

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Mi'kmaw Family and Children's Services of Nova Scotia v. A.P.*,  
2019 NSCA 55

**Date:** 20190614

**Docket:** CA 487066

**Registry:** Halifax

**Between:**

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

Appellant

v.

A.P. and J.P.

Respondents

-and-

Minister of Community Services

Intervenor

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

**Judge:** The Court

**Appeal Heard:** June 14, 2019, in Halifax, Nova Scotia

**Subject:** **Children and Family Services Act, S.N.S. 1990, c. 5;**  
**Mootness; Conditions in Supervision Orders.**

**Summary:** The Mi'kmaw Family and Children's Services of Nova Scotia commenced a protection proceeding concerning the three children of the respondents. They sought a supervision order which would allow the children to stay in the home of the parents under the supervision of the Agency on specified terms.

An interim order granted did not contain restrictions on the Agency entering the premises of the children.

On March 27, 2019, the Family Court issued a second interim order which contained provisions which prevented the Agency from attending the home or entering the residence of the children unless accompanied by a translator or a Mi'kmaw-speaking worker.

At the hearing where the Court considered granting the order, no evidence was presented to support the necessity of the restrictions.

The Agency appealed the inclusion of the restrictions in the order. The Minister of Community Services intervened.

The Agency sought to introduce fresh evidence on the appeal.

Between the time of the second interim order and the time of the appeal, two further orders were issued by the Family Court, neither of which contained the provision requiring a translator or a Mi'kmaw-speaking worker.

The most recent order removed the children from the care of their parents and placed them in the care of their maternal grandparents.

At the time of the appeal the children were no longer in the care of the respondents nor was there any condition in the supervision order requiring a Mi'kmaw-speaking worker or translator to be present during visits.

**Issues:**

- (1) Should the fresh evidence be admitted?
- (2) Was the issue moot in light of the superseding orders?
- (3) Did the hearing judge err by requiring that a Mi'kmaw-speaking individual be present when the Agency entered into the residence of the children to provide guidance and assistance?

**Result:**

It was not necessary to address the fresh evidence motion. The Court determined that the issue was moot but that it

would exercise its discretion to decide the issue. The Court concluded that on the record that was before the Family Court there was no evidence filed or given to support the request or why it was necessary. As a result, without commenting on whether restrictions such as those contained in the second interim order would ever be available under the *Family and Children's Services Act*, S.N.S. 1990, c. 5, it was not appropriate to impose the restrictions in these circumstances.

The appeal was allowed, and the impugned clauses struck from the order.

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 5 pages.***

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

**Judges:** Wood, C.J.N.S.; Farrar and Van den Eynden, JJ.A.

**Appeal Heard:** June 14, 2019, in Halifax, Nova Scotia

**Written Release** June 21, 2019

**Held:** Appeal allowed per oral reasons for judgment of the Court.

**Counsel:** Jennifer C. MacDonald and Paul Morris, for the appellant  
Respondent, A.P., in person via telephone  
Respondent, J.P., in person via video conference  
Peter C. McVey, Q.C., for the intervenor

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: (By the Court) (Orally)**

[1] On February 8, 2019, Mi'kmaw Children and Family Services of Nova Scotia commenced a Child Protection Application concerning three children, (A. (13), J. (6½), and J. (2)). The respondents, A.P. and J.P. are the children's parents.

[2] The child protection concerns were that the children were exposed to violence, substance abuse and/or the criminality of their parents and/or their parents' associates. The allegation made in the Application was that the children were in need of protective services within the meaning of ss. 22(1) and (2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 which provides:

### **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 ...

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

[3] In the Application, the Agency asked for an interim order allowing the children to remain in their parents' custody but under the supervision of the Agency on specified terms pursuant to s. 39 of the *Act* which provides:

39 (4) Within thirty days after the child has been taken into care or an application is made, whichever is earlier, the court shall complete the interim hearing and make one or more of the following interim orders:

...

(b) the child shall remain in, be returned to or be placed in the care and custody of a parent or guardian or third party, subject to the supervision of the agency and on such reasonable terms and conditions as the court considers appropriate, including the future taking into care of the child by the agency in the event of non-compliance by the parent or guardian with any specific terms or conditions;

[4] One of the terms requested in the Application was for an order allowing representatives of the Agency to enter the residence of the children to provide

guidance and assistance and to ascertain whether the children were properly cared for – worded as follows:

7. An Order confirming that representatives of the Applicant shall have the right to enter the residence of the children to provide guidance and assistance and to ascertain that the children are being properly cared for.

...

[5] On February 11, 2019, the hearing judge, Justice Kenneth C. Haley, granted an interim order providing for custody and care of the children by their parents under the supervision of the Agency. The interim order tracked the wording of what was requested by the Agency:

- 1.(c) 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.

[6] The matter was set down to return to court for the completion of the interim hearing on March 8, 2019.

[7] On March 8, 2019, the hearing judge rendered an oral decision which was incorporated into a second interim order dated March 27, 2019, as follows:

- 1.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.
- 1.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.

[8] Apart from the request itself and a brief exchange between the judge and the parties, no affidavit or other evidence was put before the judge respecting the need for the imposed restrictions.

[9] On April 8, 2019, the Agency filed a Notice of Appeal (Child Protection) appealing the requirement for a translator or Mi'kmaw-speaking caseworker to be present when the Agency attends the home of the children. It also applied for a stay of the March 27, 2019 Order.

[10] On April 18, 2019, the Minister of Community Services was granted leave to intervene in the appeal.

[11] On April 25, 2019, Justice Elizabeth Van den Eynden rendered a decision (reported as 2019 NSCA 39) granting the Agency's motion for a stay with respect to paragraphs 1.e) and f) of the Supervision Order. The Stay Order was issued on June 3, 2019.

[12] A further protection hearing was heard on May 6, 2019, before Justice Lee Anne MacLeod-Archer. In an order dated May 14, 2019 she provided:

- 12.(e) A representative of the Agency may enter the residence of the children to provide guidance and assistance and to determine that the children are being properly cared for.

[13] The Order does not contain any provision requiring that a Mi'kmaw translator or Mi'kmaw-speaking worker be present.

[14] Perhaps more importantly, a variation hearing was held on May 31, 2019, before Justice Robert M. Gregan. The hearing judge found there had been a change in circumstances requiring a variation of the previous order and ordered that the children be placed in the customary care and custody of their maternal grandparents, S.M.P. and P.P., pursuant to s. 39(4)(da) of the *Act*. The order further provided:

- (j) 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.

[15] As a result, the children are no longer in the care of the respondents and the Customary Care and Custody Order does not require that a Mi'kmaw translator or Mi'kmaw-speaking worker be present at the time a representative of the Agency enters the children's residence.

[16] On June 3, 2019, the Agency filed a Notice of Motion seeking admission of fresh evidence consisting of two affidavits of Amy LeBlanc, a child protection worker employed by the Agency.



## Issues

1. Should the fresh evidence be admitted?
2. Was the issue moot as a result of the subsequent orders?
3. Did Justice Haley err by requiring that a Mi'kmaw-speaking individual be present when the Agency entered the residence of the children to provide guidance and assistance?

## Decision

### *Fresh Evidence*

[17] The fresh evidence relates to the First Interim Order. The order containing those provisions has been superseded by Justice Gregan's Order which changes the residence of the children and places them under the care of their grandparents. The circumstances that were present at the time of the hearing before Justice Haley have changed.

[18] Therefore, it is not necessary to address the fresh evidence motion because of the change in circumstances since the order under appeal.

### *The First Interim Order*

[19] As a result of the change in circumstances, the issue before this Court has become moot. However, we will address whether it was appropriate, in these circumstances, to require a Mi'kmaw-speaking individual to be present when the Agency is providing services or undertaking supervision.

[20] Justice Haley and Family Court judges are entitled to considerable deference when crafting orders to address the best interests of the children in a protection proceeding. However, it is our unanimous opinion the hearing judge should not have included paragraphs 1(e) and (f) in the March 27, 2019 Order. Without commenting on whether such an order would ever be appropriate, it was not necessary in this case based on this record. The hearing judge undertook no analysis of the *Children and Family Services Act* or any legal principle when imposing the terms. There was no evidence filed to support the request or why it was necessary. The record does not disclose any basis for imposing the conditions.

[21] Although it is tempting to embark on an analysis of the *Children and Family Services Act* to determine whether such an order would ever be permitted, we decline to do so based on this limited record.

**Conclusion**

[22] The appeal is allowed and paragraphs 1(e) and (f) are struck from the order of March 27, 2019.

Wood, C.J.N.S.

Farrar, J.A.

Van den Eynden, J.A.