NOVA SCOTIA COURT OF APPEAL
Citation: ***G.M. v. Children's Aid Society of Cape Breton-Victoria***,
2007 NSCA 20

Date: 20070214
Docket: CAC 272355
Registry: Halifax

Between:

G.M.

Appellant

v.

Children's Aid Society of Cape Breton-Victoria

Respondent

Restriction on publication: **Pursuant to Section 94(1) of the Children and Family Services Act**

Judge(s):	Saunders, Oland & Hamilton, JJ.A.
Appeal Heard:	February 5, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed, as per reasons for judgment of Hamilton, J.A.; Saunders and Oland, JJ.A. concurring
Counsel:	G. M., self-represented appellant Robert Crosby, Q.C., for the respondent

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] This appeal is from Justice M. Clare MacLellan's finding, pursuant to s.63(3) of the **Children and Family Services Act**, S.N.S. 1990, c.5, as amended (**CFSA**), that the appellant, G.M., abused a child. The respondent, the Children's Aid Society of Cape Breton-Victoria, applied for such a finding in connection with having the appellant's name entered in the Child Abuse Register pursuant to s. 63(2) of the **CFSA**. The appellant appeals the judge's finding reported as 2006 NSSC 252. He represented himself on appeal but was represented by counsel at the hearing before the judge.

[2] There is no appeal from the child protection aspect of the judge's decision which was heard at the same time as the application under s.63(3).

[3] The facts relevant to this appeal are clearly set out in the agency's factum:

> 3. [G.M.] is the 50 year-old father of [D.M.] and grandfather to her five children in respect of whom there are outstanding protection proceedings: [names of children deleted]
>
> 4. He also has the status of joint custodian of the two oldest grandchildren by virtue of a Dartmouth Family Court Order arising out of an earlier intervention with the family by the Dartmouth Agency.
>
> 5. [G.M.] became known to the Agency prior to the commencement of the within proceeding as a result of a 1994 meeting between Agency worker Shaun Butler and a runaway youth [G.D]. [G.D.] disclosed at that meeting that he had been sexually abused as a child by his godfather and great-uncle, [G.M.]. With Butler's assistance [G.D.] gave a report and statement to the police, but [G.M.] was living in the United States at the time, so no charge was laid.
>
> 6. In July 1996, when Butler learned that [G.M.] had returned to the area for a visit, he notified police. Because police were unable to locate the 1994 complaint, the Agency assisted in obtaining a new statement from [G.D.] (who had by this time relocated to BC), and charges were subsequently laid. No trial took place, however - apparently because of the loss of the first statement - and the Appellant returned to live in Texas.

7. The Agency's interest in the Appellant rekindled in the spring of 2001, when it was made aware that [G.M.] had returned to live in Nova Scotia, that he had joint custody of two young children, and that several adult males had recently come forward with allegations that he had sexually abused them as children. Butler, who had since become a director of the Agency, confirmed with police that charges were now pending against [G.M.] in respect of one of the alleged victims, and that additional complaints (and complainants) were under active investigation.

8. Butler referred this information on to the Dartmouth District Agency, where he believed [G.M.] was living. He was soon advised, however, that [G.M.] – and his daughter and grandchildren – had recently moved from Dartmouth back to Cape Breton. Because of the perceived possible risk to [D.M.]'s young children in light of the allegations against their grandfather, and the return of the family to their jurisdiction, the Agency became more directly involved.

9. Agency workers met with [D.M.] in May 2001 to ensure, *inter alia*, that she knew of the allegations against her father, and that she understood her obligation to protect her children from the risk of harm from him. To that end, the Agency specifically advised [D.M.] that the Appellant was not to have unsupervised contact with the children, and that apprehension was a possible consequence should she permit any unsupervised contact. [D.M.] signified both her understanding of the Agency's position and her intention to cooperate at that time.

10. Later on, the Agency confirmed that as a condition of his release pending trial of the various charges he faced, the Appellant was under an undertaking not to have unsupervised contact with children under the age of 14. That undertaking, coupled with the assurances of [D.M.] and her partner (and father of two of the children) [C.N.] that the Appellant's contact with any of the children would be supervised, led the Agency to close its file in April 2002 pending resolution of the criminal charges. Shaun Butler testified that it was Agency policy not to pursue placement on the Child Abuse Register while criminal charges were outstanding.

11. Although the timeline is somewhat unclear, the evidence reveals that by the end of 2003, early 2004, none of the criminal charges against [G.M.] had resulted in a (valid) conviction. Nevertheless, the Agency maintained its position that the Appellant represented a demonstrable risk of sexual abuse to the children, and continued to require that the Appellant's contact be supervised by another adult. At the same time, other significant protection concerns surrounding the parents' ability to properly care for

the children surfaced, including an allegation of sexual abuse of [one of the children] against the paternal uncle [J.N.]. (That allegation was never substantiated but [J.N.]'s contact with the children was essentially terminated by the parents.)

12. The Appellant abided by the no-unsupervised-contact requirement until approximately December 2005, albeit unhappily. He wrote numerous letters to the Agency demanding retraction or justification of the condition "in writing". The Appellant also used [D.M.] as a conduit for his complaints to the Agency. She would be sent to the worker with specific requests or assertions from her father that she would ask be responded to in writing. The Agency letters were then shared with the Appellant.

13. [D.M.] testified that he and his ‘advisor' William O'Neill "pressured" her considerably to allow unsupervised outings and visits, stating that as the criminal charges were dismissed and/or resulted in acquittals, and the criminal court undertaking was vacated, the Agency had no right to hold it against him. She in turn relayed this argument to the Agency, who explained to her the difference between criminal and civil burdens of proof, and reiterated that apprehension of the children was a possibility should she allow her father unsupervised contact.

14. Ultimately however, [D.M.] gave in to the Appellant, and from January – March 2006, he saw several of the children four or five times unsupervised, sometimes overnight.

15. When this unsupervised contact came to the Agency's attention, on March 2, 2006, the children were apprehended on grounds, *inter alia*, that they were at risk of sexual abuse by their maternal grandfather from which their parents failed to protect them (s. 22(2)(d)).

16. In the course of the protection proceeding, the Agency brought application on April 26th pursuant to the Child Abuse Register provisions of the Act for a finding (for the purposes of entry onto the Register) that the Appellant has abused a child, and sought to consolidate the hearing of that application with the protection hearing.

17. Over the objection of the Appellant, who was represented by counsel, the learned trial Judge granted the consolidation request, stating:

> . . . the common element of these decisions is that in order for consolidation to be ordered the decision in one case would dispose of the essential cause of

> action in the other case insofar as that would be correct if the allegation is made against [G.M.] and it is obviously going to be something that is seriously going to be weighed in the s. 40 determination. If it is not made out against [G.M.] that effectively takes care of the Child Abuse application. So they are so common as to almost be twins so I am going to grant the motion.

18. The consolidated hearing began on May 23, 2006, with the evidence of five, now adult, male relatives of the Appellant, all of whom accused him of sexually abusing them while they were children. The Court heard from W.K. (46 years old), B."J." K. (36), J.M. (34), M.D. (44) and G.D. (25). W, J, J and M are all nephews of the Appellant, while G is a great-nephew. Each of them testified that the abuse by the Appellant began when they were pre-teens and ended in their early teens. Acts of abuse alleged ranged from fondling to attempted and actual anal penetration and oral sex. Their evidence is individually summarized in the learned Trial Judge's decision at paras. 4-12.

19. The Appellant testified. He denied engaging in any kind of sexual activity with any of the five accusers. When asked why they might falsely accuse him of such heinous acts, he expressed himself to be at a loss, offering only that there had been a family falling-out over his inheritance of the family home in 2000, and that there might be some kind of revenge at the root of it all. [he also suggested other family members may have been jealous because [D.M.] had been the favourite of his parents.]

[4] The issues on appeal can be stated as follows:

1. Did the judge err in fact or in law in her assessment of the evidence and in her conclusion that the agency had met the statutory burden under s.63(3) of the CFSA?

2. Was the judge biased or does the conduct of the proceeding or the fact that the judge acted as counsel for the agency prior to her appointment to the bench give rise to a reasonable apprehension of bias?

3. Did the judge err in finding that the **Limitations of Actions Act**, R.S.N.S. 1989, c.258, did not apply to the appellant’s s.63(3) application before her?

[5] The standard of review applicable on this appeal is as set out in **Children's Aid Society of Cape Breton-Victoria v. A.M**. (2005), 232 N.S.R. (2d) 121:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.**, [2003] N.S.R. (2d) Uned. 119; [2003] N.S.J. No. 416 (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169; 542 A.P.R. 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C(B).T. and F.Y.** (2002), 207 N.S.R. (2d) 109; 649 A.P.R. 109 (C.A.); **K.V.P. v. T.E.**, [2001] 2 S.C.R. 1014; 275 N.R. 52; 156 B.C.A.C. 161; 255 W.A.C. 161, at paras. 10-16.

[6] Shortly before the hearing, the appellant provided us with copies of 12 pages of material. He indicated that he wished to introduce most of these pages as evidence that the judge had acted as counsel for the agency prior to her appointment as a judge, and the balance to indicate that due to his late receipt of the court tapes he was unable to provide us with transcripts of two pre-trials held in the course of the ongoing child protection matter. He felt the material concerning the judge acting as counsel for the agency was necessary to prove she had worked for the agency and supported his argument alleging bias. We have reviewed all of this material. It includes an order of the judge in 1995 dealing with an agency matter, a 1993 application on an agency matter where the judge had acted as counsel for the agency, and an order on another agency matter where the judge was counsel for the agency in 1993. However, there has never been any dispute that she did so prior to her 1995 judicial appointment.

[7] The appellant indicated he was not seeking an adjournment of his appeal hearing as a result of not being able to provide us with the transcripts of the pre-trials. When asked, he confirmed that he was ready to proceed. Accordingly, I will not refer to these pages of materials further.

[8] With respect to the first issue on appeal, the appellant argued that the evidence before the judge did not support her findings of fact. As an example, he pointed to the statement in her reasons that he had antagonized the agency. He suggested there was no evidence supporting this finding. However, when questioned, he agreed that his daughter had testified that he and Mr. O'Neill had pressured her to let him have unsupervised access to some of the children, including overnight visits. This and other testimony supports the judge's finding that the appellant was antagonistic towards the agency. In any event this finding was not critical to the principal issue before the judge, nor to her decision. Having carefully considered the entire record there is no merit to the appellant's submission that the judge's findings of fact were not supported by the evidence.

[9] The appellant also argued that the judge erred by accepting the evidence of the five complainants as credible, pointing to the inconsistencies in their evidence and to the fact that the judge who presided at his former criminal trial had not found their evidence credible, presumably relying on the fact he was not convicted. The decisions rendered pursuant to his former criminal proceedings were not provided to us. The appellant argued that the judge erred by not obtaining and reviewing the transcripts of the evidence given by the complainants at the prior criminal trial in order to probe further into their credibility.

[10] There is no merit to these arguments. The appellant was represented by counsel before the judge. He casts no aspersions with respect to the competence of his lawyer. His counsel, if so advised, could have obtained the transcript of his former criminal trial and used it to impeach the witnesses through prior inconsistencies. During his cross-examination of two of the complainants, the appellant's counsel made productive use of earlier statements given by them to the police. The judge specifically noted that there were errors in the recall of these witnesses, but nonetheless accepted their testimony:

> [50] . . . I watched the witnesses. They were uncomfortable in Court, but they came and gave evidence, which withstood cross-examination. There was occasional errors in recall, which are to be expected, but do not impact on the weight which I have afforded their evidence. I accept the testimony of the five (5) victims that when they were little boys, their uncle and grand-uncle sexually abused them on numerous occasions.

[11] It is squarely within the judge's jurisdiction to consider the evidence and to make findings of credibility. The record discloses no error by the judge in this regard.

[12] The judge's reasons indicate that she was focussed on the issue before her: whether the agency had proven, on a balance of probabilities, that the appellant had abused a child. She commented on the statutory onus shouldered by the agency throughout the hearing, and that the appellant did not have to prove that he had not abused a child. She reminded herself that the onus for a finding under s.63(3) was on a high level of probabilities, referring to **Nova Scotia (Minister of Community Services) v. K.F.** (2002), 206 N.S.R. (2d) 166.

[13] In essence the appellant is asking us to re-try the application. That is not the function of this Court. I would dismiss this ground of appeal.

[14] The second ground of appeal raised by the appellant is that the judge was biased, or that there is a reasonable apprehension of bias raised by the manner in which the judge conducted the hearing, or by the fact that the judge acted as a lawyer for the agency prior to her appointment to the bench. The same argument has been made in other cases concerning this judge when Mr. William O'Neill, a self-styled 'parents rights' advocate has been involved, as he was in this case; **Children's Aid Society of Cape Breton v. L.M.** (1998), 169 N.S.R. (2d) 1 and **M.S. v. Children's Aid Society of Cape Breton-Victoria)** (2004), 227 N.S.R. (2d) 260.

[15] The threshold for a finding of a real or perceived bias of a judge is high. The person claiming bias has the onus of proving it. There is a presumption of course that a judge will carry out his or her oath of office; **R. v. R.D.S.**, [1997] 3 S.C.R. 484; per Cory, J. at 552.

[16] There is nothing in the record before us to indicate bias or a reasonable apprehension of bias. The appellant, who was represented by a lawyer at trial, never raised the complaint then. The judge did not say or do anything that would suggest to a reasonable and informed person that she did not approach this application with an open mind as required. There was no suggestion that the judge had acted for the agency previously in matters concerning this appellant. As stated in **L.M**., supra, ¶ 50:

> . . . The fact that a judge, at some time prior to appointment, acted as a lawyer for a party before the court or had a professional association with a lawyer before the court, does not, on its own, give rise to a reasonable apprehension of bias. . . .

[17] I agree with the respondent's submissions that none of (1) the consolidation of the s.63(3) hearing and the child protection hearing, (2) the questions the judge asked the appellant while he was testifying, (3) her observations or (4) her factual findings raise a serious issue of actual or apprehended bias. While the appellant may be upset that the judge found against him, that is hardly the test for appellate intervention. I would dismiss this ground of appeal.

[18] The appellant's third ground of appeal is that the judge erred in finding that the agency's application under s.63(3) of the **CFSA** was not barred by the **Limitation of Actions Act**, because the abuse she found to have occurred, took place many years ago.

[19] The appellant relies on the case of **Children's Aid Society of Halifax v. D.L.** (1994), 135 N.S.R. (2d) 292 to support his argument. In that case the issue was whether the six month limitation period in the **Summary Proceedings Act**, R.S.N.S. 1989, c.450, as amended, applied to a s.63(3) application. The judge in that case held that it did not. There was no issue before him of whether the **Limitations of Actions Act** applied. However, the judge opined in obiter that **if** there were a limitation question in a s.63(3) application, it would be dealt with under the provisions of the **Limitation of Actions Act**. Such an observation was in no way a definitive finding that the latter statute would act as a bar to proceedings initiated under s.63(3) of the **CFSA**. In any event, the comment is not binding on us.

[20] The judge in **D.L.**, supra, stated in ¶ 20 of his reasons that "[a s.63(3) application] is not a type of application which is amenable to a time limitation." but continued:

> [26] In conclusion, the time periods for making an application are not governed by the **Summary Proceedings Act** and <u>if any</u> limitation period is in effect it would be governed by the **Limitation of Actions Act**. . . .

[Underlining mine]

[21] Considering this judge's use of the words "if any" in ¶ 26 referred to above and having read the whole of the case, I am satisfied the judge in **D.L.**, supra recognized - without having had to decide the point - that questions of limitation under the **Limitation of Actions Act** may have no application to proceedings taken pursuant to s.63(3) of the **CFSA**.

[22] In the case at bar I am not satisfied Justice MacLellan erred in finding that the **Limitation of Actions Act** did not apply to the agency's s.63(3) application.

[23] Section 2 of the **Limitation of Actions Act** sets out the limitation periods that apply to different types of actions. On a plain reading of this section there is no provision that includes an application under s.63(3) of the **CFSA**. Although the subject matter of s.2(1)(a) (assault/battery) appears to be relevant, a s.63(3) application is not an "action for" assault/battery. It is an application for a finding that a person has abused a child. The subject matter is similar, but the parties and remedy are different.

[24] In addition, an application under s.63(3) of the **CFSA** is not an "action" and as the name suggests, the **Limitation of Actions Act** applies to "actions"; **Allcott v. Walker** (1997), 160 N.S.R. (2d) 1:

> [7] The **Limitation of Actions Act** is designed to set reasonable time limits on the commencement of "actions" in the courts. The types of "actions" intended are extensively enumerated in s. 2 of the **Act** and relate to remedies sought in proceedings brought under the **Rules of Civil Procedure**. These **Rules** require statements of claim, defences and other pleadings enabling the issues to be defined and joined between the parties. These **Rules** require a reliance on a limitation period to be pleaded and the **Act** permits in s. 3(2) the disallowance of this defence if it is equitable to do so.

[25] The purpose of the registration of a person's name in the Child Abuse Register (and hence the purpose of a finding) is to protect other children from a continuing source of potential harm by naming persons who have committed past child abuse. That purpose would be thwarted if a limitation period applied.

[26] Accordingly, I would dismiss this appeal.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.