NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. J.P.*, 2021 NSCA 45

Date: 20210610
Docket: CA 501513
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

J.P., J.W. and R.M.

Respondents

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

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	March 11, 2021, in Halifax, Nova Scotia
Legislation:	*Children and Family Services Act*, S.N.S. 1990, c. 5; *Civil Procedure Rules*: 27.01(2); 60A.13; 60A.13(4); 60A.16; 77; 77.02; 77.03(5); 77.05;
Cases Considered:	*Nova Scotia (Community Services) v. C.K.Z.*, 2016 NSCA 61; *R. v. Desmond*, 2020 NSCA 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *D.C. v. Children's Aid Society of Cape Breton Victoria*, 2004 NSCA 146; *Slawter v. Bellefontaine*, 2012 NSCA 48; *R. v. Lacasse*, 2015 SCC 64; *R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Chase*, 2019 NSCA 36; *Children's Aid Society of Algoma v. R.M.*, [2001] O.J. No. 2441 (ONCJ); *W.(K.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 778; *Moore v. Darlington*, 2012 NSCA 68; *Mosher v. Gosby*, 2016 NSCA 10; *Children's Aid Society of Ottawa-Carleton v. S.*, [2003] O.J. No. 945;

Subject:	Practice. Costs. Family Law. Child Protection. Costs against child welfare authority. Written reasons expanding oral decision. Evidence. Judicial notice of contexts in which judges perform their duties.
Summary:	Judge awarded $250 costs against the Minister arising from late filing of a motion which resulted in an adjournment. The Minister objected to J.P.'s motion, arguing that it was not in correct form, contained no affidavit and cited no law. The judge ruled that J.P.'s counsel letter was adequate for evidentiary purposes and citation of authority was unnecessary because authority was found in *Civil Procedure Rule* 77. The judge gave an oral decision, indicating written reasons would follow. The written reasons substantially expanded on the oral decision, relying upon points not argued and caselaw not cited.
Issues:	1. Was there procedural unfairness? 2. Did the judge err in law by purporting to distinguish "binding" authority which confines costs against the Minister to "exceptional circumstances"? 3. Did the judge fail to consider the "mixed" result? 4. Did the judge err by impermissibly amending her oral decision in the written decision?
Result:	Leave granted. Appeal dismissed. The written decision should be disregarded because it impermissibly amended the oral reasons. The allegations of unfairness and errors of law related to the written decision. These alleged errors were not made by the judge in her oral decision. J.P. succeeded: result not "mixed". Although the Minister's conduct did not constitute "exceptional circumstances" described in the leading case of *D.C. v. Children's Aid Society of Cape Breton Victoria*, 2004 NSCA 146, the Minister had habitually been dilatory in meeting timelines in the Rules and as ordered by the court. Isolated procedural missteps that are not

"exceptional" should not result in costs awards against the Minister, but may attract costs if they are persistent, as here.

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 25 pages.

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Judges:	Bryson, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	March 11, 2021, in Halifax, Nova Scotia
Held:	Leave granted, appeal dismissed, per reasons for judgment of Bryson, J.A.; Van den Eynden and Beaton, JJ.A. concurring
Counsel:	Peter McVey, Q.C. and Tara MacSween, for the appellant Jill Perry, Q.C. and Shannon Mason, for the respondent J.P. Dianne Paquet, for the respondent J.W. (watching brief) Stephen Jamael, for the respondent R.M. (watching brief)

Prohibition on publication

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 motions judge awarded $250 in costs against the Minister of Community Services following an adjournment necessitated by the late filing of a motion in a child protection proceeding.

[2] A judge's discretionary award of nominal costs would rarely attract criticism, let alone appeal, but in this instance it has. Before the judge, J.P. did not confine her objections to the late filing of the motion. Rather, complaint was made of systemic flouting of the Rules by the Minister in this case and other child protection proceedings in the district. No affidavit supported these submissions and the judge did not request one. The Honourable Justice Lee Anne MacLeod-Archer issued an oral decision awarding $250.00 in costs against the Minister, indicating that a written decision would follow. It did (2020 NSSC 290).

[3] The judge expressed concerns in her oral decision about chronic delay in filing materials with the court which had plagued her judicial district for some time. But she did not consider them when confining her costs award to J.P.'s request for relief. In her written decision the judge elaborated on chronic delays, specifically taking issue with the Minister's compliance with timelines in the *Civil Procedure Rules* or as set by the court.

[4] The Minister's fundamental argument is that the process in this case was unfair. The Minister says she had no opportunity to address evidence, law, or arguments relied upon by the judge in her written decision.

[5] If leave is granted the Minister alleges these errors:

> **Q1:** **Breach of Procedural Fairness:** Did the hearing judge deny procedural fairness by,
>
> - not giving notice of or allowing the Appellant to be heard on the fruits of her legal research;
> - permitting the motion to proceed without evidence, once informed facts were in dispute; or
> - considering a range of events not known to be under judicial consideration?

Q2: **Errors in Principle:** Did the hearing judge err in principle in a discretionary ruling by,

- how she circumvented binding authority in Nova Scotia regarding Costs against an agency;
- applying any law to the facts other than the law regarding mere thrown-away Costs; or
- failing to consider mixed result in a Costs ruling, once limiting herself to the one late filing?

Q3: **Error or Injustice:** Did the hearing judge err when revising her oral decision?

[6] As J.P. concedes, leave should be granted because there are arguable issues, but for reasons that follow, the appeal should be dismissed. The judge's written decision should not be considered. But for that decision, the judge did not make the errors alleged. Those alleged errors focus on the written decision and provide context why it should be disregarded. Accordingly, these reasons will address:

1. Factual background;
2. The context of the costs motion;
3. Whether the written decision exceeded the authority to revise the oral decision;
4. Whether the written decision breached procedural fairness;
5. Whether the written decision erred in principle; and,
6. May costs be awarded against the Minister for procedural impropriety?

Background

[7] On March 12, 2020, the Minister started child protection proceedings with respect to two young children, whose parents were named as respondents. On March 16, 2020, the children were placed in temporary care and a supervision order was granted in favour of the Minister. The order was issued on April 14, 2020. A thirty day interim hearing was held April 7, 2020. Care and supervision arrangements were continued. A protection hearing was set for June 9, 2020. The interim order was issued May 13, 2020.

[8] The June 9, 2020 protection hearing was adjourned to June 22, 2020 because counsel for J.P. and R.M. could not obtain instructions. He advised the court he

would likely move to withdraw as counsel. On June 22, 2020 the court authorized his withdrawal for J.P. and found the children in need of protection under s. 22(2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c. 5, but deferred other findings since only J.P. was present. August 5, 2020 was the date set for a prehearing conference and September 16, 2020 was the date set for the disposition hearing.

[9] On June 29, 2020, R.M. was present and the additional terms of the proposed protection order were read into the record. The court confirmed R.M.'s understanding of those terms. The protection order was sent to the court on August 4 and issued August 12, 2020.

Context of the Costs Motion

[10] J.P.'s present counsel appears to have begun acting for her in early July, but no notice of new counsel was filed.

[11] *Rule* 60A.13 requires a prehearing conference before a protection hearing. *Rule* 60A.13(4) requires that the Minister file an affidavit "providing current relevant evidence no less than ten days before the day of the prehearing conference". *Rule* 60A.16 goes on:

> (2) An agency in a proceeding in which the judge finds a child to be in need of protective services must file a notice of motion for a disposition order no later than ten days before the prehearing conference scheduled as a result of a finding that a child is in need of protective services and the agency must file an affidavit providing the current relevant evidence and the agency plan for the child's care with the notice.

[12] On August 4, 2020, the Minister's motion for a disposition order, with supporting affidavit and Plan of Care, was filed with the court and served on respondents' counsel, including new counsel for J.P. J.P.'s counsel sought an adjournment as she had insufficient time to take instructions on the Minister's materials. The Minister agreed to the adjournment. J.P.'s counsel added that "she wished to be heard on the issue of costs". The pre-trial conference was rescheduled for September 3. Counsel for the Minister advised that she "would expect Ms. Perry [J.P.'s counsel] will be making a motion and I expect I would be given an opportunity to respond to that". The judge said she would accept the motion for costs "by correspondence".

[13] On August 27, 2020, J.P.'s counsel filed a three-page letter seeking costs for "the Minister's failure to provide timely disclosure or responses to requests for information and failure to file a court order in a timely manner". The submissions were divided into "particulars of case at bar" and "chronicity of problem and systemic impact". No law was cited. More will be said about these submissions later.

[14] On September 1, 2020, the Minister responded, pointing out that J.P.'s submission did not constitute a motion by correspondence within the meaning of *Rule* 27.01(2). She asked for a brief outlining any authority for J.P.'s motion and an affidavit proving the facts alleged in her correspondence.

[15] On September 2, 2020, the judge replied that J.P.'s motion was in satisfactory form. There was no need for a sworn affidavit from counsel given that counsel's "correspondence contains information from a lawyer as an officer of the court". No authorities were required because authority was "clearly laid out in the *Civil Procedure Rules* under *Rule* 77". The judge invited response from the Minister by affidavit or correspondence.

[16] On September 2, 2020, the Minister replied with a brief, challenging J.P.'s facts and argument. The Minister filed an affidavit briefly outlining the history of the proceeding to date and J.P.'s familiarity with legal steps undertaken during that process and noting J.P.'s recent counsel change.

[17] The Minister objected to much of the material in J.P.'s submission, arguing that it referred to conversations to which J.P.'s counsel was not a party and events unrelated to the proceeding. The Minister insisted the court's consideration should be confined to the issue of late filing of the motion on August 4, 2020. The Minister explained that when the adjournment was granted, the disposition hearing itself was still almost six weeks away. There was ample time for J.P.'s counsel to prepare for that hearing. The failure to file in a timely way for the prehearing conference on August 5, 2020 had been remedied by adjourning to September 3, 2020. The Minister interpreted some of J.P.'s criticisms as directed against counsel, with a request that counsel pay costs.

[18] Although the judge had directed a "motion by correspondence", she did entertain oral submissions as well at the September 3 pre-trial conference. At the hearing, J.P. clarified that costs were not being sought from counsel personally.

The Oral Decision

[19] After brief submissions from J.P. and the Minister, the judge issued oral reasons, salient excerpts of which include:

> **THE COURT:** Okay, all right. I'm going to deal briefly with this and as I said, I'm going to reduce this to writing because it's a novel issue and it's one that I think needs to be addressed in writing.
>
> Very briefly, I will say that the Civil Procedure Rules have been very loosely followed in child protection proceedings for quite some time and we have been, as a court, trying to reinforce with counsel for the various parties that there is a need to meet the Rules and the requirements of those Rules because it disadvantages everybody, including the courts, when they're not followed.

[20] After noting that materials often arrive late in child protection proceedings, the judge observed:

> […] Very often they come in as late as the materials on this one. And I will tell you, ***I'm dealing only with the late filing of August 4th. The other issues that have been raised I'm not dealing with those today because they are larger issues and there's more information required*** and it may come up at the end of a hearing at some point that someone wants me to deal with them but I am solely focusing on the late filing for the Pre-Trial to Disposition. Ms. Perry is asking the court to sanction the late filing, as well as the adjournment request, because she says ***there's systemic delays, including disclosure, but as I said, I'm not dealing with that. I'm only dealing with the adjournment request.*** But the chronic delays that we are seeing, particularly on the Minister's end in filing affidavits and motions, has impacted everybody in the system.
>
> […]
>
> I can say for sure that I have cautioned the Minister's counsel in various ways about late filings over the years and there's been no improvement. In fact, orders are quite late and I have taken to setting them down for Chambers to enforce the fact that the orders have to come in. And they come in in a flurry at the last minute but they don't come in within a week as I direct. Costs are governed under Rule 77 and they are within the discretion of the judge and I did not take Ms. Perry's submissions to mean that she was looking for personal costs against counsel.
>
> […]
>
> The delays in filing that are seen are chronic and ***I will deal specifically with the August 4th filing.*** That affidavit was filed less than 24 hours before the docket appearance and when I read the affidavit, the last entry in the affidavit references activity on July 24th.
>
> […]

> ***So again, I'm making no comment on the allegations of late notes and the processes.*** It is appropriate for all parties to follow the rules and in the case of Legal Aid, if there's new counsel on the file, they should be providing a notice of new counsel because that makes it easier for the court to understand who's going to be calling in on calls as well. But again, those are issues that are for another day. ***The major problem here is the inconvenience to the parties who had to adjourn the Pre-Trial and try and try and seek instructions. So I am ordering costs of $250 payable by the Minister for the late filing on August 4th and the subsequent adjournment that is not (inaudible) against counsel personally.*** And I can indicate that if the other issues I've very briefly highlighted and identified persist and counsel wish to address the problem at future appearances, a motion can be filed and counsel should be aware that all the Judges are concerned with the late filing from all parties and costs are likely going to be a new part of the equation going forward.
>
> So that's a very brief decision on the issue of costs. As I said, I will try and find time to put that in writing.
>
> [Emphasis added]

[21] In her oral decision, the judge confined her ruling to costs occasioned by an adjournment arising from late filing of the motion. No facts or law ulterior to those issues are raised by her, which but for "mixed result" dispenses with issues (1) and (2) of which the Minister complains regarding the written decision.

The Written Decision

[22] On October 19, 2020, the judge issued a forty-paragraph written decision. The judge reviewed two leading Court of Appeal cases on costs in child protection proceedings, describing the test for awarding costs against a child protection agency in such cases. The judge then drew a distinction between those cases and costs in a procedural setting, quoting extensively from a number of decisions from Ontario, Alberta, and Prince Edward Island. The judge recognized that routine costs awards against the Minister could impede the Minister's child protection mandate, but added:

> [21] However, the Minister must act fairly, and in good faith, when it files and prosecutes child protection applications. This includes compliance with the *Civil Procedure Rules*.
>
> [22] Costs in civil proceedings (which includes child protection) in Nova Scotia are governed by *Civil Procedure Rule* 77. *Rule* 77.02 grants the court discretion to award costs "at any time" if the judge is satisfied it "will do justice between the parties".

> [23] The Nova Scotia Court of Appeal has recognized that prejudice caused by an adjournment may be compensated by costs where appropriate (see *Darlington v. Moore*, 2012 NSCA 68).

[23] The judge accepted J.P.'s complaints of prejudice from delay:

> [30] I accept Ms. Perry's argument that the late filings in this matter have negatively impacted her ability to provide timely advice to her client and obtain informed instructions.

[24] The judge complained of filing delays in the case more generally, then moved on to systemic delay:

> [32] The late filing on August 4 demonstrates a pattern which is evident in *CFSA* proceedings in this district generally. Late filings in child protection proceedings have become the norm. Respondents' counsel are often left scrambling to review the documents with their clients, sometimes just minutes before the court appearance.
>
> [33] In addition, the Minister's orders are often filed late; in some cases the order isn't filed until immediately prior to the next docket date (up to 3 months later). The vast majority of files scheduled for appearance days to deal with overdue orders, belong to the Minister. In these circumstances, one might ask: without a timely court order, how are parties to know what their legal obligations are?

[25] The judge emphasized the importance of timely disclosure by the Minister both for the parties and the court. She concluded:

> [40] The Court of Appeal has confirmed that costs may be awarded to Nova Scotia Legal Aid (see *Mosher* (*supra*) and *Cunningham v Cunningham*, 2018 NSCA 63) in appropriate cases. *Rule* 77.03 (5) confirms this. I therefore direct that the Minister pay costs to Nova Scotia Legal Aid in the amount of $250.00 for the late filing and unnecessary adjournment. Ms. Perry will prepare the order.

[26] The Minister's procedural and legal criticisms primarily focus on the judge's written decision. Accordingly, it will be convenient to begin with the Minister's third issue—whether the written decision impermissibly revised the oral reasons.

Written Revision of Oral Decision

[27] The authority to amend oral reasons is limited and may depend on what is said at the time they are expressed. Speaking for the Court in *Nova Scotia*

(Community Services) v. C.K.Z., 2016 NSCA 61, Justices Bourgeois and Van den Eynden noted:

> [61] What is the authority for a trial judge to revise the content of their oral decision, particularly, after having issued orders that flowed from their decision? It is acceptable and proper for a trial judge to edit their oral decision reduced to written form both for readability and to catch typographical transcription errors. ***When editing, a judge should not change the substance of their rendered oral reasons.*** Public confidence in and the integrity of our justice system requires that judges avoid what might appear to be after-the-fact justification. Appellate courts and the Supreme Court of Canada have confirmed these principles (See *R. v. Teskey*, 2007 SCC 267 and *R. v. Arnaout*, 2015 ONCA 655). In *Teskey*, the Supreme Court of Canada said this about the potential negative fallout when reasons are altered following the filing of a Notice of Appeal:
>
> > [18] … if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.
> >
> > [Emphasis added]

[28] In this case, no order followed the oral decision, and no appeal predated the written one. But these are not preconditions for disregarding later written reasons that go too far.

[29] In *R. v. Desmond*, 2020 NSCA 1, the Court gave guidance on written decisions following oral reasons given in court:

> [8] I consider here the March 12, 2019 decision. A trial judge has limited authority to modify or change a transcript of oral reasons rendered in court. Judges often reserve to themselves the right to edit the transcripts of oral decisions for syntax or spelling or to rectify any errors in transcription that may have been made by a court reporter. The right to edit decisions is not without limit.
>
> [9] The limited right to edit was noted in *R. v. Wang*, 2010 ONCA 435:
>
> > [9] ...This would normally be limited to matters such as punctuation, grammatical errors and the like. It is not an opportunity to revise, correct or reconsider the words actually spoken **and no changes of substance are to be made.** ...
> >
> > [Original emphasis]
>
> [10] In some cases a judge may find it necessary to indicate they are providing a brief explanation or even just a bottom line in terms of a decision. When that is

> done the judge should make it clear that more detailed reasons are to follow. This often occurs in the context of a trial, especially if there is a jury. When a ruling is made in the context of a jury trial, reasons will likely never be put before the jury. Reasons may be delivered at a later date for the benefit of the parties, for appeal, or for precedential value. The delayed rendering of reasons facilitates continuation of the trial.
>
> […]
>
> [16] ***The additions included an analysis of the cases, a review of the law, and consideration of circumstances of the case not present in the original decision.*** To a certain extent it even contradicted the oral decision. In this regard, I reference, for example, the oral decision on the forfeiture. It suggested the decision was discretionary and the judge simply refused to exercise that discretion. The March decision contained much more and referenced the circumstances, suggesting that some weighing was required.
>
> [Emphasis added]

[30] The judge gave oral reasons which she was going to "reduce to writing". The written decision did more than that. It transformed its oral predecessor. Factual and legal points exceeded what was in issue or argued. Prior to the September 3 hearing, the judge had dispensed with a proper motion from J.P. and discouraged resort to caselaw by citing *Rule* 77 as sufficient authority. The written decision quoted extensively from, or referred to directly, or by quotation, 13 cases. The written decision purported to distinguish between procedural and substantive law involving costs against child protection agencies. None of this was argued by the parties. As a result, the written decision transcended the parameters of the motion and resulted in unfairness to the Minister as consideration of the other grounds of appeal reveals.

Lack of Procedural Fairness?

[31] The Minister makes three broad submissions: (a) the Minister was not heard on the fruits of the judge's legal research; (b) the judge permitted a motion to proceed without evidence although advised there were facts in dispute; (c) the judge took into account a range of events not known to be under judicial consideration.

Fruits of the Judge's Legal Research

[32] A judge may conduct research (*IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, ¶32 per Sopinka J. dissenting in result). However, it is

an error for a judge to do so if it changes the nature of the issues under review, thereby failing to afford an opportunity to the parties to address those issues.

[33] Without elaboration, the judge observed in her oral decision that the costs motion raised "novel issues". In her written decision, the judge distinguished leading authorities from this Court by describing this case as "procedural" and then adverted to various decisions elsewhere. But her directions to counsel had not required caselaw and mentioned no legal novelty. The novelty point was not raised or argued.

[34] The judge began her written analysis by quoting from this Court's leading authority on costs involving child protection proceedings, *D.C. v. Children's Aid Society of Cape Breton Victoria*, 2004 NSCA 146:

> [6] In particular, in the context of child welfare proceedings, costs are not generally awarded against an agency which takes proceedings that are not successful. In M. Orkin, *The Law of Costs*, 2nd ed. (looseleaf) (Aurora, Ontario; Canada Law Ltd., 2003) the author discusses costs in child welfare proceedings at p. 2-91:
>
> > In wardship proceedings involving a Children's Aid Society costs have been awarded against the agency when it acted ***improperly***, or ***unfairly*** and ***indefensibly***, or while ***not grossly negligent***, performed below a reasonable level and prolonged the litigation; or adopted an ***untenable position***, but not where the agency brought the proceedings in good faith and committed no error; or, where although the agency made severe and grave allegations against the respondent which it subsequently withdrew, the ordinary person would not see such actions as unfair or unreasonable.
> >
> > ***Costs should only be ordered against an agency in exceptional circumstances of improper or overbearing action***. [Emphasis added]

[35] The judge went on to observe that this Court "does not appear to have dealt with costs against a child protection agency as it relates to procedural issues". The judge then quoted extensively from other Canadian courts to support a distinction between substantive and procedural cost awards. It is not clear whether any settled principle emerges from those cases, but the judge concluded:

> [20] Like other child protection agencies or ministries across the country, the Minister of Community Services in Nova Scotia has a statutory mandate to protect children from harm. Its child protection social workers are given broad powers of investigation, and having determined that a child is at risk of harm, they are empowered to take children into care. ***Routine costs awards against the Minister could impede that mandate***.

> [21] ***However, the Minister must act fairly, and in good faith***, when it files and prosecutes child protection applications. This ***includes compliance with the Civil Procedure Rules***. [Emphasis added]

[36] The Minister fairly complains she had no opportunity to argue either the novelty of the procedural distinction to which the judge refers in her oral decision or the law upon which she relied to make that distinction in her written one.

Proceeding Without Evidence?

[37] The Minister acknowledges that if J.P. had limited herself to seeking costs for the late filing of materials for the August 5 prehearing conference, no evidence would have been required. For context, it is useful to refer to the first part of J.P.'s submission on costs put before the judge:

> **1. Particulars of Case at Bar**
>
> The following is a summary of my attempts to obtain information, pleadings, case notes, and orders:
>
> - On July 7, I e-mailed the Department of Justice lawyers advising of my retainer and requesting a copy of the court documents and case notes.
> - On July 15th, I sent a follow-up e-mail repeating my request.
> - On July 16th, I sent another e-mail.
> - On July 16th, I contacted the court to ascertain which Department of Justice Lawyer was handling the case.
> - I received a response from the court and e-mailed Ms. MacSween directly on July 16th.
> - I was advised by Ms. MacSween that her assistant had already sent the documents. I responded that I had received nothing.
> - I subsequently received the protection application and affidavit, supplementary affidavit, and Interim orders from Ms. MacSween's assistant on July 16th.
> - Between July 7 and 16th, I rescheduled my client's initial appointment two times because I had not received the requested information.
> - On July 24th, I sent an e-mail to Ms. MacSween asking for clarification regarding the nature of the upcoming court appearance on August 5th.
> - On July 24th, I sent a further e-mail to Ms. MacSween repeating the above inquiry, requesting a copy of the protection order (based on assumption it

> had been made), asking several substantive questions about services/access, and requesting case notes. I received no response.
>
> - On August 4th, I was copied on an e-mail to the court filing the Notice of Motion, affidavit, and Plan of Care.
> - Upon receipt, I advised Ms. MacSween I would be requesting an adjournment of the August 5th pre-trial because I did not have time to review the documents with my client.
> - I couriered the filed documents to my client upon receipt on August 4th. I understand she did not receive them until August 5th.
> - Later on August 4th, I received case notes and records of the Cape Breton Regional Police from Ms. MacSween.
> - Later on August 4th, I was copied on an e-mail to the court filing the Protection Order from June 9th.
> - On August 5th (prior to court), I advised counsel of my intention to seek costs.
> - At no point in this sequence of events was I made aware of any challenges or barriers to providing the requested information.
>
> As a result of my difficulties obtaining information from the Minister, I was unable to provide timely advice to my client. My client also did not have a copy of the Order in effect. Appointments had to be rescheduled. The August pre-trial had to be rescheduled.

[38] In her oral decision, the judge properly accepted that J.P. was prejudiced by the Minister's late filing of extensive motion materials on August 4 for the prehearing conference the next day. It was impossible for J.P. to instruct counsel in those circumstances.

[39] The oral decision was confined to prejudice caused by the late filing of the motion on August 4, 2020. Any prejudice prior to that was expressly excluded by the judge; even though the written decision sustains the conclusion of the oral decision, the written reasons represent an impermissible "change of substance" and cannot be relied upon in this appeal.

Events Not Known to be in Issue

[40] The Minister claims that the court relied upon facts or events earlier in the proceeding in her decision than had been complained of by either J.P.'s former or new counsel.

[41] It is trite to say parties must be given notice about the issues and an opportunity to give evidence and make submissions on those issues. The court has said so in a family law setting: *Slawter v. Bellefontaine,* 2012 NSCA 48, ¶5, 21, 22, 24, 26, 33 and 52.

[42] After dealing with disclosure complaints in July, the judge referred to earlier events not raised or argued:

> The original application was filed on March 12, 2020 accompanied by a 79 page (368 paragraph) affidavit. The 5 day interim hearing was scheduled for a docket appearance on Monday, March 16, 2020. The child was not taken into care, so the Minister had some flexibility when seeking court dates. A filing on March 12 did not leave sufficient time to serve the parties with notice under *Rule* 39. However, as is almost standard, a waiver was requested and granted.

[43] In this paragraph, the judge moved from the prejudice claimed by J.P. to a description of late filings earlier in the case, about which J.P. did not complain, and which the Minister had no opportunity to address.

[44] The written decision also appears to embrace the very broad "systemic" allegations of J.P.'s costs submissions which were:

> **2. Chronicity of Problem and Systemic Impact**
>
> The difficulties experienced in the case at bar are not unusual in this jurisdiction. Instead, the concerns are chronic and ongoing (to varying degrees).
>
> Late filing of pleadings, late filing of court orders, and late or non-existent provision of case notes has been an issue of concern for respondents' counsel for years. There have been many attempts to address the concern by other means.
>
> - Issue has been raised at several CFSA Bench and Bar committee meetings.
> - Issue has been raised by Legal Aid Executive office with Department of Justice management.
> - In December 2018, I wrote to Department of Justice lawyers outlining our concerns. I indicated that some respondents' counsel may be seeking costs in the future if the issue was not addressed.
> - In December 2018, I was contacted by one of the Department of Justice lawyers advising there was plan in place to address the concerns and requesting that we refrain from making costs submissions until there was time for this plan to take effect.

- In December 2019, I sent another e-mail to the Department of Justice lawyers advising that the problems identified a year ago still existed. I reiterated our desire to avoid seeking costs if possible.
- I did not receive a response to that e-mail.
- I am aware of justices warning Department of Justice counsel of the possibility of costs.

The problems with timely filing and the provision of full disclosure have an ongoing systemic impact on our ability to effectively represent respondents in CFSA matters.

- Legal Aid incurs significant costs couriering documents to clients at the last minute.
- Respondents' counsel must review pleadings a [*sic*] rushed manner with clients a day or two before court. There is little time to ask follow-up questions that may arise.
- Requests for adjournments are generally not opposed but such adjournments are not ideal for clients or busy lawyers and stacked court dockets.
- Respondents routinely do not have a current order to which they can refer. Lawyers provide detailed reporting letters that attempt to fill this gap.

[45] The Minister says that when the judge considered generic or systemic problems there was no way for her to know "what were the matters in issue". The Minister says:

> 191. The Minister further could not reasonably reply regarding events in other unidentified court proceedings, or other unidentified extra-judicial discussions, meetings, letters or emails. She could have replied if the hearing judge had directed evidence be filed proving these "facts".

[46] In her oral decision, the judge did not give weight to J.P.'s "systemic impact" submissions. But her written decision amplified them:

> [32] The late filing on August 4 demonstrates a pattern which is evident in *CFSA* proceedings in this district generally. Late filings in child protection proceedings have become the norm. Respondents' counsel are often left scrambling to review the documents with their clients, sometimes just minutes before the court appearance.
>
> [33] In addition, the Minister's orders are often filed late; in some cases the order isn't filed until immediately prior to the next docket date (up to 3 months later). The vast majority of files scheduled for appearance days to deal with

> overdue orders, belong to the Minister. In these circumstances, one might ask: without a timely court order, how are parties to know what their legal obligations are?
>
> [34] Finally, late filings compound the problem of a busy court docket that is already dominated by child protection proceedings. In addition to duplicate docket appearances due to adjournment requests, *CFSA* proceedings take priority over other family files scheduled for hearing, because they involve statutory time limits. So when a party contests the Minister's position in a *CFSA* proceeding, civil family files are "bumped" from the docket to obtain trial time. Given the number of *CFSA* trials held in this district, this has become a regular occurrence.
>
> [35] This priority status may have led to complacency on the part of the Minister, as courts are generally unwilling to dismiss a child protection matter for lack of procedural compliance. That being said, procedural fairness is an important component of any court proceeding. The *Civil Procedure Rules* lay out the processes that must be followed, in order to ensure that parties receive fair notice of all steps taken by the other party to the litigation.
>
> […]
>
> [39] Finally, as counsel for J.P. noted during her submissions, it is not clear where fault lies for the delay at the Minister's end. The filing delays cannot be attributed to the Covid-19 state of emergency, as they are chronic and long-standing. It may be that institutional complacency has set in, because courts have been reluctant to order costs in child protection proceedings in the past. Or it may be that more resources are required, in order for the department to meet its obligations under the legislation and the *Civil Procedure Rules*. Either way, the problem must be addressed.

[47] Judges can take judicial notice of the "context in which they perform the duties of their office" (*R. v. Lacasse*, 2015 SCC 64, ¶95 and see *R. v. MacDougall*, [1998] 3 S.C.R. 45). The judge's knowledge of her own docket, and the habitual breach of the Rules and court directions in her judicial district are things of which the judge can take notice.

[48] In *Lacasse*, the Supreme Court put it this way:

> [95] In any event, I am of the view that ***it was open to Judge Couture to take judicial notice of the evil represented by the large number of offences related to drinking and driving that are committed in the Beauce district. Judge Couture was the resident judge in that district.*** He was therefore in a position to observe and assess the magnitude of the problem in his region, especially given that it is well established in our law that **[*judges can take judicial notice of the contexts in which they perform the duties of their offices*]**: *R. v. Z.Z.*, 2013 QCCA 1498, at para. 68 (CanLII); *R. v. Hernandez*, 2009 BCCA 546, 277 B.C.A.C. 120, at para.

> 29. This Court stated in *R. v. MacDougall*, [1998] 3 S.C.R. 45, at para. 63, per McLachlin J., that trial judges and provincial courts of appeal are in the best position to know the particular circumstances in their jurisdictions. In the case at bar, the frequency of impaired driving offences is something that can be determined objectively by consulting the court rolls. In short, it is public information that is known and uncontroversial, and the local reality was not in dispute in the instant case.
>
> [96] In the circumstances, requiring the preparation and filing of additional evidence to establish that prosecutions for impaired driving offences were regularly on the penal or criminal roll in the Beauce district is in my opinion pointless. ***It is the trial judge who is in the best position to know the nature of the cases before his or her court.***
>
> [Emphasis added]

[49] In *R. v. Chase*, 2019 NSCA 36, this Court made the same point:

> [56] Furthermore, one can take judicial notice of the fact that Judges Murphy, Hoskins and Buckle are all very experienced trial judges who preside at two of the busiest Courthouses in Nova Scotia, one located in Dartmouth and the other in Halifax. If there happened to be a noticeable spike in the number of Schedule I drug offences taking place in the city, one can say with confidence that they would be the first to see it. Their unique vantage point as judges serving at the "front lines" of our justice system, is one of many reasons why such a heightened level of deference is paid to the broad discretion they wield in sentencing. These advantages of personal insight and familiarity were underscored by Chief Justice Lamer in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at ¶91-92:
>
> > [91] This deferential standard of review has profound functional justifications. ... in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions ... the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current

> conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
>
> [92] ... courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See *Mellstrom*, *Morrissette* and *Baldhead*. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. ...
>
> [Original emphasis]

[50] However, as *Lacasse* counsels, if a court seeks to attach weight to local circumstances, parties should be given an opportunity to respond:

> [94] ***It is true that considerations of procedural fairness will generally require that a judge who intends to attach weight to the local reality and to the frequency of a crime in a given region offer the parties an opportunity to make representations on the subject.*** However, this was not an issue in the case at bar, given that the local reality was not in dispute. The record shows that the point about the local reality was raised by the appellant in argument in a timely fashion and that the respondent therefore had all the information he needed in deciding to say nothing in this regard: transcript from September 14, 2013, A.R., vol. II, at p. 91.
>
> [Emphasis added]

[51] In fact, the judge did not place weight on "systemic" issues in either her oral or written decision when awarding $250 in costs for prejudice caused by the adjournment on August 5, 2020.

[52] The judge's extensive review of "systemic" issues without an opportunity for response gives the impression of unfairness to the Minister, even if it did not inform the *ratio decidendi* of her decision. But because the judge did not rely on systemic issues in either of her decisions to sanction the Minister in costs, no unfairness in fact resulted.

Errors in Principle

[53] The Minister makes three submissions. First, that the judge "circumvented" binding authority in child protection cases. Second, the judge should only have applied the law respecting "thrown away" costs. Thirdly, she failed to consider the "mixed result" of J.P.'s motion for costs. The first two submissions will be considered together.

Ignoring Binding Authority and "Thrown Away" Costs

[54] As the Minister points out, the judge acknowledged the law of costs set out in *D.C. v. Children's Aid Society of Cape Breton Victoria*, but distinguished that case without giving the Minister an opportunity to argue the distinction that was made between substantive and procedural issues. Over several pages the judge canvassed jurisprudence from other Canadian courts, but it is not clear what principles the judge extracted from these cases and applied in this case. The judge did highlight "accountability" and "accountability ties to conduct" from *Children's Aid Society of Algoma v. R.M.*, [2001] O.J. No. 2441 (ONCJ). The judge referred to *W.(K.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 778 for the proposition that Ontario and Alberta had the same test as Ontario of "fairness and accountability".

[55] As earlier noted, the judge conceded that "routine costs awards against the Minister could impede [the Minister's] mandate", but went on to say, "… the Minister must act fairly and in good faith … this includes compliance with the *Civil Procedure Rules*".

[56] The Minister maintains that this sets a different and lower bar than that of "exceptional circumstances" described in *D.C.* The Minister observes that if, as the judge said in her oral decision, "costs are likely going to be a new part of the equation going forward", might that not lead to costs being awarded routinely? The Minister adds that it would not only be the Minister who would be subject to potentially routine costs awards, listing the following scenarios not unknown in these kinds of proceedings:

1. Parents and/or their legal counsel do have the proper notice, but still appear at the court appearance "without instructing/instructions", necessitating an adjournment;
2. Parents appear with legal counsel but have given instructions only on some of the relief sought, asking to "defer" (adjourn) the other party's properly brought request for relief;

3. Parents (as in this case at protection) fail to appear at court appearances or to instruct counsel, causing an adjournment; it is very common for only the judge, court reporter, lawyers and social worker to "show up" and a second appearance have to be scheduled, often urgently;

4. The practice of "maximizing time limits" (consenting but asking to adjourn to a date closer to a legal maximum) may be characterized as just another adjournment: the party is either going to consent or contest; parents have no legal right to "have the maximum time"; it's not theirs;

5. Finally, if an agency seeks to terminate a child protection proceeding but the request must be (repeatedly) adjourned, almost always the reason is to negotiate the post-proceeding custody and parenting arrangement, with delay and adjournments caused directly by parents' counsel in the child protection proceeding only having a Legal Aid Certificate for that application.

[57] There was already evidence before the court in this case of delay and additional expense caused by the respondents. The June 9 protection hearing had to be adjourned to June 22 because J.P.'s counsel could not obtain instructions. A further adjournment was required to June 29 because R.M. could not be served.

[58] Another example arises from the costs hearing itself. J.P.'s new counsel invited the court to consider events unrelated to the adjournment and indeed to the case before the court. It was perfectly reasonable for the Minister to ask for a motion and supporting affidavit to which she could respond. Since the adequacy of counsel's letter was not known to the Minister until the judge's ruling to that effect two days before the hearing, an adjournment may well have been required to address all of the issues raised in that letter. In other words, an adjournment would have to have been granted and presumably costs associated with that adjournment would be borne by J.P. as the party who had failed to make a proper motion to the court.

[59] One can easily see how arguments on costs quickly degenerate into procedural fault-finding obscuring the more pressing and substantive issues before the court. Procedural delay and inefficiencies of time and expense would readily follow. Neither serves the purposes of the *Act* nor the interests they protect.

[60] The Minister asserts that the judge's written decision changes the law on costs involving child protection authorities in this province. The Minister complains that the judge concluded her summary of extra-provincial caselaw by observing, as previously quoted, that "… the Minister must act fairly, and in good faith … This includes compliance with the *Civil Procedure Rules*". But then the

judge cited *Rule* 77 and *Moore v. Darlington*, 2012 NSCA 68, which awarded costs for prejudice caused by an adjournment, to which the Minister does not take exception.

[61] The analytical challenge is that *Moore* applies well-known civil law standards in private litigation, not the higher *D.C.* "exceptional circumstances" standard in a child protection setting. More will be said about this dichotomy below (¶64 and following).

[62] The judge concluded that a distinction could be made between costs awarded against a child protection agency on substantive matters, and in procedural cases. She did not thereby circumvent the "binding authority" of *D.C*, because *D.C.* was not a procedural ruling.

Mixed Result

[63] The Minister goes on to say the judge should have considered the "mixed result" because a number of J.P.'s arguments were rejected by the judge in her oral ruling on costs. With respect this is unpersuasive. The adjournment triggered by the Minister's late filing of the motion for the prehearing conference prompted J.P.'s costs motion. That J.P. was not successful on all the arguments she offered does not detract from her fundamental success in requesting costs for the prejudice arising from the adjournment. On that issue, J.P. prevailed, and the very modest sum of $250 was a reasonable outcome.

May costs be awarded for procedural impropriety against the Minister?

[64] *Rule* 77.05 permits the award of costs on a motion. Costs generally follow the event but are notoriously a matter of judicial discretion.

[65] The original purpose of costs was to indemnify the successful party for the legal expense of that success. More recently a wider array of purposes have been identified, including influencing the conduct of parties such as preventing abuse of process, encouraging settlement, deterring frivolous proceedings, discouraging steps that prolong litigation and even facilitating access to justice (*Orkin*, ¶201[1]).

[66] Indemnification would not ordinarily apply to a party represented by legal aid as here, but that limitation has been overtaken by a recognition of legal aid's

[1] Mark M. Orkin & Robert G. Schipper, *Orkin on the Law of Costs*, 2nd ed (Toronto: Thomson Reuters Canada Ltd, 2020) (loose-leaf).

scarce public resources (*Mosher v. Gosby*, 2016 NSCA 10 at ¶17) and by *Rule* 77.03(5) which allows payment directly to the Legal Aid Commission.

[67] Judicial discretion must accord with principle. *D.C.*'s test for a costs award sets a high bar (¶34 above). In *D.C.* the Society discontinued protection proceedings. But that discontinuance was informed by an evidentiary process in which a judgment call was made by the Society. It was not a case of "procedural impropriety" in the sense of non-compliance with the rules which involved some prejudice in legal expense to the respondent.

[68] By way of contrast, *Moore*, cited by the judge in her written decision, awarded costs "thrown away" by an adjournment. *Moore* was a family law case, not a child protection proceeding. Should a normal civil law standard apply to the Minister for procedural transgressions? *D.C.* and *Moore* cannot be reconciled unless one accepts that distinction, but the Minister is not an ordinary litigant and should not be readily subject to costs awards, even those "thrown away" such as in *Moore* because:

- The Minister is not a private self-interested litigant, but a public actor performing important public duties in which the best interests of children are "paramount" (s. 2(2) of the *Act*);
- Discharging those duties may require swift action inconsistent with the timelines typical of civil litigation (for example, an interim hearing must take place within 5 working days of commencing an application, on two day's notice, which may be waived (s. 39(1));
- In addition, owing to the specialized nature of the litigation, it may not always be easy to draw a clear substantive/procedural distinction;
- Timelines in the *Act* are relatively short and move the litigation forward much quicker than the typical civil case;
- The obligation to respect those short timelines rests primarily on the Minister;
- Evidence in child protection cases is typically evolving; time constraints may conflict with obtaining complete and current information;

- The valuable time of courts and litigants in child protection proceedings should not be taxed by procedural disputes over costs;

- Respondents may also be responsible for delays and duplication of effort, but should they be obliged to pay costs for procedural breaches even though they may be of modest means? For example, parents are typically insulated from costs awards because they are entitled to have the state prove its case (*Children's Aid Society of Ottawa-Carleton v. S.*, [2003] O.J. No. 945, ¶3) but should such forbearance extend to procedural impropriety?

[69] Courts must be able to control their own processes and are entitled to expect litigants – including the Minister – to abide by the *Rules* and court-directed filing timelines. One can sympathize with the apparent frustration of Justice MacLeod-Archer in this case, even without reference to "systemic delay". Perhaps waiver of time could not have been avoided when proceedings were started in March 2020. But thereafter orders were slow coming. The June protection order was not sent to the court until August 4, 2020. The Agency Plan was not filed a week in advance of the August 5 pretrial conference, as the judge had directed on June 22. Such delays not only inconvenience counsel, but also busy judges who should not have to waste valuable time policing procedural compliance by counsel.

[70] Orders should be issued promptly. As the judge laments in her written decision:

> [33] In addition, the Minister's orders are often filed late; in some cases the order isn't filed until immediately prior to the next docket date (up to 3 months later). The vast majority of files scheduled for appearance days to deal with overdue orders, belong to the Minister. In these circumstances, one might ask: without a timely court order, how are parties to know what their legal obligations are?

[71] The policy reasons that discourage costs awards against child protection agencies when discharging their public mandate inform the demanding "exceptional circumstances" test described in *D.C.* While it may be tempting to draw a bright line between substantive and procedural matters and treat the Minister "like any other civil litigant" in the latter, that temptation should be resisted for the reasons described in ¶68 above.

[72] That does not mean that procedural transgressions may not attract a costs award, as the judge suggests in her oral decision:

> […] So I am ordering costs of $250 payable by the Minister for the late filing on August 4th and the subsequent adjournment that is not (inaudible) against counsel personally. ***And I can indicate that if the other issues I've very briefly highlighted and identified persist*** and counsel wish to address the problem at future appearances, a motion can be filed and counsel should be aware that all the Judges are concerned with the late filing from all parties and costs are likely going to be a new part of the equation going forward.
>
> [Emphasis added]

[73] From this can be inferred that an isolated "procedural breach", which causes little or no prejudice to other parties, will not result in a costs award. But a pattern of breaches may do so if it causes prejudice without reasonable excuse. Although the judge awarded only nominal costs for the late-filed motion, she did so in the context of prior procedural mis-steps.

[74] The requirement to show "exceptional circumstances" as described in *D.C.* remains the rule for an award of costs against the Minister. Thrown away costs may be awarded in exceptional circumstances per *D.C.* or if a pattern of procedural errors emerges, as here.

Conclusion

[75] The oral decision noted the history of delay in filing orders granted, but that did not inform the ruling for costs. The judge did not thereby make the error attributed to her of considering material and events not known to be under judicial consideration. Unfortunately, while they affirm the oral decision, the written reasons give another impression, but for reasons already expressed, the written decision must be disregarded.

[76] I would grant leave, but dismiss the appeal.

Bryson, J.A.

Concurred in:

Van den Eynden, J.A.