*Antoine v Imbeault,* 2023 NWTSC 19 S-1-FM-2023-000060

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**MIKHAELA ROSE ANTOINE**

**-and-**

**CHAD SEBASTIEN CHARLES IMBEAULT**

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**Transcript of the Decision held before the Honourable Justice S.M. MacPherson, sitting in Yellowknife, in the Northwest Territories, on the 30th day of June, 2023**

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**APPEARANCES:**

S. Smith: Counsel for the Applicant appearing

 via teleconference

A. Duchene: Counsel for the Respondent appearing

 via teleconference

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(TELECONFERENCE COMMENCES)

THE CLERK: Order. All rise. This sitting of the Supreme Court of the Northwest Territories is now in session, the Honourable Justice MacPherson now presiding.

THE COURT: Good afternoon, counsel.

A. DUCHENE: Good afternoon, Your Honour.

THE COURT: Just give me a minute to settle in.

S. SMITH: Good afternoon, Your Honour.

THE COURT: Good afternoon, Ms. Smith. Mr. Duchene.

A. DUCHENE: Hello. Your Honour, there’s a bit of noise outside of my office today. If you hear a bit of that in the background, I apologize.

THE COURT: Okay. No worries at all. Counsel, are either of your clients on the phone?

A. DUCHENE: No, my client is not here today.

THE COURT: Okay.

M. ANTOINE: I’m here.

THE COURT: And Ms. Smith --

S. SMITH: I believe Mr. Imbeault is. He did arrive before Mr. Duchene, and my client is here as well, Your Honour.

A. DUCHENE: Oh, pardon me.

C. IMBEAULT: Yeah, I’m here.

THE COURT: Oh, so, Mr. Imbeault, you are here?

C. IMBEAULT: Yeah.

THE COURT: Excellent. And, Ms. Antoine, are you present by phone as well?

M. ANTOINE: Yes. I’m here.

THE COURT: Okay. That is really helpful to know. Thank you, everybody, and good afternoon. I will render my decision this afternoon. I did want counsel to know that it is my intention to order a transcript of this decision and to provide it to counsel. I think counsel will find that helpful, I hope, as they end up dealing with issues on this application or in terms of their custody dispute. Of course, I reserve the right to revise the transcript for minor grammar, but I am reading off my notes today.

 So, counsel, this is an application by the applicant Mikhaela Rose Antoine for interim sole custody and related relief of two children of the relationship, namely LA, four years of age, almost five years of age, and RA, three years of age. The respondent Chad Sebastien Charles Imbeault asks this Court not to grant the application on the basis that this Court lacks jurisdiction over the children by virtue of section 25 of the *Children’s Law Act*.

 This matter proceeded to argument last Friday on the issue of jurisdiction only. On this application I am asked to decide the following issues: were the children habitually resident in the Northwest Territories at the beginning of the applicant’s application; if the children are not habitually resident, am I satisfied that the factors in section 25(1)(b) of the *Children’s Law Act* are met to allow the Court to assume jurisdiction, and if the children are not habitually resident and the factors in section 25(1)(b) are not met, should the Court nonetheless exercise jurisdiction on the basis that the children would suffer serious harm if returned to Ontario.

 Each of the parties has filed an affidavit. The applicant’s affidavit is sworn May 18, 2023. The respondent’s affidavit is sworn May 29, 2023. In addition, the applicant has provided the Court with two letters attesting to her good character: one from her counsellor dated May 23, 2023, and one from her Member of the Legislative Assembly dated June 6, 2023.

 The letter from the applicant’s counsellor is directed to “whom it may concern,” and outlines that the applicant has been engaged in counselling for addressing issues arising from an abusive relationship. The letter from Ms. Antoine’s MLA attests to Ms. Antoine’s good character and fitness as a parent. These letters together with a memorandum of law were filed with the Court on June 22nd.

 Counsel for the applicant also filed a package of notes from the Muskoka Women Shelter spanning the period August 16, 2022, to May 23, 2023. In addition, counsel for the applicant provided this Court with case law. Counsel for the respondent did not object to the admissibility of the two letters and the Muskoka Women Shelter notes but argues that they should be given limited weight as they go to issues of custody, not jurisdiction.

 The facts with respect to the duration of time that the children have spent in the Northwest Territories are largely uncontested although the characterization to be drawn from those facts is contested. The applicant is from the Northwest Territories but has spent a considerable amount of time living in Alberta completing her education and working. She always returned to her home community in the Northwest Territories.

 The applicant relocated to Ontario in 2017 to live with the respondent. Although the applicant lived in Ontario from 2017 to early 2023, she continued to spend time in the Northwest Territories following the birth of the parties’ children. Their first child was born in the Northwest Territories in August 2018 and spent the first three months of her life in the Northwest Territories.

 From August 2019 to February 2020 the applicant and LA were in the Northwest Territories with the applicant returning to Ontario just prior to giving birth to the couple’s second child, RA, in March of 2020. The applicant and both children spent time in the Northwest Territories from October 2020 to April 2021. The applicant left Ontario for the Northwest Territories on March 2, 2023, with the children.

 The applicant attaches to her affidavit a document signed by the respondent which states that the applicant is traveling to the Northwest Territories to, quote “live, work, visit for six months, returning September 2023.” The applicant deposes that there was a further oral agreement to possibly extend her stay until August 2024.

 This is denied by the respondent who asserts that it was the intention of the parties that the children would return to Ontario in time for the oldest child to start school in the fall. And on either characterization of that letter, both periods of time would have these children returning to Ontario approximately the end of August.

 The applicant describes a difficult relationship of verbal, emotional and physical abuse. She asserts that the respondent verbally abused her frequently in the presence of the children and that this had an impact on both her and the children. She alleges that the respondent also yelled at the children and on one occasion tried to pull her daughter out of her arms while the respondent was intoxicated.

 She alleges that the respondent has used cocaine, acid and prescription drugs and that this drug abuse caused the respondent to behave in a violent and irrational manner towards her. She claims he is currently struggling with drug use. The notes from the Muskoka Women Shelter corroborate that the applicant disclosed emotional abuse for a period of approximately eight months before her relocation to the Northwest Territories.

 The notes do not disclose any physical abuse by the respondent directed to the children with the possible exception of the one reference to the respondent trying to pull her daughter out of the applicant’s arms. The letter from the applicant’s counsellor reveals that the applicant is currently in counselling to address issues arising from an abusive relationship.

 The applicant also asserts that she was the primary caregiver for the children as well as being a consistent source of financial support for the children and for the family. She also deposes to a strong system of family support in the Northwest Territories and the importance to her and the children of exploring their Indigenous culture and traditions.

 The respondent’s evidence is that the applicant and their children lived together in Ontario until March 2023. He acknowledges that the applicant spent considerable periods of time in the Northwest Territories with her family and would take the children with her. He indicates that he was also present for some of these periods of time although he does not specify how much time he spent in the Northwest Territories.

 He recalls signing the travel letter attached to the applicant’s affidavit, but his recollection was that it did not state “returning September 2023” because the parties had agreed that LA needed to be back in time for school. She will be starting kindergarten this fall, I understand.

 He advises that he received a phone call on April 25th, at which time the applicant advised that she was not planning on returning to Ontario. The respondent agrees that the applicant was the primary caregiver of the children until April 2022 because he worked in the mines, but he submits that since April 2022, he and the applicant have shared equally in the parenting of the children.

 He acknowledges that the parties have used cocaine in the past but always had done so together and that they have not used cocaine together since last summer, which is also when he last used cocaine. He denies using psychedelics and abusing prescription drugs. He denies having a drinking problem and asserts that the applicant herself has a drinking problem and that her drinking when coupled with her medication for depression and anxiety makes her unstable. He alleges that the applicant was physically and emotionally abusive to him.

 Neither party alleges that the other party was physically abusive to the children with the one possible exception of the applicant’s statement of the respondent attempting to pull LA out of her arms while intoxicated. The applicant alleges that the children were exposed to the respondent’s abusive treatment of her on many occasions. She deposes that LA is in counselling to deal with the trauma of being exposed to this abuse, as is the applicant.

 The respondent alleges that while the applicant was not physically abusive to the children, the applicant would raise her voice enough to scare the children.

 The applicant commenced these proceedings on May 18, 2023, seeking interim sole custody, parenting time for the respondent and child support.

 The respondent commenced proceedings in Ontario on May 16, 2023, seeking an immediate order directing the return of the children to his care, that he have the final decision-making authority and that the applicant, (being the respondent in these proceedings), have parenting time in the respondent’s (applicant in those proceedings) discretion, including the need for supervision and related relief.

 At the time the applicant commenced her proceedings in the Northwest Territories, she had not been served with the Ontario application, which had been filed two days prior. The *Children’s Law Act*, section 25(1)(a) provides that this Court has jurisdiction over children who are habitually resident in the Northwest Territories at the commencement of the application. The concept of habitual residence is defined at section 25(2):

A child is habitually resident in the place where he or she last resided with:

1. both parents;
2. one parent under a parental or separation agreement or court order or with the consent, implied consent or acquiescence of the other if the parents are living separate and apart, or
3. a person other than the parent on a permanent basis for a significant period of time.

The respondent asserts that the children are habitually resident in Ontario, whereas the applicant asserts that the children were habitually resident in the Northwest Territories. The applicant relies on the fact that one of the children was born in the Northwest Territories and both children have spent a great deal of time in the Northwest Territories and have very strong family connection in the north.

 The challenge with this argument is that the applicant in her affidavit states that she and the children lived in Ontario until she left in March: paragraph 6 of the applicant’s affidavit. There is also no question that the respondent resides in Ontario, and that when the applicant and the children were in Ontario, they resided together.

 Given that the children last resided with both parents in Ontario, it cannot be said that the children are habitually resident in the Northwest Territories pursuant to section 25(2)(a). Nor does the evidence demonstrate that the children were resident in the Northwest Territories with the applicant with the consent or the acquiescence of the respondent.

 The travel letter attached to the applicant’s affidavit is clear that the parties intended the trip to be for a defined period of time. The applicant deposes that she advised the respondent of her intention to possibly extend her stay; however, the fact that the respondent commenced proceedings in Ontario less than a month after the applicant advised him of that fact and well in advance of the planned return date suggests that the respondent did not acquiesce to the children’s residence being in the Northwest Territories.

 There is no evidence to support the contention that the children were habitually resident in the Northwest Territories when this application was commenced. As such, this Court does not have jurisdiction pursuant to section 25(1)(a). In the alternative the applicant suggests that this Court can find jurisdiction by virtue of section 25(1)(b). This section is engaged when the children are not habitually resident, but where certain other criteria are met.

 These criteria are: the child must be physical present in the Northwest Territories, substantial evidence as to the best interests of the child must be available in the Northwest Territories, no application for custody is pending in another place where the child is habitually resident, no extra-territorial order in respect of custody exists, the child has a real and substantial connection to the Northwest Territories, and lastly, on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Northwest Territories.

 The respondent takes the position that section 25(1)(b) does not assist the applicant. He submits that the criteria in section 25(1)(b) are expressed in the conjunctive by the use of the word “and,” and therefore all the criteria must be present for the Court to find that it has jurisdiction under this subsection.

 The respondent states that the children are physically present in the Northwest Territories and that one could find, without conceding the point, that there is substantial evidence as to what is in the best interests of the children in the Northwest Territories. However, he states that the fact that the respondent commenced his proceedings in Ontario two days before the applicant commenced her proceedings in the Northwest Territories is fatal to the applicant’s ability to rely on section 25(1)(b).

 He also disputes that on the balance of convenience, it would be more appropriate for jurisdiction to be exercised in the Northwest Territories. The applicant does not agree that section 25(1)(b) should be read in the conjunctive and states that as long as most of the criteria in section 25(1)(b) are met, then this Court should assume jurisdiction.

 I must reject this argument. Courts in other jurisdictions have held that equivalent provisions are to be read conjunctively. See, for example, *Knox v McQueen*, SKQB 445 and *Wan v Lin*, 2013 ONCA 33, 358 D.L.R. 452. If section 25(1)(b) is to be read conjunctively, the applicant argues that all of those criteria are met.

 In response to the argument that proceedings have been commenced in Ontario, hence section 25(1)(b)(iii) cannot be met, counsel for the applicant argues that it is relevant that the applicant was not served with the Ontario application prior to the applicant commencing her own proceedings in the Northwest Territories, suggesting that these facts meant that there were no proceedings pending in the other jurisdiction at the relevant period of time.

 I cannot agree with the applicant’s position that service of the Ontario proceedings is an essential component to find that proceedings are pending in another jurisdiction. To accept this submission could have the effect of encouraging litigants to avoid service. Additionally, the public policy reason behind this provision is evident. Generally, there should be no vacuum in dealing with custodial issues, and generally, those issues are best determined in the jurisdiction where the children are habitually resident.

 Furthermore, section 25(1)(b)(iii) does not require that the proceedings in Ontario be filed before the commencement of these proceedings. It simply provides that the Court must be satisfied today that an application is pending in the jurisdiction where the children are habitually resident.

 In *A.G.M. v R.S.M.*, 2018 BCSC 1670, dealing with a situation where proceedings were commenced in Alberta *after* proceedings were commenced by the other parent in BC, but before the Court in Alberta heard the jurisdictional arguments, Justice Donegan of the BC Supreme Court held as follows:

Proceedings have been properly brought in Alberta, the jurisdiction of this child’s habitual residence. The fact that they were brought subsequent in time to the filing of this application is immaterial. I find there is an application pending within the meaning of s.74(2)(b)(iii) at the time within the application was heard (paragraph 75).

 In other words, the key point is not necessarily when the application was filed or whether the application was served before the application in the other jurisdiction, but the simple fact that when the jurisdictional issue is decided, there is an application pending in the jurisdiction in which the children’s habitual residence is found to be.

 Even if I am wrong in this regard -- and, to my knowledge this is the first time this provision of the *Children’s Law Act* has been interpreted in the NWT -- I also find on the balance of convenience the Northwest Territories is not the appropriate jurisdiction and that the criteria in section 25(1)(b)(vi) is not met.

 There is no doubt that the children have a real and substantial connection to the Northwest Territories. However, the evidence is that the parties have resided for six years in Ontario and that the children have a real and substantial connection to that jurisdiction. While the respondent has had lengthy visits to the Northwest Territories, most of the children’s short lives have been spent in Ontario.

 Both parties have made serious allegations about drugs and alcohol abuse of the other party, and both have alleged that the other is physically and verbally abusive. These allegations are very relevant to custody issues, and it is more likely that the evidence to corroborate or dispel these allegations can be found in Ontario, not the Northwest Territories.

 The last issue I am asked to decide is whether this Court should exercise its jurisdiction to make a custody order under section 26 of the *Children’s Law Act*. To do so, I must be satisfied that the children would suffer serious harm if returned to Ontario and to the care of the respondent. It is not enough that they might suffer serious harm; it must be proven on a balance of probability that serious harm would occur.

 The *Children’s Law Act* does not define serious harm. The Supreme Court of Canada in considering the interpretation of an analogous provision of the *Hague Convention on the Civil Aspects of International Child Abduction* has held that the serious harm in Article 13(b) of the *Convention* is physical or psychological harm to a degree that amounts to an intolerable situation. The risks must be more than an ordinary risk; it must be substantial. See *Thompson v Thompson*, 1994 3 SCR 551.

 And, counsel, this is probably the portion of this case that I wrestled with the most given the very serious and very concerning allegations of abuse that have been made by the applicant. They are very serious allegations, and this Court does not take those allegations or the concerns raised by the applicant lightly at all.

 The applicant cites a history of emotional and verbal abuse in the presence of the children, she indicates that that abuse is harmful to the children and she notes that LA is in counselling to deal with her trauma. While I accept the applicant’s position in this regard and accept that LA is in counselling for her trauma, I do find that there are several challenges in the applicant’s position.

 Firstly, the applicant does not assert that the respondent has ever physically harmed the children. She does submit that the trauma caused by exposure to conflict is sufficient to find serious harm. However, one note from the Muskoka Women Shelter reveals a worker asking the applicant after she left the family home with the -- after she left the family home leaving the children in the home if she felt that the children were safe with their father, and the applicant is reported by the worker to have said “yes”. This response is at odds with an assertion of serious harm.

 Secondly, while LA is in counselling, that by itself is not sufficient to suggest that there would be a substantial risk of harm if she were to return to Ontario. It is not unusual for children of separated parents to benefit from counselling to address issues relating to the breakdown of the family unit.

 Lastly, the respondent has denied being abusive and has alleged that the applicant is the abusive one in the relationship. While the notes from the women’s shelter corroborate that the applicant has had serious concerns about the conduct of the respondent for quite some time before the bringing of this application, I must also bear in mind that the allegations made by both parties have not yet been tested through cross-examination or introduction of other evidence.

 For those reasons I decline to make an order under section 26 of the *Children’s Law Act*. I find that Ontario is the proper forum for a consideration of the custody and access issues. That is not to say that the applicant does not have a meritorious case for custody. The parties concede that she was the primary caregiver until April of 2023, and the notes from the Muskoka Women Shelter illustrate behaviour that, if true, is concerning and would certainly have a bearing on custody.

 However, Ontario is clearly the jurisdiction where the evidence can be found to flesh out the allegations that both parties have made. As such, this application is dismissed. In the circumstances there will be no costs to either party, but I would also like to take this opportunity to thank

both counsel involved for their very helpful submissions and for their advocacy on behalf of their clients.

 Counsel, are there any questions arising out of the judgment?

A. DUCHENE: Nothing from me, counsel -- Your Honour. Thank you very much for your decision.

THE COURT: Ms. Smith?

S. SMITH: Your Honour, nothing from me but we would definitely like a transcript once it’s ready, or I can make that request through the clerk’s office.

THE COURT: Absolutely. We will make sure that you are provided with a transcript, Ms. Smith and Mr. Duchene. I know you may not be counsel in the Ontario proceedings that would be helpful but if there was a way for counsel to ensure that this transcript reaches the Ontario court so that they have the benefit of some of the reasoning on this matter.

 I also note -- and this is really not part of the jurisdictional decision, counsel -- but perhaps I will just say this. Mr. Imbeault in his Ontario proceedings is seeking an order that the children be returned immediately. Last Friday Mr. Duchene initially indicated there was no immediate urgency to this matter, but that he then amended his submissions to note that there was this request being made by Mr. Imbeault.

 It seems to me that the parties have both agreed that these children should spend some time in the Northwest Territories with the applicant and members of her extended family. I think this Court can take judicial notice of the fact that the NWT is a particularly lovely place to be in the summertime, and I do hope that whatever occurs, that the parties are able to bear in mind the wisdom perhaps of letting the children enjoy some time in this jurisdiction with their extended family.

 But I will leave that for the Ontario courts to determine if the parties are unable to agree between themselves on that issue. So unless there are any further questions, court is adjourned.

A. DUCHENE: Your Honour, insofar is this is my first time drafting an order for you, will an order simply stating that this Court declines jurisdiction over this matter be sufficient?

THE COURT: Yes.

A. DUCHENE: Thank you very much.

THE COURT: Yes. And please, if you can indicate in the preamble who appeared, the fact that submissions were made last Friday and that both of the parties were present by phone here today, that would also be helpful.

A. DUCHENE: I’ll make sure that’s the case. I think apart from that, I’ll just wish everyone a lovely long weekend.

THE COURT: Thank you. Ms. Smith?

S. SMITH: Thank you, Your Honour.

THE COURT: Thank you.

S. SMITH: Have a good weekend. All right. Bye bye.

THE COURT: Thank you. Bye bye.

THE CLERK: All rise.

A. DUCHENE: Bye, everyone.

(TELECONFERENCE CONCLUDES)

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, Canada, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 16th day of October, 2023.

Veritext Legal Solutions, Canada

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