NOVA SCOTIA COURT OF APPEAL

Citation: *J.L. v. Nova Scotia (Minister of Community Services)*, 2024 NSCA 51

Date: 20240503
Docket: CA 531164
Registry: Halifax

Between:

J.L. and R.S.

Appellants

v.

Minister of Community Services

Respondent

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

Judge:	Bourgeois, J.A.
Motion Heard:	May 1, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion for state-funded counsel dismissed
Counsel:	J.L and R.S., appellants, on their own behalf Caitlin Menczel-O'Neill and Cierra Mateo, Articled Clerk, for the Attorney General of Nova Scotia Sarah Lennerton, for the respondent Minister, not appearing

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

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:

> Prohibition on publication
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> 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.

Decision:

[1] The appellants, J.L. and R.S., are the parents of four children. The Minister of Community Services (the Minister) commenced legal proceedings against J.L. and R.S. and eventually sought orders placing the children in permanent care pursuant to the provisions of the *Children and Family Services Act* (*CFSA*).[1]

[2] A hearing was held before Justice Cindy G. Cormier in October 2023. Both J.L and R.S. were represented by their own lawyers and opposed the Minister's plan for permanent care. They argued the children should be returned to their care and the Minister's involvement with the family terminated.

[3] In a lengthy decision reported as *Nova Scotia (Minister of Community Services)*, 2023 NSSC 330, the hearing judge determined the children remained in need of protective services by virtue of s. 22(2)(g) of the *CFSA*[2] should they be returned to the care of J.L and R.S. She ordered all four children to be placed in the permanent care and custody of the Minister. Four orders were subsequently issued. The orders in relation to the two youngest children were issued on December 1, 2023. The orders in relation to the two older children were issued on February 1, 2024.

[4] After having made a successful motion for an extension of time to file an appeal, J.L and R.S. filed a Notice of Appeal on March 19, 2024 seeking to challenge the orders for permanent care.

[5] On March 26, 2024, J.L. and R.S. filed a Notice of Motion and affidavit in which they sought the appointment of state-funded counsel to represent them on the appeal. By virtue of a chambers appearance on April 4, 2024, the hearing of the motion for state-funded counsel was scheduled for April 25, 2024, but eventually heard on May 1, 2024. At the direction of the Court, J.L and R.S. filed a second affidavit sworn April 29, 2024 for the purpose of providing additional evidence with respect to their financial circumstances.

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[1] S.N.S. 1990, c. 5, as amended.

[2] Section 22(2)(g) provides a child is in need of protective services where "there is a substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unavailable, or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;".

Legal Principles

[6] Before considering the particulars of this matter, it is helpful to set out the legal principles relating to a request for state-funded counsel in child protection proceedings.

[7] In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, the Supreme Court of Canada determined state intervention by means of child protection proceedings may give rise to an obligation to provide state-funded counsel to parents. Chief Justice Lamer noted:

> 2 . . . When government action triggers a hearing in which the interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s. 24(1) of the *Charter* through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.

[8] Section 7 of the *Canadian Charter of Rights and Freedoms* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. . . .

[9] Chief Justice Lamer found the state-intrusion occasioned by child protection proceedings involving the removal of a child from parental care impacts on a parent's security interest, notably their psychological integrity:

> 61 I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.), supra,*[3] at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the

[3] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

> relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

[10] However, even where s. 7 *Charter* interests are engaged, the provision of state-funded counsel is not guaranteed. A parent must first establish they do not have the financial means to hire a lawyer, and they have sought out and exhausted the possibility of obtaining representation through other sources. It is the obligation of a parent seeking state-funded counsel to provide an evidentiary basis demonstrating their financial circumstances as well as their efforts to obtain counsel.

[11] Should the motion judge be satisfied the above criteria have been met, the critical determination then becomes whether the appointment of counsel is required to ensure a fair hearing. Chief Justice Lamer explained:

> 86 I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

[12] This Court has recognized the above principles apply not only at trial, but may also be engaged on appeal. In *D.B. v. A.B.*, 2016 NSCA 43, Chief Justice MacDonald determined, in addition to the factors enumerated in *G.(J.)*, that the merits of the appeal should also be considered. However, the "merit" threshold is a low one. A judge "need only be satisfied that the appeal, on its face, is not frivolous".[4] See also *K.P. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2017 NLCA 37.

[4] *D.B.* at para. [13].

[13] Based on the above, when considering a motion for state-funded counsel on an appeal of an order issued under the *CFSA*, a judge should consider:

- Whether the nature of the state action in the matter under appeal is such that it engages the appellant's interests under s. 7 of the *Charter*. If not, the motion will be dismissed;

- The merit of the appeal. Specifically, based on the material available, can it be said the appeal is not frivolous? If the parent cannot demonstrate the merits of the appeal meet this low threshold, the motion will be dismissed;

- Is the appellant, due to their financial circumstances, unable to secure a lawyer and have they exhausted other avenues to obtaining legal representation? To satisfy this criterion, an appellant must provide evidence of their financial circumstances along with their efforts to obtain legal representation through Nova Scotia Legal Aid, and other sources. If the parent fails to meet this criterion, the motion will be dismissed;

- Can the appellant obtain a fair appeal? In determining this question, it is necessary to examine the seriousness of the matter, the complexity of the issues and the capabilities of the appellant. It is only where a parent would be precluded from advancing and obtaining a fair appeal, would the appointment of state-funded counsel be granted.

Analysis

[14] I will turn now to a consideration of the above factors in the present matter.

Nature of the state action

[15] The Attorney General, appropriately in my view, concedes that J.L. and R.S.'s rights under s. 7 of the *Charter* are engaged in the present matter. Nothing further needs to be said regarding this factor.

Merit of the appeal

[16] I have limited information on which to base a merits assessment. I have the Notice of Appeal, the trial judge's written decision, two affidavits filed by J.L. and R.S. and submissions.

[17] Based on the material before me, I understand J.L. and R.S. are alleging, among other things, the trial judge materially misapprehended the evidence before her and may have demonstrated bias. These are two grounds of appeal, which if shown to be true, would lead to the appeal being granted. Although the Attorney General raises valid arguments regarding the strength of these grounds, I am satisfied they are not frivolous. This factor has been met.

Financial means and attempts to obtain counsel

[18] J.L. and R.S. assert they do not have the means to hire a lawyer. In their affidavits they describe their employment and living circumstances. The only documentation provided in support of their claim of impecuniosity is bank statements for the last three months. Because the Attorney General has conceded J.L. and R.S. lack the financial means to obtain a private lawyer, I am prepared to conclude that is the case.

[19] However, the evidence before me does not establish that J.L. and R.S. have exhausted all avenues in obtaining legal counsel. In making this determination, I note in particular:

- J.L. and R.S. have established their application submitted to Nova Scotia Legal Aid for counsel on the appeal was declined. Both acknowledge however, that they were aware they could appeal this decision, but chose not to do so;

- J.L and R.S. provided an explanation for why they did not pursue the statutory appeal process. Simply, they are distrustful of the representation they would receive from any lawyer employed by Nova Scotia Legal Aid. They believe that the Nova Scotia Legal Aid Commission is aligned with the Minister and would not represent their interests or that of their children. J.L recounted that he has, in other legal matters, fired more Nova Scotia Legal Aid lawyers than those he

has continued to retain due to their perceived incompetence. Both J.L. and R.S. said they would be willing to accept representation from a private lawyer who receives a Certificate from Nova Scotia Legal Aid, but only if they could be assured of that lawyer's credibility; and

- The Attorney General points out that if the Court orders it to provide counsel to J.L. and R.S., it is the Nova Scotia Legal Aid Commission that will fulfill that obligation – the same entity that J.L and R.S. do not wish to represent them. This creates the very real potential of J.L. and R.S. refusing to accept or continue a retainer should a lawyer from Nova Scotia Legal Aid be provided to them.

[20] As noted above, I am not satisfied this factor has been met by J.L. and R.S. Although they may have had unsatisfactory experiences with certain lawyers employed by Nova Scotia Legal Aid, there is an inadequate evidentiary basis to conclude all lawyers that work there would be incapable of representing them competently and fairly.

[21] This Court regularly expects on a motion for state-funded counsel for the appellant to have applied to Nova Scotia Legal Aid and to have appealed to the Appeal Committee, if their application for representation is denied. If an appellant has failed to take these steps, the motion is dismissed. Based on the material before me, I cannot conclude it would be appropriate to take a different approach in this matter. Accordingly, the motion for state-funded counsel will be dismissed on this basis. However, even if I was satisfied J.L. and R.S. had met the evidentiary burden of this criterion, the motion would still fail. I will explain why below.

Fairness of the appeal

[22] Although it is not necessary in order to determine the outcome of the motion to consider the final factor, I will do so. As will be explained, I am of the view that J.L. and R.S. will be able to receive a fair appeal, notwithstanding being self-represented.

[23] In assessing whether J.L and R.S. will be able to obtain a fair appeal, I will consider the seriousness of the matter, the complexity of the issues and their capabilities to advance them.

[24] There is no doubt about the seriousness of the appeal. As Chief Justice MacDonald said in *D.B.*, "it is hard to imagine a more serious risk than that of permanently losing contact with your children."[5] The Attorney General acknowledges the seriousness of the matter before the Court.

[25] I turn now to the complexity of the appeal. As a general observation, the focus of an appeal is typically much narrower than a trial. On appeal, the Court is asked to determine whether, based on a review of the record and relevant legal principles, an error or errors occurred which require intervention. In their Notice of Appeal, J.L. and R.S. set out the following grounds of appeal:

1. Omitting/altering trial-provided evidence and evidence.

2. False claims made by Justice Cormier about criminal history to gain desired outcome for Child Protection Agency.

3. Ignoring criminal code to falsely adjudicate on a premise to best suit the Child Protection Agency.

4. Omitted/altered psychological assessments and information to contradict their intended submission.

5. Omitted/altered housing information claiming we were without home at time of trial proving that we, in fact, had a home and were ready to receive children as of July 1, 2023, three months prior to trial.

6. Ignored clear perjury submitted/committed by Katie Brown entering an Affidavit claim that she had had a private conversation with us about privately adopting our four children. Which in fact never happened.

7. For such further grounds as may become apparent through review of the overall decision.

[26] As I noted earlier, I see the complaints being advanced by J.L. and R.S. as equating to a claim of judicial bias as well as a misapprehension of evidence.

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[5] *D.B.* at para. [13].

Although they suggest there are numerous aspects of the decision and the evidence that are problematic, the legal principles relating to both types of claims are well-established. The law is not complex. I am not convinced, considering the issues raised by J.L. and R.S. that the appeal will be unduly complex.

[27] The final consideration is the capacity of J.L. and R.S. to advance their arguments on appeal. I have had the benefit of reviewing the motion materials filed by J.L. and R.S. as well as hearing from them while being cross-examined and in presenting argument. I was impressed with both of their abilities to communicate clearly and their grasp on the issues they wish to advance on appeal.

[28] R.S. has indicated she is content to have J.L. speak on her behalf as co-appellant and that, from her perspective, their interests are aligned. She did not hesitate, however, to speak up to add additional comments where she felt more elaboration was required.

[29] J.L. has no difficulty in expressing himself, and explaining why he feels the decision under appeal is marred by error. His written submissions contain a detailed analysis of the errors contained in the trial judge's reasons. J.L. is intelligent and has demonstrated he is able to present his arguments in an organized, coherent and comprehensive manner. Although the stakes are certainly high, he presented himself calmly and in a manner that demonstrates his ability to focus on why this Court should allow the appeal.

[30] J.L was forthright in explaining, despite believing he has the ability to advance the issues on appeal, why he needs state-funded counsel appointed. He explained that since being denied representation by Nova Scotia Legal Aid, he has attempted on many occasions to obtain a copy of the file materials of Dalhousie Legal Aid, who had represented him in the court below. J.L asserted the contents of that file would be essential for advancing the grounds of appeal and demonstrating error. He said he was told by Dalhousie Legal Aid that he would be receiving a package with the file materials, but he has yet to receive them. J.L. says appointing a lawyer would help him obtain the contents of the file.

[31] Dalhousie Legal Aid was not a participant in the motion before me. I have heard only from J.L. regarding the challenges in obtaining a copy of the file materials relating to the matter in the court below. It would seem to me however, that at a minimum, his former counsel's file would contain important information

that would be of use in preparing the Appeal Book in relation to this matter. It is not clear to me why it would take so long for him to obtain this material.

[32] That being said, I do not believe the appointment of state-funded counsel is necessary for J.L to obtain the material he says he needs. He has other options which he can pursue to obtain a copy of his former counsel's file materials.

[33] What is abundantly clear, is that J.L., along with R.S., have a firm grasp on the issues they wish to advance before the Court and have the capabilities to do so. Ultimately, I am not satisfied the appeal will be unfair should J.L. and R.S. remain unrepresented.

Conclusion

[34] For the reasons outlined above, the motion for state-funded counsel is dismissed, without costs.

Bourgeois, J.A.