

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: MacKay v. Dauphinee, 2007 NSSM 11

Claim No. 22522

Date: 20070423

**BETWEEN:**

**Keith MacKay**, Assignee of Atlantic Electronics Limited

**Claimant**

- and -

**Harvey Dauphinee**

**Defendant**

**DECISION**

***Background***

- [1] This matter was initiated by an application (styled as an interlocutory notice - *ex parte* application) for:

*An order granting leave to the Applicant to sell the interests of the Judgment Debtor, Harvey Dauphinee, in lands situate in the County of Halifax, Nova Scotia, pursuant to the Sale of Land Under Execution Act, R.S.N.S. 1989, c. 409.*

- [2] There are a number of registered judgments against Harvey Dauphinee. Keith MacKay, is the assignee of one, which was originally issued to Atlantic Electronics Limited. Mr. MacKay, who is also a barrister and solicitor, brings this application and has filed his own affidavit as well as written submissions in support of the application.
- [3] Notice of the application was given to the Attorney General of Nova Scotia and as well, to Nova Enterprises Limited and Jardine Investments Limited who also hold judgments against Harvey Dauphinee. Neither Nova Enterprises Limited nor Jardine Investments Limited appeared or have taken any steps to contest the application.

- [4] Notice was given to the Attorney General because there are registered judgments against Harvey Dauphinee in the name of other corporate judgment creditors who apparently have been struck off the Register of Companies and dissolved pursuant to provisions of the *Nova Scotia Companies Act, R.S.N.S. 1989, c. 81*. As such, I understand that their rights as judgment creditors may have become vested in the Crown by virtue of Section 28 of *Corporations Miscellaneous Provisions Act, R.S.N.S. 1989, c. 100*. I base these comments on submissions made by Mr. MacKay in correspondence in the file.
- [5] The Attorney General takes the position that, for a number of reasons, the Small Claims Court does not have jurisdiction to deal with the application brought by Mr. MacKay. Stephen T. McGrath, counsel with the Department of Justice filed a written submission of February 8<sup>th</sup> arguing that position. Following that, it appears that an accommodation of sorts was reached between the two counsel, the upshot being that Mr. MacKay agreed to “*severe all issues relating to [the] application as it affects the interest of the Crown, for determination by the Supreme Court of Nova Scotia*”. Based on that undertaking, Mr. McGrath did not attend on either March 13, 2007, when the matter initially came before me, or on March 27, 2007, the date I adjourned the matter to in order to have an opportunity to review the substantial legal submissions filed by both Mr. MacKay and Mr. McGrath.
- [6] The sole issue before me therefore was whether or not the Small Claims Court has jurisdiction to issue an order pursuant to the *Sale of Land Under Execution Act*, as sought by Mr. McKay.
- [7] On March 27<sup>th</sup> I provided oral reasons to Mr. MacKay supporting my conclusion that the Small Claims Court does not have jurisdiction to issue an order under the *Sale of Land and Execution Act*. I indicated that written reasons would follow.

### *Analysis*

- [8] I start by making the fundamental observation with respect to the jurisdiction of the Small Claims Court. It is a statutory body and as the case law makes clear, it has no inherent jurisdiction but only has the powers and jurisdiction as set out in its enabling statute. Authority for this can be found in *Wexford Communications Ltd. v. Buildrite Centres Inc.* (1996), 156 N.S.R. (2d) 78 (S.C.); and in *Blair's Custom Metals v. Howard E. Little Excavating Ltd.*, 2006 NSSC 251 (S.C.).
- [9] The issue therefore posed by the application before the court primarily involves a matter of statutory interpretation. It is a cardinal rule of statutory interpretation that the whole of the statute is to be read in order to interpret the statute and its constituent parts, bearing in mind at all times that the ultimate goal of statutory interpretation is to discern the intention of the Legislature.
- [10] The particular provisions that have most relevance to this case are Sections 2, 9, 10 and 31 of the *Act*. I set them out in full:

***Purpose***

*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.*

**Jurisdiction**

**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 Legislatures to be determined pursuant to this Act, R.S., c. 430, s. 9; 1992, c. 16, s. 117; 1999 (2<sup>nd</sup> Sess), c. 8, s. 16.*

### ***Taxations***

*9A (1) An adjudicator has all the powers that were exercised by taxing masters appointed pursuant to the Taxing Master Act immediately before the repeal of that Act, and may carry out any taxations of fees, costs, charges or disbursements that a taxing master had jurisdiction to perform pursuant to any enactment or rule.*

### ***Monetary limits***

*(2) The monetary limits on the jurisdiction of the Court over claims made pursuant to Section 9 and on orders made pursuant to Section 29 do not apply to taxations or an appeal of an order of the Director of Residential Tenancies pursuant to Section 17(c) of the Residential Tenancies Act.*

### ***Exclusions from jurisdiction***

*10 Notwithstanding Section 9, no claim made under this Act*

*(a) for the recovery of land or an estate or interest therein;*

*(b) in respect of a dispute concerning the entitlement of a person under a will, or settlement, or on an intestacy;*

*(c) for defamation or malicious prosecution;*

*(d) which involves a dispute between a landlord and tenant to which the Residential Tenancies Act applies, other than an appeal of an order of the Director of Residential Tenancies pursuant to Section 17(c) of that Act; or*

*(e) for general damages in excess of one hundred dollars. R.S., c. 430, s. 10.*

### ***Order of Supreme Court***

*31(1) An order of the Court may be enforced in the same manner as an order of the Supreme Court and Section 45 of the Judicature Act applies;*

*(2) repealed 1992, c. 16, s. 123.*

***Fees and allowances***

*(3) Notwithstanding the Costs and Fees Act, the fees and allowances for the enforcement of orders under this Act are in such amounts as are from time to time fixed by the regulations. R.S. c. 430, s. 31; 1992, c. 16, s. 123.*

[11] Based on a review of these provisions, it is apparent that an initial significant hurdle to the order sought is Section 10(a) which reads:

*10 Notwithstanding Section 9, no claim may be made under this Act  
(a) for the recovery of land or an estate or interest therein;*

[12] Certainly, on first blush this would appear to be a complete bar to the order sought herein. Mr. MacKay's response to this is that Section 9 and 10 do not deal with the court's **enforcement** function but deal with the court's **adjudicative** function. He states that he is not seeking to recover land or an estate or interest in land, and the application does not call upon the court to **adjudicate** issues arising in a claim. What he seeks is permission to exercise a bare power of sale of the Defendant's lands. On this interpretation, Mr. MacKay argues that Section 10(a) is simply not triggered in this request.

[13] He further refers specifically to Section 31(1) of the *Act* which I again quote:

*31 (1) An order of the Court may be enforced in the same manner as an order of the Supreme Court and Section 45 if the Judicature Act applies;*

[14] Mr. MacKay then states and I quote him here:

*The sole purpose of the sale of land under Execution Act is the enforcement of the judgments, and it is common ground that its provisions are available for the enforcement of orders of the Supreme Court. Subsection 31(1) therefore **impliedly imports** the provisions of the Sale of Land Under Execution Act to the court's authority for the purpose of enforcing its own orders.*

[15] I consider this to be Mr. MacKay's strongest argument but for the reasons which follow, I decline to follow it. Certainly, reading Section 31 alone without reference to the stated object and purpose of the *Act* and the other provisions can arguably support an interpretation that Section 31 incorporates by reference the full plethora of enforcement provisions available in the Supreme Court. That would necessarily mean all of the remedies in the Civil Procedure Rules, the *Judicature Act*, and at common law, equity and through the Supreme Court's inherent jurisdiction. With respect, I do not think that the Legislature intended Section 31 to have such a broad and encompassing interpretation.

[16] I comment here on a specific point made by the applicant - that since the form of execution order prescribed under the Small Claims regulations includes reference to sale of land under execution that this is an indication of legislative intention. This can be answered briefly by observing that to the extent this is supportive of the applicant's position, this cannot be used as any indication of legislative intent at all since the regulations are not made by the Legislature.

[17] The purpose of the *Small Claims Court Act* is contained in Section 2 cited above and which I repeat:

***Purpose***

*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.*

[18] While, in general or abstract terms, I can and do accept a distinction between adjudication and enforcement, it seems to me that Section 2 of the *Act* does still apply to the Court on such an application as that presented in this case. I also consider that Section 10(a) does apply in a case where this Court is being asked to grant an order permitting the sale of land.

[19] As part of the type of application being requested here, and the process surrounding it, various issues can be expected to arise . Without in any way suggesting this to be exhaustive, there might well be issues with respect to priorities between other interest holders, sufficiency of notice to interested parties, the potential disposition of surplus monies, and potentially issues surrounding requests for vacant possession. No doubt many other issues would arise.

[20] I am also mindful of the long history involving the often complex laws and approach of the common law (and historically, equity) and the legislature (in England, Parliament) to interests in land. In short, interests in land hold a special place in our system of laws. The court that I perceive to have been envisaged by the Legislature in creating the Nova Scotia Small Claims Court was not one that was intended to either adjudicate regarding interests in land (as explicitly made clear in s. 10(a) ) or issue orders permitting that sale of land, albeit under the cloak of enforcement. Here, I believe the proffered distinction between adjudication and enforcement loses its intended force.

[21] In my view, an application seeking this Court's approval for the sale of land is functionally and at its core a "*claim...for the recovery of land or an estate or interest therein*".

[22] The process of sale of land under execution can be likened to a foreclosure application. I think it appropriate in this regard to take notice that the Supreme Court exercises a significant supervisory role (as I understand, steeped in ancient principles of law and equity, and in part, codified in the Civil Procedural Rules ) in such applications and is particularly vigilant in ensuring that the interests of the person whose property is being

foreclosed are considered and that all items charged against the person are properly supported. Even if a sale of land under execution process were to viewed as requiring somewhat less of a meticulous process than foreclosure, I cannot conclude otherwise than that it would involve a substantial degree of supervision and to a degree that this statutorily-created court is not equipped to handle, either functionally or administratively or as a matter of legal jurisdiction.

[23] I conclude therefore that this Court does not have the jurisdiction to grant leave for sale of land under the *Sale of Land Under Execution Act*.

[24] In further support of my conclusion , I would make a specific comment with respect to the wording of Section 31 itself which states:

*31 (1) An order of the Court may be enforced in the same manner as an order of the Supreme Court and Section 45 if the Judicature Act applies.*  
(emphasis supplied)

[25] Section 45 of the *Judicature Act*, R.S.N.S. 1989, c. 240 reads:

***Exemption from seizure under execution***

*45 (1) The following articles are exempt from seizure under execution:*

*(a) the wearing apparel and household furnishings and furniture which are reasonably necessary for the debtor and his family;*

*(b) all fuel and food reasonably necessary for the ordinary use of the family;*

*(c) all grain and other seeds, and all cattle, hogs, fowl, sheep and other livestock which are reasonably necessary for the domestic use of the debtor and his family;*

*(d) all medical and health aids reasonably necessary for the debtor and his family;*



(e) such farm equipment, fishing nets, tools and implements of, or other chattels, as are used in the debtor's chief occupation, not exceeding in aggregate value the sum determined by the Governor in Council;

(f) one motor vehicle not exceeding in aggregate value the sum of three thousand dollars or such sum as may be determined by the Governor in Council.

(2) For greater certainty, subsection (1) does not affect the rights of a person secured by a duly filed agreement for hire, lease, chattel, conditional sale or charge, other than a floating charge, on a chattel to secure the payment of money or the performance of an obligation and acting pursuant to that agreement, lease, contract, conditional sale or charge, other than a floating charge, on a chattel to secure the payment of money or the performance of an obligation.

(3) The Governor in Council may make regulations determining the aggregate value of chattels used in the debtor's chief occupation and of the motor vehicle actually used in the course of and required for the debtor's full-time occupation, which are exempt from seizure pursuant to this Section.

(4) The exercise by the Governor in Council of the authority contained in subsection (3) shall be regulations within the meaning of the Regulations Act. R.S., c. 240, s. 45.

[26] As will be seen, this Section of the *Judicature Act* deals solely with personal property. The reference to s. 45 *Judicature Act* in s. 31 is supportive of the interpretation that the legislative intent was that enforcement powers of the Small Claims Court would only extend to personal property, and not land.

[27] The applicant has referred to two decisions of this Court - ***Wickwire Holm v. Wilkes*** (2005), 237 N.S.R. (2d) 197 (Adjudicator Casey) and ***Scarelli & Associates v. Quinlan*** (2005) 241 241 N.S.R. (2d) 64 (Chief Adjudicator Giles) - both of which found that the Small Claims Court had jurisdiction to order discovery in aid of execution, and relied on s. 31 in coming to that conclusion. As a statutory tribunal, these decisions are certainly to be treated as persuasive but I do not think they assist the applicant here given what was being requested in those cases and what has been requested here. In no way are these decisions

inconsistent with the notion that the Small Claims Court's enforcement powers were intended to only extend to personal property.

***Conclusion and Disposition***

[28] In summary, I see the application which has been brought before me to be a very significant request. Given the purpose of the Small Claims Court and the jurisdiction set out in the *Act*, I believe that more explicit language would be required in order to clothe the Small Claims Court with the enforcement power urged by the applicant.

[29] For the above reasons I conclude that the Nova Scotia Small Claims Court does not have the jurisdiction to grant leave or otherwise authorize a sale of land under the *Sale of Land Under Execution Act*.

[30] The application is dismissed.

**DATED** at Halifax, Halifax Regional Municipality, Nova Scotia, this 23<sup>rd</sup> day of April, 2007.

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**Michael J. O'Hara**  
**Adjudicator**

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