SUPREME COURT OF NOVA SCOTIA
Citation: *National Bank of Canada v. Beals Estate*, 2016 NSSC 246

Date: 20160923
Docket: Hfx No. 449047
Registry: Halifax

Between:

National Bank of Canada

Plaintiff

v.

Natasha F. Smith and Grant Thornton Limited, in its capacity as Trustee of the Estate of Tony A. Beals

Defendants

Decision

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	June 16, 2016, in Halifax, Nova Scotia
Last Written Submission:	July 11, 2016
Counsel:	Nicholas Mott for the plaintiff Michael Pugsley, Q.C. for the intervenors (The defendants were not entitled to notice.)

Moir, J. :

Introduction

[1] Under directions from the Department of Justice, sheriffs have taken over the scheduling of foreclosure auctions to be conducted by lawyers in courthouses. Although not authorized by the order for foreclosure and sale and not invited by the lawyer conducting the auction, a sheriff attends the auction and charges the lawyer a fee for providing security. The departmental directive calls for a fee of $309 plus HST for what is often less than ten minutes attendance.

[2] The National Bank of Canada, and in three other actions CIBC Mortgages Inc., seek orders for foreclosure and sale that include an unusual term. The term reads, “The sheriff shall, … if requested by the Plaintiff, provide security services for any sale conducted pursuant to this Order.” The intent is: no request, no fee.

[3] The government says that security is necessary at foreclosure auctions held in courthouses, and the plaintiffs are attempting to shift the expense from the parties to the public.

[4] The main issue is whether the court can and should stop the government from charging the security fee to the parties.

Evidence

[5] In addition to the usual proof on a motion for foreclosure and sale, I have been given affidavits of William Clancey, the Director of Court Services, Sheriff Allan Coley, and Stephen Kingston. I heard Mr. Kingston cross-examined and I had a few questions of my own for Mr. Clancey and Sheriff Coley.

[6] After the hearing, Mr. Pugsley provided me with some helpful representations, which are not controverted. Also, I think I can take notice of common practices in this field.

[7] The affidavits of Sheriff Coley, Mr. Clancey, and Mr. Kingston provide evidence that support the essential findings of fact. They also provide evidence or information about the merits, or otherwise, of having sheriffs at foreclosure auctions and making the parties pay for them. The banks object to some of the content of the Coley and Clancey affidavits on those merits.

[8] As I see it, the most serious issue raised by the banks' proposed term is whether the Department of Justice directive infringes judicial independence. The merits of the attendance and fee do not have much impact on the determination of that issue. So, I will begin with the facts essential to the issue of independence.

They are not controversial. Then, I will deal with the merits including the determination of the objections.

Facts

[9] For well over two centuries, the Supreme Court of Nova Scotia and the equity courts that were merged with it granted orders for foreclosure and sale as the primary foreclosure remedy in Nova Scotia. Sheriffs were ordered to conduct a public auction and to execute a deed to the highest bidder. The auction foreclosed the equity in the mortgaged property: *Pew v. Zinck*, [1953] 1 S.C.R. 285.

[10] The sheriff's services were limited. For many years, hand bills had to be posted at the mortgaged property. When that was abolished, the sheriff only saw to posting of a notice in the prothonotary's office, obtaining a tax certificate, conducting the auction, sometimes obtaining and remitting proceeds, and signing a report and the deed. The lawyer for the plaintiff did everything else, including preparation of all required documents, effecting the closing, and providing directions and advice to the sheriff.

[11] So, some thought the fees charged by sheriffs in recent times were high. They are prescribed by order-in-council under the *Costs and Fees Act*. They are expressed as commissions with maximums, but the commission amount almost

always exceeds the maximum. In 1982, the fee was $1,000 for completed sales and $500 for cancelled sales: N.S. Reg. 199/82 (15) and (16). Those amounts were continued in 1990: N.S. Reg. 132/90 (16).

[12] In 2000, the amounts were changed to $2,000 for the auction and $1,000 for a cancellation: N.S. Reg. 188/2000 (14). Four years later, $2,130 and $1,065: N.S. Reg. 58/2004 (14). Lately, $2,653 and $1,326: N.S. Reg. 90/2015.

[13] These excessive fees lead mortgagees to seek orders appointing experienced lawyers to conduct the sale instead of sheriffs. The court will grant such orders if satisfied that the lawyer meets certain criteria: *Royal Bank of Canada v. Moffat*, 2013 NSSC 111.

[14] The government participated in the argument of the *Moffat* case. It made "submissions with respect to the public interest in the conduct of foreclosure sales and the nature of the role performed by sheriffs" (para. 3). Justice Wood found these submissions very helpful (also, para. 3).

[15] The criteria for appointing someone other than the sheriff to conduct the auction are at para. 17 of *Moffat*:

> 1) They are willing to accept the appointment and abide by the terms of the order, including any directions with respect to the conduct of the sale.

> 2) They must be of high ethical standards and have no interest in the subject matter of the proceeding. In other words, they must be unbiased and appear to be unbiased. Usually this will require that they be an officer of the court such as a lawyer or bankruptcy trustee.
>
> 3) They must have sufficient knowledge and experience with respect to judicial sales.
>
> 4) They must be insured in the event that a claim is made concerning their conduct of the sale.
>
> 5) Their fee should be fixed so that parties know in advance of the sale what it will be.

At para. 20, Justice Wood specified procedures to be followed by a lawyer in addition to those found in the standard instructions to sheriffs that applied at the time. Both the criteria and the procedures imply that the auction is to be conducted professionally, including securely. Neither suggest the lawyer must hire the sheriff or any other security person.

[16] Justice Wood concluded his decision in *Moffat* by referring to the substantial saving for the mortgagees. He said at para. 21 that he was satisfied to appoint Stephen Kingston, who "has extensive experience… and meets the requirements for high ethical standards and impartiality." Justice Wood concluded, also at para. 21:

> In light of his fee, the costs of the sale will be approximately $1,800.00 less than if the sheriff performed this service. This will ultimately represent a saving to the defendants and is sufficient justification for appointment of Mr. Kingston in this case.

[17] Almost all of the hundreds of orders for foreclosure and sale in the last three years appoint a lawyer, rather than a sheriff, to conduct the auction. The standard instructions have been modified to reflect this fact.

[18] For a time, lawyers conducted some of the auctions in their offices. The judges felt that a sale by the court should be conducted in the courthouse, and they changed the foreclosure practice memorandum to require that.

[19] On January 22, 2015 Mr. Kenneth Winch signed a policy that had been developed by a group of officials in the provincial Department of Justice that included Mr. Winch and Mr. Clancey. The policy is titled Court House Space Utilization Policy. It had been in the works for several years "to address the issue of external parties' use of courthouse facilities across the province for non-court related matters", as Mr. Pugsley put it. It was adapted to the new situation of lawyers conducting foreclosure auctions in courthouses.

[20] The policy purports to create a priority among "Court related matters". "Sheriff or private foreclosure sales" come after "court hearings", "settlement conferences", "Judicial ceremonies, conferences and meetings", and "mediation/conciliation conferences". The policy suggests that "The scheduling of courtroom space recognizes the guiding principle of judicial independence." (In

fact, principles of judicial independence require that scheduling of courtroom space is for the judiciary and not the department, as we shall see.)

[21] Part 5 of the policy is titled “Charges/Fees for Court House Space”. The charge for “Security” is an “Hourly fee of $77.30 + HST”. The policy includes “Private foreclosure sales – fee required – minimum of four (4) hours”.

[22] Subsection 2(1) of the *Costs and Fees Act* provides for the Governor-in-Council to determine fees for services of departments and the court. Section 3 makes it an offence to take “any other or greater fee”. I assume that the Court House Space Utilization Policy had the necessary authorization.

[23] Neither the court nor the bar were consulted about the policy. Indeed, the first time I saw it was when Mr. Clancey’s affidavits were filed in response to the banks’ motions.

Merits of Sheriff Attendance and Fees

[24] In addition to providing evidence about the fees charged after auctions or cancellations, Mr. Kingston provided evidence about foreclosure auctions. These were admissibly presented as factual inferences based on broad experience, sometimes called “lay opinion”.

[25] His affidavit shows that there was no disturbance or disorderly conduct at any of the hundreds of auctions he attended in the past twenty-five years. Most auctions took ten minutes or less. Often only the lawyer for the mortgagee and the auctioneer were present. Mr. Kingston offers nothing further on the merits beyond these simple and uncontroversial facts.

[26] The banks objected to some of the contents of the Clancey and Coley affidavits. Mr. Clancey states his position at para. 7, and the banks do not object to his doing so:

> As the senior Department of Justice employee responsible for the Halifax Law Courts, I am opposed to foreclosure sales being conducted in areas that are not secured in Courthouses with the attendance of the Sheriff.

The definite article requires some clarification. "The sheriff" usually refers to the person appointed as sheriff for a territory, such as the Sheriff for Halifax, a position in which Sheriff Coley served for a short time. There are also numerous deputy sheriffs, each of whom is addressed as sheriff. These are often the sheriffs who conducted, or now attend, foreclosure auctions. They are not necessarily experienced in, or knowledgeable of, foreclosure.

[27] Mr. Clancey goes further and the banks do object to the following on the basis that they are statements of opinion not qualifying as lay opinion, or are unsupported speculation:

> Para. 9 “it is neither secure nor conducive for these sales to take place in an area not secured by the Sheriff’s attendance.”
>
> Para. 10 “I have concerns for public safety if foreclosure sales are conducted without a Sheriff’s attendance.”
>
> Para. 11 regarding the possibility of holding the auction in hallways “There would be a marked departure from practice were such sales to be permitted in these areas without the Sheriff’s attendance and such a change would negatively affect the efficiency and decorum of these foreclosure sales and cause potential security issues. There would be issues with noise and disruptions if these sales are conducted in common areas in Courthouses without the attendance of the Sheriff.”
>
> Para. 17 “It is my view that foreclosures that occur in any area or room in a Courthouse in Nova Scotia should always be overseen by a Sheriff.”

> Para. 18 "The areas that are appropriate for foreclosure sales include Courtrooms, and certain media rooms/conference rooms if attended by a Sheriff. No foreclosure sales should occur in any area in a Courtroom without a Sheriff's attendance for reasons of security, safety, and decorum."

The province defends these statements on the basis that they "are not conclusions that embody points of law". It cites *Armoyan v. Armoyan* 2013 NSCA 99 at para. 143 to 147.

[28] Rule 39.04(2)(a) requires a judge to strike a part of an affidavit containing "information that is not admissible" and it goes on to provide examples. These examples were taken in part from *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (Davison, J.). The examples in the Rule read "such as an irrelevant statement or a submission or plea".

[29] I do not think that *Armoyan* or the decision to which it refers at para. 146, *CNH Capital Canada Ltd. v. Canadian Imperial Bank of Commerce* 2013 NSCA 35, restrict Rule 39.04(2)(a) to "a conclusory statement that embodies or assumes a point of law." See *Armoyan* at para. 147 and *CNH Capital v. CIBC* at para. 82. Those decisions considered objections based on Justice Davison's "submissions or pleas and not evidence". The comments about conclusory statements do not apply

to the other example in Rule 39.04(2)(a), “an irrelevant statement”. The comments are about the meaning of “a submission or plea”, and I do not read them as creating a restriction on the general exclusion, “information that is not admissible”.

[30] The objected statements are opinions. No one suggests they are to be admitted on expert qualification. For two reasons, they do not qualify as inferential statements of fact sometimes called “lay opinion”. First, there is no evidence that Mr. Clancey has direct experience of foreclosure auctions. Second, the statements are not of inferred fact. (The reference to “a marked departure from practice” seems like inferred fact until one realizes that the “practice” is from a time when sheriffs exclusively conducted the auctions.)

[31] Opinion is inadmissible unless it is of an expert qualified by the court, or it is a properly supported factual inference. Therefore, the objected statements are inadmissible and must be struck under Rule 39.04(2)(a).

[32] It is concerning that Mr. Clancey expressed the opinion that foreclosure auctions in courthouses “should always be overseen by a Sheriff”. The court decided otherwise. It did so in 2008 when it adopted the new Rules, including the express recognition in Rule 72.08(3) that a judge can appoint someone other than the sheriff. It did so in 2013 when Justice Wood delivered the decision in *Moffat*.

And, it did so hundreds of times afterwards when the judges appointed lawyers in orders for foreclosure and sale.

[33] The banks object to "with one exception when a Sheriff was not available" in para. 14 of Mr. Clancey's affidavit, on the ground that the statement is hearsay. As I see it, this phrase helps explain the rest of the sentence and is part of a description of how the policy is intended to work. Limited in that way, the phrase is not for proof of its contents.

[34] The banks object to parts of paragraphs 6, 9, and 10 of Sheriff Coley's affidavit on the same ground as with the specified statements in Mr. Clancey's affidavit.

[35] The first sentence in para. 6 is pure argument. It introduces the detail found in the rest of the paragraph, but that is unnecessary. It is an inadmissible opinion.

[36] I see no harm in Sheriff Coley's statement at para. 9 of his personal opposition "to the decrease or elimination of the security at the Courthouse regarding foreclosure sales", although he is not an intervenor. Also, "Sheriffs are trained in how to deal with issues that threaten security" is factual and within Sheriff Coley's direct observations.

[37] Sheriff Coley has been working in Nova Scotia for a short time. He has experience "with the deployment of Sheriffs in foreclosure sales". I do not know whether he has ever attended one himself. The rest of the statements in para. 9 are inadmissible opinion.

[38] The banks object to the second conjoined clause in the first sentence of para. 10: "Private sales are a commercial transaction and it is, therefore, reasonable to expect parties seeking the sales to absorb the costs of this activity…". This is an inadmissible opinion. Also, it is wrong. These are not private sales. Both the party seeking the sale and the debtor ultimately charged with the cost are entitled to find the terms of this public sale in the public documents. They are the order for foreclosure and sale, the incorporated instructions, and the advertisement, as Rule 72.08(3) provides.

[39] Sheriff Coley surveyed all the Court Administrators in the province, as well as other employees of the Department of Justice for "any information… you can provide (anecdotal or otherwise) where there has been confrontation/verbal altercation/disturbance or similar incident etc., at any prior foreclosure sales (sheriff-led sales or otherwise) held at your justice centres." He exhibited the responses. The banks object to this hearsay.

[40] I see the survey as revelation against the province's position. This is just the kind of inquiry that ought to have been made before the adoption of a policy that costs vulnerable people who are losing their homes hundreds of dollars for ten minutes work.

[41] We asked Mr. Clancey about some of the other events in courthouses that require the decorum and security he is concerned about and for which no sheriff is assigned automatically:

- Settlement conferences in rooms without a panic button, involving judges, lawyers, and parties, sometimes parties acting on their own,
- General chambers almost every work day involving the public, sometimes persons acting on their own, with the same panic button that could be installed for sales by the court,
- Bankruptcy chambers every Friday with trustees and many undercharged bankrupts, some disgruntled,
- Civil applications and civil trials involving witnesses and parties who are sometimes emotional.

Why are foreclosure auctions considered more risky than so many other things we do?

[42] Despite the large audience, despite the big net ("anecdotal or otherwise"), despite the long time ("any prior foreclosure sales"), only a handful of minor incidents got reported in response to the survey. The responses evidence, as Mr. Mott put it, "relatively benign instances… not unique to public auctions."

[43] One response was about a rumor in 2010 that "the property owner was going to attend with a handgun", which turned out to be false. Also, there were "a couple of other incidents where there was a challenge over whether the successful bidder should be allowed time to go to a financial institution to certify a cheque".

[44] Another response was about "three incidents over the last 10 years." In one, the debtor was "confrontational with potential bidders". The second involved a debtor who "was the successful bidder and then became obnoxious". The third was "an incident with the owner showing for the sale." Nothing is said about why this presented a problem. (The owner has the right to be there.)

[45] Another response was about an "incident when the bidding itself became controversial" and the issue went to court. "There was no risk for violence on this instance, however the Sheriff staff were critical in the resolve of this dispute." They "provided affidavit evidence to support the validity of the sale and it was upheld in Court." You can rest assured the affidavits were drafted by lawyers.

[46] One lawyer, let alone the two at foreclosure auctions not conducted by a sheriff, could have handled each of these few problems as well as did the sheriff. So, the question about singling out foreclosure auctions remains unanswered.

[47] Sheriff Coley's survey is admissible not to show that a debtor was confrontational at an auction or that a dispute arose about this or that but to show what the government would have learned about the magnitude of the perceived problem when it formulated the Court House Space Utilization Policy. As such, the survey does not offend the rule excluding hearsay.

Merits of Attendance and Fees

[48] The province submits that "The party that provides security in the courthouses of Nova Scotia are the Sheriffs who are as Justice Wood stated 'an important component of the Nova Scotia judicial system'." No one disputes that the provincial government has a constitutional obligation to provide security at courthouses, or that sheriffs are the primary vehicle by which that obligation is performed. The question is whether I should exercise my discretion under Rule 72.08(3) to explicitly direct the person conducting the sale that retaining security officers is in his or her authority.

[49] The government also submits that "The Sheriff's Office has customarily attended these sales and provided security at these sales." Before 2013, sheriffs attended foreclosure auctions because they conducted them. It is not "customary" for sheriffs to attend sales conducted by others. They attend because the Department of Justice directed them to do so and to charge for it.

[50] I am not aware that anyone relied particularly on the sheriff's ability to provide security at sales conducted by the sheriff. We relied on the sheriff, and the lawyer for the mortgagee, to produce a professional and lawful auction. Justice Wood wrote at length in *Moffat* about the services provided by sheriffs and those to be provided by lawyer auctioneers. Security was not mentioned.

[51] The province also refers me to statutes authorizing security for "court areas" and for occupational health and safety. It refers to its duty of care and goes so far as to demand an indemnity if the parties are not to pay for attendance.

[52] The banks submit, "There is no demonstrable need for a sheriff to be present for a sale by public auction." And, "The Sheriffs have not tendered any evidence to suggest that the security needs of a public auction differ in any way from those of a courthouse in general." I agree with those submissions.

[53] Respectfully, there is a fallacy at the core of the government's submission and in its policy. The submission includes "Private sales are a commercial transaction primarily for the benefit of the involved parties and it is just and appropriate that the transaction costs of the same be paid for by those parties." The Court House Space Utilization Policy itself refers to "private foreclosure sales" in the purported hierarchy of courthouse functions and in the minimum fee for "private foreclosure sales".

[54] They are not private. Not in any sense. The foreclosure auction is a sale by the court. It is an equitable remedy necessitated by the equity of redemption, which overrides the contract made by the parties. It is conducted by an officer of the court in accordance with terms imposed by the court, not any private contract. There are significant public interests at stake in the process, as the government argued in *Moffat*.

[55] The evidence satisfies me that there is no more need for a sheriff at every foreclosure auction than at every chambers sitting, every settlement conference, every bankruptcy chambers, every civil application, and every civil trial. If the sheriffs see a need, they may consult with the court's appointed officer, just as they consult with judges and registrars in bankruptcy on the rare occasion when a security problem appears. I will make it clear in my orders that sheriffs are not to

charge a fee except through an agreement with the officer conducting the auction or a further order.

Judicial Independence

[56] I brought up this issue. I thank the parties for their submissions.

[57] As Mr. Pugsley points out, I wrote about administrative independence in *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)* 2010 NSSC 295, a decision concerning the need for the Provincial Court of Nova Scotia or its representative, rather than the provincial government, to be a party to an application for access to records of the court. The only development since that time of which I am aware is the release by the Ontario Court of Appeal of the decision in *R. v. Pan* 2012 ONCA 581.

[58] I agree with Mr. Pugsley's submission that the facts of the present case are not analogous with any other.

[59] Justice Laskin wrote the decision in *Pan* and Justices Feldman and Watt concurred. Failure of the provincial government to supply an interpreter on time for a scheduled criminal trial does not offend administrative independence. Justice Laskin wrote at para. 15:

> … Contrary to the apparent view of the trial judge, administrative independence has nothing to do with the individual independence of a judge of the court. It means control by the court, as an institution, "over the administrative decisions that bear directly and immediately on the exercise of the judicial function". The Supreme Court has defined administrative independence narrowly, referring only to the "assignment of judges, sittings of the court and court lists - as well as the related matters of allocation of court rooms and *direction of the administrative staff engaged in carrying out these functions*" (emphasis added): see *Reference re: Remuneration of Judges of the Provincial Court (P.E.I.)*… .

Justice Laskin took the italicized passage to be the only basis for the trial judge's finding that judicial independence was compromised. He concluded at para. 16:

> The trial judge's finding that judicial independence was compromised could only be supported if there were evidence that the unavailability of an interpreter that day amounted to interference with the ability of the Ontario Court of Justice, as an institution, to direct its administrative staff. There was no such evidence.

[60] I need not repeat what I said at para. 25 to 38 of the *CBC* decision. I agree that administrative independence is defined narrowly by the Supreme Court of Canada. In our hybrid system for court administration, judicial administrative independence has to allow for the government's role in court administration. On the other hand, principle also excludes the government from "administrative decisions that bear directly and immediately on the exercise of the judicial function."

[61] That is why I took the view in the *CBC* case that the applicable general principle is the requirement for independence on "administrative decisions that bear directly and immediately on the exercise of the judicial function", and the

court also provided examples: “assignment of judges, sittings of the court, and court lists”, “allocation of courtrooms”, and “direction of the administrative staff engaged in carrying out these functions”. I did not think that every instance of judicial administrative independence had to fall categorically into one of these “examples”. See *CBC* at para. 35. I remain of that view, but the hybrid approach necessitates caution before a new example is found.

[62] A sale by the court is a judicial function although it is carried out by a judicial agent rather than the judge himself or herself. The government submits:

> The requirement for all foreclosure sales to have sheriff’s security is not in conflict with a Foreclosure Order that is silent on security because the sale will still take place albeit with security. The presence of security does not legally thwart the Order. The issue is really over the cost and which party is to pay it, the banks, the Sheriff’s office, or the public? That is the real issue driving the position of the banks, not the authority of the Sheriff to provide security at the sale.

[63] Of course, the issue is the fee the government purports to impose on a sale by the court conducted in a courthouse, but the interests are not restricted to “the banks, the Sheriff’s office, or the public [in the sense of government expense]”. They include the debtors who are losing their homes or businesses, and the subsequent encumbrancers who are losing their security. The cost imposed by the government without judicial authority or contract is passed on to the equity and to liability on the mortgage covenants.

[64] The judicial nature of the foreclosure auction is apparent in the terms. *Civil Procedure Rule* 72.08(3) recognizes an alternative to the auction being conducted by the sheriff. In that event, it does not provide some residual role for the sheriff. Rather, the agent, whether a sheriff or a lawyer, "must" conduct the sale "in accordance with the terms of the order, the court's instructions or directions, and the advertisement of a sale by auction". None of these permit a payment to the government for security.

[65] (The Rule is in a form recommended by the Rules Revision Committee to the Supreme Court of Nova Scotia in 2008. The same Mr. Winch who signed the Court House Space Utilization Policy without consulting the judiciary sat as the representative of the government on that committee.)

[66] The standard order for foreclosure and sale settles the mortgage debt at outstanding principal, interest, and other charges "approved by the court". Nowhere does the court approve the security fee imposed by the government. The process leads to foreclosure "unless before the time of sale the amount due, together with costs, are paid to the Plaintiff". Nowhere is the owner or a subsequent encumbrancer required to pay the government's cancellation fee in order to redeem.

[67] In my opinion, the fees imposed by the government on mortgagees, mortgagors, and subsequent encumbrancers conflict with the orders for foreclosure and sale. It conflicts in two ways. First, it prevents the agent from following the order unless he or she books through the sheriffs and subjects himself or herself to the gratuitous fee.

[68] More importantly, the policy interferes with the judicial function of the agent who is authorized by the court to conduct the auction. He or she has the authority to determine all aspects of the sale within the bounds of the order, incorporated instructions, and advertisement. That includes retaining and paying for security. It does not preclude the presence of a sheriff, if the sheriff acting within the bounds of his or her authority, sees attendance as necessary, but it precludes the sheriff from intruding on the authority of the agent of the court by charging for the attendance.

[69] The administrative decisions embodied in Rule 72.08(3), the orders for foreclosure and sale, the incorporated instructions, and the advertisement bear directly and immediately on a judicial function, the conduct of a foreclosure auction on behalf of the court. The policy of charging for a sheriff's uninvited attendance when the sheriff is not appointed is contrary to judicial administrative independence.

[70] My reasons do not fit within what I regard as examples of administrative independence, and what the Ontario Court of Appeal regards as principles of administrative independence, developed by the Supreme Court of Canada. However, the facts do touch on some of them.

[71] In my view, “allocation of courtrooms” now has to include any room in a courthouse in which a judicial function is performed. This would include rooms for judicial settlement conferences and pretrial conferences. All of those uses are allocated by prothonotaries and schedulers under the direction of the Chief Justice or a district judge, except for one. Under direction of the Department of Justice, sheriffs schedule foreclosure auctions in Halifax. Nevertheless, the allocation is for the judicial branch, not the government. For the government to do the allocating is an infringement of judicial independence.

[72] To the extent that sheriffs allocate rooms in courthouses for lawyers appointed by the court to conduct foreclosure auctions, they are “administrative staff engaged in carrying out these functions”. They should be directed by the court, not the government.

Conclusion

[73] I am granting the orders provided by Mr. Mott in this action and the three actions brought by the CIBC. (In future, the order should not provide additional instructions for a lawyer appointed to conduct the sale as the new instructions apply to whoever is appointed and the request for sheriff's services should be of the lawyer appointed, not the plaintiff.) The parties may make written submissions on costs if necessary.

J.