NOVA SCOTIA COURT OF APPEAL
Citation: *Roumeli Investments Ltd. v. Gish*, 2018 NSCA 27

Date: 20180329
Docket: CA 464705
Registry: Halifax

Between:

Roumeli Investments Limited, a body corporate

Appellant

v.

Elliot Gerald Gish and Amy Ryan

Respondents

Judges:	Beveridge, Saunders and Bourgeois, JJ.A.
Appeal Heard:	January 22, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Beveridge and Saunders, JJ.A. concurring
Counsel:	J. Paul Niefer, for the appellant Billy Sparks, for the respondent Gish Anthony Rosborough, for the respondent Ryan (watching brief only)

Reasons for judgment:

[1] Roumeli Investments Limited ("the appellant") is the owner of a 51-unit apartment building in Halifax. On February 14, 2015, a fire started in an apartment occupied by the respondents Gish and Ryan. The fire resulted in substantial damage to both the interior and exterior of the unit.

[2] The appellant commenced a claim in the Supreme Court of Nova Scotia (the "NSSC") alleging the fire and resulting damages were caused by the negligence of the respondents. In response, the respondent Gish brought a motion for summary judgment seeking a dismissal of the appellant's action on the basis the NSSC had no jurisdiction to hear the matter. The respondent Ryan maintained a watching brief before this Court and below. As such, reference to "the respondent" in these reasons is meant to refer to the respondent Gish.

[3] In the motion below, the respondent submitted that the exclusive jurisdiction to hear the matter rested with the Director of Residential Tenancies (the "Director") by virtue of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended (the "*RTA*"). In a written decision (2017 NSSC 125) Justice Ann E. Smith granted the respondent's motion.

[4] The appellant now appeals to this Court, submitting the motions judge erred in her conclusion that the NSSC lacked jurisdiction. For the reasons that follow, I would allow the appeal and set aside the dismissal of the appellant's action.

Background

[5] It is useful to begin with the nature of the appellant's claim. In its Amended Originating Notice and Statement of Claim, the appellant alleged:

- the respondents were renting unit 206 of its 51-unit residential apartment building;
- a fire started in unit 206 due to fat or oil igniting on the stove;
- the fire was caused by the negligence of the respondents, noting particulars of their negligent conduct;
- extensive remediation was required due to the damages resulting from the fire; and

- a judgment of $77,180.83 was claimed, with particulars provided.

[6] The appellant did not plead or make reference to the *RTA*, or the statutory conditions contained therein.

[7] A Statement of Defence was not filed. Rather, a summary judgment motion was brought by the respondent seeking dismissal of the action on the basis of *Civil Procedure Rule* 13.03(1)(b). That Rule provides:

> 13.03(1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> . . .
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

[8] Before the motions judge, the respondent argued that various provisions of the *RTA* made it clear and obvious that the Director had the exclusive jurisdiction to adjudicate disputes between landlords and tenants. As such, Rule 13.03(1)(b) mandated a dismissal of the appellant's action.

[9] In support of that proposition, the respondent noted a number of legislative provisions including Statutory Condition 4, as found in s. 9(1):

> 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. (Emphasis added)

As well as:

> 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**.
>
> . . .
>
> 1A The purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes.

. . .

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.

. . .

17(1) Where, after investigating the matter, the Director determines that the parties are unlikely to settle the matter by mediation, the Director shall, within fourteen days, make an order in accordance with Section 17A.

…

17A An order made by the Director may

(a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act;

(b) require a landlord or tenant not to again breach a lease or an obligation pursuant to this Act;

(c) require the landlord or tenant to make any repair or take any action to remedy a breach, and require the landlord or tenant to pay any reasonable expenses associated with the repair or action;

(d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;

(e) terminate the tenancy on a date specified in the order and order the tenant to vacate the residential premises on that date;

(f) determine the disposition of a security deposit;

(g) direct that the tenant pay the rent in trust to the Director pending the performance by the landlord of any act the landlord is required by law to perform, and directing the disbursement of the rent;

(h) require the payment of money by the landlord or the tenant;

(i) determine the appropriate level of a rent increase;

(j) require a landlord or tenant to comply with a mediated settlement;

(k) award to a successful party to an application the costs of an application fee paid to the Director, but no other costs associated with the application;

(l) set aside a notice to quit given by a landlord under subsection 10(6), (7), (7A) or (7B) or clause 10(8)(a), (b), or (c) or by a tenant under subsection 10F(1).

…

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

[10] The respondent also argued that the issue of the Director's exclusive jurisdiction had been conclusively determined in an earlier decision of Rosinski, J., *Corfu Investments Ltd. v. Oickle*, 2011 NSSC 119.

[11] In response, the appellant submitted that there was no doubt the legislature had given the Director jurisdiction to address disputes between landlords and tenants as outlined in the *RTA*. However, it argued that nothing in the *RTA* served to extinguish the jurisdiction of the NSSC to hear similar disputes. The appellant submitted the *RTA* created a concurrent jurisdiction, but did not extinguish the original jurisdiction of the NSSC. The appellant argued that *Corfu* was wrongly decided and presented a number of authorities where the NSSC exercised jurisdiction over matters between residential landlords and tenants.

[12] In rendering her decision, the motions judge agreed with the respondent as to the effect of the above statutory provisions:

> [19] I am satisfied that the combined effect of these provisions is to oust the jurisdiction of the Supreme Court in matters of residential tenancy disputes.

[13] After considering the principles of statutory interpretation and earlier decisions of the NSSC, including *Corfu*, the motions judge concluded:

> [17] In *Corfu Investments Ltd. v. Oickle*, 2011 NSSC 119 Rosinski J. conducted a thorough analysis of the same issue that is before the Court in the within case: Do the RTA authorities have exclusive jurisdiction to deal with "residential tenancies" matters? Justice Rosinski answered that question – "yes." I concur.

[14] The motions judge ultimately determined:

> [28] The DRT has exclusive original jurisdiction to determine the matters within his or her jurisdiction. This Court does not have concurrent or residual jurisdiction to determine such matters. … To be clear, there is no original jurisdiction of the Supreme Court to adjudicate residential landlord and tenant disputes.

Issue

[15] The sole issue for determination by this Court is whether the motions judge erred in concluding the Director had the exclusive jurisdiction to adjudicate the appellant's claim.

Standard of Review

[16] The parties agree, as do I, that the standard of review is correctness. The question of whether a court has jurisdiction is a question of law and, as such, the motions judge's determination must be correct.

Analysis

[17] I will commence the analysis with a consideration of the following general principles:

- The jurisdiction of the NSSC;
- Principles relating to removing jurisdiction from superior courts; and
- The analytical framework when courts share concurrent jurisdiction with a competing court or tribunal.

The jurisdiction of the NSSC

[18] In addressing the issue before this Court, a helpful starting point is to consider the NSSC's general jurisdiction and, more specifically, its jurisdiction in relation to disputes between landlords and tenants. In his article, "*Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?*" (2010) 33:2 Dal. L.J. 63, Professor W.H. Charles described both the general and inherent jurisdiction of the court. He described its broad general jurisdiction as follows (at pp. 70-71):

> In Nova Scotia, the general jurisdiction of the Nova Scotia Supreme Court has been traced by MacKeigan C.J. in *Midland Doherty v. Roher and Central Trust Company*, who notes that the jurisdiction of the Supreme Court of Nova Scotia is that of the Supreme Court as originally established long before the *Judicature Act* of 1884. This jurisdiction included the same powers as were formerly exercised by the English Courts of Queen's Bench, Common Pleas, or Chancery and Exchequer and with the same powers as were exercised by the Supreme Court of Judicature in England as they were on the 19th of April 1884.
>
> The notion of an unlimited jurisdiction in a superior court may have evolved from the ancient English legal principle that was expressed in *Peacock v. Bell* to the effect that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the superior court but that which specifically appears to be so." In proceedings before a superior court it was unnecessary to allege that the court was possessed of jurisdiction—unlike an inferior court proceeding. It was up to the court itself to decide judicially whether it was acting within its jurisdiction.

> This led to the idea that the jurisdiction of a superior court was unlimited. …
> (Footnotes omitted)

[19] The broad original jurisdiction of the court is reflected in the present *Judicature Act*, R.S.N.S. 1989, c. 240, as amended. In particular, s. 4 provides:

> **Jurisdiction and power and authority**
>
> 4(1) The Court shall continue to be a superior court of record, having civil and criminal jurisdiction and it has all the jurisdiction, power and authority that on the coming into force of this Act, was vested in or might have been exercised by the Supreme Court, and such jurisdiction, power, and authority shall be exercised in the name of the Court.

[20] There is no question that civil claims founded in negligence fall within the jurisdiction of the NSSC. I turn now to claims where the parties are landlord and tenant.

[21] In the context of considering the constitutionality of proposed amendments to the *RTA*, the historical jurisdiction of superior courts to adjudicate on matters arising from residential tenancies was considered by the Supreme Court of Canada in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R 186 (the "*1996 RTA Reference*"). Writing for the majority, McLachlin, J. (as she then was) explained:

> 81 A review of the situation which prevailed generally in the pre-Confederation colonies reveals that jurisdiction over residential tenancy disputes was not vested exclusively in what became the s. 96 courts. The inferior courts in the founding provinces exercised jurisdiction over residential tenancy disputes to varying degrees, but all played a meaningful role in their adjudication. This jurisdiction was more than a "gloss" upon a dominant superior court power. Rather, it represented a shared involvement in deciding residential tenancy disputes.

And further:

> 92 In summary, the evidence adduced in this case demonstrates that the superior courts of Canada did not enjoy exclusive jurisdiction over tenancy disputes at the time of Confederation. In every former colony inferior courts exercised a significant concurrent jurisdiction at or about the time of Confederation. It follows that the Nova Scotia House of Assembly's conferral of jurisdiction over residential tenancies on a provincially appointed tribunal does not violate s. 96 of the *Constitution Act, 1867*.

[22] I will have more to say about the above decision in due course. At this point, it suffices to confirm that prior to the amendments to the *RTA*, the NSSC had jurisdiction to hear matters arising between landlords and tenants.

Principles relating to removing jurisdiction from superior courts

[23] The decision under appeal concluded that the *RTA* completely removes the NSSC's jurisdiction to hear all claims involving landlords and tenants, including those alleging negligence, and vested exclusive authority in the Director. That brings the analysis to the second consideration, the principles relating to the derogation of a superior court's jurisdiction.

[24] In *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, the Supreme Court considered if the provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, removed jurisdiction from the Ontario Superior Court of Justice to hear various civil claims. The Ontario Court of Appeal determined that the legislation did not serve to remove the jurisdiction of the superior court, and that it retained a concurrent jurisdiction with the Federal Court. In dismissing the appeal, Justice Binnie writing for the Court set out the following principles:

> D. *The Jurisdiction of the Provincial Superior Courts*
>
> [42] What is required, at this point of the discussion, is to remind ourselves of **the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court ... requires clear and explicit statutory wording to this effect":** *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.
>
> [43] The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.
>
> [44] The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *Mills v. The*

> *Queen*, [1986] 1 S.C.R. 863, *per* McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at p. 271, and *per* Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R.v.Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the superior court's authority to award damages. The dispute centres on subject matter jurisdiction.
>
> [45] It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous. (Emphasis added)

[25] Binnie, J. further noted the well-established principle that inferences and implications arising from statutory provisions are insufficient to oust the jurisdiction of provincial superior courts (para. [5]).

[26] I have also found informative the following synopsis from Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont: LexisNexis, 2014):

> **15.57 Ousting jurisdiction of court. It is presumed that the legislature does not intend to alter existing jurisdictions, and particularly to transfer jurisdiction out of superior courts.** The presumption was applied by the Supreme Court of Canada in *Ordon Estate v. Grail* where the issue was whether the jurisdiction conferred on the Admiralty Court to hear certain actions for damages was exclusive or concurrent with provincial superior courts. Iacobucci and Major JJ. wrote:
>
> > It is well settled, and the defendants do not dispute, that as a general rule provincial superior courts have plenary and inherent jurisdiction to hear and decide all cases that come before them, regardless of whether the law applicable to a particular case is provincial, federal or constitutional. …
> >
> > As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court. In particular, it is well established that the complete ouster of

> jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect. …
>
> **15.58** Section 646 of the *Canada Shipping Act* conferred jurisdiction on the Admiralty Court for actions arising out of wrongful death. There was nothing in the section purporting to remove jurisdiction from other courts. Thus, Iacobucci and Major JJ. concluded:
>
> > The lack of any express language … excluding superior court jurisdiction, or vesting sole jurisdiction in the Admiralty Court, is sufficient by itself to justify interpreting s. 646 as conferring on the Admiralty Court only concurrent jurisdiction over fatal accident claims by dependants. **This finding accords with the basic principle of statutory construction that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect.** … (Emphasis added. Footnotes omitted)

Analytical framework

[27] I turn now to consider, when a court shares concurrent jurisdiction with another court or tribunal, how it should determine to accept or decline jurisdiction over an action. In *TeleZone*, the Ontario Court of Appeal (2008 ONCA 892) turned to principles from the labour context to sort out the competing jurisdictional claims. Justice Borins wrote:

> 5 Because all of the controversies arising within the territorial jurisdiction of the province of Ontario are cognizable in the Superior Court, questions of competence of provincial superior courts to adjudicate a particular kind of case rarely arise. However, there are two common exceptions that give rise to motions attacking the jurisdiction of the superior court. The first is in respect to an arbitration clause contained in a contract between the parties. **The other arises from cases where there is a statutory code that governs enabling the plaintiff to recover the remedy that he seeks in his claim in another forum.** Perhaps the leading example of the second exception is *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, which I will discuss subsequently. (Emphasis added)

[28] This Court has adopted the principles in *Weber* in determining whether the statutory provisions in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 and a collective agreement implemented thereunder prevented the NSSC from hearing a civil action (*Canada (Attorney General) v. Pleau*, 1999 NSCA 159); whether provisions of the *Securities Act*, R.S.N.S. 1989, c. 418 ousted the jurisdiction of the Nova Scotia Securities Commission to hear a complaint in

favour of the Mutual Funds Dealers Association (*Nova Scotia (Securities Commission) v. Schriver*, 2006 NSCA 1); and whether statutory provisions in the *Trade Union Act*, R.S.N.S. 1989, c. 475 served to remove a personal injury claim from the jurisdiction of the NSSC (*Gillan v. Mount Saint Vincent University*, 2008 NSCA 55).

[29] In *Pleau*, Cromwell, J.A. (as he then was) summarized the analytical approach set out by the Supreme Court of Canada as follows:

> [18] In my view, the judgments of the Supreme Court of Canada in *St. Anne Nackowic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704., *Gendron*, *Weber* and *O'Leary* show that the decision by courts to decline jurisdiction in disputes like this one is not based simply on a clear, express grant of jurisdiction to an alternative forum. For reasons that I will develop, I am of the opinion that there are three main considerations which underpin these decisions of the Supreme Court of Canada. The three considerations are inter-related, but it is helpful to discuss them individually for analytical purposes.
>
> [19] The first consideration relates to the process for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> [20] If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process. This was an important question in the *Weber* decision. The answer given by *Weber* is that one must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on the process for resolution of disputes, the second consideration focuses on the substance of the dispute. Of course, the two are inter-related. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.
>
> [21] The third consideration relates to the practical question of whether the process favoured by the parties and the legislature provides effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy. (Emphasis in original)

[30] In my view, the above general principles can be summarized as follows:

- The NSSC has original jurisdiction to hear civil claims founded in negligence;
- Prior to the passing of residential tenancies legislation, the NSSC historically shared a concurrent jurisdiction with inferior tribunals to hear disputes arising between landlords and tenants;
- As a matter of statutory interpretation, there is a presumption that the legislature does not intend to remove the jurisdiction of the NSSC to hear matters within its original jurisdiction;
- Statutory provisions which intend to remove jurisdiction from the NSSC must be explicit, clear and specific in that intention. Inferences and implications arising from a single statutory provision, or several read in conjunction, are not sufficient; and
- Where asked to decline to exercise its concurrent jurisdiction in favour of another tribunal, courts should conduct a *Weber* analysis.

[31] I return now to the decision under appeal. It is important to recall that the motions judge was asked only to determine, in the context of *Civil Procedure Rule* 13.03(1)(b), whether the appellant's cause of action was in the exclusive jurisdiction of another court or tribunal.

[32] Given the arguments before her, it is not surprising that the motions judge framed the issue as being whether the provisions of the *RTA* precluded the NSSC from hearing any matters arising between landlords and tenants, as opposed to considering solely the appellant's claim. It is clear from her reasons that not only did the motions judge preclude the appellant's claim from being heard, but she determined that the NSSC had no jurisdiction to hear any disputes between landlords and tenants given the provisions of the *RTA*. In reaching this conclusion, the motions judge adopted the reasoning of Rosinski, J. in *Corfu*, who determined that the *RTA* vested the NSSC's jurisdiction over tenancy matters in the "*RTA* authorities".

[33] The broad strokes of the motions judge's conclusion are illustrated in the following passages:

> [19] I am satisfied that the combined effect of these provisions is to oust the jurisdiction of the Supreme Court in matters of residential tenancy disputes.

> . . .
>
> [21] I conclude that the legislature intended that residential landlords and tenants could avail themselves of the "efficient and cost-effective means" for settling disputes provided for in the RTA. An interpretation of the RTA that concludes that landlord and tenants may file claims in the Supreme Court for disputes which fall within the jurisdiction of the DRT is not consistent with the purpose of the Act.
>
> . . .
>
> [28] The DRT has exclusive original jurisdiction to determine the matters within his or her jurisdiction. This Court does not have concurrent or residual jurisdiction to determine such matters. … To be clear, there is no original jurisdiction of the Supreme Court to adjudicate landlord and tenant disputes.

[34] It is also clear from her reasons that the motions judge applied principles of statutory interpretation to reach her conclusion that the legislature intended that the Director have the exclusive authority to hear matters arising between residential landlords and tenants. She determined that a combination of statutory provisions led to that conclusion.

[35] The appellant concedes there would be many "typical" disputes arising from residential tenancies that the legislature signalled were better suited to an informal and quick dispute resolution mechanism. That does not equate, however, to the legislature intending to have more complex matters, better suited for the traditional court process, being forced into the hands of the Director. The appellant submits that more complex negligence claims, such as those involving substantial damages or personal injuries, should not be deprived of adjudication by the NSSC.

[36] The respondent submits the motions judge did not err in her conclusion, and says, as argued in the court below, that the Supreme Court of Canada and the NSSC has already determined that the Director has exclusive jurisdiction over residential tenancy matters. The respondent relies upon the *1996 RTA Reference* and, in particular, the following passage from McLachlin, J:

> 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 had no power to determine them.

[37] The above passage does, at first instance, support the respondent's view and the motions judge's conclusion. However, context is essential to appreciate the import of that decision.

[38] The *1996 RTA Reference* decision arose by virtue of the Attorney General of Nova Scotia submitting a constitutional question to this Court for determination. The question posed was:

> Are the unproclaimed provisions of *An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act*, S.N.S. 1992, c. 31 (the "Act"), within the legislative jurisdiction of the House of Assembly of Nova Scotia to the extent that those provisions confer authority respecting residential tenancies upon persons other than judges appointed pursuant to s. 96 of the *Constitution Act*, 1867… ?

[39] Writing for the majority of the Court, Chief Justice Clarke found that the proposed amendments permitting residential tenancy disputes to be investigated and mediated by the Director to be *intra vires*, but that the transfer of adjudicative functions to be *ultra vires* the legislature. This latter finding was based upon the conclusion that such disputes fell within the "core function" of the superior courts at the time of Confederation and, as such, could not be derogated from. Freeman, J.A. in dissent, found the provisions to be constitutionally valid, having opined that superior courts at the time of Confederation shared a concurrent jurisdiction over tenancy matters with other inferior tribunals. As such, a transfer of authority to a provincially created tribunal was not encroaching upon a "core function" of the NSSC and, as such, raised no constitutional concern.

[40] On appeal, the Supreme Court of Canada determined that the provisions were not *ultra vires* the legislature. For present purposes, it is important to note that neither this Court, nor the Supreme Court, were asked to determine what impact, if any, the proposed amendments had on the original jurisdiction of the NSSC. Neither Court addressed in any substantive way whether the NSSC continued to retain some form of jurisdiction over tenancy disputes. It is also clear that in discussing "residential tenancy disputes", both Courts envisioned that term encompassing matters of limited scope and complexity. By way of example, Chief Justice Lamer wrote:

> 63 In light of the nature of residential tenancy disputes and the types of disputes entertained by many pre-Confederation inferior courts, it is reasonable to conclude that pre-Confederation legislatures would have vested residential tenancy jurisdiction in those courts. As Freeman J.A. describes, **residential tenancy disputes involve a high volume of repetitive and narrowly defined matters of limited complexity**. They are amply suited to resolution by lay persons applying the rules with fairness and common sense. These were the

> hallmarks of the cases entertained by many pre-Confederation inferior courts. (Emphasis added)

[41] Also absent from the analysis in the *1996 RTA Reference* is a consideration, based on the principles as articulated in *TeleZone*, as to whether the proposed amendments were sufficient to oust the jurisdiction of the NSSC to adjudicate "narrowly defined matters of limited complexity". Further, and more significantly for the purposes of this appeal, there is a lack of analysis of whether the proposed amendments would serve to remove more complex disputes from the jurisdiction of the NSSC.

[42] Based on the above observations, I do not agree with the respondent that the *1996 RTA Reference* stands for the proposition that all civil matters between parties who are, or have been, in a tenancy relationship have been removed from the jurisdiction of the NSSC.

[43] The respondent also relied on *Corfu*. Although in many respects the analysis undertaken in *Corfu* mirrors the general principles outlined earlier, their application goes astray. The general conclusion reached that the *RTA* serves to oust the jurisdiction of the NSSC over all matters involving residential tenancies should not be followed.

[44] In *Corfu*, Rosinski, J. correctly noted that prior to the passing of residential tenancies legislation, the NSSC historically shared concurrent jurisdiction to hear disputes arising between landlords and tenants. He also correctly noted the principle that statutory provisions which intend to remove jurisdiction from a superior court must be clear, explicit and unambiguous in that intention.

[45] Rosinski, J. further cited the principles arising from *Weber*, which look to the "essential character" of the particular dispute to decide the issue of concurrent jurisdiction. He wrote:

> [67] I would suggest that a similar analysis is appropriate in the residential tenancies context. First, it is important to discern whether the parties are in a landlord-tenant relationship. Second, one must consider the matter in dispute between the parties. Regardless of how the parties characterize the 'legal wrong', do the facts fall within the ambit of matters covered by the *RTA*? At this stage one considers both statutorily mandated requirements (e.g. s.9 of the *RTA*) and any other rights/obligations that the parties have agreed to under the lease agreement. Third, can a proceeding under the *RTA* furnish an effective remedy for

> the parties? If not, then such would be an instance where a Superior Court would have residual jurisdiction.
>
> [68] If the circumstances of an alleged residential tenancy dispute satisfy the above three criteria of the "essential character test", then the Director has the exclusive authority to hear the matter, at first instance.

[46] Despite articulating a dispute-specific mechanism for determining whether to exercise a concurrent jurisdiction, Rosinski, J. did not use it. Rather, he undertook a *Weber*-inspired analysis to globally conclude that the *RTA* ousts the NSSC's jurisdiction in all residential tenancy matters. Such is clearly contrary to the case by case analysis contemplated in *Weber*.

Conclusion

[47] I am satisfied that the NSSC has original jurisdiction to hear the claim advanced by the appellant and the *RTA* does not oust that jurisdiction. There is only one provision in the *RTA* that specifically addresses the "exclusive" authority of the Director. Although set out above, it bears repeating:

> 13(1) Where a person applies to the Director
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> (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.**
>
> (Emphasis added)

[48] There is nothing in the above provision, or any others in the *RTA*, which speak to the jurisdiction of the NSSC. Although the respondent argues ss. 17(1) and 17A (see para. [9]) in combination with s. 13(1) demonstrates a clear intent to have the Director exclusively hear residential tenancy matters, I disagree. In my view, there is an absence of clear language specifically expressing the legislature's intention to remove the NSSC's original jurisdiction to hear matters arising from residential tenancies. There is certainly nothing to hint at an intention to have negligence claims where the parties also happen to be in a tenancy relationship, removed from the NSSC's authority. The motions judge erred in concluding otherwise.

[49] It is not difficult to contemplate property claims, similar to this one, or personal injury claims which may arise in the context of a residential tenancy. It would seem to me highly unlikely the legislature intended the Director to have exclusive jurisdiction to hear significant or complex claims that would normally require days or weeks of trial and perhaps competing expert evidence on issues of causation or quantification of damages. Often these claims are advanced with the assistance of pre-trial motions, with the parties being entitled to pre-trial disclosure and discovery. Should it have been the intention of the legislature to remove claims of this nature from the jurisdiction of the NSSC, it must explicitly declare such an objective.

[50] For the above reasons, I would allow the appeal. In doing so, I would add that there may be circumstances where, given the nature of the claim, the matter is one more suited to be adjudicated by the Director. Others will be better suited to the procedural and evidentiary safeguards of a court proceeding. When asked to make such a determination, a *Weber* analysis ought to be undertaken after which a court will choose to exercise or decline jurisdiction.

Disposition

[51] I would allow the appeal and set aside the order dismissing the appellant's claim. Costs ordered in the court below are to be reversed. On appeal, the respondent shall pay to the appellant costs of $2,000, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.

Saunders, J.A.