NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Community Services) v. B.L.C.***,
2007 NSCA 48

Date: 20070426
Docket: 276472
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

B.L.C.

Respondent

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

Judge(s): Roscoe, Bateman, Hamilton, JJ.A.

Appeal Heard: April 12, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed, as per reasons for judgment of Hamilton, J.A.; Roscoe & Bateman, JJ.A. concurring

Counsel: John Underhill & Mary S. Knox, for the appellant
Lola Gilmer & Karen L. Hudson, 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] The Minister of Community Services (Minister), appeals the decision of Justice Beryl A. MacDonald of the Family Division of the Nova Scotia Supreme Court in which, in a child protection matter, she referred the respondent mother, B.L.C. (Ms. C.), for an assessment to Martin Whitzman and David Cox, assessors requested by Ms. C., rather than by Suzanne Eakin, the assessor put forward by the Minister.

[2] Both parties agree the merits of this appeal are moot. By letter dated January 5, 2007 Mr. Whitzman indicated that he and Mr. Cox were no longer prepared to conduct the assessment ordered because Ms. C. missed scheduled appointments. On February 14 the Minister confirmed to the judge that she was no longer seeking an assessment of Ms. C. and the trial dates for the Minister's application for permanent care and custody of the child were set for July 2007.

[3] Despite the mootness of the appeal, both parties submit that this Court should decide the merits of this appeal. For the reasons that follow I would decide the merits of the appeal confined to the issue of the judge's jurisdiction in these circumstances to refer Ms. C. to an assessor other than the one recommended by the Minister, but would dismiss the appeal.

[4] By agreement of counsel an affidavit of Beth Archibald, a long-term caseworker with the Minister, was entered as further evidence on appeal. It simply confirmed that Mr. Whitzman was no longer prepared to conduct the assessment.

[5] The facts are set out in the judge's decision (2006 NSSC 361). A short chronology will suffice for this decision:

May 25, 2006	Ms. C.'s daughter was taken into care.
May 29	Minister filed a protection application including a request that the judge refer Ms. C. for assessment.
May 31	5 day hearing held and order granted. Judge found there were reasonable and probable grounds that the child was

	in need of protective services and ordered that the child remain in the interim care and custody of the Minister.
June 16	Thirty day hearing held and order consented to. Ms. C. did not consent to an assessment. Issue of assessment deferred.
August 11	Pretrial prior to protection hearing. It was agreed that the protection order would issue but at a later time because the Minister wished to maximize the time periods available under the **Childrens and Family Services Act**, 1990, c. 5, s.1.
August 25	Protection order issued. The Minister was to continue to have interim care and custody of the child. There was no provision dealing with assessment. A pretrial was scheduled for October 2.
September 28	Minister filed an application for a disposition order seeking permanent care and control of the child. It indicated a pretrial was set for October 2.
October 2	Pretrial conference. File notes and the judge's decision suggest the Minister was seeking a parental capacity assessment of Ms. C. to be conducted by Ms. Eakin who could commence her assessment in December, 2006 or January, 2007 and that Ms. C. still felt an assessment was unnecessary. The matter was adjourned to give Ms. C.'s counsel an opportunity to explore the outstanding issues with her client.
October 20	Letter from Ms. C.'s counsel stating that she understood "the Minister [was] requesting that Ms. [C.] participate in a Parental Capacity Assessment and would agree to an Order for Temporary Care and Custody at first disposition, to be reviewed upon completion of the Assessment Report." She indicated Ms. C. would agree

	to an assessment and requested that it be conducted by Mr. Whitzman who could commence work in December or January.
October 25	Pretrial conference. The Minister argued that Ms. Eakin was the better assessor in this case to do the assessment. She agreed Messrs. Whitzman and Cox were excellent and had done similar assessments for the Minister previously. The Minister never suggested that the judge should not name the assessor in her order. No issue was raised about the relative cost of the assessors. Ms. C. argued that she should be referred to Messrs. Whitzman and Cox because the assessment would be better if she felt she had some input into the process and if she did not feel the Minister was trying to force a particular assessor on her. There was no issue of timing as both assessors could commence work at approximately the same time. The judge ordered Messrs. Whitzman and Cox to do the assessment.
October 30	Mr. Whitzman advised that due to the involvement of Mr. Cox their report could not be completed until the middle or end of March, 2007.
November 1	Ms. Eakin advised her report could be available mid January.
November 20	The Minister sought a reconsideration of the judge's decision. By letter he argued Ms. C. should be referred to Ms. Eakin for the assessment because she could complete her report earlier and because the judge had no jurisdiction to refer Ms. C. to an assessor other than the one he recommended if he was going to be paying for it.
November 22	Pretrial on the reconsideration issue. The Minister orally confirmed his position. Ms. C. argued the time frame proposed by Ms. Eakin was unrealistic considering the

	Christmas period, that there was no problem having a report by mid or late March in terms of the time frames set out in the CFSA or in terms of the trial as the Minister had not applied for trial dates, that the extra time would allow her to make any necessary changes, and that with her having some input into the process the assessment would be better. The judge confirmed her original decision. The Minister requested a written decision.
November 29	Written decision released.
December 21	Disposition order issued giving the Minister temporary care and custody of the child and referring Ms. C. to Messrs. Whitzman and Cox for her assessment.

[6] The first issue is whether we should decide the merits of this moot appeal.

[7] Factors to be considered when deciding whether to hear a moot appeal are set out by the Supreme Court of Canada in **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342, **Doucet-Boudreau v. Nova Scotia (Minister of Education),** 2003 SCC 62; [2003] 3 S.C.R. 3 and **R. v Smith**, 2004 SCC 14 [2004] 1 S.C.R. 385. In **Doucet-Boudreau**, supra, the Court states:

> 18 . . . Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):
>
> (1) the presence of an adversarial context;
>
> (2) the concern for judicial economy; and
>
> (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[8] In **Borowski, supra**, the Court said at p. 345:

> 42 The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of the three basic factors is present. This process is not mechanical. The principles may not all support the same conclusion

and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[9] In **Smith, supra,** which dealt with the death of the appellant in a criminal matter, the Court states at p. 406:

> 50 In summary, when an appellate court is considering whether to proceed with an appeal rendered moot by the death of the appellant (or, in a Crown appeal, the respondent), the general test is whether there exists special circumstances that make it "in the interests of justice" to proceed. That question may be approached by reference to the following factors, which are intended to be helpful rather than exhaustive. Not all factors will necessarily be present in a particular case, and their strength will vary according to the circumstances:
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> 1. whether the appeal will proceed in a proper adversarial context;
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> 2. the strength of the grounds of the appeal;
>
> 3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:
>
> (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;
>
> (b) a systemic issue related to the administration of justice;
>
> (c) collateral consequences to the family of the deceased or to other interested persons or to the public;
>
> 4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;
>
> 5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.
>
> 51 What is necessary is that, at the end of the day, the court weigh up the different factors relevant to a particular appeal, some of which may favour continuation and others not, to determine whether in the particular case,

> notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed.

[10] When considering these factors, it is important to remember the specific context in which the judge was called upon to decide whether she had jurisdiction to refer Ms. C. to an assessor other than the one put forward by the Minister and, if so, to exercise her discretion.

[11] The Minister, not the mother, applied to the judge for an order referring Ms. C. for assessment, implying that she had determined that such an assessment was necessary and that she was prepared to pay for it. There was never a suggestion that the relative cost of the suggested assessors was an issue. There was no dispute that all assessors were excellent and had done assessments for the Minister previously. There was no suggestion the judge should not name a specific assessor in her order. There was no issue of timing at the October 25 pretrial as it appeared that all proposed assessors could begin their work at approximately the same time. Timing however was an issue at the November 22 pretrial when the judge's original decision was reconsidered because Ms. Eakin had indicated that her report could be ready two months earlier than that of Messrs. Whitzman and Cox. There was never a concern that either report would not be available for trial, as is often the case, because the Minister had not yet applied for trial dates. Nor was there ever a timing issue in terms of the time limits for completion of child protection proceedings legislated in s.45 of the **CFSA** as the final disposition decision with respect to this child does not need to be made until November 2007.

[12] The Minister's grounds of appeal raised both the issue of the judge's jurisdiction to refer Ms. C. to an assessor other than the one she recommended and the issue of how she exercised her discretion, if she had jurisdiction. The focus of the arguments at the hearing was on the jurisdictional question, the Minister describing it as the "nub of the appeal."

[13] The parties do not suggest that this specific fact situation arises often, which may suggest that the issue is of no public importance so that judicial resources should not be expended to deal with it. However, the parties do suggest that there is some tension among persons involved with work in the Family Division in Halifax as to whether a judge has jurisdiction to order the Minister to provide services under the **CFSA**, for example pursuant to s.13, to be paid for by the Minister and that this appeal may be relevant to that issue.

[14] The context in which the judge made her decision in this case and the issue before her was so specific that I am satisfied this appeal does not engage the larger issue referred to by the parties. This is not a case about the provision of services pursuant to s. 13. It would not be appropriate for this Court to comment on this larger issue in a vacuum. However, with respect to the jurisdiction issue alone the expenditure of judicial resources may be warranted even in the specific context of this moot appeal to clarify the issue that was before the judge and the particular context in which it arose.

[15] By deciding the merits of the jurisdiction issue the Court would neither be departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere. The question of whether the judge had jurisdiction to name the assessor in the context of the application before her falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement. In addition, the continued existence of the appropriate adversarial context and the short time frames legislated under the **CFSA** for child protection proceedings which may make the jurisdictional issue raised in this appeal evasive of appellate review, suggest this Court should exercise its discretion and decide the merits.

[16] I am satisfied this Court should exercise its discretion to decide the merits of the jurisdiction issue. I am not satisfied we should decide the merits of the appeal as they relate to the judge's exercise of her discretion. It would not be of any practical benefit to the parties or the public generally.

[17] The second issue for us to consider is whether the judge had jurisdiction to refer Ms. C. to an assessor other than the one put forward by the Minister.

[18] This court should only intervene in the judge's decision if she erred in legal principle or made a palpable and overriding error in finding the facts; **Children's Aid Society of Cape Breton-Victoria v. A.M.** 2005 NSCA 58; (2005), 323 N.S.R. (2d) 121, ¶ 26. As there were no facts found by the judge, we should only intervene if she erred in legal principle.

[19] On December 21, 2006 the judge ordered that the Minister have temporary care and control of the child pursuant to s.42(1)(d) of the **CFSA.** Thus s. 44(1) of the **CFSA** sets out the judge's jurisdiction:

> 44 (1) Where the court makes an order for temporary care and custody pursuant to clauses (d) or (e) of subsection (1) of Section 42, **the court may impose reasonable terms and conditions, including**
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> (a) access by a parent or guardian to the child, unless the court is satisfied that continued contact with the parent or guardian would not be in the best interests of the child;
>
> (b) access by any other person to the child;
>
> (c) the assessment, treatment or services to be obtained for the child by a parent or guardian or other person seeking the care and custody of the child;
>
> (d) **the assessment, treatment or services to be obtained by a parent or guardian, or other person residing with the child**;
>
> (e) where an order is being made pursuant to clause (e) of subsection (1) of Section 42, the circumstances or time when the child may be returned to the parent or guardian or other person under a supervision order; and
>
> (f) **any terms the court considers necessary**.
>
> (Emphasis mine)

[20] The parties did not provide, and I was unable to find, any cases exactly on point, where the Minister applied for an assessment and the only issue before the judge was a choice between the assessor put forward by the Minister or the one put forward by the parent, where both were agreed to be qualified. In **Children's Aid Society of Halifax v. C.V.**, 2004 NSSF 107; (2004), 228 N.S.R. (2d) 226, affirmed at 2005 NSCA 87; (2005) 233 N.S.R. (2d) 360 (C.A.), the Minister requested an assessment and the judge ordered that the parents could decide who their assessor would be. The judge stated:

> [80] Section 44(1) of the **Children and Family Services Act** permits the Court, when making an Order for temporary care and custody, to impose reasonable terms and conditions to that Order including the assessment, treatment

> or services to be obtained by a parent or guardian or other person residing with the child.
>
> [81] As indicated previously, the Children's Aid Society of Halifax has requested that the Respondents participate in an assessment which will include a psycho/social history, a psychological/psychiatric examination and assessment, a parental assessment including an examination and assessment of parental skills and techniques and a home study and assessment. It appears, from the materials filed, that Ms. C.V. consents to at least a portion of this assessment. . . .
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> . . .
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> [83] Regardless of Ms. C.V.'s consent, I am satisfied that it is appropriate to order the assessment requested by the Children's Aid Society of Halifax and I am prepared to grant the relief requested in this regard.
>
> [84] I am hopeful that this assessment will be beneficial to all of the parties to this proceeding. **As I have indicated previously, in light of the Respondents' conspiracy theories, I am of the view that the assessment process will be much more beneficial to Ms. C.V. and Mr. L.F. if they have a say in who actually conducts the assessment. In order to assist in this regard, I am going to give both of the Respondents until December 10th, 2004 (two weeks from the date of this decision) to advise the Agency's counsel, Elizabeth Whelton, in writing, of which psychologist and psychiatrist they wish to conduct the assessment. The psychologist and psychiatrist must both be individuals who are licensed and registered to practice in the province of Nova Scotia and must be available to undertake the assessment in the Halifax Regional Municipality without significant delay.** In the event that the Respondents do not provide the above-noted notification to Ms. Whelton, in writing, on or before the 10th day of December, 2004, the Children's Aid Society of Halifax shall be at liberty to select the psychologist and the psychiatrist who will conduct the assessment. If any difficulties arise in relation to this assessment (including the issue of payment of the psychologist or psychiatrist), I hereby reserve the right to deal with the matter further.
>
> (Emphasis mine)

[21] The question of the judge's jurisdiction to make such an order in **Children's Aid Society of Halifax v. C.V.**, supra, was not raised in the appeal to this Court nor does it appear to have been challenged in the trial court.

[22] E.A. Driedger set out the modern principle of statutory interpretation in the *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] Section 44(1) of the **CFSA** governs what a court may order once it has determined at a disposition hearing that the Minister should have temporary care and custody of a child. It provides that the court may impose "reasonable terms and conditions", including "any terms the court considers necessary." Section 44(1)(d) explicitly gives the court authority to refer a parent for assessment. There is nothing in the section restricting the court from referring a parent to an assessor different from the one recommended by the Minister. All of this suggests that a court has authority to refer a parent to an assessor other than the one put forward by the Minister if it considers this to be “reasonable’ and “necessary.” A number of relevant considerations would bear on the result such as the relative cost, the availability of each report and the relative expertise of the candidates. It is difficult to imagine that the legislature would have used the words in s.44(1) if it intended to restrict the judge to only refer a parent to the assessor suggested by the Minister in the present situation. I am satisfied that in the unique circumstances of this case the judge had the jurisdiction to make the referral she did.

[24] Accordingly, I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.