T.M.M. v. P.C., 2001 ABPC 127

Date: 20010716
File: N17378

IN THE PROVINCIAL COURT OF ALBERTA

IN THE MATTER OF THE CHILD WELFARE ACT, ALBERTA

AND IN THE MATTER OF AN APPLICATION FOR A PRIVATE GUARDIANSHIP ORDER OF THE CHILD J.C., BORN AUGUST 12, 1997, A CHILD WITHIN THE MEANING OF THE CHILD WELFARE ACT

BETWEEN:

T. M. M.

Applicant

- and -

P. C.

Respondent

File: CFC121755

AND IN THE MATTER OF THE CUSTODY OF AND ACCESS TO THE CHILD J.C., BORN AUGUST 12, 1997

BETWEEN:

T. M. M.

Applicant

- and -

P. C.

Respondent

JUDGMENT OF THE HONOURABLE JUDGE N.A. FLATTERS

COUNSEL

For the Applicant: A. Fares
For the Respondent: H. McKay

INTRODUCTION

[1] This case is about the jurisdiction of this Court to award costs under each of the *Child Welfare Act*, S.A. 1984, c. C-8.1, as. am. (*CWA*) and the *Provincial Court Act* R.S.A. 1980, P-20, as am. (*PCA*).

[2] The issue arose on the dismissal of each of the Applicant's applications to be appointed as a private guardian of the child, J.C., born August 12, 1997 (the child) under Part 5 of the *CWA* and for an order of custody and access under Part 3 (Family Matters), section 32 of the *PCA*.

FACTS

[3] The parties are not married and the Applicant is not a guardian of the child. He has never seen the child. The parties made an agreement that provided the Applicant would not seek access to the child then the Respondent would not seek child support. Some two years after the child's birth, the Applicant brought an Application for a Private Guardianship Order under Part 5 of the *CWA*. Under Part 5, even though the proceedings are between private litigants, service of an application on the Director of Child Welfare is mandatory which is in keeping with the *CWA* as a child protection statute. The threshold requirement is that an applicant must have had continuous care of a child for six months, although in a proper case the Court may waive this requirement if it is in a child's best interests. If the threshold is met, then willingness, ability and suitability to be a guardian must be established. As to the latter requirements, the Court may order a report from a qualified person respecting these. The Applicant also brought an Application for custody and access under Part 3, section 32, of the *PCA*. In the circumstances of this case, guardianship is a pre-requisite for custody, although not for access. The test for decision-making under each of the *CWA* and the *PCA* is a child's "best interests".

[4] There have been extensive Examinations for Discovery. A number of the Applicant's Undertakings have remained outstanding for a significant period of time. The outstanding Undertakings, some of which were taken under advisement and in respect to which there had been no advice as to whether there would be an Answer, included information on the Applicant's immigration status; release for the Respondent's counsel to make enquires with

Citizenship and Immigration Canada regarding his immigration status; copy of his resume; educational background; and a criminal record check. An objection was made to the Undertaking that the Applicant supply his financial information.

[5] At the time set for hearing the Applications, the Applicant's counsel sought to adjourn each *sine die* as the Applicant was in Hamilton, Ontario on judicial custodial remand after a Preliminary Inquiry into unspecified charges. On the adjournment applications, no valid reason was given for his lack of Answers or the objection to produce financial information, other than now compliance was difficult and out of the Applicant's control because he was in jail. Notwithstanding that, he had the opportunity to provide Answers as he had been in Calgary until his Preliminary Inquiry. The Respondent had answered her Undertakings, with the exception of one, the Answer for which had been made available to her counsel.

[6] On the applications to adjourn and the Respondent's cross-applications to dismiss, the Applicant was granted an adjournment for two months to allow him time to answer his outstanding Undertakings and if he was still in custody, then to appear by Affidavit to establish the required foundation for his Applications. If the Applicant had not complied by then with his Undertakings, the Applications would be dismissed. These are child-centred proceedings and the child cannot and should not have to wait to have determinations made, which affect the child, while the Applicant sorts out his difficulties with the law and decides whether and when he will answer his Undertakings despite having had ample time to do so prior to his Preliminary Inquiry. When the matters returned, and in the absence of Answers and an Affidavit, the Applications were dismissed.

[7] The Applicant's counsel had advised that if the Applications were dismissed the Applicant would simply re-file. I accepted Respondent's counsel submissions that this would entail further significant legal fees for the Respondent. If the Respondent is faced with new proceedings, then resources which would otherwise be available for meeting the child's needs would be diverted to pay legal fees, thereby creating the prospect of a further compromise to the child's standard of living. Given the Applicant's position, in my view it was in the child's best interests that terms be established on any re-application by the Applicant. I ordered that the Applicant:

> (a) Obtain leave of the Court to bring new applications for guardianship and access and if granted then:

i) pay security for costs in the amount of $10,000.00;

ii) provide a release for a Canadian Police Information Computer and Child Abuse Registry search; and

iii) provide answers to outstanding Undertakings and any others arising from those Answers or others arising as a result of the passage of time.

[8] The remaining issue is the jurisdiction of the Court to award costs and, parenthetically, reasons for ordering security for costs.

QUESTIONS

1. Does this Court have jurisdiction to award costs under the CWA?

2. Does this Court have jurisdiction to award costs in proceedings under section 32 of the PCA prior to the proclamation of the Justice Statutes Amendment Act?

THE LAW

[9] Acts and Regulations

(a) Maintenance and Recovery Act, R.S.A. 1970, c. 223 (*MRA*), section 5, repealed by revision R.S.A. 1980, C. M-2:

5. (1) The Minister may make regulations

...

(b) prescribing rules under which applications under this Act or any Part thereof are to be made and dealing generally with all matters of procedure under this Act or any Part thereof,

(c) prescribe forms and provide for their use, and

(d) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act or any Part thereof.

(b)(i) *CWA*, section 96(1)(c) and (d):

96(1) The Lieutenant Governor in Council may make regulations

...

(c) prescribing the rules to be followed in a proceeding before the Court under this Act;

(d) prescribing the forms including notices to be used in any application made to the Court under this Act;

(ii) *CWA* Court Rules and Forms Regulation, AR 184/85 (*Regulation*):

...

2(1) In any matter not provided for in the Act [*CWA*] or this Regulation [*Regulation*], the practice and procedures followed in the Court, as far as the case may be, shall be regulated by analogy to the Alberta Rules of Court and the procedures followed in the Court of Queen's Bench.

(2) The Court may give directions on practice and procedure.

(3) The Court on application may

(a) vary a rule of practice or procedure,

(b) refuse to apply a rule of practice or procedure, or

(c) direct that some other procedure be followed.

...

(b) *PCA*, sec. 19.1 (en. 1996 c.28.s.37)

Rules of Court

19.1(1) The practice and procedure of the Court shall be as provided in this Act and the regulations.

(2) Where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may

(a) apply the Alberta Rules of Court, and
(b) modify the Alberta Rules of Court as needed.

(d) *Judicature Act*, (S.A., en. 1976, c. 58, s. 6(4); re-enacted RSA 1980, c. J-1, (*Judicature Act*), s. 47; re-acted 1997, c. 13, s. 2):

> 47(1) In this section, "Alberta Rules of Court" means the Alberta Rules of Court, filed as Alberta Regulation 390/68 as amended prior to the commencement of this section.
>
> (2) The Alberta Rules of Court are validated notwithstanding that any provision in the Rules may affect substantive rights.

[10] Submissions of Counsel

(a) For the Applicant

[11] Counsel for the Applicant submits this Court has no jurisdiction to award costs under either the *CWA* and *PCA*, citing as authority: ***Re M.(B.) AND M.(D.)*** (1988), 61 Alta. L.R. (2d) 383 (P.C., Fam. Div.); ***R.F.B. v. T.L.B.*** (1990), 105 A.R. 67 (P.C., Fam. Div.) (sub nom. *B. (T.R.) (Re)*) (***R.F.B.***); and ***A.(K.) CHILDREN and K. v. A.***, (Prov. Ct., Fam. Div.), Edmonton, 71735286F10101, 22 June, 1999, (unreported) .

(b) For the Respondent

[12] Counsel for the Respondent submits this Court has jurisdiction to award costs under both, citing as authority: ***St. Denis v. Trumbley*** (1977), 3 Alta. L. R. (2d) 193 (Alta. S.C. [Appellate Div.]); ***F. v. W.C.*** (1978), 5 Alta. L.R. (2d) 216 (D.C.); the *Regulation*; and ***B. (A.D.) (Re)***, [1989] A.J. No. 653 (Alta. Prov. Ct., Fam. Div.); the *Regulation;* and section 19(2) of the *PCA*.

(c) By the Court

[13] I have also considered ***L.L.M.***, cited in ***B. (A.D.) (Re)*** as: In the matter of ***L.L.M.,*** unreported, (P.C.A.) at Calgary, No. N9079, April 28, 1988, (at 1 and 3) (sub nom. in ***R.F.B.***

as Re: L.L.M. (P.C.A.) #9079, April 29, 1988, (at para. 19)); and ***R. B. v. The Director of Child Welfare for the Province of Alberta***, (Q.B.), cited in ***R.F.B.*** at para. 22.[1]

[14] Cases

(a) *CWA*

[15] In ***St. Denis v. Trumbley***, the issue was the jurisdiction of the statutorily constituted then District Court to apply the *Rules of Court* in affiliation proceedings under the *MRA*. Section 5 provided that the Minister had the power to make regulations to prescribe rules relating to all matters of procedure under the *MRA*, including forms and use, or any other matter necessary or advisable to carry out the intent and purpose of the *MRA*. The Minister had not made any regulations. McDermid, J.A., writing for the majority, held that the *Rules of Court* were applicable and said (at 198):

> It would appear to me that, whether the view is taken that the rules are applicable or that the court must regulate its own procedure in the absence of the Minister making rules, the end result is the same. Once it is decided that the procedure is civil the court should turn to the ordinary civil rules governing civil procedure, i.e., the Rules of Court.
> ...

[16] He then set out a test for statutory courts in determining the applicability of a given Rule within the *Rules of Court* (at 198):

> In deciding whether a rule contained in the Rules of Court is applicable the court should consider: firstly, whether the rule is to be applied contrary to any provisions in the Act [*MRA*] or any regulation made by the Minister and, if it is, such rule does not apply; secondly, whether it is practicable to apply the rule and, if it is not, such rule does not apply.

The Provincial Court of Alberta is a statutory Court. The reasoning in ***St. Denis v. Trumbley*** is equally applicable to this Court absent case law or legislative changes over time.

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[1] Neither a copy of ***L.L.M.*** nor ***R. B. v. The Director of Child Welfare*** is available through the Provincial Court Library. A transcript for either cannot be provided now as the tapes are not retained by Transcript Management Services for more than ten years.

[17] In ***F. v. W.C.***, where the issue was an award of costs against the Director of Maintenance and Recovery under the *MRA*, McFadyen, D.C.J. (as she was, then J., now J.A.) held that the *Rules of Court* relating to costs were not contrary to the provisions of the *MRA*, other than with respect to section 16, which provided that no costs were to be awarded to an applicant on a rehearing (at para. 7). She concluded that the Legislature intended that costs may be awarded to an applicant other than in section 16 proceedings (at para. 8); there was no practical reason why costs should not be awarded against the Director (at para. 9); and while the District Court had the power to award those costs, the award should not be routinely made other than in cases of special and unusual circumstances (at para. 12). The reasoning in ***F. v. W.C.*** is analogous to this Court.

[18] Without citing the decisions in ***St. Denis v. Trumbley*** and ***F. v. W.C.***, in ***Re M.(B.) AND M.(D.)***, Russell, P.C.J. (as she was, then J., now J.A.), held that this Court did not have the jurisdiction to awards costs under the *CWA*, because that jurisdiction was a matter of substantive law, and the authority to enact rules under the *CWA* provided in section 96(1)(c) could not be used to incorporate the substantive provisions of the *Rules of Court* despite the implementation of the *Regulation*. She said at 388-89:

> The authority to award costs is not merely incidental to the jurisdiction; it is a form of jurisdiction and as such it is matter of substantive law which must be prescribed either in statute or by common law (at 388).
>
> ...
>
> The determination of whether a matter is substantive or merely procedural is not dependent upon the matter being statutory or substantial in nature; whether the matter is prescribed by statute is not relevant to the characterization of the law as being substantive or procedural. But the fact that a law is substantive in nature, and not procedural does require that it be prescribed either by the common law or by statute. If it were merely procedural it could be prescribed by subordinate legislation, or by the court itself (at 389).

[19] In answering the question as to whether section 96(1)(c) and the *Regulation* provided statutory authority to award costs, Russell, P.C.J. held that section 96(1)(c), empowering procedure as to Court rules and forms, limited the power of the Court to incorporate the substantive provisions of the *Rules of Court* despite section 47(2) of the *Judicature Act*. Section 47(2) validated the *Rules of Court* notwithstanding that any provision in those *Rules* may affect substantive rights.

[20] ***L.L.M.*** was cited in ***R.F.B.*** by Brownlee, P.C.J. at paragraph 19 as follows:

> In **Re: L.L.M.** (P.C.A.) #9079, April 29, 1988, Anderson, J.P.C., in holding that party and party costs could not be awarded under the **Child Welfare Act**, did make reference to the **Feagan v. Corcoran** [***F. v. W.C.***], supra, decision. It seems from his judgment that he interpreted the **Feagan v. Corcoran** decision as cloaking an inferior court (the former District Court in that case) with authority to grant costs under special or unusual circumstances, but that such circumstances did not exist in the case before him and thus he declined to grant costs.

[21] In ***B.(A.D.)***, where the issue was the jurisdiction of the Court to award costs, and if jurisdiction, then the exercise of judicial discretion in awarding costs payable by the Directior of Child Welfare for a guardian *ad litem* appointed by the Court for a child, Landerkin, P.C.J. declined to follow ***Re M.(B.) AND M.(D.)*** noting, amongst other reasons, that ***St. Denis v. Trumbley*** had not been cited. Rather, he applied the rule in ***St. Denis v. Trumbley*** and by analogy the rationale in ***F. v. W.C.***, holding that "... nothing in the Act [*CWA*] or the Regulations [*Regulation*] is contrary to the Rules of Court concerning costs and it is practicable to apply those Rules" (at 4). In the special circumstances of that case the Court exercised its discretion and ordered the costs of the guardian ad litem to be paid by the Director.

(b) *PCA*

[22] In determining whether costs could be awarded under the *PCA*, Brownlee, P.C.J. in ***R.F.B.*** followed the reasoning in ***Re M.(B.) AND M.(D.)*** and found, notwithstanding the latter was a decision under the *CWA*, that Russell, P.C.J. had established the general principle that as a statutory court there was no jurisdiction to award costs unless specifically empowered to do so under the terms of the statute or regulation at (para. 23). In this respect he noted the *obiter dicta* of Chrumka, J., approving the reasoning in ***Re M.(B.) AND M.(D.)*** in ***R. B. v. The Director of Child Welfare for the Province of Alberta*** (Q.B.) (at para. 22) as follows:

> In an unreported October 1989 oral decision of Mr. Justice Chrumka of the Court of Queen's Bench of Alberta, in the case of **R.B. v. The Director of Child Welfare for the Province of Alberta**, the court dealt with the question of whether the Provincial Court has jurisdiction to award party and party costs in an application pursuant to the **Child Welfare Act** and found in the negative. Mr. Justice Chrumka is quoted as saying on page 2 of the transcript of his judgment as follows:
>
> > "The reasoning of Her Honour Judge A.H. Russell in the case which concerned the temporary guardianship application with respect to B.

> and D. Mugala is persuasive. I agree with the conclusion reached by Her Honour and the reasons therefor. Basically, in my view, costs, the right to or the jurisdiction to award costs is substantive law. The actual awarding or the assessment of costs is provincial law ... pardon me, is practice, not substantive law. And, in my view, the Provincial Court was not granted the substantive power ... does not ... the law did not grant jurisdiction to the Provincial Court to award costs."

When ***R.F.B.*** was decided there was no empowerment to award costs under the *PCA*. Section 19.1 of the *PCA* was not implemented by the Legislature until 1996, some six years later.

[23] In ***A.(K.) CHILDREN and K. v. A.***, Fowler, P.C.J., in proceedings under the *PCA*, also applied the reasoning in ***Re M.(B.) AND M.(D.)***, notwithstanding the implementation of section 19.1 of the *PCA*. Also referenced in the decision was Regulation: *AR 18/91*: *Provincial Court Fees and Costs Regulation*. This Regulation set out fees payable in Civil division to the Clerk of the Court and discretionary costs payable to a party by the Court to a maximum of $300.00, as well as other billed fees in Civil Division; and fees payable to the Clerk of the Court in Criminal, Family and Youth Divisions. That Regulation was amended by AR 220/93 which increased the fees payable to the Clerk of the Court in all three Divisions, and as between parties in Civil Division, removed the $300.00 cap on any additional payment of costs ordered by the Court as between the parties, amongst other increases of fixed fees. Fowler, P.C.J. "inferred" that because Regulation AR 18/91 followed the decision in ***Re M.(B.) AND M.(D.)***, "the legislators did not intend to give the Family Division jurisdiction to award costs between parties, having specifically addressed this issue in the Civil Division and not in the Criminal Youth or Family Divisions"(at 2). He applied the reasoning in ***Re M.(B.) AND M.(D.)*** and ***R.F.B.*** in saying that section 19.1 "did not expand the jurisdiction of the Provincial Court Family Division in so far as costs are concerned. It is restricted in application to matters of procedure and practice and not to matters of substantive law"(at 3). Following ***Re M.(B.) AND M.(D.)*** and ***R.F.B.***, Fowler, P.J.C. held there was no jurisdiction to award costs and distinguished the jurisdictional finding in ***B. (A.D.)*** as one based on the "somewhat unusual facts in that case". The decisions in ***St. Denis v. Trumbley*** and ***F. v. W.C.*** were not referenced.

[24] In considering then whether section 96(1)(c) and the *Regulation* empower this Court to award costs under the *CWA*, I decline to follow ***Re M.(B.) AND M.(D.)*** because Russell, P.C.J. did not consider the Appellate decision in ***St. Denis v. Trumbley*** nor ***F. v. W.C.*** Similarly I decline to follow those of my colleagues who have followed ***Re M.(B.) AND M.(D.)*** or have otherwise held that this Court does not have the jurisdiction to award costs under the *CWA*. I do not consider myself bound by ***R. B. v. The Director of Child Welfare.*** I consider the Appellate decision in ***St. Denis v.***

Trumbley binding. I agree with my colleague Landerkin, P.C.J. that this Court has the power to award costs under the *CWA*.

[25] In considering then whether section 19.1 of the *PCA* empowers the Court to award costs under the *PCA*, I decline to follow ***Re M.(B.) AND M.(D.)*** for the same reasons as I did in relation to the *CWA*. That decision is also not applicable in that it was restricted to the *CWA*, decided prior to the implementation of section 19.1 of the *PCA*, and in my opinion does not have broader applicability nor did it establish a general principle for the Court in the award of costs. I decline to follow those of my colleagues who have followed ***Re M.(B.) AND M.(D.)*** or have otherwise held that this Court does not have the jurisdiction to award costs under the *PCA*.

[26] In my opinion then, there is no bar in case law to preclude the application in its totality of the *Rules of Court* to the *CWA* and the *PCA*. I am also satisfied that there is no legislative bar, nor is it contrary to the provisions of either the *CWA* or the *PCA* to apply all of the *Rules* within the *Rules of Court,* in that it was the intention of the Legislature in implementing the *Regulation* pursuant to section 96(1)(c) of the *CWA* and section 19.1 of the *PCA*, to encompass the entirety of the *Rules of Court* without exception. There is no restriction in the use of the term "rules" under section 96(1)(c) or in the *Regulation*. Section 19.1 of the *PCA*, as a statutory enactment, takes precedence over Regulations AR 18/91 and AR 220/93 (see *Dreiger on the Construction of Statutes,* 3rd Ed. (Toronto: Butterworths, 1994) (*Dreiger*), at 185). In any event, by not enunciating any exceptions nor restrictions in the application of any one of the *Rules*, as it could have done, the Legislature must have contemplated the making of an order for costs under *CWA* section 96(1)(c) and the *Regulation*, and section 19.1 of the *PCA*, over and above fees payable to the Clerk of the Court in the Family Division. In my view, whether or not costs are substantive or procedural in nature, especially after the enactment of section 47 of the *Judicature Act*, is not the real issue. It is rather the intention of the Legislature to give jurisdiction to this Court to apply all of the *Rules of Court*, including the cost *Rules*. In my opinion that was and remains the intention of the Legislature in the same manner as that was given to the statutorily constituted then District Court, a Court without inherent jurisdiction, to use the *Rules of Court* and award costs even prior to the implementation of section 47 of the *Judicature Act*. That intention also accords with sound policy and makes sense in ensuring uniformity in the application of the *Rules of Court* across all of the trial courts in Alberta.

[27] In the result, and respecting the *CWA*, I hold that this Court has both the power to make an award of costs under the *CWA*, regardless of whether the litigation is between the Director and guardians or under Part 5, as between private parties. I also hold this Court has the power to award costs in applications under section 32 of the *PCA* pursuant to the provisions of section 19.1.

REASONS

[28] In common law jurisdictions, statute law is traditionally regarded as a law of exception, filling in the gaps where the common law is incomplete (See Pierre-André Côté, *The Interpretation of Legislation in Canada*, Third Edition, Carswell, Scarborough, 2000 (Côté), (at 36)). The power for this Court to apply the *Rules of Court* under the *CWA,* arises from section 96(1)(c) as the enabling legislation and the *Regulation.* These are closely meshed so as to form an integrated scheme which must work with other Acts and Regulations (*Dreiger*, at 185). The sole function of a regulation must be to help implement or carry out the statutes of the Legislature, although there is a presumption against conferring jurisdiction to affect substantive rights by a regulation (*Dreiger*, at 551). Regard must be had to enabling legislation. In the case of the *CWA* the issue then is the interpretation of the section 96(1)(c) meaning of "rules".

[29] I am satisfied the Legislature intended an expansive use of the term "rules" in section 96(1)(c) to allow for the fullness in application of the *Rules of Court* as set out in ***St. Denis v. Trumbley***. The implementation by the Regulation regulates, by "analogy", the use of the *Rules of Court*. Reasoning by analogy recognizes the similitude of relations existing by comparison with the Court of Queen's Bench and thereby results in the harmonization of and continuity in the use of the *Rules of Court* regulating access to justice in all of the trial courts of Alberta. Giving the Court this wide power of application ensured the legislative goal of efficient, orderly and timely administration of justice.

[30] To achieve this goal, the Legislature delegated its functions as to judicial procedure to more conversant authorities, that is: the Court of Appeal and the Court of Queen's Bench, which derive the power to enact rules from the *Queen's Bench Act*, R.S.A. 1980, c. C-29, s. 18 and the *Judicature Act*, R.S.A. 1980, c. J-1, s. 47, and in the case of the Provincial Court of Alberta, by section 96(1)(c) of the *CWA* and section 19.1 of the *PCA*. The authority for making Rules is further delegated by the Legislature to the Rules Committee under the *Court of Queen's Bench Act,* S.A. 1978, c.51, s. 6(4), re-enacted R.S.A. 1980, c. C-29:

> 23(1) There shall be a Rules of Court Committee consisting of the following members:
>
> (a) the Chief Justice of Alberta or a judge of the Court of Appeal designated by him;

(b) the Chief Justice of the Court of Queen's Bench or a judge of the Court of Queen's Bench designated by him;

c) the chief judge of the Provincial Court of Alberta or a judge of the Provincial Court designed by him;

...

(3) The Committee shall meet as occasion requires to consider the rules of court made under this Act, The Court of Appeal Act and any other Act and may make recommendations respecting those rules of court to the Attorney General.

...

[31] The Administrative Chief Justices and Judge have this remedial delegation to ensure that each of the courts may appropriately and consistently organize and harmonize the rules governing access to the courts. In my opinion, including the Chief Judge of the Provincial Court of Alberta as a member of the Rules Committee in 1978, was a first step taken by the Legislature to demonstrate its intention to extend the public interest by eventually empowering this Court to apply the *Rules of Court*, which was ultimately realized with the 1984 implementation of the *CWA*, the implementation of the *Regulation* pursuant to section 96(1)(c) of the *CWA* in 1985, and section 19.1 of the *PCA* in 1996.

[32] By giving this grant of power to all the trial courts to ensure expeditious and cost-effective access to justice, it must have been the intention of the Legislature that similar benefits and consequences in the application of the *Rules of Court* should entail to all litigants regardless of the forum in which a matter was proceeding and whether a litigant was self-represented or represented by counsel. Clearly it is in the public interest that litigants should know the rules governing the conduct of their litigation before the courts. While this Court is meant to be a Court of first instance and one of expeditious and cost-effective access to justice, the fact that many litigants are self-represented should not derogate from this principle, nor should it be assumed that the cost consequences should be different from those of other litigants accessing other courts, whether represented by counsel or not.

[33] In this respect, the thirty-two year legislative history of the *Court of Queen's Bench Act* and the enactment of the *Rules of Court* in 1969 and the twenty-five year history since the enactment of section 47 of the *Judicature Act* bears examination in that it elucidates the intention of the Legislature in empowering this Court to award costs under the *CWA*, section 96(1)(c) and the *Regulation,* and section 19.1 of the *PCA*. Procedure and rules of procedure do not relate purely to form only. There may be consequences for the substantive law. By definition, provisions that are

purely procedural do not interfere with substantive rights. It must have been the concern of the Legislature that the *Rules of Court* were not purely procedural and did affect substantive rights because in 1976 the Legislature clarified its intention, in enacting section 47 of the *Judicature Act*, that the *Rules of Court* be validated even if those affected substantive rights. Once a court was empowered to apply the *Rules of Court*, that power extended to all of the *Rules* without exception unless the Legislature otherwise determined. In respect to this Court, had the Legislature intended an exception for Part 47 (Costs) of the *Rules of Court*, it could have stated that. It did not. In my opinion the Legislature intended the *Rules of Court* to be validated and operative for this Court without exception.

[34] I note the decisions in ***St. Denis v. Trumbley*** and ***F. v. W.C.*** followed the 1976 implementation of section 47 of the *Judicature Act*. The rule applied in ***St. Denis v. Trumbley*** and the rationale in ***F. v. W.C.*** must be read in that context. As well, the wording in section 96(1)(c) of the *CWA* substantially mirrors the wording of the *MRA* being considered at the time by the Court of Appeal in ***St. Denis v. Trumbley***. Section19.1 of the *PCA* is explicit in the use of the *Rules of Court* with modifications as required. In my opinion, both give legislative credence to the decision in ***St. Denis v. Trumbley***, a ***F. v. W.C.*** The *Justice Statutes Amendment Act*, S.A. 2000, c. 20, which, in section 21.8(1) provides that the Court may award costs under Part 3 of the *PCA*, has served only to clarify that which was already given in section 19.1 of the *PCA*.

[35] In this respect, the rules of statutory interpretation applied by modern courts, and as discussed by Professor Ruth Sullivan in *Dreiger*, should also be considered in interpreting the intention of the Legislature. At page 7 Professor Sullivan summarized the basic propositions of the "ordinary meaning" rule of interpreting statutes as preferred to the "literal meaning":

> As understood and applied by modern courts the ordinary meaning rule, consists of the following propositions.
>
> > (1) It is presumed that the ordinary meaning of a legislative text is the intended or the most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
> >
> > (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning.

> They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified, or rejected. That interpretation, however, must be plausible; that is, it must be one that the words are reasonably capable of bearing.

[36] Professor Sullivan recognized that while there may be a reason to reject this meaning in response to some other concern, the above formulation "... affirms that there is such a thing as ordinary meaning, and it makes this meaning determinant in the absence of a reason to reject it" (at 7).

[37] These propositions were adopted by the Alberta Court of Appeal in ***Learning Disabilities Association of Alberta et al. v. Board of Education of Edmonton Public Schools et al.*** (1994), 162 A.R. 173; 83 W.A.C. 173. The criteria for determining the appropriateness of the interpretation were adopted from Professor Sullivan's restatement of the modern rule of statutory interpretation by Kerans, J.A. in ***R. v. J.L.S. and T.S.*** (1995), 162 A.R. 388 (Alta. C.A.) (*J.L.S.*), and one he later adopted in ***Christensen (Bankrupt) v. Christensen*** (1996), 184 A.R. 194 at 198 (Alta. C.A.). In *J.L.S.* Justice Kerans quoted Professor Sullivan as follows:

> ... An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just (at 391).

[38] The Supreme Court of Canada has also held that statutory interpretation cannot be founded on the wording of legislation alone. This principle was stated by Iacobucci J. in ***Rizzo v. Rizzo Shoes Ltd., Re***, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991). Elmer Driedger in *Construction of*

> *Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[39] A principle for statutory interpretation has also been stated in the *Interpretation Act*, R.S.A. 1980, c. I-17, as am., sections 1(1) and 10 which provide:

> 1(1) In this Act,
>
> (a) "enact" includes issue, make, establish or prescribe;
>
> ...
>
> (c) "regulation" means a regulation ... enacted
>
> ...
>
> (ii) by or under the authority of the Lieutenant Governor in Council, ...
>
> ...
>
> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[40] The interpretation of regulations passed under statutory authority are subject to the same rules of interpretation as the statute itself and the purpose of interpretation remains the discovery of legislative intent, whether the enactment is a statute or a regulation (See *Côté*, at 24-25). Different enactments of the same legislature should be taken to be as consistent as the provisions of a single enactment; all legislation is deemed to make up a coherent system; interpretations favouring harmony between statutes should prevail over discordant ones, because the former are thought to better represent the thought of the legislator; and the presumption of coherence in enactments of the same legislature is even stronger when they relate to the same subject matter (see *Côté*, at 342-43).

[41] Interpreting the meaning of "rules" in section 96(1)(c) and *Regulation* respecting the *CWA* and section 19.1 of the *PCA* as a single enactment, which in turn, makes up a coherent system with the Court of Queen's Bench in the application of the *Rules of Court*, without limitation for this Court, in my opinion best represents the intention of the Legislature, in that regardless of the level of

court, the benefits, limitations and consequences in the application of the *Rules of Court* should apply equally to all litigants. The rule-making power under the *CWA* is not restricted by section 96(1)(c) nor the *Regulation*. To assume the Legislature intended to restrict the application of the *Rules of Court* only to the Court of Queen's Bench thereby excluding this Court would not achieve the legislative principle of harmonizing the application of the *Rules of Court* consistently across all the trial courts of Alberta. As I have noted, this consistent harmonization accords with sound policy and makes sense.

[42] Similarly, the Legislature cannot have intended to limit the jurisdiction to award costs under the *CWA* to special circumstances. Either jurisdiction exists or it does not. Its existence is not dependant on special circumstances. Special circumstances, however, may dictate whether or not costs will be awarded. That is a matter of judicial discretion which will be determined by the circumstances of each case.

RULING

[43] Based on the foregoing, the answer to *Question 1* is yes.

[44] Based on the foregoing, the answer to *Question 2* is yes.

RESULT

[45] I have noted the proceedings before the Court are child centred. The Applications were dismissed because, in the circumstances of this case, those are analogous to delay. The Applicant failed to answer Undertakings in a timely manner prior to the trial date. Despite having been given a further two months to rectify his tardiness in answering and to set out his position in an Affidavit rather than having his Applications dismissed outright, he did not respond. In reality, he was given another chance. His failure to do either is both inordinate and inexcusable. The fact that he is in jail may have made that task more difficult, but not impossible, and in any event, the child is not responsible for his problems with the law. It is axiomatic that each chance for the Applicant is one less for the child.

[46] In my opinion there are no terms on which these matters could have been adjourned other than which would, ultimately, seriously prejudice or unduly affect the child. It is not in the child's best interests that the child be compromised by prolonged litigation, which affects

the child despite the protestations of the Applicant, through his counsel, to the contrary. All of these considerations are particularly underlined by what appears to be the unresponsive attitude of the Applicant to his own litigation and to the best interests of the child.

[47] I have also considered, in this case, whether the application of *Rule* 578(4), by analogy, and *Rules* 593(1.1) and (1.2) is contrary to any provisions in either the *CWA* or *PCA* on the dismissal of the Applicant's Applications. In my opinion, there is nothing contrary to that application, and it is practicable to apply those *Rules*. Hence, the Applicant must:

> (a) Obtain leave of the Court to bring new applications for guardianship and access and if granted then:
>
> i) pay security for costs in the amount of $10,000.00;
>
> ii) provide a Release for a Canadian Police Information Check and Child Abuse Registry search; and
>
> iii) provide Answers to outstanding Undertakings and any others arising from those answers or others as a result of the passage of time.

[48] Ordering security for costs in the amount of $10,000.00, in my opinion, is reasonable in the circumstances. This amount reflects the potential of the Respondent's legal fees and disbursements, as well as, in my view, the distinct possibility of an order for costs on a solicitor-client basis. It is not unreasonable to provide generously for the Respondent's future costs on the facts of this case, recognizing that amount may not even adequately reflect the totality of those future costs. The fact that terms have been set in the child's best interests underlines, especially in view of the Applicant's position that he will simply re-file, that the proceedings in this Court are child-centred and the manner in which it will proceed once it is before the Court will be determined by the Court. The Applicant may re-file. He is not being stopped from doing so. However, if he is allowed to proceed, then the conditions, set in the child's best interests, must be met. Alternatively, depending on the circumstances at the time of re-filing, the Applicant may apply to vary the amount of security (*Rule* 598). In any event, the security must be furnished within two months of the filing of any future applications; until the

security is given, those further proceedings are stayed; and in default of the security being given, those actions shall be dismissed.

[49] In summary, it is neither fair to the child nor in the child's best interests to allow, nor tolerate, future litigation absent terms, especially having regard to the fashion in which the Applicant has litigated these proceedings; it is not in the child's best interests that the child's standard of living be compromised when the resources of the Respondent must be used to retain counsel rather than using those resources to meet the needs of the child; and it is not in the best interests of the child that Undertakings remain unanswered and Releases not provided. The child must not be subjected to prolonged litigation, now or in the future, having regard to the particular circumstances of this case.

[50] As the award of costs is in the discretion of the Court, Counsel may set a convenient time to speak to those.

Dated at the City of Calgary in the Province of Alberta this 16th day of July, 2001.

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Nancy A. Flatters
Judge, The Provincial Court of Alberta