FAMILY COURT OF NOVA SCOTIA

Citation: *A.L. v. Nova Scotia (Community Services)*, 2017 NSFC 8

Date: 2017-04-11
Docket: FATCFSA-104565
Registry: Antigonish

Between:

A.L.

Applicant

v.

Minister of Community Services

Respondent

Judge:	The Honourable Judge Timothy G. Daley
Heard	March 27, 2017, in Pictou, Nova Scotia
Oral Decision:	April 11, 2017
Counsel:	Rejean Aucoin, for the Applicant Lorne MacDowell, Q.C., for the Respondent

The Court:

[1] This decision concerns a motion of nonsuit brought by the Minister of Community Services in an application by A.L. who seeks his name removed from the Child Abuse Register. Specifically, the Minister asks the court to find that on the closing of A.L.'s case in the application, there is no evidence on which a properly instructed trier of fact could find for A.L. in that application.

History of Child Protection Proceeding

[2] The history of the matter is of relevance in this case. A.L. is a respondent in a current child protection matter which commenced on October 15, 2015. He is the biological father of two children who are the subject of that proceeding and the step-parent of another child in that proceeding, W.D.

[3] During the child protection proceeding, the matter came before this court on January 19, 2016 for a protection hearing under the Children and Family Services Act. The court was required to determine, on the balance of probabilities, if the children were in need of protective services and to determine on which grounds pursuant to section 22 (2) of the Act such protection finding was grounded.

[4] A.L. was represented by counsel at that time. He consented, through counsel, to a finding pursuant to sections 22 (2) (c) and (d). Those subsections read as follows:

> (c) the child has been sexually abused by a parent or guardian of the child, or by another person were a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
>
> (d) there is a substantial risk that the child will be sexually abused as described in clause (c)

[5] Section 22 (1) defines substantial risk as follows:

> In this section, "substantial risk" means a real chance of danger that is apparent on the evidence.

[6] This finding related to the child W.D. Findings related to the other two children were on the ground of substantial risk of sexual abuse.

[7] Independent of the consent of A.L., the court found, on review of the Notice of Application and the affidavits of the agency workers, that the children were in need of protective services and made the findings with respect to W.D. under sections 22 (2) (c) and (d) as set out earlier.

[8] That child protection proceeding continued and is before the court today with the Minister seeking termination on certain conditions including the issuance of an order under the Maintenance and Custody Act.

Legal Framework

[9] As a result of the finding made by this court, A.L.'s name was placed on the Child Abuse Register. This register was established pursuant to section 63 of the Act and is a database containing the names of individuals who have been found to have caused harm to a child. Its purpose is to provide a repository of names for search by a person seeking to satisfy an entity regarding the status on the registry. For example, a person seeking to volunteer to coach children or to provide services at a daycare may be required to have their name searched within the registry. The registry may also be used by designated child welfare staff as part of their role in assessing risk and working with families.

[10] A.L. has now made application pursuant to section 64 (2) which provides as follows:

> A person whose name is entered on the child abuse registry may apply to the court at any time to have the person's name removed from the register, and if the court is satisfied by the person that the person does not pose a risk to children, the court shall order that the person's name be removed from the register.

[11] It is important to note the burden of proof on an application under section 64 (2). As Comeau J. noted in the decision of K.R.M.W. v. Nova Scotia (Minister of Community Services) (2010), 297 NSR 2d (FC) at paragraph 11:

> The burden of proof is clearly on the applicant under this section to satisfy the court that he does not pose a risk to children.

[12] The term "risk to children" is discussed by Comeau J. when he quoted from Judge Milner's decision in M. H. v. N. S. (1993), 275 NSR (2d) (FC) at paragraph 44 as follows:

> There is no definition in S. 64 of what is meant by "risk to children"; therefore, I think the legislature must have intended the meaning to be the same as the risk defined in S. 22, i.e. "substantial risk", or "a real chance of danger that is apparent on the evidence."

[13] I am mindful that the standard of proof to be applied in such circumstances is the same as in all civil matters, that being the balance of probabilities.

[14] At the close of A.L.'s evidence in his application, counsel for the Minister brought a motion of non-suit. The motion for non-suit is grounded in the Family Court Rules and Civil Procedure Rules. Family Court Rule 1.02 (1) directs as follows:

> Subject to subsection (3), these rules govern every proceeding in the Family Court for the province of Nova Scotia.

[15] Family Court Rule 1.04 (1) connects the Family Court Rules with the Civil Procedure Rules as follows:

> The Interpretation Act applies to these rules and the Civil Procedure Rules apply at the discretion of the court, when no provision under these rules is made.

[16] I find that there is no provision in the Family Court Rules for a motion for non-suit and I therefore exercise my discretion and turn to the Civil Procedure Rules for guidance.

[17] Civil Procedure Rule 51.06 (1) deals with non-suit motions as follows:

> At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.

[18] Judicial interpretation of this provision has been provided many times over the years including decisions from the Nova Scotia Court of Appeal. In the decision of Johansson v. General Motors of Canada Ltd, 2012 NSCA 120 where Fichaud J. set out the applicable law as follows:

> **19** The issue here is legal. …
>
> **20** In *Herman v. Woodworth*, [1998] N.S.J. No. 38 (Q.L.) (C.A.), Justice Flinn elaborated:

> **4** In an application for a non-suit, following the close of the plaintiff's case at trial, the question as to whether the plaintiff has established a prima facie case is a question of law. …
>
> > ... This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact.

[19] Fichaud J. went on to find as follows;

> **26** In *MacDonell v. M & M* Developments Ltd., Justice Hallett described the approach:
>
> > The Law Applicable to Non-Suit Motions
> >
> > **38** On a non-suit motion, the trial judge has to consider all of the circumstances, including the issues of fact and law raised by the pleadings
> >
> > **39** The general test for a non-suit motion is whether or not a prima facie case was made out by the plaintiffs. It is sometimes expressed as whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff. If not, the motion will succeed..
>
> **27** In *Herman v. Woodworth*, Justice Flinn … more expansively, adopted the following from Sopinka's *The Law of Evidence in Civil Cases*:
>
> > ... If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it.

The Applicant's Evidence

[20] In this matter, the evidence of A.L. was given by way of affidavit sworn March 7, 2017 and in cross-examination. His evidence was that on two occasions he was putting W.D. to bed alone without her mother's involvement. He said this occasionally occurred and usually it was both he and the mother involved in bedtime activity. Usually stories were read and there was some singing to settle W.D. into sleep.

[21] A.L. said that on two occasions, four days apart, he was in W.D.'s bedroom. He was dressed in a T-shirt and pajama pants and was wearing underwear. The mother was with the other children. He was lying in bed with W.D. and on the first occasion. W.D. asked if she could touch his penis. He was unsure if she used the word penis but he knew what she meant. He allowed her to reach inside his pajama pants and beneath his underwear and allowed her to touch and twist his penis. He said the contact was brief.

[22] On the second occasion, he was wearing the same or similar clothing and when she asked to touch his penis, he allowed it again. He agreed that the request made on the first occasion was a surprise and on the second occasion it was not a surprise. He said that he did not want to bring shame to her or damage or curiosity. He allowed her to touch his penis again beneath his pajama pants and underwear, touching and twisting it a second time. He said that W.D. then rolled over and went to sleep.

[23] In his affidavit A.L. said that the decision to allow W.D. to touch his penis was completely inappropriate and a very poor decision on his part. He was taken aback by the request and reacted without thinking. This latter comment applies to the first of the two incidents and not the second.

[24] He maintained in his affidavit he had no sexual intention of was not sexually motivated by his behaviour.

[25] A.L. was charged criminally with a sexual offense involving W.D. but the matter did not proceed. He has therefore not been convicted for a sexual offense in this matter.

[26] A.L. called evidence from Dr. Angela Connors, a clinical and forensic psychologist who conducted a comprehensive forensic sexual behaviour assessment on A.L. during the child protection proceedings. She was qualified as

an expert in clinical and forensic psychology and was permitted to give opinion evidence with respect to assessment of sexual risk.

[27] Her report, dated July 5, 2016, was entered as evidence. In that report she detailed the information that she reviewed, the interview A.L., the testing she conducted on him as well as the methodology used in arriving at her opinion.

[28] As she noted in part:

> As noted previously, the risk measures are designed to project re-offense in a population of men who are already known to have committed a sexual offense. While generally this population is identified by criminal conviction, occasionally the undersigned has utilized these measures in a situation where the commission of the sexual offense is acknowledged, but for whatever reason, a conviction in a criminal court did not (or has not) occurred. A.L. presents an unusual case in that he does not fit either of these two groups of individuals, although he does acknowledge that W.D. touched his penis.
>
> The undersigned completed these instruments to see, if the touching of his penis was considered a criminal code violation (which in the end it was not), what would A.L.'s risk for another sexual criminal code violation be? Those results show that A.L. was uniformly considered a low risk for re-offense, whether that was in the prediction of any form of violence… Or sexual re-offense specifically…. Further he scored in the lowest category of dynamic risk indicators… Suggesting few active dynamic risk factors…. In this situation treatment is not generally suggested as it is not possible to improve upon risk beyond the current scores.

[29] Dr. Connors went on to say as follows:

> Thus, even if A.L. is considered to have been sexually motivated in the sexual boundary violations with W.D., his risk for repeating the behaviour and being back before the Courts is in the lowest risk category.

[30] That notwithstanding, Dr. Connors said in her second recommendation:

> It is recommended that, should there be no concerns in parenting on the part of A.L. and his new intimate partner, that progression of A.L.'s custodial parenting of his daughters be pursued. Should this include W.D., to be most cautious it is suggested that some family safety rules be put in place as it pertains to W.D.; however, the high risk family safety plan protocol often prepared by Ms. McGrath would not be appropriate to A.L.'s low risk circumstance vis-à-vis W.D....

[31] In her direct evidence, Dr. Connors confirmed that, using the tools and methodology applied in this circumstance, there is no such thing as a “no risk finding” and at best she can conclude there is a “low risk" of re-offense. When asked, she indicated that the family safety plan to which she referred in her report included supervised access for A.L. and W.D. and that such supervision is an external control to manage the low risk circumstance.

[32] Under cross-examination she again reiterated that low risk is not equivalent to no risk and that supervision in low risk circumstances such as this is typical and should be reviewed at some later point.

[33] In the parallel child protection proceedings, A.L. continues to have supervised access with W.D. This is on a consensual basis and has been in place for some time. The only basis for the supervision is the protection concern raised in the child protection proceeding regarding W.D., that being the circumstance of A.L. letting W.D. touch his penis.

Analysis

[34] When analyzing the evidence in the context of the legal test to be applied as set out earlier, I have considered all the circumstances including the issues of fact and law raised by the pleadings. I have considered whether a finder of fact, properly instructed on the law, could, on the facts adduced, assuming them to be true and given their most favorable interpretation, find that A.L. has made out a prima facie case in his application.

[35] In doing so, I have not reached any conclusion about whether such a finder of fact will accept the evidence but rather whether the inference that A.L. seeks the court to find in favour of him could be drawn from the evidence adduced if the trier of fact chose to accept the evidence.

[36] In the present circumstance, I am not satisfied that A.L. has adduced evidence to establish a prima facie case in support of his application. If the evidence put forward by him is assumed to be true and is assigned the most favorable meaning capable, I am not satisfied that he has established a prima facie case that, on the balance of probabilities, he does not pose a risk to children. To do so A.L. would have to establish a prima facie case that he is not a "substantial risk" to children, or the he poses “a real chance of danger that is apparent on the evidence" to children.

[37] A.L. has established that on two occasions he allowed the child to touch his penis and to twist it.

[38] This court made a protection finding that W.D. is a child in need of protective services on the ground that A.L. had sexually abused her.

[39] The assessment conducted by Dr. Connors does establish, on its most favorable interpretation, that A.L. is a low risk to reoffend. That assessment does not, however, establish that he is at no risk to reoffend.

[40] Dr. Connors recommended, in managing the low risk circumstance of A.L., that supervision of access by A.L. with W.D. should be in place for some time and reviewed later.

[41] Finally, in the current child protection proceeding this court had for some time required the supervision of A.L.'s access with W.D. to manage the risk to W.D.

[42] Given all the evidence, I find that the Minister has made out its motion for nonsuit. A.L. has not satisfied this Court that he has established, on a balance of probabilities, a prima facie case that he is no risk to children, even if his evidence is given its most favorable interpretation and assuming it were all believed. His application to have his name removed from the Child Abuse Register is therefore dismissed.

Daley, J.P.C.