Citation: D. L. v. Child and Family All Nations Coordinated Response Network, 2014 MBCA 86
Date: 20140923
Docket: AH 14-30-08117

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Alan D. MacInnes
Mr. Justice Christopher J. Mainella

B E T W E E N :

L. (D.)	)	***K. M. Saxberg*** *and* ***K. J. Muys***
	)	*for the Appellant*
(Applicant) Respondent	)	
	)	***R. P. Rolston***
- and -	)	*for the Respondent*
	)	
CHILD AND FAMILY ALL NATIONS COORDINATED RESPONSE NETWORK	)	*Appeal heard and Decision pronounced:* ***September 12, 2014***
	)	
(Respondent) Appellant	)	*Written reasons:* ***September 23, 2014***

NOTICE OF RESTRICTION ON PUBLICATION: No one may disclose any information likely to identify any person involved in the proceedings as a party or a witness (see s. 75(2) of *The Child and Family Services Act*).

MAINELLA J.A. (for the Court):

Introduction

[1] The Child and Family All Nations Coordinated Response Network (the agency) moved pursuant to s. 37(1)(a) of *The Child and Family Services Act*, C.C.S.M., c. C80 (the *Act*), for production of electronic communications in the possession of the respondent. The judge dismissed the agency's

motion from which it appeals. At the hearing of the appeal, the court announced that the appeal was allowed with reasons to follow. These are those reasons.

Background

[2] In October of 2010, the agency received a complaint that the respondent had sexually exploited a teenage girl (K.S.) between 2008 and 2010; the alleged exploitation included sexual intercourse and videotaping of sexual acts.

[3] In accordance with the process mandated by the *Act*, the agency's child abuse committee reviewed the suspected child abuse. In addition to information provided by K.S. and her agency worker, the committee received written submissions from the respondent denying the allegations. He advised that he had befriended K.S., however, when he stopped financially assisting her, she repeatedly and persistently asked him for money in exchange for not making a false report of child abuse.

[4] Based on a report of its child abuse committee, the agency gave notice to the respondent pursuant to the *Act* of its intention to submit his name for entry on the Child Abuse Registry.

[5] The respondent filed an application in the Court of Queen's Bench (Family Division) pursuant to the *Act*, objecting to the entry of his name on the Child Abuse Registry.

[6] The respondent's counsel then provided the agency with printed copies of electronic communications between the respondent and K.S. under

trust conditions. The trust conditions required that the documents not be disclosed to K.S. or her agency worker, and that they be returned to counsel, without copying, if the agency decided to continue its case against the respondent. The respondent's position was that the electronic communications undermined the credibility of K.S. and confirmed she was prepared to make a false claim of child abuse in order to extort money from the respondent. Counsel for the respondent advised the agency he would use the electronic communications at the abuse registry hearing to impeach the credibility of K.S.

[7] Counsel for the agency reviewed the documents, returned them in accordance with the trust conditions and then moved for an order for the respondent to produce the electronic communications to the agency for their unrestricted use at the abuse registry hearing.

[8] The judge characterized the issue for him to decide on the motion as follows:

> At the heart of this dispute is the duty of disclosure on an applicant seeking to challenge the inclusion of his or her name on the Child Abuse Registry. In order to answer this question, it is crucial for me to decide whether applications to include a person's name on the Child Abuse Registry can be categorized as being something akin to a civil proceeding, which has wide-ranging and mutual disclosure obligations on both parties to the dispute, or whether it is closer in nature to a criminal proceeding in which the duty of disclosure rests exclusively on the prosecution.

[9] The judge concluded that, in his view, an abuse registry hearing under ss. 19(3.5) to 19(3.7) of the *Act* "is closer in nature to a criminal

prosecution than to a civil proceeding." The judge distinguished such a hearing from child protection proceedings taken against the parents of underage children under the *Act*, which he suggested were "more like civil cases than criminal cases." The judge reasoned that because of the stigma of being entered in the Child Abuse Registry and the imbalance in power between child welfare agencies and individuals, an applicant has no "positive duty" to disclose documents prior to an abuse registry hearing.

Analysis and Decision

[10] In an appeal of an interlocutory discretionary decision, this court will not interfere with the decision absent misdirection by the motion judge or unless his or her decision is so clearly wrong as to amount to an injustice (see *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375). Intervention is necessary in this case as the judge misdirected himself on the law in refusing the agency's request for production of the electronic communications.

[11] The first misdirection of the judge was considering an abuse registry hearing under the *Act* as being more like a criminal prosecution than a civil proceeding.

[12] The Child Abuse Registry created by the *Act* is a creature of provincial jurisdiction and is not tied to a criminal prosecution, unlike the federal database created by the *Sex Offender Information Registration Act*. The proceeding to object to entry on the Child Abuse Registry is a civil process, commenced and determined in a civil court on the civil burden of the balance of probabilities (ss. 19(3.3), 19(3.6)(a) of the *Act* and *E.G. et al. v. Child and Family Services of Winnipeg*, 2012 MBCA 65 at para. 38, 280

Man.R. (2d) 148).

[13] In an abuse registry hearing the rules of evidence in relation to children are relaxed from those of criminal proceedings, and a child can never be compelled to testify, unlike in a criminal case (s. 19(3.6)(d) of the *Act*). Finally, the judge's criminal prosecution analogy, because of his concern about self-incrimination, is flawed because an applicant, unlike an accused person, is a compellable witness for a child and family services agency at an abuse registry hearing (s. 4 of *The Manitoba Evidence Act*, C.C.S.M., c. E150 and *Nova Scotia (Minister of Community Services) v. D.J.M.*, 2002 NSCA 103 at paras. 21-22, 207 N.S.R. (2d) 296).

[14] Further, the judge's distinction between abuse registry cases from child protection cases is not persuasive. Both are purely civil proceedings (*E.G.* at para. 38). Any analogy to criminal law and procedure for such proceedings is an error in principle. Section 36 of the *Act* confirms both types of proceedings are to be conducted as informally as the presiding judge or master may allow. While we agree with the judge that entry on the Child Abuse Registry creates a stigma with consequences to an individual, that does not change the character of the proceeding to something other than a pure civil proceeding (*E.G.* at para. 38). It should be noted that, despite the serious consequences of a judicial finding that a person has abused a child, there is no right to appeal that decision (s. 19(3.7) of the *Act*).

[15] The second misdirection of the judge was dismissing the agency's motion pursuant to s. 37(1)(a) of the *Act* on the basis that the respondent did not have a positive duty to disclose the electronic communications in his

possession. In our view, the judge erred by mischaracterizing the agency's motion.

[16] The agency's request was not, as the judge suggested, for the court to declare that the normal civil procedure of automatic reciprocal disclosure of all relevant information applied to abuse registry hearings. Rather, the agency was seeking production of discrete items and was relying on statutory disclosure remedy (s. 37(1)(a) of the *Act*).

[17] It is undisputed that the *Act* modifies the normal rules of civil discovery required by Queen's Bench Rules, Man. Reg 553/88, Rule 30. Section 32(3) of the *Act* provides:

> **Queen's Bench rules re: discovery not to apply**
> **32(3)** The rules of the Court of Queen's Bench regarding examination for discovery and examination of documents do not apply to a hearing under this Part.

[18] The judge's concern that ordering production of the requested electronic communications to the agency would have far-reaching consequences to child protection practice in Manitoba, is unwarranted. The effect of s. 32(3) of the *Act* is that an applicant in an abuse registry hearing is not required to provide document disclosure automatically during the pre-hearing process to the opposing party on the basis of relevance, as is the normal civil practice in Manitoba. However, that does not mean an applicant has no disclosure obligations as the judge suggests in his reasons.

[19] An applicant in an abuse registry case can be required to disclose documents to the opposing side by statute or the common law. Here, the

agency requested a production order from the court pursuant to s. 37(1)(a) of the *Act*, which provides:

> **Power of court**
> **37(1)** A judge or master may for the purposes of a hearing under this Part
>
> (a) compel on his or her own motion the attendance of any person and require that person to give evidence under oath and to produce such documents and things as may be required;
>
> ….

[20] This section provides for judicial oversight and control of the discovery process in respect of production of documents and things to obviate concerns over possible fishing expeditions or attempts to delay proceedings under the *Act*. We are satisfied that the agency's s. 37(1)(a) request was not a fishing expedition. The requested electronic communications were properly defined, in the control of the respondent directly or indirectly and clearly relevant to the case. In fact, the respondent had previously used them twice in proceedings under the *Act*: to attempt to persuade the agency's child abuse committee not to recommend his registration in the Child Abuse Registry, and later with counsel for the agency to try to convince them not to proceed with the case.

[21] The agency also argued that the electronic communications were disclosable at common law because civil proceedings emphasize procedural fairness to both sides, the search for the truth and the elimination of trial by ambush. It is unnecessary to address this aspect of the agency's argument

given the judge's error in refusing to order production of the electronic communications pursuant to s. 37(1)(a) of the *Act*.

[22] Finally, the respondent argued that, if the judge erred in refusing to order production of the electronic communications, the appeal should nevertheless be dismissed because, as the judge commented, pursuant to s. 19.4(2) of the *Act*, the case was "moot" as K.S. turned 18 years old before the agency gave notice to the respondent of its intention to submit his name for entry on the Child Abuse Registry.

[23] The issue of the effect of s. 19.4(2) of the *Act* was not properly before the judge. The motion was for production of electronic communications, not for a determination of the merits of the case. The judge raised the issue of the effect of s. 19.4(2) on his own initiative, and then the judge went on to comment on the merits of that issue without prior notice to counsel. In its factum, the agency argued forcefully that the judge misinterpreted the meaning of s. 19.4(2) of the *Act* in his *obiter* comments. The agency says on a plain reading of the section it is clear that the case is not moot merely because of the fact that K.S. was not a child on the date that the agency gave notice to the respondent of its intention to submit his name for entry on the Child Abuse Registry.

[24] In our view, the judge erred in raising an issue not before him on his own initiative and then going on to give his views on its merits without prior notice to counsel. That said, such an irregularity has no consequences to the legality of the proceeding (s. 36 of the *Act*). The issue of the effect of s. 19.4(2) of the *Act* can be determined at the abuse registry hearing by the

presiding judge in the normal course after the benefit of full submissions from counsel.

Disposition

[25] The appeal is allowed with costs. The respondent shall produce forthwith to the agency, for the purposes of the abuse registry hearing, a copy of all electronic communications previously provided under trust conditions without the restrictions imposed previously by the trust conditions.

_____ J.A.

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