Citation: ANCR v Shaw Communications Inc, 2017 MBCA 92
Date: 20170926
Docket: AH16-30-08678

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin

B E T W E E N :

CHILD AND FAMILY ALL NATIONS COORDINATED RESPONSE NETWORK	)	***H. Cochrane*** *and* ***K. M. Saxberg*** *for the Appellant*
(Applicant) Appellant	)	
	)	***M. L. Grande*** *for the Respondent*
- and -	)	
	)	*Appeal heard:* ***March 15, 2017***
SHAW COMMUNICATIONS INC.	)	
	)	*Judgment delivered:*
(Respondent) Respondent	)	***September 26, 2017***

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On appeal from 2016 MBQB 127

STEEL JA

[1] How should we balance the desire to eliminate the horrors of child pornography and child luring with the need to protect our privacy in this expanding digital age? This appeal is about whether a child protection agency can obtain customer information from an internet service provider

(ISP) in order to conduct a child protection investigation under section 18.4(1) of *The Child and Family Services Act*, CCSM c C80 (the *CFS Act*).

[2] The applicant, Child and Family All Nations Coordinated Response Network (ANCR), appeals the judgment of the application judge dismissing ANCR's application that Shaw Communications Inc. (Shaw) produce the subscriber name, address and contact telephone numbers associated with a Shaw subscriber who used a particular internet protocol (IP) address on May 25, 2015 (the 2015 IP address).

Facts

[3] ANCR was contacted by the Winnipeg Police Service (WPS) on February 17, 2016, following information received from Interpol Manchester United Kingdom in regard to a sex offender convicted in the United Kingdom (UK) and his interaction with a person in Winnipeg some four years earlier, who was possibly then a child.

[4] Following the arrest of the sex offender in the UK, his computers were seized. An examination of the computers revealed illegal online activity including numerous Skype chat log files discussing the commission of sexual offences against young children and the exchange of indecent files involving children. An investigation was commenced by South Wales Police to attempt to identify and locate these Skype users.

[5] The WPS were alerted by UK law enforcement officials that this convicted sex offender had participated in a Skype chat four years earlier, on December 7, 2012, with someone in Winnipeg (the 2012 Skype chat). The

information provided indicated that the Winnipeg user accessed Skype using an IP address provided by Shaw. In the 2012 Skype chat, the Winnipeg user indicated that they were 14 years old.

[6] In order to pursue its investigation, ANCR wanted Shaw to identify the subscriber. Shaw advised that such information was the personal information of its subscriber and that it would not voluntarily disclose such subscriber information without a court order, although it would not take any position with respect to the granting of that court order.

[7] To that end, ANCR filed a notice of application for an order compelling Shaw to produce the subscriber's associated subscriber name, address and contact telephone numbers. ANCR sought production of the information linked to the 2015 IP address used to change the Skype account's password in May 2015, not information linked to the IP address that was used during the 2012 Skype chat with the UK offender.

[8] It may be, although it was not made clear, that ANCR is seeking the information from 2015 because Shaw has already deleted information pertaining to the 2012 Skype chat. In its factum, Shaw confirms that it has an "internal automated system" for destruction of information and that the 2015 data has been removed from this automated system and retained pending the outcome of this appeal.

[9] The application was first brought before the Master; however, a Master does not have the jurisdiction to hear an application as opposed to a motion. Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*) r 38.03 states that all applications shall be made to a judge. So the matter proceeded in the Court of Queen's Bench before a judge.

[10] In the Court of Queen's Bench, Shaw, again, did not take a position. Ultimately, the application was dismissed, as the application judge concluded that she did not have jurisdiction to make such an order, either under the *CFS Act*, the *QB Rules* or the Court's inherent *parens patriae* jurisdiction.

Decision of the Application Judge

[11] In her reasons dismissing the application, the application judge held that there was no jurisdiction in the *CFS Act*, or any other Act, for the Court to order that Shaw disclose the information sought. She concluded that the disclosure of documents and records, without a legislated obligation to provide same, is not relief that could be sought through a free-standing claim.

[12] The application judge noted that disclosure of documents and information, including information in the hands of third parties, is normally ordered as relief arising from a cause of action filed in court. There was no cause of action here; this was not a child protection proceeding or a proceeding under the Child Abuse Registry but, rather, only an investigation.

[13] Moreover, in the absence of a proper evidentiary foundation, she held that this was not an appropriate case for the exercise of the *parens patriae* jurisdiction to essentially create an obligation for Shaw to provide the information.

[14] ANCR raises several grounds in its appeal. It maintains that the Court erred in finding that there was no jurisdiction to order the disclosure of

documents and information. Also, it submits that the Court erred in finding that the evidentiary foundation was not sufficient to make the order.

Positions of the Parties

[15] ANCR maintains that it requires the subscriber information attached to the IP address in order to complete the child protection investigation that it is statutorily obligated to conduct pursuant to section 18.4(1) of the *CFS Act*. Upon receiving information that causes it to suspect that a child is in need of protection, it must investigate. To do so, it requires information from Shaw in order to identify the Winnipeg user. Upon identifying the Winnipeg user, ANCR says that it will take all necessary steps to ensure that the child or children are safe and that appropriate referrals and other steps are made.

[16] ANCR submits that the jurisdiction for the Court to grant the relief sought is embedded in *The Court of Queen's Bench Act*, CCSM c C280 (the *QB Act*), the *QB Rules* and the inherent *parens patriae* jurisdiction of the Court of Queen's Bench, and supported by the requirements and objectives of the *CFS Act*.

[17] Shaw takes the position that the personal information of its subscriber is not subject to voluntary production to ANCR and that production to ANCR requires a court order. It maintains that section 18(1) of the *CFS Act* does not apply in this situation and does not obligate it to produce the information. With respect to the granting of that court order, while Shaw took no position either in the Court of Queen's Bench or this Court, it does request costs.

Decision and Analysis

[18] ANCR brought its application pursuant to the *QB Rules* for a determination of rights based upon the interpretation of the *CFS Act* and regulations. Rule 14.05(2)(c)(iv) of the *QB Rules* allows for the determination of rights that depend on the interpretation of any document referred to in the rule, in this case, a statute. The rule does not create jurisdiction, but provides a means to determine the nature and extent, if any, of jurisdiction that already exists.

[19] In the recent case of *Grain Farmers of Ontario v Ontario (Environment and Climate Change)*, 2016 ONCA 283, the Ontario Court of Appeal observed that the rule should be engaged when there are "practical questions to be answered about the rights of state actors under legislation that was intended to guide and constrain their conduct" (at para 21).

[20] Where the application judge is dealing with a question of law such as the interpretation of a statute and its regulations, this Court should review that decision on a standard of correctness. However, "A decision on whether to grant a declaration of rights under this Rule is an exercise in judicial discretion and will be entitled to deference by this court unless the judge misdirected him or herself as to the applicable law, or as to the facts, or unless the decision is unjust" (see *Western Canada Wilderness Committee v Manitoba*, 2013 MBCA 11 at para 44). See also the case of *Pro-Demnity Insurance Company v Ontario (Financial Services Commission)*, 2016 ONCA 260, where the Ontario Court of Appeal confirmed that there is discretion available to application judges under their r 14.05(3)(d) of the Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194.

[21] ANCR may rely on r 14.05(2)(c)(iv) of the *QB Rules* to bring an application for the interpretation of provisions of the *CFS Act* and regulations in order to determine the extent of their ability to demand that Shaw disclose the subscriber information they have requested. However, this rule does not create jurisdiction to enforce obligations or duties that are not otherwise grounded in statute or some other source of jurisdiction.

[22] A close review of the *CFS Act* discloses that such jurisdiction does exist.

[23] A child protection agency is statutorily mandated to investigate a matter upon receiving information that causes the agency to suspect that a child is in need of protection. Section 18.4(1) of the *CFS Act* states:

> **Agency to investigate**
> **18.4(1)** Where an agency receives information that causes the agency to suspect that a child is in need of protection, the agency shall immediately investigate the matter and where, upon investigation, the agency concludes that the child is in need of protection, the agency shall take such further steps as are required by [the *CFS Act*] or are prescribed by regulation or as the agency considers necessary for protection of the child.

[24] Section 17 of the *CFS Act* states that when a child is in need of protection and includes:

> **Child in need of protection**
> **17(1)** For purposes of [the *CFS Act*], a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
>
> **Illustrations of child in need**
> **17(2)** Without restricting the generality of subsection (1), a child is in need of protection where the child

. . .

> **17(2)(c)** is abused or is in danger of being abused, including where the child is likely to suffer harm or injury due to child pornography;
>
> . . .
>
> **17(2)(f)** is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child.

[25] Looking further to determine the extent of the investigative powers granted to ANCR, we see that section 4(2) gives the director certain powers for carrying out the provisions of the *CFS Act* including:

> **Powers of director**
> **4(2)** For the purpose of carrying out the provisions of [the *CFS Act*], the director may
>
> . . .
>
> **4(2)(b.1)** require any person who in the opinion of the director is able to give information relating to any matter being investigated by the director
>
> (i) to furnish information to the director, and
>
> (ii) to produce and permit the director to make a copy of any record, paper, or thing that, in the opinion of the director, relates to the matter being investigated and that may be in the possession or under the control of the person,
>
> . . .
>
> **4(2)(c)** conduct enquiries and carry out investigations with respect to the welfare of any child dealt with under [the *CFS Act*].

[26] Under sections 23 and 25 of the *Child and Family Services Authorities Regulation*, Man Reg 183/2003, this power of the director is delegated to child and family service authorities.

> **Investigation powers**
> **23** Under clause 4(2)(b.1) of *The Child and Family Services Act*, an authority has the power of the director to require a person to give information relating to any matter being investigated by the authority and to produce records, papers or things and the director ceases to have those powers. The director retains these powers in relation to any matter he or she is investigating.
>
> **Investigating welfare of child**
> **25** Under clause 4(2)(c) of *The Child and Family Services Act*, an authority has the power of the director to make enquiries and carry out investigations as to the welfare of a child. The director also retains that power.

[27] Furthermore, *The Child and Family Services Authorities Act*, CCSM c C90 defines "authority" as meaning "a Child and Family Services Authority established in section 4", which includes the Southern First Nations Network of Care. According to section 1.2 of Schedule B to the *Agency Mandates Regulation*, Man Reg 184/2003, ANCR's mandate flows from the Southern Authority. See also the schedule of designated agencies to the *Joint Intake and Emergency Services by Designated Agencies Regulation*, Man Reg 186/2003.

[28] Thus, although the delegation of power is, to say the least, convoluted, ANCR has the jurisdiction of the director when conducting investigations of this kind to require that third parties (like Shaw) furnish information of the nature being requested in this application or produce, for

the purposes of making copies, any relevant records or other information that relates to a matter being investigated.

[29] In turn, section 4(2.1) of the *CFS Act* protects individuals, such as Shaw, who furnish such information. It states that:

> **Proceedings re furnishing information prohibited**
> **4(2.1)** No proceedings lie against a person by reason of the person's compliance with a requirement of the director to furnish information or produce any record, paper or thing, or by reason of answering any question in an investigation by the director.

[30] As well, section 86.1 of the *CFS Act* indicates that, if a provision of the *CFS Act* is inconsistent or in conflict with a provision of *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, the provisions of the *CFS Act* prevail.

[31] As an aside, although it was not used in this case and not argued, a reading of the *CFS Act* would indicate that there may be an easier and more direct delegation of authority of the director's powers by use of section 4(3) of the *CFS Act*, which states:

> **Delegation by director**
> **4(3)** The director may, in writing, authorize a person or an agency to perform any of the director's duties or exercise any of the director's powers and may pay reasonable fees and out-of-pocket expenses therefor.

[32] It is unnecessary for me to deal with counsel's jurisdictional arguments based on the general provisions of the *QB Act* or the inherent *parens patriae* jurisdiction of the court since I have found that the *CFS Act*

and its regulations give ANCR the jurisdiction to require that Shaw furnish the information and produce the records and papers directly to it.

[33] Normally, where authority is delegated by legislation to an administrative entity to require that a third party provide information or documents, the legislation will contain some explicit enforcement provisions.

[34] So, for example, section 118.4(6) of *The Health Services Insurance Act*, CCSM c H35 allows for an application to a court for a warrant to facilitate the exercise of the powers granted in section 118.4(2) to inspect records and demand the production of documents. The same is true for sections 6(2) and 6(4) of *The Protection for Persons in Care Act*, CCSM c P144; and sections 56(2) and 56(5) of *The Regional Health Authorities Act*, CCSM c R34. In section 22(4) of *The Securities Act*, CCSM c S50, the commission and any person appointed for the purposes of an investigation, have the same power to compel the production of documents as is vested in the Court of Queen's Bench.

[35] Some of the other child protection statutes across Canada grant explicit enforcement powers to child protection authorities. For example, section 65 of the *Child, Family and Community Service Act*, RSBC 1996 c 46, allows the authority to apply to the court for an order. Section 31(2.6) of the *Family Services Act*, SNB 1980 c F-2.2 allows for an application to court for production of documents.

[36] In fact, the *CFS Act* does contain some enforcement provisions. For example, section 21(3) provides an agency with the ability to apply to

court for a warrant, but it is limited to situations involving the entry into a building or other place to search for a child who is reasonably believed to be in need of protection.

[37] So, it seems as if a legislative gap exists in this situation. ANCR has the jurisdiction to require that Shaw provide the name of the subscriber, but what happens if Shaw refuses? Can it apply to the court for a remedy and what is the nature of that remedy?

[38] The jurisprudence seems to indicate that, in these types of situations, the administrative entity is not powerless. Section 32(1) of *The Interpretation Act*, CCSM c I80 states that, "The power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers."

[39] In *Sciberras v Workers' Compensation Board (Man)*, 2011 MBCA 30, this Court held that, "a court may imply into an express grant of authority . . . all powers which are necessarily incidental or practically necessary to accomplish the intentions of the Legislature" (at para 73).

[40] More recently, in *Green v Law Society of Manitoba*, 2017 SCC 20, the Supreme Court of Canada relied on that provision in *The Interpretation Act* to hold that, if an administrative body has the power to create a scheme, it must have the implied power to carry out and enforce the scheme. As the Court stated in *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 (at para 51):

> The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu* [*Limited Partnership v Rex*, 2002 SCC 42], at para. 62) without crossing the line between

> judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.* [*v Canada (Attorney General)*, 2005 SCC 26], at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see [Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017) vol 2 (loose-leaf updated July 2017)], at p. 2-16.2; *Bell Canada* [*v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722], at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[41] Similarly, Robert W MacAulay & James LH Sprague, *Practice and Procedure before Administrative Tribunals* (Toronto: Thomson Canada Limited, 2004) vol 2 (loose-leaf updated 2010, release 6) at 12-85, 12-87 states:

> As creatures of statute an agency does not have the authority to issue a subpoena unless it is given that authority by Parliament or a Legislature.
>
> In the event that an agency is without the authority itself to compel the attendance of a witness it can always appeal to a superior court for assistance. The superior courts have the inherent jurisdiction to issue subpoenas in aid of the inferior tribunals. The agency may apply under the court's Rules, or if there is no specific rule, then "in any way consistent with the due administration of justice."

[42] *Pharmascience Inc v Binet*, 2006 SCC 48 was a case related to the regulation of pharmacists in Quebec. In that case, the majority of the Supreme Court of Canada held that it was appropriate for the regulatory body to apply for an injunction from the superior court, compelling a third party (Pharmascience) to produce documents relevant to the regulator's investigation.

[43] In the subsequent case of *Lakehead Region Conservation Authority v Demichele,* 2010 ONCA 480, the Ontario Court of Appeal applied *Pharmascience* and upheld the application judge's decision to grant an injunction. They observed that, "In the ordinary course it would be appropriate for the Conservation Authority to rely on the penal provisions of the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, to ensure compliance. However, this is not an ordinary situation. . . . [i]n this case there is a public interest in ensuring compliance with the *Act*" (at paras 1, 3).

[44] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 389 states:

> Although courts have no jurisdiction to amend legislation, in appropriate cases they may invoke the common law, and in particular the inherent jurisdiction of superior courts, to supplement under-inclusive legislation and thereby fill a gap.

[45] Thus, it appears that, "[R]esort to courts of inherent jurisdiction to assist in the enforcement of orders of inferior tribunals has a long and respectable history" (see *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 at 936). A court may deal with these types of situations by way of an application for a mandatory injunction or a finding

of contempt, applying the appropriate test in the circumstances and exercising an independent discretion. See Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at 936.

[46] Although I find that the application judge erred in finding that she had no jurisdiction to make an order, I wish to emphasize that the application judge was not referred to the relevant regulations reviewed above, in either the written material or oral arguments. This was also true of the argument in front of this Court.

[47] Moreover, again, although I have found that there is jurisdiction for ANCR to request the documents and information and to obtain relief from the Court by way of a finding of contempt or an injunction, that is not the relief that was requested in this Court or the Court below. There are specific tests applicable to relief of that nature and I would not issue such relief in the absence of relevant evidence and submissions. It is more appropriate for such applications to be made before a Court of Queen's Bench judge who will apply the correct test and make an independent decision as to whether to order the requested relief.

[48] As was said earlier, this was an application under r 14.05(2)(c)(iv) of the *QB Rules* and the Court's task is to interpret the legislation so as to advise the parties as to their rights. However, ANCR also asked for a remedy from this Court by way of a declaration.

[49] A decision as to whether to grant a declaration is an exercise in judicial discretion. In exercising that discretion, I agree with the application judge as to her factual findings and would decline to issue such a declaration in this particular case based on the evidence.

[50] Protecting children from potential harm is an important social objective and "there is a public interest in ensuring compliance with the *Act*" (see *Lakehead Region Conservation Authority* at para 3). However, even given the important social purpose served by child protection legislation, the duty to investigate upon suspicion cannot be unlimited. The powers granted by section 4(2)(b.1) of the *CFS Act* are subject to the *Canadian Charter of Rights and Freedoms* (the *Charter*) and should be exercised in a *Charter*-compliant manner.

[51] In most cases, there is an expectation of privacy in subscriber information, including their IP addresses. Criminal cases regularly confirm the high expectation of privacy individuals have in the content of their computers and their internet browsing habits. So, for example, in the criminal context, the Supreme Court of Canada has held in *R v Spencer*, 2014 SCC 43, that the police violated the accused's section 8 *Charter* rights when they obtained his subscriber information from his ISP (which, coincidentally was Shaw) without a warrant.

[52] While I am not suggesting that the evidence in an investigation of a suspected case of child endangerment must be on the same level as a criminal case, the evidence in this case is severely lacking in several respects.

[53] First, there was no evidence provided to the application judge as to the utility of releasing the subscriber information linked to the 2015 IP address to the subscriber information directly connected to the 2012 Skype chat in question. In particular, she indicated that no evidence was provided

to her as to whether Shaw can connect Skype user names to specific customers.

[54] The 2012 Skype chat that gave rise to ANCR's concerns that a child might be in need of protection was connected to a different IP address than that specified in the application. Moreover, the information from the law enforcement officials in the UK indicated that the Skype account in question was created in May of 2012 from yet a third IP address. While there were two password changes in May 2015, neither occurred on the date of use specified in ANCR's application.

[55] Second, there are significant doubts as to whether there was a child in need of protection or whether there was still a child involved in this case. The material received from the Interpol Manchester National Crime Agency included a document titled: "Operation RED MARKET – Child Protection Advice". The material contains excerpts which include the following information and opinion:

> We appreciate that the above intelligence relates to activities that took place a number of years ago as a result of a historic investigation by UK Police.
>
> However, our competent authorities have identified the above Skype user as someone who may be a child victim or who indeed may pose a risk to children.
>
> . . .
>
> Although at this time it is unknown if [JC] is a child himself.

[56] As the application judge concluded, "There seems to have been a bit of a leap to a conclusion that JC is a child. This particular document is

not precise, and I don't know how the author could be precise as to whether JC is a child or isn't."

[57] Third, the application in front of the application judge was unopposed. She examined the evidence carefully and was not satisfied as to the candour of the affidavit evidence submitted before her.

[58] She concluded (at paras 40-41):

> It is of grave concern that the body of the Friesen affidavit and the evidentiary grounds submitted by ANCR were, in a number of respects, inconsistent with the information contained in the documents that the [WPS] received from law enforcement officials in country X, attached to the Lagunay affidavit.
>
> I am concerned that the Friesen affidavit and ANCR's application contain statements that were not borne out by, or are inconsistent with, or are contradicted by, the evidence in the documents from country X.

[59] In summary, the 2012 Skype chat in question occurred over three and one-half years before the court application, there was no evidence of subsequent communications between the Winnipeg user and the foreign offender, the foreign offender is incarcerated in another country, and it is uncertain whether the Winnipeg user, even if a child at the time, remains a child now. The information ANCR is seeking relates to a Skype password change in 2015 and ANCR has not explained how that will assist with respect to the 2012 Skype chat.

Costs

[60] During the argument in front of the application judge, the Court asked whether counsel for ANCR had discussed with Shaw whether they

were obligated to disclose the information pursuant to section 18(1) of the *CFS Act*, which required individuals to report child abuse of which they became aware, and whether counsel would be drawing Shaw's attention to that section. The application judge further stated that, in counsel's discussions with Shaw, he could indicate that she had raised the issue of that section in light of the "more fulsome evidence with respect to the possibility that JC is a child."

[61] There was some miscommunication between counsel for ANCR and corporate counsel for Shaw as to the nature of the Court's comments with respect to section 18(1) of the *CFS Act* and Shaw's obligation under that section. Shaw requests costs, arguing that, except for this matter, it would not have been necessary for Shaw to retain local counsel and appear in court.

[62] Cost awards in child protection proceedings should be awarded only in exceptional circumstances of improper or overbearing action on the part of the agency. See *BW v Child and Family All Nations Coordinated Response Network*, 2009 MBCA 95; and *Director of Child and Family Services v AC et al*, 2008 MBCA 18.

[63] In *Winnipeg Child and Family Services v AMH*, 2002 MBCA 8, this Court stated (at paras 11-12):

> It is of vital importance that the potential impact of an order of costs should not deflect the Agency from fulfilling its duty to protect children, which includes both their apprehension and, where appropriate, court proceedings, where the object is to obtain a permanent order of guardianship.

> So long as the Agency acts reasonably and in good faith, it should not have costs assessed against it regardless of the ultimate result of the litigation.

[64] Interestingly, in the case of *Children's Aid Society of Hamilton v KL and TM*, 2014 ONSC 3679, the Court observed that (at para 14):

> In cases involving procedural impropriety on the part of a Society, the level of protection from costs may be lower if the irregularity is not clearly attributable to the Society's efforts to diligently carry out its statutory mandate of protecting children.

[65] Nonetheless, my reading of the record is that there was a misunderstanding between counsel and the Court as to what counsel was to convey to Shaw, and I do not believe there was intentional misconduct on the part of counsel that warrants criticism of his actions or costs being assessed against ANCR.

[66] The appeal is dismissed without costs.

_____ JA

I agree: _____JA

BEARD JA (concurring):

[67] I have read the reasons of my colleague, Steel JA, and I agree that the appeal should be dismissed, as should Shaw's request for costs (see paras 60-65 herein).

[68] I also agree with the following aspects of Steel JA's decision, as contained in paras 1-45 and 47: that ANCR has jurisdiction under section 4(2)(b.1) of the *CFS Act* to require that any person give it information and documents in its possession relating to a child welfare investigation, and to make enquires under section 4(2)(c) of the *CFS Act*; that any person who complies with such a requirement will not be subject to proceedings arising out of that compliance (section 4(2.1) of the *CFS Act*); that, in the event that any person fails to cooperate, ANCR can apply to the Court of Queen's Bench for an injunction or an order of contempt, as appropriate, to assist it with its statutorily mandated child welfare investigation; and that a judge of the Court of Queens' Bench has jurisdiction to hear the application and to grant the appropriate injunctive relief or contempt order.

[69] In my view, however, the matter ends with her finding that there was no application before either the application judge or this Court for either an injunction or a contempt order and that, if ANCR wants that relief, it should make the appropriate application to the Court of Queen's Bench (see para 47 of these reasons).

[70] Where I part company with my colleague is in relation to her findings in para 49, which states as follows:

> A decision as to whether to grant a declaration is an exercise in judicial discretion. In exercising that discretion, I agree with the application judge as to her factual findings and would decline to issue such a declaration in this particular case based on the evidence.

[71] The appeal proceeded as an appeal of the application judge's interpretation of several pieces of legislation and, in particular, her finding that she had no jurisdiction to order that Shaw comply with ANCR's demand for information. Having found that the application judge did have jurisdiction to make an order, albeit on a different basis than was argued either before the application judge or in this Court, and that an application for that relief should be made to the Court of Queen's Bench, in my view, the underlying declaration application and the appeal were spent and there was no further or alternative legal basis upon which this Court could either exercise any discretion or grant or dismiss a declaration on the merits.

[72] While the underlying application was brought pursuant to r 14.05(2)(c)(iv) of the *QB Rules*, it is clear, as my colleague has stated in paras 18 and 21, that that rule does not give a court any jurisdiction to grant or refuse an order of disclosure. It is a procedural rule only. As it relates to this case, the only decision that can be taken under that rule is to interpret the legislation. By exercising discretion under that rule to hear an application, a court is agreeing to undertake the interpretation of the relevant legislation. (See *Pro-Demnity Insurance*.) If that interpretation leads to the conclusion that the Court has jurisdiction to grant an order, then it could go on to exercise its legislated jurisdiction to determine whether, on the facts, an order should be granted. If the Court determines, as the application judge did in this case, that it has no jurisdiction to grant any order, then its jurisdiction is spent and it has no further or alternative jurisdiction to make a finding on the merits as to whether an order should be granted. There is no further or alternative discretion to be exercised.

[73] Having interpreted the legislation and found that there was jurisdiction to grant an order, but on a different basis and by applying different principles than were argued before the application judge, and that an application for what is different relief would have to be brought in the Court of Queen's Bench, this Court has no further or alternative jurisdiction in law to exercise any discretion or to grant or refuse any declaration on the merits. The appeal was, at that point, spent.

[74] Given the finding that an application can be made to the Court of Queen's Bench for an injunction or contempt order, I question, with the greatest of respect, whether it is appropriate to review and comment, in detail, on the evidence that was before the application judge. This may be seen as fettering the discretion of another judge hearing such an application. As is our practice when ordering a new trial or granting leave to appeal, the less said about the facts, the better.

[75] In conclusion, while the application judge erred in finding that she had no jurisdiction to grant an order for the production of information, there was no application before her for either an injunction or a contempt order. I would find, therefore, that the application judge did not err in finding that she had no jurisdiction to make the orders that were requested by ANCR. If ANCR wishes to obtain an injunction or contempt order, it must do so in the appropriate manner, as set out above. For these reasons, I, also, would dismiss ANCR's appeal, with the *proviso* that it is open to ANCR to file a new application in the Court of Queen's Bench for an injunction or contempt order, as is appropriate. In making this finding, I make no comment on the evidence that has been presented to date.

_____ JA