# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Mi'kmaw Family and Children's Services of Nova Scotia v. A.P.*, 2019 NSCA 39

**Date:** 20190425
**Docket:** CA 487066
**Registry:** Halifax

**Between:**

Mi'kmaw Family and Children's Services of Nova Scotia

Appellant

v.

A.P. and J.P.

Respondents

Minister of Community Services

Intervenor

**Restriction on Publication: s. 94(1) Children and Family Services Act**

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| **Judge:** | Van den Eynden, J.A. |
| **Motion Heard:** | April 25, 2019, in Halifax, Nova Scotia in Chambers |
| **Written Decision:** | May 29, 2019 |
| **Held:** | Motion granted |
| **Counsel:** | Jennifer C. MacDonald and Paul Morris, for the appellant<br>Laura McCarthy, for the respondents<br>John Underhill, for the intervenor, Minister of Community Services |

**Restriction on publication pursuant to s. 94(1) *Children and Family Services Act,* S.N.S. 1990, c. 5.**

**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:**

## Introduction

[1] The respondents' children were found to be in need of protective services. The children remain in the care of their parents, but subject to supervision by the Mi'kmaw Family and Children's Services of Nova Scotia (the Agency). However, the judge who made the protection finding and granted the supervision order also imposed restrictions upon the Agency's ability to enter the respondents' home. The Agency appealed, seeking the restrictive provisions be struck from the order and brought a motion to stay pending appeal. The Agency claims that these restrictions impede its statutory mandate to supervise and protect the children from harm, and if a stay is not granted there is an increased risk of harm to the children.

[2] I heard and granted the stay motion with reasons to follow. These are they.

## Background

[3] The respondent parents have three children (ages 13, 6 and 2). The protection proceedings in the court below started in February 2019. The Honourable Justice Kenneth C. Haley of the Nova Scotia Supreme Court (Family Division) found the children to be in need of protective services under s. 22(2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, (*CFSA*) and ordered the children to remain in the care of their parents subject to Agency supervision. Section 22(2)(b) ties into s. 22(2)(a) and they provide:

> **Child is in need of protective services**
>
> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (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);

[4] The fact that the children have been found in need of protective services is not disputed on appeal. Thus, I will only generally cover the circumstances giving rise to the protection finding as they place in context the concerns with the

imposed restrictions upon the Agency's ability to enter the respondents' home to provide guidance and assistance and to ascertain whether the children are being properly cared for. But first I will explain the restrictions imposed by the judge and how the topic arose.

[5] During the interim protection hearing on March 8, 2019, the judge directed that the Interim Protection Order contain these restrictive provisions:

> 1. The children (**names and dates of birth deleted*) shall remain in the care of the Respondents (**names deleted*), subject to the supervision of the Applicant, Mi'kmaw Family and Children's Services of Nova Scotia, pursuant to s. 39(4)(da) of the *Children and Family Services Act*, under the following terms and conditions:
>
> e) **Representatives of the Agency shall not attend visits at the home, scheduled or unscheduled, without the assistance of a translator or Mi'kmaw speaking worker;**
>
> f) A representative of the Agency may enter the residences of the children to provide guidance and assistance and to determine that the children are being properly cared for, **but must be accompanied by a translator or a Mi'kmaw speaking worker;** (emphasis mine)

[6] The respondent mother speaks English as her first language. The children also speak English. The respondent father also speaks English, but his first and preferred language is Mi'kmaw. The respondent parents requested that a Mi'kmaw-speaking worker attend all home visits, primarily for the benefit of the respondent father.

[7] Through its counsel, the Agency recognized the need to provide culturally-appropriate services and indicated that the Agency would try and have a Mi'kmaw-speaking worker attend home visits whether scheduled or unscheduled; however, the Agency objected to the inclusion of the above mandatory provisions in the order.

[8] Counsel for the Agency explained to the judge that there are a limited number of available Mi'kmaw-speaking workers and translators and how such restrictions could negatively impact and delay the Agency's ability to carry out its responsibilities. Nevertheless, the judge directed the restrictions be inserted in the order. The judge did not reference any authority, statutory or otherwise, to so restrict the Agency from attending the family home. Nor did counsel for the

Agency refer the judge to any authority that would limit his authority to place such restrictions on the Agency's statutory responsibilities and powers.

[9] Turning to the circumstances which gave rise to the protection concerns, the record reveals a significant history of violence, including family violence. The Agency's involvement with this family dates back to 2006—the year their first child was born and concerns elevated to the level of formal protection proceedings before the court on two prior occasions.

[10] The third and current protection application filed by the Agency stemmed from recent referrals reporting the occurrence of violent incidents in the presence of the children. The respondent parents are both facing serious criminal charges in relation to these incidents. The respondent mother is facing charges for mischief, disturbing the peace, uttering threats to cause bodily harm, assault with a weapon and assault. The respondent father is facing charges for uttering threats to cause death or bodily harm and uttering threats. The record also confirms that the respondent father has a significant history of convictions including numerous convictions for violent offences, many of which reportedly happened in the presence of the children. The respondent mother also has a history of convictions, including a conviction for assault causing bodily harm. Other referrals the Agency received pertained to allegations that the respondents were selling drugs out of their home and the presence of firearms in the home.

[11] On appeal, the Agency challenges the inclusion of the above-noted restrictive provisions in the Order and seeks to stay their effect pending appeal. The Minister of Community Services applied for and was granted intervenor status for the appeal, but adopted a watching brief only for the purpose of the stay motion.

[12] The Agency filed its stay motion on April 11, 2019, together with a supporting affidavit, brief and draft order. The parents were served and the matter was set to be heard in chambers on April 18, 2019. A pre-motion tele-chambers conference was set up at my direction for April 15, 2019; however, the respondent parents refused to participate. The respondents did not file any materials in response to the stay motion. At my direction, the Registrar contacted the respondent parents on April 17, 2019 to ascertain if they would be attending the hearing. The respondent mother indicated her husband would be attending the hearing and he had counsel; however, she would not reveal counsel's name.

[13] On April 18, 2019, counsel Laura McCarthy attended chambers on behalf of the respondent parents. No notice of counsel had been filed with the Court. The respondent father was also in attendance, but not the respondent mother. Ms. McCarthy said her retainer was limited to the motion, and she was not otherwise retained to represent the respondents on appeal. She requested the stay motion be adjourned for hearing at a later date. I set the matter over to April 25, 2019 for completion of the stay motion, but granted an interim stay based on the materials before me. The interim stay was without prejudice to the respondents' right to respond and challenge. The respondents were given to April 23, 2019 to file any responding materials. Their counsel filed a brief on their behalf. No respondent affidavits were filed, and cross-examination of the Agency's affiant was waived.

[14] The Agency's affiant was the child protection worker assigned to the respondents' family. In her affidavit, she sets out the details of the protection concerns, the efforts made by the Agency to accommodate the request to have Mi'kmaw-speaking service providers where possible and the difficulties the Agency expects to encounter in light of the imposed restrictions forbidding the Agency access to the respondents' home without a translator or Mi'kmaw-speaking worker. For example, she provided evidence of the limited number of Mi'kmaw-speaking workers on staff, the tiny pool of certified translators available who reside a considerable distance away from the respondents' home and, for privacy concerns inherent in child protection work, how the Agency cannot be accompanied by just any Mi'kmaw-speaking person. The worker explained that delays in being able to access the respondents' home are of concern to the Agency given the nature of the protection concerns and the paramount need to assess and respond quickly to protect the children should a time-sensitive matter arise.

[15] After hearing and considering all the evidence and submissions, as noted, I granted the motion for stay. In my analysis, I will summarize the position of the parties.

**Issue**

[16] The issue before me was whether the challenged provisions of the supervision order should be stayed pending appeal. I was satisfied the Agency established all the requirements and granted the stay. I now turn to explain why.

**Analysis**

*The principles that govern*

[17] The filing of a Notice of Appeal does not trigger a stay. Nor are stays a routine remedy. A stay is a discretionary remedy which *Civil Procedure Rule* 90.41(2) permits a single judge of this Court to grant.

[18] The principles that govern a stay, and which I applied, are well known. In *Purdy v. Fulton Insurance Agency Limited*, 1990 NSCA 23, Justice Hallett set out these principles: a stay may be granted if the applicant shows (i) an arguable issue for the appeal; (ii) that there would be irreparable harm if the stay were denied and that the balance of convenience favours the applicant; or (iii) there are exceptional circumstances. However, the *Fulton* test is modified when the stay application involves the welfare of children as it does in this case. I must consider the best interests of the children involved in these protection proceedings and their interests prevail over those of the respondent parents on matters of irreparable harm and balance of convenience. Put another way, the interests of the respondent parents must yield to the best interests of the children. The modification of the *Fulton* principles has been discussed in many cases of this Court including *D.M.F. v. Nova Scotia (Community Services)*, 2004 NSCA 113; *Reeves v. Reeves*, 2010 NSCA 6; *M.K v. Nova Scotia (Community Services)*, 2015 NSCA 69; and most recently in *Leyte v. Leyte*, 2019 NSCA 41.

[19] I now turn to my application of these principles.

*Did the Agency raise an arguable issue?*

[20] The appellant raises the following grounds of appeal:

1. That the Learned Trial Judge erred in law in finding the Applicant Agency was prohibited from attending at the residence of the children if a Mi'kmaw speaker or translator was not present, contrary to section 39(4A) of the *Children and Family Services Act* 1990, c. 5, s. 1;
2. That the Learned Trial Judge erred in law for failing to give paramountcy to the best interests of the children in rendering a decision that was parent-focused and not child focused and inconsistent and unsupported by the evidence;
3. That the Learned Trial Judge had no evidence before the Court to support the finding that a translator was required for the Respondent parents;
4. That the Learned Trial Judge erred at law in considering facts that were not in evidence;

[21] Section s. 2(2) and 39(4A) of the *CFSA* provide:

> 2(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.
>
> …
>
> 39(4A) Where the court makes an order pursuant to clause (b) or (d) of subsection (4), any representative of the supervising agency has the right to enter the residence of the child to provide guidance and assistance and to ascertain whether the child is being properly cared for.

[22] It is understandable that the respondent father preferred all communications in his language of choice; however, as noted, it does not appear that either counsel or the judge turned their minds to whether the imposed restrictions offended the Agency's statutory powers under the *CFSA*. With respect, the way this matter was addressed had an air of casualness to it.

[23] For the purpose of the stay motion, counsel for the respondent parents acknowledged the Agency has raised an arguable issue. That concession is appropriate. In my view, the Agency has raised arguable issues. Nothing further need be said about their strength—that will be for the panel to decide.

[24] I turn to the determining factor of whether a stay would serve the children's best interests.

*Would a stay serve the best interests of the children?*

[25] The Agency argued the Order as worded is focused on the parents' rights and not the best interests of the children. The Agency said the Order places the children at risk of harm. The Agency explained that to adequately protect the children from harm and ensure their best interests, it is imperative that Agency workers be able to access the children if necessary, without delay. Should a translator or a Mi'kmaw-speaking worker be unavailable, it would leave the Agency workers unable to provide any service, check in on the children to ensure their safety and wellbeing or respond to an emergency involving the children.

[26] From the respondents' perspective, no special or persuasive circumstances exist that would favour a stay. Rather, they pointed to other provisions in the order that they say safeguard the children. For example, they are not to be under the influence of drugs or alcohol while in the presence of the children and should they breach these conditions the children could be taken into care. The difficulty with

this contention is the Agency's current ability to supervise, including unscheduled drop ins to ensure compliance, is now restricted.

[27] The respondents also noted that effective, cooperative and clear communication between the Agency and parents is in the best interests of the children and that is achieved for the respondent father through the restrictions imposed by the judge. No one can disagree with the need for effective, cooperative and clear communications; however, as the Agency pointed out, should the respondent father find any communication unclear this can be remedied in a timely fashion when a Mi'kmaw-speaking worker becomes available. But to otherwise limit the Agency's supervisory obligations exposes the children to increased risk.

[28] As an alternate argument, it was suggested by respondent counsel that any stay imposed include a provision that the Agency make and document "best efforts" to first secure a Mi'kmaw-speaking worker or translator before entering the respondents' home—a point that was discussed with and rejected by the judge in the court below for lack of certainty. During the hearing of this motion, the Agency objected to such alternative relief arguing it still creates delays, barriers and risks uncertainty. I agree.

[29] Although the protection proceeding is in its early stages and the serious outstanding criminal charges against both parents are just that at this stage, the judge was satisfied that the children needed protective services. He found them to be at substantial risk of physical harm. He ordered that the children remain in the care of their parents, subject to Agency supervision, which he then imposed restrictions upon. Although the judge was live to how the restrictions might benefit the respondent father, the record does not contain findings as to how these restrictions might affect the children. Thus, although mindful of the need to be deferential to findings of the judge, there are really no findings respecting how these restrictions serve the best interests of the children. On this stay motion, I am mindful that the best interests of the children must not yield to the interests of the respondent parents.

[30] Although the objective to support the respondent father's language needs is good, it can not override the need to protect the children from the risk of harm. The children are young and thus vulnerable with minimal ability to self-protect. The concerns raised by the appellant Agency are compelling.

[31] There is need for timely supervision and timely responses to issues that might arise, particularly in these circumstances. Given the reality of limited

resources available to service the imposed restrictions, it is foreseeable how these restrictions may negatively affect the children and expose them to increased risk of harm pending the disposition of the appeal. I am satisfied there are special and persuasive circumstances present and that the granting of the stay reduces the risk of harm to and better serves the interests of the children.

**Conclusion**

[32] Motion for stay granted. No costs are ordered.

Van den Eynden, J.A.