



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**Citation:** *R. v. Penunsi*, 2016 NLCA 50

**Date:** 2016/09/28

**Docket:** 201501H0083

**BETWEEN:**

**ALBERT PENUNSI**

**APPELLANT**

**AND:**

**HER MAJESTY THE QUEEN**

**FIRST RESPONDENT**

**AND:**

**JOHN JOY, A JUDGE OF THE  
PROVINCIAL COURT OF  
NEWFOUNDLAND AND LABRADOR**

**SECOND RESPONDENT**

**Coram:** Green, C.J.N.L., Rowe and White JJ.A.

**Court Appealed From:** Happy Valley–Goose Bay Provincial Court

**Appeal Heard:** May 10, 2016

**Judgment Rendered:** September 28, 2016

**Reasons for Judgment By:** Green C.J.N.L.

**Concurred In By:** Rowe and White JJ.A.

**Counsel for the Appellant:**

Derek Hogan

**Counsel for the First Respondent:**

Iain R.W. Hollett

**Counsel for the Second Respondent:**

David C. Day Q.C.

[1] The Crown has applied for directions as to whether, on an appeal from a Trial Division decision concerning judicial review of a decision of a Provincial Court judge seeking orders in the nature of *certiorari* and *mandamus*, (i) the Provincial Court judge in question should be named as a party in the proceeding before the reviewing court and on the appeal; and (ii) what role, if any, the Provincial Court judge, whether named as a party or not, should be permitted to play on the judicial review application and on this appeal.

## **BACKGROUND**

[2] In response to an information laid under s. 810.2 of the *Criminal Code*, RSC 1095, c. C-46 requesting that the appellant, Albert Penunsi, be bound by a recognizance to keep the peace on the basis that the informant had reasonable grounds to believe that Mr. Penunsi would commit a serious personal injury offence, a warrant was issued for Mr. Penunsi's arrest to answer to the information. At that time he was serving a sentence on an unrelated matter. He was released before the s. 810.2 matter could be heard. Accordingly, the Crown sought an opportunity pursuant to s. 515 of the *Criminal Code* to show cause why Mr. Penunsi should be required to sign an undertaking or enter a recognizance pending the disposition of the s. 810.2 matter.

[3] The Provincial Court judge held that s. 515 did not apply to s. 810.2 proceedings and he therefore did not have jurisdiction to impose conditions on Mr. Penunsi's release.

## **THE JUDICIAL REVIEW PROCEEDING**

[4] The Crown made application to the Trial Division for *certiorari* quashing the Provincial Court judge's decision and *mandamus* directing that he hold a judicial interim release hearing. The Crown was named as the applicant in the style of cause, Mr. Penunsi was named as the first respondent and the Provincial Court judge was named as the second respondent.

[5] Prior to the hearing of the judicial review application, Mr. Penunsi voluntarily entered into the s. 810.2 recognizance. The Crown then abandoned its request for *mandamus* but submitted that even though the practical issue was moot, the court should proceed with the *certiorari* application and determine whether, in the abstract, s. 515 applied to s. 810.2 proceedings. The judicial review judge agreed to do so.

[6] The Crown, Mr. Penunsi and the Provincial Court judge all appeared through counsel and made submissions to the judicial review judge. The judge held that s. 515 did apply to s. 810.2 proceedings and that the Provincial Court judge exceeded his jurisdiction when he authorized Mr. Penunsi's release without providing the Crown an opportunity to show cause why he should be required to sign an undertaking or enter into a recognizance pending completion of the hearing on the merits of the s. 810.2 proceeding.

#### **THE APPEAL**

[7] Mr. Penunsi appealed the judicial review judge's ruling to this Court. In the style of cause in this Court, he named both the Crown and the Provincial Court judge as respondents.

#### **THE PRELIMINARY PROCEDURAL ISSUE ON APPEAL**

[8] In the course of his judgment the judicial review judge commented on the style of cause in the Trial Division and observed that not only did the applicable rules of court, the *Supreme Court of Newfoundland, Trial Division Rules for Orders in the Nature of Certiorari, Habeas Corpus, Mandamus and Prohibition*, SI/2000-33 ("*Prerogative Orders Rules*"), not require that the justice whose order was being challenged by *certiorari* be named as a party in the review proceeding, but the judge should *not* be so named. He stated:

[24] ... Justices make decisions but do not participate when the decision is under review, and therefore should not be included in the style of cause. Adherence to the principles of finality and impartiality require that inferior courts not make submissions to the reviewing court that, in substance, defend, qualify or supplement the reasons for decision.

[9] Following the filing of the notice of appeal in this court naming the Provincial Court judge as a party, the Crown sought directions as to whether the judge should be named as a party and what role, if any, the judge should play in the appeal. To answer those questions it will be necessary to consider party status at the initial judicial review hearing as well as on the appeal.

[10] Counsel for Mr. Penunsi appeared on the application for directions but made no submissions. Counsel for the Crown and the Provincial Court judge were heard.

## MOOTNESS

[11] Both counsel for the Crown and the Provincial Court judge agreed that the Court should rule on the request for directions (and on the merits of the appeal in due course) even though the underlying issue, whether Mr. Penunsi could be subjected to a show cause hearing under s. 515, is now moot in view of the fact that he already consented to signing a s. 810.2 recognizance. Both counsel submitted that there was considerable confusion – and interest in resolving the confusion – as to the formal and substantive roles a Provincial Court judge should play in a judicial review proceeding. Future guidance would be of benefit to the profession. I agree. This judgment will therefore deal, in advance of the appeal proper, with the two preliminary questions raised in the application for directions.

## STATUS AS A PARTY

### (a) Historical Background

[12] Understanding modern practice and procedure relating to prerogative writs (and, latterly, applications for prerogative orders) has been complicated by the writs' historical development as well as by a lack of appreciation as to the basic concepts underlying their use. They were issued by judges (primarily from the King's Bench) on behalf of the King and in the King's name but at the request of a citizen complaining of jurisdictional encroachment or failure in adjudicative duty by an inferior court, tribunal or official, including magistrates and justices of the peace. As Dunfield J. observed at page 113 in *In re Pear; Pear v. Commissioner for Public Utilities* (1948), 16 Nfld. L.R. 112, a case involving the prerogative writ of *mandamus*:

The ancient prerogative writs, such a *Mandamus*, are survivals of the Middle Ages which have come down to us across the centuries bearing still some flavor of a stormier age. In their origin they were letters missive addressed by the King to some insubordinate or defaulting magnate to bring him to a sense of his duty under pains and penalties, and they have survived up to this day embedded in the old and rigid Crown Practice which is an unfamiliar nuisance to lawyers.

[13] The theory behind the issuance of the prerogative writs is that the King, having been alerted by one of his subjects that one of his subordinate officials may have acted or threatened to act in a jurisdictionally excessive or otherwise illegal manner or failed in the execution of his public duty,

inquires into the matter by means of his Judges (usually on the King's Bench) and if warranted, those judges, acting in his name, will put the matter right. This theoretical underpinning explains, to some extent, the practice and procedure surrounding the use of the writs. Because the writs were issued in the King's name and were not issued as of right, the style of cause was usually framed as a relator action with the King named as initiator, the court, body or official whose decision was being impugned and was being required to answer, named as respondent and the applicant for the writ being named (*ex rel*) almost as an afterthought. See, e.g. *Regina v. Cranbourne Justices and Another; Ex parte Pearce*, [1955] 1 Q.B. 41. The reality, however, was that the citizen was the real claimant for relief.

[14] The invocation of the prerogative writ procedure involved three steps. The first involved a motion or application to the Court *ex parte*, setting out *prima facie* grounds for the allegation that the inferior tribunal had acted improperly, asking the Court to exercise its discretion to issue the appropriate prerogative writ or writs requiring the impugned inferior body to respond to the allegation and, if necessary, to make a return of the record so it could be reviewed. The second stage involved the issuance and service of the writ. At that point, the documentation was styled as a command of the Sovereign, as plaintiff/claimant, to the inferior body, as defendant/respondent, to respond. The "real claimant" (the complaining citizen) was noted as the *ex parte* applicant. The final stage of the process, following receipt of the record and the body's response was the actual determination of whether there was illegality and, if so, what appropriate prerogative order should issue. Since the remedy was always discretionary, the court could nevertheless decline to grant it on the basis of certain well-established reasons, such as waiver, delay, the availability of alternative remedies, absence of clean hands, and futility. (see, David Phillip Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009), pp. 596, 633-636 and 655-660 for a discussion of these matters).

[15] In this jurisdiction, the practice does not appear to have been uniform. Certainly, the practice of nominally describing the Crown as the plaintiff/claimant in applications for prerogative writs does not appear to have been followed in all cases. For example, in *Shea v. Penney* (1917), 10 Nfld. L.R. 221, it appears that the claimant for a writ of prohibition was described as the actual plaintiff and not in a relator fashion. On the other hand, in a non-criminal context, Dunfield J. in *In re Pear* noted at p. 113 that

“... the old Writ speaks directly as from the King, who is considered to be present in our Court, and not from us as his judges.”

[16] As to the presence of the tribunal as a named responding party, the decision in *Shea v. Penney*, involving a prohibition application, is an example of a magistrate, the legality of whose ability to make a decision was being challenged, was named as a defendant and represented by counsel. Prowse’s *Manual for Magistrates in Newfoundland* (St. John’s: J.C. Withers, Queen’s Printer, 1877; reprinted by Law Society of Newfoundland, Christopher Curran and Melvin Baker (eds.), 2016) does not speak directly to the party issue but does advert to the obligation of the magistrate, upon being served with a writ of *certiorari*, to make a return of the record to the reviewing court and refers to the form of the writ expressed as being directed to the justice concerned (pp. 23, 266-267).

[17] Counsel for the judge on this application, David Day Q.C. provided the Court with a very helpful and illuminating table of all reported Newfoundland cases from 1820 to 1948 dealing with prerogative writs, containing information, so far as it was available, as to the involvement of magistrates in the review proceedings, both in respect of their naming as a party and their actual participation in the proceeding whether named as a party or not. In the absence of a file-by-file review of the actual pleadings in each of these cases (something this Court did not undertake), this table must be regarded as the most complete source of information on this subject. The table suggests that in many cases, the magistrate was not named as a party and did not participate, although there were exceptions.

[18] In Newfoundland, the prerogative writ was replaced by a revised procedure for non-criminal proceedings in 1986 with the adoption of rule 54 of the *Rules of the Supreme Court, 1986* (the “*Civil Rules*”). Those rules provided that no prerogative writ was to be henceforth issued but that “all necessary directions shall be made by order” (rule 54.02(2)) and provided instead that “an order in the nature of” a prerogative writ may be granted on originating application (rule 54.02(1)). That effectively did away with the necessity for the initial *ex parte* motion asking the Court, acting in the name of the Sovereign, to exercise its discretion to issue a prerogative writ in order to start the process and instead allowed an applicant to engage the judicial review process as of right (with the exception of applications for an order in the nature of *quo warranto*, which still required judicial leave: rule 54.10. I would also note that the court’s discretion to deny the remedy following the hearing remains.) The practice quickly developed of naming the claimant for

the order in the nature of prerogative relief as the plaintiff and the body whose decision was under attack as a defendant along with any other party adverse in interest in the proceeding below. Although the new rules did not explicitly require this, it seemed to follow from the fact that the originating application had to be served on any person having an interest in or likely to be affected by the proceeding (rule 54.03(1)). Furthermore, the Crown no longer appeared as a named plaintiff-participant even in a formalistic sense. This made sense as actual Crown participation was really a fiction.

[19] This same approach was mirrored in rules 5 and 6 of the *Prerogative Orders Rules* for criminal proceedings when they were first adopted in this jurisdiction, pursuant to section 482(3)(c) of the *Criminal Code*, in 2000.

(b) **The Current Situation**

[20] The primary source for procedural law relating to prerogative orders in a criminal law context is the *Prerogative Orders Rules*. Except as mentioned above, those rules do not speak to matters such as styles of cause or who generally should be made a party to a proceeding. Section 2, however, provides:

Where no other express provision is made in these Rules in respect of applications, the *Criminal Appeal Rules of the Supreme Court of Newfoundland, Trial Division* in respect of applications apply with such modifications as are necessary.

(Underlining added.)

[21] The *Criminal Appeal Rules of the Supreme Court of Newfoundland, Trial Division* (“*Summary Conviction Appeal Rules*”), which deal with summary conviction appeals in the Trial Division, only deal with applications relating to extensions of time, withdrawal of a guilty plea and applications for trial *de novo*. They do not address the issue of naming parties or their role in an appeal. The rules generally contemplate, however, that only the prosecutor and accused will be the parties to an appeal and that service of the notice of appeal must be made on the responding party or his or her representative alone.

[22] The *Summary Conviction Appeal Rules* are thus not very helpful to the present inquiry. To the extent that their underlying approach may be relevant, they indicate, as one would expect, a predilection not to name the

Provincial Court trial judge as a party. Section 26 of the rules provides, however, that:

In matters not specifically provided for by these rules, the practice and procedure of the Supreme Court of Newfoundland relating to civil proceedings, as far as they can be made applicable, with appropriate changes, apply mutatis mutandis.

[23] This provision effectively imports into the criminal context Rule 54 of the *Civil Rules* and the related statutory and procedural rules wherever there can be said to be a gap in the *Prerogative Orders Rules* and the *Summary Conviction Appeal Rules*. Obviously, wherever anything is expressly or implicitly dealt with in these latter sets of rules, they will have primacy.

[24] Rule 6(3) of the *Prerogative Orders Rules* provides that where an application for a prerogative order is sought to quash a conviction, order or warrant, the application and all supporting documentation shall also be served on the Attorney General of Newfoundland and Labrador and “the provincial Court Judge or justice or justices of the peace who made the conviction or order or who issued the warrant.” In addition, the court may permit any other person “affected by the proceedings” who was not served with the application “to take part in the proceedings as though served” (rule 6(4)). One of the main reasons for service on the Provincial Court judge is to engage the obligation on the judge, in the case of applications for *certiorari*, to make a return of the original proceeding record to the reviewing court: rules 9 and 10(1). To that extent, the historical obligation placed on the body whose decision is being impugned to make a return of the record is preserved.

[25] An additional reason for service on the judge and others potentially interested in or affected by the proceeding (and thereby giving them notice of the proceeding) would be to allow them an opportunity to seek standing to participate in or become a party to the proceeding in order to protect their interest to the extent legally allowed. This would not obviously require making such persons a party from the outset.

[26] As noted previously, the provisions in the *Prerogative Orders Rules* are essentially mirrored in rule 54.03(3) and (4) and rules 54.07 and 54.08 of the *Civil Rules*.

[27] Given the linguistic congruence between the *Civil Rules* and the *Prerogative Orders Rules*, the interconnection between the two sets of rules

by virtue of the “gap” provisions, and the practice under the *Civil Rules* of naming the body whose decision is being attacked as a defendant, the question to be addressed is whether that practice should be followed under the *Prerogative Orders Rules* when it is a decision of a Provincial Court judge that is being attacked?

[28] In *R. v. Tippett*, 2010 NLCA 49, 299 Nfld. & P.E.I.R. 174, a case involving an application for *certiorari* to quash a committal for trial made at a preliminary inquiry, this Court expressed the view that it was not necessary in the circumstances of that case to name the Provincial Court Judge as a party. It was sufficient to repeat the style of cause as it existed in the original criminal proceeding, i.e. with the Crown named as prosecutor and the accused as the defendant. In a footnote, the Court stated:

The original style of cause of the proceeding in the Trial Division named as party-respondents (i) Her Majesty the Queen; and (ii) the Provincial Court Judge sitting as a justice under Part XVIII of the *Criminal Code* (the ‘justice’). This style of cause was repeated on appeal to this Court. [The *Prerogative Orders Rules*] do not require that the Provincial Court judge whose committal order is being challenged by *certiorari* be named as a party in the proceeding. Subsection 6(3) only requires that the application and supporting documentation be served on the justice and s. 9(1) requires that a notice in a form prescribed by the *Prerogative Orders Rules* be endorsed on the application and addressed to the justice requiring the justice to forward the record to the reviewing court. This procedure does not require naming the justice as a party to the proceeding. The name of the justice was therefore unnecessarily included in the style of cause in the Trial Division and, *a fortiori*, in this Court. The style of cause has been amended to reflect this.

[29] As noted in *Tippett*, the fact that an application is required to be served on the judge to ensure that he or she makes a return of the record to the reviewing court should not in principle automatically justify making that person a party to the proceeding with all the attendant rights of a party. It is true that the *Judicature Act*, which governs rule 54 of the *Civil Rules*, defines “party” in s. 2(m) as “a person served with notice of, or entitled to attend, a proceeding, even if that person is not named in the record,” but even if it applies to the current circumstances, it does not mean that the person served with notice must be named in the style of cause as a party, only that such person will be treated as a party for certain purposes. Rule 6(3) of the *Prerogative Orders Rules* implicitly recognizes this distinction. Service on the Attorney General has never been regarded as making him or her a separate named party (in his role as other than prosecutor; As to this distinction, see *Pardy v. Newfoundland and Labrador*, 2014 NLCA 37, 357

Nfld. & P.E.I.R. 49 at paras. 30-32) in the style of cause. By analogy, neither should service on the Provincial Court judge whose order is being impugned.

[30] Aside from according rights of participation in the proceeding, the main reason for the formal inclusion of a person as a party in the style of cause is to ensure that any resulting order will bind the named responding party or parties and provide to the claimant the benefits of the order.

[31] Counsel for the Crown submitted that although *Tippett* has stated that in applications for *certiorari* in criminal proceedings it is not necessary to include the name of the Provincial Court judge whose decision is being reviewed in the style of cause either in the reviewing court or on appeal, the situation should be otherwise when the prerogative remedies of *mandamus* or prohibition are being sought either by themselves or in conjunction with an application for some other prerogative remedy such as *certiorari*. The rationale for this distinction is that in the case of *mandamus* and prohibition the resulting order, if any, must be directed to the judge whose actions have been found to exceed or threatened to exceed jurisdiction or otherwise has failed in or contravened his or her legal duty. If the order is granted, the judge must be bound by the result in a way in which the order can be enforced against him or her.

[32] Counsel for the Provincial Court Judge brought the Court's attention to the fact that in a series of *mandamus* proceedings in 2011 after *Tippett* was decided, the Crown named the Provincial Court judge in question in eight proceedings. None of those matters led to written judgment because they were ultimately withdrawn as a result of subsequent events in the original court. Counsel for the Crown brought other cases to our attention including one in 2014 seeking both *certiorari* and *mandamus* which is currently under appeal to this Court on another issue. See also *Fleming v. R.* 2013 NLTD(G) 134, 341 Nfld. & P.E.I.R. 289 where the Provincial Court Judge was named in an application for *certiorari* and *mandamus*., and *R. v. Ramalheira*, 2009 NLCA, 282 Nfld. & P.E.I.R. 29, which involved applications for *certiorari* and prohibition.

[33] Elsewhere, there are cases where the request for *certiorari* was combined with an application for *mandamus* or prohibition and the Provincial Court judge was named as a party. See *Attorney General (Canada) v. Andrychuk Prov J. and Hickie*, [1980] 6 W.W.R. 231 (Sask. C.A.), *R. v. Walcott*, 1983 CarswellBC 2115, and *R. v. Valila*, 1986

CarswellSask 441. There is rarely, however, any discussion of the issue in the decided cases.

[34] In *R. v. M.(P.)* (1993), 110 D.L.R. (4th) 72 (Ont. S.C.), however, Cavarzan J. made the following comments:

[14] As a technical matter, however, neither [the judge nor the judges of the Court] were made parties respondent in this application. Since an order in the nature of *mandamus* is sought to be directed to [the judge or the judges collectively] it would have been appropriate to name them as parties respondent. [Counsel for the Crown] advised the Court that this matter had been considered. Rather than naming the judges involved as parties respondent, he elected instead to provide all materials filed to [the judges]. Not surprisingly, he received no indication from any of them that they wished to appear....

[19] In these circumstances, it would seem to be a triumph of form over substance to insist, as a rigid precondition to the availability of *mandamus* that the judges be named as parties respondent. This nevertheless, is the nature of the remedy. The order is directed at the office holder or at the institution and it would be anomalous to make such an order where the objects of the order are not named as parties to the proceedings in which the order is sought.

[35] See also *R. v. Pochrebny*, [1930] 3 W.W.R. 48 (Man. K.B.) where Donovan J. asserted, without further discussion, that the person or body whose duty it is to perform the act sought to be enforced by *mandamus* is a necessary party respondent.

[36] A contrary view is expressed in the recent case of *Re Alberta (Provincial Court Judge)*, 2015 ABQB 728, an application for *certiorari* and *mandamus* where the actual issue related to standing at the hearing. D.C.Read J. made the following observation on the issue of party status:

[4] I begin by questioning why the Provincial Court judge was named personally as a party to this action. It is true that he was the particular judge who made the decisions in question and I am told by counsel that he was named personally because historically that was the style of cause in the ancient writs of *certiorari* and *mandamus*. That may be so. However, it seems to me that it is the Provincial Court of Alberta and not the particular judge, who has the obligation to return the record as they are ‘the tribunal’ from whom the record is requested. That being so, why is it necessary to name the particular judge?

[37] Justice Read rejected the argument that the judge below should have full standing to argue the merits of the case by stating: “The provincial Court

is not an administrative tribunal. Rather it is a court of record.” (para. 7). Justice Read appears to proceed on the basis that the reason why the judge was made a party was because of the obligation to return the record to the reviewing court. That is an assumption that I have rejected, as explained earlier. Nevertheless, I am in general agreement with the judge’s assertion that there is a distinction between a provincial court, as a court of record, and other decision-making bodies such as tribunals. Historically, it would have been harder to make this distinction. In earlier days, stipendiary magistrates and justices of the peace, who were generally not legally trained, were not regarded as members of an institutional court, as such. They were simply individually-appointed persons who were appointed to perform certain limited judicial functions usually in a local geographical area. They were not regarded as part of the professional judiciary. As such, they were much more akin to inferior tribunals.

[38] Today, by contrast, we have a fully professionalized Provincial Court with legally trained judges who, except for the jurisdiction they exercise, cannot be readily distinguished, in terms of experience and training, from judges of superior courts. They can be expected to honour their oath to uphold and observe the law in the same manner as superior court judges. As a practical matter, they can be expected to comply with any direction given by a reviewing court whether or not they are formally “ordered” as a party to do so, in the same way as superior trial court judges are expected to do without being named as a party when their judgments are questioned on appeal. A simple declaration of right or obligation is sufficient.

[39] For this reason, notwithstanding the “technical” and historical reason that to be bound by an order of *mandamus* or prohibition one should be named as a party, as suggested in *M.(P.)* and *Pochrebny*, neither of which are binding on this Court, I am prepared to break from the historical roots of the prerogative remedies and to declare that where a decision of a Provincial Court judge is being challenged by way of an application for a prerogative order, whether *certiorari*, *mandamus* or prohibition either alone or in combination, it is not necessary to name the judge as a responding party, nor is it appropriate to do so. I am therefore in agreement with Goodridge J. in the court below when he asserted : “Justices make decisions but do not participate when the decision is under review, and therefore should not be included in the style of cause.”

[40] The application can be made using the style of cause in the criminal proceeding in which the issue arose but with the addition of a block

referential heading (“IN THE MATTER OF ...”) above the style of cause identifying the judge and the decision at issue. I stress that while this does not make the judge a party, it does not in any way minimize the obligation contained in rules 6 and 9 of the *Prerogative Orders Rules* to serve the papers on the judge or on the obligation on the judge in rule 10 to ensure the return of the record to the reviewing court. Because the judge will receive notice of the application by way of service, he or she will have the opportunity to seek standing at the hearing if he or she deems it appropriate to do so and the stringent requirements for standing, as discussed later herein, are met.

[41] Accordingly, in this case the Provincial Court judge should not have been named as a defendant in the Trial Division. Nor should he have been named as a respondent on the appeal. Parties who should be named in the style of cause in a notice of appeal should generally be limited to the party or parties in the proceeding below who are challenging the lower court decision (to be named appellants) and any other party below whose interests might be affected by the appeal decision (to be named respondents) and any other persons granted intervenor status at the appellate level. (There are some limited exceptions to this, such as where a non-party in the court below seeks to appeal a lower court order affecting him or her. See *Re Carroll; Kent v. Kent*, 2010 NLCA 53, 301 Nfld. & P.E.I.R. 152; *Re Power; Yetman v. Yetman*, 2015 NLCA 10, 363 Nfld. & P.E.I.R. 350).

#### **ROLE OF PROVINCIAL COURT JUDGE**

[42] The more important and significant question is, regardless of whether the Provincial Court Judge is named as a party or not, what role, if any, may the judge play in the proceeding?

[43] The fact that the judge is not formally named as a party does not preclude any role for him or her. There may well be matters where participation may be appropriate and helpful to the ultimate determination. To the extent that the judge, upon being given notice of the proceeding and (in the case of *certiorari* applications) being required to forward the record to the reviewing court, may consider it appropriate, he or she may, in limited circumstances, seek standing and the Court, in its discretion may grant it subject to what limitations may be considered appropriate, bearing in mind the appropriate legal principles, as hereinafter discussed.

[44] I would also observe that even if the judge were to be named as or treated for certain purposes as a party, it would not guarantee a free right to fully participate in the proceeding. The role may well be constrained or limited by other considerations. For example, a person who has been granted intervenor status in a civil matter will be named as a party in the style of cause but may nevertheless have his or her role in the proceeding restricted.

[45] One of the key considerations relating to according any role for the judge is the potential impact on the perceived fairness of the proceeding where the very decision-maker whose decision is being impugned is given a further opportunity to defend and support his or her decision. Judges are expected to speak through their judgments and not otherwise. They are expected to be impartial and neutral arbiters and, having performed their adjudicative function, their role is over. Further participation on appeal from the judgment may give the impression that the judge has an interest or stake in the proceedings. As observed by D.C. Read J. in *Re Alberta (Provincial Court Judge)*, “there is a real danger of perceived unfairness if they are permitted standing” (para. 21).

[46] These considerations were obviously the tipping point for Goodridge J. in the instant case when he observed:

[24] ... Adherence to the principles of finality and impartiality require that inferior courts not make submissions to the reviewing court that, in substance, defend, qualify or supplement the reasons for decision.

[47] The issue frequently rises in an administrative law context when an administrative tribunal, having been named as a party (for the procedural reasons explained above) seeks to participate in the judicial review of its decision. In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, the Supreme Court stressed that an administrative decision-maker’s participation in an appeal or review of its own decisions may give rise to concerns over tribunal impartiality. The Court held in that case that even where a tribunal is given a statutory right to be heard on an appeal, the role should generally be limited to explaining the record or making representations relating to the tribunal’s jurisdiction (p. 709). Comments in subsequent cases have suggested more expansive exceptions, including (possibly) making submissions on the appropriate standard of review and even arguing that the decision was reasonable (but not going so far as to argue it was correct) (*CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, per La Forest J. writing for a minority).

[48] Most recently, in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, Rothstein J., writing for a majority, eschewed a category approach to the according of standing in exceptional circumstances and adopted a discretionary, principled, approach. He explained:

[57] ... tribunal standing is a matter to be determined by the court conducting the first instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[49] Rothstein J. also provided a non-exhaustive list of factors to be considered in exercising the court's discretion:

[59] ...

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

(Emphasis added.)

[50] The third factor, which points away from according standing where the decision results from a truly adversarial proceeding, is particularly relevant in the context of the role of a Provincial Court judge. A judicial decision is the paradigmatic example of an "adjudicatory function." This led the court in *Re Alberta (Provincial Court Judge)* to go so far as to assert (helped in that case by certain statutory definitions not present in the current context) that the Provincial Court is not an administrative tribunal at all and that the approach enunciated in *Ontario Energy Board* did not have application to anything other than tribunals. In the alternative, the Court also

concluded that even if the criteria did apply, the adjudicative nature of the judge's decision militated against allowing standing.

[51] I would not go so far as to say that the approach in *Ontario (Energy Board)* has no application to a case where a provincial court judge is involved. The fundamental considerations of finality and perceived impartiality applicable to tribunal participation are the same as those applicable to any decision-maker, including judges. I do agree, however, that the application of the third factor in *Ontario (Energy Board)* should generally be accorded considerable weight. In most cases, the participation of the judge would not be indicated, except in very circumscribed and limited circumstances.

[52] Counsel for the Provincial Court judge in this case referred the Court to early decisions of the Newfoundland courts where a stipendiary magistrate whose decision was being reviewed was represented by counsel and accorded standing: *Shea v. Penney* (a case where the magistrate was actually a party); *Ex parte Costigan and Murphy* (1889), 7 Nfld. L.R. 414; *In Re Robert Bruce* (1899), 8 Nfld. L.R. 177 (cases where the magistrate appeared not to have been named as a party but was nevertheless heard through counsel; in *Bruce*, however, the case involved *habeas corpus*, which often raises different considerations). There is no discussion in any of these cases of the basis or rationale for according the judge/tribunal standing. (The purpose in *Bruce* may have been to allow for the magistrate to ask for a "protection order" under the local customs legislation protecting him from liability in the event (as the court ultimately found) he had exceeded his jurisdiction in imprisoning the claimant for customs breaches. The magistrate in the anomalous circumstances of that case may have had a personal interest at stake in the proceeding).

[53] In the vast majority of cases involving prerogative writs heard between 1817 and 1949, however, the impugned decision-maker was not represented or heard. Little help can be drawn from these materials as to the circumstances when a provincial court judge should be heard on the application.

[54] Counsel drew our attention to the suggestion in *Halsbury's Laws of England*, 4th ed. (2001 Reissue) (London: Butterworths, 2001), that "where ... the claim raises allegations concerning the bona fides or character of the justices, the normal practice is for the justices to appear at the hearing" (para. 174). He also referred to the *Cranbourne Justices* case, cited earlier,

where the allegation was one of bias or reasonable apprehension of bias on the part of the justices concerned.

[55] In each of these circumstances, the distinguishing characteristic supporting hearing from the judge (albeit in limited circumstances) appears to be the personal impact, in terms of potential personal liability (*Bruce*) or impact on the character (such as an allegation of accepting a bribe) of the judge (*Halsbury*; *Cranbourne Justices*) that may result. While an allegation of actual bias might engage this consideration, I would not agree that an allegation of reasonable apprehension of bias would do so. In the former case, the allegation of actual bias goes to the very violation of the judge's oath of office whereas the latter, being based on appearances only, does not. (I would add that the considerations might well be said to have broader application beyond applications for prerogative remedies; however, I make no further comment on that. It should be left for another day).

[56] It was also suggested in argument that another justification for a judge being heard would be if he or she was aware of events affecting the case subsequent to the original hearing that would be germane to the reviewing court's determination. I agree that a judge in such circumstances should bring such matters to the attention of the reviewing court either through counsel seeking to obtain standing for such limited purpose or by filing, on notice to other counsel, an affidavit with the court.

[57] The administrative law exceptions derived from the pre-*Ontario (Energy Board)* case law (explaining the record and speaking to jurisdiction and standard of review) would not generally be a justification for hearing from the judge. The record of the Provincial Court is generally full and complete and should speak for itself. Its structure and nature is also the type of record that would be familiar to another court. (An exception might be, as noted above, where the record, by its nature, does not disclose matters that are germane to the determination.) Unlike administrative tribunals, which may have some specialized expertise that would require explanation to the reviewing court in order to appreciate the structure of the administrative scheme in question, the jurisdiction of a judge and the standard of review of his or her decisions depend on general legal principles that will be as well-known to the reviewing court as to the provincial court judge. Even the suggestion in *Ontario (Energy Board)* that there might be a justification for a decision-maker being heard where a review would be otherwise unopposed does not have much resonance in the context of review of a provincial court decision. Courts on appeal or review often hear only one side of a matter and

in those cases do not automatically call on the judge whose decision is under scrutiny to make the case for the other side. That would cut directly to the heart of the finality and impartiality rationales for limiting such participation. Usually, other techniques, such as appointing an *amicus* or asking the Attorney General to represent the public interest, are employed.

#### **SUMMARY AND CONCLUSION**

[58] In summary, I would reiterate that where the decision of a Provincial Court judge is the subject of an application for prerogative remedy (*certiorari*, *mandamus* or prohibition, either alone or in combination) neither the judge nor the court of which he or she is a member should be named as a party in the style of cause.

[59] Furthermore, I would state that the circumstances where a provincial court judge may be accorded limited standing in a judicial review proceeding, even when not named as a party in the style of cause, will be very limited. Without foreclosing the opportunity for a judge to make an application to intervene or be heard on limited grounds in any case where it is suggested that it is in the interests of justice to do so, generally the circumstances will be limited to, (i) providing assistance in a neutral and non-confrontational way to the reviewing court with respect to matters germane to the review and which would not be disclosed on the record and would not be reasonably available from other sources, and (ii) making representations relative to issues where the judge's direct personal interest (liability or character) may be engaged and it would be regarded as unfair to the judge to reach conclusions that would expose him or her to penalty or cast aspersions on his or her character and thereby possibly undermine continued ability to sit as a judge.

[60] I therefore conclude that:

1. The Provincial Court Judge in this case should not have been named as a responding party in the judicial review application in the Trial Division or in this Court;
2. The style of cause in this appeal should be amended accordingly;
3. The Provincial Court Judge has no right to appear and be heard through counsel on the appeal;

4. Leave should be granted to the Provincial Court Judge to apply for standing to be heard on the appeal within the principles set out above, if applicable;
5. In view of the fact that the actual issue in this case is moot but the parties nevertheless requested directions from the Court on the matters discussed, there will be no order as to costs.

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J.D. GREEN C.J.N.L.

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M.H. ROWE J.A.

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C.W. WHITE J.A.