoint, alleging negligence and breach of the Seller Designated Brokerage Agreement for failing to advise the Nichols to update the PDS to disclose the leak.

[2] This is a motion by Ms. Lavoie and Viewpoint for an order striking out the statement of claim filed against them by the Nichols on the basis of: (a) issue estoppel, (b) abuse of process or (c) witness immunity.

[3] The **issue estoppel** claim arises out of the fact that Ms. Lavoie testified for the Nichols in the trial before Coughlan J. Ms. Lavoie and Viewpoint say that Coughlan J. considered Ms. Lavoie's alleged negligence in her advice to the Nichols about the PDS, and that he made findings with respect to Ms. Lavoie, her evidence, and the PDS (see para.22 of the Defendants' brief).

[4] The **abuse of process** claim is based on the Nichols' assertion that the present action is attempt to relitigate the issues before Coughlan J., and on the alleged unfairness resulting from the failure of the Nichols and their lawyer to tell Ms. Lavoie that they had filed a statement of claim against her and Viewpoint before she testified for the Nichols in the trial before Coughlan J.

[5] The **witness immunity** claim appears to be based on the argument that the Nichols are relying on what Ms. Lavoie said during her testimony before Coughlan J. in the present proceeding.

[6] In support of the motion to strike, Ms. Lavoie and Viewpoint relied on an affidavit of Ms. Lavoie. The Nichols relied on a joint affidavit of Mr. and Ms. Nichols and the affidavit of Micaela Sheppard. Ms. Sheppard is the lawyer who represented the Nichols in the trial before Coughlan J. Ms. Sheppard filed the statement of claim against Ms. Lavoie and Viewpoint on behalf of the Nichols. Ms.

Lavoie, Ms. Nichols and Ms. Sheppard were cross-examined at the hearing of the motion.

[7] In order to determine whether the Statement of Claim should be struck, I will consider the following questions:

1. With respect to the claim of **issue estoppel**, (a) did Coughlan J. consider the alleged negligence of Ms. Lavoie vis-à-vis the Nichols and (b) are the parties to the proceeding before Coughlan J. the same as or the privies of the parties in this proceeding?
2. With respect to the claim of **abuse of process**, are the Nichols misusing the court's proceedings in a way that would be manifestly unfair to Ms. Lavoie and Viewpoint or that would in some way bring the administration of justice into disrepute?
3. With respect to the claim of **witness immunity**, what is the conduct that forms the basis of the Nichols' claim?

**Issue Estoppel: (a) Did Coughlan J. Consider the Alleged Negligence of Ms. Lavoie? (b) Same Parties/Privies?**

*Legal Principles*

[8] There are three requirements for issue estoppel:

1. that a prior proceeding must have decided the same question as in issue in the subsequent proceeding;
2. that the decision said to create the estoppel be judicial and final; and
3. that the parties to the earlier decision be either the same as, or the privies of, the parties in the subsequent proceeding.

[*Canam Enterprises Inc. v. Coles (2000)*, 51 O.R. (3d) 481 (C.A.), per the dissenting reasons of Goudge J.A., concurring on the question of issue estoppel, at para.43; rev'd on the issue of abuse of process, 2002 SCC 63]

[9] Issue estoppel extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that “issue” in the prior proceeding (the material facts). This means that once a material fact is found to exist (or not to exist) by a court, the same issue cannot be relitigated in subsequent proceedings between the same parties: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para.54.

### ***Same Question?***

[10] Ms. Lavoie and Viewpoint did not identify with precision which issues or material facts they say were already determined by Coughlan J., apart from asserting that Coughlan J. previously considered Ms. Lavoie’s alleged negligence in her advice to the Nichols with respect to the PDS:

21. The Plaintiffs are seeking a judgment from this Honourable Court that orders the Realtor Defendants to pay damages and indemnify them for the losses they incurred as a result of their unsuccessful defence of the Initial Claim. It is the position of the Realtor Defendants that such a judgment ought to be estopped as it will inevitably rely on *the same set of decided upon facts* from the Initial Claim.
22. *Specifically, the Plaintiffs are seeking a decision on Ms. Lavoie's alleged negligence in her advice to the Plaintiffs with respect to the PDS. This was something previously considered by Justice Coughlan in the Initial Claim, and he made specific findings with respect to Ms. Lavoie, her evidence, and the PDS completed by the Plaintiffs.*
23. As the Realtor Defendants were not a named party in the Initial Claim, neither as a defendant nor a third party, they had no opportunity to defend the Initial Claim, nor a third-party claim. *A decision has been rendered on the issue already* and the Realtor Defendants' ability to defend the claims made against them by the Plaintiffs in the within action has been greatly prejudiced as a result of the findings made in the Initial Claim.

[Defendants' Brief, paras.21-23, emphasis added]

[11] I reject the Defendants' assertion that Coughlan J. decided the issue of Ms. Lavoie's alleged negligence vis-à-vis the Nichols.

[12] In order to succeed in their negligence claim against Ms. Lavoie and Viewpoint in this proceeding, the Nichols must establish that:

- (a) Ms. Lavoie owed the Nichols a duty of care,
- (b) Ms. Lavoie breached the standard of care,
- (c) it was foreseeable that Ms. Lavoie's breach could lead to harm, and
- (d) Ms. Nichols' breach in fact did lead to harm.

[13] Coughlan J. did not decide any of these issues. The "same issue" requirement of issue estoppel – that Coughlan J. decided the question of Ms.

Lavoie's negligence vis-à-vis the Nichols - is not met in this case: see the decision of Goudge J.A. in *Canam* at paras.48-49.

***Same Parties/Privies?***

[14] Ms. Lavoie and Viewpoint assert that Ms. Lavoie and the Nichols are privies based on a privity of interest. I disagree. First, Ms. Lavoie was not a party to the agreement of purchase and sale or the collateral warranty (the PDS) between the Nichols and the buyers. Second, Ms. Lavoie did not have a participatory interest in the outcome of the buyers' claim against the Nichols, as the outcome did not affect Ms. Lavoie's liability: see *Canam*, per Goudge J.A at paras.52-53. Ms. Lavoie is not being "twice vexed" for the same cause: see *Canam*, per the majority on the issue of issue estoppel, at para.28.

[15] Moreover, the Nichols did not allege wrongdoing by Ms. Lavoie or rely on her alleged negligence as a defence to the claim against them in the proceedings before Coughlan J. This distinguishes the facts of this case from *Malizia v. Re/Max West Reality Inc.*, 2021 ONSC 6150, a decision relied on by Ms. Lavoie and Viewpoint. In *Malizia*, the defendant buyer called his real estate agent as a witness in an action brought against the buyer by the sellers arising from the buyer's failure to close a purchase and sale agreement. The buyer alleged that his real estate agent

had forged his signature on a waiver of buyer's conditions. The court in that matter found against the buyer. The buyer then sued his real estate agent, making the same allegation of forgery against the real estate agent. The court in the subsequent proceeding dismissed the buyer's claim, in part because the court found that the buyer and the real estate agent had a privity of interest because a potential finding that the real estate agent had forged his client's signature would have exposed him to liability.

**Abuse of Process: Nichols Misusing the Court's Proceedings in a Way that would be Manifestly Unfair/Bring Administration of Justice Into Disrepute?**

***Legal Principles***

[16] Civil Procedure Rule 88.01(1) states that the rules do not diminish the inherent authority of a judge to control an abuse of the court's process.

[17] The Honourable Justice Malcolm Rowe, writing for a unanimous court, recently described the doctrine of abuse of process in *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 as follows:

1. The doctrine of abuse of process is concerned with the administration of justice and fairness. It engages the inherent power of the court to prevent *misuse* of its proceedings in a way that would be *manifestly unfair* to a party or would in some way *bring the administration of justice into disrepute*: at para.33.
2. The doctrine is “characterized by its flexibility” and “[i]s not encumbered by specific circumstances, unlike the concepts of *res judicata* and issue estoppel” at para.34.

3. An abuse of process may arise where the litigation before the court is found to be in essence *an attempt to relitigate a claim* that the court has already determined. Relitigation will be an abuse of process if it violates “such principles as judicial economy, consistency, finality and the integrity of the administration of justice”: at para.35.
4. Examples of where a multiplicity of proceedings has amounted to an abuse of process include:
  1. Where two parallel class actions involving the same parties were brought in two different jurisdictions.
  2. Where plaintiffs initiated multiple actions claiming Aboriginal and treaty rights over the same land and natural resources.
  3. Where the plaintiffs provided no viable explanation for bringing a second action that duplicated the issue of ownership of a trade name which encapsulated the original defendants.

[*Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, citations omitted, emphasis added]

### *Specific Arguments*

[18] Ms. Lavoie and Viewpoint assert that the Nicholls are misusing the court’s proceedings in a way that would be manifestly unfair to them or would bring the administration of justice into disrepute because:

1. The Nicholls are attempting to relitigate issues that have already been decided by Coughlan: Defendants’ brief at para.39.
2. This action is an attempt to raise an issue that the court could have already determined, had the Nicholls named Ms. Lavoie and Viewpoint as third parties in the proceedings before Coughlan J., relying on the decision in *Kenderry-Esprit (Receiver of) v. Burgess*,

*MacDonald, Martin & Younger*, [2001] O.J. 776 (S.C.J.):

Defendants' brief at paras.34 and 39.

3. The Nichols should have appealed the decision of Coughlan J.:  
Defendants' brief at para.39.
4. This action is unfair because, “[u]nless parts of the decision rendered by Justice Coughlan in the Initial Claim are decided differently, it is impossible for the Realtor Defendants to defend the claims made against them”: Defendants' brief at para.39.
5. This action is unfair because Ms. Sheppard failed to advise Ms. Lavoie that the Nichols had filed an action against her, and failed to encourage Ms. Lavoie to seek independent legal advice: raised at the hearing.

### ***Relitigation***

[19] I have already found that this proceeding is not an attempt to relitigate the issue of Ms. Lavoie's alleged negligence vis-à-vis the Nichols.

### ***Failure to Third Party***

[20] In *Kenderry-Esprit*, a decision relied on by Ms. Lavoie and Viewpoint, the court found that the plaintiff condominium developer, when it was sued by the

purchasers, ought to have third partied the plaintiff's lawyers. The court found that the plaintiff's subsequent action against its lawyers was an abuse of process, because the issues decided in the first proceeding would have to be decided again in the second proceeding, resulting in a danger that the same issues of fact and law would be determined in a different manner than in the first proceeding: at paras.33 and 35. The court in *Kenderry-Esprit* relied on the majority decision in *Canam* on abuse of process, which was overturned by the Supreme Court of Canada.

[21] As I have already found, the issue of Ms. Lavoie's negligence was not decided in the proceeding before Coughlan J. This proceeding is not an abuse of process by relitigation.

### ***Failure to Appeal***

[22] The failure of the Nichols to appeal the decision of Coughlan J. would be relevant if this proceeding were a collateral attack on the decision of Coughlan J. It is not.

### ***Factual Findings Binding?***

[23] In oral argument, counsel for Ms. Lavoie and Viewpoint acknowledged that Coughlan J.'s factual findings are not binding on them, and counsel for the Nichols

agreed. Ms. Lavoie and Viewpoint are not bound by Coughlan J.'s factual findings, as they were not parties to that proceeding.

*Unfairness?*

[24] Ms. Sheppard took carriage of the Nichols' file from another lawyer in her firm in or around July of 2023. Ms. Sheppard contacted Ms. Lavoie on behalf of the Nichols on or about October 10, 2023. Ms. Sheppard spoke with Ms. Lavoie several times regarding her evidence as a witness. Ms. Lavoie maintained that she had notified the buyer's agent of the leak. The Nichols were not then contemplating litigation against Ms. Lavoie. The trial was initially scheduled to be held on October 30 and 31 and November 1, 2, 6 and 7, 2023. On or around October 23, 2023, the dates were adjourned to November 22, 23, 27 and 28, 2023. On or around November 6, 2023, Ms. Sheppard formed the opinion that the Nichols had grounds for a claim against Ms. Lavoie and Viewpoint. This was when Ms. Sheppard placed certain text messages in the proper order, and realized that Ms. Lavoie had not informed the buyers' agent of the leak in writing. At the time, Ms. Sheppard believed that the limitation period might expire on November 8, 2023. On November 6, 2023, Ms. Sheppard advised the Nichols to file the claim against Ms. Lavoie and Viewpoint, in order to preserve the time limits. The claim against Ms. Lavoie and Viewpoint was filed on November 8, 2023. Ms. Lavoie

testified on November 28, 2023. Neither Ms. Sheppard nor the Nichols notified Ms. Lavoie of the claim they had filed against her and Viewpoint.

[25] Ms. Sheppard did not advise Ms. Lavoie to obtain independent legal advice. Ms. Lavoie and Viewpoint rely on Rule 7.2-9 of the Code of Professional Conduct that governs lawyers in Nova Scotia. Rule 7.2-9 states that, when a lawyer deals on a client's behalf with an unrepresented person, the lawyer must: (a) urge the unrepresented person to obtain independent legal representation; (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[26] At one point in her cross-examination on this motion, Ms. Lavoie alleged that Ms. Sheppard explicitly told Ms. Lavoie that she did not need a lawyer. I do not accept Ms. Lavoie's evidence on this point. This assertion did not appear in Ms. Lavoie's affidavit, and her testimony on this issue in cross-examination was not convincing, as it changed frequently.

[27] Ms. Lavoie and Viewpoint say that, in the circumstances, allowing this proceeding to continue would be manifestly unfair and would bring the administration of justice into disrepute because:

- Had she known of the action against her, and had she been advised to obtain independent legal advice, Ms. Lavoie would have retained legal counsel and she might not have agreed to testify voluntarily.
- Had she had the benefit of legal advice, Ms. Lavoie would have been more prepared to testify, she would have been more cognizant of her demeanour on the stand, she might have chosen her wording more cautiously, and, although she told the truth, her evidence might have been different.
- Ms. Lavoie is worried that she may be impeached if her testimony in this proceeding is inconsistent with the evidence she gave in the first proceeding.

[28] I am not satisfied that allowing the Nichols to continue with this claim would be manifestly unfair to Ms. Lavoie or to Viewpoint or would bring the administration of justice into disrepute for the following reasons:

(1) I find, based on the evidence of Ms. Sheppard, that even if Ms. Lavoie had refused to testify voluntarily as a result of knowing of the claim filed against her and/or having obtained legal advice, the Nichols would likely have compelled her to testify.

(2) Ms. Lavoie maintained that she told the truth when she testified in the proceedings before Coughlan J., and she was unable to identify how the evidence she gave in that proceeding would have been any different had she known about this law suit and/or had she retained a lawyer to represent her interests at the time. See *Ferrara v. Lorenzetti, Wolfe Barristers & Solicitors*, 2012 ONCA 851 at para.85.

(3) The judge hearing the trial of this matter is not bound by the credibility findings of Coughlan J.

### **Witness Immunity**

[29] A witness has immunity in respect of what he or she says and does in court. The immunity includes a statement made by a witness if the statement is as to the nature of the evidence the witness can give and it is made to a professional person preparing the evidence to be presented in court: *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 at para.115.

[30] The conduct that forms the basis of the Nichols' claim in this matter is the alleged failure of Ms. Lavoie to advise the Nichols to update the PDS to reflect the leak, not what she said in court. The "gist and essence" of the Nichols' claim does not fall within the scope of witness immunity: *Elliott* at para.120.

[31] The doctrine of witness immunity does not apply here.

### **Conclusion**

[32] The Defendants' motion to strike the statement of claim is dismissed.

[33] If the parties cannot agree on the issue of costs, I will receive written submissions from the Nichols within two weeks of this decision, and from the Defendants within four weeks of this decision.

Gatchalian, J.