

NOVA SCOTIA COURT OF APPEAL

Citation: *Children's Aid Society of Cape Breton Victoria v. D.C.*,
2004 NSCA 146

Date: 20041207

Docket: CA 225832

Registry: Halifax

Between:

D.C. and L.L.A.

Appellants

v.

Children's Aid Society of Cape Breton Victoria

Respondent

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

Judges: Cromwell, Chipman and Fichaud, JJ.A.

Appeal Heard: November 29, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed without costs per reasons for judgment of Chipman, J.A.; Cromwell and Fichaud, JJ.A. concurring.

Counsel: appellants in person
Christopher Conohan, for the respondent

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Reasons for judgment:

[1] This is an appeal by L.L.A. and D.C. from that part of an order by Wilson, J. in the Supreme Court, Family Division, which denied them costs on dismissal of the respondent Agency's application under s. 32 of the **Children and Family Services Act**, S.N.S. 1990, c. 5.

[2] The respondent Agency brought the application on November 27, 2003, with respect to four children; one the son of the appellant, L.L.A.; one the son of both appellants and two others, the sons of the appellant, L.L.A.'s sister. There has been a lengthy history of involvement by the Agency in the life of the appellant L.L.A. and, more recently, the appellant D.C. The last previous proceeding which was in relation to the son of the appellant L.L.A. had terminated in October, 2003. The appellants have also instituted civil proceedings against the Agency claiming damages for negligence, malicious prosecution, abuse of power and trust, and defamation.

[3] The Agency's application in the subject proceedings was heard on December 1st, 2003. At the hearing an agreement was reached that the children of the appellant, L.L.A.'s sister would be interviewed by an Agency worker under agreed upon conditions. After the interview, the Agency determined that the proceedings should not be continued, and so advised the appellants and the court. Wilson, J. advised the parties by letter dated May 5th, 2004, that various drafts of the order submitted were not acceptable, and the Court was awaiting one in form satisfactory. The appellants were seeking costs in the amount of \$750.00 each and Wilson, J. heard the parties on costs on May 21st, 2004. By written decision of June 22nd, 2004, Wilson, J. refused to grant the appellants costs and his order dismissing the proceedings without costs was issued on June 23rd, 2004. That is the order appealed from.

[4] In his reasons respecting costs, Wilson, J. referred to the lengthy history of dealings between the Agency and the appellants, and specifically, the subject application. The appellants had taken the position that the Agency, in bringing the proceedings, had acted in bad faith toward them, and refused to work in a spirit of co-operation. Wilson, J. was not prepared to conclude that the Agency had acted in a malicious way toward the respondents. He noted that the Agency had a duty to investigate allegations of abuse, and that it was not inappropriate or in bad faith

for the Agency to initiate the subject application as it had. Wilson, J. therefore exercised his discretion not to award costs against it. The appellants contend that Wilson, J. erred in exercising his discretion as to costs.

[5] A decision to award costs is discretionary, and will not be interfered with by this Court unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice. See **Founder's Square Ltd. v. Coopers & Lybrand** (2000), 179 N.S.R. (2d) 375 at para. 46; **Conrad v. Snair et al.** (1996), 150 N.S.R. (2d) 214 at p. 216; **Exco Corp. v. Nova Scotia Savings & Loan Co. et al.** (1983), 59 N.S.R. (2d) 331.

[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.

[7] Wilson, J. was very familiar with the nature of the proceedings before him. He concluded his reasons for decision by saying:

I do not find that it was inappropriate for the Agency to initiate the application and therefore, I do not find the Agency has acted inappropriately or in bad faith in initiating the application. Accordingly, the court exercises discretion not to award costs against the Agency.

[8] This finding was not shown to be wrong or reached by the application of wrong principles of law. Rather, it is consistent with the authorities governing costs in cases of this nature.

[9] The appellants further contended that as the Agency had, in effect, discontinued proceedings, costs should follow as in the case of a discontinuance which is provided for in **Civil Procedure Rule 40**. By **Rule 40.03(1)** a party discontinuing a proceeding or withdrawing a cause of action shall pay the costs of any opposing party to date, subject to **Rule 40.02**, where an order giving leave to discontinue may contain such terms as to costs or otherwise as are just.

[10] We are unable to agree with this submission. The proceedings were not determined by way of discontinuance, but by way of Wilson, J.'s order.

[11] We, therefore, dismiss the appeal but, in the circumstances, without costs.

Chipman, J.A.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.