SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. A.G, J.A.*, 2020 NSSC 334

Date: 2020-11-20
Docket: 119509
Registry: Sydney

Between:

Nova Scotia (Community Services)

Applicant

v.

A.G. and J.A.

Respondents

Restriction on Publication

Section 94(1) of the *Children and Family Services Act* applies to this decision and provides as follows:

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.

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	September 28, 2020, in Sydney, Nova Scotia
Written Release:	November 20, 2020
Counsel:	Adam B. Neal for the Applicant Jocelyn Campbell, Q.C. for the Respondent, A.G. T.J. McKeough for the Respondent, J.A.

By the Court:

INTRODUCTION

[1] The Minister of Community Services filed a notice of child protection application under the *Children and Family Services Act*, S.N.S. 1990, c. 5, on September 9, 2020 (File #119359). The supporting affidavit was 55 pages and contained 294 paragraphs.

[2] The first hearing (known as the 5-day interim hearing) was scheduled for September 14, 2020. Citing Notice #9 issued by the court on April 20, 2020, which sets a presumptive limit on affidavit length, counsel for A.G. objected to the 55 page affidavit. Her client intended to file a response affidavit, but the lengthy affidavit, combined with the short statutory notice period, effectively denied her that opportunity.

[3] With the Minister's consent, the matter was adjourned and I directed counsel to file written submissions on the issue of the length of affidavits in the proceeding.

[4] The Minister re-filed its child protection application and affidavit, along with written submissions on the issue of affidavit length on September 21, 2020. Counsel for A.G. withdrew her objection to the length of the affidavit in view of

the adjournment, which gave her an opportunity to review it and respond. J.A. took no position.

[5] In the re-filed application, the Minister requested a declaration that:

(a) Notice # 9 regarding child protection proceedings is *ultra vires* the rule-making powers of this Honourable Court;

(b) The manner in which the Notice has been imposed on litigants in individual cases is in breach of the rules of natural justice;

(c) The very existence of the Notice gives rise to a reasonable apprehension of bias on the part of any judge who must exercise discretion regarding affidavits and business records; and

(d) Notice #9 has no force and effect.

[6] The re-filed child protection application came before the Court for the 5-day interim hearing on September 28, 2020. After reviewing the full affidavit, I accepted the Minister's submission that a lengthier affidavit was necessary, because of the long and conflictual history between the parties. As a result, there was no need to permit the Minister to file a further affidavit as contemplated by Notice #9.

[7] In view of this exercise of discretion, I viewed the issue of affidavit length moot. However, counsel for the Minister requested that the Court rule on the request for declaratory relief, given that it is not a declaration limited to this proceeding. After hearing from counsel, I dismissed the motion for declaratory relief. Written reasons were requested. These are my reasons.

NOTICE #9

[8] Notice #9 and its Appendix outline the basis for the court's imposition of presumptive page limits for affidavits filed in child protection proceedings. The Appendix, which addresses the balance sought to be achieved between the *Rules* and the *CFSA* at the 5-day interim hearing, is particularly relevant.

[9] The province of Nova Scotia has been under a state of emergency since March 2020 due to the Covid-19 pandemic. The Supreme Court of Nova Scotia (Family Division) initially instituted an essential services model on March 18, 2020. This was expanded to a safe services model on June 15, 2020. When the Minister filed this application and affidavit, the Court was (and still is) grappling with the pandemic and its impact on the judicial process.

[10] Since March, 2020, the court has managed with limited resources, while implementing new and/or modified procedures. For example, electronic filing has

assumed a greater role in proceedings. This change has imposed greater demands on court staff, who are already dealing with the other challenges posed by the pandemic.

[11] In response to the state of emergency and the implementation of an essential services model, Associate Chief Justice Lawrence O'Neil issued a series of Notices containing directions to litigants. Notice #9 deals with presumptive limits to the length of affidavits filed in child protection proceedings. It states:

> "Unless a party makes a request in writing to vary the following, other parties have an opportunity to respond and a presiding judge gives different directions, the following will govern aspects of proceedings pursuant to the *Children and Family Services Act* (CFSA), ...
>
> ...
>
> 3. Effective immediately, no affidavit filed after May 1, 2020, may exceed twenty-five (25) pages. and on June 1, 2020, the limit on the length of affidavits will become twenty (20) pages. Subject to bullet 4 in this list, in both cases exclusive of exhibits.
>
> 4. Case recordings shall not be attached as exhibits to affidavits. "

[12] In its submissions, the Minister asks me to take judicial notice of the fact that:

> "The Notice has an *Appendix*, offering the Associate Chief Justice's rationale for placing restrictions on the Minister's evidence in child protection matters, including the following:
>
> 1. The Court suggests the Minister's affidavit is filed only for the interim hearing;
>
> 2. Evidential rules are relaxed as the Interim Hearings under the *Act* and *Rules*;

> 3. These new limits achieve efficiency, "during the COVID-19 pandemic, and beyond";
>
> 4. The Associate Chief Justice relies upon s. 46 of the *Judicature Act* authorizing "*Rules*";
>
> 5. The *Appendix* cites *Rules* 1, 28, 59A & 60A in support of the new restriction"

I agree that Notice #9 contains an appendix which provides background and which forms part of the Notice.

[13] The Minister also asks me to take judicial notice of the fact that:

> "a. Notice #9 has **not** been published in the *Nova Scotia Royal Gazette*; and
>
> b. No amendments to the *Civil Procedure Rules* have been made since February 21, 2020."

I take notice and agree with the above facts. They are "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (R v Find [2001], 1 SCR 863, 2001 SCC 32) In fact, the Legislature in Nova Scotia did not sit during the period in question, so it would have been impossible to place an amendment to the *Rules* before it.

THE LAW

[14] In **Nova Scotia (Securities Commission) v. Potter**, 2012 NSCA 12, Bryson, J.A. set out three questions which must be answered successfully to invoke declaratory relief:

> **15** ...

> A. Is there a sufficient factual and/or legal foundation in place to avoid giving a "declaration in the air"?
>
> B. Are there available effectual alternative remedies?
>
> C. In all the circumstances, do the interests of justice favour making the declaration on the question in issue?

[15] The Minister did not cite this case or the three part test set out therein. Nevertheless, I will address the Minister's arguments in the context of the **Potter** test.

IS THERE A SUFFICIENT FACTUAL BASIS / LEGAL FOUNDATION ?

[16] The Minister didn't file an affidavit purporting to support the motion for declaratory relief. The affidavit filed in support of the child protection finding doesn't address the issue, nor does the Minister suggest that it does.

[17] In its brief, the Minister's states that:

> "Every new referral is "relevant". Every home visit, every conversation, every service put in place to reduce risk, every opportunity given in an effort to be least intrusive, every changing story or explanation for events, every change in partner and behaviour of each new partner, and every time the parties were involved in violent or criminal behaviour, perhaps flouted an order of the court to do otherwise, is relevant to the Court's assessment and the Order it should make. This is all evidence which goes to the ability of the agency to protect the child through less intrusive means, such as placement under a supervision order."

[18] The possibilities laid out in the above extract are exactly that – possibilities. Presenting these hypotheticals only underlines the lack of a factual foundation for the Minister's motion in this proceeding.

[19] This is particularly the case with the Minister's arguments on the issue of case notes as exhibits to affidavits. There were no case notes attached to the affidavit filed in this proceeding. So to make a declaration about that portion of Notice #9 would be to make a "declaration in the air".

[20] I will next consider whether the Minister has established a legal foundation for a declaration that Notice #9 is *ultra vires* the rule-making power of the court.

[21] First, the Minister argues that Notice #9 does not constitute a valid *Civil Procedure Rule*, because the specified procedure contained in sections 46-49 of the *Judicature Act* has not been followed.

[22] The Minister argues further that Notice #9 cannot constitute a *Rule* because it was not placed before the legislature as required by section 51 of the *Judicature Act*. Both of these arguments are correct. Notice #9 is not (and does not purport to be) a *Civil Procedure Rule*. In my view, it's akin to a practice memorandum.

[23] Practice memoranda are adopted under the *Rules* to provide guidance and direction to legal practitioners. Practice memos are subordinate to both statutes

and the *Civil Procedure Rules*. As noted by Saunders, J. (as he then was) in **MacDonald v. Dumont** (2000), 186 N.S.R. (2d) 178:

> **15** ... Substantive rights are not created by practice memoranda issued, from time to time, by the Supreme Court. Such directives are intended to instruct practitioners or other interested parties as to the proper procedures to be followed , when applying a particular Civil Procedure Rule or statute to which the practice memorandum relates.

[24] This principle was confirmed by the Court of Appeal in **Briand v. Metropolitan Regional Housing Authority**, 2002 NSCA 71.

[25] Unless expressly stated, the *Civil Procedure Rules* do not limit the Court's discretion. Nor does a practice memorandum. For example, in **Re Creelman Estate** (1973), 13 N.S.R. (2d) 577 (SCTD) the Court dealt with the issue of remuneration for trustees and guardians under the *Trustee Act*. The Court stated:

> **5** The Practice Memorandum was only intended as a guide for trustees and guardians, and there is no doubt that the Court is free to award whatever remuneration is fair and reasonable for the efforts of trustees or guardians after considering all of the circumstances relating to a specific administration.

[26] If the Minister's argument is correct, then all practice directives and practice memoranda issued by the Nova Scotia Supreme Court would be *ultra vires* by reason of not being promulgated in accordance with the *Judicature Act*. That's clearly contrary to the jurisprudence, and it too narrowly construes the Court's inherent jurisdiction to control its own process.

ARE THERE AVAILABLE REMEDIES ?

[27] Notice #9 provides that the presumptive page limit applies "unless a party makes a request in writing to vary the following, other parties have an opportunity to respond and a presiding judge gives different directions ..."

[28] The Minister requested to vary the page limit when it first filed its application on September 9, 2020. Accompanying that application was a form letter indicating that:

> "The factual basis for the application herein is lengthy and complicated. In review of the file, it became apparent that the page limit set out in Notice #9 would not provide the Honourable Justice with the relevant and necessary evidence upon which to make a judicial determination regarding whether or not these children may be in need of protective services, and further with respect to the best interests of these children."

[29] The Minister argues that the law of evidence and the *Rules* governing affidavits do not impose page limits, and that to limit the quantity of evidence the Minister can lead is contrary to the "goals, purposes and objectives" of the *Judicature Act* and the *Civil Procedure Rules*. I disagree.

[30] The Minister fails to recognize that the goal of the *Rules* is to promote the "just, speedy, and inexpensive determination" of proceedings. The concept of "just" invokes the notion of fair notice to parties. The *CFSA* contains strict deadlines and short turn-around times, especially at the interim stage. A lengthy

affidavit, combined with a waiver of notice, often leaves parties with a day or less to read and digest the affidavit before responding in court. Shorter, more concise and focused affidavits can only enhance a party's ability to understand the Minister's allegations and respond.

[31] The Minister argues that, even though a hearing judge retains discretion to permit a longer affidavit, this doesn't present a reasonable alternative. The Minister's brief states that the discretion left to the judge in Notice #9 "is uninformed by both the substantive law and the practical inability of Minister's counsel to obtain leave of the Court before filing a presumptively non-compliant affidavit."

[32] That arguments fails for a number of additional reasons. First, in this particular case, the Minister decided months ago that it would file a protection application. Indeed, counsel for A.G. advised the Court that she knew in June, 2020 that the Minister had decided to pursue a court order. She followed up several times after that, to determine if the matter would proceed to court, because she'd made known to counsel for the Minister that her client intended to file a response affidavit. She was advised that the delay was due to counsel's efforts to draft a concise affidavit in compliance with Notice #9.

[33] There were a couple of options available to the Minister. If counsel found that they could not prepare a 20 page concise and focused affidavit that fully explained the child protection risk, they could have prepared submissions in advance of the 5-day hearing and filed a request to vary the limit. Or, they could have filed a 20 page affidavit referencing the more remote history in summary fashion, and then requested permission to file additional material after the 5-day hearing, as contemplated by Notice #9.

[34] I recognize that the Minister doesn't always have the luxury of lead time. In cases where circumstances dictate that a quick decision is made to take a child into care and file a child protection application, it may be difficult to parse the social worker's notes and draft a concise, focused affidavit which captures the risk. In those cases, the 20 page affidavit should focus on recent evidence of risk. The application can be accompanied by a request to permit the filing of further evidence if necessary.

[35] In such cases, the Court can adjourn the interim hearing for completion, in which case it must determine whether, on the affidavit before it, there are reasonable and probable grounds to believe the child is in need of protective services. This is a low threshold to meet. If the 30-day interim hearing is contested, a further affidavit can be filed before the hearing, to provide further

historical detail if it's deemed necessary. There's no need to lead oral evidence if the hearing is contested, as the Minister alleges.

[36] Further, if evidence of historical involvement is necessary to support a protection finding, it can be reflected in the affidavit filed in accordance with Rule 60A.13 (as suggested in the Appendix to Notice #9) before the pretrial conference in advance of the protection hearing. Again, the Minister's argument that a presumptive page limit is for affidavits will lead to the need for oral evidence on contested hearings is without merit.

[37] The Minister says that advancing its evidence in this fashion would be contradictory to its statutory obligation to provide "**all** known evidence" in support of a finding….". This misstates s.38(1) of the *CFSA*, which reads:

> **Disclosure or discovery**
>
> **38 (1)** Subject to any claims of privilege, an agency shall make **full, adequate and timely disclosure**, to a parent or guardian and to any other party, **of the, intended evidence, allegations and orders sought** in a proceeding. [emphasis added]

[38] There's a distinction to be made between disclosure and evidence. Not all material disclosed will be relevant and/or admissible evidence. The issue before me is not disclosure, it's evidence in the form of affidavits filed with the court. The Minister seems to conflate the two issues in its brief. Further, there is no

obligation to inquire into the status of disclosure at the 5-day hearing as suggested by the Minister, though the hearing judge **may** do so (*Rule* 60.A.10(1)(e))

[39] The Minister argues that the initial affidavit filed by the Minister serves to inform the entire proceeding, not just the interim hearing. This isn't entirely correct. The *Rules* require the Minister to file updated affidavits at each stage of the proceeding. The initial affidavit almost always contains evidence which wouldn't be otherwise admissible, but which is permitted under s39(11) of the *CFSA*. Affidavits filed after the interim hearing must contain only admissible evidence (*Rule* 39). Thus, the utility of the initial affidavit may be limited where it contains presumptively inadmissible evidence.

[40] The Minister also argues that s.39(11) of the *CFSA* broadens the evidence which can be admitted in support of a finding of "reasonable and probable" grounds. It argues that **more** evidence should be advanced, rather than less, as the same evidence may not be admissible at later stages of the proceeding.

[41] The onus at the 5-day and 30-day interim hearings is lower than the civil standard of proof on a balance of probabilities. The Minister need only show "reasonable and probable grounds" that the child is at risk of harm. To this end, section 39(11) permits a flexible approach to evidence at the interim stage. This is

because, at that stage, allegations of risk may still be under investigation. The Minister may have to rely on hearsay statements from reliable sources for purposes of the interim hearing. However, if the investigation reveals evidence to support the risk, the Minister must lead that direct evidence (hearsay being presumptively inadmissible at later stages of the proceeding) at a hearing.

[42] Further, in arguing that it must lead **more** evidence at the interim stage, the Minister suggests that "every referral is relevant". This is not necessarily correct. An unsubstantiated referral made ten years ago is rarely relevant. Anonymous referrals are even less so.

[43] In my view, the Minister should provide a summary of historical involvement for purposes of the interim hearing. The Minister can then provide greater detail of events that contribute to the risk in subsequent affidavits. The Minister's suggestion that a summary isn't a "fact" for purposes of *Rule* 39, or constitutes lay opinion, is without merit. A summary is a concise statement of facts.

[44] The Minister also argues that Notice #9 breaches the rules of natural justice. It says that "he who decides must hear". Notice #9 does not detract from that principle.

[45] Finally, the Minister asserts that the Notice #9 gives rise to a reasonable apprehension of bias, because it may impede the hearing judge's exercise of discretion. This argument fails to recognize that Notice #9 clearly reserves to individual judges discretion to allow longer or additional affidavits.

[46] As well, if the Minister's argument is correct, then all *Rules* and memoranda of the Court would give rise to a reasonable apprehension of bias, because they are established by judges other than the hearing or motions judge.

DO THE INTERESTS OF JUSTICE REQUIRE A DECLARATION?

[47] The Minister's overall complaint is that there is no "logical nexus" between Notice #9 and the Covid-19 pandemic. The Minister rejects the explanation for presumptive page limits offered in the Appendix to Notice #9, and states that it's "illogical" to connect page limits with the pandemic. I disagree.

[48] In light of the Covid-19 pandemic, changes to Court procedure have been implemented by necessity. Courts have been creative and flexible in meeting the needs of the public, while operating under restrictive public health protocols to control the spread of the disease. Those measures have at time included limited access to courthouses, limited courtroom availability, limited docket availability, and increased electronic filings that demand staff time to manage.

[49] Hearings which were removed from the docket under the essential services model are being rescheduled, along with new cases filed since June, 2020. The pressure on the docket is enormous.

[50] Every player in the system must do their part to support the efficient functioning of the Courts. Drafting a concise and focused affidavit is one small measure to ensure that parties are able to review the allegations in a timely way, thus making every Court appearance count. In the longer term, that's a goal worthy of pursuing. Access to justice, fairness to the parties and efficient functioning of the Courts require it.

[51] The interests of justice do not require the Court to declare Notice #9 *ultra vires*. Indeed, the interests of justice require such directions, particularly during unprecedented times.

CONCLUSION

[52] The Minister has failed to demonstrate that its request for declaratory relief meets the test set out in **Potter** (*supra*). The motion for a declaration as requested is dismissed.