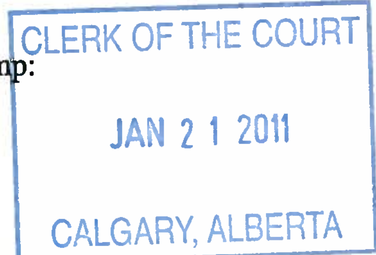
Clerk's stamp:



COURT FILE NO.	1001-03215
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	FIRST CALGARY SAVINGS & CREDIT UNION LTD.
DEFENDANTS	PERERA SHAWNEE LTD., PERERA DEVELOPMENT CORPORATION, DON L. PERERA AND SHIRANIE M. PERERA
PLAINTIFFS BY COUNTERCLAIM	PERERA SHAWNEE LTD., DON L. PERERA AND SHIRANIE M. PERERA
DEFENDANTS BY COUNTERCLAIM	FIRST CALGARY SAVINGS & CREDIT UNION LTD. AND DELOITTE & TOUCHE LLP
DOCUMENT	**BOOK OF AUTHORITIES FOR THE BRIEF OF ARGUMENT OF THE APPLICANT, DELOITTE & TOUCHE INC.** in its capacity as Court-appointed receiver and manager of Perera Development Corporation ("**PDC**") and Perera Shawnee Ltd. ("**PSL**", or when reference is being made to PDC and PSL collectively, the "**Debtor**" or "**Perera**"), and not in its personal capacity (the "**Receiver**") **(Re: Receiver's Report)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Suite 2500, 450 – 1st Street SW Calgary, AB T2P 5H1 Lawyers: Christa Nicholson and Doug Schweitzer Telephone: (403) 260-7025/7075 Facsimile: (403) 260-7024 Email: dschweitzer@osler.com File Number: 1121689

LIST OF AUTHORITIES

TAB

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2. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.
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(Consolidated up to 163/2010)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

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Part 1
Foundational Rules

Division 1
Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

(a) the Court of Queen's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with these rules, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity, or

(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.

(3) The Court may

(a) direct that an application for an electronic hearing be heard by electronic hearing,

(b) direct that an application, a summary trial or a trial be heard in whole or in part by electronic hearing,

(c) give directions about arrangements for the electronic hearing or delegate that responsibility to another person,

(d) give directions about the distribution of documents and the practice and procedure at the electronic hearing, or

(e) order that an electronic hearing be completed in person.

(4) The court clerk must participate in an electronic hearing unless the Court otherwise directs.

Evidence at application hearings

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript of questioning under this Part;

(c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

(d) an admissible record disclosed in an affidavit of records under rule 5.6;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

(2) An affidavit or other evidence that is used or referred to at a hearing and that has not previously been filed in the action must be filed as soon as practicable after the hearing.

(3) Notice of the application must be served on every party to the question or matter referred to the referee 10 days or more before the application is scheduled to be heard.

Division 7
Court-appointed Receiver

Court-appointed receiver

6.47 If a Court appoints a receiver other than under an enactment, the Court may, in addition to a procedural order,

(a) prescribe the compensation payable to the receiver and who is to pay it;

(b) require the receiver to provide security;

(c) require the receiver to file financial accounts and reports with the court clerk at the times and subject to the scrutiny ordered by the Court;

(d) order payment to or disallow all or part of a payment to the receiver;

(e) order a hearing to be held with respect to any matter for which the receiver was appointed or is responsible;

(f) make any other order or direction that the circumstances require.

Division 8
Replevin

Application of this Division

6.48 This Division applies to an application in an action

(a) for the recovery of personal property in which the applicant claims that the property was unlawfully taken or is unlawfully detained, and

(b) in which the applicant seeks to repossess the personal property in issue immediately, pending determination of the action described in clause (a).

Application for replevin order

6.49(1) A party may apply to the Court for a replevin order without serving notice of the application on any other party unless the Court otherwise orders.

Subdivision 2
Form and Contents of Affidavits and Exhibits

Types of affidavit

13.18(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or

(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

Requirements for affidavits

13.19(1) In addition to complying with rule 13.13, an affidavit under these rules must comply with all of the following:

(a) be in Form 49,

(b) state, on the front page, the full name of the person swearing the affidavit and the date the affidavit was sworn,

(c) state the place of residence of the person swearing the affidavit,

(d) be written in the first person,

(e) be divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer,

(f) be signed or acknowledged and sworn before a person empowered to administer oaths, whether that person prepared the affidavit or not,

(g) contain a statement of when, where and before whom the affidavit was sworn, and

(h) be signed by the person administering the oath.

(2) An affidavit is not invalid or otherwise improper just because it was sworn before a commencement document was filed.

AR 124/2010 s13.19;163/2010

CONSOLIDATION

Bankruptcy and Insolvency Act

CHAPTER B-3

Current to December 14, 2010

CODIFICATION

Loi sur la faillite et l'insolvabilité

CHAPITRE B-3

À jour au 14 décembre 2010

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him by this Act, the court may, on application, annul his discharge.

pose la présente loi, le tribunal peut, sur demande, annuler sa libération.

Annulment of discharge obtained by fraud

(2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.

(2) Lorsque le tribunal juge que la libération du failli a été obtenue par fraude, il peut, sur demande, annuler sa libération.

Annulation de la libération obtenue par fraude

Effect of annulment of discharge

(3) An order revoking or annulling the discharge of a bankrupt does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or annulment of the discharge.

R.S., 1985, c. B-3, s. 180; 2004, c. 25, s. 85(F).

(3) Une ordonnance révoquant ou annulant la libération d'un failli ne porte pas atteinte à la validité de toute vente, de toute disposition de biens, de tout paiement effectué ou de toute chose dûment faite avant la révocation ou l'annulation.

L.R. (1985), ch. B-3, art. 180; 2004, ch. 25, art. 85(F).

Effet de l'annulation de la libération

Power of court to annul bankruptcy

181. (1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

181. (1) Lorsque le tribunal est d'avis qu'une ordonnance de faillite n'aurait pas dû être rendue, ou une cession produite, il peut rendre une ordonnance qui annule la faillite.

Pouvoir du tribunal d'annuler la faillite

Effect of annulment of bankruptcy

(2) If an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done before the making of the order by the trustee or other person acting under the trustee's authority, or by the court, are valid, but the property of the bankrupt shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

(2) Lorsqu'une ordonnance est rendue en vertu du paragraphe (1), toutes les ventes et dispositions de biens, tous les paiements dûment effectués et tous les actes faits antérieurement par le syndic, par une autre personne agissant sous son autorité ou par le tribunal sont valides; mais les biens du failli sont dévolus à la personne que le tribunal peut nommer, ou, à défaut de cette nomination, retournent au failli pour tout droit, domaine ou intérêt du syndic, aux conditions, s'il en est, que le tribunal peut ordonner.

Effet d'annulation de la faillite

Final statement of receipts and disbursements

(3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

R.S., 1985, c. B-3, s. 181; 2004, c. 25, s. 86; 2005, c. 47, s. 109.

(3) Malgré l'annulation de la faillite, le syndic prépare sans délai l'état définitif des recettes et des débours visé à l'article 151.

L.R. (1985), ch. B-3, art. 181; 2004, ch. 25, art. 86; 2005, ch. 47, art. 109.

État définitif des recettes et des débours

Stay on issue of order

182. (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

182. (1) L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

Suspension de l'émission de l'ordonnance

PART VII

COURTS AND PROCEDURE

JURISDICTION OF COURTS

PARTIE VII

TRIBUNAUX ET PROCÉDURE

COMPÉTENCE DES TRIBUNAUX

Courts vested with jurisdiction

183. (1) The following courts are invested with such jurisdiction at law and in equity as

183. (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur

Tribunaux compétents

will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(*a*) in the Province of Ontario, the Superior Court of Justice;

(*b*) [Repealed, 2001, c. 4, s. 33]

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(*d*) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(*e*) in the Province of Prince Edward Island, the Trial Division of the Supreme Court of the Province;

(*f*) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(*g*) in the Province of Newfoundland, the Trial Division of the Supreme Court; and

(*h*) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Section de première instance de la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

g) dans la province de Terre-Neuve, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

Compétence de la Cour supérieure de la province de Québec

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

(2) Sous réserve du paragraphe (2.1), les cours d'appel du Canada, dans les limites de leur compétence respective, sont, en droit et en equity, conformément à leur procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investies de la compétence d'entendre et de juger les appels interjetés des tribunaux exerçant juridiction de première instance en vertu de la présente loi.

Cours d'appel — provinces de common law

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its or-

(2.1) Dans la province de Québec, la Cour d'appel, dans les limites de sa compétence, est, conformément à sa procédure ordinaire, sauf

Cour d'appel de la province de Québec

(*g*) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

Audit of proceedings

241. The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242. (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Vérification des comptes

241. Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242. (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

CRÉANCIERS GARANTIS ET SÉQUESTRES

Nomination d'un séquestre

243. (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire

expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(*a*) is appointed under subsection (1); or

(*b*) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (*a*) or subparagraph (*b*)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(*b*).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's

la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de « séquestre »

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), «séquestre» s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé «contrat de garantie» dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de « séquestre » — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de «séquestre», au paragraphe (2), s'interprète sans égard à l'alinéa *a*) et aux mots «ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant».

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)*b*).

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insol-

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245. (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(*a*) in the case of a bankrupt, to the trustee; or

(*b*) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246. (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245. (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246. (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247. A receiver shall

(*a*) act honestly and in good faith; and

(*b*) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248. (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(*a*) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(*b*) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was pro-

personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247. Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248. (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de

JUDICATURE ACT

Chapter J-2

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Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

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GENERAL

2. Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the *Interpretation Act*, and must be used in proceedings under the Act.

SOR/92-579, s. 3; SOR/98-240, s. 1; SOR/2007-61, s. 2(E).

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

SOR/98-240, s. 1.

4. If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

5. (1) Subject to subsection (2), a notice or other document that is received by a Division Office outside of its business hours is deemed to have been received

(*a*) on the next business day of that Division Office, if it was received

(i) between the end of business hours and midnight, local time, on a business day, or

(ii) on a Saturday or holiday; or

(*b*) at the beginning of business hours of that Division Office, if it was received between midnight and the beginning of business hours, local time, on a business day.

(2) Subsection (1) does not apply to documents related to proceedings under Part III of the Act that are filed by facsimile.

SOR/78-389, s. 1; SOR/92-579, s. 4; SOR/98-240, s. 1; SOR/2005-284, s. 1.

6. (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered

DISPOSITIONS GÉNÉRALES

2. Les documents à prescrire au titre de la Loi sont en la forme prescrite, avec les adaptations nécessaires et les différences de présentation permises par l'article 32 de la *Loi d'interprétation*, et sont utilisés dans les procédures engagées sous le régime de la Loi.

DORS/92-579, art. 3; DORS/98-240, art. 1; DORS/2007-61, art. 2(A).

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

DORS/98-240, art. 1.

4. Lorsqu'un délai de moins de six jours est prévu pour accomplir un acte ou intenter une procédure en vertu de la Loi ou des présentes règles, les samedis et les jours fériés n'entrent pas dans le calcul du délai.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

5. (1) Sous réserve du paragraphe (2), les avis et autres documents que le bureau de division reçoit en dehors des heures d'ouverture sont réputés reçus :

a) le premier jour ouvrable suivant de ce bureau, s'ils sont reçus :

(i) après les heures d'ouverture et avant minuit, heure locale, un jour ouvrable,

(ii) le samedi ou un jour férié;

b) au début des heures d'ouverture de ce bureau, s'ils sont reçus entre minuit et le début des heures d'ouverture, heure locale, un jour ouvrable.

(2) Le paragraphe (1) ne s'applique pas aux documents concernant les procédures fondées sur la partie III de la Loi qui sont déposés par télécopieur.

DORS/78-389, art. 1; DORS/92-579, art. 4; DORS/98-240, art. 1; DORS/2005-284, art. 1.

6. (1) Sauf disposition contraire de la Loi ou des présentes règles, les avis et autres documents à remettre ou à envoyer sous le régime de la Loi ou des présentes règles sont signifiés, remis en mains propres ou envoyés

COMMERCIAL INSOLVENCY IN CANADA

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(c) Court-appointed Receivers

Court-appointed receivers are not agents. They are appointed by the court under provincial legislation or the *BIA*. Their powers are not derived from any security agreement. Rather, court-appointed receivers are officers and instruments of the court and their powers are set out in the appointment order, as it may be amended from time to time. Because a court-appointed receiver is not an agent of the secured party, any liability that it incurs by virtue of its appointment or through its activities as receiver are for its own account. As a result, a typical appointment order will provide the receiver with the protection of a first charge on the assets of the debtor to secure its fees and disbursements and any liability it may incur by virtue of its appointment or in the course of performing its obligations as receiver.

The status of the court-appointed receiver as a "principal" rather than an agent has important implications for its potential liability that will be discussed later in this chapter in detail. To the extent that it exercises its powers as a principal, a court-appointed receiver may be subject to additional risk of liability for successor liabilities as compared to private receivers who are agents for the debtor when carrying on the debtor's business. Additionally, the scope of the powers of a court-appointed receiver are limited by the terms of the order appointing it and by any limits on the power of the court granting the order. The powers of provincial courts under their inherent jurisdiction or under jurisdiction conferred on them by provincial statutes are subject to territorial and substantive limitations that may materially impact the utility of a court receivership in particular cases. In respect of the territorial restrictions, a provincial court does not have *in rem* jurisdiction over immovable property located outside of the territorial jurisdiction of the court.[126] Accordingly, receivers appointed by the court under provincial legislation, as opposed to Interim Receivers appointed under the federal *BIA*, must obtain recognition orders in other jurisdictions to secure possession and control of immovable property even in other provinces of Canada.

Importantly, for the consideration of the potential liability a court-appointed receiver may incur by virtue of its appointment, provincial courts are subject to substantive limitations by privative provisions of provincial legislation that confer exclusive rights of adjudication on administrative tribunals such as the Labour Board. As a result of these

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126 *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602 (H.L.); *Grey v. Manitoba & North Western Railway Co. of Canada*, [1897] A.C. 254 (P.C.); *Ross v. Ross* (1892), 23 O.R. 43 (H.C.); *Great North-West Central Railway v. Charlebois*, [1899] A.C. 114 (P.C.).

privative provisions in labour relations legislation, the court appointing a receiver under provincial legislation or an Interim Receiver under the *BIA* may not have the substantive jurisdiction to make legal determinations concerning the potential liability of the receiver by virtue of its appointment and the conduct of its duties under labour relations legislation.[127] Because of these limitations on the provincial courts' substantive jurisdiction, receivers are unable to assess the liability to which they may be subject at the time of their appointment by the court.

(i) Indemnity

Court-appointed receivers seek a right of indemnity from the assets of the debtor secured by the court order appointing the receiver/interim receiver in priority to the security of all other secured creditors. It is clear that the court has the power to grant such protection to the receiver and the additional power to grant the receiver the power to borrow on the security of the assets of the debtor. In the exercise of both powers, the court must consider the impact of the granting of such security on the position of other creditors. To the extent that secured creditors consent to the resulting subordination of their security rights, the power to charge the assets of the debtor with charges ranking in priority to the security in favour of consenting parties will be routinely exercised. To the extent that secured parties object, the court will grant charges only if it is satisfied that the impairment of the affected secured creditor rights is in the interests of all creditors affected, including the objecting creditor.[128]

(ii) Interim Receivers

In considering enforcement options, interim receivership under section 47 of the *BIA* requires separate consideration. Ironically, by trying to discourage the enforcement of security by giving debtors a statutory grace period to commence restructuring proceedings, Parliament created a new more powerful receivership remedy that addresses some of the shortcomings of court-appointed receivership. Section 47 is so broadly worded that it has been used in many cases to appoint interim receivers who, although appointed in an application made during the 10-day notice period or in anticipation of such notice, continued indefinitely, exercising powers

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[127] *GMAC Commercial Credit Corp. of Canada v. T.C.T. Logistics Inc.*, [2004] O.J. No. 1353, 71 O.R. (3d) 54 (C.A.). There is a more detailed discussion of this issue later in this chapter.

[128] *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201 (C.A.).

fundamentally similar to those traditionally exercised by court-appointed receivers.

Because the *BIA* is federal legislation and because any bankruptcy court exercising jurisdiction under the *BIA* binds the whole country, the appointment of an interim receiver has the distinct advantage of having a national scope.[129] While orders made in court-appointed receiverships are limited to the territorial jurisdiction of the provincial court, an interim receivership order is automatically effective everywhere in Canada.[130] In addition to an extended territorial jurisdiction, the exercise of federal bankruptcy powers to appoint interim receivers may not be subject to the same substantive restrictions imposed by privative provisions of provincial legislation.[131]

(iii) Duties of Court-appointed Receivers and Interim Receivers as Officers of the Court

Court receivership, including interim receivership under section 47 of the *BIA*, is a flexible tool. At its essence, it is a mechanism directed to the orderly realization of the assets of the debtor for the benefit of all affected parties. Any application to the court for the appointment of a receiver is a surrender of control of the realization process by the creditor applying for relief. The receiver appointed by the court is not the agent of the appointing creditor. Such a receiver is the instrument of the court.

As a court officer, the court-appointed receiver has a duty to take a broad perspective in the exercise of its duties. It cannot favour the interests of one party over another. It has a duty of even-handedness. That is not to say that a court-appointed receiver should ignore the priority of interests of creditors in the realization process. Rather, in the balancing of interests of various stakeholders, it has a duty to give the rights of parties affected by its activities and its decisions the appropriate weight in light of such rights.

Because of this duty to balance rights and interests and as a reflection of the corresponding concerns of the court, court receivership is often sought by creditors seeking to impede the uncontrolled exercise of private security rights by individual creditors in order to preserve an opportunity for the receiver to pursue a going concern outcome for the business of the

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129 *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953, 114 D.L.R. (4th) 176 (Gen. Div.).

130 A broader discussion of the powers and responsibilities of Interim Receivers follows below.

131 *Re Royal Oak Mines Inc.*, [2001] O.J. No. 562, 27 C.C.P.B. 163 (C.A.). A more detailed discussion follows later in the chapter.

2009 CarswellAlta 464, 2009 ABQB 195, [2009] A.W.L.D. 2005, 4 Alta. L.R. (5th) 157, 53 C.B.R. (5th) 122, [2009] 9 W.W.R. 165, 473 A.R. 167

Transglobal Communications Group Inc., Re

In the Matter of the Proposal of Transglobal Communications Group Inc.

Alberta Court of Queen's Bench

K.D. Yamauchi J.

Heard: March 20, 2009
Judgment: March 30, 2009[FN*]
Docket: Edmonton BE03-1071018

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Kenneth W. Fitz for Stone Sapphire Ltd.

Jeremy H. Hockin for Meyers Norris Penny Limited

Michael D. Mysak for Joshua and Julia Kulbaba

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Practice and procedure

T Inc. filed proposal under Bankruptcy and Insolvency Act — S Ltd. submitted proof of claim in amount of $2,005,722.30, $1,710,345.58 of which represented amount obtained in partial summary judgment against T Inc., accrued interest and costs — T Inc.'s appeals from summary judgment and unsuccessful application to have summary judgment reopened on fresh evidence not yet heard — Individual creditors ("creditors") submitted proof of claim, outlining history of litigation with T Inc., which included order that T Inc. post $75,000 as security for costs — Trustee determined S Ltd.'s claim was worth $1 and disallowed creditors' claim for voting purposes — S Ltd. and creditors appealed — Trustee brought application for advice and directions — Appeals were on record — Act contained no reference to appeals on merits, rehearing or de novo — Not shown it was in interests of justice or some other principled basis on which appeal de novo should be directed — S Ltd.'s appeal raised extricable question of law, whether trustee bound by summary judgment and rehearing judgment in valuing S Ltd.'s claim, reviewable on standard of correctness — Valuation of S Ltd.'s claim was matter of fact and discretion and so subject to appeal on standard of reasonableness — Rejection of creditors' claim attracted correctness standard — Trustee incorrect when it did not give recognition to judgments on S Ltd.'s claim — Trustee could look behind judgment only if good reason to conclude there should not have been judgment — Judge on judgments in question had concluded new evidence would have little or no impact on outcome — While appeals extant, there was no principle that said decision of trial court had no effect or was presumed wrong until Court of Appeal disposed of it.

2009 CarswellAlta 464, 2009 ABQB 195, [2009] A.W.L.D. 2005, 4 Alta. L.R. (5th) 157, 53 C.B.R. (5th) 122, [2009] 9 W.W.R. 165, 473 A.R. 167

Cases considered by *K.D. Yamauchi J.*:

Alberta (Minister of Consumer & Corporate Affairs) v. Bennett (1992), 131 A.R. 184, 25 W.A.C. 184, 1992 CarswellAlta 645 (Alta. C.A. [In Chambers]) — considered

Alberta (Superintendent of Real Estate) v. Harder (1980), 109 D.L.R. (3d) 72, 28 A.R. 210, 11 Alta. L.R. (2d) 335, 1980 CarswellAlta 3 (Alta. Q.B.) — considered

Androscoggin Energy LLC, Re (2005), 2005 CarswellOnt 589, 8 C.B.R. (5th) 11, 195 O.A.C. 51, 75 O.R. (3d) 552 (Ont. C.A.) — considered

Beetown Honey Products Inc., Re (2003), 2003 CarswellOnt 3755, 46 C.B.R. (4th) 195, 67 O.R. (3d) 511 (Ont. S.C.J.) — referred to

Canada Asian Centre Developments Inc., Re (2003), 39 C.B.R. (4th) 35, 10 B.C.L.R. (4th) 161, 2003 BCSC 41, 2003 CarswellBC 270 (B.C. S.C. [In Chambers]) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Canada (Ministre du Développement des Ressources Humaines) c. Landry (2005), 2005 CAF 167, 2005 CarswellNat 1355, 2005 FCA 167, 2005 CarswellNat 1264, 31 Admin. L.R. (4th) 13, (sub nom. *Canada (Minister of Human Resources Development) v. Landry)* 334 N.R. 176 (F.C.A.) — referred to

Canadian Imperial Bank of Commerce v. 433616 Ontario Inc. (1993), 17 C.B.R. (3d) 160, 1993 CarswellOnt 193 (Ont. Gen. Div.) — referred to

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — referred to

Dickey v. Pep Homes Ltd. (2006), 401 A.R. 149, 391 W.A.C. 149, 2006 ABCA 402, 2006 CarswellAlta 1682 (Alta. C.A.) — referred to

Dunham, Re (2005), 2005 NSSC 57, 2005 CarswellNS 120, 9 C.B.R. (5th) 205, 231 N.S.R. (2d) 235, 733 A.P.R. 235 (N.S. S.C.) — considered

Eskasoni Fisheries Ltd., Re (2000), 16 C.B.R. (4th) 173, 2000 CarswellNS 116, 187 N.S.R. (2d) 363, 585 A.P.R. 363 (N.S. S.C.) — considered

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F. E. A. Griffiths Corp., Re (1971), 15 C.B.R. (N.S.) 231, 1971 CarswellOnt 65 (Ont. S.C.) — referred to

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s. 5(2) — referred to

s. 5(3) — referred to

s. 12 — referred to

s. 12(2) — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 51(3) — referred to

s. 66(1) — referred to

s. 108(1) — considered

s. 115 — referred to

s. 121(2) — referred to

s. 135 — referred to

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 135(2) — referred to

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s. 135(3) — referred to

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Rules considered:

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Generally — referred to

R. 3 — referred to

R. 11 — referred to

APPLICATION by proposal trustee for advice and directions in respect to its decisions under *Bankruptcy and Insolvency Act*.

***K.D. Yamauchi J.*:**

I. Nature of the Application

1 This case relates to appeals of two decisions that a proposal trustee made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). One involves the proposal trustee's valuation of a creditor's claim. The other involves the proposal trustee's disallowance of a creditor's claim for voting purposes.

II. Facts

A. Stone Sapphire Appeal

2 Transglobal Communications Group Inc. ("Transglobal") was in the business of selling imported goods to North American retailers. It became embroiled in litigation with an overseas supplier, Stone Sapphire Ltd. ("Stone Sapphire"). Stone Sapphire claimed that Transglobal had failed to pay invoices totalling USD $2,280,828.57. Transglobal defended and counterclaimed for an amount exceeding Stone Sapphire's claim.

3 On April 12, 2007, Justice Lee granted Stone Sapphire a partial summary judgment, reported at 2007 ABQB 236 (Alta. Q.B.) ("Summary Judgment"), in the amount of USD $1,533,352.62 in relation to what Justice Lee defined

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as "undisputed invoices." The undisputed invoices related to items that Transglobal had "ordered, inspected, delivered and sold ... at a profit to its retail customers," Summary Judgment at para. 10. Justice Lee concluded that Transglobal was not entitled legally or equitably to set-off its counterclaim amounts against the amounts that Stone Sapphire claimed in its summary judgment application, Summary Judgment at paras. 62-80. Finally, he stayed Stone Sapphire's enforcement on the Summary Judgment, provided Transglobal paid into court the full amount of the Summary Judgment to permit litigation on the counterclaim (the "Stay"). Transglobal filed a notice of appeal with respect to the Summary Judgment. The Alberta Court of Appeal has not yet heard that appeal.

4 Transglobal subsequently applied, unsuccessfully, for other relief, including:

(a) to have the Summary Judgment reopened on fresh evidence ("Rehearing Application"). The fresh evidence included allegations that the plaintiff in this case was not the entity with which Transglobal had contracted and that Stone Sapphire was overcharging Transglobal; and

(b) to amend its counterclaim to include the fresh evidence.

5 Justice Lee denied Transglobal's application to amend its counterclaim on April 3, 2007. Transglobal did not appeal this decision. It later filed, but did not pursue, another motion seeking the same relief.

6 On June 27, 2008, Justice Lee rendered his decision in which he dismissed the Rehearing Application, reported at 2008 ABQB 397 (Alta. Q.B.) (the "Fresh Evidence Judgment"). Transglobal has appealed the Fresh Evidence Judgment, as well.

7 Before the Court released the Fresh Evidence Judgment, Transglobal's primary lender called in its loans. Transglobal responded on May 20, 2008, by filing a notice of intention to make a proposal pursuant to *BIA* s. 50.4(1). Transglobal named Meyers Norris Penny Limited ("MNP") as the proposal trustee.

8 Stone Sapphire applied for an order declaring that it was the owner of the monies Transglobal paid into court to obtain the stay. HSBC Bank Canada opposed that application on the basis that it held a security interest in those funds. Justice Topolniski rendered a judgment on September 19, 2008, reported at 2008 ABQB 575 (Alta. Q.B.), dismissing Stone Sapphire's application (the "Property Order").

9 Transglobal filed its *BIA* proposal. MNP held an initial meeting of Transglobal's creditors. That meeting was adjourned at the creditors' request to permit them to make inquiries into the value to be assigned to Stone Sapphire's claim for voting purposes.

10 On October 27, 2008, Stone Sapphire submitted a proof of claim in the amount of $2,005,722.30, $1,710,345.58 of which represented the amount of the Summary Judgment, accrued interest and costs arising from the Summary Judgment.

11 Apparently, satisfied that it was not bound by the Summary Judgment, the court's dismissal of the Rehearing Application or its dismissal of the application to amend Transglobal's counterclaim, MNP undertook an independent valuation and determined that Stone Sapphire's claim was worth $1 for voting purposes. It noted that the following issues were relevant to its determination of Stone Sapphire's voting status:

1. With respect to Stone Sapphire's claim to be a secured creditor in the amount of $200,000, the Property Order expressly decided against Stone Sapphire, which arose from Justice Lee's decisions. However, Stone Sapphire appealed the Property Order and, accordingly, the matter is not yet finally resolved.

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> 2. With respect to the unsecured portion of its claim, Stone Sapphire's right to enforce the Summary Judgment was stayed as a result of its payment into court of the Summary Judgment amount. Stone Sapphire's efforts to lift the Stay were unsuccessful. Accordingly, while Stone Sapphire has established a claim (subject to Transglobal's "plausible" counterclaim and Transglobal's appeal), its claim is not presently enforceable.

12 The adjourned creditors' meeting was reconvened on December 15, 2008. Grant Bazian, a licensed bankruptcy trustee, acted as chair of that meeting. He advised those attending the meeting that MNP had assigned a $1 value to Stone Sapphire's claim, for voting purposes. Supported by MNP's recommendation, the unsecured creditors voted in favour of the proposal.

13 Stone Sapphire appealed MNP's valuation pursuant to *BIA* s. 135(4), observing that the valuation of its claim at the amount of Summary Judgment award would have allowed it to successfully defeat the proposal. That is because *BIA* s. 115 provides that the votes of creditors are to be calculated by counting one vote for every dollar of every claim of the creditor that is not disallowed.

14 Transglobal made an application on January 29, 2009, to sanction the proposal. That application was adjourned to allow the hearing of Stone Sapphire's appeal of the Property Order. On March 5, 2009, the Court of Appeal upheld the Property Order.

B. The Kulbabas' Appeal

15 The second appeal is by Joshua and Julia Kulbaba. Joshua Kulbaba was Transglobal's controller. On April 29, 2008, Transglobal commenced an action against the Kulbabas, claiming that they had stolen approximately $300,000 from it. Transglobal obtained an *ex parte* attachment order from Justice Clark, freezing all of the Kulbabas' worldwide assets.

16 The Kulbabas filed a defence to the action and a counterclaim against Transglobal and its president, Steven Prescott, for defamation. They also applied to set aside the attachment order. Their motion was heard on July 10, 2008, by Justice Clark, who set aside his attachment order and ordered Mr. Prescott personally to pay the Kulbabas' costs of the application on a solicitor-client basis, which amounted to $95,000. He directed Transglobal to post $75,000 as security for costs and granted the Kulbabas an injunction forbidding Transglobal or anyone associated with it from further defaming them by suggesting that they were responsible for Transglobal's insolvency.

17 The Kulbabas submitted a proof of claim to MNP on October 23, 2008. The proof of claim outlined the history of their litigation with Transglobal.

18 The chair of the creditors' meeting advised the Kulbabas that MNP had disallowed their claim for voting purposes as it was "an unliquidated contingent claim." They now appeal that decision pursuant to *BIA* s. 108(1) and s. 135(4).

C. Schedule of Proceedings

19 Stone Sapphire appeals MNP's valuation of its claim. Because the result of Stone Sapphire's appeal could determine the fate of Transglobal's proposal, Justice Topolniski ruled on January 29, 2009, that Stone Sapphire's appeal would be heard before the court would consider the MNP's application for court sanction of Transglobal's proposal.

20 Justice Topolniski further set the following schedule for resolution of the various issues which have arisen:

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1. March 20, 2009 - MNP's application for advice and directions as to the process and/or standard of review for MNP's valuations.

2. April 17, 2009 - If the appeals are on the record, review of the materials considered by MNP in making the valuations and determination of the matter on the basis of the ascertained standard of review.

3. April 14-17, 2009 - If the appeals are *de novo*, trial of the issues on the valuations and Transglobal's counterclaim, as filed.

III. Issues

21 These reasons address the following issues:

(a) Whether the appeals are on the record or *de novo*.

(b) What is the appropriate standard of review?

(c) Whether MNP erred in determining that it was not bound by the court's various judgments in valuing Stone Sapphire's claim.

IV. Preliminary Matter

22 The wording of the *BIA* as to the respective roles of the trustee and chair of the first meeting of creditors is unclear. *BIA* s. 51(3) says that the official receiver or the official receiver's nominee acts as chair of the first meeting of creditors. As well, that section says that the chair decides any questions or disputes arising at the meeting and any creditor may appeal any such decision to the court.

23 *BIA* s. 66(1) then says that, "All provisions of this Act ... in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division." *BIA* s. 135 is the section that deals with the allowance or disallowance of proofs of claim. It requires the trustee to examine the proofs of claim, to determine whether a contingent or unliquidated claim is provable and, with respect to any provable claim, to value that claim. *BIA* s. 135(2) permits the trustee to disallow any claim.

24 *BIA* s. 108(1) says that the chair of any meeting of creditors "has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court."

25 From the foregoing, one can see that the official receiver (or its nominee) or the trustee has the power to question and, ultimately disallow the creditor's claim, its right to vote or both. These rulings are subject to appeal. In this case, it was MNP who concluded that Stone Sapphire's claim for voting purposes is $1. In the case of the Kulbabas, it was MNP who rejected their claim for voting purposes. The chair at the creditors' meeting was the official receiver's nominee, one of MNP's bankruptcy trustees, and he advised the meeting of MNP's ruling.

26 Why is this important for the purposes of the following discussion? The *BIA* provides that decisions of the chair of the meeting are subject to appeal to a court, *BIA* ss. 51(3) and 108(1). *BIA* s. 135(3) says that the trustee's decision is "final and conclusive" unless the aggrieved person appeals. Thus, in the case of the chair's ruling, this Court need not provide any deference, whereas in the case of a trustee, this Court should accord some deference, based on this partial privative clause, see *Stubicar v. Alberta (Information & Privacy Commissioner)*, 2008 ABCA 357 (Alta. C.A.) at para. 22. This Court will address this issue in more detail later in these reasons. For now, it is worthwhile noting that MNP fulfilled its duties under *BIA* s. 135 and the chair of the meeting appeared to accept the trustee's

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findings when he made his rulings at the first meeting of creditors, rather than undertaking an independent valuation or finding. Thus, for the purposes of this decision, this Court will deal only with the decisions of the trustee pursuant to *BIA* s. 135.

V. Positions of the Parties

A. Stone Sapphire Appeal

27 MNP argued that the powers of the trustee are administrative or quasi-judicial in nature and, therefore, a "standard of review" analysis under *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) must be performed in connection with any appeal from a trustee's decision under *BIA* s. 135, citing *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19 at para. 21, [2003] 1 S.C.R. 226 (S.C.C.); *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at para. 21, [2003] 1 S.C.R. 247 (S.C.C.); *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.*, 2007 ABCA 131 (Alta. C.A.) at paras. 8-9. MNP submits that while there is judicial authority that an appeal from a trustee's decision on the valuation of a claim should attract the reasonableness standard of review, which suggests the appeal should be on the record, the circumstances of this case merit a *de novo* hearing based on *San Juan Resources Inc., Re*, 2009 ABQB 55 (Alta. Q.B.).

28 MNP maintains that it was not bound by the finality of the Summary Judgment decision in assessing Stone Sapphire's proof of claim. It cites *Van Laun, Re*, [1904-1907] All E.R. 157 (Eng. C.A.) at 160; *Lupkovics, Re*, [1954] 2 All E.R. 125 (Eng. Ch.) at 130; *Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.*, 1993 CarswellOnt 193 (Ont. Gen. Div.) at paras. 12 and 16 in support of that proposition. It acknowledged that *Canada Asian Centre Developments Inc., Re*, 2003 BCSC 41 (B.C. S.C. [In Chambers]) at paras. 29-31, (2003), 39 C.B.R. (4th) 35 (B.C. S.C. [In Chambers]) indicates that a proposal trustee should not go behind a judgment unless there is an allegation of fraud, collusion or miscarriage of justice. As well, it acknowledged that the Fresh Evidence Judgment ruled against the admissibility of the fresh evidence on which, presumably, MNP based its ruling.

29 MNP takes the position that it was justified in looking behind the Summary Judgment given the extant appeals and the significant amount of evidence that was available for it to consider that was not before Justice Lee when he made the Fresh Evidence Judgment. It argued that if this Court determines that a hearing *de novo* is appropriate, it should allow evidence to be led and argument presented on the merits of Stone Sapphire's claim, rather than restricting the hearing to Transglobal's counterclaim.

30 Stone Sapphire argued that the *Dunsmuir* standard of review analysis does not apply to this case. It argued that, in the absence of exceptional circumstances, an appeal from a trustee's decision is not a hearing *de novo* with new evidence, but a review "on the record" without deference to the trustee. Stone Sapphire contends that no injustice will result if the MNP's decision is restricted to a review of the record that Stone Sapphire placed before MNP. Even if one were to undertake a *Dunsmuir*-type analysis, the standard of review would be reasonableness and also a pragmatic approach requires this Court to recognize that bankruptcy proceedings call for an expedited process. It does not dismiss the possibility that in extreme or exceptional circumstances, a court could conduct a *de novo* hearing, but argues that this is not one of those cases.

31 Stone Sapphire notes as well that the new evidence that MNP seeks to introduce formed the basis for Rehearing Judgment and that Justice Lee concluded at para. 77, that even if the evidence were admitted, "it would have little or no impact on the outcome in any event."

32 Stone Sapphire maintains that the record should consist of:

(a) its proof of claim;

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2009 CarswellAlta 464, 2009 ABQB 195, [2009] A.W.L.D. 2005, 4 Alta. L.R. (5th) 157, 53 C.B.R. (5th) 122, [2009] 9 W.W.R. 165, 473 A.R. 167

(b) MNP's "Review of Claim by Stone Sapphire Ltd. in the Proposal Proceedings of Transglobal Communications Group Inc." (the "Trustee's Reasons"); and

(c) the judgments referred to in the Trustee's Reasons.

33 Stone Sapphire argued that MNP, in valuing its claim, improperly considered information which was found inadmissible by Justice Lee. It further argued that MNP had no basis for going behind the Summary Judgment as there were no allegations of fraud or collusion and the identity issue had been expressly considered and rejected, as reflected in the Rehearing Judgment. It argued that, in essence, MNP usurped the role of the Court of Appeal.

B. The Kulbabas' Appeal

34 The Kulbabas argued that a proposal trustee's decision is not subject to judicial review, as a proposal trustee acts as an officer of the court in a court proceeding, *viz.*, Bankruptcy No. 24-1071018. They maintain that appeals from a proposal trustee's decisions are heard on a *de novo* basis, citing *Eskasoni Fisheries Ltd., Re* (2000), 187 N.S.R. (2d) 363, 16 C.B.R. (4th) 173 (N.S. S.C.) at para. 16; *Dunham, Re*, 2005 NSSC 57, 231 N.S.R. (2d) 235 (N.S. S.C.); *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2008 NLTD 9 (N.L. T.D.); and *Johnson v. Erdman*, 2005 SKQB 515 (Sask. Q.B.).

35 If this Court determines that a standard of review analysis is required, the Kulbabas argued that the appropriate standard of review is correctness. While they conceded that one could establish that the starting point for reviewing proposal trustees' decisions would be a standard of reasonableness, they argued that a fulsome review of the factors outlined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), would lead one to the conclusion that the correctness standard applies in this case, citing *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.) at para. 39; *Lloyd's Non-Marine* at paras. 13-18. They argued that the findings required to assess their claim involve questions of law or mixed fact and law and argue that MNP has no experience in assessing such claims

VI. Analysis

A. Whether the Appeals are on the Record or De Novo.

36 Other than the fact that a disgruntled creditor may appeal a proposal trustee's decisions of disallowances or valuations for voting purposes, the *BIA* is silent as to the process to be followed for appeals. *BIA* s. 135(4) says that the appeal must be in accordance with the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368. Rule 11 states that: ASubject to these Rules, every application to the court must be made by motion unless the court orders otherwise. Rule 3 provides that:

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Ordinarily, an appeal is on the record, see *e.g. Reform Party of Canada v. Canada (Attorney General)* (1995), 27 Alta. L.R. (3d) 153 (Alta. C.A.) at 185-86.

37 It is important, at the outset, for this Court to provide a guidepost in its use of the phrase appeal "*de novo*." Courts have described appeals *de novo* in many different ways, including:

(a) new evidence or cross-examination is possible, *Ross v. McRoberts* (1999), 237 A.R. 344 (Alta. C.A.); *Taylor v. Alberta (Workers' Compensation Board)*, [2005] A.J. No. 968 (Alta. Q.B.); *Dickey v. Pep Homes Ltd.*, 2006 ABCA 402 (Alta. C.A.)

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(b) new grounds may be raised, *679667 Alberta Ltd. v. Allendale Bingo Corp.*, [2001] A.J. No. 1303 (Alta. Q.B.)

(c) consideration by the reviewing judge afresh in which the court may substitute its opinion, judicially reasoned, for that of the lower court, *Primrose Drilling Ventures Ltd. v. Carter*, 2008 ABQB 605 (Alta. Q.B.) at para. 14

(d) an entirely new case is presented, independent of the original case, *Canada (Ministre du Développement des Ressources Humaines) c. Landry* (2005), 31 Admin. L.R. (4th) 13 (F.C.A.) at para. 10

(e) an appeal heard on the basis of the case originally presented to the tribunal, with the addition of new facts that the tribunal accepted when it revised its decision, *Landry* at para. 10

38 In *Newterm Ltd. v. St. John's (City)* (1991), 93 Nfld. & P.E.I.R. 49 (Nfld. T.D.) at para. 13, the court made the very important statement that:

> The appeal before this Court is a civil proceeding and one must look to the particular statute giving the appeal (de novo) to determine the procedure, powers and jurisdiction to be exercised by the appellate court.

In other words, one cannot ignore the foundational statute on which the appeal is based to determine the type of appeal *de novo* with which one is dealing.

39 In *Alberta (Superintendent of Real Estate) v. Harder* (1980), 28 A.R. 210 (Alta. Q.B.), Justice Miller heard an appeal by the Superintendent of Real Estate from a decision of an Appeal Board appointed under the *Real Estate Agents Licensing Act*. The Act provided that such an appeal was to be brought by filing an originating notice but did not specify whether the appeal was *de novo* or on the record. An application for advice and directions previously had been made to Justice Dea, who ordered that the appeal be on the record and that on default of agreement between the parties as to what would constitute the record, *viva voce* evidence would be heard to determine whether the disputed items should properly form part of the record.

40 When the matter came before Justice Miller, the Superintendent questioned the procedure that had been ordered. Justice Miller noted that the appeal procedure provided for in the Act was by way of originating notice, a process frequently employed when it is unlikely there will be serious factual disputes. He observed that the Act did not use terms such as "on the merits", "rehearing" or "*de novo*." Justice Miller also commented that it would be illogical and unnecessarily expensive to conclude that the parties should be entitled under the Act to two separate and new appeal hearings. He cited the following statement by Clement J.A. from *Haugen v. Camrose (County)* (1979), 15 A.R. 451 (Alta. C.A.), at 453:

> ... An appeal court, whether this Division or another tribunal appointed for the purpose, does not conduct a new trial in order to exercise its appellate jurisdiction unless such is prescribed or permitted by the statute granting the right of appeal. An instance of such is found in the provisions of the *Criminal Code* relating to appeals from summary convictions, where formerly the appeal was specifically a trial *de novo* and now may be on the record in the summary conviction court or by a trial *de novo*. Further examples may be found in provincial statutes: *The Right of Entry Act*, R.S.A. 1970, c. 322, provides by s. 21 that an appeal to the district court shall be in the form a new hearing; s. 38 of *The Surface Reclamation Act*, R.S.A. 1970. c. 356, directs that an appeal to the district court shall be heard and determined as a trial *de novo* s. 53 of *The Expropriation Act*, R.S.A. 1970, c. 130, directs that an appeal to the district court shall be in the form of a new hearing. In such cases the scope of appeal is limited to prescribed issues. There are no such provisions here. The right of appeal given by s. 19.2(1) is in stark terms and evidence may well have had to be adduced to show what was in fact before Council when it held the prescribed

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> hearing and then enacted its bylaws; but this would be in order to constitute the record for the purposes of appeal. Such a necessity gives no warrant for the exercise of a trial jurisdiction which would result, presumably, in the trial judge determining on such evidence as might be adduced before him, whether or not the bylaw should be enacted, instead of the body to whose consideration the Legislature left it.

41 Justice Miller agreed with Justice Dea that the appeal should be on the record. He stated that because the Appeal Board was not bound to make a record of its hearing, the judge hearing the appeal should have the discretion to hear evidence to clarify any issues of fact, *Harder* at para. 42, see also *SKK Investments Ltd. v. Alberta (Director of Social Care Facilities Licensing)* (1994), 150 A.R. 351 (Alta. Q.B.), which followed *Harder* in reaching a similar conclusion.

42 In *Eskasoni Fisheries* at paras 17-20, Registrar Hill observed that appellate deference is largely based on the trier having heard the evidence and arguments firsthand. As a trustee's valuation under the *BIA* does not involve preparation of a record and there is no hearing, he concluded that an appeal must be *de novo* for justice to be done.

43 Other courts have followed *Eskasoni Fisheries*, see *e.g. MacDonald, Re*, [2002] O.J. No. 2744 (Ont. S.C.J. [Commercial List]) at para. 19; *Port Chevrolet Oldsmobile Ltd., Re* (2002), 49 C.B.R. (4th) 127 (B.C. S.C. [In Chambers]), aff'd (2004), 49 C.B.R. (4th) 146 (B.C. C.A.); *Exner, Re*, 2003 BCSC 260, 41 C.B.R. (4th) 49 (B.C. S.C.); *Beetown Honey Products Inc., Re* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.); *Dunham*.

44 The British Columbia Court of Appeal in *Galaxy Sports*, declined to follow *Eskasoni Fisheries*. The *Galaxy Sports* court noted at para. 36, that in *Port Chevrolet Oldsmobile*, "counsel did not challenge the 'trial *de novo*' approach taken in *Eskasoni*." It ruled at para. 42, that fresh evidence should not be admitted as a matter of course on an appeal and that exceptions must be established by showing that it is in the interests of justice or on some other principled basis. If courts were to permit the parties routinely to adduce fresh evidence on appeal, efficiencies would be lost, creditors who had neglected to file proofs of claim would suffer no practical consequences, and the business conducted at creditors meetings would be co-opted by the courts with attendant expense, delay and formality, *Galaxy Sports* at para. 41.

45 As well, the *Galaxy Sports* court at para. 30, observed that Parliament had assigned trustees the authority to value a contingent or unliquidated claim, a function previously undertaken by the court on application by a trustee. It also noted at para. 33, the (partial) privative clause protecting the trustee's decision in that regard and commented that presumably Parliament was of the view that trustees are suited to make the determination "because they possess specialized expertise in the areas of business financing, restructurings and insolvency, and are decision-makers to whom some deference is owed by a reviewing court," see also *Johnson* at para. 10.

46 In *Lloyd's Non-Marine*, a creditor alleged that the trustee did not duly investigate a particular claim. The creditor made serious allegations of criminality and unfairness with respect to that claim. Justice Hall referred to *Eskasoni Fisheries* and *Galaxy Sports*, and said at para. 18:

> ...efficacy, expedition, concerns over extra expense and delay or increased formality should not be permitted to trump fairness and should certainly not allow the claims determination process to constitute a de facto "good housekeeping seal of approval" upon activities surrounding which there is a serious allegation of criminality. Whether such criminality or unfairness in fact exists is a question to be determined upon the hearing of appropriate evidence. In my view however the Court should not be denied the opportunity to hear such evidence simply because doing so would be disruptive to the efficacy of the claims determination process.

47 After reviewing the two lines of authority on the issue represented by *Eskasoni Fisheries* and *Galaxy Sports*, Registrar Prowse in *San Juan Resources Inc., Re*, 2009 ABQB 55 (Alta. Q.B.), ruled that an appeal from a trustee's disallowance of a claim should not be heard *de novo* as a matter of right, but may be heard *de novo* where the cir-

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cumstances of the case are such that a hearing restricted to the record might result in an injustice. On the specific facts before him, in particular the trustee's preference for the opinion of the debtor's oil and gas expert given in pre-proposal litigation as opposed to the opinion of the claimant's expert, he ruled that the case warranted a *de novo* hearing. He said at para. 30:

> The *BIA* needs to be interpreted in a commercially reasonable manner and having regard to the need to proceed in an expedited fashion. The rights which are afforded to litigants in non-insolvency situations are not automatically available to claimants under the *BIA*. This was recognized in the ***Galaxy*** decision, where claimants were precluded from appealing a disallowance *de novo* as of right. However, the ***Galaxy*** and ***Lloyd's Non-Marine*** cases both recognize that there are situations where an appeal *de novo* would be appropriate. For the reasons given above, this is such a situation.

He ordered that the appeals from the disallowances before him should be determined by a summary hearing following the process used for summary trials in Alberta and that the evidence of any expert or other witness could be provided by way of affidavit.

48 Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in *Androscoggin Energy LLC, Re*, 2005 CarswellOnt 589, 8 C.B.R. (5th) 11 (Ont. C.A.) at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in *Royal Oak Mines Inc., Re*, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) at para. 5:

> Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.

49 Like *Harder* and *Haugen*, the *BIA*, which is the foundational statute with which we are dealing, contains no reference to appeals on the merits, rehearing or *de novo*. The proposal provisions of the *BIA* were foundational provisions on which the *San Juan* court grounded its reasons. The *San Juan* court's reasoning is compelling, as it recognized the concern raised by *Lloyd's Non-Marine* court in the case with which it was dealing.

50 In this case, however, as the *Galaxy Court* stated, no one has shown that it is in the interests of justice or some other principled basis on which this Court should direct an appeal *de novo*. Accordingly, the appeals from MNP's decisions will be on the record.

B. What is the Appropriate Standard of Review?

51 The Supreme Court of Canada has indicated that on a statutory appeal from a decision of an administrative tribunal, courts must follow the same process as on a judicial review, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) at para. 1; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 28; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19 (S.C.C.) at para. 21, [2003] 1 S.C.R. 226 (S.C.C.); *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 (S.C.C.) at para. 21, [2003] 1 S.C.R. 247 (S.C.C.).

52 *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) is the court's most recent pronouncement on that process. There is a more recent decision emanating from the Supreme Court of Canada which deals with standards of review, but it dealt with a specific tribunal which was addressing a specific issue not applicable to this case, *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 (S.C.C.). How-

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ever, *Khosa* provides further refinement of the *Dunsmuir* reasoning, so it deserves some comment in these reasons.

53 *Dunsmuir* reduced the former three standards of review to two standards of review, comprised of the correctness standard and a reasonableness standard. The aim of this revision was to make the system simpler and more workable, *Dunsmuir* at para. 45.

54 The *Dunsmuir* court at para. 62, stated that reviewing courts must undertake a two-step analysis to determine the appropriate standard of review. First, the reviewing court must ascertain whether there is satisfactory judicial authority that addresses the degree of deference that reviewing courts will accord the tribunal concerning a particular category of question. If that inquiry proves unsuccessful, the court must proceed to an analysis of the factors that will help it identify the proper standard of review. *Dunsmuir* at para. 64, provides reviewing courts with those factors when it said:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

55 Before going any further in this discussion, this Court must first ascertain whether *Dunsmuir* applies to the decisions of bankruptcy or proposal trustee's decisions at all. The *Galaxy Sports* court placed an administrative law gloss on its decision without discussing this aspect.

56 The *Constitution Act, 1867*, s. 91(21) allows the Parliament of Canada to enact laws in relation to "bankruptcy and insolvency." Thus, it enacted the current *BIA*. The *BIA* sets out the structure of administrative officials in the bankruptcy regime. *BIA* s. 5 allows the Governor in Council to appoint a superintendent of bankruptcy who, among other things, supervises the administration of bankrupt (and insolvent, in certain cases) estates and issues bankruptcy trustee licenses, *BIA* s. 5(2) and 5(3). Each province constitutes a bankruptcy district and the Governor in Council is required to appoint one or more official receivers in each bankruptcy district, *BIA* s. 12. The official receivers are "deemed officers of the court," *BIA* s. 12(2). Trustees are, as well, officers of the court, see *e.g. Beetown Honey Products Inc., Re* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.); *Reed, Re* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.), at 86; *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.); *Page, Re* (2002), 38 C.B.R. (4th) 241 (Ont. S.C.J. [Commercial List]).

57 What is an "officer of the court"? The court in *N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)*, 2004 NLSCTD 54 (N.L. T.D.) at paras. 114 and 115, provides us with a list of the basic characteristics of an officer of the court, when it said [emphasis original]:

> From the foregoing, it can be determined that an officer of the court has at least the following characteristics:
>
> 1. His duties and functions in the court process are *necessary* to enable the system to function properly;
>
> 2. In the performance of her duties, her role is to *facilitate the functioning of the court system* either directly or by assisting other officers of the court to perform their functions effectively;
>
> 3. In performing his functions he owes a *duty of loyalty and fidelity* to the court as an institution and to the rule of law, a duty which transcends other interests;
>
> 4. In acting as an officer of the court, she is the *personification of the court*; her acts are the acts of the court;

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> 5. His duties, insofar as they impact on the effective functioning of the court, are subject to the *supervisory control* and *judicial direction* of the court;
>
> 6. Her role includes the duty to *carry out and comply with orders* of the court so as to ensure they are given practical effect;
>
> 7. His failure to comply with judicial directions or orders make him *subject to sanction*, including punishment for *contempt*.

In essence, then, an officer of the court is a person whose function is so integral to the functioning of an aspect of the court system that the court could not function effectively in that regard without being able to exercise control, by way of court order if necessary, over what is done and how the officer does it.

58 To this we may add other characteristics that the cases have added to the trustee's role in a bankruptcy situation, which are referred to in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell Thomson, 2007) at C'10:

> (a) the trustee must impartially represent the interests of creditors, *Roy, Re* (1963) 4 C.B.R. (N.S.) 275;
>
> (b) the trustee should act equitably and, as far as possible, hold an even hand between competing interests of various classes of creditors. In bringing proceedings the trustee should not adopt an adversarial or hostile role, *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983) 48 C.B.R. (N.S.) 83;
>
> (c) the trustee should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the matter to the court for decision;
>
> (d) the trustee's actions should be measured by the reasonableness of the business approach taken at the time of the action, and not necessarily by whether the actions attain satisfactory results, *Re Brown* (2003), 48 C.B.R. (4th) 38 (Alta. Q.B.);
>
> (e) the trustee must realize as much as possible from the estate for the benefit of creditors, *Re Coffey* (2004), 2 C.B.R. (5th) 121 (N.L.T.D.).

This Court notes that MNP's counsel, during argument in this case, reinforced the trustee's role and took the dispassionate approach that the cases have suggested.

59 The fact that the trustee is an officer of the court does not mean that its decisions are not subject to review by the court. The *BIA* makes provision for appeals of trustees' decisions. As well, even official receivers are not immune from curial review, even though the *BIA* makes no provision for appeals of official receivers' decisions. In *Webber, Re* (1931), 12 C.B.R. 274 (N.S. C.A.) at para. 25, the court said that it "has inherent power to superintend the conduct of officers of the Court and the learned Judge in Chambers therefore had power to inquire by what authority the Official Receiver acted, and to set aside an order made without authority."

60 But is this "superintending power" a judicial review or an appeal? We will be able to answer this question through the limitations placed on the concept of judicial review. In David Phillip Jones & Anne S. de Villars, "*Principles of Administrative Law*" 4th ed. (Scarborough: Thomson Carswell, 2004) at 6-8, the authors say:

> Judicial review ... is generally limited to the power of the superior courts to determine whether the administrator

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has acted strictly within the powers which have been statutorily delegated to it. Judicial review concentrates almost completely on jurisdictional questions, and on the application of the *ultra vires* doctrine to the particular fact pattern surrounding the impugned administrative action.

...

Judicial review of administrative action can occur for the following jurisdictional defects:

(a) substantive *ultra vires* ...;

(b) exercising a discretion for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations ...;

c) not considering relevant matters;

(d) making serious procedural errors;

(e) making an error in law, in certain circumstances.

Thus, it seems, we are not in the realm of judicial review in this case, as no one is impugning MNP's jurisdiction to make the decisions it did. Arguably, the only "error in law" that MNP made and which could go to its jurisdiction concerns its dealing with the substantive issues involved in both appeals. At this stage, this Court cannot comment on those issues.

61 Earlier in the reasons, this Court said that *Galaxy Sports* added an "administrative law gloss" to its decision. The *Galaxy Sports* court did not say specifically that it was conducting a judicial review of the trustee's decision. There is good reason for this; it was not undertaking a judicial review. Rather, it seems that the *Galaxy Sports* court used the administrative law gloss to focus on and assist it in examining the issues before it. Registrar Herauf, as he then was, in *Johnson*, agreed when he applied the *Galaxy Sports* approach even in the face of his comment at para. 11, that, "it is not particularly easy to fit a trustee's decision into the continuum of administrative law."

62 Like the *Johnson* court, this Court finds the *Galaxy Sports* approach compelling and it "makes sense." This Court will take a similar approach, recognizing the concern that the *Johnson* court expressed. As well, we must remember that, even though the *Galaxy Sports* court's analysis had an administrative law gloss, it found that the appeal, as sanctioned by the *BIA*, was a true appeal and not a judicial review.

63 The *Galaxy Sports* court held that the standard of review for compliance with a "mandatory" provision, which it equated to a question of law or statutory compliance, such as the decision to allow or disallow a proof of claim, was one of correctness and that a reasonableness standard applied to trustees' decisions of a factual nature, such as the valuation of a contingent or unliquidated claim.

64 In determining the standard of review, the *Galaxy Sports* court considered Parliament's confidence in the expertise of the trustee as demonstrated by its amendment to the legislation to give the trustee authority to value and allow or disallow claims and the privative clause protecting the trustee's decisions in that regard.

65 *Dunsmuir* at para. 52, found that a privative clause represents a strong indication that Parliament intended that the administrative decision maker should be given greater deference, interference by a reviewing court should be minimized, and that review should be based on the reasonableness standard. The privative clause in the *BIA* is only a partial one, i.e. it says that the trustee's determination is final and conclusive unless a person on whom the notice is

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served appeals that decision to a court, *BIA* s. 135(4). Nevertheless, this court agrees with the *Galaxy Sports* court when it suggests that trustees' decisions in relation to certain issues they face warrant some deference.

66 Like labour arbitrators in *Dunsmuir*, this Court recognizes the relative expertise of bankruptcy trustees when they deal with matters, such as the valuation of proofs of claim. Accordingly, like *Dunsmuir* at para. 68, this favours the standard of reasonableness when reviewing trustees' decisions in this realm. They are presumed to hold relative expertise in the interpretation of their home legislation as well as related legislation that they might often encounter in the course of their functions.

67 The *Dunsmuir* court considered that the legislative purpose confirmed its view of the regime that the legislature established. The legislation established a time and cost-effective method of resolving disputes and provided an alternative to judicial determination. The provision for timely and binding settlements of disputes implied that a reasonableness review was appropriate.

68 Similarly, the *Galaxy Sports* court commented that the approach it took aligned with the implicit objective of the *BIA* to enable debtors to have their proposals voted on expeditiously. As well, the *BIA* allows creditors to have their rights and claims determined in a business-like manner, "while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases."

69 In *Dunsmuir*, the majority advised at para. 53 that:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554, at pp. 599-600; ***Dr. Q***, at para. 29; ***Suresh***, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

And further at para. 55:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> • A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> • A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> • The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (***Toronto (City) v. C.U.P.E.***, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

70 The *Galaxy Sports* court at para. 38, expressed the view that the trustee's decisions in that case did not involve the balancing of polycentric interests. It characterized the trustee's power to allow or disallow a claim (for which the trustee must give written reasons) under *BIA* s. 135 as a decision more of law than fact and, therefore, a matter on which the court might be assumed to have equal expertise. The court noted that such questions "have important legal consequences, in that a person whose proof of claim is disallowed or rejected may not participate as a creditor in the bankruptcy generally or in the distribution of the bankrupt's estate." This would attract a correctness standard.

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71 When undertaking a review of these factors it becomes clear that Stone Sapphire's appeal raises an extricable legal question, *viz.*, whether the trustee is bound by the Summary Judgment and the Rehearing Judgment in valuing the Stone Sapphire's claim or at least that portion of the claim to which the judgment relates. Accordingly, this question is subject to appeal on a standard of correctness. Once that question has been answered, the trustee's actual valuation of the claim is a matter of fact and discretion and, therefore, subject to appeal on a standard of reasonableness.

72 Where a court applies a standard of correctness, it shows no deference to the decision of the tribunal. Instead, it undertakes its own analysis and agrees with the tribunal's determination or substitutes its own view of the correct answer.

73 On an appeal based on the standard of reasonableness, the court recognizes that certain questions may give rise to a number of possible, reasonable conclusions. As indicated the *Dunsmuir* court at para. 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

74 The Kulbabas appeal the disallowance of their claim. The reason given for the disallowance apparently was that it was "an unliquidated contingent claim." Presumably, what MNP meant by this was that the Kulbabas' claim was a contingent or unliquidated claim that was not provable, but it did not say so. *BIA* s. 121(2) states that, "The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135." This provision applies in a proposal as well as a bankruptcy, *F. E. A. Griffiths Corp., Re* (1971), 15 C.B.R. (N.S.) 231 (Ont. S.C.). *BIA* s. 135(1.1) requires that the trustee determine whether any contingent or unliquidated claim is provable and, if it is, the trustee is to value the claim. *Galaxy Sports* at para. 39, said that this Court should apply a reasonableness standard when considering the trustee's role "in valuing contingent or unliquidated claims." In the case of the Kulbabas, the trustee did not value their claim; it rejected it. Thus, this falls in the "mandatory" category and attracts a correctness standard.

C. Whether MNP was Bound by the Court's Judgment in Valuing the Claim

75 As mentioned earlier in these reasons, this issue is reviewable on the standard of correctness.

76 MNP argued that there is authority that a trustee is not bound by a court judgment when assessing a creditor's proof of claim based on that judgment. It cites *Van Laun, Re*, [1904-1907] All E.R. 157 (Eng. C.A.) at 160 and *Lupkovics, Re*, [1954] 2 All E.R. 125 (Eng. Ch.) at 130 in support of that contention. In *Van Laun*, the court stated:

> The Trustee's right and duty when examining a Proof for the purpose of admitting or rejecting it, is to require some satisfactory evidence that the debt on which the Proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the Trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

77 Justice Burnyeat in *Canada Asian Centre Developments Inc., Re*, 2003 BCSC 41 (B.C. S.C. [In Chambers]) at paras. 29-31 characterized this statement as *obiter dictum*. Justice Burnyeat concluded that a trustee can look behind a judgment only if there is "some good reason to conclude that there should not have been a judgment." He offered fraud or collusion as examples of such a good reason. Justice Burnyeat observed that no appeal had been taken of the judgment involved in the *Van Laun* case. He also remarked at para. 35 that, "a judgment of a Court of competent jurisdiction should almost invariably satisfy a Trustee regarding a debt, the security, or a judgment if it can be said that the Court considered the merits of the entitlement to a creditor to a judgment relating to security claimed."

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78 In this case, MNP's reasons for its valuation of Stone Sapphire's claim are sparse, but those reasons do not refer to any fraud or collusion. MNP's reasons also refer to the fact that it considered the reasons of Justice Lee and Justice Topolniski, but it chose to disregard those judgments. Was this correct? MNP's reasons give this Court no basis on which to determine the correctness or lack of correctness in this decision. It can only surmise that MNP came to this decision because of the extant appeals and the new evidence that Transglobal presented to Justice Lee.

79 It should be noted that Justice Lee considered the new evidence that Transglobal sought to present and he concluded that "it would have little or no impact on the outcome in any event," Rehearing Judgment para. 77. As well, Justice Lee specifically found that any counterclaim that Transglobal claimed did not provide it with a right of legal or equitable set-off from Stone Sapphire's Summary Judgment.

80 While this Court acknowledges that the appeals of Justice Lee's judgments are extant, there is "no principle which says that a decision of the trial court or a chambers judge has no effect or is presumed wrong until the Court of Appeal finally at the end of the appeal disposes of it," *Alberta (Minister of Consumer & Corporate Affairs) v. Bennett* (1992), 131 A.R. 184 (Alta. C.A. [In Chambers]).

81 McEwan J. in *Exner, Re*, 2003 BCSC 260, 41 C.B.R. (4th) 49 (B.C. S.C.) expressed the view that the trustee in that case had a duty to scrutinize a certificate of judgment obtained by a creditor. One should not, however, ignore the fact that the court in that case was considering a default judgment.

82 Thus, MNP was incorrect when it did not give recognition to the judgments of Justice Lee and Justice Topolniski.

VI. Summary

83 Stone Sapphire's appeal shall be on the record. There will be no *de novo* hearing. The record that this Court will review and that the parties will argue on appeal will be comprised of the proof of claim, the trustee's notice of valuation or disallowance and all of the material that the trustee considered in determining that the claim was not provable or in valuing the claim, including the judgments of Justices Lee and Topolniski. If the parties are unable to agree as to what precisely constitutes the record, they may apply to the court for a determination of that issue.

84 With respect to the Kulbabas' claim, the parties will, in the first instance, argue whether the Kulbabas' claim is provable. Thereafter, if this Court finds that it is a provable claim, this Court may order MNP to value it, as MNP is required so to do by *BIA* s. 135(1.1).

Order accordingly.

FN* A corrigendum issued by the court on April 2, 2009 has been incorporated herein.

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2004 CarswellNfld 97, 2004 NLSCTD 54, 237 Nfld. & P.E.I.R. 94, 703 A.P.R. 94, 46 C.P.C. (5th) 95

N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)

IN THE MATTER OF an application for a determination of the right to strike of officers of the Supreme and Provincial Courts

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES (APPLICANT) AND HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by the Honourable the Minister of Justice (RESPONDENT) AND THE HIGH SHERIFF OF NEWFOUNDLAND AND LABRADOR (INTERVENOR)

Newfoundland and Labrador Supreme Court (Trial Division)

Green C.J.T.D.

Judgment: March 23, 2004
Docket: 2001 01T 0395

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Counsel: Sheila H. Greene for Applicant

Donna Ballard for Respondent

Christopher Curran for Intervenor

Subject: Labour and Employment; Civil Practice and Procedure; Corporate and Commercial

Labour law --- Industrial disputes — Strike — Right to strike — Essential employees

Union applied for declaratory determination of whether employees of supreme and provincial courts of Newfoundland and office of High Sheriff of Newfoundland statutorily designated as officers of court had right to strike — Officer of court is person whose function is integral to functioning of court system — Legislative deeming of all court and sheriff's office staff members as officers of court indicated that all individuals working within system were necessary to facilitate system in manner subject to control and direction of judiciary — Withdrawal of services by strike would interfere with court's ability to direct officers — Consequently, strike would unduly interfere with ability of court to function effectively in administration of justice — Constitutional position of courts as separate branch of government and principle of judicial independence reinforced conclusion that authority of courts to supervise court staff and sheriff's office staff are not to be interfered with — Withdrawal of services by officers of court was incompatible with unique status of officers of court in administration of justice in legislative and constitutional context — No provisions in Public Service Collective Bargaining Act indicated intention to permit action that would interfere with timely and effective access to courts — "Essential employees" provisions of Act did not apply to officers of court — "Essential employees" provisions of Act did not override legal position of court staff flowing from their status as officers of court, legislative regime, and common law holding that designated officers of court in Newfoundland did not have

right to strike.

Judges and courts --- Other officers of court — Miscellaneous officers

Union applied for declaratory determination of whether employees of supreme and provincial courts of Newfoundland and office of High Sheriff of Newfoundland statutorily designated as officers of court had right to strike — Officer of court is person whose function is integral to functioning of court system — Legislative denomination of all staff members as officers of court indicated that all individuals working within system were necessary to facilitate system in manner subject to control and direction of judiciary — Withdrawal of services by strike would interfere with court's ability to direct officers — Consequently, strike would unduly interfere with ability of court to function effectively in administration of justice — Constitutional position of courts as separate branch of government and principle of judicial independence reinforced conclusion that authority of courts to supervise court staff and sheriff's office staff are not to be interfered with — Withdrawal of services by officers of court was incompatible with unique status of officers of court in administration of justice in legislative and constitutional context — No provisions in Public Service Collective Bargaining Act indicated intention to permit action that would interfere with timely and effective access to courts — "Essential employees" provisions of Act did not apply to officers of court — "Essential employees" provisions of Act did not override legal position of court staff flowing from their status as officers of court, legislative regime, and common law holding that designated officers of court in Newfoundland did not have right to strike.

Sheriffs and bailiffs --- Duties — Miscellaneous issues

Union applied for declaratory determination of whether employees of supreme and provincial courts of Newfoundland and office of High Sheriff of Newfoundland statutorily designated as officers of court had right to strike — Officer of court is person whose function is integral to functioning of court system — Legislative denomination of all staff members as officers of court indicated that all individuals working within system were necessary to facilitate system in manner subject to control and direction of judiciary — Withdrawal of services by strike would interfere with court's ability to direct officers — Consequently, strike would unduly interfere with ability of court to function effectively in administration of justice — Constitutional position of courts as separate branch of government and principle of judicial independence reinforced conclusion that authority of courts to supervise court staff and sheriff's office staff are not to be interfered with — Withdrawal of services by officers of court was incompatible with unique status of officers of court in administration of justice in legislative and constitutional context — No provisions in Public Service Collective Bargaining Act indicated intention to permit action that would interfere with timely and effective access to courts — "Essential employees" provisions of Act did not apply to officers of court — "Essential employees" provisions of Act did not override legal position of court staff flowing from their status as officers of court, legislative regime, and common law holding that designated officers of court in Newfoundland did not have right to strike.

Cases considered by *Green C.J.T.D.*:

B.C.G.E.U., Re (1988), (sub nom. *B.C.G.E.U. v. British Columbia (Attorney General))* [1988] 6 W.W.R. 577, 30 C.P.C. (2d) 221, [1988] 2 S.C.R. 214, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 44 C.C.C. (3d) 289, 88 C.L.L.C. 14,047, 1988 CarswellBC 762, 1988 CarswellBC 363 (S.C.C.) — followed

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R. v. A. (E.J.) (2000), 2000 CarswellNfld 370, 198 Nfld. & P.E.I.R. 103, 595 A.P.R. 103 (Nfld. T.D.) — referred to

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Young v. Blackie (1822), [1817-28] 1 Nfld. L.R. 277 (Nfld. S.C.) — referred to

Statutes considered:

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Generally — referred to

s. 14 — referred to

Administration of Justice in Newfoundland and for other Purposes, Act for the Better, 1824 (5 Geo. 4), c. 67

Generally — referred to

Auditor General Act, S.N. 1991, c. 22

s. 23(1) — referred to

s. 23(2) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Child and Youth Advocate Act, S.N. 2001, c. C-12.01

s. 11(2) — referred to

Citizens' Representative Act, S.N. 2001, c. C-14.1

s. 10(2) — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Preamble — referred to

s. 92 ¶ 13 — referred to

s. 96 — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 2 "peace officer" — referred to

s. 67 — referred to

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Crown Employees Collective Bargaining Act, 1993, S.O. 1993, c. 38

s. 30 — referred to

Elections Act, 1991, S.N. 1992, c. E-3.1

s. 7(2) — referred to

Essential Services Act, S.M. 1996, c. 23

s. 1 "essential services" (d) — referred to

Executive Council Act, S.N. 1995, c. E-16.1

Generally — referred to

s. 2(a) "department" — considered

s. 5(2) — referred to

s. 9(4) — referred to

Financial Administration Act, R.S.N. 1990, c. F-8

Generally — referred to

s. 2(1)(l) "public body" — referred to

s. 6(c) — referred to

s. 7(1)(f) — referred to

s. 7(2)(a) — referred to

s. 7(2)(b) — referred to

s. 7(2)(c) — referred to

s. 7(2)(d) — referred to

s. 7(2)(f) — referred to

s. 8 — referred to

Interpretation Act, R.S.N. 1990, c. I-19

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s. 20 — referred to

s. 21 — referred to

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Generally — referred to

Judicature Act, R.S.N. 1990, c. J-4

Generally — referred to

Pt. IV — referred to

s. 3 — referred to

s. 55(1)(j) — referred to

s. 58(1)(a)(ii) — referred to

s. 60 — referred to

s. 60(1) — referred to

s. 61(4) — referred to

s. 62 — referred to

s. 62(1) — referred to

s. 63(2) — referred to

s. 65 — referred to

s. 67 — referred to

s. 73 — referred to

s. 74 — referred to

s. 74(1) — referred to

s. 74(1)(b) — referred to

s. 75(1) — referred to

s. 75(1)(b) — referred to

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s. 88 — referred to

s. 88(1) — referred to

s. 89 — referred to

Law Society Act, 1999, S.N. 1999, c. L-9.1

s. 33(2) — referred to

Oaths of Office Act, R.S.N. 1990, c. O-2

s. 6 — referred to

Provincial Court Act, 1991, S.N. 1991, c. 15

Generally — referred to

Pt. III — referred to

s. 8(1)(a) — referred to

s. 26 — referred to

s. 26(1) — referred to

s. 26(4) — referred to

s. 27 — referred to

Public Employees Act, R.S.N. 1990, c. P-36

s. 2 "public employee" — referred to

Public Service Act (Nunavut), nun-R.S.N.W.T. 1988, c. P-16

s. 41.02 [en. 1996, c. 1, s. 5] — referred to

Public Service Collective Bargaining Act, R.S.N. 1990, c. P-42

Generally — referred to

s. 2(1)(i) "employee" — considered

s. 2(1)(i) "employee" (i) — referred to

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s. 2(1)(i) "employee" (ii) — referred to

s. 2(1)(i) "employee" (viii) — considered

s. 2(1)(i) "employee" (xiii) — considered

s. 3 — referred to

s. 10 — considered

s. 10(3) — referred to

s. 10(10) — referred to

s. 10(12) — referred to

s. 10(13) "essential employee" — referred to

Public Service Commission Act, R.S.N. 1990, c. P-43

Generally — referred to

s. 2(k) "public service" — considered

Sched. A — referred to

Riot Act, 1714, 1 Geo. I, St. 2, c. 5

Generally — referred to

Royal Charter of 1825

Generally — referred to

Sheriff's Act, 1991, S.N. 1991, c. 39

Generally — referred to

s. 3 — referred to

s. 4(1) — referred to

s. 4(2) — referred to

s. 5(1) — referred to

s. 6(1) — referred to

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s. 6(2) — referred to

s. 6(3) — referred to

s. 8(a) — referred to

s. 8(b) — referred to

s. 8(c) — referred to

s. 8(d) — referred to

s. 8(f) — referred to

s. 21 — referred to

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

Generally — referred to

R. 26.01 — referred to

R. 27.04 — referred to

R. 27.13 — referred to

R. 47.01 — referred to

R. 49.05 — referred to

R. 53.03 — referred to

R. 53.05(1)(c) — referred to

Regulations considered:

Executive Council Act, S.N. 1995, c. E-16.1

Department of Justice Notice, 2003, Nfld. Reg. 85/03

Generally

APPLICATION by union for declaratory determination of whether employees of Supreme Court, Provincial Court and Office of High Sheriff of Newfoundland designated by legislation as officers of court have right to strike.

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Green C.J.T.D.:

1 The issues engaged in this case involve a consideration of the status and role, in the justice system, of persons who work in the courts and in the office of the High Sheriff of this province, and their relationship to those who work in the provincial public service. In addressing these matters, the even more fundamental question of the status of court administration and how that status impacts on judicial independence is also indirectly engaged.

The Questions

2 The Newfoundland and Labrador Association of Public and Private Employees ("NAPE"), a union representing public servants, amongst others, applies for a declaratory determination of the following questions:

> 1. Do employees of the Supreme Court, Provincial Court and Office of the High Sheriff of Newfoundland designated by legislation as "officers of the court", have a right to strike?
>
> 2. Do employees of the Supreme Court, Provincial Court and High Sheriff of Newfoundland who are not designated "officers of the court" have a right to strike?

3 NAPE asserts that both of these questions ought to be answered in the affirmative. The essence of its argument is that there is nothing in the statute or common law that sufficiently differentiates court and Sheriff's "employees" from other public servants who, in this province, generally have the right to strike. NAPE also requests that the court declare that there must be an agreement or determination on "essential employees" under s. 10 of the *Public Service Collective Bargaining Act* relating to court and Sheriff's office staff.

4 The Respondent, Her Majesty the Queen in Right of Newfoundland and Labrador, represented by the Minister of Justice (the "Minister") takes the position that the notion of withdrawing one's services as part of strike action is incompatible with the unique status of officers of the court in the administration of justice in the province, when considered in proper constitutional and legislative context, and that the answer to the first question should therefore be in the negative. The Minister further asserts that the second question does not need to be answered because as a matter of law all persons who work in the court system and the Sheriff's Office are deemed to be officers of the court.

5 The High Sheriff of Newfoundland sought and was granted intervenor status in the proceeding. He took the position that persons working in the Office of the High Sheriff did not have the right to strike because they, also, are officers of the court.

Factual and Legal Background

(a) Supreme Court

6 The Supreme Court of Newfoundland and Labrador, a superior court within the meaning of s. 96 of the *Constitution Act, 1867* consists of an appellate division, known as the Court of Appeal, and a Trial Division, which also includes the Unified Family Court. As presently constituted, the Court still draws its basic jurisdiction and authority from the *Judicature Act* of 1824[FN1] and the *Royal Charter* of 1825 issued pursuant thereto. As noted by Furlong C.J. in *Bursey v. Bursey* (1966), 51 M.P.R. 256 (Nfld. T.D.) at p. 258, the 1824 *Act* and *Royal Charter* remain the "fountain" of the Court's jurisdiction and power to this day[FN2].

7 Administratively, the Court is managed by a Registrar who holds office during good behaviour. The security of tenure of the Registrar's office underlines the independence of the Court, administratively as well as judicially, from

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the other branches of government. Broadly speaking, in addition to performing quasi-judicial functions in his capacity as a Master, the Registrar is responsible for the management and maintenance of all court records, the signing and entering of all court orders, the management and administration of the estates division of the Court and the control, security of and accounting for money paid into court. In addition, he possesses and enjoys all the rights, powers and privileges appertaining to or exercised by, and must perform the duties of, the Master, Registrar, Accountant-General and Prothonotary of the Supreme Court of Judicature in England, as well as those that had traditionally been performed by the Chief Clerk and Registrar of this Court.

8 The current *Judicature Act* provides for broad powers of delegation by the Registrar of his duties and responsibilities to other clerks and officers of the Court. (s. 63(2)) who are statutorily required to act at all times "under the direction of the Registrar" and to perform such duties as may be prescribed by him or her from time to time. (s. 62(1)).

9 When the Court was originally constituted in 1824, the creation of offices in the court and the appointment of court staff (other than the Registrar) rested with the Chief Justice subject only to the "approbation" of the governor. The *Royal Charter* provided as follows:

> And we do hereby ordain, appoint and declare, that there shall be and belong to the said supreme court and circuit courts, respectively, such and so many officers as to the chief judge of the said supreme court for the time being shall, from time to time, be deemed necessary for the administration of justice, and the due execution of all the powers and authorities which are granted and committed to the said supreme court and circuit courts respectively . . .
>
> . . . and . . . all persons who shall and may be appointed to any other office [i.e. other than the Registrar] within the said supreme court of Newfoundland, or within the circuit courts of Newfoundland, shall be so appointed by the chief judge for the time being, of the said supreme court, and shall be subject and liable to be removed from such [of] their offices by the said chief judge upon reasonable and sufficient cause.

10 Subsequently, from 1889 onwards, statute purported to vest the authority to appoint the Registrar and court clerks in the (then) Governor in Council. That approach is reflected in s. 60 of the current *Judicature Act* which provides as follows:

> 60(1) The Lieutenant-Governor in Council may appoint as clerks of the Supreme Court a registrar, an associate registrar, deputy registrars, assistant deputy registrars and such other clerks as the business of the Supreme Court may require.

11 In addition, there are now provisions for the appointment of specialized staff relative to estate and trust administration and court reporting, as follows:

> 73(1) There may be appointed in the manner provided by law such accountants, trust and estate officers and other employees as may be required to assist the Registrar in the carrying out of his or her duties as administrator, guardian, trustee and receiver
>
> 74(1) There may be appointed in the manner provided by law and upon the recommendation of the Chief Justice of Newfoundland and Labrador or the Chief Justice of the Trial Division, as the case may be, court reporters of the Supreme Court
>
> (a) to report proceedings; and
>
> (b) to perform such other duties as may be assigned by the judges.

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12 Finally, the current *Judicature Act* also contains the following general appointment clause:

> 88(1) There may be appointed in the manner provided by law other officers, secretaries and employees that may be necessary to carry out the duties and functions of the Supreme Court under this Part.[FN3]

13 It is to be noted that ss. 73, 74 and 88 are unlike s. 60, which deals specifically with clerks, in that: (i) they do not require a Cabinet appointment but simply require an appointment "in the manner provided by law"; but (ii) in the case of court reporters, the appointments also require the input, by recommendation, of the Chief Justices of the Court; and (iii) the scope of the duties of persons appointed as court reporters is to be determined by the judiciary.

14 It is also worth noting that the provisions respecting the appointment of such persons are in respect of those that are "required" or "necessary" to properly perform the business or functions of the court. The legislation begs the question as to who makes the determination of the numbers of persons who may be "required" or "necessary" for such purposes. In light of the original conferment of the authority to create such offices on the Chief Justice and the absence of the express conferment of that authority on anybody else in the subsequent legislation, it is at least arguable that the determination of the *minimum* numbers of staff persons in these categories necessary to allow for the proper functioning of the court still rests with the judicial, and not the executive, branch of government.

15 While the formal *appointment* of persons to fill the positions minimally "required" (whoever may have authority to make the determination of need) to conduct the business of the Court now purports to rest with the executive branch of government (the Cabinet, in the case of clerks, and in a "manner provided by law", in the case of others), *actual control over the performance of their duties* remains with the Court. The Rules Committees of the Court of Appeal and the Trial Division are given, by s. 55(1)(j)of the *Judicature Act*, authority to make rules "respecting the duties of the officers and clerks of the Court". In addition, s. 58(1)(a)(ii) provides that the council of the judges of the Trial Division must meet at least once annually for the purpose of considering, amongst other things, "the working of, and the arrangements governing the performance of duties by, the clerks, officers and employees of the Court". And, as noted previously, the judges are authorized by s. 74(1)(b) to assign "other duties" beyond court reporting to those who are appointed as court reporters and the Registrar has general authority to prescribe the duties of the clerks and officers of the Court. As well, it is also worth noting that there is nothing in the legislation which requires the Registrar to answer administratively to, or take directions from, the executive arm of government and in particular any Department of Justice or other public official.

16 It follows, therefore, that from the power to assign, and to make rules respecting duties and to generally oversee the working of and the performance of those duties, coupled with the Registrar's powers to prescribe staff duties to be performed under his direction without direct administrative accountability, there is considerable control over the functioning of court personnel exercisable by the Court through the judiciary and the Registrar, the Court's chief administrative officer.

17 Finally, it should be noted that while there does not appear to be any clear demarcation in the legislation with respect to the use of terminology such as "clerk", "officer", "court reporter", "trust and estate officer", "accountant", "secretary" and "employee" - and obviously some of those terms overlap each other in their commonly understood meanings - they all appear to be treated as "officers of the court". Section 89 provides:

> 89. All clerks, officers and other employees and staff appointed under this Part shall be officers of the Supreme Court.

The phrase "staff appointed under this Part" brings all of the functionaries mentioned above under the same linguistic wrapping of "officer of the court".

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(b) Provincial Court

18 The Provincial Court of Newfoundland and Labrador is a trial court that is provincially constituted and appointed pursuant to the constitutional authority of the province under s. 92(13) of the *Constitution Act, 1867*. Although an offshoot of the former magistrate's court system, the court was effectively reconstituted in the 1970's. It presently operates pursuant to the *Provincial Court Act, 1991* SNL 1991, c. 15 with judges having jurisdiction throughout the province. Like the Supreme Court, it is a court of record.

19 If there were any doubts as to the Provincial Court's independence from a constitutional point of view, those doubts were effectively removed by the decision of the Supreme Court of Canada in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.)[FN4], which held that the constitutional principle of the independence of the judiciary applies equally to provincial court judges as it does to federally-appointed superior court judges. Lamer, C.J.C. stated at para. [106]:

> . . . our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

20 The Provincial Court is presided over by a Chief Judge who, amongst other things, has "general supervision and direction of the sittings of the court". [S.8(1)(a)]. Part III of the *Act* deals with administration of the Court. Overall administration is entrusted to a Director of Court Services who, by s.26(1) is to be appointed "in the manner authorized by law." Unlike the position of Registrar in the Supreme Court, the appointment is not a Cabinet responsibility nor is there security of tenure. The "at pleasure" provisions of s. 20 of the *Interpretation Act*, RSNL 1990, c. I-19 apply to the position.

21 The appointment of court staff is authorized by the following provision:

> 26(1) There shall be appointed or employed in the manner authorized by law, a Director of Court Services, clerks of the court and other officers, clerks and employees that the administration of the court requires.

22 Section 27 provides that the persons so appointed or employed are "under the direction of the director and shall perform the duties prescribed by the director", but in respect of "judicial matters" they shall act "under the direction of a judge". As in the case of the Supreme Court, therefore, there is a recognition that both for the administrative as well as the judicial functioning of the Court, control over the performance of, and the determination of the nature and scope of, the duties of court staff is vested in the court as an institution.

23 Subsection 26(4) of the *Act* provides that all clerks of the court are, by virtue of their office, justices of the peace. This is a judicial appointment. See *Oaths of Office Act* RSNL 1990, c. O-2, s. 6.

24 As in the case of the Supreme Court, the *Provincial Court Act* also provides that all of the persons appointed under s. 26 "shall be an officer of the court" but, unlike the *Judicature Act*, it goes on to say as well that each of them shall be "an employee of the Department of Justice". It can be said, therefore, that insofar as provincial court staff are not acting as "officers of the court" the legislation purports to bring them, unlike the staff of the Supreme Court, within the administrative employment hierarchy of the civil service. That applies as well to the senior administrative officer of the court - the Director of Court Services. The Director's lack of tenure and the designation of the office holder as an "employee of the Department of Justice" would appear to amount to an indication by the legislature that the Director, unlike the Registrar of the Supreme Court, is intended to answer administratively to officials in the Department of Justice who are senior to the Director in the public service hierarchy.

(c) Office of the High Sheriff

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25 The office of Sheriff within the Anglo-Canadian tradition is an ancient one. It is the oldest continuous Crown appointment, predating William the Conqueror. In 1992, England celebrated the 1000th anniversary of the creation of the office of sheriff[FN5]. The office was carried with English settlers to the New World, including Newfoundland, under the reception of English law doctrine. See, generally, *Young v. Blackie* (1822), [1817-28] 1 Nfld. L.R. 277 (Nfld. S.C.) at p. 283.

26 The office was certainly recognized and functioning by 1793 when the *Act for Establishing Courts of Judicature in the Island Of Newfoundland and the Islands Adjacent*, 33 Geo. III c. 76 was enacted. Section 14 of that *Act* contains a reference to the setting, by the Chief Justice, of the fees and poundage to be taken by the "Sheriff of Newfoundland". It is noteworthy that that legislation did not purport to establish the office of Sheriff in the island; it merely assumed its previous existence[FN6].

27 With the promulgation of the *Royal Charter* in 1825, the Governor was charged with the responsibility of annually appointing a Sheriff but the Supreme Court was given authority to adopt rules respecting "the proceedings of the Sheriff and his deputies and other ministerial officers". Thus, as in the case of Supreme Court clerks and other staff, although the *appointment* to the office of Sheriff was vested in the executive arm of government, the *control over his functions and duties* was consigned to the court itself. The *Royal Charter* imposed the following duties on the office:

> . . . the said Sheriff, by himself or his lawful deputies, is hereby authorized to execute the writs, summonses, rules, orders, warrants, commands, and process of the said Supreme Court and the said Circuit Courts, and to make return of same, together with the manner of execution thereof, to the said Supreme Court and Circuit Courts respectively, and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff by the said Supreme Court and Circuit Courts respectively, or by the Chief Judge or assistant Judges, or either of them.

28 The requirement that the Sheriff carry out and enforce "orders, warrants, commands and process" of the Court denominated the office as an integral part of the court system. Without an effective means of enforcement, the orders and judgments of the Court have no practical effect. The office of the Sheriff became the primary mechanism by which the business of the court could be effectuated. In *R. v. Lydford*, [1914] 2 K.B. 378 (Eng. K.B.), Lord Reading put the matter as follows at p. 385:

> . . . if the Court has power to make an order, there must be someone whose duty it is to carry it out, and we must come to the conclusion that this duty falls upon the Sheriff as the officer charged with the carrying out of the orders of Courts of Justice, unless we find some provision which expressly or by necessary implication prevents that duty being cast upon him.

29 In Newfoundland, the Sheriff was described by Robinson J. in *McDonald's Insolvent Estate, Re* (1860), 4 Nfld. L.R. 526 as "the highest executive officer of the Court". When he or his deputies act in the name of the Court, he *is* the Court. The vesting in the Court, by the *Royal Charter*, of the authority to make rules regarding the proceedings of the Sheriff and his deputies, as noted above, makes it clear that the powers and duties of the Sheriff were to be commensurate with the powers and duties of the Court itself. The Sheriff, by the nature of the office, was required to do anything required by the Court to vindicate the Court's authority. In reality, the Sheriff was the means whereby the authority of the Court found practical expression.

30 The office of the Sheriff, as it developed over the ages, became multi-faceted in its functions. The Sheriff, from early times, was responsible for keeping the King's peace and was the designated official for the purpose of reading the proclamation under the statutes that eventually became known as the *Riot Act* 1 Geo I, stat 2, c. 5 (1714). This authority is preserved to this day. See, *Criminal Code of Canada*, s. 67. Although the police function of the office of the

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Sheriff has now been considerably attenuated, he or she remains as the highest ranking peace officer in the province. There are still residual areas of authority in this area that the Sheriff, in modern guise, still retains. The maintenance of security and order within the precincts of the courthouse is one obvious example. In addition, the Sheriff is a "peace officer" for the purposes of the *Criminal Code* (see s. 2) and as such has statutory authority to have custody of and to transport prisoners to and from the court for the purpose of trial and to deliver them to the gaoler following sentence.

31 The Sheriff also performed functions in Newfoundland, as he did in England, as the direct representative of the executive arm of government. He fulfilled the role of "King's Bailiff" on behalf of the Governor in the exercise of the Crown's prerogatives. See *Hoyles et al v. Bland* (1819), 1 Nfld. L.R. 160 where Forbes, C.J. recognized him at p. 162 as the "bailiff of the Crown".

32 Notwithstanding the functions of the Sheriff in his residual policing role and as a bailiff of the Crown, the Sheriff has always been, and still is, preeminently, the executive arm of the Court. The Office of the High Sheriff is currently regulated by the *Sheriff's Act, 1991*, SNL 1991, c. 39. Section 8 sets out the duties of the Sheriff, sub-sheriffs, bailiffs and deputy sheriffs as follows:

> (a) to execute attachment, recovery, enforcement, contempt and enforcement orders and other orders for execution;
>
> (b) to carry out enforcement proceedings and duties in accordance with the *Judgment Enforcement Act* or another Act;
>
> (c) to make all returns to the court which are required by law;
>
> (d) to carry out duties required of the Sheriff under the *Jury Act*;
>
> (e) . . .
>
> (f) to comply with, implement and exercise the requirements imposed upon the Sheriff by this Act, the *Judgment Enforcement Act* or another Act of the province, Canada or under the common law.

In addition, section 21 of the *Act* provides:

> 21. Except as otherwise provided for in this Act, the rights, powers, privileges, duties, obligations and liabilities of the Sheriff or anyone permitted by law to perform the duties of the Sheriff in force or existing prior to the enactment of this Act shall continue to exist.

33 The preservation, by s. 8(f), of the powers and duties of the Sheriff as they existed at common law and the general reservation, by s. 21, of such powers and duties as they existed prior to the enactment of the current *Sheriff's Act*, whether at common law, custom or prior statute, make it clear that the power and duty of the office of the High Sheriff to carry out the orders of the Court is not limited to the duties stipulated in the *Sheriff's Act*. The notion of residual power and authority, as enunciated in *Lydford*, still exists in this province. There need not be any statutory conferral of responsibility or power on the Sheriff to do that which the courts in the exercise of their lawful authority require to be done. In other words, the ability of the courts to call on the Sheriff to assist the court, and the corresponding duty on the part of the Sheriff to respond to such a call, is inherent in the historical relationship of the office of the High Sheriff to the administration of the court.

34 No better demonstration of the symbiotic relationship between the Office of the High Sheriff and the Supreme Court can be given than in the area of contempt of court. The power of a superior court to punish for contempt exists

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for two reasons: to vindicate the authority of the court system generally so as to promote and preserve the rule of law as we know it in a democratic society; and to provide an effective means of enforcing a particular order of the court for the benefit of the beneficiary of the order. Both reasons reinforce the notion that court orders are not mere pieces of paper but have real practical effect. See, *Health Care Corp. of St. John's v. N.A.P.E.* (2000), 196 Nfld. & P.E.I.R. 275 (Nfld. T.D.). Without an effective means of enforcement, the purposes behind the exercise of the contempt power would be frustrated. Court orders could be effectively flouted. The position of the courts as the upholders of the rule of law could be seriously damaged.

35 The role of the Sheriff in vindicating the court's authority through the exercise of the contempt power is clearly recognized in the *Rules of the Supreme Court, 1986* dealing with contempt. *Rule 53.03* provides that the Court may, on application or on its own motion,

> . . . make an order . . . directing the Sheriff to cause any person to appear before the Court to show cause why that person should not be held in contempt of court and, if required, to perform or abide by such order as the Court may make, and the Sheriff shall have power to take the person into custody and to hold the person if required by the order.

The Sheriff is also the official designated to execute sequestration orders in aid of enforcement of contempt orders. See, *Rule 53.05(1)(c)*.

36 In fact, the role of the Sheriff in carrying out, and rendering effective, the orders of the court generally is integrated into and is found throughout the rules of court. For example, the rules recognize, and rely on, the Sheriff as the means of conducting court-ordered sales of property (*Rule 26.01*) and ensuring the implementation of interlocutory and final recovery orders (*Rules 27.04 and 27.13*).

37 The reality is that for the Court to function properly and effectively, it must have the services of the High Sheriff at its disposal at all times.

38 The appointment of the High Sheriff is made by the Lieutenant-Governor in Council. By s. 3 of the *Sheriff's Act*, the High Sheriff is to "hold office at the pleasure of the Crown" and "is charged with the responsibility of ensuring that the powers and duties of that office are carried out". Unlike the Registrar of the Supreme Court, the High Sheriff's office is held "at pleasure". He therefore has no security of tenure. Unlike the Director of Court Services in the Provincial Court, however, the Sheriff is a Cabinet appointment and there is nothing in the *Sheriff's Act* deeming him or her to be an employee of the Department of Justice and thereby subjecting the office, administratively, to the control of officials higher in the public service hierarchy when he is acting on the business of the court.

39 The appointment of officials in the office of the High Sheriff is dealt with in a number of other sections of the *Act*. Sub-sheriffs are to be appointed by the Lieutenant-Governor in Council "upon those terms and conditions which the Lieutenant-Governor in Council may prescribe" (s. 4(1)); "bailiffs", "other clerks", "other officers" "secretaries" and "employees" necessary to assist the Sheriff in carrying out the duties and powers of the office are to be appointed "in the manner authorized by law" (ss. 4(2) and 6(2)); and "deputy sheriffs" are to be appointed by the Sheriff himself or herself (s. 5(1)).

40 Subsection 6(1) of the *Act* provides that sub-sheriffs, bailiffs and deputy sheriffs shall perform their duties "under the control and direction of the Sheriff". Control over the staff of the Sheriff's office, insofar as the effective administration of the court goes, therefore, is exercised by the Court through the Sheriff's common law and statutory obligation to effectuate the orders of the court.

41 As in the case of staff of the Supreme and Provincial courts, the Sheriff, sub-sheriffs, bailiffs, deputy sheriffs and "other officers, secretaries and employees necessary to carry out duties in the offices of the Sheriff and

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sub-sheriffs" are, by virtue of ss. 6(3) deemed to be "officers of all courts in the province".

(d) The Public Service Generally

42 It is obvious from the foregoing discussion of the specific provisions dealing with appointment and direction of the staff of the Supreme and Provincial courts and the office of the High Sheriff that they have been singled out for special treatment. They are unlike the employment provisions that apply to the public service generally.

43 The *Executive Council Act* SNL 1995, c. E-16.1 confers the authority for the appointment of staff of government departments. After providing that Deputy Ministers and Assistant Deputy Ministers are to be appointed by the Lieutenant-Governor in Council and are to hold office "at pleasure", s. 9 goes on to provide:

> 9.(4) Those other officers and employees that are necessary for the proper conduct of the business of a department shall be appointed or employed in the manner authorized by law . . . "

In fact, there is no specific legislative provision authorizing the executive arm of government to hire the necessary employees and other staff to carry out the executive's functions. Such authorization, of course, is not necessary. It is self evident that the executive must be able, within the proper spending parameters established by the legislature, to contract for the proper employment services to enable government to function. The specific provision in the Estimates of Expenditure approved by the Legislature for a given group of departmental employees constitutes the authority to engage employees of the type specified.

44 Section 9(4) of the *Executive Council Act* applies to appointment of officers and employees of a "department". Section 2(a) defines "department" as a department or branch of government. The courts and the Sheriff's office are not departments or branches of government for this purpose. They have been treated differently regarding employment matters by their own constituent legislation.

45 The *Financial Administration Act* RSNL 1990, c. F-8 assigns employment matters to Treasury Board constituted by that *Act*. Section 6 provides:

> 6. The [Treasury] Board shall act as a committee of the Executive Council on all matters relating to:
>
> . . .
>
> (c) personnel management in the public service and of a public body.

While "public service" is not defined in the legislation, "public body" is defined in s. 2(1)(e) as "a board, corporation, commission or similar body established by or under an Act" to which certain other provisions of the *Financial Administration Act* are made to apply by order of the Lieutenant-Governor in Council. The courts are not boards, corporations or commissions, or bodies similar in nature to such bodies and hence are not public bodies within the meaning of the *Act*. Thus, the Lieutenant-Governor in Council has no authority under s. 8 of the *Act* to make the personnel management provision in s. 6(c) to apply to the courts on the basis that they are "public bodies".

46 The question that remains is whether Treasury Board regulation of personnel management in the "public service"[FN7] applies to the courts. As noted, the term is not defined in the *Act*. There *is*, however, a definition contained in the *Public Service Commission Act* RSNL 1990, c. P-43. Section 2(k) of that *Act* provides:

> "Public service" means those portions of the public service of the province specified in Schedule A and includes a body or agency considered to be a portion of the public service and added to that schedule [by the Lieuten-

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ant-Governor in Council] under section 3.

Schedule A referred to in s. 2(k) makes no express reference to the courts or the office of the Sheriff. There is, however, a reference to the Department of Justice but the courts are not, and can never be, a sub-unit of the Department of Justice, or any department of government, for that matter. The constitutional notion of judicial independence precludes it.

47 This definition cannot be determinative of the issue, however, not only because it is contained in separate legislation but also because, it itself, recognizes, by its reference to "portions" of the public service, that the whole of the public service encompasses more than that which is being dealt with in the definition. Nevertheless, in light of the special and separate treatment of officials of the courts and Sheriff's office in other legislation, it is at least arguable that they do not fall within the notion of "public service" for the purpose of full employment regulation by Treasury Board under the *Financial Administration Act*. From the material and argument presented to me on this application it appears, however, to have been assumed that they are in fact and law part of the public service of the province. This assumption may flow in part from the fact that the *Department of Justice Notice, 2003* NL Reg. 85/03, promulgated pursuant to the *Executive Council Act*, ss. 5(2) lists the *Judicature Act, Provincial Court Act*, 1991 and the *Sheriff's Act* as pieces of legislation for the administration of which the Minister of Justice is responsible by way of "supervision, control and direction".

48 This does not necessarily mean, however, that the same hierarchical managerial structure that exists within the Department of Justice or the employment policies of Treasury Board are fully applicable to the Registrar and the people who work under him or her, or to the Provincial Court. The nature and degree of the "supervision, control and direction" that can be exercised in a particular case must depend on the nature of the entity in question, its own statutory structure and the constitutional milieu in which it operates. Given the special statutory regime that exists for the courts in relation to staffing in their constituent legislation and given certain other matters (such as their statutory designation as "officers of the court" and constitutional principles of judicial independence and separation of powers) to be discussed later, it must be concluded that even if it can be said in a broad sense, that court staff are part of the public service, their position and role as public servants is very different from others.

49 Nevertheless, assuming, without deciding for the purposes of this application, that the persons working in the courts and in the Sheriff's office are part of the "public service" within the meaning of the *Financial Administration Act* for the purpose of treatment by Treasury Board generally under its provisions, section 7 of the *Act* sets out the scope of Treasury Board's authority in that regard:

7.(1) The board may

. . .

(f) determine the conduct of collective bargaining negotiations within the public service and for a public body;

(2) Notwithstanding the provisions of another Act, the board may

(a) establish standards of discipline in the public service and prescribe the penalties that may be applied for breaches of discipline;

(b) determine the personnel requirements and provide for the allocation and effective utilization of personnel within the public service and of a public body;

(c) provide for the classification of positions within the public service and of a public body;

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(d) determine the pay to which persons employed in the public service or with a public body are entitled for services rendered, the hours of work and leave of those persons and related matters;

(e) . . .

(f) provide for those other matters, including the terms and conditions of employment not otherwise specifically provided for in this subsection, that the board considers necessary for effective personnel management within the public service and of a public body.

50 A fair reading of the applicable provisions of the *Executive Council Act* and the *Financial Administration Act* leads to the conclusion that, assuming court and Sheriff's office staff are part of the public service for these purposes, and subject to what is said later in this decision, those positions that are not expressly required to be filled by appointment by the Lieutenant-Governor in Council would appear to be subject to regulation by Treasury Board with respect appointment "in the manner authorized by law". The power of appointment also carries with it, of course, the power to remove or suspend the person. See, *Interpretation Act*, RSNL 1990, c. I 19, s. 21. In addition, the generic standards of discipline to be applied to their activities can be determined by the Board, as well as the levels of pay and other employment benefits and the classification, presumably for establishing pay and benefit scales, of individual positions in relation to other positions in the public service.

51 These provisions cannot apply with full force, however, as with regular members of the public service. For example the provisions in the *Judicature Act* which give the Supreme Court, though the Rules Committee (s. 55(i)(j)), the council of judges of the Trial Division (s. 58(i)(a)(ii)) and in relation to the assignment of other duties to court reporters (s. 74(i)(b)) the power to control the scope and nature of job duties and which give to the Registrar the power to prescribe duties (s. 63(2)), make it impossible for the general process of development of job descriptions and the assignment of job functions practiced in the public service generally to apply in their entirety to court staff. The general language in ss. 7(2)(c) of the *Financial Administration Act*, which accords to Treasury Board the power to "provide for the classification of positions within the public service . . . " must give way to the specific language in the *Judicature Act* where the two are in conflict. Any job classification or assignment of duties or description as to the manner of performing duties, including specific hours of work, developed as part of the management practices of the public service generally must be subject to variation when in conflict with the direction and prescription of the Registrar or the requirements of the judiciary under the *Judicature Act*. In like manner, the imposition of government-wide personnel policies and practices and any agreement reached as part of the collective bargaining process can only be effective insofar as they do not contravene the powers assigned to the senior court official and the judiciary to direct court staff and to regulate the duties they are required to perform in the administration of both the Supreme and Provincial Courts.

(e) The Collective Bargaining Regime

52 By virtue of s. 7(1)(f) of the *Financial Administration Act*, Treasury Board is charged with responsibility for the conduct of collective bargaining negotiations "within the public service". To the extent that the officials working in the courts and Sheriff's office are part of the public service, it appears that those officials could, in principle, be made part of any collective bargaining negotiations between Treasury Board and unions representing those persons. As I have noted previously, it has been assumed that court and Sheriff's officials are part of the public service.[FN8] This has led to the further assumption that the officials are not exempted from, and in fact are beneficiaries of, the collective bargaining process in the province.

53 The *Public Service Collective Bargaining Act* RSNL 1990, c. P-42 governs collective bargaining in the public sector work force. Section 3 charges the President of Treasury Board with responsibility for bargaining under the legislation. The *Act* recognizes, as a matter of principle, that members of the public service can engage in collective

bargaining with the provincial government and that, subject to some exceptions contained in the *Act* and in other legislation, they may engage in strike action as part of that bargaining process.

54 As in private sector bargaining, employee organizations representing groups of employees deemed by the Labour Relations Board to be "appropriate" for collective bargaining may be certified (or voluntarily recognized) as the bargaining agent for units of employees so deemed by the Board (or agreed voluntarily) to be appropriate for bargaining. Thereafter, the government is required to engage in collective bargaining in accordance with the procedural requirements of the *Act*. The rights of individual employees who are part of a bargaining unit represented by a certified bargaining agent are subordinated to the interests of the collective process. They are bound by the agreements reached, and the actions taken by, the bargaining agent on their behalf.

55 The *Act* governs collective bargaining on behalf of "employees". They are defined in s. 2(1)(i) which provides in pertinent part as follows:

> 2. (1) In this Act
>
> ...
>
> (i) "employee" means a person employed by
>
> (i) the government of the province,
>
> (ii) an agency, board, commission, corporation or other body that may be designated by the Lieutenant-Governor in Council, and paid a wage or salary in whole or in part from money voted by the Legislature,
>
> ...
>
> but does not include a person
>
> (viii) who is employed in a position confidential to the Lieutenant-Governor, a minister of the Crown, a judge of the Court of Appeal or a judge of the Trial Division, a Provincial Court judge, the deputy, associate deputy or assistant deputy head of a department of government or a chairperson or chief executive officer of a government board, commission or agency
>
> (ix) ...
>
> (xiii) who is employed as a manager or supervisor or who, in the opinion of the [Labour Relations] board, exercises management or supervisory functions.

56 It is to be noted that the definition contains a reference, in its exclusionary provisions, to persons in a confidential relationship to judges of the courts. It has been assumed that this applies to judges' secretaries or legal assistants. This is the only hint in the legislation that the *Act* was intended to address the working relationship of persons working in the courts or the Sheriffs office to the collective bargaining process.

57 The language of "employee" does not mesh well with the terminology employed in the *Judicature Act* respecting officials of the Supreme Court or in the *Sheriff's Act* respecting officials in his office. In the Supreme Court, the emphasis is on clerks and officers, although there is a residual category of "employees"mentioned, almost as an afterthought.. The same is true for the Sheriffs office. By contrast, s. 26 of the *Provincial Court Act* deems all persons

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working in that court to be "employees" of the Department of Justice.

58 Notwithstanding these terminological incongruencies, Treasury Board has purported to treat all non-managerial staff at the courts and the Sheriff's office as "employees" for the purpose of collective bargaining. As well, the applicant in this proceeding, NAPE, has purported to represent them in negotiations, and previous collective agreements resulting from the bargaining process have purported to include them, subject to certain management exclusions, within the bargaining umbrella.

59 In past certification and bargaining activities, the following court officials have been excluded by agreement or by order of the Labour Relations Board pursuant to the management exclusion in s. 2(1)(xiii) of the *Public Service Collective Bargaining Act*:

- Registrar of the Supreme Court
- Registrar's Secretary
- Manager of Judicial Services (Supreme Court, Trial Division)
- Director of Supreme Court Services
- Senior Deputy Registrar (Supreme Court, Trial Division, St. John's)
- Administrator of the Unified Family Court
- Estates/Trust Administrator
- Deputy Registrar (Court of Appeal)
- Deputy Registrar (Supreme Court, Trial Division, Corner Brook)
- Director of Court Services (Provincial Court)
- Court Manager (Provincial Court)
- Director of Fines Administration (Provincial Court)
- Manager of Fines (Provincial Court)
- High Sheriff
- Judgment Enforcement Officer (Sheriff's office)
- Manager of Court Security (Sheriff's office)
- Manager of Judgment Enforcement

As well, judges' secretaries have also been regarded as being excluded from the bargaining unit, purportedly by virtue of s. 2(1)(i)(viii).

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60 All of the remaining persons working in the courts and the Sheriff's office have been included in a bargaining unit of which the respondent has been certified by the Labour Relations Board as the bargaining agent. They are purportedly governed, along with a large number of other job descriptions in government departments, by the General Service Collective Agreement negotiated between the parties. Schedule "A", which lists all of the job classifications covered by the agreement, includes within it descriptors, with pay scales levels, of the various positions in question.

61 Section 10 of the *Public Service Collective Bargaining Act* requires as a condition precedent to a legal strike in support of negotiations for a new collective agreement, an agreement, or a declaration of the Labour Relations Board, on "essential employees". An essential employee is defined by ss. 10(13) as follows:

> 10.(13) In this section "essential employee" means one of a number of employees whose duties consist in whole or in part of duties the performance of which at a particular time or during a specified period of time is or may be *necessary for the health, safety or security of the public.* [Italics added]

62 The scheme of the essential employee designation process requires the employer to provide the Board and the bargaining agent with a written statement of the number of employees in each classification who are considered by the employer to be essential employees. If the bargaining agent does not object, the numbers specified by the employer will be deemed the number of essential employees involved. On the other hand, where the bargaining agent objects, the Board is required by ss. 10(3) to "determine the number of employees in each classification specified in the statement [of the employer] who are essential employees for the purpose of this Act". The employer may then name the specific employees in each classification (up to the numbers determined by the Board) who are to be treated as essential employees.

63 To the extent to which this process could apply to the courts, the nature of the process would be controlled by two factors external to the court: (i) the initial decision by the employer (i.e. Treasury Board) as to the numbers of employees and their classifications, which the employer, not the court, considers to be essential; and (ii) a decision, by way of agreement between the employer and the bargaining agent, or by the Labour Relations Board, as to whether the numbers and classifications as proposed, or some lesser variant thereof, should be designated essential.

64 The consequence of an essential employee designation is stated in ss. 10(10):

> 10.(10) An employee named by the employer as an essential employee shall report for work as if a strike were not taking place.

Effectively therefore, the determination as to which court officers will continue, in the event of a strike, to be subject to the day to day direction and control of the courts would be made by third parties external to the courts themselves.

65 Subsection 10(12) requires that until the employer and the bargaining agent have agreed as to, or the Board has made a determination on, essential employees, "a bargaining agent shall not take a strike vote and an employee in a unit shall not strike or participate in a strike".

66 In this case, no determination on essential employees was made by the Board. However, the parties did enter into an agreement, dated January 15, 2001, on the issue respecting four government departments, then known as Health and Community Services, Municipal and Provincial Affairs, Government Services and Lands, and Justice. It is only with respect to the Department of Justice that we need be here concerned. In addition to listing specific positions in the department as constituting essential employees, the agreement also contained the following general understandings:

> (a) additional essential employees shall be made available in cases of emergencies such as natural disasters,

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forest fires and medical emergencies;

(b) . . .

(c) . . .

(d) in the case of a prolonged strike, the Employer and NAPE agree to meet on as needed basis to discuss essential employee issues that may arise as a result of seasonal or operational requirements.

67 These provisions underline the fact that to the extent to which such an agreement was made to apply to court and Sheriffs office staff, the determination of the need for essential employees to keep the system running and to enforce court orders would be made, not by the court, but by Treasury Board and the bargaining agent.

68 I have already observed that the courts cannot, for reasons related to the concept of judicial independence, be considered, for any purpose impacting on the judicial function, as a sub-unit of the Department of Justice. Nevertheless, the agreement does make one reference to "Provincial Courts" in its listing of positions affected (in relation to a LAN Administrator in the Department of Justice who provided services to the Provincial Court). More significantly for the purposes of the present application, however, the agreement also contains the following acknowledgment:

> the department of Justice has indicated verbally to the Association that it believes the "Chafe" award applies to Provincial Court employees as well as to Supreme Court employees; and therefore has not requested any essential employees under this agreement for the Provincial Courts.

69 The reference to the "Chafe award" is a reference to the decision of Noel, J. of this court in *Newfoundland (Attorney General) v. N.A.P.E.* [(January 10, 1979), Noel J. (Nfld. T.D.) hereinafter *Chafe*] 1978 No. 1331 (SCN, TD; unreported; filed January 10, 1979). The implications of this decision and the subsequent appeals to the Court of Appeal and the Supreme Court of Canada figure prominently in the arguments that have been made on this application. The position of the government, I was told, was that the result of the *Chafe* decision was that the officials affected by it were not allowed to strike. Whatever its effect, however, the acknowledgment in the essential employees agreement with NAPE illustrates certain underlying assumptions of the parties about the position of court and Sheriffs office officials in the collective bargaining scheme:

(1) in principle, they fell within the notion of "employees" under the *Public Service Collective Bargaining Act* (otherwise there would not have been any reason to address the issue at all in the agreement);

(2) even though they may be "employees" for the purpose of collective bargaining, the effect of the *Chafe* case was to blunt the full application of the collective bargaining legislation to court officers;

(3) whatever the scope and legal effect of the *Chafe* case, it applied, at the least, to Supreme Court and Sheriffs office staff (this is implicit from the assumption that there was a need to deal only with Provincial Court staff).

70 It is now necessary to turn to an analysis of the *Chafe* cases.

(6) The Chafe Decisions

71 William Chafe was a bailiff in the Office of the High Sheriff of many years' standing. During a strike of provincial government employees, a picket line was established at the courthouse in St. John's. Chafe, a member of the striking union, refused to honour the picket line and crossed it to enter the courthouse in the performance of his duties.

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The union subsequently brought an internal charge under its constitution against Chafe for refusing to respect a picket line during a legal strike. Facing a "trial" under the union constitution, Chafe, supported by the Attorney General, sought: (i) a declaratory order that a courthouse was not a place where a picket line could be established or maintained because it was an interference with the administration of justice; and (ii) an injunction restraining the union from proceeding to discipline him.

(i) The Original Decision

72 Noel, J. granted an *ex parte* interim injunction. Following a subsequent *inter partes* hearing, he made the injunction permanent. He reasoned:

> The Supreme Court of Newfoundland was established by royal charter over 150 years ago and its authority has never been challenged, nor can it be. . . . As long as this court exists no person can interfere with it. The officers of this court are not ordinary civil servants, never have been, not from time immemorial.
>
> This court has ample powers to ensure that its officers perform the duties that are required of them to protect them in the performance of such duty. These powers are not for the purpose of vindicating the dignity of this court or the person of the officer, but to prevent undue interference with the administration of justice.
>
> The officers of this court are its executive arm.
>
> No person may directly or indirectly by any act, omission or stratagem whatsoever induce or attempt to induce any officer of this court to depart from his duty nor can any officer of this court for any reason whatsoever agree to do so. It is criminal contempt of this court to contravene that law.
>
> No officer of this court can be relieved of his obligation to perform his duty except by the appropriate authority. In the case of a sub-sheriff, a deputy sheriff, a sheriff's officer or a bailiff, the appropriate authority is the Sheriff of Newfoundland. I should say that the Sheriff of Newfoundland is the highest officer in this province. Upon him depends the duty of maintaining public peace. He has a great and ancient office and with that office goes great power. The appropriate authority in the case of other officers such as the registrar, the deputy registrar, the assistant deputy registrar, the clerks, the reporters . . . may be easily determined by referring to the Judicature Act, part 2, entitled "Officers of the Court".
>
> This court is the supreme court of judicature for this province. It can only function through its officers, and for that reason an intention to disable this court will not be implied from any legislation of general application. If the legislature intends to disable this court it will do so by a clearly stated intention in legislation enacted for that purpose.
>
> I hope that the officers of the court who are present will realize that they have a solemn duty which they cannot escape by any act or agreement on their own part. Just as the judges of this court are judges for 24 hours a day, every day of the year, so the officers of this court are officers 24 hours a day, every day of the year. They cannot escape that duty until they are relieved by the appropriate authority . . . .

73 I take the *ratio* of this decision restraining the union from proceeding to discipline Chafe to be: (i) a bailiff cannot be restrained by any means, including a picket line established in pursuance of an otherwise legal strike, from performing his duties as an officer of the court; and that (ii) inasmuch as interference with an officer of the court is *ipso facto* an interference with the court itself and hence with the administration of justice, any such restraint or attempted restraint amounts to a criminal contempt of court, thereby making the actions in furtherance of the restraint or attempted restraint illegal; and (iii) actions, such as union discipline hearings, which subsequently expose the officer of the court to reprisals for having refused to countenance or participate in the previous illegal act are likewise illegal and

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in contempt of court and are liable to be restrained by injunction.

74 As I read the decision of Noel, J., it was not a necessary part of his decision to rule that a bailiff or other officer of the court was precluded from participating in a strike. It was the *consequence* of the existence of the picket line, in its interference with the ability of a court officer to perform his duties with consequent impact on the ability of the court to function, that was the key to the reasoning of the court. While it seems implicit from other comments in the decision that Noel, J. was of the view that court officers were required to perform their duties at all times ("No officer of this court can be relieved of his obligation to perform his duty"; and " . . . they have a solemn duty which they cannot escape by any act or agreement on their own part") and that this all-encompassing obligation would be necessarily incompatible with the ability to go on strike or to picket a courthouse, this was not an essential part of the analysis leading to his conclusion. It is not, therefore, technically part of the *ratio*. It is an *obiter dictum*.

(ii) The Court of Appeal decision [Newfoundland (Attorney General) v. N.A.P.E.] 1984 50 Nfld. & P.E.I.R. 139 Nfld. C.A.

75 On appeal by the union to the Court of Appeal, the appeal was dismissed and the order of the trial court was affirmed. The Court, however, expressed its reasons somewhat differently and, arguably, more expansively.

76 Morgan, J.A. interpreted Noel, J.'s judgement as follows:

> [8] Implicit in the judge's reasons is that the establishment of a picket line at the entrance of the Court House constituted criminal contempt in that it was designed to induce officers of the court to refrain from carrying out their duties. He confined his remarks to that aspect of the proceedings and did not consider the further argument of the Attorney General that the picket line in question was an interference with the open administration of justice.

He then proceeded to determine whether that reasoning was justifiable. He concluded:

> [14] The power of superior courts to punish for contempt of court in the interests of the administration of justice has existed since the very foundation of these courts and the particular instances of contempt of court in which that power has since been exercised are too numerous to enumerate. . . . Any interference with the due course of justice, whatever its form, constitutes criminal contempt of court.
>
> [15] It has long been established that acts which are intended to prevent officers of the court from carrying out their duties constitute a contempt of court. . . .
>
> [19] Any conduct, which is calculated to prevent or hinder, in their access to the court, any litigant or witness or any person whomsoever having business in the court or desirous of entering for the purpose of hearing what is going on, constitutes a contempt of court. In my view the placing of a picket line at the entrance to the Court House falls within that category.
>
> [26] . . . It is of the utmost importance to the public at large that those having duties to perform in a court of justice are protected, not only in the performance of those duties but also in their freedom from reprisal for having performed them.

77 The essence of Morgan, J.A.'s reasoning, therefore, was that because it would be a criminal contempt of court to prevent, by picket line, a court officer, or anyone else for that matter, from accessing the court, the union could not discipline that officer for refusing to engage in an illegal activity.

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78 Mahoney, J.A. grounded his reasoning in the fact that preventing a court officer, by means of a picket line, from performing his duties amounted to an interference with or obstruction of "the open administration of justice" (para. [47]). Had Chafe, he reasoned, respected the picket line and not reported for work, the union would have succeeded in having him respect a crime. No provision in a collective agreement or union constitution requiring him to commit a criminal contempt could be legal and accordingly, he "could not be tried for breaching an illegal condition" (para. [53]). Noel, J. was therefore correct, he concluded, in enjoining the union from conducting the internal trial.

79 Although Mifflin, C.J.N. expressed himself in agreement with the reasons of Morgan, J.A. the language he used in fact is more in line with the analysis of Mahoney, J.A. Mifflin, C.J.N. stated:

> [58] . . . the establishment of a picket line at the entrance to a Court House is an interference with the open administration of justice, and, thus, is in itself a contempt of court. It cannot be said that the failure of William Chafe to respect the picket line, be he an officer of the court or simply a member of the respondent Association, could leave him open to jeopardy of disciplinary action by the Association. I cannot conceive of a situation where one could be disciplined for refusing to countenance an illegal act. A fortiori, an officer of the court cannot be subjected to disciplinary action for refusing to respect an illegal picket line regardless of any disciplinary procedures in the constitution of the Association. *Indeed, in my view, if William Chafe had refused to cross the illegal picket line to carry out his duties as an officer of the court, he himself would have been guilty of contempt of court.*
>
> [Italics added]

80 The reasoning of the Court of Appeal can be summarized as follows: the picketing of a courthouse is a criminal contempt of court because it is calculated to interfere with the ability of officers of the court to perform their duties and with others from accessing the court. For those with a duty to perform as part of the administration of justice, it is a contempt not to perform that duty. It follows from this reasoning that it is illegal to picket a courthouse if it interferes with the open administration of justice and it is illegal (i.e. a contempt) for officers of the court not to perform their duty by refusing to cross a picket line or, more generally, participating in an activity, such as a strike, that interferes with their duties.

(iii) The Supreme Court of Canada decision [Newfoundland (Attorney General) v. N.A.P.E.] [1988] 2 S.C.R. 204 S.C.C.

81 The injunction granted by Noel, J. was again affirmed on further appeal to the Supreme Court of Canada. However, Dickson, C.J.C, for the Court defined the issues presented on the appeal more narrowly, as follows:

> The issue presented by this case is not whether there was a right to strike, nor is the issue whether Mr. Chafe was under a duty to ignore the strike action and the picket line and report for work. There is no need to canvas either question. This appeal raises two issues. The first is whether picketing a courthouse in the course of a lawful strike constitutes criminal contempt of court. The second is whether the union has the lawful right to proceed with its charge and with its proposed discipline hearings against Mr. Chafe.

82 Following its decision in *B.C.G.E.U., Re* (1988), 53 D.L.R. (4th) 1 (S.C.C.), the Court reaffirmed that the picketing of courthouses during a lawful strike which interferes with the administration of justice by being intended as "a barrier to the court-house" constitutes criminal contempt of court. It followed, so Dickson, C.J.C. reasoned, that "if the picket line itself constituted a criminal contempt, the association can have no right in law to discipline one of its members for ignoring its unlawful plea" (p.211).

83 By its reference to the *B.C.G.E.U.* case, the Court incorporated much of the reasoning in that case into its *Chafe* decision. Some of the language used in the *B.C.G.E.U.* case is relevant to the current case. Dickson, C.J.C. stated at pp.

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13-14:

> A picket line ipso facto impedes public access to justice. It interferes with such access and is intended to do so. A picket line has great powers of influence as a form of coercion. . . .
>
> Picketing of a commercial enterprise in the context of an ordinary labour dispute is one thing. The picketing of a court-house is entirely another. A picket line in intention and in effect, is a barrier. By picketing the court-houses of British Columbia, the appellant Union, in effect, set up a barricade which impeded access to the courts by litigants, lawyers, witnesses, and the public at large. It is not difficult to imagine the inevitable effects upon the administration of justice. . . . [O]n a daily basis the courts dispose of hundreds of cases in which fundamental rights are at stake. At the very least, the picketing is bound to cause delays in the administration of justice and, as have been often and truly said, justice delayed is justice denied. The picketing would undoubtedly make it difficult, if not impossible, for the courts to process criminal cases with despatch. Any person charged with an offence has the right not to be denied reasonable bail yet potential sureties could have been discouraged from entering the court-house to satisfy the requirements of a judicial interim release order. An accused has the right to a public trial yet the members of the public not issued passes by the Union might have been deterred from entering the court-house. Accused persons have a Charter right to a fair trial and a statutory right to make full answer and defence. Witnesses crucial to the defence could well have been deterred from even requesting a pass to enter the court-house to give vital evidence. It is perhaps unnecessary to multiply the examples. The point is clear. Picketing a court-house to urge the public not to enter except by permission of the picketers could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia.

84 The essence of the decision was that picketing constituted a criminal contempt because it interfered with public access to the courts and threatened their ability to function in the provision of effective and timely justice. Dickson, C.J.C. concluded that although the actions of the union did not take place in the courtroom, actions that take place in the immediate precincts of the court-house and directed at the immediate activity taking place in the courts nevertheless constituted contempt in the face of the court. Under such circumstances, he reasoned, it was permissible and appropriate for the Chief Justice of the British Columbia Supreme Court, as he did in that case, to issue an *ex parte* injunction restraining the picketing. In the words of Dickson, C.J.C. at p. 19:

> As Chief Justice, he had the legal constitutional right and duty to ensure that the courts of the province would continue to function.

85 It is worth noting that the strike in the *B.C.G.E.U.* case included staff of the courts but that the injunction issued by the British Columbia Chief Justice did not purport to require the court staff to resume the discharge of their duties. It only enjoined picketing of the court-houses. In dealing with the appropriateness of the injunction, therefore, the Supreme Court did not therefore have to deal with the question as to whether the court staff could lawfully strike. This theme was re-emphasized in the context of the Court's *Chafe* decision as follows at p. 211:

> It should be emphasized that this judgment does not in any way order any individual or group of individuals back to work nor does it hold that the strike itself was unlawful, nor does it hold that Mr. Chafe was obliged to ignore the picket line and report for duty despite the strike.

86 In making this statement, the Court was clearly distancing itself from some of the more expansive statements made in the courts below, particularly the Court of Appeal. At the Supreme Court level, the ratio of the *Chafe* decision can be reduced to two propositions: (i) picketing in the precincts of a court-house which impedes access to the court or interferes with its proper functioning is illegal as a contempt of court; and (ii) any subsequent attempts to penalize persons who do not honour such a picket line are also illegal and improper and can be restrained by injunction.

87 The case, at the Supreme Court of Canada level, did not decide that persons working in or associated with the

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court have no right to strike and must report for work regardless of other lawful strike activity being engaged in by the union representing the bargaining unit of which those court officials might be a part. It must also be recognized, however, that statements made by Noel, J. and the Court of Appeal *do* address inferentially the issue of the right of court officers to strike, through their assertion of an obligation on the part of court officers to report for work despite the strike, and those statements were not expressly disapproved of by the Supreme Court of Canada. Instead the Supreme Court concluded it was not necessary, for the purposes of its decision, to deal with those issues. The legal effect of those statements in the lower courts therefore remains germane to the questions posed on this application.

(7) What precipitated this Application

88 It has been assumed by many that the implication of the reasoning in the lower court decisions in *Chafe* means that officers in the Sheriffs office and in the Supreme Court are, by the nature of the work they perform, legally unable to strike. If that were true, it would not be necessary to include them in any essential employee agreement reached pursuant to s. 10 of the *Public Service Collective Bargaining Act* because the general law would preclude them from striking in any event. The essential employee agreement referred to above appears to be based on this assumption. In addition, however, the provincial government has taken the position that its interpretation of the implications of *Chafe* extends to officials working in the Provincial Court as well. As noted previously, the agreement records that that is the reason why the government had not insisted that Provincial Court staff be dealt with under the essential employee process.

89 Because NAPE claims there is uncertainty as to the scope and implications of the *Chafe* decision on the question of the ability of staff in all courts and in the Sheriffs office to withdraw services by way of strike action, this application for a declaratory order, posing clear questions as to the right to strike issue, was brought.

90 The Minister, as respondent, did not suggest that NAPE did not have a sufficient interest in the answer to the posed questions to affect its standing to bring the application for a declaratory order.

The Issues and the Positions of the Parties

91 NAPE submits that the decisions of the Supreme Court of Canada in *Chafe* and *B.C.G.E.U.*, while effectively prohibiting picketing of a court-house in the course of a strike, do not preclude court staff from participating in the strike itself provided they do not picket the court-house. It argues that the public service collective bargaining regime in the province contemplates that all employees may engage in strike action unless they have been designated essential employees, either by agreement or by order of the Labour Relations Board. In this case, court staff have not been so designated. Furthermore, the union argues, the continued functioning of the courts is not threatened by a finding that court staff have a right to strike because no strike can take place without an agreement or determination by the Labour Relations Board on essential services

92 NAPE also points out that the legislation in all other Canadian jurisdictions which recognizes the right to strike in the public service does not take away the right of court staff to strike. The Supreme Court of Canada decisions in *Chafe* and *B.C.G.E.U.* in fact implicitly decide, it is said, that court staff do have the right to strike and, to the extent that the decisions of Noel, J. and the Court of Appeal suggest to the contrary, they are wrong in law. There is, the union argues, nothing intrinsic in the status of court staff, as officers of court, that negates a right to strike; rather, the key is not the designation of court staff but the ability of the court to continue to function, something that is guaranteed by an essential employee designation.

93 The Minister takes the position, firstly, that all personnel working in the courts and in the Sheriffs office, no matter what their function or job description, are, in law, officers of the court and that, as a result, the issue in the second question posed by NAPE on this application (i.e. the right of persons who are *not* officers of the court to strike) is not engaged. I agree with this submission. Section 89 of the *Judicature Act*, s. 26 of the *Provincial Court Act*,

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1991and ss. 6(3) of the *Sheriff's Act* effectively deem all court and Sheriff's office staff affected by this application to be officers of the court. That is so even though the actual job description of a particular staff person does not include what one would expect would be performed by what was traditionally understood as an officer of the court. As the affidavit of David Hickey filed in this application makes clear, there is nobody else left in the court system or Sheriff's office who falls outside the deeming provisions of the applicable legislation. It is not necessary, therefore to consider the second question posed by the union any further.

94 The main argument on the part of the Minister is that inasmuch as court staff assist the judiciary in the administration of justice, the idea of officers of the court, no matter what their actual function, being able to engage in strike action is inherently likely to interfere with the administration of justice by rendering it more difficult, if not impossible, for the judiciary to discharge its constitutional function of providing access to justice and maintaining the rule of law. The fact that the Labour Relations Board may determine, or the parties may agree on, who are essential employees is no guarantee, it is argued, that the administration of justice will not be impeded. The jurisdiction of the Board in this regard is limited to making determinations on the basis of issues of public health, safety and security and this, it was submitted, is not sufficient to ensure that broader issues relating to the proper functioning of the system of administration of justice will be properly considered.

95 The High Sheriff applies the same type of reasoning to the staff of his office. Inasmuch as his staff are "the executive arm" of the courts for purposes of implementing and enforcing court orders, he argues that to permit personnel in the Sheriff's office to go on strike "would be to debilitate the administration of justice in this province". Amongst other things, process would not be served, juries would not be summoned, court security functions would be impaired and court orders generally would not be able to be enforced. In the words of the Sheriff's brief: "The consequence ... is that access to the courts and its processes and protections would in a real and practical sense be delayed, if not denied. In short, access to justice and its fruits would be limited."

96 At the risk of oversimplification, the essence of the arguments on behalf of the Minister and the High Sheriff is that considering the constitutional position and duties of the courts in the administration of justice, the statutory structure and purposes of the court system and the importance of ensuring that the courts are not at any time disabled from maintaining the rule of law, the notion of court and Sheriff's office staff being able to withdraw their services as part of strike action is fundamentally incompatible with the unique role that the staff, as officers of the court, play in the administration of justice in the province, and that there is nothing in the scheme of the legislation governing collective bargaining that necessarily requires that such staff have the right to strike.

97 It is necessary, I believe, to approach the question that has been posed from a number of different perspectives. Arguments have been presented which draw upon concepts relating to the position of the courts in the constitutional structure of the country. As well, arguments based on the implications allegedly flowing from the statutory structure of the courts and the legal position of court and Sheriff's staff within that structure, have also been invoked. From this flows considerations of the powers of the court to control its own process and the degree of independence the courts do or should enjoy from other branches of government. It is because of such things, it is said, that makes the idea of being able to strike either (depending on the party making the submission) incompatible or compatible with the role of the staff in the court system.

98 I propose, therefore to start with an examination of what, if anything, is special about a person being designated an "officer of the court". The essential characteristics of such a designation may shed light on what it is about court and Sheriff's office personnel that may set them apart from others in respect of the implications for the role they play that having the right to strike may have. From there it will be necessary to consider the implication of designating *all* court and Sheriff's staff as officers of the court, no matter what their specific job function.

99 The statutory context in which the staff work is also important to consider as an indication of the legislative intent as to whether the staff were intended to have a special status within the system. Insight into the nature of any such special status may also be gained from a consideration of the relation which the court system has, as a matter of

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both statutory and constitutional law, with other parts of government. This would include a consideration of constitutional doctrine relating to independence of the judiciary and the implications that that has for the administrative structure of the court.

100 Finally, when the fundamental nature of the role of court and Sheriffs office staff has been delineated in appropriate legislative and constitutional context, consideration can then be given to how the legislative regime relating to collective bargaining, particularly with respect to the potential for strike action, impacts on that role. Then, determinations can be made as to whether the two are incompatible can be made and if, indeed they are incompatible, whether the legislation nevertheless permits such incompatibility.

Analysis

(1) The juridical nature of an officer of the court

101 An understanding of what it is that characterizes an officer of the court will be helpful in determining the significance of the denomination, by the legislature, of all court and Sheriffs office staff, no matter what their actual function, as such officers.

102 A person can become an officer of the court in one of three ways: (i) by assuming an office which in law and by tradition has been regarded as having that designation; (ii) by specific appointment of the court; and (iii) by being designated as such by legislation.

103 As Morgan, J.A. pointed out in *Chafe*, there is no definitive list of those who, by virtue of their office, may rank as officers of the court. The term has been used to include "any persons having official duties to perform in connection with court proceedings" (Borrie and Lowe, *The Law of Contempt* (1973), p. 232). It is clear from *Chafe* itself that bailiffs fall in that category. Morgan, J.A. at para. [15] and Mahoney, J.A. at para. [50] would also have included the Sheriff himself and his or her deputies and process servers. Mahoney, J.A.'s analysis provides the clearest statement of principle as to who should be so regarded. For him, it is not the designation as such which makes a person an officer of the court; rather, it is the duties or functions that he or she performs that is the key. Moreover, in his view, a person will be regarded as an officer of the court if he or she performs a function "as assistant to" another person who is an officer and who is required to perform those duties (see, para. [50]).

104 To determine whether a person is, by the nature of the office, an officer of the court, it is necessary, therefore, to focus on the nature of the duties that that person's office requires him or her to perform. In the case of the Sheriff, a bailiff, sheriffs officers and deputies, those functions require them, amongst other things, to carry out orders of the court, through enforcement proceedings, to provide security within the precincts of the court, and to facilitate the administration of trial proceedings, particular criminal jury trials, by, for example, supervising and managing the jury process. The Sheriff and his or her deputies in particular acts on behalf and in the name of the Court to vindicate and render meaningful, the court's contempt power. See, *Health Care Corp. of St. John's v. N.A.P.E.* (2000), 196 Nfld. & P.E.I.R. 31 (Nfld. T.D.) (NLSC,TD) at para. [2]. The essence of these duties is the enforcement and facilitating of court process, particularly court orders.

105 The Registrar of the Supreme Court is also, by virtue of his office, regarded as an officer of the court. See, *Strong (Guardian ad litem of), Re* (1993), 107 Nfld. & P.E.I.R. 350 (Nfld. T.D.) at para. [47]. The Registrar is charged with the overall administrative functioning of the court. He is also entrusted with the management of estates and money on behalf of the court. He must carry out the instructions of the court to facilitate, amongst other things, the implementation of court orders, as, for example, in *Strong (Guardian ad litem of), Re* where he was required to execute certain documents and authorizations to ensure that the purpose and intent of a court order was made effective. See also, *Judicature Act*, s. 65. In so acting, his actions are those of the court. In addition, the Registrar may act through his clerks by means of formal delegation of duties pursuant to s. 63(2) of the *Judicature Act* or by prescription of duties

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and the giving of directions pursuant to s. 62 of the *Act*. The rules of court are replete with situations where the Registrar, or clerks acting in his stead, must act to effectuate the results of adjudication. The most obvious examples are the making of certain court orders and the settlement of the forms of other orders under *Rule 49.05*.

106 In acting to assist the Registrar in the performance of his duties as an officer of the court, clerks and other staff of the court are, themselves, officers of the court. In *Chafe*, Noel, J. specifically identified deputy and assistant deputy registrars, clerks and court reporters as falling into this category. This has been so ever since the original constitution of the Court by the *Royal Charter* of 1825. It will be recalled that the *Royal Charter* provided for the creation and filling of offices in the court that were deemed "*necessary* for the administration of justice, and the *due execution* of all the powers and authorities which are granted and committed" to the Court. The criterion for the creation of an office in the court and the appointment of an officer to fill that position was that it be "necessary" for the administration of justice and the due execution of the powers of the court. The existence of officers of the court therefore presupposed that they were a *necessary* part of the court system.

107 Successive judicature legislation has always recognized the role of court clerks as officers of the court and, as noted previously, the current legislation still speaks of the appointment of court staff of various types as being "necessary" or "required" to ensure that the functions of the court are carried out.

108 It is also worth noting that the rules of court contemplate that officers of the court will carry out certain quasi-judicial functions as part of the court process. See, e.g., *Rule 47.01* which enables evidence by deposition to be taken before an "officer of the court".

109 Solicitors (but not barristers) have also been regarded as officers of the court in England. See, *Chafe*, per Morgan, J.A. at para. [15]. Their special role in the court system has resulted in them being treated, by virtue of their position, as officers of the court even though they are not in any employment relationship with the court as an institution. Again, it is the function or role they play in the system that is the key.

110 In this province, lawyers, whether barristers or solicitors, are deemed by law to be officers of the court. See, *Law Society Act*, SNL 1999, c. L-9.1, ss. 33(2). There are numerous cases in this jurisdiction affirming not only the general proposition that counsel in their dealings with the court are regarded as officers of the court (e.g. *R. v. Hart* (Nfld. T.D.) at para. [19]), but also reiterating specific duties that flow from that status, such as the duty to make honest and accurate representations to the court upon which the court is entitled to rely (*Strong (Guardian ad litem of), Re*; *R. v. A. (E.J.)* (Nfld. T.D.) at para. [3]; *Norman v. Goodridge* (Nfld. T.D.) at para. [6]),the duty not to mislead the court (*Philpott v. Greening* (1999), 178 Nfld. & P.E.I.R. 101 (Nfld. C.A.) at paras. [33]-[34] and the duty to fulfill undertakings. This duty - of fidelity and loyalty to the court - sometimes transcends the interests even of the lawyer's client.

111 The court may also exercise control of counsel in the courtroom, for example, by removing them from the record if they are in a conflict of interest (*R. v. F. (D.P.)* (Nfld. T.D.)). This supervisory jurisdiction over lawyers as officers of the court flows, as was noted by Sopinka J. in *MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 (S.C.C.), at pp. 256-257, from the necessity of controlling the "conduct [of lawyers] in legal proceedings which may affect the administration of justice". Control may also be exercised by use of the contempt power.

112 Thus, as illustrated by the role of lawyers as officers of the court, where the conduct of an officer of the court affects or has the potential of affecting the administration of justice, the officer of necessity must be subject to the supervisory jurisdiction of the court.

113 As noted previously, in addition to becoming an officer of the court by assuming a particular office or being legislatively designated as such, a person can also become an officer by virtue of a specific appointment of the court. For example, a receiver and manager appointed by the court is "an officer of the Court put in to discharge certain duties prescribed by the order appointing him": per Viscount Haldane L.C. in *Parsons v. Sovereign Bank of Canada* (1912),

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[1913] A.C. 160 (Ontario P.C.) (JCPC) at p. 167. See also, *Coopers & Lybrand Ltd. v. Bank of Montreal* (1996), 146 Nfld. & P.E.I.R. 252 (Nfld. C.A.) where Marshall, J.A. stressed that a court-appointed receiver-manager, as an officer of the court, must act under "judicial direction" and without doing so would expose himself or herself to "sanction" (para. [22]). In acting pursuant to the appointment, the receiver's acts are regarded as the acts of the Court itself; for example, any property that comes into his or her possession is regarded as the "possession of the court". See *Jenny Lind Candy Shops Ltd., Re* (1935), 16 C.B.R. 193 (Ont. S.C.) at p. 195. Similar comments could be made about a trustee-in-bankruptcy. See, *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83 (Ont. S.C.).

114 From the foregoing, it can be determined that an officer of the court has at least the following characteristics:

1. His duties and functions in the court process are *necessary* to enable the system to function properly;

2. In the performance of her duties, her role is to *facilitate the functioning of the court system* either directly or by assisting other officers of the court to perform their functions effectively;

3. In performing his functions he owes a *duty of loyalty and fidelity* to the court as an institution and to the rule of law, a duty which transcends other interests;

4. In acting as an officer of the court, she is the *personification of the court*; her acts are the acts of the court;

5. His duties, insofar as they impact on the effective functioning of the court, are subject to the *supervisory control* and *judicial direction* of the court;

6. Her role includes the duty to *carry out and comply with orders* of the court so as to ensure they are given practical effect;

7. His failure to comply with judicial directions or orders make him *subject to sanction*, including punishment for *contempt*.

115 In essence, then, an officer of the court is a person whose function is so integral to the functioning of an aspect of the court system that the court could not function effectively in that regard without being able to exercise control, by way of court order if necessary, over what is done and how the officer does it.

116 It is obvious, of course, that not all staff members working in the courts or the Sheriff's office may be equally fundamentally necessary for the continued effective operation of the system. Some functions performed by some officers will no doubt be considered more vital than others. The fact that the legislature has nevertheless seen fit to denominate *all* staff members, no matter what their individual actual function, as officers of the court, is significant. It is a legislative signal that *all* of the individuals who contribute, with their labour, to the functioning of the system, no matter how diverse their work, are to be regarded as - to use some of the characteristics identified above - *necessary* to *facilitate the functioning of the system* in a manner that is *subject to the supervisory control and direction* of the judiciary, and which requires a *duty of fidelity and loyalty* that transcends other interests. For this reason, if no other, court staff have a special - indeed, unique - work relationship. This was recognized by Noel, J. in *Chafe* when he declared:

> The officers of this court are not ordinary civil servants, never have been, not from time immemorial.

117 The question as to whether staff of the courts and Sheriff's office may withdraw their services by way of strike action, then, must be answered taking into account this special role that officers of the court play in the court system.

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Are the characteristics of an officer of the court - extended by legislation to all staff subsequent to the enactment of public service collective bargaining legislation - so fundamentally inconsistent with the notion of being able to withdraw services that the ability of the court to control its officers in effect, as a matter of legislative interpretation or constitutional imperative, trumps the right to strike? Before answering that question, it is necessary to consider the statutory regime under which court and Sheriff's office staff operate, in the conduct of the inherent nature and constitutional role of the courts.

(2) Judicial Independence and the Constitutional position of the Courts

118 Although traditional English theories of parliamentary democracy have not been based on the notion of the separation of government into three independent branches (legislative, executive and judicial), the Supreme Court of Canada has certainly recognized the separation as a fundamental part of Canada's constitutional polity, and as providing a rationale for the application of the constitutional principle of judicial independence.

119 In *Provincial Court Judges' Reference*, Lamer, C.J.C. referred to the "central place that courts hold within the Canadian system of government" and stated:

> [108] . . . As this Court has said before, there are three branches of government - the legislature, the executive, and the judiciary. . . . Courts, in other words, are equally "definitional to the Canadian understanding of constitutionalism" . . . as are political institutions. It follows that the same constitutional imperative - the preservation of the basic structure - which led Beetz J. [in OPSEU v. Ontario (Attorney General) [1987] 2 S.C.R. 2] to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the *Constitution Act*, 1867, contains within it *an implied limitation that the independence of these courts cannot be undermined.* [Italics added]

120 The notion of judicial independence is now recognized as being based on an "unwritten constitutional principle" (per Lamer, C.J.C. at para. [83]) derived from the preamble to the *Constitution Act, 1867* as well as from other sources. Although specific provisions of the *Constitution Act, 1867*, such as s. 96, which guarantee the "core jurisdiction" of superior courts against legislative encroachment (see, *Provincial Court Judges' Reference*, paras. [84], [88] and *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.)) do not apply to all courts in all situations, the general constitutional principle does (para. [106]). In the words of Major, J. in *Ell v. Alberta*, [2003] 1 S.C.R. 857 (S.C.C.) at para. [19], it is "one of the pillars upon which our constitutional democracy rests".

121 The rationale for upholding judicial independence extends beyond the reinforcement of the separation of the judicial function from that of the legislative and executive and beyond the notion of ensuring that judges, as arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference. The principle also exists to ensure the preservation of our constitutional order, the application of the rule of law to all, including other branches of government, and the maintenance of public confidence in the administration of justice. See, *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405 (S.C.C.) at paras. [34] - [37]; and *Ell v. Alberta*, paras. [18] - [24].

122 As was emphasized in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.) and the *Provincial Court Judges' Reference*, judicial independence has both an individual and an institutional dimension. As noted in *Mackin*, para. [39],

> . . . institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers.

As well, institutional independence of the courts "inheres in adjudication under the *Charter*, because the rights protected by that document are rights against the state" (per Lamer C.J.C. in *Provincial Court Judges' Reference* at para. [124]).

123 Within the two dimensions of judicial independence are its three essential characteristics: financial security; security of tenure and administrative independence. Gonthier J in *Mackin* stressed at para. [40] that these characteristics "create the relationship of independence that must exist between a court and any other entity" and that "their maintenance also contributes to the general perception of the court's independence".

124 As noted by Lamer, C.J.C. in *Provincial Court Judges' Reference* at para. [120] the characteristic of administrative independence, unlike the other characteristics, really only has an institutional or collective dimension. He stated:

> administrative independence . . . only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice).

125 In *Provincial Court Judges' Reference*, the discussion of administrative independence in *Valente* was generally adopted. There, LeDain J. had stated that "an essential condition of judicial independence" was control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function" (at p. 712). Those types of decisions were described in this way:

> Judicial control over . . . assignment of judges, sittings of the court, and court lists - as well as the related matters of allocation of court rooms and *direction of administrative staff engaged in carrying out these functions* has generally been considered the essential minimum requirement for institutional or "collective" independence. [Italics added]

126 Although the administrative functions that are protected under the rubric of administrative independence, as a characteristic of judicial independence, have generally been thought to belong to a narrow category, it must be recognized that a court cannot function and deliver adjudication in an independent fashion without operating as an integrated whole. As Noel, J. noted in *Chafe*, the court "can only function through its officers". In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.), Cory, J., after noting the evolving nature of judicial independence, observed that "the privilege relating to administrative functions is an adjunct to the adjudicative privilege". A court cannot operate to perform its adjudicative functions without appropriate court staff. The staff are the means whereby the judicial function finds real practical expression.

127 To the extent, therefore, that the functions of court staff are necessary to enable the judiciary to perform their functions, the right to direct and control the administrative support provided by court staff of necessity falls under the protective umbrella of judicial independence. Anything that impinges on the ability of administrative staff to support the judiciary in the performance of those functions in itself will amount to interference with administrative independence. The role of the judiciary in scheduling sittings of the court and allocating courtrooms, for example, necessarily requires administrative support. As noted in *Valente*, "the direction of administrative staff" engaged in carrying out such functions is recognized as part of administrative independence.

128 It is not necessary to attempt to define the outer parameters of administrative independence as it relates to the direction and control of court staff. It is sufficient, for the purposes of this case, to recognize that *some* administrative functions performed by court staff *are* protected, by the constitutional principle of judicial independence, from interference from outside the judiciary. To that extent, the principle of judicial independence ensures that direction and control over court staff for such purposes is exercisable by the judiciary and no one else.

129 It must also be remembered that the ultimate rationale for judicial independence, including administrative

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independence, is to ensure impartiality in adjudication. Judicial independence is, as noted by Lamer, C.J.C. in *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.), but a means to the end of achieving a reasonable perception of impartiality. To the degree to which it is perceived that administrative staff are influenced, directed or controlled by outside agencies or forces in the performance of their duties as an adjunct to the judicial function, the perception of impartiality of the courts will be affected. At p. 140 in *Lippé*, Lamer, C.J.C. observed:

> . . . if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.

130 Judicial independence then, including administrative independence, operates to "insulate the courts" (per Lamer, C.J.C. in *Provincial Court Judges' Reference* at para. [130] from improper influence. In *Lippé*, Lamer, C.J. expressed the view that the scope of improper influence from "government" against which judicial independence was to provide insulation included "any person or body which can exert pressure on the judiciary through authority under the state" (p. 138) but Gauthier, J., writing for the majority expressed it more broadly, referring to language from *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.) at p. 69, which included any "outsider - be it government, pressure group, individual or even another judge", who interferes with or attempts to interfere with the way in which a judge conducts a case. In *Provincial Court Judges' Reference*, Lamer, C.J. expanded the notion to interference from "the public generally" (para. [130]).

131 In the context of administrative independence it follows that influence or pressure from agencies acting under state authority or from pressure groups or individuals which interfere with or attempt to interfere with the administrative functioning of the court, with the risk that the courts will be perceived by the public as having been disabled or hampered in the performance of their role of providing access to justice so as to uphold the rule of law, will offend the constitutional principle of judicial independence.

132 To the extent to which agencies such as the Labour Relations Board or public or private agencies acting under the authority of state collective bargaining legislation purport to make decisions or undertake actions which interfere with the ability of the court to function effectively from an administrative point of view and thereby affect the ability of the court to perform its adjudicative function, the decisions or actions so undertaken may be ineffective. The interpretation and application of legislation purporting to affect the role of court staff in the administration of the courts must therefore be approached with the principle of administrative independence and its rationale in mind.

(c) The Statutory Context

133 In addition to designating all Supreme Court staff as officers of the court, with the attendant implications that flow from that designation, the provisions of the *Judicature Act* governing their appointment and the performance of their duties also create a legal regime that is both different and, to some extent, separate from, that governing persons employed in the public service generally.

134 In the first place, there is a complete absence of any express connection between Supreme Court staff and employees of the Department of Justice or any other department or entity of government, nor is there any indication that they are intended to be integrated with, or treated the same as, public service employees for employment purposes, or any other purpose for that matter. This contrasts strikingly with the statutory regimes governing other entities or agencies that have a degree of independence from government. For example, the *Auditor General Act* SNL 1991, c. 22 provides, in ss. 23(1), for the appointment, "in the manner authorized by law" of "auditors and employees" to enable the auditor general to perform his or her statutory duties, and expressly provides that the persons so appointed "are members of the public service of the province". Subsection 23(2) further provides that the personnel management policies of Treasury Board as they relate to the province apply to the office of the Auditor General. Similar provisions making the staff of the offices of the Child and Youth Advocate, the Citizens' Representative and the Chief Electoral Officer "members of the public service" are found in their constituent legislation. See, *Child and Youth Advocate Act*

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SNL 2001, c. C-12.01, ss. 11(2); *Citizens' Representative Act* SNL 2001, c. C-14.1, ss. 10(2); and *Elections Act, 1991* SNL 1992, c. E-3.1, ss7(2). The absence of similar language in the statute providing for the engagement and control of Supreme Court staff is therefore of some significance.

135 On the other hand, the fact that the constituent legislation of the courts and the Sheriff's office is included within the *Department of Justice Notice, 2003* as being statutes over which the Minister has administrative supervision would appear to indicate an intention, or at least an assumption, that staff administering those acts were to be regarded as part of the public service, at least for some purposes. However as noted previously, it does not flow from this that the full force of departmental hierarchical administrative control can be brought to bear on the courts. Their separate legislative structure and the notions of judicial administrative independence of necessity mean that, at least with respect to the assignment of duties, the determination of the scope of individual job responsibilities, and the manner and time when those responsibilities must be discharged, control and direction rests in the court at an institution exercisable by the judiciary and the Registrar, free from outside interference, where, to allow otherwise, would affect the ability of the court to perform its function of providing access to adjudicative justice.

136 It is not necessary for the purpose of this decision - nor would it be appropriate - to express a decisive view on whether court and Sheriff's office staff are members of the public service for any purpose. That would have implications that extend well beyond the current controversy. Issues relating to such other public service benefits respecting promotions, transfers and pensions might be engaged. In addition, the right to representation in the collective bargaining process and the benefits such as grievance and bumping rights that that entails might be impacted. It is sufficient for present purposes to record that, even as part of the public service, court and Sheriff's office staff are different from other members of the public service in respect of the degree of control that of necessity must be exercised by the court over their activities and the degree of accountability which they owe to the court system free from other interference, be it from government or outside government.

137 The second point of note is that there is nothing in the legislation creating a reporting relationship between the Registrar, as the administrative head of the court, and senior officials in the Department of Justice or in any other department of government.[FN9] That is consistent with his role as head of an institution that is required, constitutionally, to be independent of other branches of government, a fact that is underscored by ss. 61(4) of the *Judicature Act* which accords security of tenure to the Registrar and removes from the Lieutenant-Governor in Council the power to remove him unless an absence of "good behaviour" can be shown. Section 21 of the *Interpretation Act* RSNL 1990, c. I-19, which provides that the power of appointment of a public officer or functionary carries with it the power of removing, suspending, reappointing, reinstating or replacing him or her, does not extend to the appointer (in this case, the Lieutenant-Governor in Council) an implied power to direct, control or discipline the appointee during the tenure of the appointment. While the ultimate power of removing and replacing the appointee obviously carries with it a degree of disciplinary control, that is of little significance in the current context because, as I have said, the legislation specifically imposes a "good behaviour" standard for removal of the Registrar.

138 Given the Registrar's special designation as officer of the court subject to the court's control and supervision, his security of tenure, the lack of any express legislative indication that he was intended to be regarded as an employee of the Department of Justice, as well as the special place of the court as a separate branch of government, and the impact of the constitutional principle of judicial administrative independence, it is questionable whether he can be subject to the specific direction and control by senior officials in the department in the same way as departmental divisional heads may be. The legislation should not be interpreted in a way that will offend these fundamental principles. Indeed, it may well be that if there were a direct clash between the legislation and the constitutional principle of judicial independence, the legislation would have to give way.

139 That is not to say, of course, that the Registrar is a law unto himself. In our parliamentary system of government, the Registrar remains accountable in a general sense directly to the Minister of Justice[FN10] who, in turn, is accountable to the House of Assembly. There is nothing in the legislation to impose a greater degree of managerial control and supervision than that. Certainly, where, by virtue of the nature of a specific function he is performing, he is

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subject to the direction and control of the court, then the nature of the role he plays in the system requires him to defer to the orders of the court in preference to any perceived conflicting departmental direction.

140 A third point of note in this context is that, unlike the brief staffing provisions contained in other legislation, the *Judicature Act* contains, in Part IV entitled "Officers of the Supreme Court", a detailed set of provisions purporting to regulate not only appointment but also the nature and scope of the duties of different types of staff members and the manner in which such staff are to be directed and controlled in the performance of those duties. As noted previously, the court clerks and officers of the court are required to act at all times "under the direction of the Registrar" and to perform such duties as may be prescribed by him or her from time to time. See, *Judicature Act, ss.* 62(1) and 63(2). In addition, there is express recognition of *judicial* control and direction of court staff through the enactment of rules of court relating to clerks' and officers' duties (s. 55(1)(j)), or through review, in meetings of the council of judges of the Trial Division, of the arrangements for the performance of duties of clerks and officers of the court (s. 58(1)(a)(ii)), or, in the case of court reporters, through the assignment of other duties beyond court reporting (s. 74(1)(b)).

141 The situation is not so clear with respect to the staff of the Sheriffs office and the Provincial Court. Neither the High Sheriff nor the Director of Court Services of the Provincial Court have security of tenure.

142 On the other hand, staff in the Sheriffs office are "under the direction and control of the Sheriff" (*Sheriff's Act*, s. 6(1)). In addition, the role of the Sheriff and his or her officers as "the executive arm of the court" necessarily subjects the Sheriff and related staff to direction and control by the judiciary. Indeed, the right of the court to direct the Sheriff in the enforcement of its orders is a core function of the court which constitutionally cannot be taken away from the court (just as the power to punish for contempt cannot be taken away; see, *MacMillan Bloedel Ltd. v. Simpson*) as it would derogate from the essential nature of a court as an *effective* adjudicative body. The authority of the Sheriff to act independently of direction and control of government is essential because, if he or she is not independent, the courts would be at the mercy of the executive branch of government as to whether judicial rulings will be enforced, thereby undermining the rule of law. The absence of any provision in the *Sheriff's Act* deeming staff of the Sheriffs office to be members of the public service and subjecting them to the normal regulation and control by Treasury Board or of the Department of Justice of their employment relationships is therefore consistent with this notion of a special status for persons who work in the Sheriffs office. As in the case of the Registrar, the Sheriff must defer to specific orders of the court in preference to any perceived conflicting departmental direction.

143 The staff of the Provincial Court are administratively under the direction of the Director of Court Services who may prescribe their duties. In addition, they are subject to the direction of a judge in respect of "judicial matters". See, *Provincial Court Act*, 1991, s. 27. These control provisions, coupled with the constitutional principles of judicial independence, especially administrative independence, likewise lead to the conclusion that Provincial Court staff have a special status that differentiates them in respect of the regulation of employment relationships as part of the general public service.

144 There is one important difference, however, between staff of the Provincial Court and staff of the Supreme Court and Sheriffs office: s. 26 provides that, in addition to being an officer of the court, each member of the staff of the Provincial Court is also "an employee of the Department of Justice". This provision is cause for concern. It derogates from the principle of administrative independence insofar as it implies that the Director of Court Services and the staff of the court are part of the regular administrative hierarchy of the Department of Justice and that the court, in effect, constitutes a division or sub-unit of that department. It also derogates from administrative independence insofar as it implies that the control and direction of provincial court staff that flows from being part of the Department of Justice administrative hierarchy may supercede the control and direction necessary for the court to exercise in the carrying out of its judicial functions. Insofar as this provision does contravene the principle of judicial independence, it is probably of no force and effect. It is not necessary to decide that question for the purposes of this case, however. It is sufficient to recognize that even though provincial court staff may be treated for some purposes as employees of the Department of Justice, their status as officers of the court, coupled with the other provisions relating to administrative and judicial control by the court mentioned earlier, clearly demarcates them as being under the direction and control of

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the court for all purpose associated with the performance of the judicial function.

(d) The Special Status of Court and Sheriff's Office staff: Summary

145 The combination of: (a) the role of all staff as officers of the court; (b) the special statutory regimes, especially in relation to the Supreme Court, in which the staff operate; and (c) the operation of the constitutional doctrine of the separation of powers and the principle of judicial independence, especially administrative independence, leads to the conclusion that court and Sheriff's office staff are either directly or indirectly (through the ability of the courts to control the Registrar, Director of Court Services or the High Sheriff, as the case may be) subject to the control and direction of the court as a means of ensuring that the judicial function of adjudication is carried into practical effect. This means that they have to be available to comply with orders of the court and to perform their other duties as the exigencies of the operation of the courts require.

146 The ability of the court system to control its own functioning is fundamental to the notion of an independent, and therefore impartial, system of effective justice. The courts must be accessible at all times. As Noel, J. observed in *Chafe*, judges are judges "24 hours a day, every day of the year" and have to be available to provide access on an emergency basis outside of normal sitting hours as required.[FN11] In like manner, officers of the court are officers "24 hours a day, every day of the year" and have to be available to assist the court administratively to perform its function at all times.

147 Without access to the courts to enable rights to be enforced in a timely manner, the maintenance of societal order is threatened. Persons engaged in a lawful strike need to be assured that if they are arrested as a result of alleged violence on the picket line, they will be able to be brought before a court within the times stipulated by law so their *Charter* rights to reasonable bail pending trial will be upheld. Numerous other examples could be given. Without access to the courts, self-help would become the preferred - perhaps the only other - option.

148 The opening sentence in Dickson, C.J.C.'s judgment in *B.C.G.E.U.* stresses the importance of access:

> "This case involves the fundamental right of every citizen to have unimpeded access to the courts and the authority of the courts to protect and defend that constitutional right. [Italics added].

149 Later in his judgment, he elaborated on why access was so important:

> Of what value are the rights and freedoms guaranteed by the **Charter** if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the **Charter** if court access is hindered, impeded or denied? The **Charter** protections would become merely illusory, the entire **Charter** undermined.
>
> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule by men and women who decide who shall and shall not have access to justice (pp. 11 - 12).

150 In *Chafe* itself, Dickson, C.J.C. reiterated:

> "The rule of law, enshrined in our constitution, can only be maintained if persons have unimpeded, uninhibited access to the courts of this country. [Emphasis added].

151 These comments were made in the context of the Court's consideration of whether picketing a court house constituted interference with access to the courts. The court concluded that it did.

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152 In my view, however, the comments are equally apposite to a consideration of whether the ability of court staff to withdraw their services as part of strike action could constitute an interference with access to the courts. Surely, the refusal of court staff to perform any of their functions - be it processing files in the Registry, dealing with counsel, attending in court, operating the recording equipment, reproducing and inscribing court orders, or ensuring service and enforcement - is an even greater threat to the ability of citizens to get access to the courts to have their cases heard than the erection of picket lines which might (or might not) be effective in persuading persons not to attend court. If the staff are not present, the court cannot even open for regular business. The public cannot have, in the words of *Chafe* "unimpeded, uninhibited access" if the courts are shut down because of a strike.

153 While it is certainly possible that even in strike conditions, some judicial business could be conducted through the assistance of senior court staff who are excluded from the bargaining unit because of the "management" exception to the definition of "employee". However, it is a virtual certainty that all courtrooms and all administrative support activity essential to the day to day functioning of those courtrooms and the myriad other functions of the court system could not continue to operate regularly and continuously as normal. At the best of times, with all court staff working full-time, the court system is stretched to the limit of its capacity. The withdrawal of services during a strike would disable it. The court cannot be content to operate on an emergency basis only. It has to be assumed that the same level of demand to hear criminal, civil and family cases will continue whether or not the public service is on strike. *Charter* rights will continue to need to be protected, single parents will continue to need access for child support, children in need of protection will continue to need protective court orders, those challenging allegedly oppressive administrative action will continue to need urgent relief, and important commercial rights will need to be decided, to take just a few obvious examples. Indeed, there may be increased demand flowing from strike issues that frequently find their way into court for urgent attention.

154 A withdrawal of services by way of strike action will therefore clearly impinge seriously on the rights of others to have their legal claims adjudicated in an effective and timely way. In principle, therefore, such a withdrawal of services is fundamentally inconsistent with the ability of the courts to continue to operate.

155 It is true, of course, that in upholding the decision enjoining picketing of a court house, the Supreme Court of Canada in *B.C.G.E.U.* did not question the legality of the right of court workers to strike. And in *Chafe* the court specifically defined the issue as excluding a determination of whether Chafe as a court officer had the right to strike or was under a legal duty to ignore strike action, cross the picket line and report for work. I do not read the decisions in those cases, however, as counsel for NAPE invited me to do, as affirming the right of court officers to engage in strike action. In the view of the Supreme Court, the issues were simply not engaged and there was no need to canvas those questions. The matter was left open, without expression of opinion one way or the other, by the Supreme Court of Canada.

156 It is otherwise, however, at the lower decision levels in *Chafe*. It is clear from the judgment of Noel, J. though writing in *obiter*, that he was of the view that officers of the court had a duty to report for work regardless of a strike or picketing. His statements that "no officer of this court can be relieved of his obligation to perform his duty except by the appropriate authority" and that court officers "have a solemn duty which they cannot escape by any act or agreement on their own part" are inconsistent with any other reasonable conclusion.

157 What was implicit in Noel, J.'s judgment was made explicit in the Court of Appeal. Mifflin, C.J.N. observed at para. [58] that "if William Chafe had refused to cross the illegal picket line to carry out his duties as an officer of the court, he himself would have been guilty of contempt". There is nothing remarkable in this conclusion. It is well recognized as a basis for invoking the contempt power. Borrie and Lowe, in *The Law of Contempt* (1973) put it his way at p. 241:

> Contempt may not only be committed by interfering with persons having duties towards the court, but also by those persons themselves in the execution of their duties.

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It is thus a contempt for a receiver not to perform his duties as, for example, by not paying money due from him as a receiver.

158 In similar manner, Mahoney, J.A. concluded at para. [53] in *Chafe*:

"No trade union can contract with its members to do any act which interferes with the administration of justice and had William Chafe respected the picket line *and not reported for work, and thus not performed his duties*, NAPE would have succeeded in having him respect a crime, for that is what a criminal contempt amounts to. [Italics added].

159 It was a integral part of the reasoning of Mifflin, C.J.N. and Mahoney, J.A. that an officer of the court had an obligation to perform his or her duties and that this duty would supercede a "right" to strike or picket. The same conclusion is implicit from the judgment of Morgan, J.A. when he wrote:

[14] " . . . Any interference with the due course of justice, whatever its form, constitutes criminal contempt of court.

. . .

[19] Any conduct, which is calculated to prevent or hinder, in their access to the court, any litigant or witness or any person whomsoever having business in the court . . . constitutes a contempt of court. In my view, the placing of a picket line at the entrance of the Court House falls within that category. [Emphasis Added].

160 The "category" of interference with "access to the court" that could amount to contempt was, for Morgan, J.A., broader than merely picketing of the Court House. The category implicitly includes withdrawal of services by strike action which affects the ability of the court to provide access.

161 The considered opinion of the Court of Appeal, though perhaps technically an *obiter dictum* on a narrow view of the *ratio* of a case, still represents the law of this province and is entitled to deference unless overruled or disapproved of by the Supreme Court of Canada. The narrower approach taken by the Supreme Court to deal with the issue in *Chafe* does not amount to a disagreement with or overruling of the views of the Court of Appeal or Noel, J. on the right to strike issue; rather the Supreme Court chose to leave the expression of its opinion on the issue until another day. In referring to the strike in *Chafe* as a "legal" strike, the court was, in my view, merely referring to the fact that the statutory pre-conditions for strike action by government workers generally had been met; the court was not focusing on whether persons *working at the court* and having a special status as officers of the court could lawfully participate, along with their non-court colleagues, in what was otherwise a legal strike.

162 The lower court decisions in *Chafe* therefore remain the law in this province and the Minister was correct in taking the position that the effect of the *Chafe* decision was that officers of the court did not have the right to strike.

(e) Inconsistency with the Collective Bargaining regime

163 Counsel for NAPE points out that, regardless of the scope of the *Chafe* decision, the *Public Service Collective Bargaining Act* was enacted *subsequent to* the pronouncements of Noel, J. Accordingly, it was submitted, the previous law as stated in *Chafe* was implicitly amended once the right of public service employees to strike was recognized in the legislation. Counsel stressed that Noel, J. had, in his reasons, acknowledged that the legislature could "disable" the court by "a clearly stated intention in legislation enacted for that purpose". The subsequently enacted public service collective bargaining legislation was, it was argued, just such "clearly stated" legislative intention that recognized and

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allowed strike action by court staff.

164 Putting aside for present purposes the question of whether the provincial legislature could, as a matter of constitutional law, "disable" the courts from performing their core adjudicative functions by allowing staff to withdraw their services by strike action, given the separate constitutional status of the judicial branch of government and the principles of judicial independence, I am not satisfied that the collective bargaining legislation, properly interpreted, purports to accomplish this purpose in any event.

165 NAPE argues that the exclusion from the definition of "employee" in s. 2(1)(i)(viii) of the *Public Service Collective Bargaining Act* of "judges' secretaries" [NAPE's choice of words] coupled with silence on all other court officers amounts to a clear indication that the legislature intended that all other court employees were to be included (subject to management exclusions) within the collective bargaining regime.

166 In fact, s. 2(1)(i)(viii) does not expressly exclude "judges' secretaries". It excludes, instead persons who are "employed in a position confidential to ... a judge of the Court of Appeal or a judge of the Trial Division, a Provincial Court judge ... ". While it is commonly thought that this provision is designed to cover such persons as confidential secretaries for judges, it does not necessarily follow that this is so. Senior secretaries might well be caught by the management exclusion in s. 2(1)(i)(xiii) as is the case of the Registrar's secretary who clearly acts in a confidential capacity to the Registrar as the senior administrative officer of the Supreme Court. It must not be forgotten that by virtue of s. 89 of the *Judicature Act* and s. 26 of the *Provincial Court Act*, 1991 (both of which were enacted *after* the enactment of the *Public Service Collective Bargaining Act*) judges' secretaries, along with all other staff of the court, have been declared to be officers of the court. That designation in itself is, as I have noted above, a legislative signal that all court staff, including secretaries, are to be treated as a special category and, as a result of *Chafe*, we know that "officers of the court" were not entitled to withdraw services by way of strike action. By subsequently designating judges' secretaries, in the face of the *Public Service Collective Bargaining Act*, as officers of the court, the legislature can be taken as saying that the *Chafe* notion that officers of the court could not strike was to be preserved for secretaries as well as all other court staff. It would not have been necessary, on this analysis, for the legislature to include judges' secretaries in a special confidentiality exclusion category. The provision of s. 2(1)(i)(viii) could equally be interpreted to cover other persons such as regular employees of the Department of Justice (who would otherwise be covered by the definition of "employee") who may be seconded - as has happened from time to time - for specified purposes to work for a judge in a confidential capacity.

167 In my view, given the government's interpretation of the effect of the *Chafe* decision on the right of officers of the court to strike, as well as the step taken by the legislature to include all court staff in the category of officers of the court regardless of their actual function in the court system, and the ambiguity of the intended scope of s. 2(1)(i)(viii), it cannot be said that the references to confidential positions relating to judges in the *Public Service Collective Bargaining Act* amount to, in the words of Noel, J. a "clearly stated intention" by the legislature to do away with the well-understood previous legal regime.

168 Counsel for NAPE also submitted that the requisite "clearly stated intention" to permit court staff to strike could be gleaned from the provisions of the legislation relating to the designation of essential employees.

169 Counsel argued that there is no fundamental inconsistency between the duties of court and Sheriff's office staff as officers of the court and a right to withdraw their services as part of a strike, because the collective bargaining legislation has built into it a mechanism to ensure that services will continue to be provided to enable the courts to function if a strike occurs. As noted earlier, s. 10 of the *Public Service Collective Bargaining Act* provides that before a strike can take place, either the government and the bargaining agent must reach an agreement on essential employees (who would not be allowed to strike) or the Labour Relations Board must make a designation, following a hearing, of essential employees. In this way, it was submitted, sufficient staff would be made available to ensure that the courts could continue to function. I am not persuaded by this argument.

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170 The definition of "essential employee" in ss. 10(12) ties the concept to persons whose duties "at a particular time or during a specified period of time" are or may be "*necessary for the health, safety or security*" of the public [my emphasis]. The maintenance of the rule of law and the continued functioning of the courts are broader in concept than notions of "health, safety or security". The designation of essential employees under the legislation is therefore no guarantee that sufficient persons would continue to be available during a strike to allow the courts to continue to function effectively without interruption. It must be remembered that by designating all court and Sheriff's office staff as officers of the court the legislature was in essence signaling that all persons working in the court system and Sheriff's office, no matter what their actual function, are to be regarded as necessary and essential to the operation of the courts. Such a notion is incompatible with a selective determination by agreement or by an outside agency that only certain of them are essential.

171 In *R. v. C.A.T.C.A. (No. 2)*, [1982] 1 S.C.R. 696 (S.C.C.) which involved consideration of federal legislation providing, in similar vein to s. 10 of the Newfoundland and Labrador legislation, for the determination of "designated employees" who were necessary to ensure "the safety and security of the public", the Public Service Staff Relations Board purported to determine what level of air services was necessary to ensure safety and security of the public, in addition to determining the number of employees in the bargaining unit who would be needed to provide that level of service in the event of a strike. In upholding a Federal Court of Appeal decision setting aside the Board order, the Supreme Court of Canada held that the Board's task was simply to determine whether, with respect to the employees designated by the employer as being necessary, the performance of their stipulated duties was necessary for public safety or security. The Board did not have authority to determine the level of air services to be provided in the interests of safety or security.

172 This decision demonstrates that the jurisdiction of a labour board on the essential employee issue is limited in application, since it allows for a determination of essential employees whose duties are related (in the case of the Public Service Staff Relations Board) only to safety and security or (in the case of the Labour Relations Board) to health, safety or security. It also demonstrates that the role of the Board is constrained by what the employer initially submits is essential. The government would therefore be the one to define the parameters of the inquiry even though the court and its senior staff were of the view that a broader range of personnel was essential.

173 An even more significant concern is that the determination of those persons who, during a strike, would continue to be subject to the control of the court in the enforcement of its orders or the performance of its other functions, would be consigned to the decision of a third party agency (the Labour Relations Board) or to an agreement between the government and the union. The continued operation of the courts and the office of the High Sheriff and access of citizens to the courts would then depend, not on a determination by the court of what is necessary or appropriate to ensure that access, but upon decisions external thereto.

174 An agreement on essential employees made between the government, represented by Treasury Board, and a bargaining agent could, by the nature of the process, involve negotiation in the context of labour issues generally. Negotiated agreements frequently involve compromise that takes account of a broader agenda. The trade-offs that result would not necessarily lead to an agreement which recognizes the pre-eminent interest of the courts in continuing to provide access to justice in a timely and efficient manner at all times.

175 In like manner, even if the determination were to be made by the Labour Relations Board, as opposed to agreement by the parties, the Board would be constrained in considering the interests of the courts by its constituent legislation (to make determinations based on health, safety and security only) and by the initial decision of the government, represented by Treasury Board, as to the number and categories of employees to seek designations as essential. This latter determination might well be at odds with the court's view as to what is needed to continue to operate. It was suggested that the Registrar of the Supreme Court and the Director of Court Services of the Provincial Court could always make submissions at the hearing and in that way ensure that the points of view of the courts were made known. This, of course, misses the point. The ultimate decision as to whether access to the courts will continue

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to be afforded to the citizens of this province during a strike would, under an essential employee designation regime, be delegated to an outside quasi-judicial administrative agency. The resulting decision could have the effect of interfering with the ability of the courts to continue to function and to provide access to their services at all times. Such a process in inconsistent with the notion of the courts controlling their own officers and directing them in the way they think best to achieve their constitutional mandate.

176 To make such a fundamental change in the legal regime as it has been understood in the province since the *Chafe* decisions, would require, I would have thought, a more direct indication in the legislation that it was intended to cover court staff in this way. An explicit statement that the essential employee designation process was intended to apply to court staff to the exclusion of the previous regime could have been easily inserted in the legislation. This was the approach taken in some other jurisdictions. For example, in Manitoba, s. 1 of the *Essential Services Act* S.M. 1996, c. 23 expressly brings "disruption of the administration of the courts" within the essential employee designation regime. Similar provisions exist in Ontario and Nunavut, recognizing that, in addition to protection of the health and safety of the public, essential services include services to prevent disruption of the administration of the courts. See *Crown Employees Collective Bargaining Act*, 1993, S.O. 1993, c. 38, s. 30; and *Public Service Act (Nunavut)* S. Nunavut 1999, s. 44.02. These provisions make it clear that the legislature in these jurisdictions intended to make consideration of the administration of the courts a part of the essential services regime.

177 The absence of such an express provision in this province, in light of the judicial analysis of the issue flowing from the *Chafe* decisions, means that the legislature has not evinced a "clearly stated intention" to impose a new legal regime on court staff by substituting essential employee designation as the chosen means to protect the operation of the courts, instead of continuing the "no strike" approach in *Chafe*.

178 The fact that some other provinces have public service collective bargaining legislation providing for essential employee designations without express inclusion of the courts and the fact that (so counsel tell me) they may have nevertheless negotiated essential service agreements dealing with court staff cannot alter the situation in this province. It has not been shown to me that those provinces share the same legal culture respecting court staff that has developed in Newfoundland and Labrador, flowing from the designation of *all* court staff, no matter what their actual function, as officers of the court and from the approaches taken to the issue in the lower court decisions in *Chafe*.

Summary and Conclusions

179 I have concluded, as a result of the foregoing analysis, that

1. The effect of the *Chafe* decisions at the trial and at Court of Appeal levels is that persons designated as officers of the court in this province do not have the right to strike.

2. The decisions of the Supreme Court of Canada in *Chafe* and in *B.C.G.E.U.* do not derogate from this conclusion.

3. All persons working in the Supreme Court, Provincial Court and Office of the High Sheriff are deemed by law to be officers of the court, no matter what actual function they perform in the court system.

4. Officers of the court, by the inherent nature of that designation, are subject to the direction and control of the court, owe duties of loyalty and fidelity to the court that transcend other obligations, must carry out and comply with court orders and are subject to judicial sanction including (in the case of superior courts) punishment for contempt.

5. Withdrawal of services by way of strike action will unduly interfere with the ability of the courts to supervise, direct and control their officers and as a consequence will unduly interfere with the ability of the

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court to function effectively in the provision of access to justice, constituting an interference with the administration of justice.

6. By deeming all court and Sheriffs office staff as officers of the court, the legislature declared that it regarded all such staff as necessary for the continued operation of the court system and that they must continue to work in the face of a public service strike to ensure that the court system will continue to function without disruption or hindrance.

7. The fact that staff working in the Provincial Court are also deemed to be employees of the Department of Justice does not derogate from the fact that they are also officers of the court; where their duties as court officers conflict with their duties as employees of the Department of Justice, their duties as officers of the court must always prevail.

8. The constitutional position of the courts as a separate branch of government and the constitutional principle of judicial independence, including administrative independence, reinforce the conclusion, based on the deemed status of staff as officers of the court, that the power and authority of the courts to supervise, direct and control the staff of the court and the Sheriffs office staff must not be interfered with. The applicable legislative provisions, where not in direct conflict with such principles, should be interpreted and applied to promote such constitutional values.

9. The statutory regimes regulating the power of the courts' administrative officers, as well as the judiciary themselves, to supervise, direct and control court officers also reinforce the conclusion that it was not intended that court officers be entitled to affect the effective administration of the courts by engaging in strike action.

10. Accordingly, the ability of the courts to supervise, direct and control their officers to ensure that the courts continue to function effectively at all times is inconsistent with the ability of such officers to withdraw their services.

11. There are no provisions of the *Public Service Collective Bargaining Act* indicating a clearly stated intention to permit action, such as strike action, by officers of the court, that would have the effect of interfering with the ability of the courts to provide access to the court system in a timely and effective manner.

12. The "essential employees" provisions of the *Public Service Collective Bargaining Act* do not provide an effective protection to ensure the continued functioning of the courts and cannot be said, in the absence of more explicit language such as exists in other jurisdictions, to override the legal position of court staff flowing from their status as officers of the court, the legislative regime under which they operate, and from the *Chafe* decisions.

13. Accordingly, the essential employee provisions do not apply to officers of the court. They are not needed to ensure that persons in the court system do not withdraw services by way of strike. The provisions are simply not engaged.

14. It is not sufficient to recognize a right to strike on the part of officers of the court, subject to the ability of the court to order individual employees to continue to work from time to time. That would place the court in the untenable position of having to engage in almost day to day personnel management and planning and in so doing risk being perceived as interfering in the ongoing labour-management dynamics extant during a strike.

15. Accordingly, no member of the staff of the Supreme and Provincial Courts and of the office of the High

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Sheriff has the right to withdraw services collectively from the court by way of strike action.

16. Certain corollaries follow from this basic conclusion:

a) no member of the staff of the courts or of the Sheriff's office may refuse to work during a strike, whether lawful or unlawful;

b) by continuing to work they are entitled to be paid for that work;

c) such persons must attempt to cross any picket lines, wherever erected, that may have the effect of impeding them from working or persuading them not to work;

d) failure to observe such picket lines and failure to comply with other union directives affecting the ability of court or Sheriff's office staff to perform their duties cannot be made the subject of disciplinary or other punitive action by the union against them;

e) failure of such staff to perform their duties to the court during a strike will make them liable to a proceeding for contempt of court in the Supreme Court.

Observations

180 In the course of this Decision I have made a number of observations about the status of court staff in relation to the public service. It is to be regretted that that status - in all its facets - is not more clearly delineated in the applicable legislation, taking into account the special position of the courts in our constitutional structure. If that were so, the struggle to draw the appropriate inferences from often unclear and seemingly inconsistent language could perhaps have been avoided.

181 It should be understood, nevertheless, that this Decision should not be taken as deciding that court and Sheriff's office staff are not to be regarded as part of the public service. Such a conclusion was not necessary in order to reach the disposition in this case.

182 I recognize that a conclusion that court and Sheriff's office staff are not members of the public service would have serious, and perhaps prejudicial, ramifications for such staff. If they are not members of the public service they could not be in the existing bargaining unit represented by the union. They would be deprived of the benefits and protections of the collective agreement that now purportedly governs them. In like manner, they would not automatically be the beneficiaries of general public service policies that accord benefits to them. Things like bumping rights, transfers within the public service and grievance rights would likely be affected.

183 It is sufficient, as I have noted earlier, to conclude that even if court and Sheriff's office staff are to be regarded as members of the public service, for some purposes, they have a special status that restricts the application to them of general public service regulation and policies, as well as obligations flowing from the collective bargaining process where such regulations, policies and obligations would interfere with the ability of the courts to supervise, direct and control them in the interests of ensuring that the courts function effectively. In other respects it can continue to be assumed, for the present, that other working conditions, salaries and benefits, including the right to representation by a bargaining agent (absent, of course, the right to strike) which other members of the public service enjoy will continue to apply to them. It may well be, however, that some or all of these matters may have to be revisited if they are directly engaged in another case.

184 Because the status of court staff in relation to the public service is unclear, it is to be hoped that this whole

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question will be clarified in the context of a general consideration of the degree to which administration of the court ought, as a matter of legal and constitutional principle, to be independent of other branches of government.

185 This Decision has also involved the making of a number of observations about the constitutional position of the courts and the impact which the principle of judicial independence may have on the relationship of the courts to other branches of government. It must be stressed that no declarations of invalidity of provincial legislation as a result of the application of these constitutional principles were sought in this application. The references to these constitutional principles were made to provide context for the interpretation of the constituent legislation with a view to ensuring, to the extent possible, the legislation was interpreted and applied consistently with such principles.

Disposition

186 The answers to the questions posed on this application can now be given as follows:

1. Do employees of the Supreme Court, Provincial Court and Office of the High Sheriff of Newfoundland designated by legislation as "officers of the court" have a right to strike?

Answer: No. Accordingly, the request that the court declare that there must be an agreement or determination under s. 10 of the *Public Service Collective Bargaining Act* on the issue of essential employees is dismissed.

2. Do employees of the Supreme Court, Provincial Court and High Sheriff of Newfoundland who are not designated "officers of the court" have a right to strike?

Answer: It is not necessary to answer this question.

187 The interim order made on consent of all parties pending the filing of final judgment in this proceeding is now spent in terms of its continuing effect.

188 A declaratory order may be entered accordingly. There will be no order as to costs.

Order accordingly.

FN1 Geo. IV, c.67

FN2 See also *Judicature Act* RSNL 1990, c.J-4, s. 3

FN3 The reference to "this Part" refers to Part IV of the *Act* entitled "Officers of the Supreme Court" and in which all of the forgoing appointment sections are located.

FN4 Hereinafter referred to as the *Provincial Court Judges Reference.*

FN5 See "A History in Commemoration of the Sheriffs Millennium, 1992" (Pamphlet prepared by Sheriffs Millennium (1992) Ltd., York, England, 1992)

FN6 In fact, Bannister records references to the High Sheriff in 1779. See, Jerry Bannister, *The Rule of the Admirals: Law, Custom and Naval Government in Newfoundland, 1699-1832* (Toronto: The Osgoode Society, 2003), p. 124.

FN7 The definition of "public employee" in the *Public Employees Act* RSNL 1990 c. P-36, s. 2 is arguably broader

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than the notion of a member of the "public service" since the definition of "public employee" purports to capture every person paid from the public purse from funds voted by the Legislature, provided the office in question is held "during pleasure only".

FN8 It is arguable, of course, that officers of the court, though paid by the province, are not "employed" (in the sense of being controlled and directed pursuant to the regular public service management hierarchy)by the "government" (i.e. the executive branch) of the province within s. 2(1)(i)(i) of the *Public Service Collective Bargaining Act* and that inasmuch as the courts have not been designated as an "other body" to which the *Act* may be made to apply under s. 2(1)(i)(ii), the *Act* does not apply at all to officers of the court. It is not necessary, however, to definitively decide this question.

FN9 The only provision that could possibly be said to create a departmental reporting relationship is s. 67 which requires the annual presentation of a copy of the financial accounts managed by the Registrar to the Minister of Justice, in addition to the Chief Justice. It is not without significance however, that the accounts must be given directly to the Minister, as opposed to a senior bureaucrat in the administrative hierarchy of the department.

FN10 As is reflected in the requirement in s. 67 of the *Judicature Act* to send annual accounts of his financial stewardship directly to the Minister.

FN11 See *Practice Note* "Access to Judges After Hours for Emergency Purposes" P.N. (TD) No. 2002-02.

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