

SUPREME COURT OF NOVA SCOTIA

Citation: *Eastern Shore Progressive Conservative Association v. Moulton*,
2018 NSSC 19

Date: 2018-01-29

Docket: Hfx No. 441950

Registry: Halifax

Between:

Eastern Shore Progressive Conservative Association and
Wawanesa Mutual Insurance Company

Plaintiffs

v.

Tara Moulton and Gerald Coughlin

Defendants

Judge: The Honourable Justice Gregory M. Warner

Heard: January 2, 2018, in Halifax, Nova Scotia

Counsel: Michael P. Scott and Paul Nieffer, for the plaintiffs
Tara Moulton, self-represented defendant
Gerald Coughlin, not present, not represented

By the Court:

[1] Does the Supreme Court of Nova Scotia have jurisdiction to order a tenant to pay her landlord for damage to residential premises claimed solely on a breach of a statutory condition in s. 9 of the *Residential Tenancies Act* (the “*Act*”) (and not claimed on another basis of liability)?

Background

[2] Tara Moulton (“Moulton”) leased as a residence the main floor of a building owned by the plaintiff Eastern Shore Progressive Conservative Association (“the Association”). On December 8, 2013, she was taken to the hospital because of a medical emergency. That evening her father, the defendant Gerald Coughlin (“Coughlin”), of no fixed address, who had been hunting in the woods, went to her residence to check on Moulton’s young son. He had already been taken away by another family member. Seeing a sink full of dirty dishes, Coughlin turned on the water, sat down, fell asleep with the water running, and woke up with the water overflowing.

[3] The Association was contacted December 9th and made a claim to Wawanesa Mutual Insurance Company (“Wawanesa”) on December 10th. Wawanesa arranged remediation of the water damage at a cost of \$30,612.53 and paid all but the \$1,000.00 deductible to the Association.

[4] Wawanesa sued Moulton and Coughlin in Small Claims Court. In a reported decision dated May 5, 2015 (2015 NSSM 21), the adjudicator held that the claim against Coughlin was in negligence and the claim against Moulton was based on a breach of statutory condition #4 of the residential lease entered in pursuant to the *Residential Tenancies Act* (“*Act*”). The court held that it did not have jurisdiction to determine the claim. It cited *Corfu Investments Ltd. v Oickle*, 2011 NSSC 119 (“*Corfu*”), and *City Center Property v. Al-Khalafah*, 2015 NSSM 3, and stated that the fundamental problem with Wawanesa’s claim was that it was in substance a claim by a landlord against its own tenant, which claim at first instance was within the exclusive jurisdiction of the Director of Residential Tenancies (“Director”).

[5] Wawanesa and the Association commenced this action on July 31, 2015. Their claim was framed against Coughlin in negligence (and *res ipsa loquitur*) and against Moulton for breach of her lease with the Association. The plaintiffs expressly plead that their cause of action is pursuant to the *Act*.

[6] Coughlin did not file a defence and default judgment was entered against him. Moulton filed a defence, in which she pleaded: *res judicata*, based on dismissal of the Small Claims' action; that the Director had exclusive jurisdiction to deal with the alleged breach by her of the lease pursuant to s. 13 of the *Act*; and specifically, that she was not negligent and the only basis for liability against her was a statutory condition in the lease made pursuant to, and subject to, the *Act*, which *Act* gave the Director exclusive jurisdiction over the claim against her.

[7] This hearing was set down to: assess damages against Coughlin, determine whether this court had jurisdiction to deal with the claim against Moulton and, if jurisdiction is established, determine her liability and the quantum of damages against her.

[8] At the opening of the trial, the parties filed an agreed statement of facts, and joint exhibit book containing the residential lease and the Small Claims Court Order. Effectively, Moulton acknowledged the accuracy and reasonableness of the rehabilitation costs of \$30,612.53.

Plaintiffs' Submissions

[9] Most of the plaintiffs' pretrial brief addresses whether this court has jurisdiction.

[10] This court's jurisdiction is dependent upon the proper interpretation of s. 13 of the *Act*. It reads:

Application to Director

13 (1) Where a person applies to the Director

- (a) to determine a question arising under this Act; or
- (b) alleging a breach of a lease or a contravention of this Act,

and, not more than one year after the termination of the lease, files with the Director an application in the form prescribed by regulation, together with the fee prescribed by regulation, the Director is the exclusive authority, at first instance, to investigate and endeavour to mediate a settlement.

(2) Upon making an application pursuant to subsection (1), the applicant shall, in accordance with the regulations, serve the other parties to the matter with a copy of the application.

(3) Where the landlord or the tenant has made efforts to serve the other party that have been unsuccessful, the Director may order an alternate acceptable method of service.

(4) An applicant may withdraw an application at any time before an order or decision is made. 1997, c. 7, s. 7.

[11] Related relevant provisions include ss. 1A, 3(1), 16, 17 and 25. Section 1A, 3(1) and 25(1) read as follows:

Purpose

1A The purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes. 1993, c. 40, s. 1.

Application of Act

3(1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act applies when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.

Application of Act

25(1) This Act governs all landlords and tenants to whom this Act applies in respect of residential premises.

[12] The plaintiffs direct the court's attention to *Nova Scotia Worker's Compensation Board v Rhodenizer* ("Rhodenizer"), 2015 NSCA 15, and s. 9(5) of the *Interpretation Act* for the principles of statutory interpretation.

[13] Based on those principles, they submit that the Director does not have exclusive jurisdiction to deal with this landlord-tenant issue, unless and until an application is made to the Director pursuant to s. 13(1); that is, an application to the Director is a pre-condition to the Director's exclusive jurisdiction. The Supreme Court of Nova Scotia retains inherent jurisdiction respecting disputes arising in the context of a residential tenancy relationship governed by the *Act* in the absence of clear and explicit words in the *Act* removing the Supreme Court of Nova Scotia's inherent jurisdiction.

[14] Effectively, the plaintiffs submit that landlords and tenants have the option of commencing a proceeding in the Supreme Court of Nova Scotia or by application to the Director.

[15] The plaintiffs submit that the two Nova Scotia Supreme Court decisions holding otherwise, *Corfu, supra*, and *Roumeli Investments Ltd. v Gish*, 2017 NSSC 125 (now under appeal), were wrongly decided. The plaintiffs rely upon statements made by the Nova Scotia Court of Appeal in *Reference Re: An Act to Amend Residential Tenancies Act* (1994), 115 DLR (4th) 129 (“*Reference*”), in support of their interpretation. They submit that the Supreme Court of Canada decision, [1996] 1 SCR 186, in overturning the Nova Scotia Court of Appeal decision, did not address the Court of Appeal’s interpretation of s. 13(1) of the *Act*.

[16] They submit that the purpose of the *Act*, described in s. 1A - to provide landlords and tenants with an efficient and cost effective means for settling disputes, “does not serve to extend the powers of a subordinate body beyond jurisdiction conferring provisions”.

[17] They further submit that ousting the superior court’s jurisdiction would lead to absurd results, including:

- a) complex litigation, including personal injury cases, being forced through the Director;
- b) multiple actions, where matters involving parties and non-parties to the tenancy would be heard by separate proceedings;
- c) the shorter limitation period under the *Act* (one year); and
- d) if the Superior Court is without jurisdiction, prior decided Supreme Court proceedings that arose in landlord-tenant context, would be void (not voidable).

[18] Counsel submits that interpreting s. 13(1) to mean that the Supreme Court of Nova Scotia has jurisdiction to hear any residential tenancy issue under the *Act* if no application has been made to the Director, would not lead to an absurdity in respect of minor matters due to the authority of the Supreme Court to stay any proceeding and refer it to the Director.

[19] In oral submissions, plaintiff's counsel made the following acknowledgments and concessions:

1. The defendant Moulton was not negligent. The sole basis of her liability is the statutory conditions of the standard residential tenancy lease - condition #4, which reads:

Statutory conditions

9 (1) Notwithstanding any lease, agreement, waiver, declaration or other statement to the contrary, where the relation of landlord and tenant exists in respect of residential premises by virtue of this Act or otherwise, there is and is deemed to be an agreement between the landlord and tenant that the following conditions will apply as between the landlord and tenant as statutory conditions governing the residential premises:

Statutory Conditions

1. Condition of Premises - The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.

2. Services - Where the landlord provides a service or facility to the tenant that is reasonably related to the tenant's continued use and enjoyment of the premises such as, but not so as to restrict the generality of the foregoing, heat, water, electric power, gas, appliances, garbage collection, sewers or elevators, the landlord shall not discontinue providing that service to the tenant without proper notice of a rental increase or without permission from the Director.

3. Good Behaviour - A landlord or tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants, respectively.

4. Obligation of the Tenant - **The tenant is responsible** for the ordinary cleanliness of the interior of the premises and **for the repair of damage caused by wilful or negligent act** of the tenant or **of any person whom the tenant permits on the premises.** [Court's highlight]

5. Subletting Premises - The tenant may assign, sublet or otherwise part with possession of the premises subject to the consent of the landlord which consent will not arbitrarily or unreasonably be withheld or charged for unless the landlord has actually incurred expense in respect of the grant of consent.

6. Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall

mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

7. Entry of Premises - Except in the case of an emergency, the landlord shall not enter the premises without the consent of the tenant unless

(a) notice of termination of the tenancy has been given and the entry is at a reasonable hour for the purpose of exhibiting the premises to prospective tenants or purchasers; or

(b) the entry is during daylight hours and written notice of the time of the entry has been given to the tenant at least twenty-four hours in advance of the entry.

8. Entry Doors - Except by mutual consent, the landlord or the tenant shall not during occupancy by the tenant under the tenancy alter or cause to be altered the lock or locking system on any door that gives entry to the premises.

9. Late Payment Penalty - Where the lease contains provision for a monetary penalty for late payment of rent, the monetary penalty shall not exceed one per cent per month of the monthly rent.

2. There is no monetary limit to the jurisdiction of the Director under the *Act*.

3. Its interpretation of the *Act* and, in particular, s. 13(1) means that the Nova Scotia Supreme Court, as a superior court of inherent jurisdiction, has concurrent jurisdiction with the Director to adjudicate any dispute between a landlord and tenant in respect of residential premises covered by the *Act*, subject only to the condition that a landlord or tenant has not previously filed an application with the Director. Said differently, a landlord or tenant may choose to commence proceedings in the Superior Court or with the Director. The first choice governs jurisdiction; the first proceeding determines the jurisdiction of the dispute.

Analysis

Principles of Statutory Interpretation

[20] The modern principles of statutory interpretation are as described in *Rhodenizer, supra*. This court has described and applied them most recently in *New Minas Baptist Church v Director of Assessment, 2017 NSSC 72* (“*New Minas*”). I incorporate by reference and apply in this case the principles described in paras 24 to 45 in *New Minas*.

First Question – Meaning of the text in context

[21] The use of the word “where” in s. 1 is an adverb or informal conjunction that could equally be replaced by the word “when”. On its face, it means “in what situation” or “whenever”.

[22] The *Act* purports to set out a complete comprehensive code governing the relationship between landlords and tenants in respect of residential premises (s. 3). It purports to govern: the disposal of property of tenant (s. 5), a tenant’s access to the premises (s. 5A), restrictions on a landlord’s fees (s. 6), the landlord’s duties on entering a lease (s. 7), mandatory conditions applicable to all residential tenancies (ss. 8 and 9), the length, renewal and termination of leases (s. 10), rent increases (s. 11) and security deposits (s. 12).

[23] Beginning at s. 13, the *Act* sets out comprehensive procedures for enforcement of the provisions of the *Act*, and for the investigation, mediation and resolution of disputes. The procedure is clearly complaint driven.

[24] The role of the Supreme Court of Nova Scotia in respect of the subject matter codified by the *Act*, is explicitly set out in s. 17E. Its role is to hear and determine the limited grounds for appeal from the Small Claims Court decisions. Small Claims Court decisions are the result of the more fulsome rights of appeal from the Director’s determinations and orders, and are set out in s. 17C of the *Act*.

[25] Jurisdiction has two components: subject matter and procedural. Procedural jurisdiction deals with the process by which the subject matter comes before a court, tribunal or administrative body.

[26] The plaintiffs effectively suggest that the *Act* gives the Supreme Court and Director concurrent jurisdiction over the subject matter codified in the *Act*, by reason that the Supreme Court has inherent jurisdiction over all civil matters, except where specifically precluded by legislation.

[27] I do not agree with the plaintiffs’ analysis. The *Act* clearly codifies the relationship between landlords and tenants in respect of residential tenants. It identifies the procedure by which the subject matter of the *Act* be investigated, mediated, resolved and determined. It expressly identifies the role of the Supreme Court of Nova Scotia in s. 17E as an appellate court.

[28] Sections 4 and 8 of the *Judicature Act* grant general civil and criminal jurisdiction to the Supreme Court of Nova Scotia. The legislated Civil Procedure Rules govern how the Supreme Court exercises its subject matter jurisdiction. Like the scheme in the *Act*, proceedings in the Supreme Court are complaint driven. *CPR 3.01* provides that a person may claim a civil remedy by starting either an action, an application, or a proceeding for judicial review or appeal. *CPR 4, 5 and 6* set out what a person must do to commence a proceeding in the Supreme Court. In the same way that the Supreme Court does not have jurisdiction to deal with a matter within its subject matter jurisdiction until a proceeding is commenced, the Director does not have jurisdiction to deal with subject matters within its jurisdiction until an application is filed. I agree with Justice Smith's conclusion at paragraphs 15 and 16 in *Roumeli*, that the effect of sections 1A, 3(1), 13(1) and 25 is that the application triggers jurisdiction only in the sense that it starts a complaint driven process.

[29] The proper meaning of s. 13(1), in the context of the *Act* as a whole, is that the Director does not have jurisdiction in a procedural sense until an application is filed. Section 13(1), in the context of the *Act* as a whole, does not purport, by inference or otherwise, to deal with subject matter jurisdiction. It does not, expressly or by inference, preserve, at first instance, concurrent jurisdiction in the Supreme Court of Nova Scotia to deal with the subject matter of the *Act*.

Second Question - Legislative Intent

[30] The *Act* in s. 1A describes its purpose, and in s. 3 its intent to constitute a comprehensive codification of the landlord-tenant relationship in respect of residential tenants. The subject matter codification is contained in ss. 5 to 12 of the *Act*. Of particular relevance to this proceeding is statutory condition (4) in s. 9(1) of the *Act*, which imposes on the tenant, without any other legal basis for liability to a landlord, responsibility for repair of damage caused by the negligent act of any person who the tenant permits on the premises.

[31] This court has the benefit of the interpretation of 13(1) made by the Supreme Court of Canada in the *Reference, supra*, case. That court heard and determined the constitutionality of new ss. 13 to 17, which sections replaced the prior dispute mechanisms of the *Act* in respect of the same subject matter jurisdiction that the *Act* conferred on the Director and Board (now Small Claims Court).

[32] The question before the Supreme Court of Canada was the constitutionality of the 1992 amendments to the *Act*. Section 13(1), as considered by the Supreme Court is identical to s. 13(1) of the present *Act*. Since the 1996 Supreme Court of

Canada decision, the provisions permitting the Director to investigate and determine matters on his/her own initiative have been removed.

[33] The majority reasons, written by McLachlin J (as she then was) and the minority reasons written by Lamer CJC both upheld the constitutionality of the provincial delegation of dispute resolution mechanisms to the Director, but for different reasons.

[34] What is important for this proceeding is that the Supreme Court was required to interpret the meaning of the amendments and the legislative intent as a starting point for their analysis of the constitutional issue.

[35] At the beginning of her reasons, McLachlin J interpreted the amendments and legislative intent as follows:

70 The impugned provisions of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, contained in *An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act*, S.N.S. 1992, c. 31 (collectively, the "Act") provide a mechanism for the resolution of first- and second-level residential tenancy disputes. The legislation gives the provincially appointed Director of Residential Tenancies and his delegates the power to investigate, mediate and adjudicate disputes between landlords and their residential tenants. It empowers the Director to make orders for compliance, termination, repair and possession. The Director's order may be appealed to the Board, and an order of the Board may be appealed, with leave, to the Appeal Division of the Supreme Court of Nova Scotia on questions of law or jurisdiction. An unappealed order is deemed to be an order of the Board, which in turn may be entered as an order of the court under s. 21 of the Act.

71 The jurisdiction of the Director and Board is exclusive. All residential tenancy disputes must be determined by the procedure specified in the Act, and except for formally entering orders and its limited appellate jurisdiction, the superior court has no power to determine them. [Court's highlight]

[36] Lamer CJC, for three justices, described the purpose of the Nova Scotia Statute at para 35 as follows:

35 The problem with the characterization advanced by the respondent and the majority of the court below is that it runs afoul of the principles set out in *Sobeys Stores*. It limits the historical inquiry to remedies over which the superior court exercised jurisdiction at Confederation and ignores the purpose and subject matter of the legislation. Consequently, I agree with the appellant that the proper characterization of the unproclaimed provisions is "*jurisdiction over residential tenancies; disputes between residential landlords and tenants*". This characterization captures the "raison d'être" of the legislation. The *Residential Tenancies Act* of Nova Scotia is not meant to be a replica of landlord and tenant

law. It sets up a complete and comprehensive code independent of landlord and tenant law which is specially designed for governing the residential tenancy relationship.

[37] Justice McLachlin's interpretation is clearly that the jurisdiction of the Director and the Board (the Board has since been replaced by the Small Claims Court) in respect of the subject matter codified in the *Act* is unconditionally exclusive and that all disputes respecting matters codified in the *Act* must be determined by the procedures in the *Act*.

[38] The implicit conclusion of the Supreme Court in the *Reference* case is that, except for limited appellate jurisdiction, the superior court has no power to entertain claims based on rights claimed under the *Act*, other than on appeal pursuant to s. 17E.

[39] Since the *Reference* case, other courts have described the purpose of residential tenancy legislation in the same way. See, for example, *Sanderson v Sasknative Rentals Inc*, 1999 CarswellSask 170 (SQB) at paras 5 to 6.

[40] The meaning of s. 13 in the context of the *Act* as a whole, and the legislative intent, is that the Supreme Court of Nova Scotia has no jurisdiction to determine the subject matter codified by the *Act*, except limited to the appellate jurisdiction as set out in the *Act*.

Third Question - Consequences of the interpretations

[41] The plaintiffs suggest that it is absurd that: the Director should have jurisdiction to deal with subject matters that may be complex, inefficient to promote multiple proceedings in situations where causes of action and some parties may not come within the jurisdiction of the Director, and it is not absurd that a landlord or a tenant may be permitted, whoever files their application first, to elect whether to proceed by application to the Director or a proceeding in the Supreme Court of Nova Scotia.

[42] I acknowledge that as a matter of common sense there may be situations where the subject matter of a dispute may include parties not covered by the *Act* or causes of action over which the *Act* does not assign responsibility to the Director. The matrix of this case is not one of those situations. It may be that in such a matrix a party may have a choice of forum, but that is not the matrix in this case, and I make no determination of the outer parameters of the Director's exclusive jurisdiction.

[43] Of some assistance in understanding the implications of the third question is the text by Richard A. Feldman, *Residential Tenancies*, 9th Edition (Toronto: Carswell, 2009). This text deals with Ontario's residential tenancies legislation.

[44] In Chapter 1, the historical development of Ontario's residential tenancies legislation is described; its legislation evolved in a similar way and with similar content to the Nova Scotia legislation (pp. 1 to 24). The text reviews judicial interpretation of the legislative objectives and framework of the Ontario legislation, and includes judicial statements by the Supreme Court of Canada (pp. 24 to 28).

[45] In Chapter 2, the text describes the jurisdiction of the Ontario Landlord and Tenant Board (beginning at p. 29) and contains a discussion of whether and when there is a choice of forum for disputes between persons who may be landlords and tenants.

[46] At page 95, the writer deals with the issue of the impact of the failure to take note of the limitation period provided under the legislation.

Conclusion

[47] Paragraphs 70 and 71 of the decision of the Supreme Court of Canada in the 1996 *Reference, supra*, case contain an interpretation of the meaning, and legislative intent, of s. 13(1) of the *Act*. I conclude that the subject matter jurisdiction in respect of matters codified by the *Act* are, at first instance, in the exclusive jurisdiction of the Director, whose monetary jurisdiction is not (as conceded by the plaintiffs) limited.

[48] The purpose of the *Act*, to provide landlords and tenants with an effective and cost-efficient means for settling disputes, is contraindicative of the retention of subject matter jurisdiction by the Supreme Court.

[49] Section 17E of the *Act* is contraindicative of the jurisdiction of the Supreme Court to deal at first instance with landlord-tenant disputes codified by the *Act*.

[50] Where the cause of the action before the court is based solely upon the tenant's breach of a statutory condition contained in a residential lease - and no other cause of action, as is the situation in this case, the Director has exclusive jurisdiction over the subject matter of the dispute at first instance.

[51] The plaintiffs action against the defendant Moulton is dismissed.

Gerald Coughlin

[52] The plaintiffs' claim against Coughlin was in negligence. They obtained default judgment. The court is satisfied that the plaintiffs have established a loss, as claimed, of \$1,000.00 by the Association and, by subrogated claim, of \$29,612.52 by Wawanesa.

[53] Judgment against Coughlin is entered in those amounts.

[54] If the parties are unable to resolve costs, the court will entertain written submissions.

Warner, J.