

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Pictou Landing First Nation v. Clark, 2011 NSSC 270

**Date:** 20110707

**Docket:** Pic No. 339884

SCP 307476

**Registry:** Pictou

**Between:**

Pictou Landing Indian Band

Appellant

v.

Samantha Anne Clark

Respondent

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** May 11, 2011, in Halifax, Nova Scotia

**Final Written  
Submissions:** June 23, 2011

**Written Decision:** July 7, 2011

**Counsel:** Brian J. Herbert and Jason May (Articled Clerk), for the  
Appellant  
Patrick J. Eagan, for the Respondent

**Coughlan, J.:** (Orally)

[1] Samantha Anne Clark commenced action in the Small Claims Court against Pictou Landing Indian Band (Pictou Landing First Nation) for the sum of \$3,961.83. The amended notice of claim sets out the claim, as follows:

The Defendant, in disbursing funds to Band Members from the 1993 Boat Harbour Settlement, paid monies owing to the Claimants, minors at the time, to the minors' parents in breach of the Guardianship Act, S.N.S. c. 189 (1989) and in breach of the Band's fiduciary and trust obligations to the said minors. ... the sum of \$3,961.83 owing to the Claimant Clark was paid to her mother between or about 1991 and 1994. The Claimants seek the payment of these funds plus interest from the dates when the payments were due to the Claimants.

[2] The matter came before an adjudicator of the Small Claims Court on July 15, 2010 to deal with the jurisdictional issue, whether the Small Claims Court had jurisdiction to hear the claim. The learned adjudicator determined the Small Claims Court had jurisdiction. The Pictou Landing First Nation has appealed the decision.

[3] The notice of appeal filed September 3, 2010 sets out the grounds of appeal as (a) jurisdictional error, and (b) error of law. Particulars of the alleged error are:

1. The learned Adjudicator erred in law and made a jurisdictional error in determining that the Small Claims Court had jurisdiction over the subject matter of the claim as it does not arise under tort or contract as required by section 9(a) of the *Small Claims Court Act* but rather under the law of trust, guardianship and fiduciary duty; and
2. The learned Adjudicator erred in law and made a jurisdictional error in determining that the Small Claims Court had jurisdiction over the subject matter of the claim as the claim arises under the settlement of a trust and the Small Claims Court has no jurisdiction over such claims by virtue of section 10(b) of the *Small Claims Court Act*.

[4] The learned adjudicator filed a summary report of his findings on November 19, 2010.

[5] The adjudicator found the Small Claims Court had jurisdiction to hear the claim as the claim was one of tort - the tort of negligence. Ms. Clark submits there

was a failure by Pictou Landing First Nation to take care in circumstances where there was a duty owed by Pictou Landing First Nation to Ms. Clark to take reasonable steps to ensure Ms. Clark's entitlement was held and kept safely for delivery to Ms. Clark upon her reaching the age of majority. The negligence consisted in delivering Ms. Clark's share of the proceeds to her parent where it was reasonably foreseeable the funds would be dissipated, squandered or converted to the parent's own use.

[6] The adjudicator also found the agreement between Pictou Landing and Her Majesty the Queen was not a "settlement" as contemplated by s. 10(b) of the *Small Claims Court Act*, R.S.N.S. 1989 c. 430 (the *Act*) and even if the agreement was such a "settlement", this was not "a dispute concerning the entitlement of a person under a settlement" as there was no dispute of Ms. Clark's entitlement to the sum of \$3,961.83.

[7] The Small Claims Court jurisdiction is set out in s. 9 of the *Act*:

9 A person may make a claim under this Act

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

(b) notwithstanding subsection (1) of Section 5, for municipal rates and taxes, except those which constitute a lien on real property, where the claim does not exceed twenty-five thousand dollars exclusive of interest;

(c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of twenty-five thousand dollars; or

(d) respecting a matter or thing authorized or directed by an Act of the Legislature to be determined pursuant to this Act. *R.S., c. 430, s.9; 1992, c. 16, s. 117; 1999 (2nd Sess.), c. 8, s. 16; 2002, c. 10, s. 38; 2005, c. 58, s. 1.*

[8] The Small Claims Court jurisdiction is limited to those matters set out in its enabling legislation.

[9] For the purposes of this proceeding s. 9(a) applies and the issue is, does Ms. Clark's claim arise under a contract or a tort. Ms. Clark submits that breach of fiduciary duty and breach of trust are torts and, therefore, such a claim is within the Small Claims Court jurisdiction.

[10] In support of the submission that breach of fiduciary duty or breach of trust are torts, Ms. Clark refers to the case of *Canada Building Materials Co. v. Osler Paving & Construction Ltd. (Trustee of)* (2009), 95 O.R. (3d) 448, although in that case Master Dash found at para. 43:

I am of the view however that the breach of trust under the *Construction Lien Act* allegedly committed by the defendants was not a tort, but is rather that field of "legal liability calling for demarcation from tort" as described by Fleming as liability based on "restitution of unintended benefits so as to prevent unjust enrichment". ...

[11] The *Canadian Encyclopedic Digest*, in defining a tort, provides at Torts 1.2 paras. 3 and 4:

It is difficult to establish a comprehensive definition of tort law or a tort that is sufficiently specific to be useful and that does not result in a series of exceptions. However, the word "tort" when used in a statute should be given a legal, not a popular, definition as it is a legal word and, when used by a legislative body, it should be presumed that the legislative body intended to use the word in a legal sense.

"A civil wrong, other than a breach of contract, which the law will redress by an award of damages" has been suggested as a definition. This definition, however, is so broad as to include other wrongs and remedies such as breach of trust, quasi-contract and restitution, which, based on proprietary principles, are distinguishable from torts.

[12] In determining that incest constitutes not only a tort, but is also a breach of the fiduciary relationship between parent and child, LaForest, J., in giving the majority judgment in *M.(K.) v. M. (H.)*, [1992] 3 S.C.R. 6, indicated the distinction between tort and fiduciary duty, stating at paras. 68 and 70:

... The appellant's statement of claim seeks damages for incest occasioned as a result of reoccurring sexual assaults. In addition the appellant claims damages for her father's breach of his fiduciary duty to care for and minister to his child. Of

course, the proper term for the equitable relief sought would be compensation, but this defect in the pleadings is of no great moment. In the result, the pleadings present neatly compartmentalized concurrent common law and equitable claims.

....

Consequently, it is left to this court to consider the question of fiduciary duty. In my view, the issue must be addressed even though the tort action has survived the limitations defence. It was fully argued by the parties, and there may well be cases where the limitations statute cannot be circumvented but where the fiduciary claim is unaffected by the statute. Moreover, the equitable remedy available to the appellant may vary from the common law award established by the jury. The importance of considering any equitable cause of action has recently been stated by Justice McLachlin in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at p. 290-291:

These examples underline the importance of treating the consequences of this relationship on the footing of what it is - a fiduciary relationship - rather than forcing it into the ill-fitting molds of contract and tort. Contrary to the conclusion of the court below, characterizing the duty as fiduciary *does* add something; indeed, without doing so the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages. [Emphasis in original.]

[13] Dealing with equitable and common law doctrines in *Fiduciary Law* by Dr. Leonard I. Rotman, Thomson Carswell 2005, the author states at p. 232:

Whatever Lord Diplock actually meant in *United Scientific Holdings Ltd.* equitable concepts are doctrinally and functionally distinct from their common law counterparts. Each possess different points of emphasis that are influenced by distinctions in their historical evolution. As seen in Chapter III's discussion of the distinction between the fiduciary concept and contract law in relation to the notice of efficient breach, the fiduciary concept is premised upon fundamentally different objectives than common law doctrines. ...

As Keeton suggests, while there was a fusion of administration between common law and equitable jurisdictions, that fusion did not alter the distinct nature of legal and equitable doctrines or rights. The important distinction that remained after the passage of the *Judicature Acts* is, indeed, one of history and attitude, but also one of profoundly distinct ideas and approaches to law, leading to different results. This is well-illustrated by Burrows in relation to the fiduciary concept:

Once one realizes that a fiduciary duty is a duty to look after another's interests, it becomes plain that what may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary. Hence undue influence or non-disclosures, while not in themselves wrongs, may be wrongs where committed by a fiduciary because they may then constitute a breach of the duty to look after another's interests. ...

[14] A breach of fiduciary duty or breach of trust are breaches of equitable duties, not torts.

[15] Ms. Clark's claim is not under a contract.

[16] The claim of Ms. Clark, not being under a contract or a tort, but rather pursuant to equitable claims of breach of trust and/or breach of fiduciary duty is not within the jurisdiction of the Small Claims Court. The Small Claims Court does not have jurisdiction to deal with the claim.

[17] Having determined Ms. Clark's claim is neither in tort or contract, I do not have to deal with the issue whether her claim is a "settlement" as set out in s. 10(b) of the *Small Claims Court Act*.

[18] The appeal is allowed.

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Coughlan, J.