NOVA SCOTIA COURT OF APPEAL

Citation: *A.P. v. Nova Scotia (Minister of Community Services)*, 2023 NSCA 75

Date: 20231030
Docket: CA 524168
Registry: Halifax

Between:

A.P.

Appellant

v.

Minister of Community Services, C.B.,
and A.P. and O.P., by their Guardian Ad Litem Beth Archibald

Respondents

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

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	October 19, 2023, in Halifax, Nova Scotia
Subject:	*Children and Family Services Act* (*CFSA*) proceeding – Conference Memorandum – Bias
Summary:	The appellant, A.P., appealed a Conference Memorandum which addressed the procedural issues relating to a Disposition Hearing under the *CFSA*. He alleged the judge was biased as a result of being in a conflict of interest, erred in proceeding when he did not have legal counsel, and erred in failing to consolidate the *CFSA* proceedings with a divorce variation proceeding between him and his ex-wife.
Issues:	Did the judge commit any of the alleged errors in issuing the Conference Memorandum?

Result: Appeal dismissed. The appellant was attempting to address matters which were irrelevant to the Conference Memorandum. The appeal was entirely without merit and had no chance of succeeding.

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 39 paragraphs.

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Judges:	Farrar, Fichaud and Beaton JJ.A.
Appeal Heard:	October 19, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Farrar J.A.; Fichaud and Beaton JJ.A. concurring
Counsel:	A.P., the appellant, self-represented, with J.S. making submissions for A.P. Sarah Lennerton and Shawn O'Hara, for the respondent Sue Young, counsel for the Guardian ad Litem

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.

(2) Where the court is satisfied that the publication of a report of a hearing or proceeding, or a part thereof, would cause emotional harm to a child who is a participant in or a witness at the hearing or is the subject of the proceeding, the court may make an order prohibiting the publication of a report of the hearing or proceeding, or the part thereof.

(3) Where the court makes an order pursuant to subsection (2), no person shall publish a report contrary to the order.

(4) A person who contravenes subsection (1) or (3), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and upon summary conviction is liable to a fine of not more than ten thousand dollars or to imprisonment for two years or to both.

Reasons for judgment:

Background

[1] On December 14, 2022, the Minister of Community Services commenced a *Children and Family Services Act* (*CFSA*) proceeding by filing a Notice of Child Protection Application. The proceeding involved A.P. ("A.") who, at the time, was 15 years old and O.P. ("O.") who was then 12 years old. A. and O. are the children of A.P. and C.B.

[2] A.P. and C.B. are divorced.

[3] On December 21, 2022, Justice Pamela MacKeigan of the Supreme Court Family Division commenced the Interim Hearing pursuant to s. 39(1) of the *CFSA*. She found there were reasonable and probable grounds to believe A. and O. were in need of protective services and placed them in the care and custody of their mother, C.B., subject to the supervision of the Minister of Community Services.

[4] On January 4, 2023, the appellant filed a Notice of Appeal with respect to the Interim Order of December 21, 2022 (the Original Appeal). On January 9, 2023, Justice MacKeigan completed the Interim Hearing pursuant to s. 39(4) of the *CFSA*. A finding of reasonable and probable grounds was confirmed, as was the children's placement in the care and custody of C.B. subject to supervision.

[5] An Interim Order granted January 9, 2023 replaced the earlier Interim Order.

[6] On February 3, 2023, A.P. amended his Original Appeal to include an appeal of the Interim Order granted January 9, 2023.

[7] Pre-hearing conferences, prior to the Protection Hearing, were held February 21, 2023 and March 7, 2023.

[8] On March 13, 2023, at the Protection Hearing, Justice MacKeigan found the children A. and O. were in need of protective services. The children remained in the care and custody of C.B.

[9] On March 16, 2023, the appellant discontinued his Original Appeal. Although not required to give a reason for discontinuing the Original Appeal, it is apparent the Original Appeal became moot once the decision on the Protection Hearing was rendered.

[10] Under the *CFSA*, a Disposition Hearing was required to be held within 90 days of the finding the children were in need of protective services. A pre-hearing conference prior to the Disposition Hearing was held on May 15, 2023, resulting in a Conference Memorandum dated May 25, 2023.

[11] Also on May 15, 2023, Justice MacKeigan granted an Order for Production for the files and records of the IWK Health Centre in relation to A.P., C.B., A. and O. The Order was issued May 19, 2023.

[12] Justice MacKeigan also granted Orders for Production for file materials of the police.

[13] A.P. filed a Notice of Appeal on May 30, 2023 appealing the Conference Memorandum. In his Notice of Appeal, he lists the following grounds of appeal:

> 1. The Judge made error in law by acting on this file as a conflict of interest.
> 2. The Judge made error in law by proceeding with the Children and Family Services Act proceeding after declaring herself as a conflict of interest.
> 3. The Judge displays reasonable apprehension of bias by presiding over this case and denying my requests for accommodations.
> 4. The Judge violated my constitutional rights under the Canadian Charter of Rights and Freedoms and is preventing me from participating fairly and equally in this proceeding.
> 5. The Judge is misinterpreting the facts of this case.

[14] A.P. also filed a Notice of Motion to Introduce Fresh Evidence on the appeal. However, he did not file an affidavit in support of the motion. The only reference in his factum to fresh evidence is to a disposition decision made by Justice MacKeigan at the completion of the Disposition Hearing on September 27, 2023. The Order has not yet been taken out. On October 13, 2023, A.P. attempted to appeal that decision by sending a Notice of Appeal to the Registrar. It has not yet been filed due to procedural irregularities.

[15] The decision on the Disposition Hearing may result in all of the issues on this appeal being moot. However, as I do not have a copy of the oral decision, which has not been transcribed, and the Order has not yet been taken out, I cannot reach that conclusion.

[16] The appellant asks us to consolidate this appeal with his “October 13, 2023 appeal” and address all of the issues raised by both appeals.

[17] There are any number of reasons why we cannot consolidate the two appeals, not the least of which are: the October 13, 2023 appeal has not been accepted for filing, we do not have the transcripts of the proceedings, there is no motion for consolidation before us setting forth the basis upon which the two appeals should be consolidated, and the Order is yet to be taken out.

[18] There is no basis upon which we could consolidate the two appeals.

[19] In support of this appeal, A.P. has filed a two-page factum. The grounds in his Notice of Appeal and his factum are somewhat different. The issues in the factum appear to be as follows:

a. Did the Trial Judge err in granting Orders for Production?

b. Did the trial judge err by proceeding when A.P. did not have legal counsel and did the trial judge err in issuing the Orders for Production in the absence of legal representation being present for A.P.?

c. Did the Trial Judge act in a manner leading to a reasonable apprehension of bias?

d. Did the Trial Judge err by accessing the file for the *Divorce Act* proceeding?

e. Did the Trial Judge err by failing to hear a motion for consolidation of the *CFSA* and *Divorce Act* proceedings?

[20] The appellant has not sought to amend his Notice of Appeal. Nevertheless, I will address the issues as raised in his factum. As will become apparent, it is not necessary to address the standard of review for the issues raised.

[21] Throughout the proceeding below and on this appeal A.P. has been assisted by his partner, J.S., who, for the most part, made submissions on his behalf.

Analysis

Issue 1: Did the trial judge err in granting the Orders for Production?

[22] Leaving aside the fact that the Orders for Production are not subject to a Notice of Appeal, A.P. has not indicated why the trial judge was in error in granting the orders or how the orders are relevant to the issues in the *CFSA* proceeding. His concern seems to be that the orders are not referenced in the Conference Memorandum—without any explanation why that would have been

required or impacted in any way on the issues addressed in the Conference Memorandum.

Issue 2: Did the trial judge err by proceeding when A.P. did not have legal counsel and did the trial judge err in issuing the Orders for Production in the absence of legal representation being present for A.P.?

[23] Dealing with the latter issue first, A.P. and his partner, J.S., were present on May 15, 2023 at the time the production orders were issued. They raised no concerns with respect to the production orders. J.S. indicated they were in favour of the granting of the orders for production.

[24] With respect to A.P. being represented by legal counsel in the proceeding, he has a Legal Aid Certificate for the *CFSA* proceeding, however, has not been able to retain counsel. He does not identify in his factum or in oral argument how counsel being present would have impacted the content of the Conference Memorandum which simply provides directions for the Disposition Hearing. Nor does he indicate how he may have been prejudiced by the absence of counsel.

Issue 3: Did the trial judge act in a manner leading to a reasonable apprehension of bias?

[25] The test for reasonable apprehension of bias is well established and was recently discussed by this Court in *R. v. Chartrand*, 2023 NSCA 43, at ¶4. The test originates from *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at pp. 394-395:

> […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> […] The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[26] The appellant does not say in his factum the basis on which he believes Justice MacKeigan to have been biased at the pre-trial conference. He states in his

factum that she made "one-sided orders", but the only order subject to appeal is the Conference Memorandum.

[27] At the appeal hearing, J.S. argued Justice MacKeigan was in a conflict of interest because she refused to become involved in the divorce variation proceeding between A.P. and C.B. To add some context to the appellant's argument on this point, as noted earlier, A.P. and C.B. are divorced. They have an ongoing divorce variation proceeding in relation to parenting arrangements. A.P. wanted Justice MacKeigan to hear both the *CFSA* and the divorce proceeding. Justice MacKeigan refused to do so as she was previously the presiding justice at a settlement conference in the divorce proceeding.

[28] Although both the appellant and respondent indicate that Justice MacKeigan considered herself in a conflict of interest, that is not the terminology used by the judge. During the hearing on May 15, 2023, Justice MacKeigan, on being asked by J.S. to consider a Variation Application brought by A.P. and the Response to the Application by C.B., refused to do so because she was the settlement conference judge, not because she was in a conflict of interest:

> **THE COURT:** […] We're not even at first disposition yet and this matter will need to be set down under the *Divorce Act* to deal with the various variation applications and response. And that will be heard before Justice Berliner as I was the settlement conference judge in this matter which … and as the settlement conference judge I would not hear further private proceedings as between the parties.
>
> […]
>
> **J.S.**: [A.P.] is wishing for the Court to look at the information as you already have an understanding.
>
> **THE COURT:** I understand that, [J.S.], but the protocol here would be that I not hear it simply because I was the settlement conference judge. And settlement conference judges because we have very frank and open discussions in the process of trying to reach a consent which I fully believe the consent order was entered into freely and voluntarily by all parties …

[29] In oral argument, the appellant alleged bias because the judge refused to become involved in the divorce proceeding. As the judge informed the parties at the May 15, 2023 hearing, settlement conference judges, as a matter of protocol, do not hear subsequent contested matters between the parties because they have had very frank and open discussions in trying to reach a settlement.

[30] The interests of the judge do not conflict with the interests of the participants, but rather she has received information a judge may not otherwise have as a result of trying to reach a settlement between the parties in the divorce proceeding. The judge refusing to become involved in the divorce proceedings does not lead to the conclusion she was biased against A.P. in the *CFSA* proceeding.

[31] There is nothing in the Conference Memorandum to suggest bias. In her trial directions, Justice MacKeigan expressly allowed J.S. to act as A.P.'s advocate and to cross-examine witnesses. She provided guidance clearly directed toward a self-represented litigant, including information on filing, court processes and obtaining legal advice and information.

[32] It is notable that the appellant repeatedly requested Justice MacKeigan to continue hearing the matter. He did not raise the issue of conflict of interest or bias at the pre-trial conference. In fact, as noted, J.S. advocated for her to hear both matters.

[33] A reasonable person would consider Justice MacKeigan able to decide fairly, being mindful that she allowed ample time for A.P. and J.S. to speak, permitted J.S. to act as advocate, directed how to obtain legal advice, provided information on procedure, and specified that cross-examination would be possible at the Disposition Hearing.

Issue 4: Did the trial judge err by accessing the file for the *Divorce Act* proceeding?

[34] Although Justice MacKeigan did not provide notice that she was going to look at the divorce file, the appellant has not demonstrated how he has been prejudiced by Justice MacKeigan doing so. She was already familiar with most of the contents, given that she was the settlement conference judge in the divorce proceedings. Again, A.P. failed to identify any error as a result of Justice MacKeigan reviewing the divorce file.

Issue 5: Did the trial judge err by failing to hear a motion for consolidation of the *CFSA* and *Divorce Act* proceeding?

[35] At the time of the pre-trial conference prior to the Disposition Hearing no such motion was before Justice MacKeigan.

Conclusion

[36] It is apparent from their oral and written arguments, as well as their interactions with the Court, J.S. and A.P. have a fundamental misunderstanding about the role of this Court. The only issue in this appeal was the Conference Memorandum. Any events which occurred before or after that Conference Memorandum are not the subject matter of this appeal. The sole issue on this appeal, and one which was not addressed by the appellant, was whether Justice MacKeigan made an error of law or whether an injustice would result from her issuance of the Conference Memorandum. A.P. has wasted his own resources, the resources of the Minister, and those of this Court in proceeding in the manner in which he did.

[37] A.P.'s arguments are entirely without merit and the appeal is dismissed.

[38] As this is a *CFSA* matter, it would be a rare circumstance to order costs against an appellant parent. However, A.P. is coming very close to having costs awarded against him should he persist in filing appeals which have no merit or which may be moot.

[39] I decline to order costs at this time.

Farrar J.A.

Concurred in:

Fichaud J.A.

Beaton J.A.