IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Wickwire Holm v. Nova Scotia (Attorney General), 2007 NSSC 287

Date: 20071004
Docket: S.H. 276379
Registry: Halifax

Between:

Wickwire Holm

Applicant

v.

Attorney General of Nova Scotia

Respondent

Revised Decision: The text of the original decision has been corrected on October 12, 2007. The name of the applicant has been changed from "Wickwire Holmes" to "Wickwire Holm." This decision replaces the previously distributed decision.

Judge: The Honourable Justice Gregory M. Warner

Heard: April 26 and July 9,2007, at Halifax, Nova Scotia

Counsel: Janet M. Stevenson, for the Applicant

Alicia Arana, for the Respondent

By the Court:

A. Summary of Issues and Facts

[1] The Applicant seeks " (a) a declaratory order that any order issued by an Adjudicator of the Nova Scotia Small Claims Court shall be enforced according to the terms of the order, (b) another order to be issued by Adjudicator Casey requiring the Sheriff of Halifax County to cause Peter Wilkes to appear before the Small Claims Court on specified dates to show cause why he should not be held in contempt, and (c) costs". The Respondent states that the first issue to be decided is whether the Small Claims Court has *ex facie* civil contempt jurisdiction.

[2] The Applicant law firm obtained default judgment and execution order in Small Claims against a client ("debtor"). When the debtor failed to appear for discovery in aid of execution, the applicant obtained an order from the Small Claims Court Adjudicator for his attendance at examination in aid of execution. The decision to issue this order is reported as **Wickwire Holm v. Wilkes**, 2005 NSSM 3. The debtor apparently did not attend the examination.

[3] The Applicant applied (ex parte) to the Adjudicator for leave to apply for contempt against the debtor. The Adjudicator granted leave (in a decision that was not reported, nor provided, to this Court), and set a date for the debtor to show cause why he should not be found in contempt. The Applicant was unable to personally serve the debtor, and the Adjudicator appears to have granted an order for substituted service of the contempt application on the debtor. The debtor did not appear before the Small Claims Court on the scheduled date.

[4] On March 21, 2006, the Adjudicator issued another order that the Sheriff caused the debtor to appear before the Adjudicator to show cause, on one of six dates that the Small Claims Court was scheduled to sit. The order included a provision that the Sheriff may take the debtor into custody "if required" one hour before any of the six dates set in the order.

[5] When the Director of Court Services for the Nova Scotia Department of Justice received the March 21st order on April 3rd 2006, he advised the Adjudicator that the Sheriff could not enforce the order because of a departmental directive, and of the department's concerns about the order. He later spoke to Ms Stevenson to the same effect, and that he "would be seeking a legal opinion for clarification". On August 22,

2006, through a Freedom of Information application, the Applicant obtained a copy of a January 16, 2006 directive from the Executive Director of Court Services for the Department of Justice, which directive read in part:

> "It has come to my attention that at least one Small Claims Court Adjudicator may issue an Order requiring a Deputy Sheriff to compel the attendance of a person in relation to an examination in aid of execution.
>
> I am not confident that a Small Claims court Adjudicator has the authority to issue any Order respecting examinations in aid of execution and because the type of order described above affects the liberty of the person, I direct that you not execute such an Order until further notice.
>
> I will accept responsibility for this decision."

[6] It appears that the only order not enforced by the Sheriff's office was the order directing the Sheriff to cause the debtor to be brought, forcibly if necessary, to face the contempt application.

[7] It appears that the Respondent was not given notice, by the Applicant or Small Claims Court, of the intention of the Small Claims Court to issue the relevant enforcement orders on the request of the Applicant. When the Respondent became aware of the issued orders, it appears not to have taken any steps to stay or set aside

the order, either to the Small Claims Court, or to the Supreme Court by application for judicial review, prerogative writ, or some other remedy.

[8] The complete record of proceedings before the Small Claims Court have not been provided to this court. The above summary is gleaned from the affidavits filed, and the reported decision.

[9] The Applicant submits that the only issue is whether a Sheriff can refuse to carry out *any* Small Claims Court order; it submits that the Small Claims Court's *ex facie* civil contempt jurisdiction should not be an issue before this Court.

[10] The Respondent submits that the jurisdiction of the Small Claims Court is the first issue and that the Small Claims Court had not jurisdiction to deal with *ex facie* civil contempt, and therefore to cause a Sheriff to take the debtor into custody.

[11] On April 26, 2007, this Court requested that the Applicant respond to the Crown's brief respecting the Small Claims Court's contempt jurisdiction, noting that the only order that the Sheriff was asked to enforce, and refused to enforce, was an order to cause the debtor to attend, by force if necessary, before the Small Claims

Court to show cause why he should not be found in contempt. This application was adjourned for that purpose.

[12] While the application asked the court for a Declaratory Order that ***any*** order of a Small Claims Court Adjudicator be enforced according to its terms, it appears that the only order that the Sheriff refused to enforce was the Adjudicator's order of March 21st, 2006. For reasons that follow, this decision deals only with that order.

B. PARTIES POSITIONS

B.1 Applicant's First Brief

[13] Section 31 of the Small Claims Court Act ("Act") provides that "an order of the Court may be enforced in the same manner as an order of the Supreme Court and s. 45 of the Judicature Act applies." By Civil Procedure Rule 53.15, the Supreme Court may make an order compelling a judgement debtor to attend a discovery examination in aid of execution. By directing sheriffs not to enforce orders of Adjudicators, the Department of Justice acted without statutory authority which amounts to an abuse of discretion.

[14] Citing **Roncarelli v. Duplessis**, [1959] S.C.R. 121, the Applicant notes that Justice Rand wrote at para. 45 that "action dictated by and according to the arbitrary likes, dislikes, and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law...", and that Justice Abbott, at para. 167 to 169, wrote that the executive branch of government does not make the law but merely carries it out; and, in that case, since the Liquor Commission was not a department of government but an independent body, neither the Premier nor the Attorney General was authorized in law to interfere with the administration of that Commission.

[15] The Applicant cited **Sobey's Group Inc. v. Nova Scotia Attorney General**, 2006 NSSC 290, para. 36, for the proposition that the executive (Cabinet) can only do that which it is expressly or impliedly permitted or authorized to do by the Legislature.

[16] The Applicant submits that, absent clear statutory authority, the Respondent has no power to interfere with the enforcement of any court orders.

[17] It cites **N.A.P.E. v. Newfoundland and Labrador (Minister of Justice)**, 2004 NLSCTD 54, at para. 142, for an analysis of the role and responsibility of the Sheriff:

> "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 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.
>
> 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."

B.2 Respondent's First Brief

[18] The Respondent says the issue is whether the Small Claims Court has jurisdiction to issue contempt orders for purposes of enforcing its own orders. It submits that s. 31 of the Act does not give the Small Claims Court this jurisdiction.

[19] At common law, courts of inferior jurisdiction do not have the authority to deal with contempt which is not "in the face of" the Court. It is the duty of superior courts to protect statutory courts and administrative tribunals from such contempt. The only basis upon which the common law may be over-ridden, is if the statute empowering the inferior court or tribunal, by express or by clear and unambiguous language, confers such jurisdiction.

[20] The Respondent cites **Chrysler Canada Ltd. v. Canada (Competition Tribunal) [**1992] 2 S.C.R. 394, which decision in turn relies heavily upon **Canadian Broadcasting Corp. v. Quebec (Police Commission)** [1979] 2 S.C.R. 618.

[21] With respect to **Chrysler**, the Respondent submits that, unlike the Small Claims Court Act, s. 8(2) and (3) of the Competition Tribunal Act expressly conferred on the Competition Tribunal the powers of the Superior Court to enforce its orders, including the power to find contempt.

[22] With respect to the interpretation of s. 31 of the Act, the Respondent notes that s. 45 of the Judicature Act simply lists exemptions from seizure by execution, and submits that, while the Supreme Court's Civil Procedure Rules provide for enforcement by execution orders, receivership orders and contempt orders, the Small Claims Court authority to enforce pursuant to s. 31 is limited to execution orders. Only execution and recovery orders are specifically referenced in the regulations made pursuant to the Act, or by s. 45 of the Judicature Act.

[23] Presumably referring to Adjudicator Casey's decision cited above (**Wickwire Holm v. Wilkes**, 2005 NSSM 3), the Respondent argues that the Adjudicator erred in relying upon **Imperial Life Financial v. Langille** (1997) 166 N.S.R. (2d) 46 (NSSC). In that case, Macdonald J. (as he then was) concluded that the Supreme Court had monetary jurisdiction concurrent to that of the Small Claims Court for amounts falling within the jurisdiction of the Small Claims Court. The Respondent argues that the Adjudicator extended the reasoning behind the finding that the Supreme Court had concurrent monetary jurisdiction with the Small Claims Court, to the erroneous conclusion that Small Claims Courts must have concurrent jurisdiction with the Supreme Court in respect of enforcement of orders (para.17 in **Wickwire Holm v. Wilkes**). The Respondent argues that the principle of concurrent monetary jurisdiction cannot be extended to grant jurisdiction to a statutory court beyond what is found in the authorizing statute.

[24] The Respondent further argues that, in the context of the clear intent of the Legislature not to incorporate the Supreme Court's Civil Procedure Rules into the Small Claims Court process (including, for example, the exclusion of discovery), it is not clear that the enforcement processes of the Supreme Court, beyond those expressly incorporated (that is, execution and recovery orders) were intended to be

granted. In support of this approach, the Respondent cites paras. 3, 4, and 5 in **Wexford Communications Ltd. v. Buildrite Centres Inc.** (1996) 156 N.S.R. (2d) 78.

[25] In summary, the Respondent says that s. 31 of the Act is not as all-encompassing as the wording in the federal Competition Tribunals Act interpreted in the **Chrysler** case.

B.3 Applicant's Rebuttal Brief

[26] While maintaining its original position that the primary issue is whether the Department of Justice directed that orders of the Small Claims Court not be enforced without having any statutory authority to do so, the Applicants make the following submissions in support of the Small Claims Court's contempt jurisdiction.

[27] First. S. 31 of the Act gives the Court jurisdiction to issue contempt orders in accordance with Supreme Court Civil Procedure Rule 55.

[28] Second. S. 96 of the Constitution Act gives Superior Courts unencumbered core jurisdiction over contempt but, as noted by Jeffrey Miller in ***The Law of Contempt in Canada*** (Carswell: 1997) at p. 23, Parliament and Legislatures have granted inferior courts concurrent contempt jurisdiction.

[29] Third. In **Chrysler**, Gonthier, J. wrote that there are no magic words or precise formula for expressly or clearly conferring jurisdiction on inferior courts or tribunals to issue and enforce contempt orders. "If a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given affect." (Para.12). As in **Chrysler** - where the Supreme Court upheld the Tribunal's contempt power in part because it did not oust the Federal Court's contempt power or power of full review (para.28), s. 32 of the Act provides for appeals to the Supreme Court for jurisdictional errors, errors of law, and failures to follow the requirements of natural justice; in effect, the Tribunal's exercise of its contempt power is subject to full review by appeal under s.32 of the Act to the Supreme Court.

[30] Fourth. The language in s. 31 of the Act is as clear as s. 8(2) of the Competition Tribunals Act in displacing the common law presumption.

[31] Fifth. Two forms attached to the Small Claims Court Forms and Procedures Regulations - the Subpoena to Witness, and Execution Order, make specific reference to contempt. Form 3 (Subpoena) states: "If you do not obey the subpoena and do not have an adequate excuse for disobeying the subpoena, then you may be found to be in contempt of court and you could be arrested," and Form 11 (Execution Order) states: "Any person who fails to comply with the provisions of paras. 3, 4 and 5 may be deemed to be in contempt of court and may be dealt with as the court thinks just." The Applicant argues that if a stranger to a proceeding (that is, a witness) can be found in contempt by Small Claims Court, clearly a party such as the debtor should also be subject to contempt.

[32] Sixth. Noting Miller's observation in ***The Law of Contempt in Canada*** at pp. 23 and 24, and **United Nurses of Alberta v. Alberta (Attorney General)** [1992] 1 S.C.R. 901, legislation that authorizes registration of inferior court orders in the superior court for enforcement purposes, does not violate s. 96 of the Constitution Act. The Applicant argues that, since the Act and Civil Procedure Rules contain no similar

provision (that would allow the Supreme Court to enforce orders of the Small Claims Court), then, if the Small Claims Court is not afforded power to enforce its own orders, no "avenue for recourse" would exist. This, it submits, leads to the inevitable conclusion that the intent of the Legislature with respect to s. 31 of the Act was to grant the power to the Small Claims Court to enforce its orders including the power of contempt described in Civil Procedure Rule 55. The Applicant's submission, that it should not be implied that the Legislature intended that there be no enforcement mechanism for decisions and orders of the Small Claims Court, is the foundation for its argument that s. 31 should be interpreted as including the power to deal with contempt.

[33] Seventh. The Applicant cites three Small Claims Court decisions in support of the power of the court to enforce its own orders; all involve orders directing attendance by debtors at examinations in aid of execution. The first is **Wickwire Holm v. Wilkes**, 2005 NSSM 3. It was followed, without analysis, in **Bank of Montreal v. DiBacco** [2005] N.S.J. 459 (Parker), and, with some analysis, in **Scaravelli and Associates v. Quinlon** 2005 NSSM 7 (Giles).

[34] In **Wickwire Holm v. Wilkes**, Adjudicator Casey noted other provincial statutes that grant powers of enforcement to inferior courts and tribunals: Residential Tenancies Act, Family Court Act (Rule 22, made pursuant to s. 11 and 12 of that Act), and Public Inquiries Act. He relied upon s. 9(5) of the Interpretation Act which mandates that all statutes shall be interpreted remedially. Finding that the Supreme Court has no enforcement authority in respect of Small Claims Court decisions, he held there would be no point to Small Claims Court orders if the Court was powerless to enforce them. In ***Scaravelli,*** Adjudicator Giles cited **Markevich v. Canada** [2003] 1 S.C.R. 94, para 12, to the effect that words and statutes must be read in their entire context and harmoniously with the scheme and object of the Act and the intent of Parliament. He held that it would be an odd thing if the Legislature chose to establish a civil form to resolve Small Claims but neglected to give the form some enforcement procedures.

[35] Eighth. The Applicant submits that to interpret the reference in s. 31 of the Act to s. 45 of the Judicature Act so as to limit the enforcement provisions of the Small Claims Court to execution orders, is overly narrow and restrictive. Such could lead for example, to an order for discovery in aid of execution under CPR 53.15, but no ability to force attendance. The Applicant cites **Canada Metal Co. v. CBC (No. 2)** [1974]

4 O.R. (2d) 585 (OHCJ) at para. 70, for the proposition that to allow orders to be disobeyed and disrespected would be "to tread the road towards anarchy". The Applicant submitted that "if the Nova Scotia Legislature intended that contempt orders should be exempted from the Small Claims Court at jurisdiction than it could have been expressly excluded, just as s. 45 of the Judicature Act is included."

[36] Ninth. Continuing this theme, the Applicant submits that limits on the Small Claim Court's enforcement jurisdiction would impact negatively taxation of lawyer's accounts (which are now taxed by either the Small Claims Court or the Supreme Court). In several cases, Adjudicators have taxed very substantial legal accounts, all of which would be uncollectible if the Respondent's interpretation were to prevail. This would mean that future legal accounts would only be taxed in the Supreme Court.

C. ANALYSIS

C.1 Contempt Jurisdiction of the Small Claims Court

[37] The Applicant's principal argument (the same as that made by the Adjudicator in **Wickwire Holms v. Wilkes**) is that proceedings in and orders of the Small Claims

Court will be ineffective if that court does not have full authority to enforce its orders. On this premise, the Applicant argues that a contextual and purposeful approach to interpretation of s. 31 of the Act should lead this Court to find that the Legislature intended that s. 31 be broadly interpreted so as to include the authority to issue orders that debtors attend for discovery in aid of execution, and orders directing that the Sheriff secure by force if necessary the attendance of debtors before the Small Claims Court to show cause why they should not be found in contempt for failing to attend the discovery in aid of execution (the only order which the Sheriff refused to enforce in the case at bar).

[38] The Adjudicator's determination appears to be based on his interpretation of **Royal Insurance Co. Of Canada v. Legge** [1996] N.S.J. 233, and **Imperial Life Financial v. Langille** [1997] N.S.J. 550. **Royal Insurance** dealt with the Small Claims Court's monetary jurisdiction. In that context Justice Gruchy made several general statements about the relationship between the Supreme Court and Small Claims Court, including: "The Small Claims Court is not supervised by the Supreme Court other than by prerogative remedies for judicial review. This court's relationship to the Small Claims Court is as an appellate tribunal only."

[39] With respect to **Imperial Life Financial**, the adjudicator concluded that since the Court found that the Supreme Court had concurrent monetary jurisdiction with the Small Claims Court in respect of small claims, the corollary must also be true: that is, that s. 31 of the Act gives the Small Claims Court concurrent enforcement jurisdiction as the Supreme Court (para. 17). From this the adjudicator concluded that "A court order or execution order pursuant to that order would be a hollow remedy if no procedure existed to facilitate the enforcement of such orders" (para. 21).

[40] This is the background for the applicant's argument that the proper interpretation of s. 31 is that it, in clear and unambiguous terms, confers jurisdiction on the Small Claims Court to enforce its orders in the same manner as described in the Supreme Court Civil Procedure Rules 51 to 55, including not just execution and recovery orders but orders for discovery in aid of execution and contempt. The applicant specifically argues in its rebuttal memorandum at pages 15 - 16:

> . . . If the Nova Scotia Legislature intended that contempt Orders should be exempted from the Small Claims Court jurisdiction then it could have been expressly excluded, just as S. 45 of the **Judicature Act** is included. . . . Conceivably, under such an interpretation ['an overly narrow and restricted interpretation of s. 31'], Adjudicators could make an Order for discovery in aid of execution under the authority of **Civil Procedure Rule** 53.15 and not be able to proceed any further. A debtor would simply have to ignore such an Order to avoid ever having to fulfill payment to a party who has a valid Order granted in their favour from the Nova Scotia Small Claims Court.

[41] In my view, the underlying premise of the Applicant (and the Adjudicator in **Wickwire Holm v. Wilkes**) is wrong. The inherent common law jurisdiction of superior courts continues to be available to those statutory courts and tribunals which are intended to have the protection of contempt proceedings to enforce the orders of those statutory courts and tribunals.

[42] The nature of proceedings in the Small Claims Court are judicial, not administrative, and are therefore of the type for which *ex facie* civil contempt is intended to be available. However, I respectfully reject the premise, which underlies the applicant's approach to the interpretation of s. 31 of the Act, that the "inherent core" jurisdiction of the Supreme Court of Nova Scotia to deal with *ex facie* civil contempt of orders of the Small Claims Court does not exist, or has been eliminated by statute or otherwise. Said differently, Small Claims Court orders only be effectively enforced if the Small Claims Court has contempt jurisdiction.

[43] The Applicant argued that paragraphs 59 and 60 in **United Nurses of Alberta v. Alberta** [1992] 1 S.C.R. 901 stand for the proposition that where legislation provides that orders of the inferior court may be registered with a s. 96 court for purposes of enforcement, the superior court has jurisdiction to enforce the orders of the

inferior court, and that, absent such a provision, there is no such authority. This is a misinterpretation of the majority decision in that case. That decision simply affirmed the constitutionality of the sharing of enforcement arrangements by registration; it did not purport to oust the superior court's inherent core jurisdiction to protect inferior courts and tribunals from contempt.

[44] **United Nurses of Alberta** does not stand for the proposition that the absence of a specific provision for registration of inferior tribunal orders with a superior court deprives the superior court of its inherent common law jurisdiction to enforce by contempt orders of inferior or statutory tribunals and courts.

[45] The law is as set out in Chapter 13 of **Arlidge, Eady & Smith On Contempt**, Third Edition, by Sir David Eady and A.T.H. Smith (London: Sweet & Maxwell: 2005), and the Supreme Court of Canada decisions in **Reference re: Residential Tenancies Act 1979 (Ontario)** [1981] 1 S.C.R. 714, and **MacMillan Bloedel Ltd. v. Simpson** [1995] 4 S.C.R. 725, and summarized in Canadian Encyclopaedic Digest: Contempt of Court: Jurisdiction, sections 102 to 112. The first paragraph in chapter 3 of Jeffrey Miller's text (copied in the Applicant's rebuttal brief) states that **R. v. Vaillancourt** [1981] 1 S.C.R. 69 settled the issue: only a constitutional amendment can

alter (take away) the superior court's untouchable core jurisdiction over contempt of court. In addition, at para. 12 of **Chrysler**, Justice Gonthier noted, in respect of the interpretative process, the importance of distinguishing between statutes that deprive superior courts of contempt jurisdiction, and those that simply grant concurrent jurisdiction to statutory courts and tribunals. In my view, the most important statement was made by the Supreme Court in MacMillan Bloedel v. Simpson, which decision barred transfer of exclusive ex facie contempt jurisdiction to an inferior court and upheld a guaranteed core of superior-court jurisdiction. (***Constitutional Law of Canada***, by Peter W. Hogg, 5th Edition Supplemented (Carswell: release 2007-1) at pages 7-41 to 7-52).

[46] These sources lead me to conclude that the jurisdiction of the Supreme Court to deal with *ex facie* civil contempt of the Small Claims Court continues to exist. No provision of the Act attempts to oust the inherent jurisdiction of the Supreme Court to deal with contempt of inferior tribunals or statutory courts.

[47] The fact that the Supreme Court retains jurisdiction to enforce orders and proceedings in the Small Claims Court by civil contempt does not, by itself, mean that the Small Claims Court does not have *ex facie* civil contempt jurisdiction.

[48] I do however conclude that the Small Claims Court of Nova Scotia does not have *ex facie* civil contempt jurisdiction, based on the Supreme Court of Canada's decisions in **Canadian Broadcasting Corp. v. Quebec (Police Commission)** [1979] 2 S.C.R. 618, and **Chrysler Canada Ltd. v. Canada Competition Tribunal** [1992] 2 S.C.R. 394,. I

[49] In **Chrysler**, Gonthier, J., wrote that such jurisdiction exists only "if a statute read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction . . . ."

[50] In **Canadian Broadcasting Corp. v. Quebec**, the legislation vested the Commission with powers and immunities of commissioners appointed under the Public Inquiry Commission Act. This Act gave commissioners, "with respect to the proceedings upon the hearing, all the powers of a judge of the superior court" and the power, by summons, to order any person to attend and bring with them any papers, books or other writings, and the power to punish by contempt any person who refuses to appear, be sworn, or produce the required papers.

[51] In **Chrysler**, legislation gave the Tribunal all the powers, rights and privileges that are vested in a superior court respecting "...the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction", with the express proviso that no person would be punished for contempt unless a judicial member of the Tribunal concurred.

[52] The Supreme Court found in **Canadian Broadcasting Corp. v. Quebec** that the Police Commission had no *ex facie* civil contempt jurisdiction. In **Chrysler** the majority held that the Tribunal did have *ex facie* contempt power to enforce its "dispositive orders".

[53] In **Chrysler** Justice Gonthier cited the majority and minority decisions in **Canadian Broadcasting Corp. v. Quebec** for the view that the conferring of contempt jurisdiction had to be "express" or "clear and unambiguous" to over-ride the common law. At paragraphs 26 and 27, he distinguished the **Canadian Broadcasting Corp. v. Quebec** decision based on the wording of the governing statutes and based on his finding that the Competition Tribunal's contempt power dealt with "dispositive orders" with respect of which the Tribunal had special knowledge or qualifications. He wrote:

> In terms of expertise, the Tribunal is in fact better suited than a superior court to decide these matters. In comparison, the commission in **C.B.C.** . . . would have been outside of both its function and its field of expertise.

[54] Justice Gonthier's conclusion was based on the expertise of the Competition Tribunal making them better able to enforce their "dispositive orders", and distinguishes the circumstances of that case from circumstances in the case at bar. There is no evidence (or representation) in this case that the Small Claims Court of Nova Scotia has any special expertise, knowledge or qualifications, in respect of matters that are before it, that does not exist in the Supreme Court. Nor is there any evidence or representation that matters decided by that court are so complex that enforcement by way of a superior court's inherent contempt power would not be effective.

[55] This point was analysed, and the same conclusion reached, by the Copyright Board (Callary, Charron, and Gomery J.) in **Re Private Copying Tariff Enforcement**, 2004 CarswellNat 2365.

[56] It is in this context that one must look at the Act and Regulations. Neither the Act generally, nor s. 31, nor the Regulations, contain any express or direct reference

to that Court having *ex facie* civil contempt jurisdiction. Applying the reasoning in C.B.C. v. Quebec respecting the language of the legislation in that case to the references to contempt in Form 4 (Witness Subpoena) and Form 11 (Execution Order) in this case does not, in my view, assist the Applicant. The special circumstances in **Chrysler**, which distinguishes the Competition Tribunal Act and circumstances of that case from the Small Claims Court Act and the circumstances of this case, make the analysis and conclusions of the Federal Court of Appeal, written by Chief Justice Iacobucci (as he then was), and repeated, when the case came before the Supreme Court, by McLachlin, J., (as she then was) in dissent, more relevant to the circumstances of this case, than the majority decision of the Supreme Court. McLachlin, J., made two points that are directly applicable to the circumstances of this case:

> (1) ambiguous legislation should not justify departure from the common law presumption; and

(2) a general contempt power should not be inferred from a contextual interpretation of legislation such as, in this case, the Act.

[57] It is noteworthy that some jurisdictions have legislatively set out the enforcement jurisdiction and procedures of small claims courts; for example, Rule 20 of the *Rules of the Small Claims Court*, being *Ontario Regulation 258/98*, made pursuant to the *Courts of Justice Act, R.S.O. 1990, Chapter C.43*, provides for examination of debtors (Rule 20.10), and for contempt hearings before a judge of the Superior Court of Justice if the debtor fails to attend (Rule 20.11), and section 13 of the *Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22*, sets out the jurisdiction and procedure for the Divisional Court to hear contempt in respect of tribunals.

[58] In conclusion:

(1) The Supreme Court has inherent jurisdiction to deal with *ex facie* contempt of orders and proceedings in the Small Claims Court. Consequently, contrary to the underlying premise of the Applicant, orders and proceedings in the Small Claims Court would not be uselessly unenforceable if the common law presumption is upheld, and the Small Claims Court is denied contempt jurisdiction.

(2) The common law presumption is against statutory courts and inferior tribunals having *ex facie* civil contempt jurisdiction, unless granted by statute in clear and unambiguous language.

(3) The Act and Regulations do not grant, in clear and unambiguous terms, *ex facie* contempt jurisdiction.

(4) The interpretation of s. 8 of the Competition Tribunal Act, in **Chrysler**, was based on the expertise that the Tribunal had in respect of its "dispositive" orders, which made the Tribunal better suited than a generalist court (such as a superior court) to enforce its orders by contempt. That circumstance, which mandated contempt authority to effectively enforce tribunal orders, does not exist in respect of the circumstances of the Small Claims Court of Nova Scotia.

C.2 Entitlement to Declaratory Relief

[59] The Applicant seeks a declaration that, in directing the Sheriff not to enforce orders of Adjudicators of the Small Claims Court of Nova Scotia, the Department of Justice acted without statutory authority which amounts to an abuse of discretion.

[60] The Applicant has not provided a full record of the various proceedings before the Small Claims Court involving the applicant and debtor. The Applicant says that the proceedings before the Small Claims Court, and the jurisdiction of the Small Claims Court to make the March 21,2006 order or any other order, is irrelevant to the application.

[61] This application is, in my view, a request for judicial review of the decision of the Department of Justice not to enforce the Small Claims Court Order. The applicant's express limitation on the remedies it seeks does not change the essential character of the application. The approach to applications for declaratory relief and their characterization, as part of an analysis of the "essential " nature of claims against government actions in the Federal, Ontario, and British Columbia courts, is canvassed by Michael Morris and Roy Lee in "*Civil Action Challenges to Government Decisions*", an article in 20 CJALP 117-216 (July 2007). The writers suggest that the caselaw is evolving towards the view that if the essential character of the dispute, regardless of the pleadings, is fundamentally one of public law, then the appropriate procedure is judicial review, an important component of which is declaratory relief.

[62] The Judicature Act of the Province of Nova Scotia gives the Supreme Court jurisdiction to deal with prerogative writs including applications for declarations, and Civil Procedure Rule 5.14 provides:

> No proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[63] The granting of a declaratory judgment is discretionary. In many circumstances, for reasons other than the merits of the application, courts have declined to grant declaratory judgments as stand-alone remedies.

[64] Clear and helpful statements of the law are contained in the following:

(a) **Canada v. Solosky,** [1980] 1 S.C.R. 821;

(b) **Kourtessis v. MNR**, [1993] 2 S.C.R. 53;

(c) ***The Law of Declaratory Judgments***, Second Edition, by Lazar Sarna (Carswell: 1988), and in particular chapters 2, 3 and 7; and

(d) ***Judicial Review of Administrative Action in Canada*** by Donald Brown and the Honourable John Evans (Canvasback Publishing: Toronto: Looseleaf July 2007), chapters 1:6000 - 1:7330 and chapter 3.

[65] Because the Departmental directive was based in part upon concern about the jurisdiction of the court, and the effect of the order on the "liberty of the person", Charter values and issues are engaged. Courts have declared declarations to be an appropriate remedy in dealing with unconstitutional conduct of government. See for example, **Mahe v. Alberta** [1990] 1 S.C.R. 342, **Eldridge v. B.C.** [1997] 3 S.C.R. 624, and **Little Sisters v. Canada** 2000 SCC 69.

[66] Examples of circumstances where courts decide not to grant declarations include: where the applicant has no special interest (standing) in respect of the subject matter, where other remedies are available or more appropriate, where there are no live issues between the parties, where the application is not timely, and where the application is interlocutory or a preliminary step to a further remedy. There is no limit to the reasons. On the other hand, the usefulness of the remedy is exemplified by the quotation from Wade and Forsythe's text set out at para.18 in **Krause v. Canada** (1999), 236 N.R. 317 (FCA).

[67] In **Canada v. Solosky**, at para.11, the Supreme Court wrote:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real

> issue' concerning the relative interests of each has been raised and falls to be determined.

[68] Lazar Sarna writes at page 18:

> . . . the discretion of the court is almost unlimited and should not be continually used to deny declaratory relief. . . . It is as well a question of law and not discretion that no declaration issue where the fundamental elements of a proceeding are absent or irregular, . . . The power to issue declarations without consequential relief does not enable the court to create its own powers: but within the apparent scope of the declaratory jurisdiction judicial discretion is the sole determinant of the life of the recourse.

Sarna cites **Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.**, [1921] 2 A.C. 438 at 447-48 (H.L.) as follows:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor . . .

[69] At page 21 he cites Madam Justice Wilson of the Supreme Court in **Operation Dismantle Inc. v. R.** [1985] 1 S.C.R. 441 at page 446 as follows:

> The real issue . . . is not the ability of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes.

[70] Sarna goes on at page 22:

> While the court has an extremely wide jurisdiction, it will not entertain an action or a motion seeking relief where there is no dispute between the parties, ...
>
> . . . the applicant and respondent (must) demonstrate some necessity for judgment . . . The proceeding must allege facts underpinning the claim; to allege a conflict of laws, bereft of facts, is insufficient.
>
> A proper case for a declaratory judgment generally requires some privity in law between parties concerned, an existent right and an interference or dispute concerning the right.

[71] In ***Administrative Law in Canada***, Third Edition (Butterworths: 2001), Sara Blake writes at page 205:

> Declarations are not made on matters of morality, wisdom or policy. Court will make declarations only on questions of law. As courts prefer not to involve themselves in academic exercises, declaratory relief must be necessary to resolve a party's rights with respect to an actual exercise of statutory powers.

[72] The above passages, and especially Justice LaForest's view at para. 51 of **Kourtessis**, are cited as background to this court's conclusion that the exercise of my discretion be limited to a declaration respecting the circumstances of the case at bar.

C.3 Whether Sheriff can refuse to enforce a Small Claims Court order.

[73] The Applicant cites **Roncarelli**, **Sobey's**, and **NAPE** as authorities for the proposition that no statutory authority exists, and therefore an abuse of discretion occurred, when the Department of Justice directed the Sheriff not to bring (by force if necessary) the debtor before the Small Claims Court to face a contempt application.

[74] It is a fundamental principle of public law that government action be supported by a grant of statutory authority, either express or necessary implication (see Brown and Evans, Chapter 13:1100).

[75] **Roncarelli** and **Sobey's** are not particularly relevant to the circumstances of this case.

[76] **Roncarelli** was not about the absence of statutory authority; rather it was about

> (a) whether discretion granted to the administrative branch of government is absolute;
>
> (b) whether the discretion could be used for an improper purpose (bad faith); and
>
> (c) whether the exercise of such discretion was subject to review by a superior court.

[77] Justice Richard's decision in **Sobey's** related to whether a regulation was *ultra vires* a statute, and whether a superior court had authority to determine its validity.

[78] **NAPE** is relevant to the circumstances of this case. The applicant in **NAPE** sought a declaration respecting whether employees of the Newfoundland courts, and in particular, members of the sheriff's office, had the right to strike. To determine this issue, Chief Justice Green addressed the role of sheriffs in the justice system. The Applicant cites paragraph 142 of that decision for the following:

> 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 Sheriff's 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 notice of a special status for persons who work in the Sheriff's 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. (Underlining by applicant).

[79] In his text Jeffrey Miller makes the following statements:

(a) Chapter 3.2 page 24:

It is a truism of contempt law that one must respect even a potentially "bad" or null order until it is formally struck down or amended by the court. This applies to putatively unconstitutional orders as well:

> But the *Charter* is no licence to break the law or defy an order of the court. It is elementary that so long as a law or an order of the court remains in force it must be obeyed. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, while the majority found it unnecessary to deal with the issue, McLachlin J. said at p. 974 S.C.R., p. 635 D.L.R.:
>
> > In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them. (*Paul Magder Furs Ltd. v. Ontario (Attorney General*), 1991 CarswellOnt 403 (OCA).

(b) Chapter 8.8, page 95:

It is no defence that the court order is incorrect, null, unconstitutional, or under appeal, and thus "ineffective". The order stands, and commands respect in all of its aspects, until it is reversed on appeal "or an equally effective order [is] secured to the effect that it need not be obeyed.

Miller cites as authority for this statement **Ontario(Securities Commission) v. Gaudet**, 1988 CarswellOnt 165 (OSC), **Magder**, supra, **Poje v. British**

Columbia [1953] 1 S.C.R. 516, **Regina (City) v. Cunningham** 1994 CarswellSask 221 (SQB), and **Everywomen's Health Centre Society v. Bridges** 1991 CarswellBC 50 (BCCA). While I fail to see how **Poje** and **Everywoman's** support Miller's premise**, Magder** (paragraph 12)**, Gaudet,** (paragraph 6) and **Cunningham** (paragraph 4) appear to support Miller's conclusion.

(c) Chapter 8.9, page 96:

> Neither is it a defence that, rather than displaying contempt for a court order, the alleged contemnor breached the order as a matter of conscience or public safety. Typically, alleged contemnors in these situations will avert to "higher authority" or purer motive.

[80] When **MacMillan Bloedel v. Simpson** was before the British Columbia Court of Appeal (1994 CarswellBC 162), McEachern, C.J., wrote at paragraphs 45 - 46:

> In my judgement, this defence [necessity] cannot be applied in this case for at least two reasons. First, the Defendants had alternatives to breaking the law, namely, they could have applied to the court to have the injunction set aside. None of them did that prior to being arrested. I do not believe this defence operates to excuse conduct which has been specifically enjoined. . .
>
> Second, I do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law.

[81] In a corollary decision (1994 CarswellBC 948), he wrote at paragraphs 11 - 12:

> Instead of disobeying the law, therefore, the Defendants or any of them could have applied . . . . to have the order set aside. It was not necessary for the Defendants to disobey the court's order . . .
>
> Secondly, we have the view that the defence of necessity can never be available to avoid a perceived peril that is lawfully authorized. The impugned logging was being conducted under permits and licenses issued by the Government of British Columbia and was legally authorized.

[82] As a general principle I accept that the Department of Justice has no authority, statutorily or constitutionally, to direct a Sheriff not to enforce a court order, and a Sheriff has no authority, statutorily or constitutionally, to refuse to enforce a court order.

[83] The important constitutional principle of separation of the judicial and executive branches of government and the rule of law is seriously and adversely affected when the executive branch purports to direct what judicial orders will be enforced. This is Green C.J.'s primary message in **NAPE**. That is the underlying basis for many judicial statements of the kind set out in paragraph 17 of the British Columbia Court of

Appeal's decision in **Re British Columbia (Judicial Compensation Committee)** 1998 CarswellBC 1181.

[84] Text writers suggest that the law may not be as clear with respect to tribunals or inferior courts of civil jurisdiction. In his text (chapter 7.1), Hogg suggests that while adjudicative tribunals and inferior courts may attract some of the characteristics of judicial independence, they have not attained the equivalence of a superior court. In his text (chapter 8.3), Jeffrey Miller cites **M.G.E.A. v. Manitoba (Health Services Commission)** 1991 CarswellMan 293 (MCA) as suggesting that "wrong" tribunal orders may be distinguished from "wrong" court orders.

[85] As Chief Justice McEachern pointed out in **MacMillan Bloedel Ltd v. Simpson**, the avenue open to the protestors in **Macmillan Bloedel v. Simpson** was an application and/or obtain an equally effective order to the effect that it need not obey the order. In the case at bar no evidence was presented that the Department of Justice or the Sheriff did anything to have the Small Claims Court order appealed, reviewed, stayed or in some other manner made ineffective, since the date of the Department's directive (January 16, 2006) or the date it learned of the March 21, 2006 "arrest" order (April 3rd, 2006).

[86] The affidavit of Stephen Campbell shows instead that the Department of Justice dragged its feet. The Applicant was only able to obtain a copy of the Departmental directive by an application under the Freedom of Information legislation. It was the Applicant, not the Respondent, that made this application, almost a year after the fact.

[87] The Small Claims Court is entitled to have its orders respected in the same manner as other courts and tribunals, until and unless its orders are stayed, reversed by appeal, judicial review, prerogative writ, or by an equally effective order to the effect that its order need not be obeyed.

[88] As stated, the rule of law and constitutional principle of the separation of powers is in jeopardy when the executive branch of government interferes with the execution, by court officers of core functions of the court.

C.4 **Remedies**

Declaration

[89] The granting of any remedy, including in particular a declaration, is discretionary. As noted above a declaration should be granted in the context of the circumstances of the case and not in the abstract, or a context broader than the dispute between the parties.

[90] The applicant seeks a declaration that the Department of Justice and Sheriff is required to carry out any order of an Adjudicator. I decline to make such a generalized order. I do, however, declare that the Department of Justice and Sheriff were required, on being advised of the orders made by the Small Claims Court in this case, whether or not the Department believed the orders to be unlawful or unconstitutional, to carry them out, unless a court of competent jurisdiction stayed the order, or otherwise released them from an obligation to enforce it.

Direction to Adjudicator

[91] The applicant seeks an order directing this Court to direct the Adjudicator to issue another order having the same effect as the March 21, 2006 order.

[92] The Small Claims Court has, in my opinion, no jurisdiction to deal with *ex facie* civil contempt. For that reason I decline the applicant's request.

[93] As *obiter*, I add that if the Small Claims Court had jurisdiction, it would not be appropriate, if it is lawful (which I doubt), for this Court to direct the Small Claims Court on how it should exercise its discretion to enforce its orders.

[94] As a further *obiter*, even without the full record of the proceedings before the Small Claims Court being made available to this Court, it is apparent that the March 21, 2006, order for the arrest if necessary of the debtor was made in circumstances where the order he failed to comply with was served on him by substituted service. In the post-Charter era, when heightened respect for the protection of the liberty and security of the person exists, measures that interfere with a person's liberty are subject to special scrutiny. **Regina (City) v. Cunningham** (paragraphs 23 and 24) is one example of many decisions which reflect this concern. It is only in exceptional circumstances, that a contempt application should proceed absent personal service. It appears the application was not personally served. It is troublesome that in respect of the applicant's attempts to learn more of the debtor's means to answer for a civil debt, in circumstances where he appears to have not appeared or filed any documents at any

stage of the proceeding, that an “arrest” order was issued. On a review of the full record, if it had been provided, this court would have given special scrutiny to an order issued in respect of steps to enforce a collection of a civil debt that are served on the debtor by substituted service.

COSTS

[95] Costs are in the discretion of the court. The discretion is a judicial one to be exercised according to the circumstances of each particular case.

[96] While the applicant has been successful in obtaining a declaration that in the circumstances of this case the respondent was obligated to obey the court order, or have it stayed or overturned, the order would have been stayed or overturned.

[97] In light of this split success, no costs are ordered.

J.