NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. K.H.*, 2021 NSCA 44

Date: 20210604
Docket: CA 506485
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

K.H., K.K., T.H.

Respondents

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

Judge:	Farrar, J.A.
Motion Heard:	June 3, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed without costs to any party
Counsel:	Peter McVey, Q.C., for the appellant Lola Gilmer, for the respondent K.H. Neil Robertson, for the respondent T.H. Ray Kuszelewski, for the respondent K.K., not participating

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] By oral decision dated May 31, 2021 (written decision released June 1, 2021, reported at 2021 NSSC 140), Justice Lester Jesudason dismissed the Minister of Community Services' application for permanent care and custody of three children, J., 7 years old, A., 6 years old, and I., 14 months old.

[2] In conjunction with dismissing the Minister's application for permanent care, the trial judge granted an order under the *Parenting and Support Act*, SNS 2015, c. 44 (the *PSA*), placing the children in the custody of the respondent, T.H.

[3] The Minister is appealing the trial judge's ruling and applies for a stay which would have the children remain in the care of the Minister pending outcome of the appeal.

[4] For the reasons that follow, I dismiss the Minister's motion for a stay.

Background

[5] K.H. and K.K. are the parents of J., A. and I. J. and A. were taken into the custody of the Minister on June 27, 2019. The children were found to be in the need of protective services on September 13, 2019. J. and A. have remained in the care and custody of the Minister throughout the proceedings, a total of 23 months. They have been placed together since coming into the care of the Minister and have been in their current foster home since the end of 2019.

[6] On March 22, 2020, K.H. and K.K. had a third child, I. I. was taken into the care of the Minister on March 24, 2020, and remains in the care of the Minister. She was placed in a foster home from the hospital and remains in that same placement.

[7] J. and A. were subject to one proceeding, I. was subject to a separate proceeding, however, the two proceedings were heard together.

[8] The Minister's plan for the three children was that they would be placed in adoptive homes, which would provide them with stability and security. The priority would be to place the children together as a family group.

[9] The children's parents did not put forward a plan for the care of the children.

[10] Two family members, T.H. and P.G., put forward plans for care of the children. T.H. is the children's maternal aunt and the sister of K.H., and P.G. is the aunt of K.K. The trial judge noted in his decision that K.H. preferred the plan of T.H. and K.K. preferred the plan of P.G., but both parents supported either family plan for their children and opposed the Minister's plan seeking permanent care and custody of their three children. P.G.'s plan was rejected by the trial judge on the basis that it lacked the detail necessary to convince him that it was a long-term and stable placement for the children.

[11] T.H. lives in British Columbia. She resides with her common law spouse, three sons, ages 12, 7, and 6, and her nephew, S., who is the biological son of K.H. and the half-brother of J., A. and I. Her plan was to move the children to British Columbia and have them live together with her and the other four children as a family.

[12] The Nova Scotia Department of Community Services (the Agency) contacted the British Columbia Child Protection Services (the B.C. Agency) and requested that an assessment be done with regard to T.H. and her common law spouse. The B.C. Agency advised that a full adoption assessment would take up to a year to complete. The Agency requested that a "lesser assessment", a Kinship Assessment, be completed. The assessment was conducted by Mr. Kruger, an employee of the B.C. Agency, and identified a number of concerns based on his assessment, as follows:

- A slapping incident involving T.H.'s stepdaughter, which Mr. Kruger said was not disclosed to him;
- Two of T.H.'s children present behavioural challenges, with one of the children being assessed for autism;
- The home had three medium-sized dogs in it;
- Mr. Kruger expressed concerns to T.H. about the level of responsibility required of having seven children in the home, including two of her own children who have special needs including ADHD;
- Mr. Kruger understood that T.H. and her common law husband had a combined income of $40,000, which he did not feel could support some of the possessions owned by the couple such as the home, a boat, a motorhome and three motorcycles; and

- Mr. Kruger had concerns about the front and back yard being "unkempt", for example, he noted that the fenced back yard had an old spring trampoline without a net and a newer aboveground pool (about four feet deep) with a ladder, but not secure cover (Trial Decision ¶ 21).

[13] The slapping incident referred to involved T.H. and her spouse's daughter when the daughter was 17 years old. She and T.H. got into an argument and the 17 year old spit in T.H.'s face and T.H. responded by slapping her in the face with the flat of her hand. T.H. had previously (prior to Mr. Kruger's visit) disclosed this incident to Nicole Slaunwhite, an employee with the Nova Scotia Child Protection Services.

[14] Ms. Slaunwhite swore an affidavit in the proceeding below saying, in light of the "red flags" and concerns noted by Mr. Kruger, her office did not require any further assessment of the home.

[15] In its brief filed before the trial judge on November 24, 2020, the Minister said that the "red flags" raised during the course of the assessment in the Summer of 2020 lead to the determination that the Agency would not support the children being placed with T.H. (Trial Decision ¶ 24).

[16] The trial judge addressed the Minister's concerns with respect to the "red flags" at some length in his decision:

> [26] Having done so, I don't agree with the Minister that placing the children with T.H. and her spouse shouldn't be supported largely because the Minister believes "red flags" have been raised based on Mr. Kruger's preliminary assessment during his initial meetings with T.H. I come to this conclusion for the following reasons:
>
> • Beyond expressing Mr. Kruger's concerns over possible "red flags", the Agency has, at no time, suggested that the children would be placed at any substantial risk of harm if placed with T.H. and her family. In my view, the evidence doesn't establish on the balance of probabilities that the children would be at any significant risk of harm, let alone a substantial risk of harm, if now placed with T.H. and her family.
>
> • By waiving cross-examination of T.H. on her affidavit, the Minister hasn't directly challenged much of T.H.'s evidence. Furthermore, no affidavit evidence was filed by Mr. Kruger challenging any of T.H.'s evidence. While Mr. Kruger raised the initial red flags, he didn't say that the children wouldn't be safe if placed with T.H.'s family. Rather, according to Ms. Slaunwhite, Mr. Kruger advised her that a supervisor would be required to approve an ongoing assessment

which would take time to do. The Agency then determined that it would not seek any further assessment of the home.

- While I respect the Agency's decision not to seek further assessment of T.H.'s home based on the initial red flags and concerns noted (para. 26 of Ms. Slaunwhite's affidavit sworn on September 11, 2020), my role isn't to make decisions for these children simply based on "red flags". Rather, my role is to make decisions which consider the children's best interests as determined by what the evidence shows, and the law requires.

Here, I'm satisfied that T.H. has shown a clear willingness to provide a safe and nurturing environment for the children should they be placed in her care. Indeed, she has shown to be responsive to concerns raised by Mr. Kruger. For example, in paragraphs 39-40 of her affidavit, she says that after Mr. Kruger noted that the trampoline had no safety net, she disposed of it the day after his visit. Similarly, after concerns were expressed by Mr. Kruger about the above-ground pool, the family disposed of it in a further effort to create a safe environment for young children.

- While I can certainly understand why the Agency would have concerns over the slapping incident involving T.H.'s 17-year-old step daughter, it appears to be an isolated incident where the context included a responsive reaction to the 17-year-old spitting directly in T.H.'s face. While I don't diminish T.H.'s physical response (which she acknowledges as being wrong), this isolated incident occurred in 2019. T.H.'s uncontradicted evidence is that she has never before or after had any physical incident with any children in her care and that she and her now likely adult step-daughter have rekindled their relationship after this uncharacteristic and highly regrettable one-time occurrence. There is no evidence that there is any ongoing child protection involvement or that any child protection agency has placed any restrictions on T.H.'s ability to parent her children in the home.

- I don't accept that adding the three girls to T.H.'s family is by itself a red flag which rises to the level where it would cause any significant risk from a child protection perspective. Having large families doesn't equate to children being placed at a risk of harm. Judges shouldn't arbitrarily sanction any stereotypes based on family size or conclude parents or adult caregivers cannot appropriately care for children simply by engaging in a mathematical counting exercise based on the number of children in a home. Each case must be examined on its unique facts. Here, the Minister has failed to persuade me that T.H. and her spouse couldn't adequately and appropriately manage the addition of the three girls to their home. To the contrary, T.H. has presented a viable plan which includes the assistance of a Community Support Worker to assist with childcare of the girls if they were placed in the home.

- I am not prepared to speculate, as Mr. Kruger apparently did, how T.H. and her family are able to afford their home and the other items in their possession based on what he concluded was a combined income of $40,000. Not only do I think

> this is unwarranted speculation but, as noted, earlier, T.H. says that her family income in 2019 was approximately $110,000 through self-employment plus they also receive the Canada Child Benefit and income assistance. I also note that in the Case Recording Notes dated July 9, 2020, Ms. Slaunwhite notes having a conversation with Mr. Kruger where he acknowledged that T.H. did clarify that the family income was $110,000, not $40,000 [Exhibit 2, Page 194].
>
> • Mr. Kruger apparently didn't expressly state or conclude that the girls shouldn't be placed with T.H. Again, as noted in Ms. Slaunwhite's Recording of July 9, 2020, what Mr. Kruger indicated was that there were many "red flags" and advised that a full Safe Study for adoption would be more rigorous and would be more appropriate for the family [Exhibit 2, Page 194]. Ms. Slaunwhite notes that she decided this would be discussed with her supervisor, Mr. Hood. While the Agency apparently subsequently decided not to proceed with any further assessment, this is a far cry from any well-founded conclusion based on the evidence that the children shouldn't be placed with T.H. and her family if it's indeed in their best interests to do so.

[17] The trial judge found the "red flags" were insufficient to dismiss T.H.'s plan (Trial Decision ¶ 27). He then turned his attention as to which placement was in the best interests of the children – the Minister's or T.H.'s:

> [29] Since I have determined that J.K., A.K. and I.K. should be removed from their parents' care, and that P.G. hasn't presented a viable plan of care for them, I must now determine whether it's in the children's best interests to be placed in the Minister's permanent care and custody or be placed with T.H. and her family. I have to consider the so-called relevant "best interests" circumstances or factors as enumerated under the *Acts* (e.g. s. 3(2) of the *CFSA* and s. 18(6) of the *PSA*). I have done so and will not go through each of those circumstances or factors individually.

[18] He then concluded that it was in the best interests of the children that they be placed in the care of T.H. and provided detailed reasons for doing so:

> [30] Having carefully considered all the evidence and the law, I conclude that it's in the children's best interests that they should be placed with T.H. and her family. I come to this conclusion largely for the following reasons:
>
> • As noted in paragraph 35 of Ms. Slaunwhite's affidavit of September 11, 2020, the Agency's plan is that the three children be eventually placed in adoptive homes with the hope that they all can be adopted together. If that isn't possible, the plan is for J.K. and A.K. be placed together and that I.K. be placed in a separate adoptive home and that the sibling relationship between the three be maintained.

• Plainly, the Minister acknowledges that the Agency's plan for these children involves some uncertainty and unknowns. While the Agency's hope is to secure one stable and secure long-term placement for all children, as Ms. Slaunwhite has candidly stated, this may not be possible and that the children may have to be placed in separate homes.

On the other hand, T.H.'s plan involves placing all the children together in the same home where they can all grow up together with their older half-brother, S, and other family. They would be placed with biological family who clearly love them. T.H. has satisfied me that she and her spouse can provide these children with a loving and stable home. Their home appears to not just have all the basic amenities, but seems to have additional comforts or luxuries such as a boat and motorhome. With respect, the Minister has not persuaded me that the red flags identified would create any significant risk to the children. Furthermore, even if I shared those concerns, I find they are outweighed by the known tangible benefits that would be realized by placing the children with T.H. and her family.

• When I consider the needs of the children and the capacity of T.H. and her common law husband to meet them, I'm satisfied that the evidence supports that T.H. and her spouse have a viable plan that will help ensure that the children's needs are met in a positive way. T.H. has presented a well-thought out plan which includes details for childcare, schooling and taking necessary steps to ensure that they will be provided with a stable home life. I note that T.H. says that she and her spouse looked after the older girls in the past without any issues despite there being six children in the home.

• The Preamble to the CFSA recognizes, amongst other things that children and their families have 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. It also recognizes and that preservation of children's cultural, racial and linguistic heritage promotes their healthy development. Through s. 42(3), the CFSA recognizes the desirability of keeping children placed with family or other individuals who have a meaningful relationship with them and that such placement shall be considered before placing a child in permanent care and custody. Here, T.H. has presented me with a viable plan in the children's best interests where the children can be immediately placed with family who love and care for them.

• There is a well-known expression that "justice delayed is justice denied". I believe this to be particularly true when it comes to determining the fates and futures of children. Sadly, these children have lived in uncertainty for far too long in their young lives. For J.K. and A.K. it will be two years in June that they have been in the care and custody of the Minister. In I.K.'s case, she has been in the Minister's care since leaving the hospital shortly after her birth.

Considering all the circumstances, I believe that it is desirable that these children receive stability and certainty now. In my view, T.H. has presented me with the best option for their futures consistent with their best interests. She has satisfied

> me on the balance of probabilities that her plan is the best option available to me which will help ensure that the children will have stable and secure futures where their needs can be met in a positive way. This option allows all three children to be placed together with family including their older half brother and first cousins. When I weigh all the evidence, and consider the law, I find it to be more in accordance with the children's best interests than the Minister's plan for permanent care and custody. (emphasis added)

[19] He then dismissed the Minister's application for permanent care and custody and granted an order under the *PSA* placing the children with T.H.

[20] The Minister appeals raising the following grounds of appeal:

> (1) The hearing judge erred in law by requiring the Minister of Community Services to establish significant risk, substantial risk, red flags and/or child protection concerns in relation to a member of the children's extended family proposed to assume the children's custody, before an Order for Permanent Care and Custody may be granted to the Minister.
>
> (2) The hearing judge erred in law by holding that the Preamble (6th recital), Section 3(2) (definition of best interests) and Section 42(3) of the Children and Family Services Act combine to create a legal preference for family rather than agency custody, including when a proceeding has reached the maximum time limit for disposition review.
>
> (3) Such other grounds as the Appellant may identify by filing any [sic] Amended Notice of Appeal not later than fifteen (15) days after the day this Notice is filed, as permitted in Nova Scotia Civil Procedure Rule 90.39.

Issues

[21] Has the Minister established the requirements for a stay?

Analysis

[22] In *M.K. v. Nova Scotia (Community Services)*, 2015 NSCA 69, this Court summarized the law governing stays in child protection cases:

> [39] A combination of s. 49(3) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (*CFSA*), s. 41(e) of the *Judicature Act*, R.S.N.S. 1989, c. 240 and Rule 90.41(2) of the *Civil Procedure Rules* permits a single judge of this Court to grant a stay.
>
> [40] In *Fulton Insurance Agency v. Purdy* (1991), 100 N.S.R. (2d) 341 (C.A.), Justice Hallett set out the well-known principles which govern the exercise of discretion in granting a stay. 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.
>
> [41] However, in child protection cases, special principles infuse the Fulton test, Justice Fichaud in *D.M.F. v. Nova Scotia (Minister of Community Services)*, 2004 NSCA 113 reviewed the authorities and summarized the test as follows:
>
> > 13 Although the Fulton test provides the format for analysis, under s. 2(2) of the *Act* in a child protection case the overriding factor is always the best interests of the child. This reformulates the "irreparable harm" and "balance of convenience" branches of the *Fulton* test. The standard civil tests of irreparable harm to the applicant and balance of convenience between applicant and respondent are sterile in a child custody case. It is not the irreparable harm to the applicant (whether parent or Agency) or the balance of convenience between the litigants (parent and Agency) which governs. Rather the focus is on the child. It is highly unlikely that harm to the child would be compensable in money. So the "irreparable" concept recedes.
>
> [Underlining in original]
>
> [42] Therefore, to grant the motion I must be satisfied the appellant has raised an arguable issue and there are circumstances of a special and persuasive nature that would warrant the granting of the stay. In other words, I would have to be satisfied that the circumstances here are such that the best interests of the children would be served by a stay.

[23] As in *M.K.*, I must be satisfied that there is an arguable issue and that the circumstances are such that it is in the best interests of the children to grant the stay pending appeal.

Application of Principles

[24] I have previously set out the grounds of appeal. I am satisfied that the two grounds of appeal raise arguable issues.

[25] I will now turn to the consideration of whether it is in the best interest of the children to grant the stay.

[26] In *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 125, Cromwell, J.A., discussed the considerations that this Court must take into account when the issue is the care and custody of children:

> [13] … It follows that the decision to grant or deny a stay must weigh and give effect to their best interests. In my view, this requirement leads to some

> modification of the irreparable harm aspect of the test. The primary focus in a case like this should be on the risk of irreparable harm to the children while, of course, taking due account of the rights of the parties. In addition, given the need for stability and finality in child custody matters, there will generally need to be circumstances of a "special and persuasive nature", usually connected to the risk of harm to the children, in order to persuade the Court to grant a stay...

[27] The fundamental issue on a stay application such as this is to balance the risk of harm to the children in light of the possibility that the appeal may be successful. Simply put, the issue is balancing the relative risk of granting or withholding the stay. The Minister must show a risk of harm produced by the combination of the continuing in force of the order under appeal and the delay until the result of the proposed appeal is known.

[28] The Minister's position reduced to its basics is that it would be very disruptive for the children to be removed from the foster care settings where they are now and where they have been residing continuously for a considerable period of time. With respect to J. and A., they have been in the same foster home for approximately the last 18 months. I. has been in the care of the same foster parents since she was taken from the hospital after her birth.

[29] Disruption of children is to be avoided, but not all disruption will result in a harm to children to justify a stay pending appeal. In *Nova Scotia (Community Services) v. B.F., supra*, Cromwell, J.A., explained:

> [22] Disruption of children, particularly temporary and avoidable disruption, is to be avoided. <u>However, simple disruption, in the sense of moving children from one stable and appropriate environment to another, has usually not been taken, on its own, as sufficient risk of irreparable harm to justify a stay pending appeal.</u> As Flinn, J.A. pointed out in *Children's Aid Society of Halifax v. B.M.J., supra* at para. 42 , " ... disruption will be present in every case involving the transfer of care of young children. If that was the sole basis on which [a stay were to be granted], it would be tantamount to making a stay automatic in cases involving the custody of young children ...". (See also, *G.R. v. C.M.*, [2003] A.J. No 1169 (Q.L.)(C.A. Chambers). Generally speaking, something more than evidence of the inevitable disruption of change of place of residence will be needed to demonstrate a risk of irreparable harm. (emphasis added)

[30] I am not satisfied, in the unique circumstances of this case, that the disruption of the children from their present situations justifies the granting of a stay. I say this for the following reasons:

1) With respect to the two older children, T.H. is not a stranger. She is their aunt and has had contact with those children throughout their lives. I recognize that the contact with the children has been lesser in the latter years since they moved to Nova Scotia. But nevertheless, there has been contact.

2) The two oldest girls previously lived with T.H. and her family when the parties resided in Saskatchewan, at one point for approximately a year and a half. On another occasion, the two older children lived with T.H. pursuant to a Temporary Care and Custody Order issued by the Saskatchewan authorities while K.H. and K.K. were being investigated.

3) The youngest child, although not having a relationship with her aunt, is young enough to adapt to the situation.

4) T.H. took the children's half-brother, S., into her home in February 2019. She was granted custody of him in early 2020. Her evidence was that S. is doing well in her care.

5) The trial judge's conclusion that T.H. has shown a clear willingness to provide a safe and nurturing environment for the children (Trial Decision ¶ 26).

6) My own observations of T.H. during the course of the stay hearing were she was cross-examined on her affidavit, sworn on June 2, 2021. In response to questioning, it was clear to me that she cared deeply for these children. She has also taken steps to ensure that counselling and other services needed by the children would be available for them in British Columbia when they arrive.

7) The children will be moving from one appropriate environment to another.

8) The delay that has already occurred in this proceeding with respect to the two older children. It has now been almost two years since they were apprehended.

9) My view of the strength of the Minister's appeal, which I will address in more detail below.

The Strength of the Minister's Appeal

[31] Although the merits are for the panel hearing the appeal – in assessing the risk of the children being returned to Nova Scotia, I must consider the strength of the grounds of appeal.

[32] In my view, although they are arguable, the grounds of appeal are not particularly strong.

[33] On the first ground of appeal the Minister alleges the trial judge erred by requiring the Minister to establish significant risk to the children if placed in the custody of T.H. I do not see the trial judge having done so. It was the Minister who raised the risks associated with putting the children in the care of T.H. based on the "red flags" identified by the B.C. Agency. The trial judge's comments on those points were simply in response to the Minister's argument (see ¶ 26 of the Trial Decision reproduced at ¶ 16 above).

[34] With respect to the second ground of appeal, the Minister argues the trial judge's decision created a legal preference for family placement rather than agency custody. Here the Minister is referring to the trial judge's reference to s. 42(3) of the *CFSA*. In his decision, the trial judge says the following:

> [28] Section 42(3) of the *CFSA* states:
>
> > Where the Court determines that it is necessary to remove the child from the care of a parent or guardian, the Court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether (a) it is possible to place the child with a relative, neighbour or other member of the child's community or extended family with whom the child at the time of being taken into care had a meaningful relationship pursuant to clause (c) of subsection (1), with the consent of the relative or other person...
>
> [29] Since I have determined that J.K., A.K. and I.K. should be removed from their parents' care, and that P.G. hasn't presented a viable plan of care for them, I must now determine whether it's in the children's best interests to be placed in the Minister's permanent care and custody or be placed with T.H. and her family. I have to consider the so-called relevant "best interests" circumstances or factors as enumerated under the *Acts* (e.g. s. 3(2) of the *CFSA* and s. 18(6) of the *PSA*). I have done so and will not go through each of those circumstances or factors individually.
>
> [30] Having carefully considered all the evidence and the law, I conclude that it's in the children's best interests that they should be placed with T.H. and her family…

[35] The Minister says that by referencing this section, the trial judge created a legal preference for family over the Minister. The Minister relies on this Court's decision in *T.B. v. Children's Aid Society of Halifax*, 2001 NSCA 99, where Saunders, J.A., found that once the proceedings have reached the maximum time limits, family relationships are no longer given preference:

> [26] One ought not lose sight of the relationship between s. 42(3) and 42(1)(c). **Once the maximum time limit is reached, s. 42(3) can no longer be determinative, since temporary placement with a relative, neighbour or other extended family is no longer available. At the end of the time limits, once the agency establishes that the child remains in need of protective services**, and subject to the court's authority to extend time in the rare circumstances I have described in paragraph 56 infra., **the determination for the court becomes one of what final or "terminal" order is in the child's best interests. At that stage during such a proceeding, consideration of family relationships is required only because it is one of several factors which are to form part of the child's best interests as defined by s. 3(2) of the *Act*, not because s. 42(3) continues to require such consideration**. (emphasis in Minister's brief)

[36] I do not see the trial judge's reasons as preferring T.H.'s plan over the Minister's because she was a family member. Immediately after he cited that section, he instructed himself that he had to consider whether it was in the children's best interests to be placed in the care of the Minister or with T.H. and her family. His consideration of the family relationship was just one factor he took into account in his best interests analysis. I do not see his reasons as creating a preference for a family member.

[37] In my consideration of the strength of the Minister's grounds of appeal, I see the chances of the children being returned to Nova Scotia as low.

[38] Again, I want to make it clear that I make these comments on the strength of the Minister's case only in assessing the risk of harm to the children on the stay application. The ultimate determination is for a panel of this Court.

Conclusion

[39] I dismiss the Minister's motion for a stay without costs to any party. Hopefully there can be an orderly transition of the children from their present placements to the care of T.H.

[40] I conclude by expressing my gratitude to all counsel for their assistance in this matter.

Farrar, J.A.