NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 125

Date: 20031121
Docket: CA 210920
Registry: Halifax

Between:

Minister of Community Services

Respondent

v.

B.F., B.W. and Mi'Kmaq
Family and Children's Services of Nova Scotia

Applicants/Appellants

Restriction on publication:	Pursuant to s. 94(1) of the **Children and Family Services Act**
Judge:	Cromwell, J.A. (in Chambers)
Application Heard:	November 20, 2003, in Halifax, Nova Scotia
Held:	Application for a stay dismissed with conditions
Counsel:	Andrew Ionson, for the applicants/appellants, BF and BW Bruce W. Gillis, Q.C., for the respondent, Minister of Community Services

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:

I. Introduction:

[2] A week ago, the Court allowed an appeal by the Minister of Community Services in this matter and ordered that four children between the ages of 8 and 4 be placed in the permanent care of the Minister: **Minister of Community Services v. B.F.**, 2003 NSCA 119. The children's parents, B.F. and B.W., who were the individual respondents on that appeal, apply for a stay of the Court's order while they seek leave to appeal to the Supreme Court of Canada. As a judge of the Court appealed from, I have jurisdiction to hear the matter under s. 65.1(2) of the **Supreme Court Act**, R.S.C. 1985, c. S-26.

II. Facts and Proceedings:

[3] A brief history of the proceedings will be helpful. The Family Court order which gives rise to the appeal directed that the children should remain in the applicants' care and custody, subject to a six month supervision order. During this period, the Minister was ordered to provide and pay for specific services, notably intensive, in-home parental support services: see **Nova Scotia (Minister of Community Services) v. B.F.** (2003), 216 N.S.R. (2d) 26; N.S.J. No. 157(Q.L.)(F.C.).

[4] On an appeal to this Court by the Minister, the Court found that the Family Court had erred in law by making a supervision order which extended beyond the statutory limit provided for in s. 43(4) of the **Children and Family Services Act**, S.N.S. 1990, c. 5. As pointed out in Fichaud, J.A.'s reasons on the appeal, that section provides, for present purposes, that "... in no case shall a supervision order or orders extend beyond 12 consecutive months of supervision from the date of the initial supervision order ...". The 12 month period expired on May 21, 2003 and the effect of the Family Court order was to extend the supervision order to November, 2003, nearly six months longer than the legislated limit.

[5] Pending the appeal to this Court, the Minister obtained a partial stay of the Family Court order: see: (2003), 216 N.S.R. (2d) 59; 2003 NSCA 73. Roscoe, J.A. ordered that the part of the Family Court order directing the Minister to provide

and pay for services should be stayed, but that the children should remain in the applicants' care subject to supervision pending the disposition of the appeal. She found that neither counsel had suggested that the children would be at risk pending the appeal if the part of the order providing for funding of services were to be stayed and that it appeared that the respondents (now applicants) adequately managed the basic requirements for several months prior to the trial.

[6] I emphasize that these findings were made in the context of a request by the Minister to stay the part of the order requiring specific services to be provided. The order under appeal did not contemplate a change in physical custody of the children: per Roscoe, J.A. at para. [5]. The factual distinction between the situation facing me and that before Roscoe, J.A. pending appeal to this Court is that what is sought to be stayed now is an order changing the place of residence of the children. The only issue before my colleague was whether specified services were to be provided pending the hearing of the appeal. However, it is significant to bear in mind that in seeking to stay the order which required those services, the Minister did not suggest that leaving the children at home without those services but subject to the general supervision of the Minister for the four months between the stay application and the hearing of the appeal would place the children at risk.

[7] The facts as disclosed by the findings of the Family Court judge and the record before him were summarized by Fichaud, J.A. beginning at para. [102] of his judgment. (The children referred to are B.W. Jr (aged 8), L.W. (Aged 6), R.W. (Aged 5) and A.W. (Aged 4). The quotation is lengthy, but provides necessary background.

> [102] The following is a paraphrased recitation from the trial judge's decision of the findings and statement of evidence apparently accepted by the trial judge:
>
> (a) The respondent B.F. had deficits in parenting skills which in 1995 resulted in another of her children being placed in permanent care because B.F. failed to recognize and protect the child from sexual abuse. (trial decision ¶ 3)
>
> (b) After B.W. Jr. was born, an Agency family skills worker was engaged in 1996 to help B.W. because of B.W.'s low functioning and inability to deal with the baby. B.W. opposed this service. (trial decision ¶ 4)

(c) In 1998 a dentist noticed untreated abscesses in B.W. Jr.'s mouth. The parents resisted Agency involvement. The Native Council of Nova Scotia advised of concern over nutrition, dental care and stimulation. (trial decision ¶ 5)

(d) It was determined that B.W. Jr. was developmentally delayed. In 1999 the respondent refused to place him in preschool. Reluctantly, the respondents accepted Agency help and financial assistance. B.W. spent some of the money inappropriately. (trial decision ¶ 6)

(e) By 2000 the Agency was providing extensive support. Progress was slow because of lack of cooperation by the respondents and their limited cognitive abilities. B.F. cooperated to the best of her ability, but B.W. was belligerent, and as a result, the service ended. (trial decision ¶ 7)

(f) There were concerns throughout about safety hazards in the home, broken windows, debris on the floor, lack of stimulation, lack of affection, parental lack of understanding of the Agency's concerns, lack of dental follow-through, yelling at the children, children harming one another, and children running out of the house into the road. (trial decision ¶ 8)

(g) In December 2000 B.W. Jr. still had toilet training problems, a heart defect was noted and dental hygiene continued to be a concern. (trial decision ¶ 9)

(h) L.W. requires extensive support and follow through for a speech defect. Follow up at home has been a problem. She has been diagnosed with aproxia, and has difficulty planning the necessary movements to produce a particular sound. Extensive and continued support is required. (trial decision ¶ 10)

(i) In 2001 there was concern about the home being kept to housing standards. In 2001 and 2002 there was reluctant participation by the parents in parental capacity assessments. The reports concluded that both parents have very limited cognitive ability and verbal comprehension which made it difficult to follow through with recommendations. Two of the children were developmentally delayed, and extensive home support was recommended. (trial decision ¶ 11)

(j) The parents have to be reminded to cooperate with Agency initiatives. (trial decision ¶ 12)

(k) In November 2001 the Agency contracted with the Conway Workshop Association to assist the parents. Progress was slow because of the respondents' lack of cooperation and distrust of the Agency. (trial decision ¶ 13)

(l) In June 2002, the Agency involvement decreased because the respondents asked for the service to end. (trial decision ¶ 14)

(m) R.W. also has been diagnosed with the speech problem aproxia. The Agency is concerned about follow-up at home. He has difficulty initiating, planning, organizing and monitoring. (trial decision ¶ 16)

(n) The trial judge, (trial decision ¶¶ 17 ff) quoted extensively from professional reports which were entered into evidence by witnesses who testified. The trial judge made no explicit finding rejecting any of these reports, and (trial decision ¶¶ 113 and 115) adopted the conclusions from those reports:

> 113. ... It is clear from the professional reports that long term support of this family is required and this should not mean Agency involvement for the whole period.

(o) Dr. Dominique Couture's report of December 12, 2000 stated that B.W. Jr.'s difficulties "related to lack of stimulation and lack of normal parenting". He may have perceptual difficulties. He has incontinence. He has a systolic click which suggests an abnormal aortic valve. He has otitis media which may require a hearing assessment from an ENT specialist. (trial decision ¶ 18)

(p) Ms. Deborah Pick, a psychologist, wrote a parental capacity assessment for the period February 15 to April 15, 2001. Ms. Pick reported that the home was unclean, the children were often unclean and lacked stimulation. (trial decision ¶¶ 19-20) The report concluded that the respondents had "very limited cognitive ability" with deficits in problem solving, comprehension, vocabulary, organization skills, attention span and memory. B.F.'s receptive vocabulary is equivalent to that of a 7-8 year old and B.W.'s is equivalent to a 9-10 year old. They lacked the understanding and skills to follow through consistently with instructions. B.F. lacked parenting/home management skills and her ability to acquire those skills was limited. B.W. has not overcome his anger with past experiences and is defensive. The assessment concludes "that these parents are not capable of meeting the needs of their children without extensive support" and "it is likely that they will require concrete, long-term support." The respondents

"seem to be very distrustful of having outsiders caring for their children." (trial decision ¶¶ 19-22)

(q) Ms. Sheila Bower-Jacquard, a psychologist, wrote a psychological assessment for the period April 12 to June 28, 2002. The assessment stated that B.W. Jr. has difficulty initiating, planning, organizing and monitoring and appears to have social and attention problems. B.W. Jr. required continuous intervention in the home to benefit from stimulation and motor skill activities. He required monitoring of his heart condition and tutoring. The home required intervention in the areas of safety, hygiene, medical and dental care. (trial decision ¶¶ 23-27)

(r) Deborah Pick, psychologist wrote another parental capacity assessment covering June 3 to August 14, 2002. The report noted that as of August, 2002 there were improvements in certain areas of concern, but many areas of concern remain. The respondents remained very dependant on others to assist them to follow through with appointments. There were concerns about B.W.'s ability to supervise his children. B.F. did not consistently follow through with activities between appointments. Both parents have difficulty giving directions and following through to see that tasks are completed. The report stated:

> B.F. and B.W. seem to respond best to recommendations when they are under pressure (eg. after a visit from the Agency during which there is serious discussion),however, tend to fall into old habits when they perceived the pressure is decreased. They often seem to do thing [*sic*] because they're instructed to and not because they recognize the importance of them.

The respondents still required a great deal of prompting, teaching, modeling and support. There was doubt that the respondents would ever be able to meet the needs of their children independently, and that even with support, the children's emotional needs might not be met. Ms. Pick stated that the respondents do not put the children's needs before their own, and the children do not live a normal existence. (trial decision ¶¶ 28-30)

(s) Dr. Ann Hawkins of the IWK Health Centre - Developmental Clinic wrote a report dated September 24, 2002 respecting B.W. Jr. She concluded that B.W. Jr. has a non-verbal learning disability and cannot work at the grade two level. He requires a great deal more practice on motor skills. He lacks focus and has short attention span. He has a reading problem of a phonetic nature and has difficulty recognizing letters. It is likely that B.W. Jr.'s problems result from a combination

of genetics and environment which result in his academic and behavioural difficulties. She stated that B.W. Jr. requires a great deal of one-on-one support, certainly requires an individual program in math and perhaps in reading. A toileting program is essential to deal with his incontinence . The report stated "the children seemed very needy of affection and tend to look to individuals other than their parents for this affection." (trial decision ¶¶ 31-35)

(t) Diane AuCoin, Family Life Counselling Support Worker, wrote a report in October, 2002. The report stated that B.F. missed appointments scheduled to teach parenting skills. B.W. also missed appointments and refused to participate during sessions. B.F. became argumentative and refused suggestions. As a result, the sessions were discontinued. L.W. has difficulty with her expressive language, but can speak in four or five word phrases as opposed to the grunts and gestures which were her mode of communication at the beginning of the sessions. R.W. also has language difficulties but uses speech when another shares attention with him. (trial decision ¶¶ 36-44)

(u) Darlene Lawrence of the Family Resource Centre proposed the respondents' plan. Ms. Lawrence stated that the family will always need some kind of part-time support. She stated that both B.F. and B.W. have impaired cognitive abilities. (trial decision ¶¶ 46-52)

(v) The Conway Workshop Association issued a progress report on October 25, 2002 which noted that the family has made considerable progress.

(w) Kevin Graham is a psychologist who conducted over 30 sessions with B.W. beginning in late spring, 2001. Mr. Graham stated that the children will continue to be in need of outside support to provide for their needs. (trial decision ¶¶ 55-56)

(x) The trial judge (trial decision ¶ 99) noted that there had been recent improvements with some of the concerns but (trial decision ¶ 100) acknowledged:

... there remained a risk of emotional harm to the children given their diagnosed difficulties and the Respondent's [*sic*] cognitive deficits.

(y) The trial judge stated, (trial decision ¶¶ 113, 115):

> It is clear from the professional reports that long-term support of this family is required and this should not mean Agency involvement for the whole period.
>
> That this family needs long term support all professionals concurs [*sic*].

[103] From this recitation, it is apparent that the children have special needs. Their health and safety, behavioral well being and development are seriously at risk. At least some of the children's deficits are a product of their deprived environment.

[104] It is clear that to respond to these special needs the parents or care givers must be able to understand the problem and the need for response, must have the ability to stimulate and care for the children, must be willing and able to cooperate with the professionals (in home and external) upon whose services the children will depend and must be able and willing to follow through with regimes for treatment and amelioration.

[105] It is also clear the respondents have cognitive deficits and parenting deficiencies which significantly impair their ability to recognize or satisfy their children's special needs. The respondents have made some improvements with the assistance of the intense initiatives provided by the Agency. Nonetheless, as Ms. Pick stated: (quoted in trial decision ¶ 30)

> B.F. and B.W. seem to respond best to recommendations when they are under pressure (e.g., after a visit from the agency during which there is serious discussion), however, tend to fall into old habits when they perceived the pressure is decreased. They often seem to do thing [*sic*] because they're instructed to and not because they recognize the importance of them.

III. Order Requested:

[8] The applicants ask me to stay the order of this Court in certain respects. Strictly speaking, a stay of this Court's order would leave the Family Court order,

with its direction to provide services, in place. But that is not what the applicants seek. They ask that the children be left in their care subject to Agency supervision, but without the requirement that the services ordered by the Family Court be provided, pending their application for leave to appeal. They seek, in effect, a continuation of the stay which was granted by Roscoe, J.A. at the request of the Minister pending the appeal of the Family Court order to this Court.

IV. Legal Principles:

[9] The application is, as mentioned, under s. 65.1 of the **Supreme Court Act**. Given that an application for leave to appeal has not yet been filed, the specific statutory authority for the stay is s. 65.1(2). That subsection provides that the proceedings may be stayed with respect to the judgment from which leave to appeal is being sought on the terms deemed appropriate if I am satisfied that the applicants intend to apply for leave to appeal and that delay would result in a miscarriage of justice. For convenience, the text of s 65.1(1) and (2) reads:

> **65.1** (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
>
> (2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

[10] These provisions have been held to authorize "... any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the [Supreme] Court of the controversy, so as to enable the Court to render a meaningful and effective judgment.": **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311 at p. 329.

[11] The test for a stay under s. 65.1, in circumstances in which a leave application has been filed at the time the stay is sought, was set out by the Supreme

Court in **RJR-MacDonald** . (In fact, by the time the decision on the stay was given in that case, leave to appeal had been granted.). Briefly, the test calls for examination of three factors: the strength of the case on the merits to ensure that it raises a serious question, whether the applicant for the stay will suffer irreparable harm if the stay is refused, and finally which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: at p. 334.

[12] I should clarify certain aspects of this test as it applies in the context of this case. In applying the first part of the test I must remember that, as leave has not been granted at this point, the first part of this test must be modified so as to be concerned with whether there is a serious or arguable issue for leave being granted pursuant to s. 40 of the **Supreme Court Act**. In other words, the question is not simply whether there is an arguable issue of law, but whether there is an arguable issue of law which could qualify for leave to appeal to the Supreme Court of Canada. As decided by Freeman, J.A in **Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.** (1995), 144 N.S.R. (2d) 326 (C.A. Chambers), this requires that the applicants show that there is an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court of Canada as required for leave to appeal to that Court under s. 40 of its **Act**.

[13] A second aspect that differs from **RJR-MacDonald** is that s. 65.1(2) of the **Supreme Court Act** requires that the applicants satisfy me that they intend to apply for leave and that delay (that is, waiting to consider the stay application until the leave application has been filed) would result in a miscarriage of justice.

[14] A third clarification is necessary because, unlike **RJR-MacDonald**, this case involves the care and custody of children. It follows that the decision to grant or deny a stay must weigh and give effect to their best interests. In my view, this requirement leads to some modification of the irreparable harm aspect of the test. The primary focus in a case like this should be on the risk of irreparable harm to the children while, of course, taking due account of the rights of the parties. In addition, given the need for stability and finality in child custody matters, there will generally need to be circumstances of a “special and persuasive nature”, usually connected to the risk of harm to the children, in order to persuade the Court to grant a stay: see, for example, **Children’s Aid Society of Halifax v. B.M.J.**

(2000), 189 N.S.R. (2d) 192; N.S.J. No 405 (Q.L.)(C.A. Chambers) at paras. 29 - 30 and the cases cited there.

V. Analysis:

[15] I will consider each element of the test in turn.

(i) intention to seek leave:

[16] I am satisfied that the applicants intend to seek leave to appeal to the Supreme Court of Canada. I accept counsel's assurance that the application will be filed on or before December 5, 2003.

(ii) miscarriage of justice:

[17] In the time available to me, I have found little judicial consideration of this requirement: see **Pelley v. Pelley** (2003), 222 Nfld. & P.E.I.R. 305 (N.L.C.A. Chambers); **Canada (Minister of Indian and Northern Affairs) v. Corbiere** (1996), 206 N.R. 122; F.C.J. No. 1620 (Q.L.) (F.C.A. Chambers) . I take the requirement to mean that there is a risk of injustice occurring if the consideration of the stay application were to be deferred until after the leave application has been filed. Here, the respondent intends to remove the children from the applicants' care as soon as an appropriate placement can be found for them. This could occur at any time and once a placement is found, the Minister intends to act on it quickly. I am, therefore, satisfied that to delay considering the stay application until an application for leave has been filed could result in a miscarriage of justice in the sense that if a stay is found to be appropriate, it could come too late if delayed until after the leave application has been filed.

(iii) strength of case:

[18] The main legal issue addressed by the Court was whether the Family Court judge had erred by extending the statutory time limit for supervision orders under the **Children and Family Services Act**. Although it was also argued on the appeal that the judge had erred by ordering the Minister to provide and pay for certain services, the Court did not deal with that issue in light of its conclusion that the judge had erred in extending the supervision order (during which the services were to be provided) beyond the time limit set out in the statute. The applicants advise that they intend to raise in their leave application both of these issues, as well as the question of when an appellate court should use its authority under s. 49(6)(c) of the **Family and Children's Services Act** to make a disposition order as the Court did in this case.

[19] I am satisfied that there is at least an arguable case for leave to appeal in the sense that the application is not frivolous or vexatious: see **RJR - MacDonald** at p. 337. I note that the Court commented at p. 337 that this threshold is "a low one."

(iv) risk of harm:

[20] The fundamental issue in an application of this sort is to balance the risks of harm — particularly harm to the children — in light of the possible, but as yet unknown, outcome of the application for leave to appeal. To paraphrase R. J. Sharpe's description of the central problem posed by interlocutory injunctions (of which the stay pending appeal may be viewed as an example), the issue may be best understood in terms of balancing the relative risks of granting or withholding the remedy. The applicants must show a risk of harm produced by the combination of the continuing in force of the order under appeal and the delay until the result of the proposed appeal is known. This risk is that if the stay is withheld, their rights and the interests of the children will be so impaired by the time of final judgment that it will be too late to afford complete relief. On the other hand, this risk must be balanced with the risk of harm to the children if the stay is granted. The risk to be considered is that of harm to the children that could result from staying an order that may be affirmed on further review to be both lawful and in their best interests: R. J. Sharpe, *Injunctions and Specific Performance* (Canada Law Book Inc.: Aurora, updated to November, 2003) at para. 2.90 - 2.100.

[21] The applicants' position, reduced to the basics, is that it would be very disruptive for the children to be removed from the home setting in which they have

been residing continuously for a considerable period of time including throughout these proceedings. The risk they identify is that this disruption would be followed by another move in the event the proposed appeal were successful. As expressed by the applicants in their helpful memorandum of argument:

> 13. It is further submitted that there are circumstances unique to these children that are of a special and persuasive nature, warranting a stay. With the exception of the brief disruption to [B.] Jr. when his biological mother and the Applicant [B.W.] Sr. separated, these four children have always been a part of an intact family unit. While their parents have cognitive deficits and these have impacted on the children, these children have not been exposed to family violence, drug and alcohol or sexual abuse, or the disruption caused by parental separation and loss, exposure to inconsistent parental approaches and the like. These children have had the benefit to a "continuity of care" that, in light of the circumstances, could be seen as quite remarkable. As well, the three elder children have special needs that are being addressed. The Applicants' affidavit indicates that the children are established in routines relating to schooling and health care that are meeting their needs. Services within the community of Digby have been implemented that may [not] be replicated elsewhere. Nevertheless, it is submitted that the attendant disruption, along with an estrangement from the only caregivers these children have known, could only have an adverse affect on these children. Over its lengthy involvement with this family the Respondent Minister has not disrupted the bond these children have forged with their parents. It would be inappropriate to do so now, where the matter remains unresolved.

[22] The applicants' affidavit puts it this way:

> 14. We believe that to move the children at this time, in light of their routines and in light of the services they are now receiving would be very disruptive to the children and will cause them to lose some of the gains they have made. We love our children very much and want what is best for them. We know the children love us too, and feel safe in our home. We are prepared to continue to cooperate with [A.W.] or anyone else suggested by the Respondent Minister;

[23] Disruption of children, particularly temporary and avoidable disruption, is to be avoided. However, simple disruption, in the sense of moving children from one stable and appropriate environment to another, has usually not been taken, on its own, as sufficient risk of irreparable harm to justify a stay pending appeal. As Flinn, J.A. pointed out in **Children's Aid Society of Halifax v. B.M.J.**, **supra** at

para. 42 , " ... disruption will be present in every case involving the transfer of care of young children. If that was the sole basis on which [a stay were to be granted], it would be tantamount to making a stay automatic in cases involving the custody of young children ...". (See also, **G.R. v. C.M.**, [2003] A.J. No 1169 (Q.L.)(C.A. Chambers). Generally speaking, something more than evidence of the inevitable disruption of change of place of residence will be needed to demonstrate a risk of irreparable harm.

[24] In my opinion, there are some additional elements in play here. There are four siblings and there is a risk that if the stay is refused, they may not only be separated from their parents, but from each other. Refusal of the stay would not simply move the children from their place of residence or even result in placing them with another parent. It would remove them from their home and both of their parents and, probably, place them with strangers. Moreover, as troubled and inadequate as their home life has been, the *status quo* has been in place for a considerable period of time – in fact, for a period that would seem to be "forever" from the perspective of these young children. I would conclude that there is at least some risk of irreparable harm resulting if these children were moved and in retrospect as a result of a successful appeal it was proved that the move should not have been made.

[25] It is appropriate for me, therefore, to move on to consider the risk of harm to the children if the stay is granted.

[26] Given the position taken by the Minister on its own stay application before Roscoe, J.A., it cannot now be argued that leaving the children where they are, subject to general agency supervision, will place them in any immediate risk. However, time marches on. The risk identified by the Minister is not so much the result of what may happen to these children if they are left where they are, but what will <u>not</u> happen to them.

[27] The Minister points out that, as found by both the trial judge and this Court, these children have significant and urgent needs. I have already set out the detailed summary of their situation contained in Fichaud, J.A.'s judgment. I simply repeat his conclusion, speaking for the Court at para. [103], that the children have special needs, that their health and safety, behavioural well-being and development are seriously at risk, and that at least some of the children's deficits are a product of their deprived environment. This gloomy assessment is not at all inconsistent

with the trial judge's findings of fact or assessment of the evidence. It is based on them. I would also point out that the resolution of the legal question raised in this appeal about the permitted length of supervision orders will not change this assessment of the children's needs. The case is about how those needs should be meet, not whether those needs exist.

[28] While it is not suggested that the children are at any immediate risk, they are living in a setting in which their parents cannot be counted on to provide even the most basic aspects of their care on a consistent basis. The ongoing supervision of the Agency provides some measure of protection, but it must be remembered that the trial judge found that these children should only remain at home with extensive support services. Given the young ages of these children, every day that passes without full and proper attention to their many needs increases the risk that their development will be permanently affected.

[29] I would conclude, therefore, that there is some risk of irreparable harm to the children if the stay is granted. The only way to be sure, at this stage and in the current understanding of the applicable law, that these children will receive the services they need is to permit them to be placed in an appropriate foster setting without further delay.

(v) Balance of Risk of Harm:

[30] That brings me to the balance of the risk of harm - that is, to consideration of what order would best minimize the overall risk of harm to the children pending disposition of the applicants' application for leave to appeal.

[31] Assessment of the respective risks of granting or refusing the stay requires information about the effects of each course of action. I have reasonably good information about what will happen if I grant the stay, as I have discussed above. I have much less information about what will happen to the children should I refuse the stay. This makes the assessment of the risks of refusing the stay extremely difficult.

[32] The Minister's plan for the children advanced in the Family Court had been for permanent care and custody with placement for adoption. Realistically viewed, no placement for adoption can occur with a leave application outstanding so that

the granting or refusal of the stay will not, in any practical sense, have impact on such a placement.

[33] Counsel for the Minister advised during the hearing that there is no intention to remove the children from the applicants' care until a suitable foster placement is found for them. What is being sought is a placement (or perhaps, if necessary, placements) in which the children can be kept together (or at least in very close proximity to each other) and in reasonably close proximity to their parents so as to facilitate ongoing contact with them. This will make it certain, it is submitted, that the children will receive the sort of care and services they need while not severing contact with their parents and each other.

VI. Disposition:

[34] I have no doubt at all that if a placement along the lines suggested by counsel for the Minister could be obtained, the balance of convenience would strongly favour refusing the stay. The children would receive reliable and effective day to day care while maintaining contact with each other and their parents near their home and familiar surroundings. Schooling and other day to day arrangements could likely continue as at present and provision of necessary care and services would be assured.

[35] The difficulty I have is that no such placement has as yet been found. If I simply dismiss the stay application, it may turn out that some quite different placement is obtained because what the respondent is now seeking proves to be unavailable. In saying this, I do not intend to suggest any lack of candour or anything other than good faith efforts being made to find the sort of placement which was described to me. I simply acknowledge the obvious fact that often something far less than the ideal is what proves to be available. Given this uncertainty, it is appropriate for me to do what I reasonably can to assure that my balancing of the risks of harm is based on the options actually available to the children. The point is not that I wish to engage in ongoing judicial supervision of the care of these children by the respondent. The point is that my order will be premised on my assessment of the balance of risks resulting from a comparison of the two options for the children placed before me. If one of those options, due to no one's fault, turns out to be quite different than what was hoped for, the premise of my order will have disappeared.

[36] I am sensitive to the pressures of time and resources on the respondent as well as the need to respond flexibly and promptly to the needs of the children in light of the available placement options. I have no wish to attempt to "micro-manage" the discharge of the respondent's statutory duties. However, it is appropriate for me to do what reasonably can be done to assure that the basis on which I have exercised my authority and responsibility in relation to these children, their parents and the community reflects the actual situation of the children.

[37] I, therefore, will dismiss the stay application, but on the following conditions. Before moving to enforce the order of this Court granting permanent care and custody of the children to the respondent, the respondent shall give reasonable notice of the particulars of the intended placement of the children upon their removal from the applicants' care and custody. I intend the term "reasonable" in this context to mean such notice as can be given taking into account the exigencies of obtaining placements. On receipt of such notice, the applicants shall be at liberty to apply again for a stay of proceedings if the intended placement differs in significant respects from that outlined in the course of submissions to me by counsel for the Minister and summarized earlier in my reasons. Such application, if any, must be made within 48 hours of receipt of the notice and be made returnable before a judge of this Court at the first possible opportunity bearing in mind the discretion of the Court to abridge the usual periods for service of notice.

[38] I will issue an order reflecting my disposition. I am grateful to both counsel for their assistance in this difficult matter.

Cromwell, J.A.