Date: 20020816
Docket: CA 177775

NOVA SCOTIA COURT OF APPEAL
Cite as: D.J.M. v. Nova Scotia (Community Services), 2002 NSCA 103]

Bateman, Cromwell, Hamilton, JJ.A.

BETWEEN:

D.J.M.
Appellant

- and -

THE MINISTER OF COMMUNITY SERVICES

Respondent

REASONS FOR JUDGMENT

Counsel: E. Roxanne MacLaurin for the appellant
Deborah I. Conrad for the respondent

Appeal Heard: June 13, 2002

Judgment Delivered: August 16, 2002

THE COURT: Appeal dismissed per reasons for judgment of Hamilton, J.A.; Bateman and Cromwell, JJ.A. concurring.

HAMILTON, J.A.:

[1] This is an appeal from an oral interlocutory decision of Supreme Court Justice Suzanne Hood, delivered March 4, 2002. On a preliminary motion the Chambers judge held that the appellant is a compellable witness at the hearing to determine whether his name should be entered in the Child Abuse Register pursuant to s. 63(3) of the **Children and Family Services Act**, S.N.S.1990, c.5. She also held that the disclosure principles set out in **R. v. Stinchcombe**, [1991] 3 S.C.R. 326, S.C.J. No. 83 (Q.L.) were not applicable to the proceedings and did not order the respondent to provide further disclosure to the appellant.

[2] The standard of review applicable to an interlocutory discretionary decision is that this Court will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331.

[3] In the main proceeding the respondent applied to have the name of the appellant entered in the Child Abuse Register pursuant to s. 63(3) the **Act.** Section 63 provides:

> 63 (1) The Minister shall establish and maintain a Child Abuse Register.
>
> (2) The Minister shall enter the name of a person and such information as is prescribed by the regulations in the Child Abuse Register where
>
> (a) the court finds that a child is in need of protective services in respect of the person within the meaning of clause (a) or (c) of subsection (2) of Section 22;
>
> (b) the person is convicted of an offence against a child pursuant to the Criminal Code (Canada) as prescribed in the regulations; or
>
> (c) the court makes a finding pursuant to subsection (3).
>
> (3) The Minister or an agency may apply to the court, upon notice to the person whose name is intended to be entered in the Child Abuse Register, for a finding that, on the balance of probabilities, the person has abused a child.
>
> (4)A hearing pursuant to subsection (3) shall be held *in camera* except the court may permit any person to be present if the court considers it appropriate.

[4] The application under s. 63(3) arose from investigations into alleged abuse at the Shelburne Youth Centre (formerly the Nova Scotia School for Boys).

The appellant was, at the relevant time, a Catholic priest in Shelburne and provided services to the Shelburne Youth Centre.

[5] The appellant was notified of the respondent's application for a finding pursuant to s.63(3). As is required the application included a caution to the appellant that if he did not file a Notice of Objection within 30 days, the court could make a finding of abuse for purposes of entry on the Child Abuse Register without further notice to him. The affidavit of Monique Andrea, a social worker and an agent of the respondent, providing particulars of the alleged abuse, was also served on him.

[6] The appellant filed an amended Notice of Objection, stating:

i) The allegations against me are false;
ii) I have never been convicted of any offence.

[7] Following the filing of the Notice of Objection, by letter dated July 31, 2001, appellant's counsel requested additional disclosure from the respondent. By reply letter dated August 3, 2001, respondent's counsel agreed to provide some of the information requested; indicated that some of the material requested did not exist (such as Operation Hope Compensation files); indicated that the material in the possession of third parties should be obtained by the appellant from the third parties; suggested that obtaining some of the material requested would engage confidentiality issues; and stated that some of the requested material (such as the statements of the alleged victims who would not be giving evidence at the s. 63(3) hearing) was not relevant because the respondent would not be relying on this material at the s. 63(3) hearing.

[8] There was no written application by the appellant setting out the issues to be determined by the Chambers judge on the preliminary motion. Counsel inform us that the issues in dispute were raised with another judge during pre-trial telephone conferences with counsel.

[9] The only evidence before the Chambers judge was the affidavit of Ms. Andrea, sworn May 11, 2001. There was no cross-examination on the affidavit and counsel did not refer to it in their oral submissions to the Chambers judge. The affidavit indicates Ms. Andrea worked in the Child Protection Investigative Unit, working with Operation Hope, the R.C.M.P investigation into the alleged abuse. In her affidavit she indicates the appellant's name was referred to her to investigate and determine whether he posed a possible risk to children. She details the process she followed to do this, which included reviewing material from the RCMP, interviewing the appellant, speaking with the four alleged victims who agreed to testify at the s. 63(3) hearing, reviewing records of other alleged victims of the appellant who could not be located or were unable to communicate with her, and attending a Risk Management Conference where it was determined there was sufficient evidence to apply to have the appellant's name entered in the Child Abuse Register. She names the four alleged victims who have agreed to give evidence at the hearing and provides their statements with respect to the appellant. In her affidavit she

indicates there are no ADR reports regarding the appellant and his alleged victims and that there is no statement of the appellant in the investigation records, because he was not a government employee. The nature of the allegations of abuse made against the appellant, by the four alleged victims who will testify at the s. 63(3) hearing and by the other alleged victims, are set out in her affidavit.

[10] The affidavit makes it clear that Ms. Andrea had access to RCMP records relating to the appellant and the alleged victims at the time she was investigating whether an application should be made under s. 63(3). Respondent's counsel indicates this access is no longer available and that the respondent would now have to make an application to court to obtain production from the RCMP and from other third parties. There is no evidence on this.

[11] While the affidavit of Ms. Andrea was the only evidence before the Chambers judge, the Chambers judge also had a copy of the July 31, 2001 and August 3, 2001 letters on disclosure between counsel. The appellant's letter does not indicate the authority pursuant to which he is seeking disclosure. Similarly, the respondent's letter does not set out support for the respondent's position that he is only required to disclose material on which he is going to rely at the s. 63(3) hearing. It also does not indicate which, if any, of the requested documents are or have been in the possession, custody or control of the respondent.

[12] There was no evidence before the Chambers judge of the disclosure practice usually followed by the respondent in this type of case. (In contrast see **K.(S.D.) v. Alberta (Director of Child Welfare**)(AQB), 2002 CarswellAlta 116 (eCarswell) where such information was provided to the court.) Respondent's counsel advised us that to some extent disclosure would be governed by her ethical obligations as an officer of the court. It is my view that the appellant is entitled to a more secure and defined basis of disclosure than the ethics of counsel. While there is absolutely no suggestion that these ethical obligations have not been adhered to, disclosure involves the rights of the appellant and not simply the ethical obligations of counsel.

[13] The oral representations made by counsel before the Chambers judge were based solely on **Stinchcombe** and the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The application was not one for civil production pursuant to any section of the **Act** or the **Civil Procedure Rules**.

[14] There is insufficient evidence in the record as to what information being sought by the appellant is available; whether certain of the information exists, and, if so, what third party has it; whether that third party will provide it to the respondent or the appellant, and if so, on what terms; and whether there are confidentiality issues. For example, we do not know if the alleged victims of the appellant, who will not be testifying at the s. 63(3) hearing, have consented to information relating to them being disclosed in a proceeding such as this. Counsel for the appellant maintains that such consents exist, so that we need not be concerned with production of their statements without notice to them. Counsel for the respondent states not all persons have adequately consented. Ms. Andrea's affidavit refers only to one consent, that of M.S.R. Accordingly, on the present record there is

insufficient evidence from which to determine whether appropriate consents exist to permit the disclosure of this information.

[15] The grounds of appeal as set out in the appellant's factum are:

> a) Is [D.M.] a compellable witness for the purposes of cross examination with respect to his Statement of Denial contained in the Notice of Objection (as amended) filed in relation to the Application by the Minister to have his name added to the Child Abuse Register pursuant to section 63(3) of the *Children and Family Services Act*?
>
> b) What are the duties of the Minister with respect to disclosure? Does the Minister's duty to disclose extend beyond materials contained in the Minister's file?

[16] In order to more appropriately conform to the arguments made before the Chambers judge I would restate the grounds of appeal as follows:

> 1. Did the Chambers judge err in finding that the appellant is a compellable witness at the hearing to determine if his name should be entered in the Child Abuse Register?
>
> 2. Did the trial judge err in finding the disclosure provisions set out in **R. v. Stinchcombe** do not apply to this hearing and refusing to order further production by the respondent?

[17] I will deal first with the Chambers judge's decision that the appellant is a compellable witness.

[18] Counsel for the appellant argues the appellant is not compellable. At the hearing before us counsel for the appellant conceded s. 11(c) of the **Charter** is not applicable because the proceeding in which the appellant is involved does not involve punitive sanctions, i.e., it is not a criminal, quasi criminal or regulatory offence. She relied instead on her argument that the appellant's rights under s.7 of the **Charter** would be violated if he is required to testify, focussing on the nature of the proceeding in which the appellant is involved. The respondent's position is that the appellant is compellable.

[19] Sections 7 and 13 of the **Charter** provide as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[20] As found by the Chambers judge, the proceeding in which the appellant is involved is a civil matter. As such the appellant is governed by s. 45 of the **Evidence Act**, R.S.N.S. 1989, c. 154 which reads as follows:

> **45** On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.
>
> (Emphasis added)

[21] Pursuant to the above, the appellant is compellable to testify at the hearing. By virtue of being compellable alone, without the need to consider the nature of the proceeding in which the appellant is involved, the appellant's s. 7 **Charter** rights are engaged. This is so because if the appellant fails to testify he may be subject to contempt proceedings. The question then becomes whether on the facts of this case he has been deprived of his s. 7 rights in accordance with the principles of fundamental justice.

[22] Here, if compellability limits the appellant's s. 7 rights, that limitation is in accord with the principles of fundamental justice because the appellant receives protection against the subsequent use of the compelled testimony (and, in an appropriate case, against the use of evidence derived from it) under s. 13 of the **Charter** and in accordance with the principles set out in **British Columbia Securities Commission v. Branch**, [1995] 2 S.C.R. 3, S.C.J. No. 32 (Q.L.). There is no evidence in this case that the testimony is being sought for any improper purpose and hence no argument that the limited exception to compellability described in **Branch** could be engaged in this case.

[23] It is important to note that the appellant has not challenged the constitutionality of s.45 of the **Evidence Act** or **Rule** 31.03(3).

[24] Accordingly, the Chambers judge did not err in finding the appellant is compellable.

[25] I will next deal with disclosure.

[26] Appellant's counsel argues the Chambers judge erred when she failed to order the respondent to disclose further information to the appellant. She argues the respondent should have been ordered to disclose all information listed in counsel's July 31, 2001 letter that has not been disclosed, except the medical and psychiatric information which she concedes does not have to be disclosed, namely items 7, 8, 9, 15, 16, 17, and 23. She further argues that if the information she is seeking is misdescribed in the letter, such as the Operation Hope Compensation files relating to the alleged victims that counsel for the respondent indicates

do not exist, the respondent is obliged to produce information of the type being sought, such as compensation files relating to the alleged victims.

[27] Appellant's counsel argues the respondent is required to make full disclosure to the appellant in accordance with **Stinchcombe**, whether the proceeding in which he is involved is criminal or civil.

[28] She says, as well, that the appellant is entitled to disclosure, generally, in accordance with the disclosure requirements set out in **S.D.K**., supra. Those disclosure provisions set out in **S.D.K.** are as follows:

> ¶ 1 Parents and guardians of children who are the subject of child protection proceedings under the *Child Welfare Act*, S.A. 1984, c. C-8.1, as amended, ("the CWA") are entitled to receive, upon request, disclosure of all relevant information in the possession of the Department of Child Welfare ("the Department") subject to the reviewable discretion of that Department which may decline to disclose information which is irrelevant or which may disclose the identity of informers or which may potentially harm a child's physical, mental or emotional health to a degree that such harm outweighs the entitlement of his or her parents to disclosure.
>
> ¶ 2 The Department is required to provide a sufficient description of any information so withheld to the parent applicant so that the latter may make an informed decision as to whether to apply for judicial review of the Department's decision. The Department may not rely on any withheld information in child protection hearings, directly or by providing a summary of it, without obtaining permission of the Court in advance of the child protection hearing, on notice to the parties from whom the information has been withheld.
>
> ¶ 3 The duty to disclose obliges the Department to produce to a parent relevant information which is not in its possession but which is within its power to obtain, including test scores and interview notes relating to that parent prepared by a psychologist whom the Department has retained, and witness statements obtained by police where there has been a criminal investigation as companion to the child protection proceedings, subject to any legal entitlement of such a third party to decline to provide disclosure.

[29] Appellant's counsel relies on **S.D.K**. as authority for her argument that the respondent is obliged to provide the appellant with more than the information in the respondent's file upon which the respondent intends to rely at the hearing (which respondent's counsel indicates has been provided). She argues the disclosure provisions in **S.D.K.** require the respondent to produce all relevant material in his file, regardless of whether the respondent is going to call the alleged victims referred to in this material at the hearing. She argues this would include the statements of the alleged victims who will not be testifying at the s. 63(3) hearing. She argues the respondent is required to provide a sufficient description of any information he withholds. She also argues that the disclosure provisions in **S.D.K.** would require the respondent to produce all relevant material involving the appellant and all alleged victims that is in the files of all government agencies and departments that were involved in

the investigation and prosecution of alleged abuse at Shelburne, arguing they are not third parties to the respondent, but branches of the Crown. The appellant argues these agencies and departments include the RCMP, the Department of Justice, Facts-Probe Inc., Stuart Stratton and the ADR process.

[30] Appellant's counsel acknowledges that, using the **Civil Procedure Rules**, she could obtain the information she is seeking from the other agencies and departments. It is the appellant's position, however, that pursuant to **Civil Procedure Rule** 20 the respondent is required to provide the documents she is seeking. In this regard the appellant relies upon **Rule** 20.01. In the appellant's view the respondent can more easily obtain the information. Neither counsel addressed the issue of whether all or only some of the **Civil Procedure Rules** apply to s. 63(3) hearings. Both assume **Rule** 20 applies, but neither addressed the applicability of the requirement for mutual production in that **Rule**. Neither addressed the issue of whether only **Rule** 69, entitled **Proceedings Under The Children and Family Services Act**, applies and, if so, what it incorporates by reference.

[31] At the same time that appellant's counsel argued that the respondent is required to produce relevant information held by the other agencies and departments mentioned above, she agreed the respondent is not required to produce anything not in its possession, custody or control, mirroring the words used in **Rule** 20.01. While these two arguments appear to be contradictory, counsel for the appellant attempts to reconcile them by stating that the respondent has control over the files of the other government agencies and departments, in the sense that it will be given the files if it requests them (which counsel for the respondent denies). There is no evidence on this point, only counsel's submissions. Counsel for the respondent indicates that her request to obtain from the RCMP, the criminal records of the alleged victims who have been located and agreed to testify at the hearing, was refused.

[32] The appellant also relies upon the wording of s. 38(1) of the **Act** which provides as follows:

> **38 (1)** Subject to any claims of privilege, an agency shall make full, adequate and timely disclosure, to a parent or guardian and to any other party, of the allegations, intended evidence and orders sought in a proceeding.
> (Emphasis added)

[33] The appellant says that the above words require full disclosure by the respondent.

[34] With respect to disclosure, the Chambers judge stated as follows at paragraph 50:

> "I, therefore, conclude that the Minister of Community Services is not under the obligations imposed upon the Crown in criminal proceedings by the *Stinchcombe, supra*, decision. However, the *Civil Procedure Rules* provide a mechanism whereby the documents sought by D.J.M. can be the subject of an application for a court order to produce. The court, pursuant to *Civil Procedure Rule 20.06*, however, must be satisfied on such an application, that the order for production is "necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest".

[35] The appellant has not made an application pursuant to **Civil Procedure Rule** 20.06 or pursuant to any other **Rule** or under the **Act**.

[36] The Chambers judge did not err in finding that the disclosure provided by **Stinchcombe** does not apply in this case. **Stinchcombe** was expressly stated by Sopinka, J. to apply to criminal proceedings by indictment: para. 26. As conceded by the appellant during oral argument, the appellant is not an accused person and the proceeding in which the appellant is involved is not a criminal matter. **Stinchcombe** is clearly not directly applicable.

[37] I am also satisfied the Chambers judge did not err when she refused to order the respondent to disclose in accordance with **S.D.K.**. In that case the judge concluded that neither **Stinchcombe** disclosure nor the production provided for in the Alberta **Rules of Court** were appropriate in child protection matters and used the authority provided by a regulation to the **Child Welfare Act**, S.A. 1984, c. C-81 to design rules of disclosure specifically for child protection matters. In determining what these specific rules should be the judge considered the requirements of s.7 of the **Charter**.

[38] In **S.D.K.** the judge accepted the argument that she had the authority to design such disclosure rules because of the regulation under the applicable statute:

> ¶ 24.... It argues that this Court has the power to modify the operation of the Rules of Court as it applies to practice and procedure under the *Child Welfare Act* pursuant to Alberta Regulation 184/85, *Child Welfare Act*, Court Rules and Forms Regulation, which reads in part:
>
> > 2(1) In any matter not provided for in the Act or this Regulation, the practice and procedure in the Court, as far as may be, shall be regulated by analogy to the Alberta Rules of Court and the procedures followed in the Court of Queen's Bench.
> >
> > (2) The Court may give directions on practice and procedure.
> >
> > (3) The Court on application may
> >
> > > (a) vary a rule of practice or procedure,
> > >
> > > (b) refuse to apply a rule of practice or procedure, or
> > >
> > > (c) direct that some other procedure be followed.
>
> ¶ 25 The Department acknowledges that it made no formal application to the trial court, or to this Court, to vary the civil production rules to endorse the procedure that it followed in this case but asks that this be done now, *ex post facto*. ...

[39] In designing the disclosure rules for child protection matters in **S.D.K.**, the judge considered the disclosure provisions in the Alberta **Rules of Court** as follows:

> ¶ 19 Those Rules have now been repealed and replaced in the Alberta Rules of Court by Part 13, Division 1, "Discovery of Records", which creates an obligation on each party to an action to prepare and serve an Affidavit of Records listing records which are in their possession, custody or power and which, as provided in Rule 186.1,:
>
> ... could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
>
> ¶ 20 Also of interest is Rule 187(7) which provides:
>
> Despite anything in this Rule, the Court may, on application, order a party to provide any further information to any other party that the Court may direct.

[40] The general requirement to produce documents within a party's "power" may have influenced the judge's decision to include disclosure of third party documents by the Director of Child Welfare, subject to any legal entitlement of such third party to decline to provide disclosure.

[41] The general production rule in the Nova Scotia **Civil Procedure Rules** uses different words. **Rule** 20.01(1) provides:

> **20.01.** (1) Unless the court otherwise orders, a party to a proceeding shall, within sixty (60) days after the close of the pleadings between an opposing party and himself, or within seven (7) days after the service of the originating notice where there are no pleadings, serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding and file with the prothonotary the list without a copy of any document being attached thereto.
>
> (Emphasis added)

[42] There is no regulation under the **Children and Family Services Act** similar to that relied on by the judge in **S.D.K.**, which authorizes a judge of the Supreme Court of Nova Scotia to design disclosure provisions for use in s. 63(3) hearings.

[43] In this case, there has as yet been no determination of what statutory or rule-based disclosure obligations apply or whether their use would assure a fair hearing. It is implicit in the appellant's arguments that the respondent has not complied with s. 38(1) of the **Act** (which is assumed by both parties to apply and about which I would reach no conclusion) and that **Rule** 20, while assumed to be available (again about which I would reach no conclusion) is inadequate. Those are issues that must first be determined. It may be that the application of the existing **Rules** facilitates adequate disclosure. In that case, it will be unnecessary to consider the implications of s. 7 of the **Charter** for the proceedings in which the appellant is involved. It is well-settled that the requirements of the principles of fundamental justice are highly contextual. An important part of the context for the purposes of this case is the existing statutory framework for the proceedings.

[44] Without a regulation authorizing a judge to design disclosure provisions in child protection matters such as the judge in **S.D.K.** relied on, and given that there are a number of discovery and production provisions in the **Act** and the **Rules** that are potentially relevant here that have not been judicially considered as to their applicability and adequacy because the application before the Chambers judge was framed almost exclusively in **Stinchcombe** and **Charter** terms, and given the limited evidence before the Chambers judge, it would have been premature for the Chambers judge, and would be premature for this Court on the record before us, to consider whether the existing disclosure provisions with respect to a s. 63(3) hearing are adequate to protect the appellant's s. 7 **Charter** rights.

[45] If the appellant thinks (as he apparently does) that the respondent has a disclosure obligation under s. 38(1) of the **Act** or under **Rules** 20 or 69 of the **Civil Procedure Rules** which has not been complied with, then it is open to him to bring the appropriate applications. Once the result is known, if the appellant feels that the standard of fairness required in this proceeding by s. 7 of the **Charter** has not been satisfied, an appeal from that decision may be brought that will have an appropriate context and underpinning. The appropriate underpinning could include evidence about the existence of consents, what information exists, what organization has it and the conditions under which that organization will release it to either of the parties. To make a determination that the existing disclosure provisions for a s. 63(3) hearing are inadequate to protect the appellant's s .7 **Charter** rights without this evidentiary basis would be inappropriate.

[46] The appellant's argument that s. 38(1) of the **Act** requires full disclosure of the type he is seeking because these words are contained in the subsection itself is not convincing, even if s. 38(1) applies.

[47] While the words "full, adequate and timely disclosure" are used in s. 38(1), they must be read in the context of the whole subsection. Reading these words in the context of the subsection makes it clear they mean full, adequate and timely disclosure of the matters described later in the subsection, namely: the allegations, intended evidence and orders

sought. The respondent indicates there has been full disclosure of the allegations, intended evidence and orders sought and this is not disputed by the appellant.

[48] Accordingly, I am satisfied the Chambers judge did not err in refusing to order further disclosure by the respondent given the nature of the application before her. I want to make it clear that because of the nature of the record before me, I am not deciding which, if any, of the **Civil Procedure Rules** apply in this case or whether s. 38(1) of the **Act** applies.

[49] I would dismiss the appeal with costs of $1,000 including disbursements payable by the appellant to the respondent.

Hamilton, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.