

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Patriquin v. Killam Properties Inc.*, 2014 NSCA 114

**Date:** 20141223

**Docket:** CA 420770

**Registry:** Halifax

**Between:**

Mark Patriquin

Appellant

v.

Killam Properties Inc.

Respondent

**Judges:** Saunders, Fichaud and Bryson, JJ.A.

**Appeal Heard:** December 3, 2014, in Halifax, Nova Scotia

**Held:** Motion to dismiss appeal allowed with costs, per reasons for judgment of Fichaud, J.A.; Saunders and Bryson, JJ.A. concurring.

**Counsel:** Lloyd R. Robbins for the respondent Killam Properties Inc.  
(applicant on the motion)  
Donna D. Franey and Stephanie Szczesniak (student) for the  
appellant Mark Patriquin (respondent on the motion)

**Reasons for judgment:**

[1] After the Supreme Court determines an appeal from the Small Claims Court on a residential tenancies matter, is there a further appeal to the Court of Appeal? The question turns on s. 32(6) of the *Small Claims Court Act*.

***Background***

[2] Killam Properties Inc. owns a 300 unit trailer park in Amherst. Mr. Patriquin is a tenant. For years, they have disagreed on who should maintain Mr. Patriquin's driveway.

[3] Mr. Patriquin applied for relief to the Director of Residential Tenancies. On November 17, 2010, the Director determined that Killam was obligated to maintain the driveway.

[4] Killam appealed to the Small Claims Court.

[5] The Small Claims Court first considered a jurisdictional issue. On April 7, 2011, the Small Claims Court's Adjudicator ruled in Mr. Patriquin's favour on that preliminary point (2011 NSSM 29). Killam appealed to the Supreme Court of Nova Scotia. Justice McDougall held that an appeal of the jurisdictional issue was premature and remitted the dispute to the Small Claims Court (2011 NSSC 338).

[6] On December 5, 2011, the Small Claims Court heard the merits. Adjudicator Parker's Decision of January 3, 2012 dismissed Killam's appeal (2012 NSSM 1).

[7] In February 2012, Killam appealed to the Supreme Court of Nova Scotia. Justice Duncan heard the appeal on November 13, 2012 and issued a Decision on June 4, 2013 (2013 NSSC 171), followed by an Order dated September 10, 2013. The judge held that the Small Claims Court Adjudicator had erred in law, and allowed Killam's appeal. Justice Duncan concluded that Mr. Patriquin's driveway was not a common area for which the landlord is responsible, but was leased space for the tenant to maintain.

[8] On October 15, 2013, Mr. Patriquin filed a Notice of Appeal to the Court of Appeal.

[9] Killam moved to dismiss the appeal on the ground that this Court has no jurisdiction to entertain the appeal. A chambers judge scheduled Killam's motion

for a hearing before a panel. On December 3, 2014 this Court heard Killam's motion.

### *Issue*

[10] The only issue is whether the Court of Appeal has jurisdiction to hear the appeal, a legal question of first instance in this Court. The jurisdictional submissions do not challenge the rulings of the judge of the Supreme Court, the Adjudicator of the Small Claims Court or the Director of Residential Tenancies. There is no appellate standard of review.

### *Analysis*

[11] Justice Duncan's Decision said:

[23] The statutory basis for this appeal is found in Section 17E of the **Residential Tenancies Act** ...

[12] Section 17E of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended [see S.N.S. 1997, c. 7, s. 7 and S.N.S. 2002, c. 10, s. 28] says:

#### **Appeal to Court**

**17E (1)** Subject to subsection (2), a party to an appeal to the Small Claims Court pursuant to this Act may, if that person took part in the hearing, appeal the order of the Small Claims Court to the Supreme Court of Nova Scotia *in the manner set out in the Small Claims Court Act*.

(2) An appeal pursuant to subsection (1) may only be taken on the ground of

(a) jurisdictional error;

(b) error of law; or

(c) failure to follow the requirements of natural justice.

[Emphasis added]

[13] Section 17E is the only provision in the *Residential Tenancies Act* that permits an appeal from the Small Claims Court to the Supreme Court of Nova Scotia. The *Residential Tenancies Act* does not mention a further appeal to the Court of Appeal.

[14] Section 17E(1) says that the appeal to the Supreme Court is to be "in the manner set out in the *Small Claims Court Act*". The only provision in the *Small*

*Claims Court Act*, R.S.N.S. 1989, c. 430, as amended [see S.N.S. 1992, c. 16, s. 124 and S.N.S. 1996, c. 23, s. 39] that contemplates an appeal to the Supreme Court of Nova Scotia is s. 32. Section 17E(1)'s words, "in the manner set out in the *Small Claims Court Act*", engage s. 32.

[15] Section 32 of the *Small Claims Court Act* says:

**Appeal**

32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of

- (a) jurisdictional error;
- (b) error of law; or
- (c) failure to follow the requirements of natural justice,

by filing with the prothonotary of the Supreme Court a notice of appeal.

(2) A notice of appeal filed pursuant to subsection (1) shall be in the prescribed form and set out

- (a) the ground of appeal; and
- (b) the particulars of the error or failure forming the ground of appeal.

(3) Upon the filing of a notice of appeal in accordance with this Section, the prothonotary shall transmit a copy thereof to

- (a) the adjudicator; and
- (b) where the prothonotary is not the clerk of the Court, to the clerk.

(4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

(5) Upon receipt of a copy of the notice of appeal, the clerk of the Court, where the prothonotary is not the clerk, shall transmit the file for the case to the prothonotary.

(6) A decision of the Supreme Court *pursuant to this Section is final and not subject to appeal.* [Emphasis added]

Section 3(1) of the *Small Claims Court Act* defines "Court" as "the Small Claims Court of Nova Scotia".

[16] Section 32(6) of the *Small Claims Court Act* states that a decision of the Supreme Court "pursuant to this Section is ... not subject to appeal". If Justice

Duncan's Decision of June 4, 2013 and Order of September 10, 2013 were "pursuant to" Section 32 of the *Small Claims Court Act*, then Mr. Patriquin has no appeal to the Court of Appeal.

[17] Had s. 17E(1) of the *Residential Tenancies Act* said the appeal to the Supreme Court was "pursuant to" s. 32 of the *Small Claims Court Act*, that would end any debate. Section 17E(1)'s wording would match that of s. 32(6), which explicitly precludes an appeal to the Court of Appeal. Mr. Patriquin's counsel submits that s. 17E(1)'s wording - "in the manner set out in" - is softer than "pursuant to" in s. 32(6). According to the submission, "in the manner set out in" s. 32 means that s. 32 "shapes" but does not "govern" the appeal to the Supreme Court. So Justice Duncan's Decision would not be "pursuant to" s. 32, and s. 32(6)'s preclusion of an appeal would not apply. The Court of Appeal would maintain its default appellate jurisdiction under s. 38(1) of the *Judicature Act*, R.S.N.S. 1989, c. 240:

38(1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.

[18] I respectfully disagree with Mr. Patriquin's submission. Section 17E(1) of the *Residential Tenancies Act* isn't just a helpful exhortation to litigants. The appellant to the Supreme Court doesn't have a discretion to choose between following s. 32 and fashioning another appeal process of his own. A residential tenancies appeal from the Small Claims Court to the Supreme Court by law must follow s. 32. There is no material difference between "in the manner set out in" - the words of s. 17E(1) - and "pursuant to" in s. 32(6).

[19] This appeal is precluded by s. 32(6) of the *Small Claims Court Act*. The preclusion is "otherwise provided by [an] enactment", within the opening words of s. 38(1) of the *Judicature Act*. So this Court's general jurisdiction to hear appeals in s. 38(1) does not apply.

[20] Mr. Patriquin next submits that the Court of Appeal has jurisdiction for the reasons that this Court has accepted jurisdiction in appeals from taxations of costs and legal fees.

[21] In *Turner-Lienaux v. Campbell*, 2004 NSCA 41, Justice Roscoe held that the Court of Appeal may hear an appeal from the Supreme Court that involves an adjudicator's taxation of costs:

[17] ... Although the **Small Claims Court Act** does limit appeals of small claims matters to one level, pursuant to s. 32(6), which is in keeping with the purpose of the **Act**, that is, to simplify matters involving small claims, it is not clear that there was any intention to limit the number of appeals from taxations undertaken by adjudicators. This matter is obviously not a small claim, having started out as a matter involving in excess of \$800,000. Furthermore, *the taxation of a bill of costs is not a "proceeding before" the Small Claims Court*. The proceeding is in the Supreme Court. *The adjudicator, acting as taxing master, is in effect acting on a reference from the Supreme Court* in furtherance of the original order where a party was ordered to pay taxed costs.

[18] For these reasons, I would determine the jurisdictional matter by finding that s. 32(6) of the **Small Claims Court Act** does not apply to taxations of bills of costs by adjudicators pursuant to the authority vested by s. 9A of that **Act**.

[Emphasis added]

[22] In *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35, this Court entertained an appeal from a Decision of the Supreme Court that had considered a taxation of a lawyer's account in the Small Claims Court. Justice Saunders (paras. 23-30) adapted and applied Justice Roscoe's reasoning in *Turner-Lienaux*.

[23] Mr. Patriquin's counsel submits that Adjudicator Parker's hearing of December 5, 2011, culminating in his Decision of January 3, 2012, was not "proceedings before the [Small Claims] Court" within the opening words of s. 32(1) of the *Small Claims Court Act*. Rather it was a "proceeding before the Director of Residential Tenancies" because that is where the dispute first aired. Mr. Patriquin's factum says:

15. ... Because these proceedings originated before a Residential Tenancies Officer, this appeal is not a "proceeding before" the Small Claims Court within the meaning of section 32(1) of the *Small Claims Court Act* and is therefore not subject to the limited right of appeal set out by section 32(6) of the *Small Claims Court Act*.

As support, Mr. Patriquin cites Justice Roscoe's comments from *Turner-Lienaux*, paras 17-18.

[24] With respect, this submission misses the point of Justice Roscoe's passage in *Turner-Lienaux*.

[25] In a civil claim, like *Turner-Lienaux*, the judge of the Supreme Court has discretion over costs under the *Civil Procedure Rules* (Rule 77.02 since January 2009, and the former Rule 63.02 at the time of *Turner-Lienaux*). The judge may

quantify the costs, or may refer the quantification to an Adjudicator of the Small Claims Court (Rule 77.16). That Adjudicator does not conduct an appeal from the Supreme Court and cannot reverse or vary the Supreme Court's order. Rather, the Adjudicator's quantification completes a numerical gap in the Supreme Court's Order by performing a function that the judge deliberately delegated to the Adjudicator. As Justice Roscoe characterized it, "[t]he adjudicator, acting as taxing master, is in effect acting on a reference from the Supreme Court in furtherance of the original order where a party was ordered to pay taxed costs". In that sense, as Justice Roscoe said, "[t]he proceeding is in the Supreme Court" and the Supreme Court's Order incorporates the Adjudicator's quantification.

[26] In Mr. Patriquin's case, the Small Claims Court heard what ss. 17C and 17D of the *Residential Tenancies Act* describe as an "appeal" from the Director. The Adjudicator conducted a hearing *de novo*, and had the authority, under s. 17D(1)(a), to "confirm, vary or rescind" the Director's ruling of November 17, 2010 that Killam should maintain the driveway. Killam's appeal to the Adjudicator was not a reference, or a delegated function, by the Director to the Small Claims Court. The statutory appeal was a new "proceeding" before the Small Claims Court. This meant that, in the Supreme Court, Justice Duncan heard an appeal from "proceedings before the [Small Claims] Court" within s. 32(1) of the *Small Claims Court Act*. Consequently, s. 32(6) applies and bars a further appeal to the Court of Appeal.

[27] The appeal route to the Supreme Court, from an Adjudicator's taxation of either costs or lawyers' accounts, is not confined to s. 32 of the *Small Claims Court Act*. As Justice Roscoe noted in *Turner-Lienaux* (para. 16), the former Civil Procedure Rule 63.38 permitted an appeal of a taxation to the Supreme Court, from which s. 38(1) of the *Judicature Act* authorizes an appeal to the Court of Appeal. The current Rules 77.16(5)(a) and 77.17 permit an appeal to the Supreme Court from a certificate of taxation. Similarly, the *Legal Profession Act*, S.N.S. 2004, c. 28 (as amended S.N.S. 2010, c. 56), ss. 65(b) and 67(a) authorize an Adjudicator of the Small Claims Court to tax a lawyer's account, and s. 70(a) says a "decision on a taxation may be appealed to ... the Supreme Court of Nova Scotia, if the taxation is conducted by an adjudicator". Neither the *Civil Procedure Rules* nor the *Legal Profession Act* preclude a further appeal to the Court of Appeal. Rather, Rules 90.05(d), 90.10 and 90.13 specifically authorize a further costs appeal to this Court with leave.

[28] As the Supreme Court's jurisdiction in a costs or fees appeal from an Adjudicator would not depend on s. 32(1) of the *Small Claims Court Act*, the preclusion of a further appeal to the Court of Appeal by s. 32(6) of that *Act* would not apply. Consequently, the Supreme Court's decision would engage the Court of Appeal's authority to entertain a further appeal under s. 38(1) of the *Judicature Act*, and Rules 90.05(d), 90.10 and 90.13.

[29] The Court of Appeal's authority to hear a costs or fees appeal does not assist Mr. Patriquin. As discussed, Justice Duncan's residential tenancies authority depended solely on s. 17E of the *Residential Tenancies Act*. Section 17E(1) channelled the Supreme Court's process through s. 32 of the *Small Claims Court Act*. This triggers s. 32(6) which precludes a further appeal to the Court of Appeal.

### *Conclusion*

[30] I would allow Killam Properties Inc.'s motion and dismiss Mr. Patriquin's appeal. I would order Mr. Patriquin to pay costs of \$1,000 to Killam for the proceeding in this Court.

Fichaud, J.A.

Concurred: Saunders, J.A.

Bryson, J.A.