NOVA SCOTIA COURT OF APPEAL

Citation: ***Nova Scotia (Minister of Community Services) v. B.L.C.***, 2007 NSCA 45

Date: 20070424
Docket: CA 275634
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

B.L.C.

Respondent

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

Revised Decision: The text of the original judgment has been corrected according to the attached erratum dated September 21, 2007.

Judges: Roscoe, Bateman and Fichaud, JJ.A.

Appeal Heard: March 29, 2007, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Fichaud, JJ.A. concurring.

Counsel: Peter C. McVey and May S. Knox, for the appellant
Lola Gilmer and Karen Hudson, for the respondent

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 ("the Agency") appeals from an interlocutory order dismissing, in part, the Minister's application for the production of certain documents. The application came before Justice Beryl A. MacDonald of the Nova Scotia Supreme Court, Family Division, in a proceeding under the **Children and Family Services Act**, S.N.S. 1990, c. 5 (the "**Act**"). The decision is reported as **Minister of Community Services v. B.L.C.**, 2006 NSSC 379; [2006] N.S.J. No. 504 (Q.L.); 249 N.S.R. (2d) 368.

BACKGROUND

[2] In July of 2001 the Agency first became involved with B.L.C., mother of a child J.L. It was alleged that she was on medication, abusing alcohol and exhibiting inappropriate behaviour. That contact with the Agency ended when the file was closed in August of that year, it appearing that B.L.C. was receiving drug dependency counselling and attending with a psychiatrist to address her mental health issues. The child, J.L., is now in his father's custody and not involved in this proceeding.

[3] The Agency's involvement resumed in April 2004 upon receiving a referral from a pre-natal nurse at the IWK Hospital. B.L.C., who was then pregnant with K.E.C., had been admitted to the hospital preparatory to a caesarean section. She was said to be addicted to alcohol and to have imbibed heavily in the early months of her pregnancy. B.L.C. was prescribed anti-anxiety medication and referred for mental health counselling. The Agency commenced an investigation.

[4] K.E.C. was born on May 9, 2004. An initial plan that saw B.L.C. and K.E.C. living with B.L.C.'s mother broke down within the month. It appeared that B.L.C. had resumed drinking. Her mother could not care for K.E.C.. The child was taken into care. Those proceedings continued until the Agency proposed resolution by a memorandum of understanding setting out various conditions aimed at addressing B.L.C.'s substance abuse and mental health issues. B.L.C. refused to agree to the terms. Agency involvement ended in November, 2005 when the time limits under the **Act** expired.

[5] In May, 2006, the Agency initiated a protection application under the **Act** alleging the child to be in need of protective services. K.E.C., then two years old, was taken into the Agency's care. That application was supported by a detailed affidavit from Agency caseworker, Beth Archibald.

[6] K.E.C. was said to be in need of protection pursuant to s. 22(2) of the **Act**, paragraphs (b), (g), (ja) and (k):

> 22 . . .
>
> (2) A child is in need of protective services where
>
> > (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
> >
> > (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
> >
> > . . .
> >
> > (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
> >
> > (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
> >
> > . . .
> >
> > (j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

> (ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);
>
> (k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;
>
> . . .

[7] On August 25, 2006, B.L.C. admitted that the child was in need of protective services within s. 22(2)(k). On September 27, 2006 the Agency filed an application for a disposition order seeking permanent care and custody of the child.

[8] At a pre-hearing conference on October 2, 2006 the parties addressed the Agency's request for production of a variety of records, primarily medical. The respondent did not object to disclosing some of the records and the Agency withdrew certain of the requests. The judge was left to decide those areas remaining in dispute. It is from that determination that the Agency appeals.

ISSUES

[9] The Agency says the judge erred in law or in principle where she refused to order production of the records. The judge's rulings relied on her views respecting principles of relevance, privacy and necessity for production. I will address these topically under the analysis below.

STANDARD OF REVIEW

[10] In **Minkoff v. Poole and Lambert**, [1991] N.S.J. No. 86 (Q.L.); 101 N.S.R. (2d) 143 at p. 145, Chipman J.A. addressed the standard of review applicable to a discretionary, interlocutory order such as this:

> **[9]** At the outset it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this,

> unless wrong principles of law have been applied or a patent injustice will result.
> ...
>
> **[10]** Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. [citations omitted]

ANALYSIS

[11] It is helpful to situate the timing and context of the production application. Although the request for the various production orders had been included in the Agency's initial Protection Application, production was not pursued until after there had been a consent finding that the child was in need of protective services. Thus, at the time the application was heard the child was in need of protective services and the Court had sanctioned intervention by the Agency.

[12] Pursuant to s. 38(1) of the **Act**, an agency must make full and timely disclosure of the allegations, intended evidence and orders sought in a proceeding. There is no reciprocal disclosure obligation on a parent. We are advised by counsel that as a matter of practice the parties in child welfare proceedings do not serve and file a List of Documents (**Civil Procedure Rule** 20.01(1)). That **Rule** mandates the exchange of a list of "documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding", subject to withholding on a claim of privilege. Nor does the parent responding to a protection application commonly file a pleading, such as the "defence" that would be filed in civil actions. Therefore, an agency has no formal indication of the facts in issue nor access, as of right, to relevant documentary evidence within the control of the parent. Consequently, unless the parent consents, an agency must actively pursue disclosure through requests for production orders.

[13] Production orders serve a number of purposes. Document disclosure brings together records from a variety of community sources, providing both the parent and the Agency with information about the parent and child. This facilitates a better understanding of the case by both sides and provides a focus for remediation and an incentive for settlement. Additionally, the records will contain information about collateral sources who may assist in the development of expert opinions and assessments. The records further provide a foundation for the evidence from which the Court will determine the resolution which is consistent with the best interests of the child.

[14] The Agency's initial request for production was very broad seeking the "complete medical record" in relation to B.L.C. or K.E.C. or both from: MSI including Pharmacare records; Barry House (B.L.C. and K.E.C.); Capital Health Addiction Prevention and Treatment Services; The Nova Scotia Hospital; the Community Mental Health Clinic; family physician Dr. S.; QE II Health Sciences Centre including the Abbey Lane and Mental Health Clinic; psychiatrist Dr. M.; family physician Dr. D. (B.L.C. and K.E.C.); the Early Intervention Clinic (K.E.C.); pediatrician Dr. S. (K.E.C.); and IWK Health Centre (K.E.C.); and the "complete record" of Adsum Centre (B.L.C. and K.E.C.).

[15] B.L.C. opposed production of the records of Capital Health Addiction Prevention and Treatment Services (beyond those of Elizabeth Fitzgerald); the Nova Scotia Hospital, including a previous assessment by Dr. C.; Dr. S.; the QE II Health Sciences Centre including the Abbey Lane Mental Health Clinic; Dr. D.; and Adsum Centre.

[16] It was the Agency's position that these records would provide information about the risks to the child and the ability of the respondent to meet her needs. The respondent opposed production on the basis that some of the records in dispute would contain information not relevant to the proceeding; would reveal "a great deal of highly personal and private medical information"; and would be burdensome in terms of the volume of information generated.

[17] The judge ordered production of some of the records and denied the request for others. In relation to those for which production was not ordered the judge said, in summarizing her disposition:

[42] Having reviewed the principles to be applied to evaluate the Minister's request I find the following:

. . .

3. The medical records and files of Dr. S and Dr. D are only relevant in respect to consultations, and treatment involving the Respondent's alcohol and possible pharmaceutical or other drug addiction, her depression, post traumatic stress disorder and other conditions of mental illness. This information may be obtained by other means, by way of interrogatories or medical reports and therefore the Orders of Production in respect to these physicians are not granted.

. . .

5. The complete medical record, files and charts of the QEII, to the extent it has this information separate or in addition to the information held by the Abby Lane and the Mental Health Clinic, are relevant only in respect to admissions, consultations, and treatment involving the Respondent's alcohol and possible pharmaceutical or other drug addiction, her depression, post traumatic stress disorder and other conditions of mental illness. The Minister's request for an Order of Production from this institution captures information that is irrelevant and as a result is denied. A request restricted to the collection of relevant information would be considered but this request is not before me.

6. The Minister seeks the complete record and file of Adsum Centre. I am not informed by either party about what these records may contain. From its description on the web site, it is funded by the Department of Community Services and it *"provides support and programming, in a residential setting, to 16 women and their children who are trying to address barriers, which have led them to experience homelessness. Residents are asked to make a commitment of at least six months and stay a maximum of 12. As part of their exit strategy, women will develop a long-term plan that will encourage reflection and include tools to assist them to maintain safe, stable housing and the changes they've realized in their lives."* If this organization has kept records of every conversation the Respondent has had with staff, the records may contain significant irrelevant information. On the other hand if the Respondent's alcohol and possible pharmaceutical or other drug addiction, her depression, post traumatic stress disorder and other conditions of mental illness were identified "barriers" the recommendations made to her, her compliance, and her resulting plan are relevant to the plan of care and assessment. I do consider it important to consider the Respondent's right to privacy in respect to the production of irrelevant information. The relevant information must be produced notwithstanding the

> Respondent's wish to keep it private. However, it is not necessary to produce all the records. This organization may be requested to prepare a report, or interrogatories may be used in respect to the identified barriers, the recommendations made, the Respondents follow through and the plan she prepared prior to her leaving the Centre. Since the Minister is requesting all records in its Order of Production I deny the request.
> (Emphasis added)

[18] For the reasons set out below, it is my respectful view that the judge erred in principle where she refused to order production.

[19] As stated above, this production application came before the judge after the consent finding that the child was in need of protective services but in advance of the disposition hearing where the Agency would be seeking an order for the permanent care of K.E.C.. The Agency had been involved with B.L.C. for all but about six months of K.E.C.'s life - between the lapse of the first protection proceeding and the commencement of this proceeding. As set out above, B.L.C. formerly had contact with the Agency about J.L.'s care in 2001. K.E.C. continued in foster care at the time of the production application. It was the Agency's position that B.L.C. had long standing, unresolved health issues and could not provide the stable, ongoing parenting that K.E.C. needed.

[20] At the disposition stage the court must determine whether the child is to continue in temporary care, be placed in the permanent care of the agency or be returned to the parent. In so deciding the court must make both a retrospective and prospective inquiry:

> 42 . . .
>
> (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.

. . .

> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

(i) The Scope of Rule 69.08

[21] **Civil Procedure Rule** 69 governs proceedings under the **Act**. Production of third party records is addressed at 69.08:

> (5) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a hearing, the court may, on notice to the parties, make an order in Form 69.08A or 69.08B for the production and inspection of the document or the preparation of a true copy that may be used in lieu of the original.
>
> (6) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for the disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

[22] The wording of these subsections mirrors that contained in **Rule** 20.06(2) and (3), which applies to all civil proceedings. **Rule** 20.06 differs only in that it requires notice of the application to the affected document holder. Such notice is not required in **Rule** 69.

[23] There are no reported decisions on the meaning or application of **Rule** 69.08(5) and (6). There is, however, an established body of case law on **Rule** 20.06. The words of **Rule** 20.06 require a wide, liberal interpretation (**Gould Estate v. Edmonds Landscape & Construction Services Ltd.**, [1994] N.S.J. 15 (Q.L.); 127 N.S.R. (2d) 365 (C.A.)). A document which is relevant is subject to production. At the pre-trial stage, documents that have a ‘semblance of relevance’ are producible (**Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.**, [1995] N.S.J. No. 177 (Q.L.); 141 N.S.R. (2d) 180 (C.A.)). The 'semblance of relevance' test focuses on relevance, but also recognizes two

realities of the pre-trial stage when production is sought. First, at the early stage of a proceeding, the pleadings may not predict exactly what issues will be joined later at trial, after the refinements of the pretrial process have run their course. Second, the party seeking production is most often unaware of the document's exact contents, whereas at trial each party usually possesses the document and can address relevance by pointing to parts of it. These realities exist in a child protection case as in other civil proceedings under **Rule 20**.

[24] Not only is the relevance test adopted by the judge unsupportable for the above reasons, it is inconsistent with the basic principle of statutory interpretation that the same words are to be given the same meaning throughout a statute (**R. v. Zeolkowski**, [1989] S.C.J. No. 50 (Q.L.); 1 S.C.R. 1378; 61 D.L.R. (4th) 725 at 732 D.L.R. *per* Sopinka J.). **Rule** 69.08(5) and (6), using identical language to **Rule** 20.06(2) and (3), came into effect April 1, 1999 in the face of twenty-five years of jurisprudence interpreting **Rule** 20.06. Had the drafters intended a different test, different language would have been chosen.

(ii) Use of Criminal Standard

[25] The respondent urged that the test for relevance pursuant to **Rule** 69.08(5) should be set at a substantially higher standard than that required under **Rule** 20.06. The judge agreed saying:

> [15] The Respondent argues the higher standard used in criminal proceedings to determine relevancy should apply to child protection proceedings. I agree. The nature of these proceedings have very serious consequences for parents and for their children and therefore demand "*...a heightened concern for accuracy in fact finding...*" (D.A.Rollie Thompson in his article "*Are There Any Rules of Evidence in Family Law?*" (2003) 21 C.F.L.Q. 245)
>
> [16] In *R. v. O'Connor, [1995] 4 S.C.R. 411 at paragraph 22*, the Supreme Court required a judge to *"be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify."* I consider this to be the appropriate standard to use when evaluating the question of relevance in a child protection proceeding.

[26] In **R. v. O'Connor**, cited by the judge, the accused who was charged with sexual assault sought disclosure of the complainant's therapeutic counselling

records. The records were not in the possession of the Crown and thus not part of the disclosure provided to the defence. The majority of the Supreme Court, noting that a complainant's therapeutic records would rarely be relevant in a sexual assault trial, focussed on the need to carefully limit such applications so as to not discourage the reporting of sexual abuse. These concerns were balanced against the right of the accused to make full answer and defence. It was in this context that the more stringent test was endorsed. It was coupled with a procedure whereby the trial judge would first review the records to be disclosed to determine relevance. Unlike the complainant's therapeutic records in **O'Connor** which had only speculative relevance, B.L.C.'s physical and mental health are squarely in issue here.

[27] The judge supported her adoption of the more restrictive **O'Connor** test, in part, because she found that in child welfare proceedings there was "a heightened concern for accuracy in fact finding". While I do not accept that there is or ought to be any such distinction between the proof of facts in child welfare cases as compared to any other types of civil proceedings, if accuracy in fact finding were said to assume greater importance in child welfare litigation, this would militate in favour of a broad interpretation of relevance at the production stage to ensure that all potentially relevant information will be available to the trier of fact. It would not support restrictive disclosure.

(iii) Effect of Admitted Protection Finding

[28] Further problems with the judge's analysis are revealed in the following passage from the judgment:

> [18] Information that merely provides or supports a fact or proposition already admitted is not relevant. The Respondent has admitted to the protection finding pursuant to section 22 (2) (k):
>
> > the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody.

> [19] The affidavit filed with the Protection Application contained the factual material from which to conclude that the Respondent is unable to resume care and custody of her child because she suffers from alcohol and possibly pharmaceutical or other drug addiction that may be aggravated by depression, post traumatic stress disorder and other conditions of mental illness. Treatment and programs the Respondent has accessed in an attempt to eliminate or control these addictions and regain mental health have, for whatever reason, been unsuccessful. Since this is the information the Respondent had before her when she decided to admit to the protection finding it would appear she agrees with the Minister's analysis. In addition, section 40 (3) of the Act states:
>
> > A parent or guardian may admit that the child is in need of protective services as alleged by the agency.
>
> [20] The Respondent did not deny the factual information provided in the Minister's supporting affidavit. If there were factual allegations with which she disagreed, in respect to this protection finding, she should have provided this information at the protection hearing, otherwise she must accept all of the allegations as proof of the protection finding pursuant to section 22(2)(k). This admission renders further proof of the allegations irrelevant. No further evidence to prove the protection finding is required.
> (Emphasis added)

[29] With respect, the difficulties with the above analysis are obvious. Firstly, the Agency's protection application asserts that the child is in need of protective services within a number of the subsections of s. 22 (see para. 6 above). The mother's admission is limited to s. 22(k). Agency caseworker Beth Archibald's affidavit submitted in support of the protection application comprises some eighty-three paragraphs, to which is attached one hundred and seventy pages of caseworker notes. There was no agreed statement of facts supporting the need of protection finding. It is impossible to know which, if any, of the affidavit's factual assertions are admitted by the mother. At the disposition hearing B.L.C. cannot dispute that the child was in need of protective services but she may well take issue with the factual basis for that finding and may maintain that she has adequately addressed the issues leading to the child's need for protection.

[30] Secondly, the mother's consent to a need of protection finding pursuant to s. 22(2)(k) does not limit the Agency's right to marshal evidence relevant to other alleged protection concerns arising under s. 22(2)(b), (g) and (ja). Before making a disposition, in particular, before deciding whether the child can be returned to

the mother, the Court must know the full extent of any remaining protection issues.

[31] In addressing disposition the court must consider what remedial services have been offered to the parent, whether such services, if offered, have been pursued or refused and whether services would be adequate to protect the child in future (s. 42(2)). The court can only make such an assessment if apprised of B.L.C.'s circumstances both leading up to the protection application and for the period during which the Agency has had involvement. B.L.C.'s admission does not negate the relevance of documents supporting the assertions in the Archibald affidavit or those documents which may reveal additional concerns.

[32] Consent findings of protection are an efficient procedural tool which avoid early stage litigation and facilitate a focus on remediating the parenting issues. With respect, the judge's approach here would create a significant disincentive for either a parent or the agency to proceed on consent.

(iv) Necessity for Production

[33] Apparently relying upon **Rule** 69.08(6), the judge concluded that the records from B.L.C.'s doctors S. and D. need not be produced. She determined that production of the relevant portions of these records was not necessary because they "may be obtained by other means, by way of interrogatories or medical reports" (at para. 17, above).

[34] This interpretation of **Rule** 69.08(6) is inconsistent with the case law. Necessity is not a stand alone test used to deny production of a document which is otherwise relevant. As explained in **Business Depot Ltd. (c.o.b. Staples) v. 2502731 Nova Scotia Ltd. (c.o.b. Mailboxes Etc.)**, [2004] N.S.J. No. 384 (Q.L.); 227 N.S.R. (2d) 120 (C.A.), "necessity" and "relevance" are related terms - "Relevant evidence, if accepted by the trial judge, is the raw material necessary to dispose fairly of the issues" (*per* Fichaud J.A., for the Court).

[35] The judge's view, that production is unnecessary when interrogatories are available, treats production of relevant documents and interrogatories as mutually exclusive avenues. This is not the law. Production and interrogatories (and discovery in general civil litigation) are cumulative routes to the pretrial disclosure

of evidence (see, for example, **British Columbia Lightweight Aggregate Co. v. Canada Cement LaFarge Ltd.**, [1977] B.C.J. No. 326 (Q.L.); 80 D.L.R. (3d) 365 (C.A.)). The availability of interrogatories does not bar production.

[36] Situations will occasionally occur where the production of an otherwise relevant document is unnecessary, for example, where the applicant for production has the equivalent information in another form or, perhaps, where post-pleading admissions render the information sought no longer relevant. Without attempting to canvass all of the circumstances where production of a relevant document may not be necessary, it suffices to say here that the reasons provided by the judge in these circumstances do not support the curtailment of production.

(v) Privilege

[37] The respondent's objection to production of some of the records was based upon an assertion of privilege. The judge rejected that claim, concluding that no privilege attached to the records created as a result of the B.L.C.'s involvement with the Agency. She further held that any privilege that might attach to other records was superceded by the Minister's need for the information in order to develop and evaluate an appropriate plan for the child. On this issue the judge said:

> [36] Many of the records sought by the Minister were created as a result of the Respondent's involvement in a previous child protection proceeding. When an individual is directed by a court or agrees under a voluntary arrangement with the Minister to access services, he or she cannot do so with an understanding that communication with those service providers will be confidential. The Court, the Minister, or the agency involved will request reports from those service providers which will be based on communications and records of those communications. <u>These records cannot attract privilege</u>.
>
> [37] <u>Records created by individuals and service providers sought out by the Respondent on her own initiative may attract privilege but I consider the interest of the Minister to develop and evaluate an appropriate plan of care for this child takes precedence over the interest of the Respondent to keep relevant records, otherwise confidential, out of view</u>.
> (Emphasis added)

No cross-appeal or notice of contention has challenged the judge's rejection of privilege.

[38] In addition to the privilege claim, the respondent asserted a right to privacy in relation to "irrelevant information" that might be disclosed in the otherwise relevant records. In disposing of the privilege claim the judge considered and applied the principles addressed by the Supreme Court of Canada in **A.M. v. Ryan**, [1997] 1 S.C.R. 157. Privilege from disclosure is an exception to the fundamental proposition that everyone owes a duty to give evidence relevant to the matter before the court, so that the truth may be ascertained (**A.M. v. Ryan** at para 20). The four conditions to establish privilege at common law comprise the "Wigmore test". In **A.M. v. Ryan** McLachlin J., writing for the majority of the Court, noted that any claim to a privacy interest falls to be considered under the fourth branch of the Wigmore test. Issues of privacy are not reconsidered after having decided whether privilege lies. At issue in **A.M. v. Ryan** was production of a party's psychiatric records pursuant to British Columbia Supreme Court Rule 26(11), which is similar to our **Rule** 69.08(5). McLaughlin J. wrote:

> 16 Where the person objecting to production is a party to the action and privilege is raised, there is no need for a supplementary discretion under Rule 26(11), since in considering whether privilege exists on a case-by-case basis, the judge must take into account the interest of the person being asked to disclose. The fourth branch of the Wigmore test for privilege requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation. This means that the complainant's privacy interest and interest in maintaining a productive and healing relationship with her psychiatrist must be considered and weighed in determining whether privilege lies. The fact that her privacy interest arises and hence falls to be considered in the context of her relationship to her psychiatrist does not negate the fact that what is at issue is her privacy interest and whether it should, in the circumstances of the case, prevail over the defendant's right to disclosure. It thus becomes unnecessary to reconsider the same matters after having decided whether privilege lies. Having determined the issue of privilege, nothing remains to be considered under the Rule.
>
> 17 Requiring the judge to reconsider the matter under a residual discretion conferred by Rule 26(11) according to a different methodology would, moreover, be confusing for trial judges. Even more serious, it might on occasion result in a conflicting conclusion. . . .

(Emphasis added)

[39] At paragraphs 32, 33, 39 and 41 of **Ryan** McLachlin J. discusses the concept of partial privilege and the possibility of a judge editing a document to remove non-essential material or placing conditions on who may view or copy a document. However, all of these measures are considered in the context of ascertaining 'privilege'.

[40] It was in an apparent effort to give separate effect to B.L.C.'s right to privacy, that the judge determined that relevant records which might be obtained through other means need not be produced. The judge suggests, for example, that interrogatories or medical reports would suffice. Respectfully, without an order, the Agency has no right to demand information about B.L.C. from her doctors either by way of interrogatories or a medical report.

[41] Counsel answers that B.L.C. would consent to "interrogatories" or to the preparation of a report. Inevitably, any such consent would be conditional upon B.L.C. agreeing to the form of the interrogatories or to the relevance of the information requested. In practical effect this gives B.L.C. control of the flow of information. After expressly rejecting privilege, the judge effectively elevated B.L.C.'s privacy claim to a novel class of constructive privilege. As is clear from **A.M. v. Ryan, supra**, there is no legal basis for that innovation.

[42] It is inevitable that some irrelevant material will be contained in the medical records. It is unrealistic to suggest this can be excised before production. The determination of relevance cannot be delegated to the third party record holder. The concern that irrelevant material will be revealed is of little merit. Only relevant material will be admissible at trial. Court records in child welfare proceedings are, *prima facie*, available only to the parties (**Civil Procedure Rule** 69.16). Documents received through the production process are protected by the implied undertaking rule. In this context, concern for B.L.C.'s privacy cannot defeat the Agency's right to have the medical records produced.

[43] This is not to suggest that where the records to be produced would be particularly voluminous the judge cannot explore, with counsel's input, ways in

which production might be streamlined, as was done by Davison, J. in **Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.** (1994), 137 N.S.R. (2d) 123 (S.C.) (at para. 24). Any such involvement by the judge in the production process should be the exception, not the rule, given the limited time lines within which these proceedings must advance and the reality of scarce judicial resources.

(vi) Best Interests of the Child

[44] In further limiting access to the records of doctors S and D the judge said:

> [25] The Minister has requested the complete medical records and files of Dr. S. and Dr. D., the Respondent's family physician's. Dr. S. would have nothing of relevance because he has not been her physician since the commencement of these proceedings. Dr. D., her current physician may have records that have a reasonable possibility to confirm or deny the Respondent's compliance with the court orders.
> (Emphasis added)

[45] As I have noted above, in projecting B.L.C.'s future ability to care for K.E.C., s. 42 requires the court to consider what past efforts have been made to address her mental health and substance abuse issues and her level of compliance with physicians' recommendations. The inquiry is not limited to the period within which the Agency has been involved. Dr. S.'s records, which may contain information about remedial measures prescribed in the past, are clearly relevant to this assessment.

[46] Similar concerns arise in relation to the temporal limitation the judge imposed on access to the records of the QE II Health Sciences Center and Adsum House records. She said:

> [26] The Minister is seeking the complete medical record, file and chart of the QEII Health Sciences Centre including but not limited to the complete record, file and chart of the Abbey Lane and Mental Health Clinic. I understand the QEII Health Sciences Centre is the umbrella organization that includes, among other health services, services for those experiencing mental health illness and these more specialized services are offered through the facilities known as the Abbey Lane and the Mental Health Clinic. Records from the QEII and the other facilities since the commencement date of these proceedings that show the Respondent has

> been admitted to that facility or attended at the emergency department as a result of the abuse of alcohol or drugs or as a result of a mental illness or disorder would be relevant to the question of compliance. Past records of attendances and treatment for other reasons would not.
>
> [27] The Minister is seeking the complete record and file of Adsum Centre. The Respondent has not been involved with the Adsum Centre since the commencement of these proceedings. Their records are of no assistance in respect to the compliance issue.
> (Emphasis added)

[47] With respect to the QEII records, the judge found the Agency's request to be too broadly stated, declined to order production and indicated that she would entertain a request "restricted to the collection of relevant information" (at para. 17, above).

[48] It was the judge's view that, while B.L.C.'s mental health and drug abuse related records are relevant, the records of her physical health are not. It is my view that this is not a valid distinction. As pointed out by counsel for the Agency, medical contacts by B.L.C., purportedly relating to her physical health, looked at individually, may seem irrelevant. However, collectively they could be significant. For example, repeated visits to an emergency room seeking medication for symptoms of pain would be excluded from production as related to her physical health but, viewed together, could reveal a pattern of drug seeking behaviour.

[49] As I have already indicated, broadly speaking, B.L.C.'s health records are relevant. At the pre-trial stage, there is no way to limit production to that which will ultimately be of assistance to the trier of fact. Without knowing what detail is contained in the records, the Agency cannot craft a request that is limited to information that will ultimately be 'relevant' for admission at trial. The Agency is entitled to have production of the QEII records as requested.

[50] The respondent further says that production is unnecessary because the detailed affidavit of Beth Archibald demonstrates that the Minister already knows the particulars of B.L.C.'s medical history and the resulting protection concerns. This matter is proceeding to a hearing. The Agency has the burden of proving its case by marshalling admissible, relevant evidence. The fact that the Agency has

collected information about B.L.C.'s circumstances through its caseworkers does not obviate the need to conduct a document review in order to present admissible evidence to the court.

[51] In support of limiting document production the respondent cites the recital to the **Act** which speaks of "the least invasion" of a family's privacy. As the recital makes clear, however, any limit on the intrusion into a family's privacy must be consistent with the need to protect the child:

> AND WHEREAS the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children from abuse and neglect;
> (Emphasis added)

[52] In all proceedings and matters pursuant to the **Act**, the paramount consideration is the best interests of the child (s. 2(2)). The child's best interests are the paramount considerations in the disposition of this application for production. Production of the relevant documents to the parties, allowing the litigants to tender them at trial, enables the court to make the most informed ruling sensitive to the child's best interests. To limit that relevant disclosure, in deference simply to the parent's privacy, collides with the clear mandate in s. 2(2) of the **Act**.

DISPOSITION

[53] I would grant leave and allow the appeal, set aside the parts of the Order denying document production and order that the records sought be produced.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Community Services) v. B.L.C.***,
2007 NSCA 45

Date: 20070424
Docket: CA 275634
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

B.L.C.

Respondent

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

Revised Judgment: The text of the original judgment has been corrected according to the attached erratum September 21, 2007

Judges: Roscoe, Bateman and Fichaud, JJ.A.

Appeal Heard: March 29, 2007, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Fichaud, JJ.A. concurring.

Counsel: Peter C. McVey and May S. Knox, for the appellant
Lola Gilmer and Karen Hudson, for the respondent

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.**

Erratum:

[1] In Paragraph [43] change **Canadian Coal**, **supra** to read **Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.** (1994), 137 N.S.R. (2d) 123 (S.C.).