SUPREME COURT OF NOVA SCOTIA
Citation: Towle v. Samad, 2013 NSSC 260

Date: 20130815
Docket: Hfx No. 406287A
Registry: Halifax

Between:

Clancy D. Towle

Appellant

v.

Arif Samad

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: March 26, 2013

Counsel: Lloyd Robbins, for appellant
Jack Townsend, for respondent

Moir J.:

Introduction

[1] Mr. Towle sued Dr. Samad in Small Claims Court for Mr. Towle's accounts on a renovation of Dr. Samad's kitchen at his residence in Halifax. Dr. Samad counterclaimed for the cost of repairing what he claimed were deficiencies in Mr. Towle's work.

[2] Adjudicator J. Scott Barnett presided at the trial in March of 2012. Mr. Towle acted on his own. Dr. Samad was represented by Mr. Townsend.

[3] Adjudicator Barnett issued an order and delivered an extensive written decision. This happened at the end of July, four months after the trial. Mr. Towle was surprised by the result. He set out to collect his accounts, but he ended with a judgment against him in the amount of $6,715.

[4] Mr. Towle appeals.

Issues

1. Whether the Small Claims Court adjudicator had jurisdiction to make an order after the sixty-day deadline in the *Small Claims Court Act*?

2. If so, whether making the order, and filing the decision, two months late breached the duty of fairness?

3. Whether the record of fact-finding shows errors in law?

4. Whether hearsay estimates should have been relied on for calculating damages on the counterclaim.

Sixty-Day Limit

[5] *The Operative Text*. Subsection 29(1) of the *Small Claims Court Act* reads:

> Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator may
>
> (a) make an order

> (i) dismissing the claim, defence or counterclaim,
>
> (ii) requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding twenty-five thousand dollars, and any pre-judgment interest as prescribed by the regulations, or
>
> (iii) for any remedy authorized or directed by an Act of the Legislature in respect of matters or things that are to be determined pursuant to this Act; and
>
> (b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.

[6] In this case, the operative words are " .... not later than sixty days after the hearing ... the adjudicator may ... make an order ... requiring a party to pay money ...". Read literally and out of context, these words give a permission that is applicable only in limited circumstances.

[7] The permissive nature of "may", which is recognized in s. 9(3) of the *Interpretation Act*, does not obviate the conditions under which the permission arises. So, there is no permission in s. 29(1) of the *Small Claims Court Act* for an adjudicator to make an order without holding a hearing. Literally read, the same must be said about "not later than sixty days".

[8] I have deliberately introduced this subject by twice using the word "literally". There has, in fact, been some turmoil in the jurisprudence of this court about whether the time limit for making a decision in Small Claims Court is mandatory or directory. Mr. Towle's counsel provided a comprehensive commentary on the decisions of this court in that regard.

[9] Let us review the decisions about the time limit on decision-making in the Small Claims Court. That will lead to a discussion of how the *stare decisis* principle applies to decisions of judges who interpret the *Small Claims Court Act* on appeals from the Small Claims Court, which, in turn, will take us to the reasonableness, or otherwise, of the precedents in light of the contextual interpretation required by *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2.

[10] *Case Law on the Time Limit*. The *Small Claims Court Act* was enacted in 1980. The court had a monetary limit of $2,000. The legislature raised the limit substantially, and it now stands at $25,000.

[11] The legislature expressly stated the purpose of the statute in s. 2, and the provision remains unchanged:

> 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.

[12] Cases may be heard by adjudicators "after normal business hours": s. 22. The rules of evidence are greatly relaxed by s. 28. Subsection 3(1) provides that the Small Claims Court is "a court of law and of record", but the court does not function as a court of record in the usual sense. No record is made of the oral testimony.

[13] The time limit for decision making was increased from thirty to sixty days after the decision in *Gordon Shaw Concrete Products Ltd. v. Staveley Weighing & Systems Canada Inc.*, 1995 NSSC 46. There is also a short limit for launching an appeal in s. 22(2) of the Small Claims Court Regulations and a thirty-day limit for delivery of the adjudicator's "summary report of the findings of law" and "any written reasons for decision" in s. 32(4).

[14] The grounds for intervention by this court on appeal are limited to "jurisdictional errors", "error of law", and "failure to follow the requirements of

natural justice": s. 32(1). The *Act* purports to provide against further appeal: s. 32(6).

[15] So, one sees that the scheme of the statute is consistent with its stated purpose in some ways: broad hours of business, relaxed rules of evidence, absence of a record of testimony but some protection through the adjudicator's report for use on appeal, time limits for decision making and launching an appeal, and limits the appeal court.

[16] Decisions about the time limit for an adjudicator to make a decision under the *Small Claims Court Act* begin with *MacLean v. Toomey*, [1984] N.S.J. 24 (Co. Ct.). Judge, now Justice, Simon MacDonald interpreted s. 29(1), which was the same as the present provision except that the legislature later increased the period from thirty to sixty days and added the new monetary limit, prejudgment interest, and other remedies.

[17] The court interpreted the provision as directory rather than mandatory. Judge MacDonald's main point was that a time limit having the effect of

terminating the proceeding would be inconsistent with the purpose of the statute as expressed in s. 2. See paras. 16 to 19 and 22 of *MacLean v. Toomey*.

[18] A little over a decade after *MacLean v. Toomey*, Justice Davison released his decision in *Gordon Shaw Concrete Products Ltd. v. Staveley Weighing & Systems Canada Inc.*, 1995 NSSC 46. (In the meantime, the County Court had been amalgamated into the Supreme Court.)

[19] The limit at that time was still thirty days. The adjudicator filed his order thirty-two days after the hearing, and Gordon Shaw Concrete raised the lateness as a ground of appeal.

[20] Justice Davison disagreed with the reasoning in *MacLean v. Toomey*. The ordinary meaning of the operative words in s. 29(1) was that "an order must be made not later than 30 days after the hearing." "There is no ambiguity in the manner in which the requirement is expressed ...": para. 6.

[21] Justice Davison did not confine his reading of s. 29(1) to the literal text. For him, by ignoring the words "not later than 30 days" *MacLean v. Toomey*

offended the principle that all words in a statute are to be given effect: para. 7. Also, a mandatory interpretation served the purpose expressed in s. 2, which showed that "decisions and orders rendered by the Small Claims Adjudicator should be done with dispatch": also para. 7.

[22] The claim was referred back for another hearing and decision.

[23] In 1996, the legislature amended the *Act* to increase the time period to sixty days. Mr. Robbins reasonably submits that the legislature acted on the interpretation provided in *Gordon Shaw Concrete*.

[24] Justice Simon MacDonald followed *Gordon Shaw Concrete* in an unreported decision released in July of 1996: *Jones v. LeDrew*, Sydney file number 102161.

[25] Justice Edwards took up the issue next. In *MacNeil v. MacNeil*, 2003 NSSC 44, a Small Claims Court adjudicator filed his decision sixty-six days after the hearing. Justice Edwards said that the 1996 decisions of Justice Davison and Justice Simon Macdonald "while persuasive authority, are not binding on me":

para. 5. He said that the *Gordon Shaw Concrete* and *Jones v. LeDrew* decisions were made without the benefit of *Langille v. Midway Motors Ltd.*, 2002 NSCA 39. Justice Edwards based his decision entirely on *Langille* saying that the "reasoning is directly applicable to section 29(1) of the *Small Claims Court Act*": para. 6.

[26] Ms. Langille lost her case for Section B benefits after a trial in Supreme Court. She appealed, and one of her grounds was that the trial judge failed to render a decision within six months after reserving. (That was not the main issue. The main issue was whether Ms. Langille had proved she fell within one of the Section B conditions: see para. 9.)

[27] Clause 34(d) of the *Judicature Act* provides that "upon the hearing of any proceeding, the presiding judge may … reserve judgment until a future day, not later than six months from the day of reserving judgment …". It goes on to provide "... his judgment whenever given shall be considered as if given at the time of the hearing ...". These provisions have been in the Nova Scotia *Judicature Act* since it was first enacted in 1884.

[28] In *Langille* it was possible that the judgment was given in six months, or a day or two after six months, from the end of the hearing. Justice Roscoe said it did not matter because the provision was directory rather than mandatory: para. 8. She said: "we do not agree there was a loss of jurisdiction" and explained:

> The time limit should not be considered to be mandatory but rather strongly directory. The appropriate remedy for failure to deliver a judgement after trial within six months, should be an order for mandamus, not an order for a new trial. Since the decision has now been delivered, no order is required.

The Court of Appeal provided no further reasons on this issue. Justice Edwards did not supplement them in *MacNeil v. MacNeil* or explain why the same conclusion applied to s. 29(1) of the *Small Claims Court Act*.

[29] The same issue came before Justice Douglas MacLellan in *Gallant v. United Campers*, 2008 NSSC 381. A Small Claims Court decision was filed about seven months after the hearing. Justice MacLellan held that the time limit is directory rather than mandatory, but he ordered a new hearing anyway.

[30] Justice MacLellan followed *MacNeil v. MacNeil*. He also drew an analogy to *Scotia Recovery Services v. Dimensionally Specialized Carriers Inc.*, 2008 NSSC 210, which concerned a lengthy delay in filing an adjudicator's report after

a party appealed. The time limit for the report was found to be literally "mandatory" but effectively directory. The importance of timely filing was explained and a new hearing was ordered because the delay amounted to a breach of the duty of fairness. In his case, Justice MacLellan also found the delay breached fairness.

[31] In his familiar style, Justice MacLellan captured this way, at para. 35, the purposive aspect of the original approach in *MacLean v. Toomey*: "Small Claims Court is a Court that is intended to deal relatively quickly with claims".

[32] Justice McDougall confronted a ten-day delay past the sixty-day limit in *Adams v. Crowe*, 2010 NSSC 324. He was asked to order a new hearing for breach of fairness.

[33] Justice McDougall held that an appellant who alleges breach of natural justice bears the onus of establishing the breach: para. 40. He said "it is not enough to infer that the passage of time automatically results in a finding of breach of natural justice": also para. 40. Justice McDougall went so far as to say at para. 40:

> … it may be possible to infer unfairness from delay but such an inference also requires assumptions that an adjudicator's memory has lapsed, that they were not working on the case during the delay, and that their notes are not adequate to overcome the passage of time.

[34] In *Boone v. DC Drive Electronics Ltd.*, 2011 NSSC 380 a Small Claims Court order was filed one day after the sixty-day limit. Justice Bourgeois followed *MacNeil v. MacNeil*.

[35] *Stare Decisis*. This court applies the principle with some stringency in trial level decisions, which make up the bulk of our work. We do so because failure to follow earlier decisions may do a disservice to the litigants and will damage certainty of law: *Fairview Industries Ltd.*, [1991] N.S.J. 445 (S.C.).

[36] What of the situation when a judge of this court sits in appeal? There is only one reason to distinguish this situation from that of a panel of the Court of Appeal in applying *stare decisis*. Departure in the Court of Appeal is chosen only "with great restraint" when there are "exceptional and compelling circumstances": *Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2003 NSCA 14 at paras. 12 and 13. Flexibility in the doctrine of *stare decisis* exists "to

properly accommodate sound developments in the law without encroaching unduly on its stability and predictability": para. 12.

[37] However, there is something about a Small Claims Court appeal that particularly tells us to respect decisions interpreting the *Small Claims Court Act* made by judges in earlier appeals. Our decision is "final and not subject to appeal": *Small Claims Court Act*, s. 32(6). With that in mind, I suggest that every time a judge sitting on a Small Claims Court appeal is asked to depart from established precedent on the meaning of the *Small Claims Court Act*, the judge must answer the fundamental question proposed by Justice Rothstein at para. 139 of *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. 20:

> Do the reasons in favour of following a precedent -- such as certainty, consistency, predictability and institutional legitimacy -- outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld and perpetuated?

[38] The difference with our court is that we never sit in panels, unlike the Divisional Court in Ontario. In the result, pronouncements made by a single judge lack the opportunity for Socratic dialogue. I think it is only right that we carry out that dialogue from decision to decision until it can be said that the point is established as precedent. Justice Davison's disagreement with Justice Simon

MacDonald and Justice Edwards' disagreement with Justice Davison did not offend *stare decisis*.

[39] *Precedent.* So, the questions are whether we have established precedent on the mandatory or directory nature of s. 29(1) and, if so, whether it is necessary to overturn the precedent.

[40] For the reasons given by Justice McDougall in *Adams v. Crowe*, I am of the view that precedent has been established in favour of the proposition that s. 29(1) is directory, notwithstanding conflict with the two decisions from 1996.

[41] The decisions of this court on the mandatory or directory nature of s. 29(1) are open to critical analysis.

[42] *MacLean v. Toomey* was decided in the heyday of the purposive approach as advocated by Justice Bertha Wilson. It could be criticized, as in *Gordon Shaw Concrete*, for paying too little attention to the operative text.

[43] *Gordon Shaw Concrete*, however, seems to imply that unambiguous operative words preclude a broader interpretation. This is more narrow than the approach adopted by the Supreme Court of Canada a year later in *Rizzo Shoes*, and it takes a more narrow approach than that taken when the questions of mandatory or directory limits have been decided in other circumstances, as we shall see.

[44] *MacNeil v. MacNeil* took an uncritical approach in its application of *Langille v. Midway Motors Ltd.* to the Small Claims Court. The operative words in the *Judicature Act* are different from those of s. 29(1) of the *Small Claims Court Act*. The social context of both statutes is fundamentally important and radically different. Furthermore, the Supreme Court of Nova Scotia is a s. 96 court. It is not a statutory court. The *Judicature Act* continues the court, it does not create it. Whether these concepts were considered in *Langille* may be doubted because of its suggestion that a prerogative writ could be issued against a superior court judge and its implication of a statutory basis for loss of jurisdiction. The different nature of the two statutes and the two courts needed consideration before *Langille v. Midway Motors Ltd.* could be applied to the Small Claims Court.

[45] Mr. Robbins submits *MacNeil v. MacNeil* was wrongly decided. However, the decision has been with us for over a decade and it has been accepted and followed several times. I think that *Gordon Shaw Concrete* must be regarded as overruled and *MacNeil v. MacNeil* must be taken as the established precedent on the nature of s. 29(1).

[46] *Reasonableness of the Precedent*. The idea that the interpretation of the *Judicature Act* in *Langille* extends to the *Small Claims Court Act* is troublesome. Just the same, the conclusion offered by *MacNeil v. MacNeil* is consistent with a contextualized reading of s. 29(1), as required by *Rizzo Shoes*.

[47] A directory meaning for s. 29(1) fits with purposes of the statute. The drastic consequence of the *Gordon Shaw Concrete* interpretation is out of proportion to the call for quick results. The drastic consequence tends to undermine the very same purpose in cases of unavoidable or inadvertent delay. That was the point originally made in *Toomey*. The call for quick results apparent in the *Small Claims Court Act* is more adequately served by a directory interpretation when one bears in mind that the direction is to lawyers who are

sworn to conscientiously perform an adjudicative function. Judges, in other words.

[48] The scheme of the statute was described at para. 11 to para. 15 of this decision. It does not fit with sending the parties back to square one when a decision is delayed, no matter how innocent and inconsequential the delay may be.

[49] *Gordon Shaw Concrete* takes the conditional "may" to provide a clear and "unambiguous" result in any statute: a mandatory command. Respectfully, a broader inquiry is required.

[50] Subsection 29(1) unequivocally attaches a condition to the adjudicator's decision making authority. However, courts inquire into whether the legislature intended a drastic jurisdictional result when a legislated limit attaches to a legislated procedure. Often this question of statutory interpretation has been characterized as an inquiry into whether the statute is mandatory or directory.

[51] Writing for a majority of the Supreme Court of Canada in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] S.C.J. 35, Justice

Iacobucci discussed the mandatory vrs. directory inquiry in reference to an imperative "shall consider". The discussion is at para. 145 to para. 148. Justice Iacobucci applied his thoughts on this subject to the imperative in issue at para. 149 to para. 156.

[52] I take this much from the decision:

- The mandatory vrs. directory dichotomy contains no magic (para. 148) and it deserves no special reverence (para. 145).

- However, the dichotomy describes an inquiry (para. 148) the court must undertake in cases of "failed procedural preconditions" (para. 145).

- That inquiry is "informed by the usual process of statutory interpretation" but with an important difference (para. 148).

- The difference between interpreting a statutory provision involving a procedural precondition and the general approach to statutory

interpretation is that the former "evokes a special concern for 'inconvenient' effects, both public and private, which will emanate from the interpretive result" (para 148).

- Put another way "... courts tend to ask, simply: would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?" (para. 147).

- One does not necessarily need evidence about inconvenient effects. These may appear from a "straightforward reading" of the statute (para. 155).

[53] Soon after that decision, Justice, now the Chief Justice, McLachlin took up the mandatory vrs. directory dichotomy in a decision about procedural requirements ("shall be certified" and "shall be submitted") for surrender of lands on reserves: *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] S.C.J. 99. She summed up the 1994 decision this way at para. 42:

> This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory … .

[54] The mandatory vrs. directory dichotomy was considered by Justice Oland in *Potter v. Halifax Regional School Board*, 2002 NSCA 88. She discussed the law on this subject at para. 116 to para. 120. She concluded that requirements for public notice of hearings about school closures had been complied with, but she was also of the view that the requirements were directory (para. 131). The use of the word "shall" was not determinative despite s. 9(3) of the *Interpretation Act* (para. 120). Justice Oland took into account the absence of an expressed penalty for failure to comply with the requirement for public notice and the purpose of the statute under which the requirement was created.

[55] An inquiry beyond the mandatory-sounding text was not undertaken in *Gordon Shaw Concrete*. Such an inquiry supports the conclusion in *MacNeil v. MacNeil*. Therefore, this court should not revisit the interpretation established by the decisions in *MacNeil* and those that followed it.

Duty of Fairness and Fact-finding

[56] Alternative to the argument for giving the condition in s. 29(1) mandatory effect, it is argued for Mr. Towle that the two-month delay offends the requirement for fairness. I cannot separate this argument from the criticisms of the adjudicator's fact-finding, and I will deal with these issues together.

[57] I do not think that either Justice Douglas MacLellan's remarks at para. 39 of *Gallant v. United Campers*, [2008] N.S.J. 572 (S.C.) or Justice McDougall's remarks at para. 40 of *Adams v. Crowe* suggest any hard and fast principle for determining whether delay of a Small Claims Court decision causes unfairness. This will always be a circumstantial inquiry in which the length of the delay, and the grasp of the evidence apparent from the decision or the summary report of findings, will have importance.

[58] Here, the delay was not great, the decision reviews the evidence in detail, and the part of the decision titled "Analysis" treats the evidence with care. Mr. Towle criticizes some of the fact-finding.

[59] The adjudicator found Mr. Towle the less credible among the witnesses. He accepted testimony on behalf of the respondent. The adjudicator provided examples of testimony from Mr. Towle that troubled the adjudicator.

[60] Mr. Towle disputes some of the examples. He says that failures of the adjudicator in that regard amount to error of law. They concern:

- A finding in para. 78 that Mr. Towle refused to accept the obvious when he maintained that the kitchen floor was tiled on May 20, 2011.

- Findings in paras. 79, 80, and 81 to the effect that an admitted failure to measure the kitchen chipped away at Mr. Towle's credibility.

- A discussion concerning Mr. Towle's response to cross-examination on the subject of his relating invoices to the project found at para. 82.

- A finding that entries in Mr. Towle's time sheets were contradicted by other evidence (para. 84).

[61] Two points need to be reiterated. The act by which one person believes, or disbelieves, another is primordial. It is seldom reducible to a full explanation, and it is never simply logical. That is one reason why appeal courts have to defer to triers of fact on credibility: *R. v. McDougall*, 2008 SCC 53 at para. 100.

[62] Secondly, the Small Claims Court is not a court of record, despite what the statute says. The criticisms Mr. Towle makes assume that the hearing produced no evidence on these subjects beyond what we can make from the decision and the exhibits. In oral submissions, Mr. Robbins went so far as to suggest that we must assume there was no evidence on a point beyond what is recorded in the summary report of findings. I disagree. The statute requires a record of the findings not a record of the evidence. At that, only a summary of the findings is required.

[63] I respond to the concerns about underpinnings for the findings on credibility this way:

- If there was a record, I could see whether it was obvious the floor was not tiled on May 20. Without a record of the testimony, I cannot make that assessment.

- The finding about the failure to measure the kitchen seems to have more to do with not being forthcoming.

- So also seems the response on the point in cross-examination about what tied receipts to the project.

- I cannot assess the time entries apart from the testimony.

In my assessment, the findings cannot be attacked as errors in law. Nor do they reveal a forgetfulness of the evidence despite the two-month delay.

[64] Mr. Robbins makes extensive arguments against the adjudicator's fact-finding. The submission relies on the documentary evidence and the decision. In my assessment, the record shows no misapprehension of evidence as would affect the result and no unfairness in the fact-finding exercise.

[65] The record of fact-finding shows the adjudicator remained conscious of the evidence. No unfairness is revealed. No error of law appears.

Sufficiency of Reasons

[66] Mr. Robbins makes reference to *Morris v. Cameron*, 2006 NSSC 9 at para. 38, and submits "the decision does not provide sufficient reasons for the conclusions made". I disagree. The decision demonstrates an effort to provide a detailed explanation of the fact-finding and the conclusions drawn from the findings and the law.

[67] In oral argument, Mr. Robbins submitted that the adjudicator did not deal with all issues that arose on the counterclaim. He zeroed in on just one. Specifically, the adjudicator should have explained why the entire kitchen floor had to be replaced and why cabinets had to be removed. He jumped to the estimates.

[68] The statement of defence and counterclaim contains a list of claims about damage, unfinished work, and unsatisfactory work. If established as fact, these would well ground a conclusion that Mr. Towle breached the implied term about quality of work. The defence to counterclaim engages the question of liability. It

says nothing about quantification of damages despite the well specified claim in the statement of defence and counterclaim.

[69] Paragraphs 65, 66, 68, 73, 92, and 102 to 114 of the decision are relevant to the counterclaim. Adjudicator Barnett dealt with several issues:

- breach of the implied term about quality of work (para. 104)

- repair requiring duplication recoverable as damages (para. 106)

- work in the estimate that is not recoverable because it would be duplicate (para. 108)

- claims for work done by a short-term contractor and the respondent's housekeeper (paras. 109 and 110)

- quantification of repair work to be done (para. 111)

- a defence based on a municipal by-law raised by the defence to counterclaim.

[70] I do not think that the need to replace the entire floor is ignored in the decision. See paras. 53, 54, 57, 58, 59, and 104. Adjudicator Barnett recorded his findings that "apparently the tile work cannot be repaired; it must really be re-done in order to achieve the desired result of a generally level floor" at para. 106. This is supported by paras. 53, 55, 57, 58, 59, and 104 of the decision. Nor do I think he ignored the need to replace the cabinets. Correcting the poor work "requires the removal of cabinets and countertops for the [repair] work to be done": para. 106.

[71] The reasons are not insufficient. On the contrary, they are extensive and they fully respond to the issues raised by the pleadings.

Hearsay

[72] Most of the damages awarded on the counterclaim were assessed based on estimates from people who were not called to testify. That is to say, they were assessed on hearsay. Mr. Towle now takes issue with this.

[73] Subsection 28(1) of the *Small Claims Court Act* permits hearsay. The statute makes "the hearsay rule … inapplicable with the issues of relevancy and efficiency being the only barriers to the admission of evidence": *Whalen v. Towle*, 2003 NSSC 259 at para. 6. See also, *Wiggins v. Steele*, 2006 NSSM 1 at paras. 19 to 24.

[74] *Morris v. Cameron*, 2006 NSSC 9 may take a more restrictive view. Justice LeBlanc accepted (para. 27) Ontario jurisprudence to the effect that hearsay is admitted in Small Claims Court but is subject to the principles of necessity and reliability when the evidence is weighed.

[75] Justice LeBlanc does not explain why a departure from *Whalen v. Towle* was justified in light of the principle of *stare decisis*. See the discussion at para.

35 to 38 of this decision. If *Whalen v. Towle* is not yet established precedent, then I join the dialogue to support its adoption. I do so with the greatest respect for Justice LeBlanc's reasoning.

[76] There are two serious problems with this approach to hearsay in Small Claims Court. Firstly, it is inconsistent with s. 28(1) to suggest that hearsay offered in Small Claims Court must come within the principled exception. Secondly, it ignores necessity.

[77] The principle of necessity is stringent. It would exclude the estimates in this case and all the various documents at issue in *Morris v. Cameron*. In a system under which hearsay is admitted then weighed according to the principled exception, necessity goes by the wayside. Note the absence of discussion of necessity when *Morris v. Cameron* reviews the adjudicator's use of the hearsay documents at para. 30 to para. 33. The attempt to infuse the necessity and reliability exception into Small Claims Court in *Morris v. Cameron*, and in the Ontario Court of Justice decision upon which it relies, strips the principled exception to reliability. And, it makes the reliability of the hearsay reviewable on

appeal. That is to say, the appeal court considers the proper weight to be given to the hearsay evidence: para. 30 to para. 33 of *Morris v. Cameron*.

[78] The appeal court may not consider the proper weight to be given to any evidence. (As discussed at paras. 22 and 33 of *Morris v. Cameron*, there may be situations in which the admission or weighing of hearsay evidence amounts to a breach of the duty of fairness. That is a rare circumstance and it involves a different issue than the one under discussion.)

[79] Adjudicator Barnett had to admit the estimates. I defer to his weighing of this evidence.

Conclusion

[80] This appeal is to be dismissed.

J.