IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Doucette Estate v. Muise, 2015 NSSM 8

Claim: SCY No. 351852
Registry: Yarmouth

Between:

Estate of Edward J. Doucette

Claimant

– and –

Maurice D. Muise

Defendant

Adjudicator: Andrew S. Nickerson, QC

Heard: March 5, 2015

Decision: March 10, 2015

Appearances: Hugh Robichaud, for the Claimant
Louis d'Entremont, for the Defendant

DECISION

FACTS

[1] On July 6, 2011 a Claim was filed in the Small Claims Court by the Claimant alleging the tort of conversion consisting of a claim that the Defendant unlawfully took a cash box belonging to the Plaintiff alleged to have contained approximately $20,000.

[2] Subsequent to the filing of the Small Claims Court Claim July 6, 2011, the Defendant filed in the Supreme Court an action for defamation and malicious prosecution. This court has not been provided with the Notice of Action or pleadings in the Supreme Court matter. Nevertheless counsel agreed in oral argument that the causes of action in the Supreme Court were for defamation and malicious prosecution and that the underlying

facts and evidence likely to be presented in both the Supreme Court matter and the Small Claims Court matter were the same. Counsel have agreed that the Claim in the Small Claims Court Claim was filed before the action in the Supreme Court.

[3] On September 19, 2013 the Defendant in the Small Claims Court Claim (Plaintiff in the Supreme Court action) applied to the Supreme Court for joinder of the two proceedings. On the same day His Lordship Justice Wright held that the Supreme Court did not have the jurisdiction to join the two actions essentially because they were in different courts and the Supreme Court did not have the authority to transfer a proceeding from the Small Claims Court. A copy of Justice Wright's decision is attached as Appendix A to this Decision for reference. The ruling of Justice Wright makes it clear that he was dealing with an application for joinder of the two actions. He was not dealing with an application for stay of the proceedings in either court.

[4] All parties acknowledge that the Small Claims Court Act does not have jurisdiction to hear claims of malicious prosecution or defamation but does have jurisdiction to hear a Claim founded in the tort of conversion.

[5] Justice Wright, in his decision in paragraphs 5 and 11, expresses the view that it would be "desirable" that the matters be heard together because the important underlying fact of whether the cash box was indeed taken, and if so unlawfully, is common to both actions.

ISSUES

[6] Does the Small Claims Court have jurisdiction to grant a stay in circumstances where Section 15 of the Small Claims Court Act does not apply?

[7] Has the Defendant established the basis for the granting of a stay?

POSITION OF PARTIES

[8] Both parties acknowledge that the Small Claims Court is a statutory court and all of its jurisdiction must be derived from the statute.

Defendant

[9] The Defendant submits that it would be dangerous for one court to make a finding of fact on the disputed facts that would result in res judicata. He suggests that the potential for res judicata would be an abuse of the process of the Small Claims Court and points out that all the issues between the parties could be dealt with in the Supreme Court.

[10] The Defendant stresses that in the Supreme Court the Defendant would have the benefit of disclosure and discovery pursuant to the Supreme Court's Rules. In oral argument the Defendant was clear that his major concern and basis for suggesting that there was an abuse of process justifying a stay was that in the Small Claims Court the Defendant would not have the benefit of disclosure and discovery.

[11] The Defendant also acknowledges that the Small Claims Court cannot exercise its jurisdiction under section 15 of the Small Claims Court Act in this case because the action in the Small Claims Court was commenced first. He acknowledges that the decision of Justice Saunders in **American Home Assurance Company et al. v. Brett Pontiac Buick GMC et al (1991) 105 N.S.R. (2d) 425** makes it clear that the word "already" contained in section 15 only permits section 15 to be used if the Supreme Court action had been started before the Small Claims Court action. In the present case the Small Claims Court action was filed first.

[12] In oral argument the Defendant acknowledged that, other than section 15, there is no specific authority granted in the Small Claims Court Act with respect to the jurisdiction to grant a stay. He states that the authority would be derived from section 2 of the Small Claims Court Act which directs this court to adjudicate claims in accordance with "established principles of law and natural justice".

[13] The thrust of the Defendant's submission is that the potential for res judicata coupled with the inability to have disclosure and discovery in Small Claims Court constitutes an abuse of process and a breach of the principles of natural justice.

Plaintiff

[14] Plaintiff's counsel says that the Plaintiff has a right to a trial in the Small Claims Court and to take advantage of the simplified procedure and cost effectiveness of the Small Claims Court. He argues that the issues are not the same in the two actions. He points out that there is much more to a defamation or malicious prosecution case than simply the underlying fact determination of whether or not the cash box was taken unlawfully.

[15] As to the Defendants concern about disclosure and discovery Plaintiff's counsel says that there is essentially little or no documentary evidence to be presented. He also says that there are a number of non-party witnesses but no litigant can say in advance what a witness will say on the witness stand. He argues that it would be improper to require something in the nature of a "will say" statement when the Plaintiff itself cannot be assured as to what non-party witnesses may say. He says that in this regard it is no different than if the trial were in the Supreme Court save the evidence of parties who can be discovered.

[16] The Plaintiff submits that any procedural unfairness that may arise from the lack of disclosure and pretrial discovery can be remedied by the Small Claims Court granting an adjournment if the evidence presented by the Plaintiff is such that the Defendant needs time to consider the evidence or to seek rebutting evidence.

[17] The Plaintiff's position is that the lack of disclosure and discovery in Small Claims Court does not constitute an abuse of process or violate the rules of natural justice. The Plaintiff further asserts that the potential application of res judicata does not amount to an abuse of process or a denial of natural justice.

[18] The Plaintiff also says that the Small Claims Court does not have the jurisdiction to grant a stay because the Small Claims Court does not provide for a stay other than section 15.

ANALYSIS

[19] It is clear, and it is agreed by the parties, but it is worth repeating, that the Small Claims Court is a statutory court and all of its jurisdiction must be derived from the statute. It is also clear that section 15 does not aid the Defendant.

[20] Justice Wright states in his decision that the Defendant (Plaintiff before him) "may" be able to apply to the Small Claims Court for "some kind of stay". The motion before him was not for stay and a reading of his decision makes it clear that he was not turning his mind to the question of a stay. I infer from the language "some kind of stay" that he was not offering an opinion about whether the Small Claims Court could grant a stay. In fact his language indicates that he was uncertain about what the Small Claims Court could do. Therefore Justice Wright's decision is not much help in addressing the question I must decide.

[21] Throughout this analysis I am mindful that Small Claims Court Adjudicators, Supreme Court Judges and Judges of the Court of Appeal have all stated that important guidance in the interpretation of the Small Claims Court Act is to be found in Section 2.

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[22] There is some older jurisprudence which indicates that the Small Claims Court has the authority to control its own process. In **Clarke v Collier (P.F.) & Son Ltd. (1993), 129 N.S.R. (2d) 113** Justice Haliburton said:

> [6] The Small Claims Court is now an autonomous, statutory court. Section 3 of the *Small Claims Court Act* establishes it as a separate "court of law and of record". As such, it has an inherent right to control its own processes. The court and its adjudicators must comply with the spirit and/or the law governing its operation. If they do so, then no superior court may interfere, except in accordance with the appeal process established by the Legislature.... *[my emphasis]*

[23] I have considered this passage but after careful consideration I have doubts that Justice Haliburton intended these remarks to apply to a question of jurisdiction since he was dealing with an issue about the default judgment procedure prescribed in the Small Claims Court Act as it then read. I am unable to conclude that this finding amounts to saying that the Small Claims Court has any true inherent jurisdiction. Justice Warner's decision in **Kemp v. Prescesky 2006 NSSC 122** may have now superseded Justice Haliburtion's decision in **Clarke v Collier,** so I have doubts about how helpful the quoted comments can be. I find that in determining whether or not the Small Claims Court is able to grant a particular remedy when the question involves jurisdiction that a deeper analysis is required.

[24] An Adjudicator must first look to the specific provisions of the Small Claims Court Act and Regulations, but in this case I find no section that bears on the question other than Section 2. Therefore if there is any jurisdiction to grant stay (other than under section 15) it must be derived from "established principles of law and natural justice". I interpret "principles of law" to refer to something of a statutory nature or something derived from jurisprudence. I can find no guidance to establish a jurisdiction to grant a stay from those sources except perhaps the test for a stay discussed below.

[25] The only case I have found where the Small Claims Court was asked to grant a stay (other than a section 15 stay) is **Costa v. Electec Engineering Inc., 2014 NSSM 72**. In that case an interlocutory ruling of the Small Claims Court was appealed to the Supreme Court. The appellant applied to the Small Claims Court for stay of that court's decision pending appeal. Adjudicator Knudsen found:

> I find the relief sought by the appellant is a stay of proceedings pending appeal. Further, I find the procedure for such a stay is specifically governed by Civil Procedure Rule 7, namely Rule 7.28 and thus, such an application must be brought before the Supreme Court of Nova Scotia. The Small Claims Court does not have jurisdiction. Therefore the motion is denied.

[26] **Costa v. Electec Engineering Inc.** does indicate that at least one adjudicator declined jurisdiction to grant stays other than a section 15 stay. This case is of limited help because in **Costa** there was an alternate procedure in the Supreme Court.

[27] Therefore I conclude that I must turn to natural justice to find jurisdiction to grant a stay.

[28] In **Parslow v. Galeb Construction 1998 Ltd.,2014 NSSC 390** Justice Van den Eynden considered what is meant by "natural justice" saying:

> "Natural justice" is not a defined term in the Small Claims Court Act. Natural justice was discussed in Spencer v. Bennett, 2009 NSSC 368 at para. 15 and 16 therein provide as follows:
>
> > 15 Natural Justice is not defined in the Small Claims Court Act. Nevertheless it is a familiar concept to the common law, although elusive of definition. In Lloyd v. McMahone, [1987] A.C. 625 at 702, Lord Bridge puts it this way:
> >
> > > …the so called rules of natural justice are not engraved on tablets of stone…what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.
> >
> > These criteria have been echoed and amplified in Baker v. Canada, [1999] S.C.J. No. 39; [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.), (per L'Heureux-Dube).
> >
> > 16 Natural Justice really means that the parties are entitled to a fair process…… no one should be a judge in his own cause (the adjudicator must be independent) and that one should always hear "the other side."

[29] Justice Warner in **Kemp v. Prescesky** determined that the principles of natural justice must imply that there is a right of a litigant in the Small Claims Court to expect that natural justice will be applied to allow the setting aside of a judgement and to

impose extended filing times when, other than applying Section 2, the statute did not provide a remedy on the facts of the case before him. He expressed this as follows:

> [19] In my view, it is a breach of the requirements of natural justice not to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, and he or she has a reasonable excuse for defaulting and is not just stalling, and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside. In light of the increase in the monetary jurisdiction of the court, it is as relevant to nature justice in the Small Claims Court as it is in the Supreme Court. There is still a requirement that the applicant show sufficient bases for the court to exercise discretion to avoid abuse.
>
> ….
>
> [27] With the increase in the monetary jurisdiction of the court is a concomitant requirement for rules that protect the integrity and fairness of the court. Claims of this court still fall below the quantum for which many parties are able to afford legal representation. There is still a place for an efficient legal process to resolve claims without all the steps, delays, and costs of superior court actions; however, the increase of the consequences on the parties mandates a higher threshold of procedural fairness, one of which is a lengthening of the time to react to and prepare to defend a claim.
>
> [28] For the reasons set out, the requirements for natural justice in the Small Claims Court system have increased with the increase in the monetary jurisdiction of the court. The court can now hear claims of $25,000.00. In Supreme Court actions, lawyers occasionally miss deadlines; CPR 12.06 is a remedy to correct an injustice that may result. When the small claims court can enter judgments that could bankrupt most people in this Province, the same principle of fairness, as exists in the Supreme Court, should apply.

[30] Certainly the principles of natural justice can vary depending on the tribunal as pointed out by Justice Van den Eynden. My reading of the whole of Justice Warner's decision is that he was not invoking any inherent jurisdiction of the Supreme Court but

rather interpreting and applying Section 2 of the Small Claims Court Act. Thus I take it from Justice Warner's analysis that, where the case is clear, an Adjudicator can act to ensure a fair process even though the Act does not address the point specifically. I infer from Justice Warner's decision that he would sanction the application of a remedy by the Small Claims Court on a finding that the principles of natural justice had been violated. I see no reason why this would not include the power to grant a stay.

[31] I therefore conclude that if I find that the principles of natural justice are violated by the lack of disclosure and discovery and/or by the fact that res judicata (or issue estoppel) may apply, I do have the jurisdiction to remedy that violation.

TEST FOR STAY AT COMMON LAW

[32] The parties agreed at oral argument that the test for a stay of proceedings is correctly set out in **Atlantic Home Warranty Program v. Austin Contracting Ltd., 2014 NSSM 74**.

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and
>
> (b) the stay must not cause an injustice to the Plaintiff. On both the burden is on the defendant."

[33] To determine that the Small Claims Court does have jurisdiction to grant a stay on this test, I have concluded that I would have to answer exactly the same questions that I will have to address in respect of determining whether the principles of natural justice apply. Both this test and an analysis of the principles of natural justice broadly speaking involve determining whether one party is being treated unfairly.

[34] I could determine first if the Small Claims Court Act gives a jurisdiction to grant a stay on the basis of the principles of natural justice. Then I would be permitted to apply the test for stay at common law. On the other hand an examination of this test for a stay

could be interpreted as instructing this court as to the type of thing that could be considered to be a breach of natural justice. So really, in my view, the two questions are so inexorably interlinked that they must be answered together.

[35] I am left with determining whether 1) the lack of disclosure and discovery in the Small Claims Court amounts to a denial of natural justice and/or 2) the fact that res judicata or issue estoppel might arise amounts to a denial of natural justice.

DISCLOSURE AND DISCOVERY

[36] Chief Justice J. Michael MacDonald, then sitting as a Justice of the Supreme Court of Nova Scotia, in **Imperial Life Financial v. Langille (1998) 166 N.S.R. (2d) 46** said:

> "Our Small Claims Court serves an extremely useful purpose within the administration of civil justice in this province. It provides an informal and inexpensive forum for the resolution of claims within a limited monetary value. It provides access to justice for those who might not otherwise afford it. It makes perfect sense to have claims involving smaller amounts of money processed in an efficient manner without the expense of extensive pre-trial proceedings.
>
> That being said, one must not forget the benefits of our Supreme Court pretrial process. That process provides for liberal discovery procedures designed to enhance settlement and/or narrow the issues. Therefore, it too serves a very significant purpose within the administration of civil justice.
>
> Thus in approaching this issue, I must balance or consider the goals of each judicial regime. In so doing, I conclude that the reference to "claim" in s. 9 of the Small Claims Court Act, supra, must refer to "claim" in the global sense. The legislators obviously felt that extensive pre-trial procedures could be avoided (so as to secure greater access to justice) provided the amount at stake was reasonably modest."
>
> *[My emphasis]*

[37] The clear implication of Chief Justice MacDonald's words are that the lack of disclosure and discovery procedures in the Small Claims Court is an not impediment to a fair process. He says that there are benefits to both systems, the legislature intended it that way, and when addressing a jurisdictional issue in either system the court can look to the benefits to the administration of justice afforded by each system. I do not take from his decision any suggestion that a proceeding in Small Claims Court with virtually no pre-trial proceedings is any less fair than one in the Supreme Court with all the full disclosure and discovery apparatus of the Civil Procedure Rules.

[38] The same passage from Chief Justice MacDonald was adopted by Adjudicator Knudsen in **Morris v. Mariana Cowan Real Estate Ltd.**, 2014 NSSM 56 when dealing with a request for particulars and then he says as follows:

> Suffice it to say that demands for particulars are not the only procedural issues which could lead to "meta disputes". The Small Claims Court Act and its regulations do not provide for many of the procedural requirements of the Civil Procedure Rules. Such a difference is implemented deliberately with the goal of ensuring that matters are adjudicated informally and inexpensively. The Act also makes it clear that Small Claims procedures have to follow a significant and fundamental principle, namely the adjudication of such matters must be according to the established principles of law and natural justice. *[my emphasis]*

[39] I am mindful that Adjudicator Knudsen was not dealing with a stay when he made those comments, but it does provide a perspective indicating that access to the procedural requirements of the Civil Procedure Rules are deliberately excluded from proceedings in the Small Claims Court.

[40] In **Johnston v. Wawanesa Mutual Insurance Company, 2013 NSSM 47** Adjudicator Richardson commented on disclosure and discovery, or lack thereof, in the Small Claims Court as follows:

Disclosure of Documents

[44] The process and procedure in this court in many ways mirrors that employed in labour arbitrations or, indeed, under the *Commercial Arbitration Act*. Parties in those types of proceedings gain pre-hearing access to documents by request or by subpoena. That is the case in this court. Parties in those proceedings routinely acquiesce to–or at least come to accommodations with respect to–such requests because they know that if they force the issue before the arbitrator he or she may order the documents produced and then adjourn the hearing to provide time to consider the documents. That same process is as a rule followed in this court, since a party who refuses to produce documents prior to the hearing will be subject to a subpoena and consequent adjournment to permit the requesting party to study the documents so subpoenaed.

[45] In short, it is something of a myth that disclosure is not available in this court. Production of relevant documents can always be obtained under subpoena. And most adjudicators will adjourn a hearing in the event that documents under a subpoena are not produced until the hearing "in accordance with established principles of law and nature justice."

Pre-Hearing Discovery of Witnesses and Parties

[46] Much is often made of the value of pre-hearing discovery, but it is often done without any context. For the fact is that pre-hearing discovery is not crucial to the adjudication of disputes on their merits. There is no pre-hearing discovery in labour arbitrations or in arbitrations under the *Commercial Arbitration Act* (at least as of right), and yet such arbitrations often involve important issues of financial significance to the parties.

[47] Nor is discovery inherently necessary to procedural justice in the Supreme Court of Nova Scotia. For many years there was no pre-hearing discovery at all of parties or witnesses in Nova Scotia. This was in sharp contrast with jurisdictions like Ontario, where discovery of parties, but only parties, existed since the early 1900s (if not before).

> No one suggests that justice in Nova Scotia in those days was hampered or denied by the lack of discovery, or that it suffered in contrast to the system in jurisdictions where it did exist. The Nova Scotia Supreme Court then swung to the opposite end of the spectrum, adopting an American approach to discovery that allowed for the discovery of any witness, any expert relied upon by a party, as well as of the parties themselves. But that experiment in the end served to restrict–or at least significantly increase the financial burden of–access to justice. The cost and delay associated with endless discovery, the undertakings they generated, and the further discovery attendant upon such undertakings, rendered increasingly problematic a decision to commence or defend an action in the superior court. Indeed, it was precisely this concern over the cost of such an open-ended discovery process that led to the decision of the Supreme Court–reflected in the new *Civil Procedure Rules*–to limit discovery to the parties.

[41] I am not bound by decisions in the Small Claims Court and the decision of Chief Justice MacDonald is not directly on point. However I find the reasoning and logic contained in the cases cited above to be persuasive. I have concluded that both historically and currently it cannot be said that the absence of disclosure and discovery is a denial of natural justice. To hold otherwise would fly in the face of precisely the intention of the Legislature in enacting the Small Claims Court Act. I also hold that any unfairness arising from a party being faced with evidence that that party could not reasonably anticipate can be effectively remedied by adjournment.

[42] I am further comforted in the conclusion that I have reached by the guidance expressed by the Supreme Court of Canada in **Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87.** The Supreme Court of Canada held that pretrial procedures are becoming increasingly expensive and even superior courts need to find more efficient and practical ways to resolve the matters coming before them. If this is so in superior courts, it must be even more so in inferior courts such as a Small Claims Court. It is implicit that the spirit of the Supreme Court of Canada’s view is that a restricted pre-trial disclosure and discovery procedure is not something that of itself diminishes fairness.

RES JUDICATA AND ISSUE ESTOPPEL

[43] The Defendant suggests that the potential for the application of the doctrine of res judicata would create an abuse of process in the Small Claims Court. He says in his written submissions:

> "Also, with respect to res judicata, it would be dangerous for one court to make a finding of fact on the common disputed facts because the issue would become res judicata when it is taken to the other Court."

[44] Defendant's counsel cites in support of his submission **Paul Revere Life Insurance Co. v. Harbin (1996) 149 NSR (2d) 200** at paragraph 20 and 24 as which he presents follows**:**

> "I accept counsel's submission on behalf of the insurer that the very rationale for the establishment of the Small Claims Court was that small claims would be quickly and inexpensively adjudicated. Naturally, such claims are heard without access to the usual pretrial procedures, productions, discovery of parties and discovery of experts, as would be accommodated under our own Civil Procedure Rules.
>
> ... I also agree with the submission of counsel for the insurer that a nice question involving res judicata arises here. I have been referred to the judgment of Roscoe, J. (as she then was) in Big Wheels Transport and Leasing Ltd. v. Hanson et al. reflex, (1990), 102 N.S.R. (2d) 371; 279 A.P.R. 371 (T.D.). Based on the conclusions she came to in that case, it may well be that if the Small Claims Court adjudicator found that Mr. Herbin were totally disabled, then in subsequent proceedings, Herbin might well argue that the issue of his disability had been resolved, and barring any change in his medical condition, that the issue having been decided, was res judicata. The result and consequences of such a finding to the defendant insurer would be, to say the least, profound."

[45] **Paul Revere Life Insurance Co. v. Harbin** was a case about bringing sequential claims arising from the same cause of action i.e. breach of a disability insurance policy. As I read the case, Justice Saunders was concerned that if a ruling was made at one

point in time, res judicata could make that a ruling for all times in the future when the Claimant's condition could have changed dramatically. The unjust result that res judicata may create that Justice Saunders was addressing is not relevant to the matter before me. I am not dealing with sequential claims arising over time from the same cause of action; I am dealing with quite distinct causes of action in two different proceedings that occurred (or did not occur) at a specific times and places. The situations are so different that I cannot apply Justice Saunders' logic to the case I must decide. The injustice he was addressing simply cannot arise in the present case.

[46] I should say that I am not sure that it would be res judicata that could be argued since, although the parties are the same, the applicable law and issues are dramatically different as between conversion and defamation and malicious prosecution. However I am mindful that there is also the doctrine of issue estoppel which may or may not be applicable depending on the fact finding which arises from the first trial to occur. I will not delve into or analyze the difference between these doctrines, but I do approach this decision keeping in mind that these related doctrines would have the potential of binding the parties on an essential factual point. I approach this decision from that point of view and apply the analysis I will make to both legal doctrines.

[47] I was provided with no authority that would support the proposition brought forward by the Defendant nor can I find any. The effect of res judicata and issue estoppel is exactly the same on both parties. If the Defendant in this action is successful then he may well have a benefit to his action in the Supreme Court for defamation and malicious prosecution. If the Defendant is unsuccessful then the Plaintiff has the potential for a benefit. Either party can benefit if he can successfully argue res judicata or issue estoppel in the Supreme Court. I am unable to find that this would amount to prejudice because the fact finding in question would be one derived from a fair judicial process. If a party believed that the judicial process that made the fact finding was unfair, an appeal is available and potentially the alleged procedural defect could be raised in the Supreme Court if an opposing party sought to apply res judicata or issue estoppel. I cannot find that there is any prejudice to either party by applying these doctrines. Even if I am wrong in that, one party does not risk being prejudiced any more than the other.

[48] With the greatest of respect to the members of the Supreme Court bench I am unable to conclude that in law a Small Claims Court Adjudicator is any less capable of making fair and reliable findings of fact than a Supreme Court judge. I say this because it is routine for Supreme Court Judges to defer to the findings of fact of Small Claims Court Adjudicators, of labor, commercial and other arbitrators, and of various administrative boards and tribunals. Although perhaps not used extensively in this province, many superior courts utilize masters, assessors and other non-judge personnel to make factual determinations. I take it from this that the Supreme Court does not presume that its judges have any superior powers of fact-finding than those inferior tribunals which they regularly defer to. In reviewing inferior tribunals decisions the superior courts only act to ensure that jurisdictional boundaries are respected and correct law is applied, and only in the rarest and most egregious cases are factual findings reviewed.

[49] I have been unable to conclude that either party would be prejudiced by having the issues now before the Small Claims Court adjudicated in the Small Claims Court. Each party has the same risk of res judicata or issue estoppel as the other. Neither party is put at a disadvantage.

[50] Whether I apply the criteria for a stay or a more general application of natural justice both are at their core about fairness. I have been unable to conclude that either or both of the parties would be treated unfairly simply because res judicata or issue estoppel may apply. As noted, I have been unable to find any jurisprudence that says res judicata or issue estoppel would work any unfairness. These doctrines seem to have at their core the goal of promoting the finality of decisions such that issues would not be endlessly litigated. Finality is another aspect of fairness. It seems to me that these doctrines are intended to promote fairness. I just do not see how they can be said to create unfairness except in the specific and unusual fact situation addressed by Justice Saunders in **Paul Revere Life Insurance Co. v. Harbin**.

[51] Therefore I am unable to conclude the fact that res judicata or issue estoppel may be raised later in a subsequent proceeding constitutes any kind of an abuse of process or breach of the rules of natural justice.

[52] The Defendant's counsel urges that combining the lack of disclosure and discovery with res judicata/issue estoppel affects the determination of the issues raised in this motion and should affect the result. These are quite distinct matters and combining them does not have the effect of strengthening the arguments advanced.

[53] I echo Justice Wright's sentiments that from a practical point of view it would be "desirable" that the issues between these parties be litigated in one proceeding. If I had been able to find that I had the authority to impose that result, and my authority allowed me to consider what is "desirable", I may well have been favourably inclined to grant this motion. Counsel have the right, and indeed the duty, to pursue their clients' causes in a manner that counsel believes is in the best interests of their client. I have no role to question those decisions and no jurisdiction to interfere with them regardless of what may be "desirable" as to the choice of forum, unless I have a solid legal basis to do so. Like Justice Wright I have been unable to find a jurisdictional or legal basis to effect what he and I both consider a "desirable" result.

CONCLUSION AND DISPOSITION

[54] The defendant's motion is dismissed.

[55] **Killam Properties Inc. v. Patriquin, 2011 NSSC 338** establishes that there can be no appeal from the Small Claims Court until a final determination is made. If it were otherwise I may have delayed setting down this matter during the potential appeal period as this decision has an important effect on the parties and the proceedings. I will therefore now forthwith proceed to set the matter down for trial.

[56] Given that this matter has been not been heard within a far longer time than litigants may normally expect in the Small Claims Court, I will endeavour to offer the parties as early a date as possible. The Clerk will provide the parties with a list of available dates as soon as possible after providing counsel with this decision. I ask that counsel agree on a date within 10 business days of being provided dates by the Clerk. If the parties are unable, within that time, to agree on one or more of the dates offered, I will hear the parties' submissions by conference call that will be arranged through the Clerk. If that becomes necessary, after hearing those submissions, I will set a trial date.

[57] The parties are not precluded from bringing any other pre-trial motions either party wishes to raise, but unless persuaded by counsel to do otherwise, in order to ensure that further delays are minimized, I intend to deal with them by written submissions and if necessary conference call.