

CHIPMAN, J.A.:

This is an appeal from a decision of Edwards, J. in Supreme Court setting aside the decision of an adjudicator in the Small Claims Court of Nova Scotia giving judgment to the appellant against the respondent for user fees for services provided by the appellant to the respondent at the harbour at Port Hood.

The appellant was incorporated on July 10, 1989 pursuant to Part II of the **Canada Corporations Act**, 1970, c. 32. It entered into a lease on May 8, 1991 with Her Majesty the Queen represented by the Minister of Fisheries and Oceans (the Minister) to manage and administer the wharves and facilities at Port Hood Harbour and Murphy's Pond Harbour, Nova Scotia. The Minister derived the authority to lease these harbours from s. 8 of the **Fishing and Recreational Harbours Act**, R.S.C. 1985, c. F-24 (the **Act**). The lease was made an exhibit at trial and by the terms thereof, the appellant was given the authority to use and occupy the harbours in accordance with the **Act** and the regulations made thereunder.

The appellant provided berthage and wharfage to the respondent, a fisherman. It submitted bills to the respondent which were not paid.

The Small Claims Court adjudicator heard the matter on April 29, 1997 and filed a report on June 27, 1997. The appellant established that its annual fees for the years 1993-1995 inclusive were \$50.00, plus G.S.T. and for 1996 \$200.00, plus G.S.T. It sent invoices to the respondent each year as it did with other users of the wharf facilities in the harbours. All of the others with the exception of the respondent paid the fees. The respondent continued to use the facilities without payment. The adjudicator found that the

appellant was entitled to charge user fees at the rates set by it for the use of the Port Hood Harbour facilities by the respondent. The adjudicator also found that the claim was for payment of monies arising under a contract for the use of the facilities and was thus within the jurisdiction of the Small Claims Court. The claim was allowed in the amount of \$374.50 with costs of \$30.30, for a total of \$404.80.

On appeal from the adjudicator's decision, Edwards, J. followed the decision of MacLellan, J. in **Smith, et al. v. Port Hood Harbour Authority** (1993), 123 N.S.R. (2d) 225. In that case, the decision of an adjudicator in the Small Claims Court holding that the respondent was liable to pay the appellant \$53.50 for user fees at the Port Hood Harbour for a different time was overturned by MacLellan, J. There, MacLellan, J. reviewed the relevant provisions of the **Act**, the regulations thereunder and the provisions of s. 9 of the **Small Claims Court Act**, the relevant portion of which provides:

- 9 A person may make a claim under this Act
 - (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed five thousand dollars inclusive of any claim for general damages but exclusive of interest;

MacLellan, J. held that in the circumstances he could not find that there was an implied contract to pay the fees. Rather, the authority to claim fees came from the federal government. Thus, he reasoned, when the Harbour Authority imposed fees for the use of the government facilities, it was able to do so only because the **Act** permits it when there is a lease in effect. The claim therefore arose out of a statute and not out of a contract. It was beyond the jurisdiction of the Small Claims Court. MacLellan, J. allowed the appeals and dismissed the claims.

For the same reasons, Edwards, J. allowed the respondent's appeal from the decision of the adjudicator and dismissed the claims.

The appellant appeals the decision of Edwards, J. to this Court.

At the outset, the respondent has made an application to the court for an order pursuant to **Civil Procedure Rule** 62.18(1) quashing the notice of appeal on the ground that under s. 32(6) of the **Small Claims Act** no right of appeal exists in this Court from a decision of the Supreme Court on appeal from the Small Claims Court.

Section 39 of the **Court and Administrative Reform Act**, S.N.S. 1996, c. 23 added s-s. (6) to s. 32 of the **Small Claims Court Act**, making a decision of the Supreme Court on appeal from the Small Claims Court final and not subject to further appeal. This section extinguishing the right of appeal was proclaimed in force by the Lieutenant Governor on April 1, 1997. An appeal to this Court had been created as a result of the enactment of the **Court Reform Act**, S.N.S. 1992, c. 16. See the decision of this Court in **Dunlop v. Anchor Towing and Recovery Limited** (1994), 128 N.S.R. (2d) 373.

The appellant's action in the Small Claims Court was commenced against the respondent on January 30, 1997, some two months prior to the removal of the right of appeal from the Supreme Court sitting on appeal from the Small Claims Court to this Court.

In **Dunlop v. Anchor Towing, supra**, this Court considered the right of a party to appeal to this Court from the Supreme Court sitting on appeal from the Small Claims Court in an action commenced in that Court before the enactment of the **Court Reform Act** permitting such an appeal to this Court. This Court held that in such a case an appeal did not lie because a statute that modifies a court's jurisdiction is not generally

applicable to pending cases. The court noted that the Supreme Court of Canada has ruled that a right of appeal crystallizes on the day the proceedings are instituted in the lower courts and not on the day of judgment or the day on which deliberation begins.

Based on the reasoning of this Court in **Dunlop v. Anchor Towing, supra**, this panel dismissed the respondent's motion to quash because the appellant commenced proceedings in the Small Claims Court before April 1, 1997, the day on which such appeals were abolished. The panel then heard the appellant's appeal on the merits and reserved judgment.

I accept the appellant's submission that the fact that the Small Claims Court is constituted pursuant to the Province's power to legislate by virtue of s. 92(14) of the **Constitution Act** - administration of justice in the Province - does not alone preclude that Court from hearing matters which fall within federal jurisdiction.

In **Attorney General for Ontario v. Pembina Exploration Canada Limited**, [1989] 1 S.C.R. 206, LaForest, J. writing for the court said at p. 228:

I conclude that a provincial legislature has the power by virtue of s. 92(14) of the **Constitution Act of 1867** to grant jurisdiction to an inferior court to hear matters falling within federal legislative jurisdiction. This power is limited, however, by s. 96 of that **Act** and the federal government's power to expressly grant jurisdiction to a court established by it under s. 101 of the **Act**.

Neither the **Act** nor any other federal legislation to which our attention has been drawn specifies a particular forum for the resolution of a dispute such as that between the parties here. In such circumstances, the Small Claims Court is a proper forum for the appellant to have brought its action provided it was an action "in respect of a matter or thing

arising under a contract . . . where the claim does not exceed five thousand dollars . . .”

The fact that s. 55 of the **Small Claims Court Act** of Ontario considered by the Supreme Court in **Pembina, supra**, conferred wider jurisdiction upon the court than does the **Small Claims Court Act** in this Province is immaterial.

The respondent argues that although the fee schedules established pursuant to ss. 26-28 of the regulations do not apply to property leased pursuant to s. 8 of the **Act**, the authority to establish a fee schedule and charge fees is effectively granted to the appellant pursuant to the **Act** and the regulations and, in particular, s. 28.1 thereof. He says that the right to collect fees is a statutory right, and that **Smith v. Harbour Authority of Port Hood, supra**, should be followed. Although the appellant sets the fees, its authority to do so “arises from the Federal Government”. The **Small Claims Court Act** does not confer jurisdiction on the Court respecting such a claim.

Section 28.1 of the regulations under the **Act** provides:

28.1 Sections 26 to 28 do not apply with respect to any harbour or portion thereof that, pursuant to s. 8 of the **Act**, is the subject of a lease to any person or an agreement with the government of any province or any agency thereof for the occupancy and use of that harbour or portion thereof where the person, the government or the agency is designated as a harbour authority in the lease or the agreement.

In **Smith et al. v. Port Hood Harbour Authority, supra**, MacLellan J.

concluded:

In **Jumbo Motor Express Ltd. v. Hilchie** (1988), 89 N.S.R. (2d) 222 (Co. Ct.), Palmett C.J.C.C. (as he then was) held that the Small Claims Court had no jurisdiction to deal with a claim for wages based on a federal statute (**Canada Labour Code**), because this was a statutory right and not one based

on contract or tort or any of the other specified items set out in s. 9 of the **Small Claims Court Act**.

I find that the claim here is in fact based on the provisions of a federal statute and there was no implied contract to pay and therefore, is beyond the jurisdiction of the Small Claims Court. I would allow the appeals and dismiss the claims made by the respondent in each case.

The provision of the **Canada Labour Code** on which Palmeter, C.J.C.C. in **Jumbo Motor Express Ltd., supra**, relied in concluding that the claim was based, not on contract, but on statute, is:

32. When an employee is required or permitted to work in excess of the standard hours of work, he shall be paid for the overtime at a rate of wages not less than one and one-half times his regular rate.

In my opinion, the appellant's claim is not based on the provisions of the federal statute as was the claim in **Jumbo Motor Express Limited, supra**. The appellant was in possession of the harbour pursuant to its lease. Its authority to collect fees is derived not from the provisions of the **Act** or regulations or from the provisions of any other federal legislation. Its authority arises from the fact that it is a tenant in possession of the harbour.

The adjudicator has found as a fact that the appellant used the wharf facilities after receiving invoices and that in such circumstances there was "a contract for the use of the facilities". I am not prepared to say that the adjudicator erred in making this finding of fact.

I disagree with the respondent's submission that this case raised

Constitutional issues in the Small Claims Court. It was simply a matter of contract, as the adjudicator found.

Nor do I accept the respondent's submission that the lease was a delegation of powers from the federal government to the appellant. It was simply a commercial transaction whereby the Minister, pursuant to the powers granted in s. 8 of the **Act**, leased property to the appellant. The Minister delegated no power to make laws. All that was conferred was a property right which the appellant exercised by charging fees, which the adjudicator found the respondent was liable to pay by virtue of a contract.

I would allow the appeal, set aside the judgment of Edwards, J. and restore the order of the Small Claims Court that the respondent pay the appellant the sum of \$404.80. The appellant should recover from the respondent the costs of the appeal before Edwards, J. in the amount of \$500.00, plus disbursements to be taxed, and costs of this appeal in the amount of \$500.00, plus disbursements to be taxed.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.