**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *C.M. MacNeill & Associates v. Toulon Development Corporation*, 2016 NSSC 16

**Date:** 2016/01/12
**Docket:** *Port Hawkesbury,* No. 432535
**Registry:** Port Hawkesbury

**Between:**

C.M.MacNeill & Associates and Mark MacNeill

*Claimant*

v.

Toulon Development Corporation

*Defendant*

**Judge:** The Honourable Justice Justice Arthur J. LeBlanc

**Heard:** October 30, 2015, in Port Hawkesbury, Nova Scotia

**Counsel:** Mark MacNeill, for the Claimant
Harold MacIsaac, for the Defendant

**By the Court:**

[1] Mark MacNeill, on his own behalf and on behalf of C.M. MacNeill & Associates Ltd., appeals from a decision of the Small Claims Court. His Notice of Appeal states he appeals because of a jurisdictional error, an error of law, and failure to follow the requirements of natural justice. For the reasons that follow, the appeal is dismissed.

**Background**

[2] Following the filing of the Notice of Appeal the Adjudicator prepared the required written report pursuant to s. 32(4) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430. In his detailed report dated September 12, 2014, the Adjudicator summarized the evidence and factual findings, the legal principles, and his conclusions. The evidence and factual findings set out therein may be summarized as follows.

[3] Neil Castagna is the Director of Business for the respondent, Toulon Development Corporation ("Toulon"). He is involved with leasing of properties and dealing with tenants. In or around January 2012, the appellant, Mr. MacNeill, was anxious to find premises for his newly acquired Liberty Tax Service franchise. Mr. Castagna indicated to Mr. MacNeill there was a unit in the Port Hawkesbury Shopping Centre available for lease. The unit, being 1,800 square feet in size, was much larger than Mr. MacNeill required. Mr. Castagna indicated that he could rent the unit to Mr. MacNeill for a fixed monthly rate, rather than setting rent in accordance with square footage, which is Toulon's usual practice.

[4] Mr. Castagna provided Mr. MacNeill with a document titled "Offer to Lease" for Unit #7 at the Port Hawkesbury Shopping Centre in Port Hawkesbury, Nova Scotia, for a fixed term of three years and four months commencing February 1, 2012, and ending May 31, 2015 (the "Offer to Lease").

[5] On January 18, 2012, Mr. MacNeill signed the Offer to Lease on behalf of his company, C.M. MacNeill & Associates Ltd., and on his own behalf as guarantor. In fact, Mr. MacNeill signed each page of the Offer to Lease. Mr. MacNeill acknowledged having had an opportunity to review the Offer to Lease. However, he testified that he did not recall actually having reviewed it, and that he did not understand it. He further testified that he did not receive independent legal advice and he was not told to obtain independent legal advice by Mr. Castagna or

anyone else. Mr. MacNeill also testified that he did not recall if he had consulted a lawyer about the Offer to Lease.

[6] Mr. MacNeill returned the signed Offer to Lease to Mr. Castagna, and it was signed by a representative of Toulon on January 25, 2012.

[7] Mr. MacNeill holds a law degree from the University of Edinburgh, a Bachelor of Laws degree and a Master of Laws degree from the University of Miami, and a Master of Laws degree from the University of Denver. He has experience teaching corporate finance at St. Mary's University, and he has worked as a financial advisor. Yet Mr. MacNeill maintained that he was unfamiliar with commercial leases and guarantees at the time he signed the Offer to Lease.

[8] With the respondent's permission, the appellants took possession of the Premises before the official commencement of the lease term on February 1, 2012.

[9] Unfortunately, Mr. MacNeill's business was not as successful as he had hoped it would be. On July 20, 2012, Mr. MacNeill via email provided Mr. Castagna with notice of repudiation of the Offer to Lease.

[10] As of July 20, 2012, the appellants owed rent arrears of $3,325.00. The respondent argued that the additional rent owing until the end of the lease term was $27,370.00 (34 payments of $805.00), for a total amount owing of $30,695.00. The respondent capped its claim at $25,000 to bring it within the jurisdiction of the Small Claims Court.

[11] The respondent indicated there was no claim for sharing of the common area expenses, as the occupancy had not continued long enough for it to levy such a charge.

[12] The respondent, through its counsel, sent a demand letter dated July 26, 2012, to the appellants, indicating that the respondent considered the appellants to be in breach of their obligations under the Offer to Lease. Mr. MacNeill did not recall receiving the demand letter, and the respondent was unable to produce an affidavit of service for it.

[13] The appellants, through their counsel, advanced two arguments in defence of the claim:

1. That the Offer to Lease was crudely drafted and was too imprecise to establish a binding lease agreement; and

2. The circumstances surrounding the signing of the Offer to Lease amended its terms.

[14] In support of the first argument, counsel for the appellants pointed to the following alleged deficiencies:

i. The Offer to Lease did not specify whether additional rent in the form of common area fees and other shared expenses would be pro-rated to account for the fact that the monthly rent being charged was not based on square footage, and was much lower than the respondent's usual rate per square footage;

ii. The Offer to Lease did not specify it was a binding agreement;

iii. The Offer to Lease did not specify the respondent's rights in the event of default.

[15] The appellants argued that without these terms, the appellant believed the Offer to Lease to be a non-binding basis for negotiation. The appellants pointed to clause 9 of the Offer to Lease, which says:

> 9. **EXECUTION OF LEASE:** This Offer is irrevocable for ninety (90) days from the date hereof, after which time it may be revoked by notice in writing to the Landlord at any time prior to its acceptance. Upon acceptance by Landlord of this Offer, Tenant shall be required to execute Landlord's standard form of net net [sic] lease (the "Lease") **subject to reasonable negotiation of the terms and conditions not addressed herein**. …
>
> [Emphasis in original]

[16] The appellants argued they believed the Offer to Lease simply set out "what remedies the [respondent] would have at its disposal if the [appellants] breached the terms of the offer".

[17] The appellants also disputed that they understood the rent amount to include HST. This, they argued, constituted a further ambiguity. However, the evidence showed that the appellants had made one rent payment for $805.00, and they had submitted a further cheque for $805.00, although it was returned as NSF (not sufficient funds).

[18] In the alternative, the appellants argued there was an imbalance of bargaining power. Mr. MacNeill said he should have been advised to obtain independent legal advice. In addition, the respondent did not inform him the Offer

to Lease would be binding and enforceable, and was not a "fluid" document. Mr. MacNeill argued that while he holds various law degrees, none of these are from Canadian institutions, and he has never been called to the Bar in any province or territory in Canada. Furthermore, he had never before entered into a commercial lease; therefore, he should be considered a layperson. Although the appellants also urged the Adjudicator to consider the circumstances surrounding the signing of the Offer to Lease, Mr. MacNeill testified he could not remember the circumstances.

[19] The respondent pointed to the fact that Mr. MacNeill had personally guaranteed payment of the Liberty Tax franchise fees before providing his personal guarantee for the Lease.

[20] I refer to the following determinations made by the Adjudicator:

1. Mr. MacNeill was an experienced businessman, and was familiar with business financing arrangements that would include personal guarantees. He did not need to be told to obtain independent legal advice, and he had an opportunity to do so, whether he took advantage of that opportunity or not. His assertion that he did not understand the Offer to Lease was not credible.
2. The Offer to Lease contained all essential terms and it was a binding and enforceable agreement between the respondent and the appellants.
3. Mr. MacNeill had personally guaranteed the obligations of C.M. MacNeill & Associates Ltd., and he was personally liable to the respondent for the obligations of C.M. MacNeill & Associates Ltd. under the Offer to Lease.
4. The rent was agreed to be $700 plus HST, for a total of $805 per month.
5. The appellants abandoned the premises and repudiated the Offer to Lease on July 20, 2012, due to business failure.
6. There was no duty for the respondent to mitigate its loss, and even if there was, the respondent had made reasonable efforts in this regard.
7. Arrears plus the balance of the unexpired term of the Lease amounted to $30,695.00, and the respondent's full claim of $25,000 was allowed, plus costs of $487.75, for a total judgment in the amount of $25,487.75.

## Issues

[21] The issues before this Court are whether the Small Claims Court Adjudicator made an error of jurisdiction or law, or failed to follow the requirements of natural justice.

## The *Small Claims Court Act*

[22] Section 2 of the *Small Claims Court Act* states:

> 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.

[23] The *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32(1) of the *Act* sets out the available grounds of 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
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> (a) jurisdictional error;
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> (b) error of law; or
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> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[24] Section 32(1) confines the availability of an appeal from a decision of the Small Claims Court to three grounds: (a) jurisdictional error; (b) error of law; or (c) failure to follow the requirements of natural justice. The appellants appeal on all three grounds.

## Jurisdictional Error

### *Law*

[25] Jurisdiction refers to the power of an adjudicator to entertain, hear and determine a case: *Salem v. Air Canada*, [1999] N.S.J. No. 13 at para. 17 (S.C.).

### *Analysis & Conclusions*

[26] The appellants advance three grounds of appeal under this heading:

1. Arrears claimed plus balance of unexpired term is $30,695.00 and civil law suits that involve sums greater than $25,000 should be heard by Nova Scotia Supreme Court.
2. See item 9 below citing juridical incongruence of referring a decision from an informal legal process such as Small Claims to a formal court such as the Supreme Court, whereby no record of testimony and limited evidence is available from the Small Claims Court yet the Supreme Court relies on such elements in its formal process.
3. The Appellant requests this case to be heard by the Supreme Court.

[27] The appellants assert the respondent's claim was not in the jurisdiction of the Small Claims Court because it exceeded $25,000. However, a claimant has the option of waiving any portion of their claim in excess of the $25,000 limit to bring their claim within the jurisdiction of the Small Claims Court. This is a strategic decision a litigant is entitled to make, and the respondents in this case did just that. The respondent having made that choice, the Adjudicator was conferred with the power to adjudicate the claim.

[28] Next, the appellants suggest that an appeal from the Small Claims Court to the Supreme Court creates "juridical incongruence", because it mixes an "informal" process with a "formal" one. There are a number of problems with this argument. First, jurisdiction refers to the Adjudicator's power to entertain, hear and determine the case, whereas this ground of appeal seems to question the jurisdiction of this Court to hear the appeal. Second, the appellants have not provided any authority to support his argument, and I am not aware of any such legal principle. Third, the various statutes and regulations of this Province frequently provide for a right of appeal to this Court from other less "formal" processes, such as administrative proceedings.

[29] The appellants' third ground of appeal under this heading is not a ground of appeal at all; it is a request for a hearing *de novo*.

[30] I find no jurisdictional error as alleged by the appellants.

**Error of Law**

***Law***

[31] The standard of review where a ground of appeal raises an error of law is correctness. On questions of law an adjudicator must be right: *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, [2005] N.S.J. No. 170 at para. 33.

[32] In the context of Small Claims Court appeals, the leading case on what constitutes an error of law is *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.) [*Brett Motors*]:

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[33] Saunders J. (as he then was) concluded as follows:

> 16 There was a great deal of evidence on this point during the adjudication. This pivotal issue was faced squarely by the adjudicator, as is reflected in both his Order and his Summary. He found, from the evidence, that the appellant was outside the six year prescription as set out in Section 2(1)(e) of that Act. … In coming to the decision that the act of repossession triggered the enforcement of Brett Motors' cause of action, it cannot be said that the learned adjudicator reached an unreasonable or untenable conclusion. I would therefore dismiss this ground of appeal.
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> [Emphasis added]

[34] Some decisions of this Court suggest that on appeals from Small Claims Court, a finding of fact may be reviewable where the adjudicator has made a palpable and overriding error. See *McInnis v. McGuire*, 2014 NSSC 437, [2014] N.S.J. No. 657, where Boudreau J. said:

> 21 Mistakes of fact are not reviewable absent palpable and overriding error: see *McNaughton v. Ward* 2007 NSCA 81:
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> > 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the

> evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen*, [2002] 2 S.C.R. 235 supra, and *H.L. v. Canada (Attorney General)*, 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result. …

[35] Of similar effect is Rosinski J.'s decision in *Gallant v. Martin*, 2010 NSSC 375, [2010] N.S.J. No. 566 [*Gallant*]:

> 8 As noted above, this Court is only entitled to consider the "materials" from the Small Claims Court hearing. These "materials" usually consist of all the exhibits filed in the hearing, as well as the Adjudicator's Decision and Summary report of the findings of law and fact that they have made in a case on appeal, including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by the Adjudicator -- see sections 32(3) and (4) of the Act. Notably, this Court does not have the benefit of the transcribed testimony of witnesses at the Small Claims Court trial.
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> 9 This puts an appeal court at a substantial disadvantage in relation to the Adjudicator who had the benefit of seeing the testimony of the witnesses (in particular the testimony of witnesses in relation to the exhibits in the case) and who made findings of credibility that may be determinative of the outcome of the case.
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> 10 A high level of deference must be accorded to the Adjudicator's findings of fact. Nevertheless, <u>any material finding of fact that is based on palpable and overriding error constitutes an error of law.</u>
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> 11 As Robertson, J. observed at para. 18 in *Paradigm Investments* supra.:
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> > I have also considered the law on what constitutes palpable and overriding error. I refer to McPhee v. Gwynne-Timothy, 2005 NSCA 80, at paras. 31, 32 and 33:
> >
> > > 31 A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is

> only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene ...
>
> 32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial ... Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
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> 33 On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error.

[36] However, in *Hoyeck v. Maloney*, 2013 NSSC 266, [2013] N.S.J. No. 421 [*Hoyeck*], Moir J. favoured a somewhat different approach:

> 23 We do not review Small Claims Court findings of fact for palpable and overriding error. Our jurisdiction to review for error of law may extend to the situation "where there is no evidence to support the conclusions reached": *Brett* at para. 14. That would have to be apparent from the summary.
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> 24 In conclusion on this point, fact-finding in Small Claims Court is only reviewed when it appears from the summary report and the documentary evidence that there was no evidence to support a conclusion. An insufficient summary may attract review on the third ground, fairness, but it is not insufficient just because it is less satisfying than a transcript.

[37] While opinions diverge on whether I am free to review the Adjudicator's findings of facts for a palpable and overriding error, it is clear I may intervene where there was no evidence to support the conclusions reached. This is consistent with affording a high level of deference to the Adjudicator. In *R. v. O'Brien*, 2011

SCC 29, [2011] S.C.J. No. 29 at para. 17, Abella J. reiterated the importance of deferring to the trial judge's (or in this case, the Adjudicator's) findings:

> A trial judge has an obligation to demonstrate through his or her reasons how the result was arrived at. This does not create a requirement to itemize every conceivable issue, argument or thought process. Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts. As Binnie J. noted in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55, trial judges should not be held to some "abstract standard of perfection".

***Analysis & Conclusions***

[37] The appellants advance 19 separate grounds of appeal under this heading. I will consider each ground of appeal in turn.

[38] The first ground of appeal is a submission and not a proper ground of appeal:

> 1. The appellant maintains this dispute involves more elements of law than a limited focus on if a draft offer to lease, is valid and if it constitutes a bonafide offer and a contract.

[39] Further, it is clear the Adjudicator considered other issues.

[40] The second, third and thirteenth grounds of appeal attack the certainty of the terms of the Offer to Lease, and specifically, the certainty of rent:

> 2. As to the certainty of price, rent was negotiated as $700, payment made by the appellant for that amount and then later contrary to the offer was increased by the respondent to $805.
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> 3. Space is not certain either. The appellant sought only 300 to 700 sq ft of space, and 1800 sq ft was provided at the rental rate for 700 sq. ft. e.g. $10/sq ft equivalent for 700 sq. ft. Yet, common charges are based on 1800 sq. ft. and not 700 sq. ft. But, the respondent told the appellant not to worry that rent charges would be based on 700 sq. ft.
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> 13. The offer to lease was not clear in its essential terms and negotiations continued. The appellant disputed the draft offer terms, and the respondent assured the appellant that offer amendments being negotiated would be satisfactorily addressed. Yet, no subsequent changes of terms were made. Weeks later the respondent pushed to have the appellant sign a formal lease.

[41] That the Offer to Lease did not constitute a valid and binding agreement was the crux of the appellants' argument at the Small Claims Court hearing. The Adjudicator had the benefit of hearing the evidence of the parties, and based on all of the evidence he made a specific finding that the Offer to Lease contained all fundamental terms and that there was no ambiguity, and in particular, no ambiguity regarding rent. The Adjudicator found that the Offer to Lease was sufficiently clear in its essential terms, and this was a finding of mixed fact and law: *Gavel v. Nova Scoti*a, 2014 NSCA 34, [2014] N.S.J. No. 152 at para. 27. The Adjudicator's findings are not appealable unless they amount to an error of law in that there was no evidence to support his findings, or he disregarded, overlooked or misunderstood the relevant evidence. There was evidence to support the conclusions reached, such as the evidence of a completed payment of $805, and a returned cheque in that same amount. I find no basis to disturb the Adjudicator's findings.

[42] The following grounds of appeal raise issues not argued at the hearing; they cannot, therefore, be properly considered as errors of law:

> 4. The appellant was unemployed at the time of signing the offer, under duress from spousal pressure to secure income for the family and had hoped the tax business would be successful and the respondent had represented to the appellant that the business traffic was strong at the mall location. Which it was quickly discovered was not.
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> 6. Implied reliance based estoppel – the respondent (landlord) informed the appellant (tenant) in negotiations of the draft offer to lease that he would discuss inclusion of a term allowing the tenant to give notice to vacate if business should be deemed unsustainable. In this case because there was misrepresentation, over forecasted sales potential and employee fraud, the appellant gave the respondent notice. The appellant relied on the respondent's statements in choosing to remain in the premises until July 2012, and the respondent should be estopped from collecting rent beyond the point in time when the appellant gave notice.
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> 8. Misrepresentation and negligence (not acting as a reasonable person would) by the respondent choosing to enforce draft lease offer as a contract when previously respondent had indicated to tenant if business was poor there would be flexibility for tenant to vacate premises.
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> 11. This case involves quantum meruit (a measure of damages where an express contract is not completed) and unjust enrichment (by requesting enforcement of a full contract, respondent has been unjustly enriched at the appellant's expense). Equity and good conscience require restitution to be estopped at the period when the appellant gave notice to terminate to the landlord. e.g. July 2012.

> 12. This case also involves business frustration which renders a contract null and void. e.g. Fraud by a key employee and sudden departure left the business inoperable. The respondent did not allow the appellant either business hour reductions or vacating of the space. Also supported by the appellant's poor tax business that did only 20% of its targeted sales in the space.
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> 18. When the appellant gave notice to the respondent that he was repudiating the offer and vacating the premises, he had a right to do so under clause 9 given that all terms and conditions requested by the appellant had not been satisfied.
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> 19. Per clause 18 of the draft Offer to Lease, "this Guarantee shall be limited to the payment of rent." The Appellant repudiated the Offer, with notice vacated and no future rents are due. The damages award are for loss of future rent to other tenants, not the Appellant, and isn't an obligatory 'rent' personally bound onto the Appellant under guarantee for this loss.

[43] The fifth ground of appeal asserts repudiation and abandonment:

> 5. Given the space rental was repudiated by the appellant and with notice abandoned the premises due to unsatisfactory business conditions—which was stipulated as an essential term of occupancy during negotiations with the respondent, then reasonableness should prevail.

[44] Whether the appellants abandoned the premises or not, and for what reason, is not relevant in light of the Adjudicator's finding that all rental payments for the full term of the Offer to Lease were owing.

[45] The seventh ground of appeal relates to the timing of the respondent's appeal:

> 7. Laches concerns the reasonableness of the delay (July 2012-Aug 2014 = $805/month x 25 months = $20,125) in the plaintiff's legal action. The [respondent] waited and optimized its claim timeline until a full value of $25,000 in damages was crystallized before appearing in the Court. The [respondent] could have taken the matter to court anytime after July 2012 and not waited.

[46] Thus, the appellants say the respondent should have pursued its action earlier, rather than waiting until two years had passed so its claim would be "optimized". There is no merit to this argument, first because the respondent was within the prescribed limitation period, and second because the respondent argued—and the Adjudicator found—that the respondent had the right to claim all

rental payments for the full term of the Offer to Lease. The timing of the action was irrelevant.

[47] The ninth ground of appeal involves an attempt to adduce evidence (emails) not tendered at the Small Claims Court hearing:

> 9. Emails exchanged in negotiation are not new evidence as these elements were discussed during testimony by the appellant, and the appellant hereby grieves that the Small Claims Court is an informal dispute resolution process which does not record testimony and renders appellants reliant on the adjudicator's interpretations of testimony in rendering a decision.

[48] The appellants argue the evidence is not new because reference was made in oral testimony to the existence of the emails. However, the fact remains that for whatever reason the emails themselves were not introduced into evidence. It is important to emphasize that an appeal of an adjudicator's decision is not a new hearing and an appellant does not have the absolute right to introduce new or fresh evidence on appeal. An appeal of an adjudicator's decision is based on the record. The record comprises the Adjudicator's Summary Report, the exhibits presented during the hearing, the pleadings, and certain other materials contained in the Small Claims Court file: *Parslow v. Galeb Construction 1998 Ltd.*, 2014 NSSC 390, [2014] N.S.J. No. 576 at para. 25 [*Parslow*].

[49] Section 22(8) of the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as amended, allows for the admission of new material on appeals to the Supreme Court:

> 22 (8) A judge may direct what additional material may be filed and may request a restatement of the case from an adjudicator.

[50] Proposals to introduce new evidence beyond the record on appeal are dealt with under *Civil Procedure Rule* 7.27. Rule 7.27 provides that an appellant who proposes to introduce new evidence on appeal must, at the time of filing the notice of appeal, file an affidavit describing the proposed evidence, and providing additional evidence in support of its introduction.

[51] This Court must not admit fresh evidence on an appeal of a Small Claims Court decision absent special circumstances. I refer to *Killam Properties Inc. v. Patriquin*, 2011 NSSC 338, [2011] N.S.J. No. 502, per McDougall J.:

> 7 As Justice Beveridge indicated in his decision of Lacombe v. Sutherland, [2008] N.S.J. No. 603 at para. 29, there are occasions when additional affidavit evidence may be admitted. Again, I use the word "may" because it is a discretionary thing. It depends on the particular judge who hears the appeal. A request has to be made to that particular judge to adduce fresh evidence. If it is evidence that would help to establish a jurisdictional error or a breach of natural justice the request might be found to have merit. Any additional type of affidavit evidence would only be admitted if truly exceptional circumstances exist.
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> 8 The *Small Claims Court Act* and its Regulations do not contemplate an appeal by way of trial *de novo*. It is based on the record. This is not a carte blanche refusal to admit additional evidence but it would only be in very rare and exceptional circumstances that further affidavit evidence would be admitted. There are good policy reasons for this. If affidavits were routinely accepted the appeal would soon morph into a trial de novo. It would be tantamount to an appeal based on a transcript. The Small Claims Court is not required to record the evidence. There is no transcript. To allow affidavit evidence to be filed on appeal to the Supreme Court would add unnecessarily to the expense of the proceeding. It would also defeat the principle purpose for the Small Claims Court which is to provide an inexpensive and informal venue for people to present cases without the need to incur the expense of legal representation.

[52] In *Doyle v. Topshee Housing Co-operative Ltd.*, 2012 NSSC 371, [2012] N.S.J. No. 570, Scanlan J. (as he then was) addressed an application to admit fresh evidence under Rule 7.27 on the hearing of a Small Claims Court appeal. Scanlan J. said:

> 6 Tests for the introduction of new evidence was stated in the Supreme Court in R. v. Stolar (1988), 40 C.C.C. (3d) 1. This decision was recently referred to by the Nova Scotia Court of Appeal in Hatfield v. Mader, 2012 NSCA 66 at para. 22. The Court said:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen, [1964] S.C.R. 484.
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[53] Scanlan J. declined to admit the evidence because it was clear that the evidence was within the applicant's possession and knowledge at the time of the Small Claims Court proceeding (para. 9). Admitting the evidence would "have the effect of transforming the present appeal process into a hearing de novo" (para. 10).

[54] More recently, Wood J. stated in *Electec Engineering Inc. v. Costa*, 2015 NSSC 130, [2015] N.S.J. No. 196 [*Electec*]:

> 14 The test for admission of fresh evidence on the hearing of a Small Claims Court Appeal was set out by Justice J.E. Scanlan, as he then was, in *Doyle v. Topshee Housing Cooperative Limited* 2012 NSSC 371. In that case he adopted the same test applied by the Nova Scotia Court of Appeal for the admission of fresh evidence. One of the requirements is that the evidence should not be admitted if, by due diligence, it could have been adduced at the trial. In this case the affidavit of Mr. Joudrey fails that element of the test and cannot be admitted as fresh evidence.

[55] The appellants acknowledge that the emails were available at the time of the Small Claims Court hearing. Furthermore, the appellants have not followed the process set out under Rule 7.27. The fresh evidence cannot be admitted.

[56] Under this same ground of appeal, the appellants state:

> … the appellant hereby grieves that the Small Claims Court is an informal dispute resolution process which does not record testimony and renders appellants reliant on the adjudicator's interpretations of testimony in rendering a decision.

[57] A similar criticism is advanced under the tenth ground of appeal:

> 10. Small Claims appeals to the Supreme Court, represent a legal incongruence of two distinct judicial processes, and process merger lacks juridical coherence, i.e. informal process of the Small Claims leaves appellants with deficient evidence and testimony to present in the Supreme Court appeal process because of the Small Claims' informal nature. And, appeal to the Supreme Court is final. Appellants may not get an opportunity to be formally heard before a formal court and must instead rely on an adjudicator's informal interpretation with no recorded testimony.

[58] These criticisms of the Small Claims Court's "informal" process have nothing to do with any error of law. The appellants also re-assert "juridical

incongruence". I have already found this argument to have no merit, and it also has nothing to do with any error of law.

[59] The next ground of appeal states:

> 14. There is no valid contract. And if the contract is deemed valid it must be considered that due process was not followed as the appellant was not advised to have independent legal advise. The appellant is 'lay person', and should have been advised to seek legal advise.

[60] The law holds that the absence of legal advice does not necessarily render a contract unconscionable. It can be a factor relevant to substantial inequality, but there are other factors to consider as well, such as the litigant's "poverty" and "ignorance" (CED Contracts VIII.3 at paras. 547-48). Further, the unconscionability analysis does not end with a finding of substantial inequality; consideration must also be given to the fairness of the resulting agreement.

[61] The Adjudicator found that in the circumstances there was no duty on the respondent to ensure Mr. MacNeill obtained independent legal advice. There was no substantial inequality in light of Mr. MacNeill's education and work experience. In so holding, the Adjudicator did not err.

[62] Grounds 15, 16 and 17 deal with the lack of a subsequent executed lease:

> 15. In the ongoing discussions about the lease as was noted in testimony by the appellant, the respondent's lawyer in March 2012 cited clause 9 of the draft Offer to Lease, 'Execution of Lease' to the tenant, which provides that 'a lease is to be executed'. Yet, no lease was executed.
>
> 16. Clause 9 of the draft Offer to Lease above the scratched off content reads 'This Offer is irrevocable for ninety (90) days from the date hereof, after which time it may be revoked by notice in writing to the Landlord at any time prior to its acceptance. Upon acceptance by Landlord of this Offer, Tenant shall be required to execute the Landlord's standard form of net lease (the 'Lease') subject to reasonable negotiation of the terms and conditions not addressed herein."
>
> 17. The appellant did have issue with the draft Offer and did communicate to the respondent that there was the need for other terms and conditions to be added to the draft Offer, and the respondent had indicated he didn't foresee any problems with the appellants requests in this regard. However, when these additional terms and conditions which included; duration, notice to vacate and kick-out terms were not included, the appellant informed the respondent that he was not satisfied with signing a lease agreement in lieu

> of the absence of these terms. The respondent stood firm, ignored these requests and demanded the appellant sign the lease.

[63] In essence, the appellants argue the Offer to Lease was, in effect, an agreement to agree. Where the understanding of the parties is that their legal obligations are to be deferred until a formal contract has been executed, no binding contract will have been created, even if the parties may have thought they were bound. In such circumstances, the purported contract is often characterized as a mere "agreement or agree", which is not legally enforceable: CED Contract I.3 at para. 9.

[64] The Ontario Court of Appeal was confronted with this argument in *Enticor Properties Inc. v. Quik-Run Courier Ltd*. (2005), 195 O.A.C. 138, [2005] O.J. No. 530 (C.A.):

> 4 Most significantly, the application judge erred in finding that the offer to lease was a "prior contract," another essential component of rectification. In Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) this court said:
>
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself: . . .
>
> 5 Here, the offer to lease included a term providing that "this offer shall be void" if the parties were unable to agree on the formal lease within a specified time period. In the face of this provision, we conclude that the execution of the formal lease was more than a mere formality, and that the offer to lease constituted no more than an agreement to agree. In light of this conclusion, the respondent's application for rectification of the formal lease based on the earlier written offer to lease was incapable of establishing that the offer was a prior contract. The landlord could not therefore establish all of the elements of rectification.
>
> [Emphasis in original]

[65] Clause 9 of the Offer to Lease does not provide that the Offer will be void if the Tenant does not execute a formal lease. This suggests that the Offer is more in the nature of a binding contract than an "agreement to agree", and the signing of a formal lease is a mere formality.

[66] In *1175777 Ontario Ltd. v. Magna International Inc.* (2006), 153 A.C.W.S. (3d) 354, [2006] O.J. No. 4732, aff'd 2008 ONCA 406, [2008] O.J. No. 1991, Horkins J. for the Ontario Superior Court of Justice considered the effect of the parties' subsequent conduct:

> 100 There are a number of guiding principles set out by the court in Canada Square, supra that are relevant to my consideration. At pp. 260-262 the Court states:
>
> > ... As Waddams, The Law of Contracts (1977) at p. 193 shows, there has been a difference of judicial opinion as to the relevance of the parties' conduct in interpreting a prior writing. This is an area where it seems to me it is not sensible to think that there should be an absolute rule one way or the other. Such evidence, in some cases, may be of value in shedding light on the parties' prior intention and in other cases be useless and, possibly, misleading. I think Waddams puts the matter fairly in the following passage at p. 194:
> >
> > > Often the subsequent conduct will not be conclusive, and it should be treated with caution, but it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date. It is suggested that caution is appropriate in drawing conclusions from subsequent conduct, for the fact that a party does not enforce his strict rights does not prove that he never had them.
> >
> > Corbin on Contract (1963), vol. I, at p. 93 observes that "[t]he fact that [the parties] have ... acted [by rendering some substantial performance or by taking other material action in reliance upon their existing expressions of agreement] is itself a circumstance bearing upon the question of completeness of their agreement. "
> >
> > ... Notwithstanding that the parties may have thought they were bound, if the essential terms of the alleged contract lack certainty, either because they are vague or because they are obviously incomplete, the result will not be a binding contract: 9 Hals., 4th ed., para. 262; Trietel, The Law of Contract, 5th ed. (1979), at. p. 40; Corbin on Contracts at p. 394.
> >
> > Trietel, The Law of Contract, at p. 41 says:
> >
> > > But the courts do not expect commercial documents to be drafted with strict precision, and will do their best to make sense of them.

> This is particularly the case if the parties have acted on the agreement.
>
> 101 I also recognize that I must construe the October letter "fairly and broadly". As the court stated in *Canada Square*, at p. 261 quoting *Hillas & Co. v. Arcos Ltd.* (1932), 147 L.T. 503 (U.K. H.L.) at p. 514:
>
> > ... [I]t is clear that the parties both intended to make a contract and thought that they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat* [words are to be understood that the object may be carried out and not fail]. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.
>
> 102 In summary, while the actions of the parties may shed some light on whether they thought a binding agreement existed, an alleged contract that lacks the necessary certainty will fail.

[67] Again, the Adjudicator found that all of the essential elements of a lease were contained in the Offer to Lease. The Offer to Lease was sufficiently certain. The Adjudicator further found that the parties' subsequent conduct supported the existence of a binding agreement. The Adjudicator applied the correct legal principles, and did not err in law.

[68] Under these grounds of appeal, the appellants again seek to introduce new evidence, i.e. evidence that they had issue with the Offer to Lease and communicated this to the respondent. For the same reasons as discussed above, this evidence cannot be admitted at this stage.

## Natural Justice

### *Law*

[69] An allegation of a failure to follow the requirements of natural justice does not engage the standard of review analysis in the traditional sense. The burden is

for the court to determine if the process was fair to the claimant: *Inaxess Marketing Inc. v. Curtis Custom Designs Inc.*, 2015 NSSC 99, [2015] N.S.J. No. 129 at para. 15.

[70] Rosinski J. recently considered the meaning of natural justice in *Weller v. Moser (c.o.b. Hailey's Auto Sales)*, 2015 NSSC 120, [2015] N.S.J. No. 162 [*Weller*]:

> 11 In relation to the term "the requirements of natural justice", I note that the *Small Claims Court Act* itself contains some reference in this respect.
>
> 12 Section 2 of the Small Claims Court Act sets out the purpose of that legislation in the following words:
>
> > 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.
>
> 13 Our Court of Appeal has recently commented on what is "natural justice" in *Waterman v. Waterman*, 2014 NSCA 110, per Beveridge J.A.:
>
> > 63 Natural justice has two important and distinct rules: an adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard. These rules have been historically described by the courts using Latin phrases. Gonthier J., in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, described the rules as follows:
> >
> > > [66] ...It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem)

[71] Saunders J. (as he then was) in *Brett Motors, supra*, explored the meaning of natural justice in the context of Small Claims Court hearings:

> 12 I think it helps to recall that the small claim court's purpose is to provide an informal and inexpensive forum for the resolution of disputes falling within its jurisdiction. It is meant to be accessible to those citizens who need it. To keep costs down there is no transcript of the evidence. Depending on whether the parties are represented by counsel, or other circumstances, an adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.
>
> …
>
> 17 I turn now to a consideration of the suggestion that Brett Motors was denied natural justice. With respect I find no merit to this submission. Once again it

> seems to me the appellant has confused the issue of repossession or its effect upon the lease/guarantee, and the "cause of action" issue that arises from the limitation defence pleaded by the respondent. Furthermore, the cases referred to in the appellant's notice of appeal were neither cited nor mentioned during the adjudication. In the absence of further evidence, both the facts and the issues from those cases may well have been materially different from the facts and issues placed before adjudicator Cooke in this case. One cannot, now, look at other cases and say that those "apply" or that they ought to be taken as "binding precedent" in accordance with the doctrine of stare decisis. It is trite to say that the facts of every case may be materially different. One would have to consider the evidence led in those other cases to be able to say whether the issues confronting the adjudicator were the same. It is not appropriate to suggest, now, that they were. This ground of appeal should be dismissed.

[72] In *Gallant*, *supra* at para. 12, Rosinski J. quoted with approval para. 12 of *Brett Motors*, but then noted at para. 13:

> 13 Nevertheless, a minimum level of procedural fairness must always remain. The parties are equally entitled to such protections to ensure the outcome is "just" as between them.

[73] Of similar effect are the findings of Van den Eynden J. in *Parslow*, *supra*:

> 33 "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."

***Analysis & Conclusions***

[74] The appellants' eleven grounds of appeal under the heading of denial of natural justice may be grouped together as follows:

1. The respondent's failure to recommend obtaining independent legal advice before signing the Offer to Lease (ground of appeal 1);
2. The lack of a commercial tenancy statute, suggesting human rights or constitutional infringements (ground of appeal 2);
3. Adjudicator's bias (grounds of appeal 3, 4, 5, 6 and 11);
4. The lack of a recording or transcript of the hearing (ground of appeal 7);
5. No proof the appellants had been properly served (ground of appeal 8); and
6. The Adjudicator's failure to consider the appellants' submission that the respondent is a "litigious entity" and Adjudicator's finding that the Offer to Lease was a binding agreement (grounds of appeal 9 and 10).

[75] The respondent's alleged failure to recommend obtaining independent legal advice has nothing to do with the procedural fairness of the Small Claims Court hearing. Furthermore, this argument was already raised—and dealt with—under the heading of error of law.

[76] The appellants suggest that the Legislature's failure to enact a commercial tenancy statute amounts to discrimination or infringement of his constitutionally protected rights and freedoms. Mr. MacNeill does not indicate on what basis he has been discriminated against, or which of his rights have been infringed upon. Furthermore, this has nothing to do with the procedural fairness of the hearing and is not a proper issue for appeal.

[77] The appellants allege the Adjudicator was biased. As the party alleging bias, the appellants bear the onus of proof: *Weller*, *supra* at para. 14. The Adjudicator has taken an oath to impartially try all matters that come before him; thus, I must begin with the presumption that he acted impartially: *ibid*. at para. 17.

[78] The appellants must show a reasonable apprehension of bias. The question is whether a reasonable and informed person, with knowledge of all of the relevant circumstances, viewing the matter realistically and practically, would reasonably conclude the Adjudicator was biased: *ibid*.

[79] Mr. MacNeill alleges the Adjudicator disfavoured him "by questioning his argumentativeness and chastising his credibility", while at the same time "revering" the respondent's counsel and "favoring" the respondent. Mr. MacNeill speculates about potential connections between the Adjudicator and the respondent's counsel. I am not prepared to find bias based on pure speculation. Further, I disagree with Mr. MacNeill that it was inconsistent for the Adjudicator to find Mr. MacNeill did not require independent legal advice, while at the same time finding he was argumentative and not credible. These findings are not mutually exclusive. In short, the appellants have not demonstrated a reasonable apprehension of bias.

[80] The appellants further argue that that the failure to record the Small Claims Court hearing amounts to a violation of natural justice. This is not supported in law. It is accepted that in order to serve the goals of providing an informal and inexpensive forum for the adjudication of "small" claims, testimony is not recorded. I am guided by the comments of Saunders J. (as he then was) in *Brett Motors*, *supra*:

> 12 I think it helps to recall that the small claim court's purpose is to provide an informal and inexpensive forum for the resolution of disputes falling within its jurisdiction. It is meant to be accessible to those citizens who need it. To keep costs down there is no transcript of the evidence. Depending on whether the parties are represented by counsel, or other circumstances, an adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.

[81] And in *Hoyeck*, *supra*, Moir J. stated:

> 20 "... [T]he jurisdiction of this court is confined to questions of law that must rest upon findings of fact as found by the adjudicator": Brett Motors Leasing Ltd. v. Welsford, [1999] N.S.J. No. 466 (Saunders J.): para. 14. Despite what s. 3(1) of the Small Claims Court Act says, it is not a court of record in the ordinary sense of that phrase. <u>The testimony is not recorded. This, too, accords with the economical purpose of the Act.</u>
>
> [Emphasis added]

[82] Most recently, Wood J. in *Electec*, *supra*, said:

> 18 The lack of a recorded hearing and transcript may limit the appellate review that can be carried out, at least with respect to challenging findings of fact. To the extent that this might be seen as compromising the fairness of the appeal, it is simply a function of the statutory regime which established the Small Claims Court.

[83] The appellants argue the respondent did not furnish proof that the Notice of Claim was properly served on them. However, the appellants clearly had notice of the proceeding. They filed a defence. They showed up to the hearing represented by counsel, and they did not raise lack of service at that time.

[84] Finally, the appellants criticize the Adjudicator's conclusions, and in particular, the failure to consider their submission that the respondent is a "litigious entity", and the finding that the Offer to Lease was a binding agreement. These grounds of appeal relate to the substance of the Adjudicator's decision, and do not relate to procedural fairness.

[85] The appellants have failed to establish there was a failure to follow the requirements of natural justice.

**Conclusion**

[86] For these reasons, the appeal is dismissed. Given the respondent's success, the respondent is entitled to costs in accordance with the *Small Claims Court Act* and *Regulations*.

A. LeBlanc, J.