NOVA SCOTIA COURT OF APPEAL

Citation: *E.M.Y. v. Nova Scotia (Community Services)*, 2019 NSCA 86

Date: 20191107
Docket: CA 491152
Registry: Halifax

Between:

E.M.Y.

Appellant

v.

Minister of Community Services

Respondent

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

Judge:	Beaton, J.A.
Motion Heard:	November 7, 2019, in Halifax, Nova Scotia in Chambers
Written Reasons:	November 15, 2019
Held:	Motion granted
Counsel:	Paul Sheppard and Joshua Bearden, for the appellant Peter McVey, Q.C., for the respondent Paul E. Morris, counsel for the intended 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.

Decision:

[1] On October 25, 2019 the child welfare agency Mi'kmaw Family and Children's Services of Nova Scotia ("the Agency") filed a motion seeking to be granted intervenor status in the appeal filed by E.M.Y. ("Y.") on August 16, 2019. That appeal named the Minister of Community Services ("the Minister") as respondent. Upon considering the evidence and argument on the motion in Chambers on November 7, 2019, I advised I was prepared to grant the relief sought, with written reasons to follow, as set out below.

[2] *Civil Procedure Rule* 90.19(2) affords this Court the discretion to "… make an order granting leave to intervene on terms and conditions the judge sets".

[3] The Notice of Appeal filed asserted two grounds of error concerning a secure treatment order the Minister had obtained in the Family Court of Nova Scotia in July 2019 in relation to Y. The Agency is the legal parent of Y.

[4] The Minister derives her authority to seek a secure treatment order pursuant to s. 56(1) of the *Children and Family Services Act*, SNS 1990, c. 5. ("the *Act*"). Y.'s appeal of the subject order is scheduled for hearing in this Court on December 9, 2019. On October 21, 2019, Y. filed an Amended Notice of Appeal adding an additional third ground:

> The Court erred by finding it "necessary" and in the best interests of the child, to confine the indigenous Appellant to a facility that could not ensure culturally appropriate services and would prohibit her from speaking her indigenous language.

[5] Upon learning of the third ground of appeal, counsel for the Agency filed this motion seeking to be granted intervenor status, consented to by counsel for the Minister but opposed by counsel for Y.

[6] All three parties agreed on the test to be applied in assessing the merits of the motion, as was discussed in *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 19, where Oland, J.A. noted:

> [20] In decisions such as *R. v. Fraser*, 2010 NSCA 106 at ¶ 8-9 and *R. v. Ross*, 2012 NSCA 8 at ¶ 12, this court has approved the following passage from John Sopinka & Mark E. Gelowitz, *The Conduct of an Appeal*, 2nd ed., (Canada: Butterworths, 2000), at pages 258-59:

> In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention is granted; (3) whether the intervention will widen the *lis* between the parties; (4) the extent to which the position of the intervenor is already represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As it is a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the *lis*.

[7] The Agency has limited its motion to a request to intervene on the third ground of appeal only, and has represented to the Court that its factum can be filed by November 8, 2019, the same date already assigned for the filing of the respondent's factum. In that vein, the schedule set for filing of materials in anticipation of the appeal hearing remains undisturbed and no delay will result if the Agency is permitted to intervene.

[8] I need not consider any prejudice to the Minister in granting intervenor status to the Agency. As referenced above, the Minister in her oral and written submissions agreed with the Agency's motion.

[9] As to any prejudice to the appellant, counsel for Y. suggested that granting the Agency intervenor status would afford "double representation" to the Agency in the appeal because the Minister acts on the Agency's behalf when seeking, or as in this case, defending a secure treatment order. With respect, I cannot agree. The Minister does indeed file applications for secure treatment orders upon being triggered by the request of an agency/parent, however it cannot be said that the interests of the Minister and this Agency are identical.

[10] Section 8(4) of the *Act* permits the Agency to "do such acts and things as may be convenient or necessary or the attainment of its objects, the carrying out of its functions and the exercise of its powers". As stated in the brief filed by counsel for the Agency in support of its motion:

> The Minister has a statutory right to intervene on any appeal pursued by Mi'kmaw Family and Children's Services of Nova Scotia pursuant to Sections 4(2) and 36(2) of the *Children and Family Services Act* …
>
> …

> The Legislature has granted the Minister the discretion to appear and be heard, and the right to be added as a party in any such proceeding, including in an appeal under s. 49 of the *Children and Family Services Act*.
>
> The same statutory right does not exist for Mi'kmaw Family and Children's Services of Nova Scotia.

[11] The Agency's responsibilities are delegated to it; the *Act* imbues the Minister with greater powers than are possessed by any agency constituted pursuant to the *Act*. Furthermore, under the *Act* the constituents of the Agency are Nova Scotia's thirteen first nations Mi'kmaw families and children, whereas the constituents of the Minister are all Nova Scotia's families and children.

[12] Counsel for Y. asserted that the interests of the Minister and the Agency are identical. As countered by its counsel, the Agency has been charged with certain unique responsibilities to a defined group of people however it does not act on behalf of the Minister. The Agency has a child welfare function under the *Act*, but it has different policy and a different service delivery model than other provincial child welfare agencies operated directly by the Minister.

[13] The addition of the third ground of appeal engages consideration of Y.'s status as an indigenous Nova Scotian but also raises matters of indigenous culture and language. The Agency's specific interest in the third ground of appeal, as the body responsible pursuant to the *Act* for the welfare of Mi'kmaw children, apart from the interest of the Minister is unmistakeable. It is all indigenous children under the care of the Agency (in addition to Y.) who are arguably implicated in the third ground of appeal as it is framed. The outcome on the third ground has potential to impact on the provision of services to all Mi'kmaw children under the care of the Agency.

[14] The concern that a potential intervention could have the effect of widening the *lis* does not arise here. It is Y.'s addition of the third ground of appeal that has triggered the interest of the Agency. Without it, the Agency would have been positioned no differently than any other parent whose child is the subject of the order under appeal and there would be no basis for the Agency to intervene.

[15] There was no evidence before me and no argument advanced, nor am I able to discern the addition of the Agency as an intervenor would transform the courtroom into a political arena.

[16] Counsel for Y. urged that if the Agency was successful on the motion, it was within my discretion to direct that the respondent Minister address only the first two grounds of appeal and the intervenor Agency address the third ground. This suggestion cannot succeed for two reasons: i) it is within the purview of the appeal panel, not the presiding Chambers judge, to determine allotments of time for argument and to manage the time during the hearing of the appeal; ii) it would be inappropriate to preclude the named respondent from being permitted to address all grounds of appeal advanced. If there is merit to adding an intervenor to the proceeding that merit exists on its own, not merely to thwart the standing of any named respondent.

[17] The motion is granted to permit the Agency to intervene with standing to argue confined to the third ground of appeal, as was specifically sought by the Agency. The Order giving effect to the motion shall be prepared by counsel for the Agency. The style of cause is hereby amended to reflect the addition of the Agency as intervenor in the appeal.

Beaton, J.A.