



Date: 20000825

Docket: T-2433-98

**BETWEEN:**

**LEON GRINSHPUN**

**Plaintiff**

- and -

**THE UNIVERSITY OF BRITISH COLUMBIA**

**Defendant**

**REASONS FOR ORDER AND ORDER**

Let the attached certified transcript of my Reasons for Order and Order delivered orally from the Bench at Vancouver, British Columbia, on August 16, 2000 be filed to comply with section 51 of the *Federal Court Act*.

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Prothonotary

Ottawa, Ontario  
August 25<sup>th</sup>, 2000

FEDERAL COURT OF CANADA COUR FÉDÉRALE DU CANADA	
FILED	AUG 25 2000
LOUISE SARAUULT REGISTRY OFFICER - FONCTIONNAIRE DU GREFFE	
OTTAWA, ONT.	54

FEDERAL COURT OF CANADA

TRIAL DIVISION

VANCOUVER, B.C.

August 16, 2000

T-2433-98

BETWEEN:

LEON GRINSHPUN,

PLAINTIFF;

AND:

UNIVERSITY OF BRITISH COLUMBIA,

DEFENDANT.

MR. L. GRINSHPUN,

On his own behalf;

MR. D. WALLIN,

Appearing for the Defendant.

**REASONS FOR JUDGMENT**

**PROTHONOTARY R. ARONOVITCH: (Orally)**

I have had the opportunity to fully consider the evidence and arguments of the parties, and these are my Reasons For Order and Order.

This is a simplified action in which Mr. Grinshpun claims general and punitive damages for the infringement or conversion by the defendant of his copyright in certain programs being a Boxercise and Boxing Program.

The plaintiff alleges as well that the defendant, the University of British Columbia (UBC) has, without his authority, used in its promotional materials certain descriptions of the above referenced programs in which the plaintiff claims proprietary rights by virtue of having authored the descriptions.

Mr. Grinshpun is a self-represented lay litigant. In the interests of fairness, substantial latitude has been allowed to him in adducing evidence in order that all material facts in respect of the alleged copyright infringement be placed before the court for the proper adjudication of this matter.

The essence of the plaintiff's evidence in connection with the allegations of copyright

violations resides in the following documents: two typewritten sheets entitled "Recreational Boxing and Fitness and Boxercise", Exhibits P-7 and 6 respectively; seven handwritten unnumbered undated pages which describe a 7-part Boxercise Program and includes at page 4 a diagram of an exercise called the Circuit, together marked as Exhibit P-9; a description of a Boxercise Course taught by the plaintiff in Calgary marked as P-8; descriptions of the recreational Boxercise and Boxing Courses offered between 1995 and 1998 by UBC, 1997 and 1998 being the material dates for the purposes of the alleged violations of copyright.

My apologies. I believe that would be descriptions of the recreational Boxercise and Boxing Courses offered between 1995 and 1998 by UBC, 1997 and 1998 being the material dates for the purposes of the alleged violation of copyright.

Ms. Lumholst-Smith's evidence was credible, straightforward, and uncontroverted in that regard. I accept her testimony that she did not retain nor make copies of any documents brought by Mr. Grinshpun to his interviews, and that she is the sole author of the descriptions in the UBC

publications advertising the Boxing and Boxercise classes. There is not the slightest evidence that Mr. Grinshpun was in any way the author of these descriptions. Indeed I accept her evidence that a portion of the undated, unsigned description of Mr. Grinshpun's Boxercise Program tendered into evidence by the plaintiff and marked as Exhibit P-7 was in fact authored by Ms. Lumholst-Smith.

In addition, the description of the Boxercise Court taught by Mr. Caza, a former boxing student of Mr. Grinshpun, the year following Mr. Grinshpun, was not the same as the one advertising Mr. Grinshpun's course. Indeed, in my view, the new description supports the evidence of both Ms. Lumholst-Smith and Mr. Caza that the course taught by Mr. Caza was itself neither the same nor modelled on Mr. Grinshpun's Boxercise Program.

Mr. Caza's testimony was also clear, consistent, and utterly credible. I accept his testimony wherein he provided details as to the differences between his program and the one outlined in the plaintiff's seven-page description. I also accept his evidence that he never observed Mr. Grinshpun teach a Boxercise class nor make any notation of it.

No independent evidence whatsoever was

adduced on behalf of the plaintiff attesting to the nature of Mr. Caza's program, let alone that Mr. Caza's program was the same or substantially comparable to the one Mr. Grinshpun had taught.

By contrast with Ms. Lumholst-Smith and Mr. Caza, I have found Mr. Grinshpun's evidence in these proceedings to be sometimes confused and often inconsistent.

As I find no evidence of copying, emulation, or conversion by the defendant either as it relates to the descriptions or the programs, I must conclude that Mr. Grinshpun has not met his burden of making out a *prima facie* case of infringement. I therefore need not go on to consider the proprietary rights of Mr. Grinshpun, if any, in his Boxing and Boxercise Programs including specifically the regimen described in the 7-page handwritten notes.

That said, there is no independent corroboration of Mr. Grinshpun's assertion that the program was completely original at the time it was conceived, or was necessarily conceived or produced in 1992, 1993, or for that matter at any other precise date.

More importantly, it is impossible to ascertain whether as described it falls within the

ambit or scope of the copyright certificate. Of his own admission, Mr. Grinshpun did not attach any documentation to his application for registration with the Canadian Intellectual Property Office. The copyright certificate issued to him has the title and nature of the work in precisely the terms submitted by Mr. Grinshpun in his application. The title of the work is "Recreational Boxing and Fitness." The nature of the work is described as "artistic (unique sports program)". It is further indicated to be unpublished. There is not enough specificity to conclude what artistic work is in fact covered by the certificate.

I am therefore satisfied that Mr. Grinshpun has neither successfully proven the entitlement or rights he claims with respect to his programs, or the descriptions, nor any violation of those rights by UBC. Accordingly I hereby dismiss Mr. Grinshpun's action with costs.

I would add the following: In this suit and in the course of this trial, Mr. Grinshpun has attempted to put at issue the termination of his employment and the manner in which it was conducted, tensions arising from his professional relationship with Ms. Lumholst-Smith, the lack of

recognition of his skills and dedication as a teacher, his pain and consternation at having been replaced as a teacher by the younger and allegedly disloyal and unqualified Mr. Caza, with whose honesty, character and qualifications Mr. Grinshpun has gratuitously, in my view, taken issue.

To say the least, these are not material to the issues in suit, nor is this in any way the appropriate forum for dealing with such grievances. Notwithstanding, the evidence does bear out the gradually diminishing size of Mr. Grinshpun's classes and the undoubted qualifications of Mr. Caza.

Your submissions on cost, counsel.

**SUBMISSIONS ON COSTS BY MR. WALLIN:**

Your Honour, I hope to be brief on my submissions on costs. I do feel that I will have to --in order to make proper submissions on costs, I will have to go through a little bit of the background of this lawsuit and Mr. Grinshpun's conduct in this lawsuit.

The first point that I think I should raise is this claim, in my view, in my submission, was bound to fail from the outset. It appears that this claim has been motivated by Mr. Grinshpun for



the sole purpose of punishing both his former supervisor, Ms. Lumholst-Smith, as well as his former student and boxing student, Mr. Caza. These proceedings arose within the context of a previously filed and commenced action in the B.C. Supreme Court for wrongful dismissal which Mr. Grinshpun commenced against my client, UBC. Mr. Grinshpun conducted these proceedings generally, as well as the trial of these proceedings, in my submission, as if it were an appeal of his employment matter.

It should also be pointed out that pursuant to Rule 297 of the Federal Court Rules, UBC did not have the option to seek a summary dismissal of this matter. It's specifically prohibited under Rule 297, and accordingly UBC had no choice but to attend at trial in order to protect its proprietary rights. Accordingly, UBC has incurred considerable costs in having to come as far as a trial on this matter, which in my submission, had the summary judgment application been available to UBC, this certainly in my submission would have been a classic example of a matter that could have been dealt with in such a manner.

I want to speak a little bit about specific examples of conduct and steps that have been taken

in this proceeding which have cost UBC additional expenses, more so --

THE PROTHONOTARY: Mr. Wallin, I don't mean to cut you off, but I am not going to presume what Mr. Grinshpun's motivations are, despite the inferences one might want to draw from the circumstances. And don't therefore go to solicitor-client costs, because I do not see here the kind of circumstances that would found solicitor-client costs. We will give Mr. Grinshpun the benefit of the doubt that he acted in good faith.

And as I said, I will not -- I have drawn some conclusions from the facts. I will not draw conclusions with respect to his motives.

MR. WALLIN: I only bring it to Your Honour's attention because there is of course judicial authority for this very point, and it's, of course, up to Your Honour to decide whether or not this is the appropriate circumstances which motivation can be derived from steps taken and conduct of proceedings. So I have no further submissions on --

THE PROTHONOTARY: What I'd like to hear is submissions if any with respect to whether you wish to have -- spare the taxation of costs and wish the court to

award a lump sum by way of costs in these circumstances. And if so, I would do it by reference to the midpoint of column 3, tariff B. And if you wish to make submissions in that regard, I will receive them.

MR. WALLIN: It's my position in preference to of course have a lump sum for the entire proceedings determined today, but of course before Your Honour can consider what the appropriate lump sum is, I would of course have to lay the foundation as to what steps have been taken, in my opinion, unnecessarily. I'm not sure whether or not in the circumstances a taxation would necessarily be in the best interests of the court's time as well as, of course, additional expenses for UBC.

So before I go on my submissions on what has happened in these proceedings, I'll put forward as an initial position is that it would be our preference to have a lump sum, whatever that sum is, to be determined.

THE PROTHONOTARY: Here is what I would suggest to you then, that you point out the number of proceedings, roughly the number of hours, and I will take into consideration the number of hours of the trial. And I will ask you to suggest a lump sum figure, taking that into consideration.

In other words, if you have four motions, four two-hour motions, and this trial, and you wish to suggest a sum that takes that into consideration, I will consider it; and you may wish to make your submissions in that direction.

MR. WALLIN: Yes. The difficulty I should point out to the court in coming up with a lump sum hours approach is, Mr. Grinshpun, as you are aware, has several actions outstanding with UBC, and for the purposes of presenting any kind of documentation or even an estimate, the hours which have been expended in defending these proceedings are lumped in with another proceeding as well. So it's going to be very difficult for me, without having to provide submissions, written submissions or an affidavit, as to what the best breakdown, if you will, of the two proceedings would be.

I can give you an idea of background motions and what has happened, but it's going to be very difficult to do here today.

THE PROTHONOTARY: Well then, I will receive your submissions in writing with a view to fixing lump sum costs in this action, and I would have you serve and file your submissions. What's reasonable, counsel?

MR. WALLIN: That sounds reasonable.

THE PROTHONOTARY: When?

MR. WALLIN: It would probably be within a week.

THE PROTHONOTARY: Right. So you can file your submissions within seven days. Mr. Grinshpun, you can serve and file your submissions in response, if any, in 14 days following receipt of the submissions of the defendant as to costs.

I will deal with it as a motion in writing under Rule 369. There will therefore be a right of reply if you like to yourself, Mr. Wallin, within the rules, and I will dispose of it in writing.

MR. WALLIN: Upon that direction, Your Honour, perhaps there's nothing more that needs to be said from me at this point, and they can all be in my motion pursuant to Rule 369.

THE PROTHONOTARY: Thank you and good day.

(PROCEEDINGS ADJOURNED AT 12:13 P.M.)

I HEREBY CERTIFY THAT THE FOREGOING is  
a true and accurate transcript of the  
proceedings herein to the best of my  
skill and ability.

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D.A. Bemister,

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Court Reporter

VANCOUVER  
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