NOVA SCOTIA COURT OF APPEAL
Citation: ***C.L. v. Nova Scotia (Community Services)***, 2012 NSCA 88

Date: 20120821
Docket: CA 398039
Registry: Halifax

Between:

C.L. and S.S.

Respondents/Appellants

v.

Minister of Community Services

Applicant/Respondent

Restriction on Publication: pursuant to s. 94(1) of the **Children & Family Services Act**

Judge: The Honourable Justice David P.S. Farrar

Motion Heard: August 16, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion to strike or dismiss second ground of appeal referred to the panel hearing the appeal.

Counsel: Lisa Bevin, for the appellant S.S.
Stephanie Hillson, for the appellant C.L. not appearing
Peter McVey, for the respondent

Restriction on publication:

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:

"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 relative of the child."

Decision:

Background

[1] The Minister of Community Services brought a motion in Chambers requesting that the appellants' second ground of appeal (that the trial judge erred in declining to hear a **Charter** application) be struck or dismissed as being out of time. In support of this request the Minister is relying on **Rule** 90.13 and **Rule** 90.40(2) as well as s. 49 of the **Children and Family Services Act**, R.S.N.S. 1989, c. 5.

[2] At the conclusion of argument I decided I would refer the motion to the panel hearing the appeal for disposition pursuant to **Rule** 90.37(14). I advised counsel that I would provide additional written reasons for my decision. These are those reasons.

Facts

[3] On December 7, 2011, during the trial for permanent care and custody of C.L. and S.S.'s three children (the trial lasted 8 days spread out over six months from September, 2011 to February, 2012), counsel for the parents made a motion to raise a **Charter** issue. The **Charter** issue can be best summarized as follows: The **Act** has, as its paramount consideration "the best interests of the child" (s. 2(2)). As a result of what the parents' counsel described as a narrow interpretation of s. 47(2) of the **Act** by this Court in **Children and Family Services of Colchester v. K.T.**, 2010 NSCA 72, a trial judge no longer has sufficient discretion to modify the Agency's plan of care to ensure that it is in the best interests of the children. They argued the combined effect of the **Act** and **K.T.** raised a s. 7 issue.

[4] The trial judge heard submissions on whether to hear the **Charter** issue and ultimately dismissed the parents' motion in an oral decision on January 19, 2012. An Order dismissing the motion was issued on February 7, 2012.

[5] Three separate Orders for Permanent Care and Custody of the children were issued on May 7, 2012. It is from these Orders that the appellants' appeal.

[6] In the Notice of Appeal dated June 12, 2012, the appellants allege that the trial judge erred in declining to hear the **Charter** motion. Counsel for the Minister argues that the judge's order dismissing the motion to raise the **Charter** issue was an interlocutory order with the result that the appellants are out of time to appeal that issue. The Minister applied for an order dismissing this ground of appeal for failure to comply with the time limits arguing that the appellants would have had to appeal the February 7, 2012 Order by February 22, 2012 (within 10 days).

Issue

[7] Should the appellant's second ground of appeal be dismissed?

Analysis

[8] Counsel for the Minister relies on **Rule** 90.13 (which sets out the deadline for starting an appeal) and **Rule** 90.40(2) (which allows a single judge in Chambers to dismiss an appeal if the appeal is not conducted in compliance with **Rule** 90). The Minister also relies on s. 49 of the **Act** (which is a generic appeal provision). The Minister's argument is straightforward; **Rule** 90.13 requires that an appeal from an interlocutory order be filed within 10 days of the date of the order, the appellants have not complied with **Rule** 90.13 and, therefore, the second ground of appeal ought to be dismissed pursuant to **Rule** 90.40(2).

[9] The starting point for all questions related to the authority of a single judge in Chambers as compared to the authority of a panel of the Court of Appeal is Hallett, J.A.'s judgment in **Future Inns of Canada Inc. v. Nova Scotia (Labour Relations Board)** (1996), 154 N.S.R. (2d) 358, [1996] N.S.J. No. 434 ("**Future Inns**") (which was decided under the old Rules). **Future Inns** stands for the proposition that a single judge in Chambers has limited jurisdiction and may only exercise such powers as are explicitly granted to a single judge.

[10] In **R. v. West**, 2009 NSCA 63 ("**R. v. West**"), Saunders J.A. made clear that **Future Inns** continues to be the starting point for this issue in the context of the new Rules (see also, **A.B. v. Bragg Communications**, 2011 NSCA 38 (per Beveridge J.A.) at ¶ 27). Saunders J.A. stated the basic rule as follows:

> [45] My review of this Court's jurisprudence persuades me that the authority of a Chambers judge is limited to the specific powers established by the **Rules** or some other enactment. Any residual authority rests in the Court itself, and not a single member. This is confirmed in the current **Civil Procedure Rules** by the wording of **Rule** 90.48[…].
>
> In my opinion the clear intent under old **Rule** 62 (and now **Rule** 90) is that absent specific authorization, the powers of the Court of Appeal are to be exercised by a panel of the Court rather than a single judge in Chambers.

[11] It is also worth noting that in **R. v. West, supra**, Saunders J.A. stated:

> [61] Even if I were persuaded that I had the authority to decide the question, I would decline to exercise it in this case. It is clear there will be competing affidavits. Matters of credibility will have to be addressed which will, in all likelihood, transect some of the issues relating to the merits of the appeal. In such circumstances, I think the question of waiver is best left to the panel assigned to hear the case in November. I might add that none of the parties appearing before me objected to my referring this question to the panel, as is provided for in **CPR** 90.37(12)(d).
> (My emphasis)

[12] In **Chesal v. Nova Scotia (Attorney General)**, 2003 NSCA 86 ("**Chesal**"), Hamilton J.A. declined to strike paragraphs from a party's factum or to strike an entire Notice of Contention, noting, "these matters seem more substantial than the matters **Civil Procedure Rule** 62 indicates are to be dealt with by a chambers judge": ¶ 2. Similarly, the request that counsel for the Minister is making requires me to address, arguably, equally substantial matters that may go beyond the authority granted to a single judge in Chambers.

[13] The case law is clear that a single judge in Chambers only has such authority as is explicitly or implicitly granted in legislation or the Rules. In order for me to grant the relief requested by counsel for the Minister, I would need to accept his characterization that the order made by the trial judge was, in fact, an interlocutory order which needed to be appealed within the 10-day time limit. This is hotly contested by opposing counsel.

[14] Following Saunders J.A.'s reasoning in **R. v. West, supra**, it is my opinion that, even if I had the authority to grant the relief requested, I would decline to exercise it. Counsel for the parties are not in agreement on the nature of the issue. Counsel for the Minister is arguing, as his starting point, that this is an appeal from an interlocutory order. Counsel for the parents disputes the very premise of the Minister's argument, arguing instead that the trial judge made a decision akin to an evidentiary or **Charter** ruling in a criminal trial with the result that no interlocutory appeal is, or ever was, available. There is a danger that arguments on such a contested issue would raise issues relating to the merits of the appeal as a whole.

[15] Given the fundamental differences in the parties' characterizations of the trial judge's decision on the **Charter** application, in my view, the Minister's motion is better left to the panel to hear and decide: see **R. v. West, supra** and **Chesal, supra**.

[16] As a result, I refer the Minister's motion to the panel hearing the appeal.

[17] I will also leave to the panel the determination of costs, if any, to be awarded on the motion.

Farrar, J.A.