In the Court of Appeal for the Northwest Territories

Citation: ***L.M. and R.B. v The B.C. Director et al*, 2019 NWTCA 6**

Date: 2019 12 17
Docket: A1-AP-2019-000 004
Registry: Yellowknife, N.W.T.

Between:

The British Columbia Director of Child, Family and Community Services, Custom Adoption Commissioner Mary Beauchamp, The Public Guardian and Trustee of British Columbia, and The Attorney General of the Northwest Territories

Applicants
(Respondents)

- and -

L.M. and R.B.

Respondents
(Appellants)

Reasons for Decision of
The Honourable Madam Justice Louise Charbonneau

NOTICE OF ORDER RESTRICTING PUBLICATION OF CERTAIN INFORMATION
Publication of information tending to identify L.M. and R.B. or the child, as well as information and documents respecting child protection proceedings in British Columbia is prohibited.

Application for a Stay Pending Appeal

Reasons for Decision of
The Honourable Madam Justice Louise Charbonneau

I) INTRODUCTION

[1] In this appeal, the Appellants challenge the decision of a Chambers Judge to quash a Certificate issued pursuant to the *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26 (*ACARA*). The Certificate was issued on November 30, 2016, and recognized that S.S. was adopted by the Appellants in accordance with aboriginal customary law on October 24, 2013.

[2] The British Columbia Director of Child, Family and Community Services (the Director) became aware of the Certificate in March 2017 and initiated judicial review proceedings seeking to have it quashed. On May 22nd, 2019, the Chambers Judge granted the application and quashed the Certificate. *British Columbia (Director of Child, Family and Community Services) v Beauchamp et al.*, 2019 NWTSC 19 (*Chambers Judge's Decision*).

[3] The Appellants represented themselves at the judicial review hearing and are representing themselves on the appeal. The appeal is not yet perfected but deadlines have been set for the parties to file their materials with a view of having it heard at the sittings of the Court of Appeal scheduled to commence on April 21, 2020 in Yellowknife.

[4] On November 4, 2019, the Appellants filed an Application in which they seek two areas of relief. The first is to have the judgement under appeal stayed until the appeal is decided on the merits. That Application is governed by Rule 36 of the *Rules of the Court of Appeal for the Northwest Territories Respecting Civil Appeals*. It can be heard by a single judge of the Court. The second is an Application to introduce fresh evidence at the hearing of the appeal. Pursuant to Rule 27(1)(b), it must be heard by a panel of the Court, unless a panel directs that it be heard by a single Judge.

[5] The Application was before me on December 11, 2019. I adjourned the fresh evidence Application to be dealt with by a panel of the Court. I set timelines for the filing of materials with a view of having it spoken to on the same sittings as the appeal itself. The stay Application proceeded.

II) BACKGROUND

[6] The custody and care of S.S. has been the subject of considerable litigation. I do not propose to refer to all the details of this litigation, as to do so would far exceed the scope of what is required to dispose of the stay Application. However, it is necessary to refer to some of the broader litigation history of the matter to better understand the context of this Application and the potential impact of its outcome.

[7] S.S. is Métis. She was born in 2013 in British Columbia. She was apprehended from her biological parents by child protection authorities the day following her birth. She was placed in foster care with the Appellants, under a family care home agreement that they entered into with the Director.

[8] In the months that followed, the Director was granted a series of orders regarding S.S.'s custody: an interim custody order was granted in January 2014; a temporary custody order was granted in March 2014 and was extended in June 2014. These orders were made with the consent of S.S.'s biological parents. S.S. remained in the Appellants' care during this time.

[9] On July 6, 2015, the Director was granted legal custody of S.S. Her biological mother consented to this. The court that heard the matter dispensed with the consent of S.S.'s biological father.

[10] S.S. has siblings who live in Ontario with their adoptive family, which is a non-Métis family. The Director decided to place S.S. in foster care with that same family. The Appellants were strongly opposed to this.

[11] S.S. was removed from the Appellants' care and placed with the Ontario family on September 29 2016. She has lived with them continuously since then.

[12] A number of applications were brought before courts in British Columbia in 2015 and 2016 regarding S.S.'s custody.

[13] The Appellants filed a Petition to adopt S.S. in September 2015. That Petition was dismissed in December 2015. They filed a second Petition for adoption in January 2016, which was also dismissed. Both decisions were appealed and those appeals were dismissed in September 2016.

[14] In May 2016, S.S.'s biological parents filed a Petition seeking to have S.S. returned to their care so they could place her with the Appellants. That Petition was dismissed in September 2016.

[15] Finally a Petition was filed jointly by the Appellants and the biological parents in August 2016, seeking a declaration that the Appellants adopted S.S. by way of custom adoption. The Petition was dismissed in September 2016. That decision is under appeal. My understanding is that the British Columbia Court of Appeal has stayed that matter pending the outcome of the proceedings that, by then, had been initiated in the Northwest Territories.

[16] Some time after S.S. was removed from their care, the Appellants moved to the Northwest Territories. On November 22nd, 2016 they had a meeting with the Custom Adoption Commissioner. This resulted in the issuance of the Certificate on November 30.

[17] The Director was not given notice of the steps the Appellants were taking in the Northwest Territories to obtain the Certificate. She became aware of what transpired in the Northwest

Territories in March 2017 and initiated judicial review proceedings in the Supreme Court of the Northwest Territories seeking to have the Certificate quashed. The Director invoked procedural fairness, abuse of process, and jurisdiction in support of her position.

[18] After the judicial review proceedings were commenced, the Appellants filed a Notice of Motion seeking custody, or alternatively, access to S.S. pending the outcome of those proceedings. They relied on the *Children's Law Act*, SNWT 1997, c. 4. That Application was dismissed on September 28, 2017. The Chambers Judge who heard that matter concluded that the Supreme Court of the Northwest Territories did not have jurisdiction in the matter because S.S. was not habitually resident or physically present in the Northwest Territories. *British Columbia (Director of Child, Family and Community Services) v Beauchamp et al.*, 2017 NWTSC 67.

III) ANALYSIS

[19] The judicial review hearing eventually proceeded. Ultimately, the Chambers Judge quashed the Certificate for two reasons. First, she found that under the circumstances, the rules of natural justice required that the Director be given notice that the Appellants were applying for the Certificate. The Chambers Judge also found that in light of the other proceedings that had taken place and were still ongoing in other jurisdictions about S.S.'s custody, allowing the Certificate to stand would result in an abuse of process. Given her conclusions on those issues, the Chambers Judge found it unnecessary to address other issues that were raised during the hearing.

[20] The Appellants have filed a Notice of Appeal that alleges that the Chambers Judge made several errors. They now seek to have her decision stayed until the matter is disposed of on the merits. The Director and the Attorney General of the Northwest Territories oppose the stay Application. The Custom Adoption Commissioner takes no position at this stage.

[21] The legal framework that governs this Application is not controversial. To succeed on the Application, the Appellants must establish that there is a serious issue to be tried, that they will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 S.C.R. 311; *Siksika Health Services v Health Science Association of Alberta*, 2019 ABCA 169, para 8.

1. Whether there is a serious issue to be tried

[22] As was noted at the hearing of the Application, it is important to not misunderstand the meaning of "a serious issue to be tried". The question is not whether the issues raised by a party are important or legitimate in a broad sense. In the context of a stay application, this branch of the test is concerned with whether the appeal raises issues that are at least arguable.

[23] The Director acknowledges that the threshold is low: the party seeking a stay need not establish that the grounds of appeal are compelling and have a high chance of success. *RJR-MacDonald Inc.*, paras 49-50. She nonetheless argues that the appeal is entirely frivolous and vexatious.

[24] The Notice of Appeal includes 13 grounds, some raising very specific issues and some that are quite broad in scope. One of the difficulties in analyzing the merits of an appeal at this stage is that often, the judge dealing with the stay application does not have the benefit of the full record that will be before the panel at the hearing of the appeal. That is the case here, as the Appeal Record has not yet been filed. It is also clear from the jurisprudence that a prolonged examination of the merits of the appeal is generally neither necessary nor desirable when considering a stay application. *RJR-MacDonald Inc*., para 50.

[25] Having said that, several of the grounds of appeal stem from what I understand to be the core position that the Appellants attempted to advance at the judicial review and will attempt to advance on the appeal, namely, that they adopted S.S. in 2013 under aboriginal law and that this adoption could not later be displaced by orders made pursuant to statutory law. They argue, in effect, that the order granting the Director permanent legal custody of S.S. has no effect because by the time it was made, there was already a valid adoption in place under aboriginal law.

[26] Several other aspects of the Appellants' position on this matter flow from that basic premise. For example, it is the reason that they take the view that the Chambers Judge erred in examining what happened with the Custom Adoption Commissioner through the lens of the common law rules of procedural fairness. They argue that the Director was not entitled to notice of that process because the custom adoption removed any standing that the Director otherwise may have had in the matter. They argue the matter ought to have been viewed through the lens of aboriginal law, which superseded everything else.

[27] This core position is based on the Appellants' interpretation of aboriginal law, its constitutional status, and the implications that this has on the reach of statutory legislation and orders made by courts pursuant to statutory legislation. The Director argues that these issues were not properly before the Chambers Judge and should not be entertained on appeal.

[28] In her decision, the Chambers Judge acknowledged that the Appellants' position at the judicial review raised broad substantive issues, but decided that it was not necessary to address them:

> The issues raised by L.M. and R.B., what constitutes a custom adoption and the consideration of constitutionally protected aboriginal rights, are much larger substantive issues which are best considered on another occasion. In my view, the issues raised by the Director are sufficient to dispose of this judicial review and it is not necessary to consider other issues that have been raised.

Chambers Judge's Decision, para 24.

[29] The Appellants may have an uphill battle in trying to persuade a panel of this Court to entertain these broad constitutional issues, given how the judicial review application was framed and the basis upon which it was decided. At the same time, the Chambers Judge herself did not say she was declining to decide these issues because they were not before her. Rather, she found that

they were "best left to be considered on another occasion". It will be for the panel hearing this appeal, with the benefit of the full record, to decide whether these issues should be considered.

[30] At this stage, I cannot say that all the grounds of appeal are frivolous and vexatious. I must, therefore, turn to the other branches of the test.

2. Whether the Appellants will suffer irreparable harm if the stay is not granted

[31] In considering this factor, the question is whether the refusal to stay the decision could so adversely affect the Appellants' interests that the harm could not be remedied if they succeed on the merits. It is harm which either cannot be quantified in monetary terms or cannot be cured. *RJR-MacDonald Inc.*, paras 58-59.

[32] The Appellants argue that S.S. has suffered, and continues to suffer, irreparable harm as a result of having been removed from their care and placed with a non-Métis family, thousands of kilometers away from her Métis community. They have filed extensive materials that refer to the harm that has resulted from the removal of indigenous children from their families and communities in this country. Based on this well-documented history, they assert that S.S. has already been harmed and is at great risk of further harm in her current environment.

[33] The first problem with this position is an evidentiary one. A party seeking a stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for stay is denied. The allegation of irreparable harm must not be based simply on assertions. *United States Steel Corporation and U.S. Steel Canada v Attorney General of Canada*, 2010 FCA 200, para 7. Here, there is no evidence specific to S.S. that suggests that she has been harmed or is at risk of being harmed in her current situation.

[34] But even leaving that issue aside, the other problem is a practical one, considering the legal effect that a stay would and would not have if it were to be granted. The subject matter of the judicial review hearing was the validity of the Certificate. That is the only issue that will be decided on this appeal. The Appellants themselves say that the Certificate did not create any rights, and merely recognized a custom adoption that had taken place years before. S.S. was not in the Appellants' custody when they obtained the Certificate. She was not in their custody at any time after it was issued. The issuance of the Certificate had no immediate effect on S.S.'s custody. Similarly, if it is restored pending the hearing of the appeal, or even if it were restored as a result of a successful appeal, it will also not, on its own, have any immediate or automatic consequence on S.S.'s custody or access.

[35] As I noted at Paragraph 18, there has already been a determination that the Northwest Territories courts do not have jurisdiction over issues of custody and access with respect to S.S. That decision, having not been appealed, is the final word on the matter. One way or the other, and with or without the Certificate in place, issues about S.S.'s custody and access will not be decided in the Northwest Territories. A stay pending appeal in these proceedings would not avoid or cure the irreparable harm that the Appellants rely on in seeking it.

3. The balance of convenience

[36] The third criterion in deciding whether a stay should be granted is the balance of convenience.

[37] S.S. has been in Ontario for over three years now. As I already noted, the issuance of the Certificate in November 2016 did not have any effect on her custody. Similarly, the quashing of the Certificate did not change her situation. She remained in Ontario throughout.

[38] In response to my question about what difference a stay would make between now and the time the appeal is decided, the Appellants said that it would remove some of the obstacles they have faced in attempting to assert their rights with respect to custody and access to S.S. in Ontario. They also said that in their view, a stay would reduce litigation and enable the parties to work together towards resolving the situation and eventually having S.S. returned to their care.

[39] Based on the Appellants' stated intentions, it is difficult to see how a stay will reduce litigation or put an end to any of the pending litigation. On the contrary, the Appellants have made it clear that it is their intention, if they obtain a stay, to attempt to use it to make further applications in Ontario for custody or access pending the outcome of the appeal.

[40] It appears that the Appellants' views and hopes about the effect that a stay would have are somewhat unrealistic and misguided. As I have been trying to explain, the decision on this appeal will necessarily be narrow in scope: it will be about validity of the Certificate. Whatever the outcome, its impact on issues of custody and access will remain to be determined by the courts in British Columbia, Ontario or both. That being so, it is highly unlikely that any court would contemplate disturbing the *status quo* and S.S.'s current situation on the basis of a stay pending the determination of the appeal.

[41] Still, it seems that if a stay is granted, it could lead to additional court proceedings and may give rise to some uncertainty. By contrast, not staying the Chambers Judge's decision will preserve the *status quo* for the time being and will avoid opening new avenues for additional litigation. It will ensure that the parties put their time, efforts and resources in getting this appeal perfected so that it can proceed at the April sittings and be decided on its merits as soon as possible. In my view, the balance of convenience weighs against granting the stay.

[42] For those reasons, the stay application is dismissed.

IV) COSTS

[43] I advised the parties that I would give them an opportunity to make submissions on costs after having ruled on the stay Application. The parties agreed that those submissions could be presented in writing.

[44] Accordingly, any party wishing to make submissions as to costs is to file those submissions with the Registrar no later than January 10th 2020. I will review those submissions and issue a written Ruling in due course. Any party that does not wish to make submissions as to costs should send correspondence to the Registrar to this effect, also no later than January 10, 2020.

Application heard on December 11, 2019

Ruling filed at Yellowknife, NWT
this 17th day of December, 2019

Charbonneau, J.A.

Appearances:

L.M. and R.B.
Self-represented Appellants

Sheldon Toner
For the Respondent The BC Director and Public Guardian and Trustee
Stefanie Laurella
For Custom Adoption Commissioner
Hayley Fitzgerald
For The Attorney General of the NWT

A-1-AP-2019-000 004

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

Between:

The British Columbia Director of Child, Family and Community Services

Applicant
(Respondent)

- and -

Custom Adoption Commissioner Mary Beauchamp, The Public Guardian and Trustee of British Columbia, L.M. and R.B.

Respondent
(Appellants)

Reasons for Decision of
The Honourable Madam Justice Louise Charbonneau
(Application for a Stay Pending Appeal)

NOTICE OF ORDER RESTRICTING PUBLICATION OF CERTAIN INFORMATION
Publication of information tending to identify L.M. and R.B. or the child, as well as information and documents respecting child protection proceedings in British Columbia is prohibited.