SUPREME COURT OF NOVA SCOTIA
Citation: *Caughey v. Gulliver*, 2021 NSSC 306

Date: 20211102
Docket: ST No. 500495
Registry: Halifax

Between:

Eric Caughey

Appellant

v.

Craig Gulliver

Respondent

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	April 6, 2021 in Truro, Nova Scotia
Oral Decision:	November 2, 2021
Counsel:	Eric Caughey, Self-Represented Appellant Craig Gulliver, Self-Represented Respondent

By the Court:

Overview

[1] This is an appeal from the Small Claims Court decision in *Caughey v. Gulliver*. The Small Claims Court matter involved the Respondent, Craig Gulliver, and the Appellant, Eric Caughey. Mr. Caughey hired Mr. Gulliver to construct a carport at Mr. Caughey's property in August 2018. After ongoing delays and disagreements between the parties, Mr. Gulliver ceased working on the project before its full completion.

[2] Mr. Caughey refused to pay Mr. Gulliver for the work completed, on the basis that the work was slow, and the quality of the work was poor. Following Mr. Caughey's refusal to pay, Mr. Gulliver filed a Notice of Claim with the Small Claims Court seeking an order that Mr. Caughey pay him $4,929.70 for the work completed to date.

[3] The matter was heard before Small Claims Court Adjudicator, Shelly Martin (the "Adjudicator"). The Adjudicator found for Mr. Gulliver, and ordered that Mr. Caughey pay Mr. Gulliver the requested $4,929.70 (representing $4,830 in damages and $99.70 in costs). The order is reproduced in full:

> A hearing over the outstanding bill for work done in partial completion of a carport was held before me on October 7th 2019. Both parties represented themselves. The Defendant refused to pay for the construction of a carport, alleging that it was defective. The Claimant cited this as a pattern of behaviour for which the Defendant is well known. Although there was an issue with an initial inspection of the support beams, I accept that the Defendant's abrupt change in the original design mid-project contributed to this and note this problem was also later rectified by the Claimant. While some work still needed to completed [*sic*] when the Claimant quit in frustration, the amount sought by the Defendant reflects this. The Defendant feels he should not pay for the work done as it took too long and was done poorly; the Claimant swallowed many costs to accommodate the Defendant's ever-changing plans and feels he is entitled to payment for work done. On the basis of the evidence before me, I agree and order that the Defendant pay to Claimant as follows:
>
> **Debt:** $4830.00
>
> **Costs:** $99.70
>
> **Total:** $4929.70

[4] Mr. Caughey appealed the Adjudicator's decision on the basis that he was not given an opportunity to cross-examine the Respondent and he was denied an opportunity to present the evidence of an expert witness who was at the hearing with him. As a result, he alleges the Adjudicator failed to follow the requirements of natural justice.

[5] I find that, in denying the Appellant the opportunity to cross-examine on the Respondent's direct oral testimony (which was considered and relied upon by the Adjudicator in reaching her decision) the Adjudicator failed to follow the requirements of natural justice. On this ground, the appeal is allowed and a new trial ordered.

[6] Regarding the expert witness the Appellant intended to call, I find that the Appellant should have alerted the Adjudicator of his intention to call this witness. It was his failure to do so that resulted in his lack of opportunity to call the witness, rather than a failure of the Adjudicator to follow the requirements of natural justice. This ground of appeal is dismissed.

Legislation

[7] The *Small Claims Court Act*, RSNS 1989 c. 430 (the "*Act*"), provides the potential grounds of appeal from a decision of the Small Claims Court. Section 32 reads, in part:

> 32(1) Appeal
>
> A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an Adjudicator on the ground of
>
> (a) jurisdictional error;
>
> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice…

[8] The natural justice ground of appeal is rooted in section 2 of the *Act*, the Purpose section, which reads:

> 2 Purpose
> 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.

Issues

[9] The Appellant's grounds of appeal raise the following two issues:

(a) Does a Small Claims Court Adjudicator's failure to permit a self-represented litigant to cross-examine on an opposing party's direct evidence constitute a failure to follow the requirements of natural justice as required by s. 2 of the *Act*; and

(b) Does a Small Claims Court Adjudicator's failure to confirm that a self-represented litigant has had the opportunity to call all of their intended witnesses constitute a failure to follow the requirements of natural justice as required by s. 2 of the *Act?*

Standard of Review

[10] An allegation of a failure to follow the requirements of natural justice does not engage the traditional standard-of-review analysis. Instead, the reviewing Court is required to determine whether the Small Claims Court failed to meet the requirements of natural justice in the circumstances.

[11] In *Homburg Canada Inc. v. Nova Scotia (Utility & Review Board)*, 2010 NSCA 24, MacDonald CJNS, writing for the Nova Scotia Court of Appeal, wrote:

> 66 With this issue, Homburg asserts that by deciding this matter on its merits, the Board denied Homburg natural justice. Because this type of issue involves procedural fairness, a standard of review analysis is not triggered, per se. Instead, after considering all the circumstances, it simply falls to us to decide if the process was fair to Homburg. For example, in *Creager v. Nova Scotia (Provincial Dental Board)* (2005), 230 N.S.R. (2d) 48 (N.S. C.A.), Fichaud, J.A. said this:
>
> > 24 Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5 per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:
> >
> > > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
> >
> > This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62)

> considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but considered procedural fairness without analyzing the standard of review.
>
> See also *Rogier v. Halifax (Regional Municipality)* (2009), 273 N.S.R. (2d) 292 (N.S. S.C.) at 92-93.
>
> [*Emphasis added*]

[12] This reasoning was also applied by the Nova Scotia Court of Appeal in *Sackville Trenching Ltd. v Nova Scotia (Occupational Health & Safety Panel)*, 2012 NSCA 39, at para. 12, where Farrar JA said, "Issues involving procedural fairness to [*sic*] not engage a standard of review analysis in the traditional sense. Instead, it simply falls to us to decide if the process was fair to Sackville Trenching …".

[13] This "fairness" standard of review has been applied by the Nova Scotia Supreme Court in the context of an allegation of breach of the requirements of natural justice contrary to s. 2 of the *Act*. In *Wiles Welding Ltd v. Solutions Smith Engineering Inc*., 2012 NSSC 255, an appeal from the Small Claims Court, Pickup J, of the Nova Scotia Supreme Court wrote:

> 10 It does not appear to be in dispute that the standard of review, where a ground of appeal raises an error of law, is correctness. The second ground of appeal, which is failure to follow requirements of natural justice, does not engage the standard of review analysis in the traditional sense… [t]he burden for the court is to determine if the process was fair to the claimant.

[14] In *CM MacNeill & Associates v. Toulon Development Corporation*, 2016 NSSC 16 ("*CM MacNeill"*), another appeal from the Small Claims Court, LeBlanc J wrote:

> 69 An allegation of a failure to follow the requirements of natural justice does not engage the standard of review analysis in the traditional sense. The burden is for the court to determine if the process was fair to the claimant: *Inaxess Marketing Inc. v. Curtis Custom Designs Inc*., 2015 NSSC 99, [2015] N.S.J. No. 129 (N.S. S.C.) at para. 15.

[15] The meaning of "natural justice" has been discussed extensively in the caselaw. In 1995, Palmeter ACJ, in *Shannon v Forsyth*, 125 NSR (2d) 118, wrote: "Natural justice is simply fairness, including procedural fairness."

[16] In *Waterman v. Waterman*, 2014 NSCA 110, the majority of the Nova Scotia Court of Appeal wrote:

> 63 Natural justice has two important and distinct rules: an Adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard. These rules have been historically described by the courts using Latin phrases. Gonthier J., in *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd*., [1990] 1 S.C.R. 282 (S.C.C.), described the rules as follows:
>
> > [66] ...It has often been said that these rules can be separated in two categories, namely "that an Adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*).
> >
> > [*Emphasis added*]

[17] In *CM MacNeill*, LeBlanc J canvassed the Court's caselaw on the meaning of natural justice in the context of the Small Claims Court:

> 71 Saunders J. (as he then was) in *Brett Motors*, [1999 CarswellNS 410, 181 NSR (2d) 76 (NSSC)], explored the meaning of natural justice in the context of Small Claims Court hearings:
>
> > 12 I think it helps to recall that the small claim court's purpose is to provide an informal and inexpensive forum for the resolution of disputes falling within its jurisdiction. It is meant to be accessible to those citizens who need it. To keep costs down there is no transcript of the evidence. Depending on whether the parties are represented by counsel, or other circumstances, an Adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.
> >
> > . . .
>
> 72 In *Gallant*, [2010 NSSC 375], at para. 12, Rosinski J. quoted with approval para. 12 of *Brett Motors*, but then noted at para. 13:
>
> > 13 Nevertheless, a minimum level of procedural fairness must always remain. The parties are equally entitled to such protections to ensure the outcome is "just" as between them.
>
> 73 Of similar effect are the findings of Van den Eynden J. in *Parslow*, [2014 NSSC 390]:
>
> > 33 "Natural justice" is not a defined term in the *Small Claims Court Act*. Natural justice was discussed in *Spencer v. Bennett*, 2009 NSSC 368 at para. 15 and 16 therein provide as follows:
> >
> > > 15 Natural Justice is not defined in the *Small Claims Court Act*. Nevertheless it is a familiar concept to the common law, although

> elusive of definition. In *Lloyd v. McMahone,* [1987] A.C. 625 at 702, Lord Bridge puts it this way:
>
> > ... the so called rules of natural justice are not engraved on tablets of stone...what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.
>
> These criteria have been echoed and amplified in *Baker v. Canada,* [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193 (S.C.C.), (per L'Heureux-Dube).
>
> 16 Natural Justice really means that the parties are entitled to a fair process... no one should be a judge in his own cause (the Adjudicator must be independent) and that one should always hear "the other side."

[18] In *Belshaw v. Robarts*, 2016 NSSC 127, at para. 12, LeBlanc J wrote, "Simply put, natural justice requires that every proceeding be fair to both parties."

[19] Appellate judges must decide a Small Claims Court appeal based solely on what the parties allege happened at the hearing but, because there is no record of the hearing, Small Claims Court appeals raise particular issues around reviewability.

[20] In *Pyramid Properties Ltd v. Johnston*, 2010 NSSC 51, Duncan J (as he then was) wrote:

> 24 … I will add that an appeal against the decision of a Small Claims Court Adjudicator is further restricted by the absence of a record of the testimony given in the hearing. It is against this legal and practical background that an appeal of an Adjudicator's decision is determined.

[21] And in *Malloy v. Atton*, 2004 NSSC 110, Murphy J wrote:

> 8 Unfortunately, there is no official record of what happened at the Small Claims Court hearing. Most court proceedings are recorded, and during an Appeal a Judge can review a transcript to determine exactly what occurred. This is not the way the Small Claims Court system works. Small Claims Courts are designed to be efficient and to operate with minimal expense, and when they were first established, their jurisdiction was very limited. When there is no transcript, and nothing in the record relating to the issue raised by an Appeal, the Court reviewing the Adjudicator's decision must decide based entirely on what the

> parties advise occurred at the hearing. The absence of a transcript from Small Claims Court places the parties and any judge hearing an Appeal from an Adjudicator's decision at a significant disadvantage. Adversarial litigants cannot be expected to accurately and objectively recall details about procedural and evidentiary issues addressed at a hearing several months earlier in an environment with which they are not usually familiar. This problem has existed since Small Claims Courts were first established, but is exacerbated now with the expanded Small Claims Court jurisdiction. Cases involving up to $15,000.00[1] are very important to litigants, who should be able to have Appeals considered by Judges who have had an opportunity to become fully informed of events which took place in Small Claims Court before assessing whether parties' rights have been properly addressed.
>
> 9 In the present case, without a transcript and with nothing in the record relating to the procedural/evidentiary issue raised by the Appeal, I must decide based on what the parties tell me…
>
> [*Emphasis added*]

[22] The Nova Scotia Supreme Court has recognized the inability of the Small Claims Court to provide perfect fairness, given the need to balance fairness with an efficient and inexpensive Small Claims Court process. In *Whalen v. Towle*, 2003 NSSC 259, ACJ MacDonald (as he then was) wrote:

> 7 Furthermore, there is no record of the proceedings in Small Claims Court. As well, the appeal process is limited in that this Court, the Supreme Court of Nova Scotia, is the forum of last resort. In other words, in order to provide an efficient and inexpensive process, certain judicial safeguards are sacrificed. This is to ensure that matters involving small claims can be processed efficiently and fairly.
>
> 8 Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of *R. v. O'Connor*, [1995] S.C.J. No. 98. At paragraph 193 she states:
>
> > What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemeric as perfection in any other

[1] Now $25, 000 as per s. 9(a) of the *Act*.

> social agency. *What the law demands is not perfect justice but fundamentally fair justice*.
>
> [*Emphasis in original*]

[23] Recent Nova Scotia Supreme Court decisions suggest that increases in the monetary jurisdiction of the Small Claims Court may warrant an increased threshold of procedural fairness. In *Kemp v. Prescesky*, 2006 NSSC 122, a defendant appealed an Adjudicator's order for default judgment against the defendant after he failed to file a defence within the deadline set by the *Act* and also failed to appear at the hearing. The Appellant argued that the rules of the Small Claims Court for filing defences, setting down hearings, and setting aside default judgments failed to meet the requirements of natural justice. Warner J held that the inflexibility of the rules was a breach of the requirements of natural justice and that a higher threshold for the requirements of natural justice was required, due to the increased monetary jurisdiction of the Small Claims Court. He wrote:

> 13 The rules of procedure in the court may have been appropriate, and met the threshold requirements of natural justice, at a time when the monetary limit was $3,000.00. However, according to Statistics Canada, the average annual earnings for all adult Nova Scotians, as of the 2001 census, is $26,632.00. Of those, the average for people with some university education is $41,146.00. This means that everyone who does not have a university education — which is most Nova Scotians – has an average annual income far less than the monetary jurisdiction of the Small Claims Court, which court can enter a judgment against that person for more than his or her gross annual income. This fact, in my view, informs the requirements of natural justice, one of the bases for appeal in section 32(1) of the Act.
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> …
>
> 27 With the increase in the monetary jurisdiction of the court is a concomitant requirement for rules that protect the integrity and fairness of the court. Claims of this court still fall below the quantum for which many parties are able to afford legal representation. There is still a place for an efficient legal process to resolve claims without all the steps, delays, and costs of superior court actions; however, the increase of the consequences on the parties mandates a higher threshold of procedural fairness…

Issue 1 - Does a Small Claims Court Adjudicator's Failure to Permit a Self-Represented Litigant to Cross-Examine Oral Testimony Constitute a Failure to Follow the Requirements of Natural Justice as Required by s. 2 of the *Act*?

[24] In both his written submissions and his oral submissions, the Appellant claimed that he was denied the opportunity to cross-examine on the Respondent's "evidence in general" and, more specifically, the Respondent's testimony relating to the Appellant's credibility. According to the Appellant, he had no opportunity to cross-examine or ask any questions of the Respondent. The Appellant states he asked the Adjudicator if he could ask questions and the Adjudicator denied his request.

[25] According to both the Respondent (in his oral submissions) and the Adjudicator (in her Summary Report of Findings, at para. 5), there was "back-and-forth" as each piece of evidence was presented. I am unclear whether the "back-and-forth" referred to was between only the Appellant and the Respondent or, rather, whether it was between the Appellant, Respondent, and the Adjudicator. Neither the Adjudicator in her Summary Report of Findings, nor the Respondent in his written or oral submissions on appeal, commented on whether any "back-and-forth" occurred specifically following the Respondent's testimony relating to the Appellant's credibility.

The Right to Cross-Examine

[26] In *Malloy v Atton*, 2004 NSSC 110, the Appellants appealed a Small Claims Court order on a number of grounds, including the alleged denial of the opportunity to cross-examine, amounting to a failure to follow the requirements of natural justice. Specifically, the Adjudicator admitted into evidence and considered the contents of an affidavit by the Respondent's husband, who was not present at the Small Claims Court hearing. The Appellants alleged that they had requested the opportunity to cross-examine the author should the Adjudicator admit the affidavit into evidence. The Adjudicator allegedly admitted the affidavit into evidence without providing the Appellants the opportunity to cross-examine the affidavit's author.

[27] The Court held that the Appellants had been denied natural justice when they were not provided the opportunity to cross-examine the Respondent's husband on the contents of his affidavit. Murphy J wrote:

> 16 The right to cross examine is a fundamental part of the trial process. It is a basic procedure in our court trial system that each party has the right to cross examine persons whose testimony is introduced…
>
> …

> 17 The Nova Scotia Court of Appeal in *Guptill v. Guptill* (1987), 82 N.S.R. (2d) 390 (N.S. C.A.), allowed an appeal after a Chambers Judge did not permit cross examination on an affidavit. When counsel for a husband had been denied an opportunity to cross examine his wife upon her affidavit at a hearing respecting interim maintenance, the Court of Appeal held that the husband did not receive a hearing on the full merits of the case because all potential evidence was not before the Chambers Judge.
>
> 18 I conclude that there was denial of natural justice at the Small Claims Court hearing in that the Appellants were not given an opportunity to cross examine Mr. Atton on the contents of his affidavit, and I allow the Appeal.
>
> [*Emphasis added*]

[28] The Appellants in *Malloy* claimed that they requested the opportunity to cross-examine the affidavit's author, but were denied. The Respondent, at para. 7, told the Court that she "had no recollection" of whether there had been a request for cross-examination. It appears that the Court found the Appellants' allegation to be true based on the fact that it was not contradicted by the Respondent. The Court wrote:

> 9 In the present case, without a transcript and with nothing in the record relating to the procedural/evidentiary issue raised by the Appeal, I must decide based on what the parties tell me. I accept what both parties said, and will go by their recollection — neither the Appellants' advice that Mr. Atton's affidavit was filed on the Plaintiff's behalf without any prior notice after the Defendant's case was presented, nor the assertion that the Adjudicator denied Mr. Malloy's request to cross examine the deponent, was contradicted by [the Respondent].
>
> [*Emphasis added*]

[29] The Court went on to find that the Appellants had requested the opportunity to cross-examine the deponent and had been denied that request. The Court, in *Malloy*, also established that the reviewing Court must decide the appeal based on what the parties from the hearing advise occurred at the hearing. The *Malloy* decision suggests that, where one party claims that a certain event (or omission) occurred at the hearing and the other party does not deny the alleged occurrence, the Court should find that the alleged event (or omission) occurred.

[30] In *Earthcraft Landscape Ltd. v. William Clayton/Cousins Stonewalls*, 2002 NSSC 259, the Appellant alleged a breach of natural justice on the basis that the Appellant was denied the opportunity to cross-examine the Respondent (amongst other things). Justice LeBlanc (as he then was) noted that there were no authorities squarely on the point of whether the principles of natural justice required a Small

Claims Court to provide for formal cross-examination. However, he found that several cases indicated an opportunity to cross-examine, helping to satisfy the requirements of natural justice: see paras. 11 and 12.

[31] Justice LeBlanc concluded that, "… it is the substance, rather than the form, of cross-examination that is essential": see para. 14. He concluded that, while there was no formal cross-examination at the Small Claims hearing, the Adjudicator acted as an intermediary and ensured that each party had an opportunity to present its case: see para. 13. He relied partly on the Adjudicator's Summary Report which he cited at para. 10:

> The parties remained seated at the counsel table and each spoke to me at length back and forth. The hearing proceeded in this fashion for approximately two and a half hours. Each party had a full opportunity, I think, to fully elaborate their own position and rebut that of the other. I do not adjourn without having checked to be sure the parties have had their say in full.

[32] In *Brown v. Newton*, 2009 NSSC 388, the Appellant alleged that the Adjudicator had failed to follow the rules of natural justice by not telling him that he was entitled to call the Respondent as a witness in order to cross-examine him. The claim involved an allegation of negligent legal representation on the part of the Respondent. The Appellant, who was self-represented, closed his case after giving his evidence. Counsel for the Respondent elected *not* to call evidence, which purportedly surprised the Appellant; the Appellant expected the Respondent to testify in his own defence and anticipated the opportunity to then cross-examine the Respondent on his testimony: see para. 11.

[33] In his Report of Findings in response to the Appellant's appeal, the Adjudicator stated (see para. 12):

> … I did not prohibit the claimant from calling the defendant… [t]he Claimant had indicated that he had completed his case and I turned the matter over to the Defense. The Defense indicated that they did not wish to call evidence. The Claimant seemed surprised at this and in response to questions in this regard I advised the Claimant to the effect that the Defense is not obligated to call evidence.

[34] In *Brown*, McDougall J held, at para. 33:

> By not exploring further the reasons for the Appellant's surprise when he learned that the Respondent had decided not to call evidence and by failing to provide additional information that might have alerted the Appellant to the possibility of

> calling the Respondent and to cross-examine him as part of the case-in-chief, the Appellant was denied natural justice.

[35] McDougall J first considered the fact that the Appellant was self-represented and the impact this had on the role of the Adjudicator to explain basic rules of evidence and procedure to the parties. He referred to sections 2[2] and 16[3] of the *Small Claims Court Act* to find that the Small Claims Court is intended to be a "people's court"; while lawyers are not prohibited from appearing on behalf of litigants, litigants may also represent themselves. McDougall J then wrote:

> 19 In cases where both sides are represented by competent legal counsel the presiding Adjudicator would normally be less concerned with explaining the basic rules of procedure and evidence to the parties.
>
> 20 This would not be the case where either or both parties are self-represented. In either of these last two scenarios an Adjudicator must be prepared to explain the procedure that will be followed and some of the basic rules of evidence.

[36] He went on to cite the *Civil Procedure Rules* and found that the right to cross-examine provided in the *Rules* may be used for direction on procedural issues in keeping with the purpose of the *Act*:

> 26 Certainly the learned Adjudicator cannot be faulted for what he did nor what he offered by way of explanation to the Appellant. But, should he have done more? Should he have explained to the Appellant that he could ask to re-open his case for the purpose of calling the Respondent as part of his case-in-chief as is provided for in Civil Procedure Rule 54.06 which says:
>
> > 54.06 In addition to cross-examination in accordance with the rules of evidence about a hostile witness, a party may call and cross-examine a party who is adverse in interest or a person who is, when the person is called, an officer, director, or employee of a party who is adverse in interest.
>
> 27 In my view the answer to this question is yes, he should have. Even if it involved the need for an adjournment this could have been accommodated without significant inconvenience or hardship to the Respondent. Unless there is an express provision in the *Act* or the Regulations to the contrary the *Civil Procedure Rules*, although adopted for use in the Supreme Court of Nova Scotia,

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2 Section 2 states: 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.

3 Section 16 states: A claimant or a defendant may appear at a hearing in person or by agent and may be represented by counsel.

> may be used for guidance or even direction on procedural issues which is in keeping with the stated purpose of the *Act* referred to earlier.

[37] In *Spencer v. Bennet*, 2009 NSSC 368, the Court established that the denial of the opportunity to cross-examine will only result in a breach of the rules of natural justice where the decision-maker relied on that evidence in reaching their decision. The Appellant claimed natural justice had been breached because he was denied the opportunity to cross-examine on a piece of evidence that was ordered to be submitted *after* the hearing, namely a credit card statement. Justice Bryson (as he then was) found that the principles of natural justice had *not* been breached because the Adjudicator's finding against the Appellant was not based on the contents of the credit card statement; rather, her decision was reached on the basis of her findings regarding the Appellant's credibility. The judge noted:

> 27 In coming to this conclusion, I do not mean to condone the Adjudicator's process. In most cases it would be fatal. It would have been better to adjourn so that Mr. Spencer had an opportunity to address the credit card statement, if he cared to do so. But in the particular circumstances of this case, I am satisfied that it made no difference.
>
> …
>
> 33 Although irregular, the process here did not result in a breach of the rules of natural justice. Alternatively, if there were a breach, it did not affect the outcome or result in a miscarriage of justice.

[38] Despite the ruling in *Spencer*, Courts have cautioned against speculating as to the outcome of a case had the requirements of natural justice been fulfilled (and denying an appeal on that basis). In *Belshaw v. Robarts, supra*, the Nova Scotia Supreme Court wrote:

> 20 ... It is possible that a judge may abstain from intervening when satisfied that no amount of procedural propriety would have affected the outcome (see *Spencer v. Bennett*, 2009 NSSC 368, [2009] N.S.J. No. 587 (N.S. S.C.) at paras. 25-27). But <u>generally speaking, an appeal judge should not speculate on what the outcome of the case might have been had the requirements of natural justice been fulfilled</u>.
>
> [*Emphasis added*]

[39] De Smith's *Judicial Review*, 6th ed. at pp. 471-472 expresses it this way:

> . . . The courts have rightly cautioned against the suggestion that no prejudice has been caused to the applicant because the flawed decision would inevitably have

> been the same and as a general principle, a court will be slow to rule that no harm has been done. It is not for the courts to substitute their opinion for that of the authority constituted by law to decide the matters in question.
>
> [*Emphasis added*]

[40] The following principles can be extracted from the caselaw. The right to cross-examination is a fundamental right of the trial process, including in Small Claims Court: *Malloy, supra,* at paras. 16-18. Where parties are self-represented, a Small Claims Court Adjudicator has a duty to inform them of rules of procedure and evidence, including the right to cross-examine: *Brown, supra,* at paras. 19 and 20. While no case specifically states whether cross-examination is required to satisfy the requirements of natural justice in every case, the opportunity to cross-examine will help satisfy the requirements. In considering whether the requirements of natural justice have been followed, it is the substance, rather than the form, of cross-examination that should be considered: *Earthcraft, supra,* at paras. 11-14. Lastly, a denial of the opportunity to cross-examine a witness is more likely to result in a breach of the requirements of natural justice where the decision-maker relied on that evidence in reaching their decision: *Spencer, supra,* at paras. 27 and 33.

Analysis

[41] As Murphy J stated in *Malloy,* the Court must decide this appeal based on what the parties tell the Court. The Appellant claims he was denied the opportunity to cross-examine the Respondent. While the Respondent and Adjudicator assert that there was "back-and-forth questioning" throughout the hearing, neither rebut the claim that the Appellant was not allowed to cross-examine the Respondent following his testimony relating to the Appellant's credibility. Based on the Court's decision in *Malloy,* the absence of a clear denial from the Respondent or the Adjudicator may be a sufficient basis for the Court to accept as true the Appellant's claim that he was not provided the opportunity to cross-examine the Respondent on his testimony relating to the Appellant's credibility.

[42] While it is possible that informal "back-and-forth" cross-examination will satisfy the requirements of natural justice (see *Earthcraft, supra*), the back-and-forth questioning in the case at bar was not sufficient to allow the Appellant to present his case in full: that is, the Appellant did not have the opportunity to rebut the Respondent's claims relating to his credibility. On this basis, the case at bar is distinguishable from *Earthcraft*.

[43] Furthermore, because the parties were self-represented, the Adjudicator had a duty to inform the parties of the rules of procedure and evidence (see *Brown*, *supra*), including, presumably, the right to cross-examination.

[44] The right to cross-examination is fundamental to the trial process, including in the Small Claims Court (see *Malloy*, *supra*). The inability to cross-examine on relevant evidence will pose a particularly troubling threat to natural justice where that evidence was relied upon by the Adjudicator in reaching her decision. Both the Adjudicator's decision and her Summary Report of findings suggest that she *did* rely on the Respondent's testimony in reaching her decision.

[45] In her decision, the Adjudicator states: "The Defendant refused to pay for the construction of a carport, alleging that it was defective. The Claimant cited this as a pattern of behavior for which the Defendant is well known." [Emphasis added] The Adjudicator's decision is brief but, to include this assertion in her decision without any surrounding comments or qualifications, suggests that she accepted and relied on the evidence in reaching her decision.

[46] In her Summary Report of Findings, the Adjudicator wrote at paragraph 8: "This case rested on the credibility and reliability of each party …". While the Adjudicator does refer to other bases for her finding that the Respondent is more credible than the Appellant (see paras. 12-13), she includes the Respondent's testimony as being one of these bases (see paras. 13). I note that it is unclear whether the testimony referenced in para. 13 is the same testimony in which the Respondent spoke to the Appellant's credibility.

[47] If the Adjudicator relied on the Respondent's testimony relating to the Appellant's credibility in reaching her decision (which it appears that she did), the denial of the opportunity to cross-examine the Respondent on his testimony constitutes a denial of natural justice.

[48] It is possible that the Adjudicator may have reached the same conclusion even after hearing the Appellant's cross-examination, but an appeal judge should not speculate on what the outcome of the case might have been had the requirements of natural justice been fulfilled (see *Belshaw*, *supra)*. As a general principle, the Appeal court should be slow to rule that no harm has been done.

[49] Accordingly, I find that the process was not fair. A new hearing is ordered on the basis that the Appellant was denied the opportunity to cross-examine on oral evidence that was relied upon by the Adjudicator in reaching her decision.

Issue 2 - Does a Small Claims Court Adjudicator's Failure to Confirm that a Self-Represented Litigant has had the Opportunity to Call all of their Witnesses Constitute a Failure to Follow the Requirements of Natural Justice as Required by s. 2 of the *Act*?

[50] At the Small Claims Court hearing, the Appellant called Corey O'Toole as a witness. The Appellant claims that he was denied the opportunity to call a second witness, Brandon Dennis.

[51] According to the Respondent, the Adjudicator asked the Appellant who he proposed to call as a witness, and the Appellant responded that he would like to call Corey O'Toole. According to the Respondent, the Appellant did not ask to call any other witnesses. The Adjudicator's version of the events are similar, she states in her Summary Report of Findings at para. 6: "My notes and recollection of the hearing only note one witness, Corey O'Toole, who finished the roofing on the carport. If there were other experts he wished to call, the Appellant did not present them to the court as part of his defence."

[52] The Appellant does not dispute this version of events. The Appellant confirmed that he did not bring the second witness to the attention of the Adjudicator. He stated he would have done so during his closing arguments, but the Adjudicator did not give the parties the opportunity to provide closing arguments.

Analysis

[53] Section 28 of the *Act* governs the admissibility of evidence in a Small Claims Hearing. Section 28 reads:

> (1) An Adjudicator may admit as evidence at a hearing whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject matter of the proceedings and may act on such evidence, but the Adjudicator may exclude anything unduly repetitious.

[54] It does not appear as though the testimony of Mr. Dennis would have been unduly repetitious. In fact, the Adjudicator's Summary Report of Findings suggests that her ruling was based, in part, on a lack of evidence, particularly from someone

knowledgeable in the field. The Adjudicator wrote at paragraph 21 of her Summary Report of Findings:

> However, when I considered the testimonial and documentary evidence before me, I could not reasonably conclude the workmanship of the carport was subpar without more evidence. The Appellant was being asked to pay a fraction of the cost of the work and the Respondent did and I felt it was unfair for him to remain unpaid on the basis of the evidence before me.

[55] She also wrote:

> …There was no evidence of building code requirements with respect particular [*sic*] aspects of the construction, nor was there sworn evidence of an expert who might have enlightened the court with respect to the requirements for framing, concrete pads, or other parts of carport structures. On the whole, I accept the Dennis letter was intended to offer his opinion about the state of the carport, but I felt it insufficient to prove poor workmanship the Appellant alleged [*sic*]. I felt that placing weight on the letter was unfair to the Respondent who had no advance notice that it would be offered, and did not have the author of the letter present to cross-examine.
>
> [*Emphasis added*]

[56] An Adjudicator cannot call a witness if she is not made aware that the witness is available to be called. Depending on the circumstances of each case, there is a burden on a self-represented litigant to bring to the attention of the Adjudicator any witnesses that they wish to call.

[57] In *Delano v. Craig*, 2010 NSSC 60, the Appellants argued that the Adjudicator failed to follow the requirements of natural justice when he accepted and relied upon testimony of the Respondent about out-of-court statements made by the co-Respondent, who was present at the hearing but not called upon to testify. Rejecting this ground of appeal, McDougall J wrote:

> 13 As to the argument that the Adjudicator failed to follow the requirements of natural justice by accepting and relying upon or considering out-of-court statements attributed to the co-defendant who, although present in the courtroom, was not called upon to testify, I am also not satisfied that this forms a valid ground of appeal.
>
> 14 The Appellant could have objected to what amounted to hearsay evidence given by one defendant on behalf of another. The other defendant who was present in the courtroom could then have testified as to the conversations that took place between her and the Appellant prior to her husband's arrival.

> 15 The Appellant could have also requested permission to give further evidence to rebut the evidence offered in defence of the claim if he thought that it was not accurate or did not fairly represent what had transpired between him and the female Respondent.
>
> [*Emphasis added*]

[58] This suggests that, where a party wishes to have an individual present in the courtroom testify, it is incumbent upon that party to bring that intention to the attention of the Court. If a party fails to do so, they cannot later appeal on the basis that the individual did not testify.

[59] In *Rosenthal & Co. v Boulton*, 1981 CarswellOnt 2674 (ONCJ) the Appellant argued that they were denied a full opportunity to cross-examine one of their witnesses in an Ontario Small Claims Court proceeding. The Appellant did cross-examine the witness in question but, allegedly, not to the extent that the Appellant wished to do so. Part way through the cross-examination, the Court interjected to confirm the evidence of the witness, and then asked the Respondent if he would like to call his next witness. The Appellant alleged that, in doing so, the Adjudicator denied him the opportunity to fully cross-examine the witness. The Ontario Superior Court cited the Small Claims Court record during the Appellant's cross-examination, stating at para. 27:

> …
>
> THE COURT: These kind of questions might be better suited for the other witness, sir, so he can see all the documents.
>
> MR. ERIKSON [Respondent]: I agree with that, but I wasn't about to...
>
> MR. BOULTON [Appellant]: I didn't know what the criteria was.
>
> MR. ERICKSON: There is another witness. Mister Remington, who dealt with your account, sir, is going to be on the stage next. This man was merely to explain...
>
> THE COURT: He is just explaining the relationship of the companies. All right. Thank you, sir. Do you want to call the actual gentleman that was involved?
>
> Mr. ERIKSON: Yes. Mister Remington?
>
> 28 Mr. McDermott submits that as a result of this exchange the Court denied Mr. Boulton the right to cross-examine the first plaintiff's witness to the extent that he wished to do so. I have carefully examined this exchange and I must say that it does not appear to me that the Court was making a ruling that Mr. Boulton might not continue his cross-examination. It may well be that Mr. Boulton thought that that was the result of what the Court said and did not, if he intended to cross-examine further, explain to the Court that he had not finished his cross-

> examination in which case it would have been incumbent upon the Court to allow him to continue provided that his cross-examination was relevant. I cannot find that at any other time Mr. Boulton raised his point again…
>
> [*Emphasis added*]

[60] The Court found that the burden was on the Appellant to bring to the attention of the Court the fact that he wished to cross-examine further. The Appellant in *Rosenthal & Co.*, also claimed that he did not have the opportunity to call additional witnesses to the stand and that this, too, was a failure by the Court to follow the principles of natural justice. The Court referenced the record at para. 28:

> THE COURT: Sir, if you wished you could have subpoenaed any one of these people to court today.
>
> MR. BOULTON: Which people?
>
> THE COURT: The ones that you said you made a verbal agreement with.
>
> MR. BOULTON: Oh, they were in the court. Two of them are in the courtroom today. There is no purpose served in that.

[61] In dismissing this ground of appeal, the Court wrote:

> 29 With all due deference to Mr. Boulton, I think it fair to say that as a man of some experience in this market which he acknowledges, he must have known what the case was he was trying to advance to the Court and I should have thought that any reasonable person whether counsel or a layman who had this comment made by the Court and who felt that he had not had ample opportunity to call witnesses from the plaintiff or to cross-examine the plaintiff's witnesses, would at that point have told the Court that he still wanted to get some information from one or more of those who were actually in Court at that time with whom, by implication he had the verbal agreement. But he did not do so.
>
> 30 In any event, while I have not been given any statement by Mr. Boulton, which could have made in an affidavit tendered to me at the outset of this appeal, saying what line of questioning he wished to pursue with plaintiff's witnesses in cross-examination or otherwise, I was given no such explanation and I am left only to speculate as to what it is that he has in mind. Mr. McDermott attempted to assist me by saying that Mr. Boulton may well have wished to have them elaborate on the oral arrangement but it seems to me that when the moment passed at the time of Mr. Dewsbury's cross-examination, that it was open to Mr. Boulton to ask the Court that Mr. Dewsbury again take the stand and that the other witnesses, who may have included Mr. Dewsbury, to whom he referred as being in Court, also take the stand. In the informal atmosphere of

> the Small Claims Court, I do not accept Mr. McDermott's argument, (which if counsel had been handling Mr. Boulton's case, might well have been valid) that Mr. Boulton could not very well be expected to call plaintiff's witnesses and perhaps make them his own. To put the matter very simply, in the atmosphere of that Court I should have expected the Court to allow Mr. Boulton to bring out from the mouths of those witnesses one way or the other any further information he felt that he could elicit.
>
> 31 I have considered very carefully whether the way this matter was handled by the Small Claims Court judge warrants a new trial and I have come to the conclusion that it does not.
>
> …
>
> I have some difficulty in seeing how in those circumstances Mr. Boulton's position could have been bettered or worsened by further cross-examination of the plaintiff's witnesses had he chosen to assert it. In the result, I therefore do not see that he has been prejudiced by his failure to do so which I reiterate was a failure on his own part to explain to the judge, if indeed he wished to continue his cross-examination of any of them or to call there that he wished to take that course. If he had done so then I should have expected the judge to make a ruling and at that point the matter might have looked quite different from what it does. In the circumstances it does not appear to me that on this appeal I would be warranted in either ordering a new trial or in overturning the findings of the trial judge which are supported by evidence before the Court that he was entitled to accept.
>
> [*Emphasis added*]

[62] While the judge in *Rosenthal* brought the additional potential witnesses to the attention of the Appellant, the decision still reiterates that it is incumbent on the party wishing to call a witness to bring that intention to the attention of the Court.

[63] In the case before me, the Appellant stated that he brought his intention to call another witness to the attention of the Adjudicator at the end of the Small Claims Court hearing. The Adjudicator did not err in refusing to allow the witness to testify at that stage in the hearing because it would have unfairly prejudiced the Respondent, notwithstanding the more relaxed rules of evidence in Small Claims Court.

[64] In *Reeves Water Treatment Systems v. Cooke & McNally*, 2019 PESC 9, the PEI Supreme Court considered whether to allow the Plaintiff to call witnesses after the Defendants had called their witnesses and made their closing arguments in light of the Small Claims Court Rules of Evidence. The Supreme Court found that allowing the Plaintiff to call witnesses following the closing of the Defendants' arguments would unfairly prejudice the Defendants, stating at para. 4:

> 4 I make note of the fact that Eustace, who presented the Plaintiff's case, was provided the opportunity to call witnesses, besides himself, during his presentation of the Plaintiff's case but explicitly chose not to do so. He did make a request to call Dorothy and Stephen Reeves to testify after the Defendants had called their witnesses and made their closing arguments. While recognizing that the rules of evidence are relaxed in Small Claims Court, such relaxation pertains primarily to admissibility issues and the request to call additional witnesses in this case raised matters of trial fairness. In my view, the prejudice to the Defendants of allowing the Plaintiff to split its case, especially given that the written statements of Dorothy and Stephen Reeves had been admitted in evidence, was such that I disallowed the request.

[65] The Appellant should have alerted the Adjudicator to the presence of Mr. Dennis and of his intention to call Mr. Dennis as a witness. Specifically, he should have done so immediately after calling his first witness, Mr. O'Toole, and not at the end of the trial.

Conclusion

[66] I find that the Adjudicator failed to follow the requirements of natural justice in denying the Appellant's cross-examination of the Respondent as it pertained to the Appellant's credibility. This was particularly pivotal, given that the Adjudicator both considered and relied upon this testimony in reaching her decision. On this ground, the appeal is allowed and a new hearing is ordered.

[67] The Appellant, despite being presented with opportunities to do so, did not question his second witness (who was present in court). This was in no way an oversight or error of the Adjudicator but, rather, a failure on the Appellant's part to bring the witness to the attention of the Court. This, in my opinion, does not constitute a breach of natural justice on the part of the Adjudicator. The Appellant's appeal is dismissed on this ground.

Bodurtha, J.