NOVA SCOTIA COURT OF APPEAL

Citation: ***Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.***, 2013 NSCA 141

Date: 20131209
Docket: CA 414340
Registry: Halifax

Between:

Mi'kmaw Family and Children's Services of Nova Scotia

Appellant

v.

H.O., M.T. and B.T.

Respondents

and

Minister of Community Services

Intervenor

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

Judges:	MacDonald, C.J.N.S., Saunders and Oland, JJ.A.
Appeal Heard:	October 9, 2013, in Halifax, Nova Scotia
Held:	**Leave to admit fresh evidence granted. Appeal dismissed per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.**
Counsel:	Paul E. Morris, for the appellant David Baker, for the respondent H.O. Donald Fraser, for the respondent M.T. Sharon L. Cochrane, for the respondent B.T. Peter McVey and Sanaz Gerami for the Intervenor Minister of Community Services

Restriction on publication:

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:

"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 relative of the child."

Reasons for judgment:

[1] The narrow but important issues central to this appeal concern a trial judge's discretion to sever child protection proceedings on account of the native and non-native heritage of the half-siblings said to be in need of protection; and whether Mi'kmaw Family and Children's Services of Nova Scotia has standing to involve itself in such proceedings involving non-native children under the *Children and Family Services Act*, S.N.S. 1990, c. 5 (the "*Act*").

[2] For the reasons that follow I would dismiss the appeal on the basis that the trial judge did not err in the exercise of her discretion when she ordered severance of the matters before her. It is not necessary that I decide the second issue of standing. On this record it would be inappropriate for me to do so. Nothing in these reasons should be taken as an endorsement of the trial judge's analysis or conclusions on that issue.

[3] Before addressing the trial judge's reasons, I will offer a brief summary of the facts to provide context.

Background

[4] Owing to the nature of these proceedings and the unique familial relationships among the parties, I will anonymize their identities by using initials even though full names appear in the pleadings and the record. While cumbersome, I prefer this approach in such a case. I will begin by identifying the principal actors involved.

[5] There are three children who are the subject of these child protection proceedings. They are a girl, N.O.T. and a boy, O.O.T. (now six and five years of age respectively) who are full siblings, sharing the same mother and father; whereas their half-brother, B.O.T., is a child of their common mother but a different father.

[6] M.T. is the father of N.O.T. and O.O.T., and he is of First Nations descent.

[7] B.T. is the father of B.O.T., and he is not of First Nations descent.

[8] H.O. is the mother of all three children and she is not of First Nations descent.

[9] To summarize: the parents of N.O.T. and O.O.T. are M.T. (father) who is of First Nations descent, and H.O. (mother) who is not.

[10] Neither B.T. (father), nor H.O. (mother), the parents of B.O.T. are of First Nations descent.

[11] Child protection proceedings were initiated by Mi'kmaw Family and Children's Services of Nova Scotia (Mi'kmaw FCS) in October 2012. Mi'kmaw FCS alleged that all three children were in need of protective services pursuant to s. 22 of the *Act*.

[12] The matter came on for hearing before Nova Scotia Family Court Judge Marci Lin Melvin who on January 10, 2013 made a protection finding and issued an order stipulating the terms of supervision.

[13] A Variation Application was initiated on February 1, 2013, whereby Mi'kmaw FCS alleged that there had been a change in circumstances and that the children could no longer be appropriately protected under the then existing supervisory order.

[14] Judge Melvin found that there had been a change in circumstances and that her earlier order ought to be varied. Further directions were given and a pre-trial hearing was scheduled for February 14, 2013. Ultimately the parties agreed to a consent variation to the earlier order as it related to the child B.O.T. such that his supervision would be taken over by his maternal grandparents. That variation is reflected in Judge Melvin's Order issued February 14, 2013.

[15] By notice dated February 26, 2013, Mi'kmaw FCS applied for a disposition hearing, to be held on Monday, April 8, 2013. The terms of the notice filed by Mi'kmaw FCS reflected that the two children, N.O.T. and O.O.T. were to remain in the day-to-day care and custody of (their father) M.T. subject to the supervision of the Mi'kmaw FCS. Further, the child, B.O.T., was to remain in the day-to-day care and custody of his maternal grandmother (with the consent of his mother and father) and he too would be subject to the supervision of Mi'kmaw FCS.

[16] By notice dated March 11, 2013, B.T. announced his intention to make an "Interim Application" seeking an order separating his (and his son B.O.T.'s) case from the matter involving M.T. and M.T.'s children, O.O.T. and N.O.T.

[17] Effectively, it was this interim application to sever brought by B.T. that led to lengthy submissions before Judge Melvin and resulted in her comprehensive written decision now reported at 2013 NSFC 10, and which forms the subject of this appeal.

[18] From the record it appears that all three respondents (in other words all three parents) agreed that the two cases ought to be severed. It was only the Mi'kmaw FCS (supported by the intervenor) that opposed B.T.'s application to sever his son's child protection proceedings from the proceedings involving B.O.T.'s half-siblings, O.O.T. and N.O.T.

[19] Judge Melvin allowed B.T.'s application. She ordered that the child protection proceedings be severed with the result that O.O.T.'s and N.O.T.'s case would continue under the supervision of the Mi'kmaw FCS, but that B.O.T.'s would not. Melvin J. also concluded that she had no jurisdiction to order the Minister of Community Services (the "Minister") to be added as a party and that her authority was limited to recommending that the Minister consider making an application to be added as a party, pursuant to s. 36(2) of the *Act*. Ordinarily the Minister is the moving party in cases involving children who are in need of protection.

[20] The trial judge's decision effectively left in limbo the case involving the child B.O.T. This result prompted the parties to appear before me in Chambers to seek a partial stay of Judge Melvin's decision pending the ultimate appeal. On April 18th, 2013, I issued two orders: one granting leave to the Minister of Community Services to intervene in these proceedings and participate in this appeal; the other granting a stay of that part of Judge Melvin's decision wherein she declared that:

> "… the Mi'kmaw Family and Children's Services has no standing to make an application for non-First Nations children under the *Children and Family Services Act*, and therefore, without the Application by the Minister, the matter involving the non-First Nations family will be dismissed."

Following my directions, the Minister of Community Services immediately assumed carriage of the severed child protection proceeding regarding B.O.T..

[21] This short outline of the material facts is sufficient to provide context for the analysis that follows.

[22] At the appeal hearing separate counsel appeared for and made oral and written submissions on behalf of their respective clients: they being each of the three parents H.O., M.T. and B.T.; Mi'kmaw FCS; and the intervenor, the Minister.

[23] I will turn now to a consideration of the issues which require our attention.

Issues

[24] I would distill and reframe the host of issues raised by the parties in their submissions, to three simple questions:

(i) Should leave be granted to adduce fresh evidence?

(ii) Did the trial judge err in ordering that the proceedings involving the three children should be severed?

(iii) Did the trial judge err in finding that the Mi'kmaw FCS did not have standing regarding the child B.O.T., or for that matter, any child of non-First Nations descent?

[25] Before considering each of these issues I will address the standard of review.

Standard of Review

[26] Questions of law are assessed on a standard of correctness. Questions of fact, or inferences drawn from fact, or questions of mixed law and fact are reviewed on a standard of palpable and overriding error. As Justice Bateman observed in *Hendrickson v. Hendrickson*, 2005 NSCA 67 at ¶6:

> [6] ... Findings of fact and inferences from facts are immune from review save for palpable and overriding error. Questions of law are subject to a standard of correctness. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding

> error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.
> ...

[27] Experienced trial judges who see and hear the witnesses have a distinct advantage in applying the appropriate legislation to the facts before them and deciding which particular outcome will better achieve and protect the best interests of the children. That is why deference is paid when their rulings and decisions become the subject of appellate review. Justice Cromwell put it this way in *Children's Aid Society of Halifax v. S.G.* (2001), 193 N.S.R. (2d) 273 (C.A.):

> [4] In approaching the appeal, it is essential to bear in mind the role of this Court on appeal as compared to the role of the trial judge. The role of this Court is to determine whether there was any error on the part of the trial judge, not to review the written record and substitute our view for hers. As has been said many times, the trial judge's decision in a child protection matter should not be set aside on appeal unless a wrong principle of law has been applied or there has been a palpable and overriding error in the appreciation of the evidence: see **Family and Children Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 at ss. 24. The overriding concern is that the legislation must be applied in accordance with the best interests of the children. This is a multi-faceted endeavour which the trial judge is in a much better position than this Court to undertake. As Chipman, J.A. said in **Family and Children Services of Kings County v. D.R. et al.** (1992), 118 N.S.R. (2d) 1, the trial judge is "... best suited to strike the delicate balance between competing claims to the best interests of the child."

[28] These are the principles I will apply during my review of the trial judge's decision in this case.

(i) Should leave be granted to adduce fresh evidence?

[29] Here, all parties agree that we ought to receive and consider evidence that was not placed before the judge (or not adequately addressed by counsel) at trial. Specifically, the parties say we ought to have before us during the course of our deliberations the following documents:

(a) Letter from Ms. Vicki Wood, Director of Child Welfare, to Ms. Karlena Johnson, Acting Executive Director of the Mi'kmaw FCS dated October 10, 2012;

(b) Letter from Ms. Sanaz Gerami, solicitor with the Nova Scotia Department of Justice, Legal Services Division, to Mr. Paul Morris, solicitor for the Mi'kmaw FCS dated March 6, 2013;

(c) Written brief filed by Ms. Sharon L. Cochrane, solicitor for the respondent father, B.T., to Judge Melvin dated March 11, 2013;

(d) Constitution and By-laws of the Mi'kmaw Agency; and

(e) Current written ministerial designation document dated June 12, 2009.

[30] While of course the parties' consent to the admission and consideration of fresh evidence is not binding upon this Court, I would – in the unique circumstances of this case – be prepared to accept and treat this evidence as properly forming part of the record and satisfying the well-known requirements for its reception. See for example, *R. v. Palmer*, [1980] 1 S.C.R. 759; *R. v. West*, 2010 NSCA 16; and *R. v. Jamieson*, 2011 NSCA 122; as may be modified to suit civil matters, especially in family law cases whenever the welfare, protection and best interests of children is of primary concern. See for example, *Children's Aid Society of Cape Breton v. S.G.*, [1995] N.S.J. No. 231(Q.L.)(C.A.); *Children's Aid Society of Halifax v. C.M.*, [1995] N.S.J. No. 421 (Q.L.)(C.A.); *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43; and *K.B. v. Nova Scotia (Community Services)*, 2013 NSCA 32 where at ¶18 Justice Fichaud observed:

> [18] ... In considering a fresh evidence motion in a child protection appeal, this Court will apply the *R. v. Palmer*, [1980] 1 S.C.R. 759 criteria but modified to ensure that the Court of Appeal has current evidence that would bear on a child's best interests: *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, [1994] 2 S.C.R. 165; *Children's Aid Society of Cape Breton v. S.G.* (1995), 142 N.S.R. (2d) 57 (C.A.) para.15; *Children's Aid Society of Cape Breton v. L.M.* (1998), 169 N.S.R. (2d) 1 (C.A.) para. 43; *A.L.F. v. Children's Aid Society of Cape Breton-Victoria*, 2004 NSCA 2 at para. 6.

[31] I would admit and will consider these five new documents in more detail at ¶52 *ff.* of these reasons.

(ii) Did the trial judge err in ordering that the proceedings involving the three children be severed?

[32] It is settled law that the standard of review from a decision-maker's exercise of discretion is to ask whether wrong principles of law have been applied or whether our intervention is required to prevent an obvious injustice. See, for

example, *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89. Clearly, the application brought by B.T. to sever his son's case from the rest required Judge Melvin to exercise her discretion. Considerable deference is paid in such circumstances.

[33] It cannot be seriously disputed that Judge Melvin had the authority to sever these matters. Her authority is anchored in both the *Family Court Rules* and the *Civil Procedure Rules*. Respectfully, I am not persuaded by any of the appellants' or intervenor's submissions challenging the trial judge's exercise of her discretion.

[34] The *Family Court Rules* govern joinder and severance. *Family Court Rule* 5.02 permits the Court to order separate hearings:

> **5.**02 Where parties are joined in a proceeding and it may embarrass or delay the hearing, or the proceeding ought to be disposed of by a separate hearing, or it is otherwise inconvenient, the court may order separate hearings, or make such other order as is just. (Underlining mine.)

[35] *Family Court Rule* 1.04 permits recourse to the *Civil Procedure Rules*. *Civil Procedure Rule* 37.05 says:

> **37.05** A judge may separate parts of a proceeding for any of the following reasons:
>
> (a) a party joined a party or claim inappropriately;
>
> (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
>
> (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined. (Underlining mine)

[36] Section 2(2) of the *Children and Family Services Act, supra*, is also engaged on applications such as this. As we all know, judges are required to rank the best interests of the child as the paramount consideration "(i)n all proceedings and matters pursuant to this Act…"

[37] As is apparent from Judge Melvin's decision, the two respondent fathers had questioned the joinder of these investigations at almost every stage of the

proceedings. However, it was not until B.T.'s counsel made a formal application to the court, that objections were noted and submissions heard. The thrust of B.T.'s application asking that the two matters be severed and that his son's case be processed by the Minister of Community Services, was based on privacy concerns. None of B.T., his son B.O.T., or his son's mother H.O. are of First Nations descent. The relationship between the two fathers, B.T. and M.T., was and is extremely acrimonious. Neither father wanted their respective children's cases heard together. Neither had any interest in the personal difficulties and circumstances of the other. Each father strongly opposed having such private matters concerning their parenting of their respective children disclosed in protection proceedings involving the other children.

[38] A fair reading of the trial judge's decision as a whole demonstrates that she explicitly and repeatedly recognized the overarching principle of choosing a course of action that "…must look at all times . . . to what would be in the best interests of these children." Having frequently dealt with these parents in the past, she was well acquainted with their personal circumstances, interaction, and the volatile relationship between both fathers. She specifically found that:

> [78] …M.T. and B.T. are strangers to one another. They are neither privy nor should they be, to the intimate details of one another's lives. They are essentially little more than a member of the public to one another.

[39] Judge Melvin went on to describe how it would cause harm to the children:

> [69] …for their respective fathers to have knowledge of the other, especially given the potential for antagonism between them as was evident during the brief times they were in Court together.

[40] This reality was perhaps best illustrated during oral argument at the appeal hearing in this Court. There, Mr. Fraser made an impassioned submission on behalf of his client M.T. urging us not to interfere with the judge's severance order. Mr. Fraser said Judge Melvin recognized that to not sever these cases would be to pour fuel on the fire because it would then oblige full disclosure which would undoubtedly have a negative impact on these three children. Mr. Fraser told us that he had acted for M.T. for many years and that there were thousands of pages of Agency records and testimony concerning his file and personal history alone. He said it would be naive to think that this information would not at some point filter down to the children. He advised that on at least two occasions in

proceedings before Judge Melvin, his client M.T. had stormed out of the courtroom; not the result of any particular disagreement or displeasure with the presiding judge but because of his own open hostility towards the other father, B.T. Having practiced law for more than 40 years, Mr. Fraser said this case was the most volatile example of parental hostility he had ever encountered. In his submission, the forced disclosure of such intensely private information (which would occur if the matters were not severed), would only diminish the value of any services these three children might otherwise receive.

[41] In my opinion, on the facts of this case it was perfectly reasonable for Judge Melvin to find that there were in fact "two separate families" and that "(e)ach family has it's **[sic]** own story" such that these two separate family units:

> [59] …have a right to the least invasion of privacy and interference with freedom that is compatible with their own interests.

[42] The record here is replete with references to the vast array of interventions and community-based professional resources committed to each of these three parents which included social, psychological and psychiatric counselling; supervised urine and hair follicle collection for the purposes of random drug and alcohol testing relating to their suspected addictions; and orders to attend scheduled appointments designed to address parenting, housing, anger management and discipline issues as well as the need to focus on child protection concerns surrounding medical neglect, substance abuse and parental conflict.

[43] Judge Melvin was obviously very familiar with the difficult circumstances surrounding all of these adults and their impact upon the lives and well-being of these three young children. I have no doubt that these facts weighed heavily in her ultimate conclusion that *not* severing these two cases would cause harm to the children.

[44] The judge went on to carefully consider whether separating these matters would cause unnecessary duplication of proceedings and amount to a waste of resources. She satisfied herself – as an experienced trial judge very familiar with these parties – that it would not.

[45] Respectfully, I do not read the judge's decision as expressing or invoking any kind of presumption in favour of severance in cases where the children said to be in need of protection, are the offspring of different fathers. Obviously, there is no such legal presumption and to suggest otherwise would be a serious error of

law. Nothing of the sort happened here. I am satisfied that Judge Melvin gave proper consideration to all relevant factors in judicially exercising her discretion and concluding as she did:

> [84] The evidence is clearly that all Respondents are unhappy with this proceeding as one matter. If the matter were to proceed as one matter, given the personalities involved, the discomfiture of the Respondent fathers and the mother may well affect the children, and their relationship (as step-siblings) with one another.
>
> [85] For this and all of the reasons noted in this decision, the Court finds it is in the best interest of these children, that this matter be separated into two matters.

[46] In conclusion on this second issue, after carefully reviewing the record and the whole of the judge's reasons, I am not persuaded that in exercising her discretion and deciding that severing these two matters was in the best interests of these children, the judge ignored important factors, or emphasized insignificant factors, or gave no or insufficient weight to relevant considerations : see *Aliant Inc.supra*.

(iii) Did the trial judge err in finding that the Mi'kmaw FCS did not have standing regarding the child B.O.T., or for that matter, any child of non-First Nations descent?

[47] Important detail surrounding the lead-up to the trial judge's decision was provided by Mr. McVey in his factum on behalf of the Minister. On April 3, 2013, the trial judge released a brief faxed decision in which she listed a number of "complexities" she said would have to be resolved in her written decision. Five days later when all counsel appeared before the judge on April 8, she proceeded to outline her reasons in a lengthy oral judgment. The next day, April 9, 2013, the judge released her written decision. The judge's oral and written reasons differ in a number of material respects. For example, the final paragraph in her written decision on "Standing" was <u>not</u> part of her oral decision. This paragraph in the written decision provides:

> Although the court cannot order the Minister be added as a party the Court recommends the Minister consider an application pursuant to Section 36(2). The Court has found the Mi'kmaw Family and Children's Services has no standing to make an application for non-First Nations children under the Children & Family Services Act, and therefore, without the Application by the Minister, the matter involving the non-First Nations family will be dismissed.

A week later the Mi'kmaw FCS launched an appeal and moved for a stay of that portion of the trial judge's decision which had directed that the case involving B.O.T. would be dismissed absent the Minister's involvement as a party. The Minister applied for intervenor status. When all parties appeared before me in Chambers on April 18, 2013, I ordered a partial stay of the trial judge's decision, as described in more detail at ¶20, *supra*, of these reasons.

[48] Obviously, the question of standing raises an important jurisdictional issue which in this case would engage principles of statutory interpretation as well as constitutional law, such that the decision-maker's reasoning and disposition would be reviewed by this Court on a standard of correctness.

[49] I have decided, for the reasons that follow, that it would not be appropriate for the Court to answer the question in this case. In my opinion such an important issue can only be resolved if a proper record has been established in the court below, anchored by evidence and comprehensive submissions. During argument in this Court Mr. McVey, counsel for the Minister, conceded that this is not the case to pronounce on the authority of the Mi'kmaw FCS to be involved in child protection cases that concern children of non-First Nations descent. Mr. McVey properly acknowledged that the evidence was incomplete and counsels' submissions were lacking because they did not fully appreciate that this issue was going to be front and center in the judge's mind.

[50] For the most part, counsel were taken by surprise by Judge Melvin's consideration of this issue. The point had only surfaced obliquely, if at all, and was not the subject of evidence or substantial argument at the hearing before her. Yet, a large part of the judge's analysis and commentary addresses this very issue.

[51] Counsel for the Mi'kmaw FCS as well as the intervenor Minister were especially concerned that many of the judge's observations, left unchallenged, would become a source of precedent in the next case.

[52] The five new documents I would admit as fresh evidence and listed at ¶29 , *supra*, all relate to this last issue. Because I have decided this is not a proper case to address the question of standing, I need only refer to the documents summarily.

[53] The first document is a letter from Ms. Vicki Wood to Ms. Karlena Johnson dated October 10, 2012. Ms. Wood is the Director of Child Welfare with the Nova

Scotia Department of Community Services. Her letter to Ms. Johnson is written to:

> …confirm that Mi'kmaw Family and Services (sic) have been granted the authority to a make (sic) a protection application to the Family Court of King's County, regarding the child (B.O.T.) …
>
> Two other children of (H.O.) are also to be included in the protection application … The Agency has determined that this intervention is necessary to ensure the continued safety and well-being of all the children involved.

[54] The second document is a letter from Ms. Sanaz Gerami, a solicitor with the Nova Scotia Department of Justice to Mr. Paul Morris, counsel for Mi'kmaw FCS dated March 6, 2013, stating in part:

> Please be advised that the Minister of Community Services is in support of this matter being retained by one Agency office in order to maintain efficiency and efficacy in this proceeding. However, should the Court grant an order to sever the application, the King's District Office will assume responsibility of the application involving the child, (B.O.T.)…

[55] The third document is a copy of the written submission filed by Ms. Cochrane on behalf of her client, B.T., dated March 11, 2013, and included simply to complete the record.

[56] The fourth document is the Constitution and By-Laws of the Mi'kmaw FCS.

[57] The fifth document is described as the "current written ministerial designation document dated June 12, 2009".

[58] As noted earlier in my reasons, all parties in this appeal consented to having these five new documents admitted by the Court as fresh evidence.

[59] It is really the first, fourth and fifth documents that relate to the question of standing and the vigorous submissions by both the appellant and the Minister, that the judge erred in concluding that the Mi'kmaw FCS had no standing to become involved in B.O.T.'s file or, for that matter any proceeding concerning any child who was not of First Nations descent. The relevance of these documents is explained by Mr. McVey at ¶117 *ff.* of his factum on behalf of the Minister:

> Standing

117. The Minister submits that the Trial Judge was correct in fact but wrong in principle, when she concluded the Mi'kmaw Agency lacked standing to bring a protection proceeding concerning [B.O.T.], a non-aboriginal child living off-Reserve.

118. A retrospective review by the Minister of the authorization letter dated October 10, 2012, undertaken only after this appeal was filed, reveals that the Director was acting ultra vires.

119. However, the Minister submits that it is important the erroneous principles articulated by the Trial Judge not stand, even though she was correct in her ruling on the facts of this case.

…

123. It is the Constitution of the Mi'kmaw Agency that states that the "territorial jurisdiction" of the Mi'kmaw Agency is limited to "Indian Reserves in Nova Scotia". The Trial Judge did not have that Constitution before her when she ruled on the Severance Motion.

124. Limiting the jurisdiction of the Mi'kmaw Agency to "Indian Reserves in Nova Scotia" is not a racial or ethnic limitation of jurisdiction, but a territorial one.

125. If an aboriginal child is living off-Reserve, a District Office of the Minister will commence the proceeding and provide notice to the Mi'kmaw Agency under Section 36(3) of the *Act*.

126. The Mi'kmaw Agency has the discretion under Section 36(3) of the *Act* to substitute itself for the Minister's District Office as Applicant. However, at present, as a matter of practice, the Mi'kmaw Agency does not do so in relation to off-Reserve aboriginal children. There is in Nova Scotia no urban equivalent to Native Child and Family Services of Toronto.

127. The Minister may alter the territorial jurisdiction of any agency (Section 8(3) of the *Act*).

128. By Section 8(3), the Minister may allow the Mi'kmaw Agency to deliver child protection services to non-aboriginal persons not ordinarily resident on Reserve, a discretionary power of the Minister also expressly reflected in the *Tripartite Agreement*, at para 5.3.

129. The Minister may also delegate in writing, a person to perform or exercise any of her powers, privileges, duties or functions (Section 5(1) of the *Act*).

130. Whenever such a person does exercise the Minister's powers on delegation, any written document purporting to do so must contain the language stated in Section 6 of the *Act*.

131. As a question of fact, **not known to the Trial Judge at the time she rendered her Decision**, the Minister had not, in fact, delegated her Section 8(3)

> authority to the Director. The Trial Judge did not have the list of such delegated powers in evidence before her.
>
> 132. The Trial Judge was therefore correct in fact that the letter dated October 10, 2012, was ultra vires, but only because of the following events unique to this case:
>
> (a) The letter purported to alter the territorial jurisdiction of the Mi'kmaw Agency;
>
> (b) It was signed by the Director of Child Welfare, rather than the Minister herself;
>
> (c) The Minister has not delegated in writing the power to alter territorial jurisdiction;
>
> (d) The letter did not contain the mandatory language required by Section 6 of the *Act*.
>
> 133. However, in any future case, the Minister may either by personal letter (Section 8(3)), or by written delegation of this power to the Director of Child Welfare (Section 5(1)), do exactly what was attempted in this case by means of the Director's letter dated October 10, 2012.
>
> 134. If the power had been properly exercised by the Minister personally, or delegated in writing to the Director, a letter of authority similar to that dated October 10, 2012, but containing the mandatory language of Section 6 of the *Children and Family Services Act*, would suffice to give the Mi'kmaw Agency "standing" to act in relation to [B.O.T.]..
>
> 135. If the letter had been written by one of these means, the opinions of the Trial Judge in paras 42-50 of her Decision would be errors of law. She is only correct on the facts of this case. (Emphasis in original)

[60] It is obvious, based on the submissions made by counsel during the appeal hearing in this Court, that not all parties share the Minister's interpretation of these documents or the Minister's position as to what ought to be the result when the same issue of standing arises in another case.

[61] In my view this important jurisdictional question must be left for another day when a proper record based on relevant evidence and comprehensive argument emanates from the court below.

[62] To avoid the risk that the judge's statements – whether explicit or expressed as *obiter dicta* – might impede or derail child protection proceedings in future cases, it is enough for me to say that I have disposed of this appeal solely on the first issue and concluded that the judge did not err in the exercise of her discretion

when she ordered severance. Nothing in these reasons should be taken to be a comment upon or an endorsement of the trial judge's analysis or conclusions with respect to the second issue, standing. That issue should only be resolved in another case, on another day.

Conclusion

[63] I would grant leave to admit the fresh evidence. I would dismiss the appeal. The trial judge's decision insofar as it relates to severing the proceedings involving B.O.T. from the proceedings involving N.O.T. and O.O.T., stands. I would not make any order for costs.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.
Oland, J.A.