



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Acadia Atlantic ULC v. Mullett*, 2026 NLSC 36

Date: March 26, 2026

Docket: 202401G5180

BETWEEN:

ACADIA ATLANTIC ULC

**PLAINTIFF/
DEFENDANT BY COUNTERCLAIM**

AND:

MICHAEL MULLETT

**FIRST DEFENDANT/
PLAINTIFF BY COUNTERCLAIM**

AND:

WADE MERCER

SECOND DEFENDANT

Before: Justice Garrett A. Handrigan

Place of Hearing:

St. John's, Newfoundland and Labrador

Dates of Hearing:

March 4, 2026

Summary:

Michael Mullett obtained a default judgment on a counterclaim against Acadia. Acadia applied to set aside Michael Mullett's default judgment, as well as his defence to the main claim and to strike the counterclaim.

The Court allowed the Application. It set aside Michael Mullett’s default judgment on the counterclaim and struck Michael Mullett’s defence to the main claim and his counterclaim from further consideration. It ordered Michael Mullett to pay the costs of the Application to be taxed under Column 3 of the Scale of Costs.

Appearances:

Michael Plastina	Appearing on behalf of the Plaintiff/ Defendant by Counterclaim
Eli W.P. Baker	Appearing on behalf of the First Defendant/Plaintiff by Counterclaim
Wade Mercer	No appearance

Authorities Cited:

CASES CONSIDERED: *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301, 486 A.P.R. 301(Nfld. C.A.); *Loder v. Loder*, 2016 NLTD(G) 172; *Central Computer Services Ltd. v. Green Acres Memorial Gardens (1969) Ltd.* (1982), 15 Man. R. (2d) 441, 15 A.C.W.S. (2d) 393 (Co. Ct.); *Bank of Montreal v. H.O. House Ltd.*, 1978 CarswellNfld 186, 15 Nfld. & P.E.I.R. 33 (C.A.)

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] Michael Mullett obtained a default judgment on a counterclaim in these proceedings, from this Court on December 23, 2024. He entered the judgment against Acadia Atlantic ULC (“Acadia”), as the Plaintiff/Defendant by

Counterclaim. The judgment provided that because Mr. Mullett “seeks damages which are not liquidated or fixed, the issue of damages shall be set down for assessment before this Honourable Court”.

[2] Acadia filed an Interlocutory Application on March 4, 2025, asking for two orders:

1. To overturn the judgment dated December 23, 2024, that was filed against them per Rule 16.06 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”); and
2. To dismiss the defence and counterclaim pursuant to Rule 29.10(a) of the *Rules*.

[3] I heard Atlantic’s Application on March 4, 2026, and reserved my decision until now.

THE ISSUES

[4] Acadia’s Application raises two issues:

1. Should I set aside the default judgment issued by this Court on December 23, 2024? and
2. Should I strike the defence and counterclaim that Michael Mullett filed on November 26, 2024?

THE LAW

Statute – *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

[5] Rule 16.06 provides:

The Court may, on such terms as it thinks just, set aside or vary any judgment entered by default in pursuance of Rule 16.

[6] Rule 14.24 provides:

14.24. (1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that

- (a) it discloses no reasonable cause of action or defence;
- (b) it is false, scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) it is otherwise an abuse of the process of the Court,

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[7] Rule 29.10 (a) & (g) provide:

29.10. On a hearing of an application, the Court may on such terms as it thinks just,

- (a) summarily dispose of any cause of action or question arising on the application, and make such order as is just;

...

(g) exercise such jurisdiction and grant any other order as it deems just.

Case Law – Setting Aside a Default Judgment

[8] In paragraph 35 of *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301, 486 A.P.R. 301(Nfld. C.A.), Green J.A. of our Court of Appeal stated what a court should consider when deciding whether to set aside a default judgment:

Three factors are generally examined by the court in determining whether to exercise its discretion to set aside a default judgment that has been regularly obtained: the potential merits of the defence; the explanation, if any, for failing to file the defence in time; and the timeliness of the application to set aside the judgment. As well, factors that are relevant to the exercise of any discretionary decision, such as the existence of prejudice to one side or the other, must also be considered.

[emphasis added]

Case Law – Striking a Defence and Counterclaim

[9] In paragraph 20 of *Loder v. Loder*, 2016 NLTD(G) 172, I set out the law that applies on applications to strike counterclaims:

20 From my earlier review of the law, I discern that the following principles of law are relevant to applications to exclude counterclaims:

- The defendant may raise any cause of action in a counterclaim that can be conveniently disposed of within the original proceeding.
- A counterclaim need not necessarily have any connection with the claim itself.
- A Court may exclude a counterclaim if it is embarrassing or prejudicial or may cause undue delay.
- A counterclaim may be embarrassing if it does not relate to the specific subject-matter of the claim but will not be embarrassing if it relates.

- Trial judges have broad discretion to maintain or exclude counterclaims and appellate courts will not interfere with how they exercise that discretion unless the result is likely to cause an injustice to one of the parties.

[10] This is the law I will apply to the issues I stated above. I turn now to analyze those issues, starting with the background to them.

ANALYSIS

Background

[11] Acadia filed a statement of claim in this Court on September 23, 2024. It named Michael Mullett and Wade Mercer as Defendants. At paragraph 13 of its statement of claim, Acadia alleged that the Defendants owed it \$180,009.10 for goods and services that it provided under a contract with them, starting on August 19, 2020. Acadia alleged further at paragraph 16 that the Defendants had breached the contract, and it claimed from the Defendants the outstanding debt obligation and the accrued interest.

[12] In paragraph 2 of its statement of claim, Acadia stated Michael Mullett had a mailing address of 95 Cumberland Crescent, St. John's, Newfoundland & Labrador, A1B 3M4. Acadia retained Tony Dunne, a process server, to serve the statement of claim on Michael Mullett. Mr. Dunne served the statement of claim and then provided Acadia with an affidavit of service, dated November 23, 2024, for personally serving the statement of claim on Michael Mullett on November 22, 2024.

[13] Paragraphs 1 & 2 of Mr. Dunne’s affidavit, which he noted to be for (PERSONAL SERVICE), set out the details of his service¹:

1. On 2024/11/22 at 7:30 pm, I served MICHAEL MULLETT with the STATEMENT OF CLAIM by leaving copy with MICHAEL MULLETT at 95 CUMBERLAND CRESCENT, ST. JOHN’S, NL A1B 3M4
2. I was able to identify the person by means of: HE STATED HE WAS THE DEFENDANT AS LISTED.

[14] The Michael Mullett that Mr. Dunne served on November 22, 2022, filed a statement of defence and counterclaim to Acadia’s statement of claim on November 26, 2024, four days after he received the document. At paragraph 25 of the defence and counterclaim, Mr. Mullett asserted that he was not the intended Defendant, and he claimed that Acadia’s statement of claim “impugned his integrity, reputation and character...[and] caused him to suffer mental anguish and distress as well as placing a derogatory notation on his credit history”. The Defendant asked for \$300,000 in general damages for mental suffering, defamation and injury to his reputation as well as costs as noted at paragraph 26 of the defence and counterclaim.

[15] Then on December 19, 2024, Michael Mullett, the supposed Defendant, applied to this Court for a default judgment on the counterclaim, supporting his Application with an “affidavit”,² apparently signed by his counsel, who noted in paragraph 2 of the document that “[o]n the 2nd day of December 2024, a copy of the Statement of Defence and Counterclaim of Michael Mullett was duly served on

¹ Mr. Dunne used a blank form affidavit to confirm his service, filling it in as appropriate to his actions in the blanks provided. I use an uppercase font as he did on the form and also underline the portions that he wrote in on the form. He swore the affidavit before a Commissioner of Oaths on November 23, 2024.

² The document the Michael Mullett’s counsel filed to support his application for a default judgment purports to be an affidavit but it does not conform to the requirements of Rule 48.01 of the *Rules of the Supreme Court, 1986*, as to the formalities for affidavits used in proceedings. In particular, I note that the document has no jurat and it does not appear to have been sworn, despite that Rule 48.01 of the *Rules of the Supreme Court, 1986* says that “[a]n affidavit used in a proceeding shall be (d) signed by the deponent with the jurat completed and signed by the person before whom it is sworn or affirmed” (underlining added).

Acadia Atlantic ULC by email at the following address...”; the email address he provided was for Acadia’s counsel in this matter.

[16] Counsel for Michael Mullett also stated this in paragraphs 4 and 5 of the document he filed to support his client’s request for default judgment:

4. The time allocated for Acadia Atlantic ULC to file a Defence to the Counterclaim, pursuant to the Rules of the Supreme Court, 1986, has expired. More than ten (10) days have passed since the service of the Counterclaim upon Acadia Atlantic ULC and no Defence to the Counterclaim or any Notice of Intention to Defend the Counterclaim has been filed or served by Acadia Atlantic ULC.

5. No extension of time for filing a Defence to the Counterclaim has been requested by Acadia Atlantic ULC or granted by this Court, and no communication has been received by my office that would indicate any intention to defend the Counterclaim³

[emphasis added]

[17] The Court issued an order for default judgment on counterclaim on the strength of the documents that Michael Mullett’s counsel submitted. Paragraph 6 of the Order states:

Default judgment is entered against Acadia Atlantic ULC on the Counterclaim of the Defendant/Plaintiff by Counterclaim, Michael Mullett.

³ I underline this part of paragraph 4 because the claim that counsel makes about having received no communication from Acadia about its intention to defend the counterclaim is wrong. I discuss the timeline of communications between counsel in greater detail later in these reasons, but I am compelled to address this assertion now, by noting three emails that counsel for Acadia sent to counsel for Michael Mullett that relate to the point: 1. on December 18, 2024, counsel for Acadia advised that the “[t]he Statement of Defence will not be at the court on Thursday [December 19, 2024], we are working with our client to complete it”; 2. on December 19, 2024, counsel for Acadia advised that “[w]e are working expeditiously to have the Statement of Defence served and filed as soon as possible”; and, later, 3. on December 19, 2024, counsel for Acadia sent a copy of the defence by email to counsel for Michael Mullett, advising, “[p]lease find attached a copy of the unfiled Statement of Defence. We are sending a process server to the court first thing tomorrow morning to file the same document”. I am satisfied by these representations that counsel for Michael Mullett clearly knew when he applied to the court on December 19, 2024, for default judgment on the counterclaim that Acadia’s counsel had taken instructions from his client to defend the counterclaim, that he was working dilligently on drafting the defence and that he intended to file it forthwith.

[18] The Order also noted, at paragraph 7, that “the issue of damages shall be set down for assessment before this Honourable Court”, in that the damages Mr. Mullett was asking for are “not liquidated or fixed”.

[19] Acadia filed an Interlocutory Application on March 4, 2025 to set aside Michael Mullett’s default judgment on the counterclaim and to dismiss the defence he filed to its statement of claim. Acadia asked to set aside the judgment under Rule 16.06 of the *Rules* and to strike the defence and counterclaim under Rule 29.10(a). As to setting aside the default judgment, Acadia claimed at paragraph D.1 of its Factum filed on December 22, 2025 that “the Incorrect Individual [Michael Mullett] [is] not a proper party to the action”, so that the default judgment could not be sustained.

[20] As to striking the defence and counterclaim, Acadia repeated its claim, at part V of its Factum, “that the Incorrect Individual [Michael Mullett] is not a proper party and a stranger to the matter”; and says further that “the Defence and Counterclaim discloses no reasonable cause of action, are scandalous and vexatious, and are an abuse of process”.

[21] This is the background to Acadia’s Interlocutory Application. I turn now to discuss the issues I stated above.

Discussion

[22] The identities of the Michael Mullett whom Acadia served with its statement of claim on November 22, 2024, and the Michael Mullett who defended the claim and then counterclaimed against Acadia and ultimately filed a default judgment on his counterclaim against Acadia, are critical to this discussion. First, I will explain who the two “Michaels” are and how they were confused.

[23] The Michael Mullett that Acadia first served with its statement of claim lived, as already noted, at 95 Cumberland Crescent, St. John’s, NL A1B 3M4. Counsel for

Acadia found the address by searching the Registry of Deeds for the Province of Newfoundland and Labrador. Acadia's counsel made a mistake when he served that Michael Mullett, as quickly became apparent to him when Michael Mullett's counsel filed his client's defence and counterclaim on November 26, 2024.

[24] In the result, Acadia's counsel searched further for the correct Michael Mullett and found that he lived at 26-28 Delaney's Avenue, Shearstown, NL A0A 3V0; whereupon counsel served him with the statement of claim. Paul King, a process server, attended on this Michael Mullett on March 23, 2025, with a copy of the statement of claim and noted in his affidavit of service, that he identified the Michael Mullett he served, by verbal admission.

[25] Acadia's counsel adopted the practice of referring to the Michael Mullett whom he first served with the statement of claim and who filed the defence and counterclaim to Acadia's statement of claim as the "Incorrect Individual". This was a useful designation for the Michael Mullett, who has counsel in these proceedings and who filed the defence and counterclaim, but I will not follow Acadia's practice.

[26] Quite simply, there is very little, if any, need to refer to the "correct" Michael Mullett for this Application. If I have to, I will make it very clear to whom I refer. Otherwise, whenever I use "Michael Mullett" or "Mr. Mullett" hereon, I mean the Michael Mullett whom Acadia first served with its statement of claim and then obtained default judgment against Acadia on the counterclaim he issued against Acadia on November 26, 2024. And just to be doubly clear about it, that Michael Mullett was never in the contractual relationship with Acadia that Acadia relies on in its statement of claim.

Setting Aside Defence

[27] It is clear from *Langor*, that there are three factors a court must consider when deciding whether to set aside a defence:

1. The potential merits of the defence;
2. The explanation, if any, for failing to file the defence in time; and
3. The timeliness of the application to set aside the judgment.

It is implicit in any consideration of those factors that possible prejudice to one side or the other should also be considered.

[28] I note for clarity that the “defence” of which I will consider the merits is a defence that Acadia might have filed, but did not, to the counterclaim that Michael Mullett did file on November 26, 2024. I also note that, while Acadia did not file a defence to the counterclaim, it drafted one, it provided a copy to Michael Mullett’s counsel and it even presented the defence to the Court for filing, whereupon it was declined because Michael Mullett had already obtained default judgment on the counterclaim.

[29] On December 19, 2024, four days before Michael Mullett obtained default judgment on his counterclaim against Acadia, Acadia’s counsel forwarded an unfiled copy of the defence to the counterclaim to Michael Mullett’s counsel by email. He noted in his email, found at Tab M of Acadia’s Factum, that “[w]e are sending a process server to the court first thing tomorrow morning to file the same document”.

[30] Eventually Acadia’s counsel mailed the defence to the process server to file with the Court on January 6, 2025. The process server to whom counsel referred in his email to counsel opposite did not attend court until January 15, 2025. He emailed Acadia’s counsel the same day to advise that he could not file the defence, as counsel instructed him to do (Tab O of Acadia’s Factum):

I was at the Court today with documentation but there was some issue filing the Defense To your Counterclaim as there was already an order to pay the

Counterclaim. The Court Clerk is going to call you once they are certain that it may be problematic.

[emphasis added]

[31] It was “problematic”, of course, as Acadia’s counsel noted in paragraph 25 of his Factum:

On or about January 28, 2025, Acadia’s Counsel contacted the court via phone in regard to the matter and was told to file an Interlocutory Application and Supporting Affidavit.

[32] On March 4, 2025, Acadia’s counsel did as he was instructed by the Court. Since then, Acadia has focused on its Application to strike the counterclaim, or as Acadia calls it in its Interlocutory Application, to “exclude” the counterclaim.

The potential merits of the defence

[33] Michael Mullett’s counterclaim bears no relationship whatever to Acadia’s statement of claim. As I noted earlier, Acadia sued Michael Mullett and Wade Mercer in contract, alleging it provided goods and services to them from December 31, 2021, to January 31, 2024. Acadia claims that those goods and services were valued at \$180,009.10 and that Michael Mullett and Wade Mercer breached their contract with Acadia by failing to pay for them.

[34] Michael Mullett said nothing in his counterclaim about the merits of Acadia’s claim for those goods and services. He focused exclusively on how it affected him to be mistaken as a Defendant in the claim and then for the process server to serve the statement of claim on him.

[35] I did not see a copy of the defence that Acadia proposed to file to Michael Mullett’s counterclaim and I will not speculate on it. Regardless, it is immaterial to this discussion because Acadia did not file it. However, it is worth noting that Acadia’s counsel sent an unfiled copy of the proposed defence to Michael Mullett’s

counsel before the latter obtained default judgment on the counterclaim on behalf of his client.

Failing to file the defence in time

[36] Acadia’s failure to file its defence in time goes to the heart of this matter and requires generous elaboration, as will appear hereafter. For ease of reference, I start with this table setting out the exchanges that took place between Acadia’s counsel and Michael Mullett’s counsel, between November 22, 2024, and January 6, 2025.

Date	Event ⁴
November 22, 2024	Acadia’s process server served Michael Mullett with the statement of claim.
November 26, 2024	Michael Mullett’s counsel filed a defence to the statement of claim and a counterclaim against Acadia.
December 2, 2024	Michael Mullett’s counsel emailed his client’s defence and counterclaim to Acadia’s counsel, who accepted it for service on Acadia.
December 3, 2024	Michael Mullett’s counsel advised Acadia’s counsel that his client is not the “Michael Mullett” named in the statement of claim, whereupon Acadia’s counsel halted any further steps on Acadia’s claim and sought instructions from his client.
December 6, 2024	<ul style="list-style-type: none"> Acadia’s counsel contacted Michael Mullett’s counsel to schedule a meeting by telephone and expressed concern with the “ten-day deadline to respond” as stated in the notice of counterclaim he received from Michael Mullett’s counsel.

⁴ The primary means of contact between Acadia’s counsel and the Michael Mullett’s counsel was email. Acadia’s counsel reproduced these emails as Exhibits “A” to “M” of its interlocutory application. They may also appear as Tabs “E” to “O” of the Factum that Acadia filed on December 22, 2024, to support its interlocutory application.

	<ul style="list-style-type: none"> • Michael Mullett’s counsel provided Acadia’s counsel with a copy of his client’s driver’s licence to confirm his identity.
December 10, 2024	Michael Mullett’s counsel contacted Acadia’s counsel to confirm that his client was not the Michael Mullett that Acadia sued.
December 12, 2024	Acadia’s counsel contacted Michael Mullett’s counsel to schedule a meeting by telephone.
December 13, 2024	Counsel exchanged their opposing views about the viability of Michael Mullett’s counterclaim, with Michael Mullett’s counsel confirming his client would continue with it and Acadia’s counsel undertaking to provide a defence to the counterclaim the following week.
December 17, 2024	Michael Mullett’s counsel contacted Acadia’s counsel at 12:43 p.m. (NL time) asking if Acadia had filed a defence to the counterclaim.
December 18, 2024	<ul style="list-style-type: none"> • Acadia’s counsel confirmed at 5:05 p.m. (ON time) that it would not be filing a defence to the counterclaim on December 19, 2024. • Michael Mullett’s counsel advised by email at 4:03 p.m. (NL time) in reply that “if you would give me a time, acceptable to my client, at which your client will have a defence filed, then we can avoid your client being defaulted tomorrow”.
December 19, 2024	<ul style="list-style-type: none"> • Acadia’s counsel advised Michael Mullett’s counsel at 9:18 a.m. (NL time) that “[w]e are working expeditiously to have the Statement of Defence served and filed as soon as possible”. • Michael Mullett’s counsel filed the documents to obtain default judgment on the counterclaim with the Court at 3:43 p.m. (NL time)⁵.

⁵ I base this inference on a date and time stamp from the court that appears in the upper, right-hand corner of the “ORDER FOR DEFAULT JUDGMENT ON COUNTERCLAIM”, which was filed on December 23, 2024. The date

	<ul style="list-style-type: none"> Acadia’s counsel forwarded a copy of his client’s unfiled defence to the counterclaim to Michael Mullett’s counsel at 3:56 p.m. (ON time), indicating he intended to send a process server to the Court the next day to file it.
December 23, 2024	The Court granted Michael Mullett a default judgment on the counterclaim.
January 6, 2025	Michael Mullett’s counsel provided Acadia’s counsel with a copy of the default judgment on the counterclaim which the Court issued on December 23, 2024.

It is apparent from the preceding table that counsel for the parties maintained an ongoing email correspondence from December 2, 2024, until December 19, 2024, as they dealt with several issues:

- The identity of the Michael Mullett who Acadia initially served with its statement of claim and the identity of the Michael Mullett who was the intended Defendant;
- Michael Mullett’s defence to the main claim and his counterclaim against Acadia;
- Acadia’s defence to Michael Mullett’s counterclaim;
- Timelines for filing Michael Mullett’s defence to the counterclaim;
- Michael Mullett’s apparent interest in proceeding against Acadia in default of Acadia’s filing a defence to the counterclaim; and

and time stamp reads: “DEC 19 ’24 15:43”, indicating December 19, 2024 @ 3:43 p.m., as the time the court received it.

- Acadia's concern about Michael Mullett's interest in obtaining a default judgment on the counterclaim.

[37] It is appropriate to reflect on the brevity of time between when Michael Mullett was served with Acadia's statement of claim and when he obtained default judgment on his counterclaim against Acadia. Acadia served Michael Mullett with its statement of claim on November 22, 2024. On December 19, 2024, twenty-seven days after service and twenty-three days after he filed his defence and counterclaim on November 26, 2024, Michael Mullett applied to the Court for a default judgment on his counterclaim. I have tried to understand why Michael Mullett was so determined to proceed with his counterclaim and why he put so much pressure on Acadia to file its defence to the counterclaim – but nothing has emerged from the dynamics at work between them to account for that pressure.

[38] It is self-evident that Acadia's counsel had a lot to do in the aftermath of learning that he had served the wrong person in the Michael Mullett who lived at 95 Cumberland Crescent, St. John's, NL A1B 3M4. For example, counsel had to meet with and take instructions from Acadia, endeavor to locate the Michael Mullett that had allegedly been in a contractual relationship with Acadia and then serve him with the statement of claim.

[39] Additionally, counsel for Michael Mullett added to the frustration of Acadia's mistake by filing Michael Mullett's defence to the statement of claim and then issuing the counterclaim against Acadia. Counsel for Michael Mullett immediately insisted that Acadia's counsel file a defence to the counterclaim and held out for it under the threat of filing a default judgment to the counterclaim, if he did not. Ultimately, Acadia's counsel did provide Michael Mullett's counsel with an unfiled copy of the defence, but by then, Michael Mullett had already applied to Court (unknown to Acadia's counsel) for default judgment.

[40] Counsel for Michael Mullett advised when I heard Acadia's Interlocutory Application that his client was outside the country when Acadia served him with the

statement of claim⁶. According to counsel, it was Mr. Mullett's husband, and not his client who was served with the statement of claim on November 22, 2024 (although the process server swore in his affidavit that he identified Mr. Mullett who "HE STATED HE WAS THE DEFENDANT AS LISTED"; (underlining as part of the blank form affidavit). Counsel for Mr. Mullett further advised that he took instructions from his client by telephone while the latter remained outside the country for the defence to the claim and the counterclaim that he filed for him on November 26, 2024.

[41] Acadia's counsel did exceed marginally the filing timeline prescribed by the *Rules* for filing a defence to the counterclaim, but throughout that time counsel was fully engaged with the issue and maintained an open dialogue with Mr. Mullett's counsel, apprising him of his efforts and asking counsel's indulgence as he took instructions from Acadia and prepared to defend the counterclaim.

[42] I find that Acadia's counsel acted reasonably in the circumstances and his delay is excusable. Of critical importance to this finding are the several emails that counsel exchanged from December 17 to 19, 2024. I referred to them in the table above but I will examine them in more detail now:

- On December 17, 2024, Mr. Mullett's counsel emailed Acadia's counsel at 2:13 p.m. (NL time):

Hello Michael [Plastina],

I will be travelling into St. John's on Thursday [December 19] for work and will be near the Supreme Court registry. Have you had an opportunity to file the defence to the counterclaim? If so, I could drop into the registry and pick it up.

...

Have a great day,
Eli [Baker]

⁶ In paragraph 20 of the Counterclaim that Mr. Mullett filed on November 26, 2024, he also says "... he was [at the time the Statement of Claim was received by his partner] and still is at the time of the filing of this Defence and Counterclaim, out of the country receiving medical treatment and surgery".

- On December 18, 2024, Acadia's counsel replied to this email 5:05 p.m. (ON time):

Good afternoon,

The Statement of Defence will not be at the court on Thursday [December 19], we are working with our client to complete it.

Michael Plastina

- On December 18, 2024, Mr. Mullett's counsel emailed Acadia's counsel at 4:03 p.m. (NL time):

Hi, Michael [Plastina],

I have a continuing instruction from my client to deal with this matter as quickly as possible. We are 6 days past the 10 day period of time after which my client can default your client. Put simply, I am certain that my client will interpret me giving your client more time to file a statement of defence as doing the opposite of which I am instructed to do.

That being said, if you would give me a time, acceptable to my client, at which your client will have a defence filed, then we can avoid your client being defaulted tomorrow. Personally I do not see a defence to this matter, and to that point, as this is an unliquidated claim, if my client were to default your client tomorrow there would not be an enforceable damages portion to the default order; we would still have to go in front of a judge for that portion (or settle the matter beforehand).

Furthermore, I suspect that the defence that might be filed by your client would result in the Rule 17 application [for a summary trial] being filed by my client that I sent to you on December 6th (said filing would include the obvious modifications). This Rule 17 application would only serve to increase the costs associated with all of this for your client, which could be avoided with a default order, or some form of acknowledgment (to the court) of liability by your client.

I understand the difficult position that this situation has put us both in and hope that your client will consider the above (and my client's innocence) and act in furtherance of making the time short that this issue remains for my client.

Be well and have a good evening,

Eli [Baker]

- On December 19, 2024, Acadia's counsel replied to this email @ 10:47 a.m. (ON time):

Good morning,

Thank you for letting me know.

We are working expeditiously to have the Statement of Defence served and filed as soon as possible.

[43] Mr. Mullett's counsel did not respond to this email from Acadia's counsel. In fact, he attended the registry of this Court in St. John's at 3:43 p.m. (NL time) on December 19, 2024, several hours after hearing from Acadia's counsel and delivered the documents to the Court on which he relied for default judgment on the counterclaim. Default judgment was granted on December 23, 2024, and Mr. Mullett's counsel advised Acadia's counsel of it on January 6, 2025.

[44] I note, in particular, this part of the December 19, 2024 email, for the three conditions that Mr. Mullett's counsel put on Acadia's counsel to forestall his moving for default judgment on the counterclaim:

That being said, if you would give me a time (1), acceptable to my client (2), at which your client will have a defence filed (3), then we can avoid your client being defaulted tomorrow.

[emphasis added]

[45] After he stated his conditions, Mr. Mullett's counsel then disparaged any possible defence that Acadia might contemplate and suggested that default judgment was no more than a benign measure that would still require judicial scrutiny:

Personally, I do not see a defence to this matter, and to that point, as this is an unliquidated claim⁷, if my client were to default your client tomorrow there would not be an enforceable damages portion to the default order; we would still have to go in front of a judge for that portion...

[emphasis added]

[46] These emails reveal that Mr. Mullett's counsel took a rigid, formalized approach towards Acadia's obligation to file a defence to the counterclaim. He inquired if Acadia had filed it (December 17, 2024), then he delivered a veiled threat to enter default judgment if he had not (December 18, 2024) and immediately followed up on his threat (December 19, 2024) when counsel did not. Mr. Mullett's counsel did not act reasonably and Acadia's delay in filing its defence, which was entirely reasonable in the circumstances, should not be held against it.

Timeliness of the Application to set aside the judgment

[47] Acadia forwarded its defence to the counterclaim to a process server on January 6, 2025, with instructions to deliver it to this Court. Bruce Little, the process server advised Acadia's counsel by email on January 15, 2025, of the following:

I was at the Court today with documentation that but there was some issue with filing the Defense to your Counterclaim as there was already an order to pay the Counterclaim. The Court Clerk is going to call you once they are certain that it may be problematic.

[48] Acadia's counsel contacted the Court by telephone on January 28, 2025, and was told to file an interlocutory application and supporting affidavit. Counsel did as instructed and filed Acadia's Application on March 4, 2025; the Application came

⁷ Counsel misrepresents his client's counterclaim by saying it is an "unliquidated claim", because paragraph 26(A) of the counterclaim asks for "\$300,000.00 in general damages for infliction of mental suffering, defamation and injury to his reputation".

before the Court on May 6, 2025; and the Court set it for hearing on March 4, 2026, all in a timely manner.

[49] In the result, I set aside the default judgment that Mr. Mullett filed on December 23, 2024. I turn now to consider whether to strike Mr. Mullett's defence and counterclaim.

Striking the Defence and Counterclaim

[50] Earlier in these reasons, I quoted from my judgment in *Loder*, for the principles that apply on applications to strike counterclaims.

[51] I repeat them here for ease of reference:

- The defendant may raise any cause of action in a counterclaim that can be conveniently disposed of within the original proceeding.
- A counterclaim need not necessarily have any connection with the claim itself.
- A court may exclude a counterclaim if it is embarrassing or prejudicial or may cause undue delay.
- A counterclaim may be embarrassing if it does not relate to the specific subject matter of the claim but will not be embarrassing if it relates.
- Trial judges have broad discretion to maintain or exclude counterclaims and appellate courts will not interfere with how they exercise that discretion unless the result is likely to cause an injustice to one of the parties.

[52] There is, of course, considerable overlap amongst these principles. The overriding considerations are on how counterclaims contribute to delay, embarrassment, prejudice, and inconvenience; and an acknowledgement of the breadth of discretion that prevails at this level of the proceedings.

[53] It is accepted that a defendant may raise any cause of action in a counterclaim if it can be conveniently disposed of within the original proceeding. Michael Mullett runs afoul of that principle for two reasons. First, he is not a Defendant in the original proceeding and further, his counterclaim cannot be conveniently disposed of in that proceeding.

[54] Acadia's position throughout this matter is that Michael Mullett is not a party to the original proceeding and he does not have standing to bring a counterclaim against it. Acadia is right about Mr. Mullett's want of standing. Let me explain.

[55] Acadia issued a statement of claim from this Court on September 23, 2024. Everything was right about that proceeding, except the address which it gave for Michael Mullett. In paragraph 2 of the claim, it stated Mr. Mullett "has a mailing address of 95 Cumberland Crescent, St. John's, Newfoundland and Labrador, A1B 3M4". Michael Mullett is the right Defendant but his address is 26-28 Delaney's Avenue, Shearstown, NL A0A 3V0 and not 95 Cumberland Crescent, St. John's, Newfoundland and Labrador, A1B 3M4.

[56] The Michael Mullett who defended Acadia's claim and counterclaimed against Acadia has tried hard to bring himself into these proceedings through his counterclaim, which is, to employ the vernacular, "literally by the back door". But Michael Mullett cannot substitute himself for the true Defendant in this cause of action, whose status Acadia has made patently obvious through the steps it has taken since it discovered its former, mistaken address for him.

[57] Michael Mullett's proposed counterclaim is devoid of references to the cause of action that lies between Acadia and the true Michael Mullett and Wade Mercer. In *Central Computer Services Ltd. v. Green Acres Memorial Gardens (1969) Ltd.*

(1982), 15 Man. R. (2d) 441, 15 A.C.W.S. (2d) 393 (Co. Ct.), Jewers C.C.J. of the Manitoba County Court, relying on *Williston & Rolls, The Law of Civil Procedure* (1970), vol.2, p.720 observed that "...a counter-claim need not be of the same nature as, or even analogous to, the original claim and need not even be related to that original claim. It will be excluded only where it would prejudice, embarrass, or unduly delay the main action".

[58] It is, of course, a predicate to Jewers C.C.J.'s observation that the person who wishes to bring a counterclaim must be a party to the proceedings; and there is nothing in Michael Mullett's counterclaim that makes him a party to the proceedings. The relief that Michael Mullett asks for at paragraph 26(A) of his counterclaim are damages for Acadia having served him mistakenly with the statement of claim in the breach of contract case and for "mental suffering, defamation and injury to his reputation" arising from it.

[59] The other part of Jewers C.C.J.'s observation is even more persuasive: "It will be excluded only where it would prejudice, embarrass, or unduly delay the main action". Michael Mullett's intrusion into Acadia's contractual claim against Michael Mullett and Wade Mercer has already delayed Acadia's prosecution of its claim. When the claim goes to trial, Acadia will have to adduce evidence to support its allegations against the Defendants. Where in that exercise will Michael Mullett be able to prosecute his counterclaim if I leave it standing?

[60] The answer, quite simply, is nowhere. Michael Mullett's counterclaim will require a separate process, involving unrelated evidence, a focus on entirely different legal principles, depending on the legal bases Michael Mullett touts for the grievances that he claims, but regardless, they will not be grounded in contract law. At a minimum, prosecuting the counterclaim will prejudice, embarrass and delay Acadia's claim in contract so that it is patently clear that Michael Mullett's counterclaim cannot be conveniently disposed of in the original proceeding.

[61] Earlier in these reasons, I quoted from Green J.A. in *Langor* setting out the principles that apply to setting aside a default judgment. Of course, I have already

applied them to that portion of this judgment. There is one other factor from Green J.A.'s quotation which also applies to this part of the discussion:

As well, factors that are relevant to the exercise of any discretionary decision, such as the existence of prejudice to one side or the other, must also be considered.

[62] If I exclude Michael Mullett's counterclaim what prejudice, if any, may emerge from that finding? For Michael Mullett, he will not be able to pursue his claim in established proceedings. For Acadia, if I do not strike the counterclaim, it will face conflict on two fronts: from the Defendants in the main claim and from Michael Mullett in the counterclaim. Acadia instituted this proceeding and save for the unfortunate mistake of getting Michael Mullett's address wrong, it has prosecuted its claim duly and fittingly.

[63] Acadia has already suffered prejudice in bringing its claim forward, with the delays that have occurred, some on its own account but mostly because of Michael Mullett's intervention. The delay will continue if Michael Mullett's counterclaim is left in play and the prejudice to Acadia will grow if it has to engage in a totally distinct cause with Michael Mullett while it continues its contractual claim.

[64] It is clear that Michael Mullett has no standing to carry forward his counterclaim in the main cause and I will strike his counterclaim. I am unclear as to the merits of his counterclaim, but if he chooses to go forward with his grievances in a separate cause he will be no more prejudiced than if he had chosen that route in the first instance; which he may have done instead of counterclaiming.

[65] In *Bank of Montreal v. H.O. House Ltd.*, 1978 CarswellNfld 186, 15 Nfld. & P.E.I.R. 33 (C.A.), our Court of Appeal dismissed an appeal from the trial judge's decision on an application to strike a counterclaim because it could not be conveniently disposed of in the main action. In that case, the bank sued the defendant on a promissory note. The defendant counterclaimed against the bank in tort, claiming negligence, fraud and breach of fiduciary duty on the bank's part. The bank applied for an order that the counterclaim be a separate action. The trial judge agreed and the Court of Appeal upheld his ruling.

[66] In paragraph 36 of *Bank of Montreal*, Morgan J.A. summarized the trial judge's reasoning this way:

The counterclaim contains allegations of negligence, misrepresentation, fraud, breach of fiduciary duty and unjust enrichment. None of these allegations relate to the plaintiff's claim nor do they go to the merits of that claim.

[emphasis added]

[67] There are obvious parallels between *Bank of Montreal* and this case including breaches of contract (action on a promissory note v. action on a contract for goods and services) in the main causes and tort claims in the counterclaims. But a more significant difference is that H.O. House Ltd. was the true defendant counterclaiming in *Bank of Montreal*, while Michael Mullett is not the true defendant here.

[68] The observations that I quoted just above from Morgan J.A. in *Bank of Montreal* are as relevant to this cause as they were there. The learned justices of the Court of Appeal deferred to the trial judge's discretion to exclude the counterclaim. I exercise the same discretion here and I strike the counterclaim that Michael Mullett filed against Acadia on November 26, 2024.

Striking the Defence

[69] The same considerations apply to Acadia's request to strike Michael Mullett's defence to the main cause as it does to his counterclaim. Michael Mullett is not a party to the proceedings; he has no standing to file pleadings; and Mr. Mullett's defence is blocking Acadia from moving forward to prosecute its claim against Michael Mullett and Wade Mercer.

[70] I strike the defence to the main cause that Michael Mullett filed on November 26, 2024.

DISPOSITION

[71] Michael Mullett obtained a default judgment on a counterclaim against Acadia. Acadia applied to set aside Michael Mullett's default judgment, as well as his defence to the main claim and to strike his counterclaim.

[72] The Court allowed the Application. It set aside Michael Mullett's default judgment on the counterclaim and struck Michael Mullett's defence to the main claim and his counterclaim from further consideration. It ordered Michael Mullett to pay the costs of the Application to be taxed under Column 3 of the Scale of Costs.

ORDER

[73] In the result I order that:

1. The default judgment on the counterclaim that Michael Mullett filed against Acadia on December 23, 2024, is set aside;
2. The defence to Acadia's main cause that Michael Mullett filed on November 26, 2024, is struck;
3. The counterclaim that Michael Mullett filed against Acadia on November 26, 2024, is struck from further consideration in this cause; and
4. Michael Mullett pay Acadia's costs to be taxed under Column 3 of the Scale of Costs.

GARRETT A. HANDRIGAN
Justice