SUPREME COURT OF NOVA SCOTIA

Cite as: J.S.B. v. J.D.A.B.. 2010 NSSC 343

Date: 20100908
Docket: Hfx No. 331646
Registry: Halifax

Between:

J. S. B.

Applicant

v.

J. D. A. B., a minor in the care and custody of the Minister of Community Services, pursuant to the *Children and Family Services Act*, and J. C.

Respondent

Restriction on publication: *Children and Family Services Act*, R.S.N.S. 1990, c. 5, (as amended) for this Province, pursuant to s. 94, no person shall publish or make public any information that might have the effect of identifying the child, or a parent or guardian or foster parent or any relative of the child. To this extent, the conduct and content of these proceedings shall remain strictly confidential.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Glen G. McDougall

Heard: August 31, 2010, in Halifax, Nova Scotia

Written Decision of
Oral Rendered September 8, 2010

Counsel: Kenzie MacKinnon, on behalf of the applicant
Elizabeth Whelton, on behalf of the respondent

By the Court:

[1] J. S. B. (henceforth "the applicant") seeks an order authorizing Mr. Kenzie MacKinnon, Barrister and Solicitor, to conduct an examination of J. D. A.B., a minor, currently 14 years of age, and to deliver to the Circuit Court of the Ninth Judicial Circuit, in and for O.C., *, United States of America, a videotape and transcript of such examination. (I will henceforth refer to J. B. as "J.B.")

[2] A similar request to have J.C., the other named respondent, examined pursuant to a commission was resolved by way of agreement. Therefore, this Court need only concern itself with the application as it pertains to the minor child.

[3] Preliminary to giving my ruling I will reiterate what I had previously stated at the commencement of these proceedings in Chambers on Tuesday afternoon, August 31st, 2010. As this application involves a child who is the subject of proceedings under the *Children and Family Services Act*, R.S.N.S. 1990, c. 5, (as amended), pursuant to s. 94 of the said Act, no person shall publish or make public any information that might have the effect of identifying the child, or a parent or guardian or foster parent or any relative of the child. To this extent, the conduct and content of these proceedings shall remain strictly confidential.

FACTUAL UNDERPINNINGS:

[4] The factual underpinnings that have led to this application arise out of certain criminal charges laid against the applicant in the State of *.

[5] It is alleged that he committed the offences of:

(i) Sexual activity with a minor;

(ii) Lewd or lascivious battery; and

(iii) Child abuse.

All three offences carry a possible jail sentence with the most serious punishable by a maximum of 30 years incarceration.

[6] The applicant's counsel in * believes the minor child could provide relevant testimony that would aid in the defence of his client. He obtained a "Subpoena for

Deposition" from the * Circuit Court and arranged to have it personally served on the foster parents in the home where the child has been temporarily placed in Nova Scotia.

[7] Counsel for the Minister of Community Services wrote to Mr. Lindsay – the applicant's * counsel – advising that "[U]pon Review of the matter, including consultation with professionals working with the child, the Minister of Community Services will not make the child,... available for deposition."

[8] In a subsequent letter sent to Mr. Lindsey by counsel for the Minister in relation to subpoenas served on the complainant and her former social worker – J. C. – the authority of the subpoenas was challenged and participation was refused as a result.

[9] In response to Ms. Whelton's letters and after discussions with Mr. MacKinnon, Mr. Lindsey, pursuant to the "Treaty on Mutual Legal Assistance in Criminal Matters" (henceforth "the Treaty") between the Governments of Canada and the United States of America and pursuant to section 70 of the Nova Scotia *Evidence Act*, R.S.N.S. 1989, c. 154 (as amended), applied to the Circuit Court of the Ninth Judicial Circuit, in and for O.C., *, for an order in the form provided for in the Treaty. The resulting order requests the appropriate Judicial Authority – in this case the Supreme Court of Nova Scotia – to order the attendance of the child (and Mr. C., but he has since voluntarily agreed to be examined) at a deposition and to appoint Mr. MacKinnon to act as a commissioner at such deposition hearing.

[10] The Letter of Request also asked the Court to grant an order compelling the attendance of J.B. and J. C. at trial in O., *. This aspect of the request is not being pursued at this time.

[11] In an affidavit filed in support of the application, Mr. Lindsey states why he seeks the opportunity to examine the child and the kind of evidence he hopes to elicit from him. He concludes his affidavit by stating:

> Because of the extreme seriousness of the criminal allegations, counsel for Mr. B. believes that both ..[J.B.] and J. C. possess relevant testimony that is exculpatory to Mr. B. and which would be admissable to show the innocence of Mr. B. of these charges.

[12] Counsel for the applicant filed an Amended Notice of Application on August 13, 2010. The applicant seeks an order: (1) Issuing a commission to Kenzie

MacKinnon, to conduct an examination of J.B., to obtain his testimony in Nova Scotia, and to deliver a videotape and transcript of the proceedings to the Circuit Court of the Ninth Judicial Circuit, in and for O.C., *, U.S.A.; and, (2) Compelling J.B. to attend before the said commissioner to answer all questions posed by counsel for both the applicant and the State of *, at a mutually convenient time and place in Nova Scotia, the answers to which questions are to be provided without restrictions based on the *Freedom of Information and Protection of Privacy Act.*

[13] In opposing the application, counsel for the respondent filed an affidavit of Ms. J. C., a social worker with the Department of Community Services who has on-going involvement with the child, J.B. Attached to Ms. C.'s affidavit is a letter from Dr. Herbert Orlik, a medical doctor with a specialty in Child and Adolescent Psychiatry. [*editorial notice- sentence removed here to protect identity*]

[14] Dr. Orlik has diagnosed the young boy as having Asperger Syndrome which is a type of an Autism Spectrum Disorder. He has also diagnosed him as having Attention Deficit / Hyperactivity Disorder. Dr. Orlik expresses the opinion that J.B. would not be able to give testimony or function as a witness and then offers a number of reasons for doing so. He concludes by stating:

> In my professional opinion, ..[J.B.] could not function as a witness and if he had to give a deposition and/or testify, that having to do so could be quite traumatizing, quite harmful to him.

[15] It is left to this Court to decide on the legitimacy of the motion and the propriety of the proposed examination should the Court determine there is authority to grant the relief sought.

LEGISLATIVE FRAMEWORK:

[16] The authority to entertain this application is derived from the Treaty and section 70 of the Nova Scotia *Evidence Act*, (henceforth "the *Evidence Act*"). It reads as follows:

> 70 Where a court or tribunal of competent jurisdiction in any part of Her Majesty's dominions, or in any foreign country, in some proceeding before it, issues or authorizes a commission or order for obtaining the testimony of some person being within the Province, or the production of papers therein, it shall be lawful for the Supreme Court, or a judge thereof, if satisfied of the authenticity of the

> commission or order and the propriety of the examination or production, by order to direct the examination of the persons whom it is desired to examine, and the production of papers, when required, in the manner prescribed in the commission or order for examination, or in such other manner, and before such person, and with such notice, as the Court or a judge directs.

[17] The Court must first be satisfied of the authenticity of the commission or order and, if satisfied, it must then consider the propriety of the examination.

[18] The Circuit Court of *'s Letter of Request was signed by Circuit Judge, J. B. M., on the 14th day of June, 2010. It bears the seal of the O.C., * Circuit Court. By virtue of section 20 of the *Evidence Act* which states:

> **Judicial proceeding of any country**
>
> **20** Evidence of any proceeding or record whatsoever of, in or before any court in the United Kingdom or the Supreme or Federal Courts of Canada, or any court, or before any justice of the peace, or any coroner, in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, may be given in any action or proceeding by a certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal, or of the signature of such justice or coroner, or other proof whatsoever, and if any such court, justice or coroner has no seal, or so certifies, then by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court, or of such justice or coroner, without any proof of the authenticity of such signature, or other proof whatsoever. R.S., c. 154, s. 20.

[19] I am satisfied that the Letter of Request was made by a court of competent jurisdiction and, furthermore, I am also satisfied of the authenticity of the commission or order requested without proof of the authenticity of the Court's seal or the signature of the presiding Judge. This together with the Treaty establishes the authenticity and legitimacy of the request.

[20] I will now turn my attention to the propriety of the examination of the child witness and the ramifications it might have on him and on the applicant as well.

[21] The exact nature of the evidence to be adduced from the witness cannot be predicted with any degree of certainty. The * Circuit Court's "Letter of Request" states that:

> [T]he Defendant has a good-faith reason to believe that the testimony of witnesses .. [J.B.] and J. C. are relevant and material to his theory of defense, may be used to impeach witnesses that may be called against him by the State, and that these witnesses would testify to matters exculpatory to the defense in the case.

[22] In Canada (and no doubt the same occurs in the U.S.A.) child witnesses are often called to testify. This is particularly so in cases involving allegations of sexual impropriety involving minors. Care must always be taken to minimize stress and possible trauma for youthful and impressionable witnesses. Based on Dr. Orlik's letter this is perhaps even more in issue in the case of J.B. because of the special challenges he presents.

[23] Dr. Orlik's letter does not, however, say it would definitely be traumitizing or harmful but rather that it could be. Dr. Orlik's professional opinion seems to focus more on J.B.'s ability to give testimony and his general level of anxiety.

[24] I am sure no one wants to subject J.B. to anything that could be harmful to his overall health. But as for his ability to function as a witness and the relevance and reliability of his testimony, that must be left to the Court to decide.

[25] Given the seriousness of the charges facing Mr. B. and the potentially severe penal sanctions that could be imposed should he be convicted of some or all the charges I believe it is necessary that he be granted the relief he seeks. To do otherwise might deny him the right to make full answer and defence – a constitutional right that is afforded to all accused persons charged with a crime in Canada under the **Charter of Rights and Freedoms**.

[26] In granting the requested relief I would urge the Commissioner to be appointed, Mr. MacKinnon, to be particularly mindful of J.B.'s age and condition.

[27] In addition to counsel for the accused and State counsel, I order that counsel for the Minister of Community Services be permitted to be present to observe the proceedings as a representative of the Minister and the Minister of Justice.

[28] As well, J.B.'s social worker, Ms. C., should also be permitted to attend if her presence offers a source of comfort and support for the child. Similarly, J.B.'s foster parents may also attend to lend their support if it is deemed appropriate. That decision will be left to the foster parents and the child's other caregivers and health providers.

[29] I will recommend that the date and time for the examination be set to accommodate J.B.'s school schedule and any other organized activities that he might be involved in. If this means the examination must take place on the week-end then so be it. It is J.B.'s regular schedule that must take priority.

[30] If J.B.'s caregivers and health providers feel that it would be beneficial to have J.B. introduced in advance to the Commissioner and the lawyers who will ask him questions, then arrangements should be made to have this take place.

[31] It might also be helpful to have J.B. taken to the facility where the examination is to take place in advance of the actual hearing. This will offer him the opportunity to become somewhat familiar with the physical surroundings where the examination will take place. It might possibly de-mystify the process and make it less intimidating for him.

[32] These are only suggestions and are not mandatory. It is also not an exhaustive list. J.B.'s care-givers and health providers should be allowed to make any other suggestions they think could be beneficial.

[33] In order to avoid any improper influence regarding J.B.'s testimony the complainant, his sister, should not be present during his examination.

[34] I will leave it to the Commissioner to decide whether or not J.B. understands the nature of an oath or solemn affirmation before he is called on to testify. The *Canada Evidence Act*, R.S. 1985, c. C-10, provides for the administering of an oath or solemn affirmation for a witness 14 years of age and older. It might be that, given J.B.'s condition, his understanding and appreciation of telling the truth might have to be explored. Section 16, subsection (1) of the *Canada Evidence Act* provides for situations where a witness' mental capacity to testify is challenged. The Commissioner appointed should make himself aware of this provision.

[35] I will leave it all in the very capable hands of Mr. MacKinnon. I am confident he will see that the examination takes place in a manner that minimizes any potential

stress to J.B. The ultimate question of admissibility of the evidence and the weight it should be given will be left to the presiding judge in *.

McDougall, J.