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CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Foster v. Kiehl, 2001 NSSC 149]

BETWEEN:

KYRA FOSTER

APPELLANT

- and -

KENT KIEHL

RESPONDENT

DECISION

HEARD: **before the Honourable Justice F.B. William Kelly on September 28th, 2001**

DECISION: **October 29th, 2001**

COUNSEL: **Blair H. Mitchell, for the Appellant**
Kevin A. MacDonald, for the Respondent

Kelly, J.:

[1] Ms. Foster appeals the January 29th, 2001 dismissal of her Small Claims Court action in which she claimed to be the owner of the mixed German Shepherd dog,

JACOB VAUGHN KIEHL, nicknamed "Jake", and the Adjudicator's award of that dog to the Respondent, Kent Kiehl. The matter was heard by Adjudicator Alexander Beveridge, Q.C., on September 26th, 2000.

[2] The Notice of Appeal specifies three grounds of appeal in considerable detail. In general, Ms. Foster claims a breach of all three of the allowed categories of grounds of appeal found in s. 32(1) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430: jurisdictional error, error of law and failure to follow the requirements of natural justice.

[3] The Appellant has appealed to this Court to allow further evidence on this appeal hearing, consisting of three affidavits of the appellant, and three affidavits of other persons. Pursuant to the procedural recommendation in *Thies* v. *Thies*, [1992] N.S.J. No. 82, 110 N.S.R. (2d) 177 (C.A.), I have reserved judgment on this application and heard that evidence which will be discussed below. The process I will follow will be as described by Freeman, J.A, at p. 3:

> The admission of fresh evidence is set out by McIntyre, J., again writing for the Supreme Court of Canada, in *R.* v. *Stolar* (1988), 40 C.C.C. (3d) 1 at p. 8:
>
> > ... the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, she court (sic) should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to the disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trail, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact.

[4] The Appellant made a claim August 9th, 2000 to the Small Claims Court that Jake was given to her by the Respondent and sought a declaration of ownership of the

dog. The Respondent counterclaimed that Jake was "never given" to the Appellant, but was stolen from him. He sought the return of Jake and the costs of approximately $10,000 that he incurred in attempting to recover him.

[5] The matter was heard on September 2nd, 2000 and Mr. Beveridge's Decision and Order was dated January 29th, 2001. He dismissed the Appellant's claim for a declaration of ownership of Jake and allowed the counterclaim in part - finding the Respondent the owner of Jake and ordering his return. The Order constitutes the findings of the learned Adjudicator and is part of the record. I will not read it into the record in full, but in the course of my reasons, I will summarize parts of it and quote others.

[6] Many of the complaints referred to in the appeal deal with the admission of various statements and documents from the Respondent and third parties by the Adjudicator, both at the hearing and subsequent to it, and before his Order was issued. The hearing then concluded with the Adjudicator reserving his decision. The following are background facts stated in the order:

> In early August, 2000 the Claimant commenced this action for a declaration that she was owner of the dog named "Jake" and that the Defendant had made a gift of the animal to her. The Defendant counterclaimed for an order for the return of the animal.
>
> According to the Claimant the Defendant resided with her from February to May of 1999 in a platonic relationship or arrangement, that is he was sharing space. According to the Claimant the Defendant was abusive of his dog and that she ended up caring for it most of the time he was in the apartment. The Claimant testified that because of the abuse, which she says the Defendant showed the dog, she had asked the Defendant to leave the apartment and he had refused but, in any event, did move out. She testified that a few days after moving out, the Defendant showed up unannounced and uninvited and intimidated her and was calling her five times a day. She indicated that she requested the RCMP to intervene and they stopped him from calling her. She indicated that after two weeks after the RCMP were involved the telephone calls ceased and she had no further involvement with the Defendant over the summer. She testified that in August of 1999, the Defendant yelled at her from across the street indicating that he had to give the dog up as he had no place to stay that would accommodate it and that he had no one else to leave the dog with. She testified that a few weeks later he again spoke to her indicating that no one wanted the dog and that he would have to take it to the pound unless she took it. She testified that he gave her an address at which she could attend to pick up the animal and that he would be absent and that he would arrange not to be there. She testified that she attended at the address and approached the backyard and that Jake jumped

> over the fence and got in her car. She had earlier indicated in her testimony that during 1999 she was fearful of the Defendant and that she had been harassed. In the hearing before me she continued to express fear of the Defendant.
>
> There was no witness to the alleged conversation in which the gift was purportedly made nor was there a witness to the circumstance of how Jake came into the Defendant's possession.
>
> Ms. Dehmel, on behalf of the Defendant, attempted to file in support of the Defence a statement by the Defendant himself and six letters, four of which were from colleagues of the Defendant at the Department of Psychiatry at the University of British Columbia, one of which being from a John McDonald, Ph.D., Research Neuroscientist at the University of California, San Diego, and the last being, while not on University of British Columbia letterhead, also a colleague at the University. These materials were objected to by counsel for the Claimant as being inadmissible. I indicated to the Defendant's agent and counsel for the Claimant that I was prepared to grant an adjournment to have the attendance of the Defendant to give evidence from Vancouver and/or any of the other authors of the letters in question, should the objection of the Claimant continue. I granted a short recess for the Claimant's counsel and the Claimant herself to review the materials that were being sought to be introduced. Upon return to the courtroom, Counsel for the Claimant indicated that they withdrew the objection to the entering of the materials.

[7] After summarizing these facts, the Adjudicator stated that the Appellant contacted him personally advising him that she only agreed to the introduction of the materials because she was afraid of the Respondent's presence in Halifax if he was required to attend in the event of an adjournment. She also indicated she wished to give evidence to rebut the material presented by the Respondent at the hearing. The Adjudicator properly advised her that it was inappropriate for him to speak to her and that any submissions should be made through counsel.

[8] On October 3rd, 2000, Jason Gavras, a solicitor, wrote to Adjudicator Beveridge stating that he had been "approached" by the Appellant Foster to make representations to the Adjudicator regarding the September 26th hearing. He copied the letter to Ms. Dehmel, who had acted as agent for the Respondent at the hearing.

[9] The relevant portion of the letter reads as follows:

> Ms. Foster is concerned that she was not provided an adequate opportunity present her case and has asked that I bring her concerns to your attention.

I understand that the Defendant Kiehl was not in attendance and that his representative, Trish Dehmel, sought an adjournment so that he might attend to give oral evidence. Ms. Foster said that you allowed her and her counsel, Robert Carter, an opportunity to discuss this outside Court and that when they returned it was decided to waive Mr. Kiehl's attendance and to allow certain documents to go into evidence.

Ms. Foster further advises that, during the break to review the statement of Mr. Kiehl, most of the time was spent discussing whether it was safe to have Mr. Kiehl come to Halifax, and was not spent reviewing the extensive statement prepared by Mr. Kiehl.

Given these circumstances and the fact that Ms. Foster has not been provided with a copy of Mr. Kiehl's extensive statement and has not had an opportunity to respond to it (or to the other letters tendered to the Court), I would respectfully request that copies of these documents be provided to me so that Ms. Foster may have an opportunity to respond to them to complete her case.

[10] On October 11th, 2000 Mr. Beveridge replied to Mr. Gavras's letter as follows:

This will acknowledge receipt of your correspondence of October 3, 2000 with respect to the above.

At the hearing of this matter Ms. Foster was represented by counsel and any and all opportunities properly requested for the presentation of her case were made available to her and her counsel.

At the close of the Claimant's case, Ms. Dehmel commenced the conduct of the defence and sought to introduce as exhibits, statements or letters from various individuals who were not present in the courtroom, including a lengthy statement from the Defendant himself. All of these materials were unsworn. Mr. Carter, on behalf of Ms. Foster, objected to the introduction of the documentation in question. I indicated to the Defendant's representative that Mr. Carter's objections may well be well taken and that if the Defendant was relying entirely on the material being tendered and, in particular, on the statement of the Defendant as central to the defence, that I would grant an adjournment to have the authors of documents being tendered and/or and in particular the Defendant himself to attend at trial in order that their evidence could be properly taken and admitted.

It was put to the Claimant through her counsel, Mr. Carter, that the options available were the admission of the various documents being tendered without further proof but that the weight that they would be afforded would be according to the quality of the form of evidence, that is that it was unsworn and the authors were not present for

> cross-examination, or alternatively that the Defendant's request for adjournment to obtain the witnesses to present the defence would be granted. Mr. Carter and Ms. Foster adjourned for an hour to consider what the Claimant's position in response would be, and in particular had an opportunity to review the materials being tendered so as to formulate their position.
>
> Upon re-assembling in the courtroom counsel, on behalf of the Claimant said his instructions were to agree to the admission of the defence materials as opposed to facing an adjournment to have the Defendant, or other witnesses, present. At that time, no motion for the calling of any rebuttal evidence was made.
>
> With this correspondence I am delivering the original file to the Clerk's office and it will made available for the Claimant or her counsel's view, and in particular exhibits filed by the Defendant. Any response I will accept will be in the form of written submissions, that is argument, but to the extent that your correspondence is a request for presentation of rebuttal evidence, it is declined.
>
> If any submissions are to be made, they are to be copied to the Defendant's representative and she be afforded an opportunity response. If no submissions are to be made, please advise the Clerk of that.

[11] The Appellant's counsel, Mr. Mitchell, characterizes this exchange as a request to re-open the hearing to accept more evidence and that it was denied by the Adjudicator. Mr. MacDonald submits that a careful reading of this correspondence reveals that Mr. Gavras merely "request[ed] that copies of the documents" tendered by the Respondent be provided to him "so that Ms. Foster may have an opportunity to respond to them to complete her case". The Adjudicator responded by making them available, although he added, "to the extent that your correspondence is a request for presentation of rebuttal evidence, it is declined." Mr. MacDonald argues that was " a throw-away line" and submits no appropriate application to re-open the hearing was made.

[12] The Adjudicator noted in his Order that about a month after his letter of reply to Mr. Gavras's letter, the Appellant herself submitted to him "a five page letter covering a 26 page document entitled 'REPLY TO THE EVIDENCE TENDERED AT TRIAL'" which he noted consisted of some argument and constituted "the attempt to present fresh evidence".

[13] The procedural formalities of the Small Claims Court are significantly relaxed from those of other trial courts. Although a more explicit application to open for further evidence might have been expected, I am persuaded that the Adjudicator's

response of denying the request to re-open the hearing to allow rebuttal evidence indicates he considered the letter of Mr. Gavras a request to allow further evidence. I conclude in these somewhat unusual circumstances that I should treat the exchange as a request to re-open the hearing, which was denied. To the extent that this exchange of correspondence between the Adjudicator and Mr. Gavras is "new evidence" on this appeal, I allow it as I have essentially concluded above that it is part of the pleadings.

ISSUES

[14] Counsel for the Appellant usefully restated the grounds of appeal in his brief and I will use this restatement as the basis for my consideration of the issues. This restatement also reflected the basis of his extensive submissions to the Court:

1. Did the Learned Adjudicator err by failing to consider whether he had jurisdiction to grant an application by the Claimant to re-open her case and, in any event, failing to exercise such jurisdiction in the circumstances of this case?

2. Did the Learned Adjudicator err in law:

    (a) in receiving and considering hearsay evidence from the defendant, or on his behalf, which was not introduced on the hearing of the claim but on the submissions of the defendant subsequent to hearing, (submissions in reply) thereby allowing the defendant to re-open and to split his case;

    (b) in considering documentary evidence for the truth of its contents in assessing the credibility of the Claimant when he had ruled the same evidence inadmissible for the truth of its contents;

    (c) in drawing incorrect inferences from some portions of documentary evidence introduced by the Claimant that such evidence contradicted her testimony while failing to consider the evidentiary value of the remainder of the same documents which confirmed her testimony;

    (d) in drawing incorrect inferences from some portions of documentary evidence introduced by the Claimant that such evidence contradicted her testimony while failing to consider the evidentiary value of the remainder of the same documents which confirmed her testimony;

(e) in the application of the onus of proof

3. Did the Learned Adjudicator err in failing to follow the requirements of natural justice including:

(a) in making findings of credibility against the Claimant on the basis of allegation of facts which the Claimant was not given notice prior to giving her direct evidence, which were not put to the Claimant on cross-examination, or by the adjudicator, and to which she had therefore not been afforded the opportunity to respond;

(b) in receiving and considering hearsay evidence from the defendant beyond any waiver by the Claimant through her counsel and in excess of that required to conform to the inexpensive and informal adjudication of the proceeding;

(c) in drawing conclusions of fact or making findings of the Claimant's credibility or both on the basis of evidence submitted in whole or in part by the defendant only after the conclusion of the Claimant's evidence and to which the Claimant had no opportunity to respond;

(d) in admitting new evidence from the defendant while refusing to accept additional evidence from the Claimant.

CONSIDERATION

[15] After discussing the issue of jurisdiction with counsel, I am satisfied there is no failure of jurisdiction here. The submission of the Appellant's counsel is that the failure of jurisdiction was that the Adjudicator failed to consider whether he had jurisdiction to grant an application to re-open the Applicant's case after the hearing but before the decision. As noted above, this request was advanced in a letter written by the Appellant's counsel Mr. Gavras, and the Adjudicator also responded by letter.

[16] As I understand the argument of the Appellant's counsel, it is his submission that the Adjudicator did not properly consider the application to re-open the hearing. It is clear from the Adjudicator's response, the letter of October 11th, 2000, that he gave the request *some* consideration. He reviewed the facts and noted that he had given the Appellant the option of allowing the Respondent's written materials to be

entered as evidence, or to allow the matter to proceed by way of an adjournment in order to allow the Respondent to present his evidence in another form.

[17] In my opinion the Adjudicator did give some consideration to the request to present rebuttal evidence, but exercised his discretion not to allow it. If this is so, then the challenge can be more properly characterized as a challenge to his exercise of discretion, a potential 'error of law' and not a jurisdictional error.

[18] In *R.* v. *Travers*, [2001] N.S.J. No.154 (C.A.), Oland, J.A., speaking for the court in that case, stated as follows:

> [36] However, I am of the view that the appropriate approach is that in *R.* v. *Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.) which held that, in certain circumstances, trial judges have a duty to raise *Charter* issues on their own motion. The appellant there had testified at trial that the police had refused to let him call a lawyer before they questioned him and obtained his statement. If true, his evidence indicated a clear infringement of his rights under s. 10(b) of the *Charter*. There was no evidence to indicate that he had waived those rights and no inquiry had been made regarding any such infringement and, if any found, whether his statement would still be admissible notwithstanding s. 24(2) of the *Charter*. At p. 372 of *Arbour*, the Ontario Court of Appeal stated:
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> > We are of the view that once there was admissible uncontradicted evidence before the court, indicating that there had been an infringement of the appellant's rights under s.10(b) of the *Charter* it was incumbent on the trial judge to enter upon an inquiry to ascertain whether such an infringement had occurred. This was not done. Accordingly, the statement should not have been admitted in evidence or, having been admitted, should not have been considered as evidence in the circumstances.
>
> It allowed the appeal under several grounds including the improper admission of the appellant's statement, quashed the convictions, and directed a new trial.
>
> [37] The appellant in *Arbour* was represented by counsel. I suggest that the principle enunciated in that case is equally applicable, if not more so, to proceedings involving a self-represented litigant who is unfamiliar with the law.
>
> [38] The approach taken in *Arbour* is not confined to Ontario. In the case under appeal in *R.* v. *Fraillon* (1991), 62 C.C.C. (3d) 474 (Que. C.A.), the trial judge on his own motion had entered a stay of fraud proceedings on the basis that the accused was not able to make full answer and defence due to delay in laying charges. At p.476, the Quebec Court of Appeal stated:

> Generally, it is open to the judge to point out to the parties that, in his mission to do justice, he is troubled by a point in the facts or in the law which neither one raised. This is especially the case where it is a right recognized by the *Charter*. But again, he must point it out to the parties and give them all the time necessary to completely argue the question before he rules on it. Here the parties to their great astonishment learned during the rendering of judgment that it was based, and based solely, on a question that the judge had only raised and resolved *proprio motu*. (Emphasis added)

[39] In *R.* v. *Boire et. al.* (1991), 66 C.C.C. (3d) 216, one of the issues considered by the Quebec Court of Appeal was whether, in the absence of a formal application, a court of appeal is entitled to itself raise the violation of a *Charter* right. At. p. 223, Brossard, J.A. commented that, considering that the *Charter* constitutes the most fundamental law in respect of human rights and in particular of accused in penal matters, he found it difficult to see how it could be argued that a court would not be entitled, in certain circumstances and subject to certain conditions, to itself consider its provisions when confronted with a flagrant violation of the *Charter*. He continued by quoting Ewaschuk, J. who wrote in *R.* v. *Boron* (1983), 8 C.C.C. (3d) 25 at pp. 32-3, 3 D.L.R. (4th) 238, 36 C.R. (3d) 329 (Ont. H.C.):

> ...Trial judge raising the issue
>
> ...a penal prosecution is based on the adversary system which requires party presentation of evidence and not active participation by a trial judge. Active participation often bespeaks the taking of sides, i.e., the appearance of partiality, which should be assiduously avoided. Assuming the goal of a penal prosecution is to do justice to both accused and Crown, justice is best achieved by the non-involvement of the trial judge in the presentation of evidence or the raising of legal issues. However, to do justice in the particular case, judicial intervention, rare though it should be, may be warranted in penal proceedings.

[40] I do not suggest that the merest intimation of a possible *Charter* infringement will found a duty upon a trial judge to enter immediately upon an inquiry where none of the parties before him has raised this argument. However, and without attempting to fully delineate the point at which the duty arises, where there is strong evidence of a *prima facie* case of breach of a *Charter* right relevant to the proceeding, a judge has a responsibility to raise the issue, invite submissions and, if appropriate, to conduct an exclusionary hearing in order to protect the integrity of the judicial process.

[41] The evidence before the trial judge in this case warranted his intervention. It came from the police officers themselves, was uncontroverted, and suggested that the

> police may have deliberately disregarded the appellant's rights under s.8 of the *Charter* in entering and searching his dwelling and in seizing the clock radio which was entered into evidence at trial. The judge erred in law when he proceeded without entering into an inquiry as to the possibility of breach of constitutional rights. The summary conviction appeal court judge erred in law when he upheld the verdict of the trial judge in these circumstances.

[19] Although the failure to re-open the hearing is not, strictly speaking, a *Charter* issue, it is a *Charter*-guaranteed fair trial issue, and raises a similar obligation on the part of adjudicators and judges to properly exercise their discretion where such issues arise. Consequently, based on the general nature of this appeal, I feel it appropriate to review the Adjudicator's exercise of his discretion in dealing with the refusal to re-open the hearing for further evidence.

[20] The test of an application to re-open a trial, or an appeal, was reviewed by the Nova Scotia Court of Appeal in *Griffin* v. *Corcoran* (2001), 193 N.S.R. (2d) 279. In that case the trial judge had refused to re-open the trial because the evidence in question could have been available at trial and was not brought forward. The Court of Appeal (at p. 296) concluded that this was not a sufficient basis to refuse to re-open. The Court concluded that a risk of procedural injustice to the other party was not sufficient based on the precedent of the Appeal Court in *Federal Business Development Bank* v. *Silver Spoon Desserts Enterprises Ltd.* (2000), 189 N.S.R. (2d) 133. There the attempt to re-open was made *after* the decision had been issued and affirmed on appeal. At paragraph 70, Cromwell, J.A., referred to *Silver Spoon* and commented as follows:

> The Court, speaking through Roscoe, J.A., stated the test for re-opening in those circumstances as follows:
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> > [10] ... In order to succeed on an application of this nature pursuant to rule 15.08(a), where all appeals and other statutory variation proceedings have been exhausted, in my view, the applicant must prove that:
> >
> > > (1) the matter of evidence arising or discovered subsequent to the original order, is such that it was not previously capable of being obtained or discovered by the exercise of reasonable diligence;
> > >
> > > (2) the new evidence is apparently credible; and

> (3) when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant, provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence, should not be applied as strictly.

[71] I think the test under rule 15.08 as discussed in **Silver** is more onerous than the test applicable to a reopening after trial but before final judgment. Nonetheless, the final principle stated in **Silver** recognizes that procedural injustice resulting from a party's lack of diligence in obtaining evidence at trial will give way to the interests of substantial justice where the "new" evidence is credible and so important that a substantial injustice will occur if the matter is not reopened.

[72] In my view, a similar measure of flexibility applies when the application to reopen is made, as it was here, after trail and decision but before formal judgment. The risk of procedural injustice, including that flowing from a lack of diligence in relation to discovery and presentation of the evidence and the risk of substantial injustice judged mainly by the significance of the evidence to the outcome of the case should both be considered. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice.

[73] It flows from this that, in my respectful view, the trial judge did not apply correct legal principles to the application to reopen. It would appear that she dismissed it simply on the basis of the plaintiff's lack of diligence without balancing the risk of substantial injustice to them if the matter were not reopened. It is, therefore, appropriate for this Court to consider the application to reopen on its merits and to exercise the trial judge's discretion in relation to it on proper legal principles.

[74] For reasons set out earlier, the trial judge did not err in concluding that the evidence which the plaintiffs seek to adduce on the reopened trial ought to have been available at trial with reasonable diligence on their part. Moreover, their lack of diligence does not simply relate to the preparation and presentation of their own case, but also to their failure to live up to their obligations to disclose relevant documentation during discovery. To state it bluntly but accurately, what the plaintiffs ask here is an affront to basic principles of civil litigation. In these circumstances, only evidence showing that a substantial injustice will occur would justify reopening in the face of the plaintiffs' lack of diligence and breach of obligation to disclose relevant documents.

> [75] The question becomes then, whether the proffered evidence meets this standard. I note that even the plaintiffs do not make this claim. As expressed in the plaintiffs' factum in this Court, the proffered evidence, taken together, "... could well have tip[ped] the scales". In my view, that is putting it at its highest and considers the strength of the proffered evidence without opportunity for further cross-examination of the Griffins or further explanation by Mr. Corcoran and Mr. Wile. Taken as a whole, the "new" evidence does not come close to meeting the high threshold of importance that would have to be met to justify reopening the trial in the circumstances of this case.
>
> [76] I would therefore not disturb the trial judge's refusal to reopen the trial to admit this evidence.

[21] With respect, it is my opinion that the Adjudicator here did not fully apply correct legal principles to the Appellant's application to reopen. The other factors referred to in *Griffin* v. *Corcoran* above were apparently not considered, since the request to reopen was denied on the sole basis that the Appellant had accepted the Respondent's materials and did not request an opportunity to present rebuttal evidence at that time. I reach this conclusion with some reluctance and concern that such procedural rights, if extended to the Small Claims Court, might complicate what is intended to be a court of simplified procedure. Indeed, it may well be that not every circumstance should require an elaborate consideration of the test involved. However, in these circumstances, I find that the important factor of assessing the risk of injustice was not fully considered.

[22] As in *Griffin*, I find it is appropriate for this Court to exercise the Adjudicator's discretion in applying these tests to the proffered evidence of the Appellant. To this end I have considered both the material proposed by her to the Adjudicator and the material offered to this Court, including the affidavit evidence in support of the application to admit new evidence.

[23] I would also comment that both parties here have committed considerable emotional and financial resources to this litigation - much more than would normally be assigned in most Small Claims Court actions. It would appear from the file material and an estimate of legal costs that the parties combined have expended tens of thousands of dollars in the quest for ownership of Jake.

[24] I will not comment on each statement, affidavit and other document that was involved in my review of the material. The basic issue in the Small Claims Court was the determination of the ownership of Jake. As Claimant, Ms. Foster has the onus of proof that the ownership of Jake passed to her. However, this claim is based solely on her evidence that when Jake was in her temporary possession, the Respondent Kiehl spoke to her saying he had no place to keep Jake and unless she took him, he would have to take him to the pound. I understand this occurred during a period of time when Mr. Kiehl may have needed temporary care for Jake because of other commitments. As I find no other significant material in the documents referred to above or the Order of the Adjudicator regarding the gift of Jake as she describes it, it would appear the issue of the transfer of ownership is substantially, if not wholly, based on the Appellant's credibility. As well, of course, she also carries the burden of proving this transfer on a balance of probabilities. The Respondent's material denies a gift took place and I do not understand that the fact of his ownership was questioned before the alleged gift took place in the Summer of 1999.

[25] On the material before him, the Adjudicator recognized "the bulk of" the evidence adduced by the Claimant was on the poor condition, and alleged abuse of Jake by the Respondent. In his words, this evidence is "more akin to justifying a removal from the possession of the Defendant of the animal as opposed to a gift". I can say the same about the evidence provided by the Appellant after the hearing. The continuing focus appears to be on the justification that for Jake's sake, he should be in the Appellant's possession rather than the Respondent's. The Adjudicator concluded that the Appellant had not established her ownership on a balance of probabilities. He questioned her credibility based not only on the Respondent's evidence, but also noted three specific times in which her evidence was inconsistent with evidence she herself had proffered to the Court.

[26] In my view of the additional evidence of the Appellant, it is clear that her friends, and the professionals who treated Jake while in her possession, believed her to be a loving and responsible caregiver for Jake. There is also evidence that her friends and others accept her credibility on the allegations of abuse and some of these people are over-intimidated by the Respondent. The statements and affidavits from many of these sources are replete with negative opinions about the Respondent's alleged aggressive and intimidating actions, most of which are based on third-party or notional informations. Except for the professional veterinary reports, much of this material is simply not admissible, and if admissible, not relevant to the issue of gift, and of little or any value to the issue of credibility. Any references in the professional letters dealing with Jake's treatment and condition dealing with the subject of ownership are clearly based on the Appellant's information.

[27] There were some areas of evidence admitted by the Adjudicator which Counsel for the Appellant submits were considered inappropriately. At p. 6 of his Order, the Adjudicator referred to two items of evidence advanced by the Respondent after the hearing but before the decision. There was no application by the Respondent to admit such evidence. These were an advertisement in a newspaper by the Respondent which he inserted in late August of 1999 when Jake went missing. As well, the Adjudicator referred to a copy of a flyer or poster later filed by the Respondent which also advertised for the lost dog. The Adjudicator determined these could be "incorporated by reference" but rejected the rest of the Respondent's late material as "new evidence". Appellant's counsel argued these were improperly admitted to bolster the Respondent's credibility to the effect that he had not gifted the dog, but that Jake was improperly taken by someone. Even if these were not admissible, they would not likely be considerably weighty to the Adjudicator's consideration, as the Respondent had already given evidence of the flyer and newspaper ads in the material filed at the hearing. The newspaper ads would be considerably reliable evidence in any event, and it would appear from the Respondent's statement admitted at the hearing (as it appears on page 8 of the Order) that he had attached a sample of the flyers in any event.

[28] Appellant's counsel also submitted that the Adjudicator relied upon a December 2000 letter of Cpl. Pride of the Vancouver RCMP which was directed to the Respondent, a portion of which is found on page 8 of the Order and states in part, "... it is apparent that not only are you the rightful owner [of the dog], but that there is no evidence to support any allegations of mistreatment or abuse by you towards the animal". The argument is that this opinion of ownership would be weighty on the issue of credibility. One of the new documents submitted by the Appellant on Appeal was a further letter from Cpl. Pride dated April 4th, 2001, in which he stressed it was not his intent in his earlier letter to allege the Appellant had taken the dog, but that it was his "perception" that the Respondent owned Jake before the Appellant's "arrival". At the most this newer letter clarified any ambiguity between the letters.

[29] In my opinion, the Adjudicator's opinion makes it clear (on page 7) that he made his finding of credibility and the failure of the Appellant to meet her burden of proof earlier in his order, without considering the police correspondence before him. As he states on page 7, he makes these findings without reference to the Appellant's or Respondent's "new" evidence given him after the hearing, but notes in a supplementary and perhaps unnecessary manner, an apparent but possibly non-existent inconsistency. Arguably it may have been wiser not to refer to the "new" evidence of the Respondent.

[30] In my assessment of all of the relevant evidence and material filed after the hearing, I conclude that the test for admitting such evidence has not been met. As earlier noted, some areas explored are somewhat troubling, but the new evidence of the Appellant, when examined with the complete record, would not be "practically conclusive" on the issues of credibility in favour of the Appellant. It does not come close to meeting the high threshold required by the authorities. As noted, additionally, I have considerable doubt regarding the relevance and reliability of much of it.

[31] This conclusion applies equally to my consideration to reopen this hearing, and the exercise of my discretion to admit the additional "new" evidence on the application before me. I would, in any event, be most reluctant to interfere with an assessment of credibility made by an experienced Adjudicator who has had the additional and important benefit of assessing the credibility of a witness presented before him.

[32] I find no convincing basis for the other grounds raised on this Appeal.

DISPOSITION

[33] In the result I deny the appeal and the Order of the Adjudicator to return Jake to the Respondent stands. The Respondent shall have costs in the matter. If counsel cannot agree, they may approach me on that issue.

J.