Citation: Walton v. Simpson et al
2000 BCSC 0311

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Docket: 09727
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE INHERENT JURISDICTION OF THE SUPREME COURT OF BRITISH COLUMBIA IN THE MATTER OF HABEAS CORPUS AND IN THE MATTER OF THE ***CANADIAN CHARTER OF RIGHTS AND FREEDOMS***, R.S.C. 1998, SECTIONS 7, 9 AND 12 AND IN THE MATTER OF THE ***HABEAS CORPUS ACT***, OF CHARLES II 1679, AND SECTION 2 OF THE ***LAW AND EQUITY ACT***, R.S.B.C. 1998, C. 253

BETWEEN:

JERRY WALTON

PETITIONER

AND:

MARCEL EARL SIMPSON, RONALD ROY POLSON and ROSS DAWSON (DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICES)

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BRENNER

Counsel for the Petitioner:	J.H. Cluff
Counsel for the Respondent, Ronald Roy Polson:	J.M. Galloway
Counsel for the Respondent, Marcel Earl Simpson:	R.E. Peters
Counsel for the Respondent, Ross Dawson (Director of Child, Family and Community Services):	R. N. Hamilton
Place and Date of Hearing:	Prince George, British Columbia February 15 & 16, 2000

INTRODUCTION

[1] This tragic case started with the death of a four-year-old Prince George girl, Amanda Simpson. She was brought to the Prince George Regional Hospital with serious head injuries on October 30, 1999. Within hours of her hospital admission Amanda and her three sisters were removed from their mother's custody by the respondent Ross Dawson pursuant to s. 30 of the ***Child, Family and Community Services Act*** (the "***Act***"). Mr. Dawson is the Director of Child, Family and Community Services.

[2] On November 2 Amanda died from her injuries; on November 4 the Director presented the removal of the three sisters Ashley, Amber and Aimee (the "children") to the provincial court.

[3] The petitioner Jerry Walton is the mother of Amanda and her sisters. The respondent Marcel Simpson is their biological father. The respondent Ronald Polson was living with Ms. Walton in a common-law relationship when Amanda was injured.

[4] The petitioner seeks an order quashing the provincial court proceedings and returning the children to her. She says the provincial court has lost jurisdiction because the Director has failed to comply with the provisions of the ***Act*** which require disclosure and that a protection hearing take

place within 45 days of the apprehension. She also contends that the delay in providing disclosure and a timely hearing infringes her rights under s. 7 of the ***Charter of Rights and Freedoms.*** Her application is supported by both Mr. Simpson and Mr. Polson.

FACTS AND CHRONOLOGY

[5] On January 21, 1999 the petitioner was granted custody and guardianship of the four children. It was a term of that order that Mr. Simpson not interfere with the children or attend any school in which they were enrolled.

[6] Richard King, Child Protection Manager with the Ministry reviewed this family's file. He deposes that between February 1991 and October 30, 1999 the Ministry received 20 reports designated as child protection reports. The reports related to neglect, physical, emotional and sexual abuse. Of the 20 complaints, some were investigated, some were considered supplemental to earlier reports, and some were not investigated to Ministry standards.

[7] In her affidavit the petitioner says she was at work at Humpty's Family restaurant in Prince George when Amanda was injured in the home on October 30.

[8] The Director filed a report to the provincial court on November 4, 1999. It records Polson as stating that Amanda fell in the home at approximately 8:00 pm on October 30. The petitioner reported that she was called at work at 11:00 pm and was told the child wasn't breathing. She says she went home and that she and Polson brought Amanda to the hospital at 11:15 pm.

[9] The Director states that he received a report at 2:05 am on October 31, 1999 that Amanda had been brought into emergency with severe head injuries. The petitioner and Polson claimed that the injury was the result of a fall off a bunk bed. The attending paediatrician examined Amanda and after consultation with another physician concluded that that the explanation given for the child's injuries was not plausible.

[10] The Ministry concluded the children were in need of protection and they were removed into the care of the Director. Because of the severity of her injuries Amanda was flown to Children's Hospital in Vancouver and placed on life support. She died from her injuries on November 2.

[11] On November 4, 1999 the removal of the children was presented to the provincial court. On November 5 the presentation hearing continued. Counsel for the Director advised the court that the ongoing criminal investigation was

placing the Director in an awkward position with respect to information that could be divulged. He advised the court that the director expected that “within the next two weeks the investigation should be concluded, or sufficiently concluded to address this matter in a more enlightened way”.

[12] A social worker with the Ministry then testified that because of the ongoing criminal investigation the police had asked the Ministry to assist them in restricting access for approximately a week. The provincial court was concerned about holding up the mother’s access and the hearing was adjourned to November 8.

[13] At the resumed hearing on November 8 the principal issue was the mother’s access to the children. At p. 13 of the transcript the judge is recorded as saying to petitioner’s counsel: “This is a hearing solely about whether the conditions exist for an apprehension to occur which appears conceded by yourself.” Petitioner’s counsel replied “Yes”.

[14] However later in the proceedings Mr. Cluff referred to the evidence that the mother was not in the home when Amanda was injured. He questioned whether there was any basis for the children not being returned to the mother.

[15] In response the judge offered to have the presentation hearing start over again in front of another judge. He said:" Why don't we just start with a new judge who will simply say that this is a presentation hearing, Director will lead its historical concerns which apparently it has which it wants to lead, you know, and we just start all over and then everybody's at square one." The petitioner declined that suggestion.

[16] After a short adjournment, the court was told that the parties were consenting to an order by which the children would remain in the care of the Director.

[17] On November 9 a case conference pursuant to Rule 2 of the Provincial Court (***Child, Family and Community Service Act***) Rules (the "***Rules***") was scheduled for February 16, 2000.

[18] On December 2, 1999 the parties appeared in provincial court before Hogan PCJ for the commencement of the protection hearing. It was adjourned to December 17 to speak to the issues of disclosure and access.

[19] On December 13 the petitioner's counsel wrote to the Director's counsel requesting disclosure. On December 16 the Director's counsel replied seeking the petitioner's consent to

the release of information and advising that he expected to be able to disclose documents by January 31, 2000.

[20] On December 20 the Rule 2 case conference was re-scheduled to January 25, 2000.

[21] On January 17 the Director's counsel changed to Robert Hamilton.

[22] On January 25 the parties attended a case conference before the trial judge. The issue of disclosure was reviewed as well as the scheduling of the trial. Judge Hogan set a pre-trial conference for February 16 and indicated he would set the trial date and make orders re: disclosure at that time. He also reviewed access between the petitioner and her children.

[23] On February 9 this petition was filed. On February 14 the director delivered approximately 1000 pages of historical documents to opposing counsel.

ISSUES

[24] The petitioner mother is asking this court to step in and to stop the ongoing proceedings in the provincial court commenced three and one-half months ago on the basis that the provincial court has lost its jurisdiction to continue hearing this case. She says that jurisdiction has been lost because of the failure of the provincial court judge to require the

Director to disclose relevant documents and to move the case along in a timely manner as required by the ***Act.***

[25] Her position is that the proceedings have become so inordinately delayed that the legislative scheme in the ***Act*** which contains strict timelines has been frustrated and hence the provincial court proceeding has lost that inherent quality of fairness that in law results in a loss of jurisdiction. The petitioner also says that her s. 7 ***Charter*** rights have been violated.

THE LEGISLATIVE SCHEME

[26] S. 30 of the ***Act*** provides that the Director may, without court order, remove a child if the Director has reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger. If a child is removed under s. 30, the director must, within seven days of the removal, attend the provincial court for a presentation hearing.

[27] S. 37 provides that at the conclusion of a presentation hearing the court must set the earliest possible date for a hearing to determine if the child needs protection subject to certain exceptions which do not apply here. The start date for the protection hearing must be not more than 45 days after the

presentation hearing is concluded. In addition, the protection hearing must be concluded “as soon as possible”.

[28] The foregoing provisions in the statute clearly set out a stringent time line. When a child is removed the Director must justify the removal in the provincial court within seven days and then justify a continuing order at a protection hearing which must start no later than 45 days after the presentation hearing and which must be concluded as soon as possible.

[29] I agree with the petitioner’s counsel that this statutory scheme is time critical. It reflects a clear legislative intention that where a child is removed from its home, that removal and any subsequent protective arrangements are to be justified by the Director in the provincial court along a stringent time line.

HAS THE COURT LOST JURISDICTION BECAUSE OF DELAY?

[30] The requirement in the ***Act*** that the protection hearing start within 45 days of the presentation hearing is routinely met in the provincial court by the practice of starting the protection hearing and then adjourning it until the case is ready to proceed in an orderly fashion. This is what Hogan PCJ did on December 2, 1999 when he started the protection hearing and adjourned it to December 17 to deal with the disclosure and access issues.

[31] While this is the practice it is clear that the provincial court has the discretion to order that a protection hearing commence and continue without interruption to a conclusion. (See ***British Columbia (Director of Child, Family and Community Service) v. B.S.*** [1996] B.C.J. No. 2387.) However while the court has this discretion it is not obliged in every case to make such an order. Ultimately it is for the trial judge in the provincial court to decide how to move the case along in the most effective manner.

[32] I would observe that forcing the case on as was done in the ***B.S.*** case is no guarantee that the protection hearing will be completed any earlier. Collings PCJ presided over the protection hearing in ***B.S.*** He described the effect of the order earlier made in the provincial court requiring him to start the protection hearing and to continue it without a break until it was concluded.

[33] The trial lasted some 36 days over a five month period. In Judge Collings view it took about three times longer than it would have if counsel had had the opportunity to properly prepare. He concluded that in his case “this prodigious outpouring of court time hasn’t speeded resolution up – all it has done is to push the rest of the cases further down the list.”

[34] In my view the provincial court has not lost jurisdiction by virtue of the pace at which this case has proceeded. The protection hearing was convened within the required time limit and is scheduled to continue in a timely fashion. I see nothing in the scheduling directed by Hogan PCJ that fails to conform with either the letter or the intent of the ***Act***.

[35] One of the authorities referred to me by counsel supports this conclusion. In ***British Columbia (Superintendent of Family and Child Service) v. N.A.*** [1983] B.C.J. No. 120 McEachern C.J.S.C. (as he then was) dealt with a case under the former statute. He concluded that the provincial court judge lost jurisdiction when he failed to complete the trial within a reasonable time relative to its length. In ***N.A.*** the child was apprehended on April 23, 1981. The protection hearing commenced June 22, 1982 and took 90 trial days over a 13-month period.

[36] In my view ***N.A.*** illustrates the kind of delay which will result in a loss of jurisdiction; no such delay has occurred in the case at bar.

HAS THE PROVINCIAL COURT LOST JURISDICTION BY REASON OF ITS FAILURE TO REQUIRE TIMELY DISCLOSURE?

[37] There are two broad categories of documents in the case at bar. The first category consists of the historical records

which presumably relate to the 20 complaints involving these children which occurred before Amanda was fatally injured. These documents number some 1000 pages. The Director produced these to the petitioner's counsel on February 13.

[38] The second category are the documents which the Director has been asked to keep confidential by the RCMP and the Attorney-General pending completion of the criminal investigation into Amanda's injuries and death.

[39] The Director has not refused disclosure of any documents in the first category. In addition, the provincial court has never refused to make a document production order, nor has such an order ever been sought.

[40] The protection hearing began December 2 and was adjourned to December 17 to speak to the issues of access and disclosure. On December 13 the petitioner's counsel wrote to the Director's counsel stating "I look forward to receiving the disclosure a soon as possible as this matter is scheduled in Provincial court on December 17, 1999 to speak to the issue of disclosure and access." The Director's counsel replied on December 16 that he expected to be able to disclose documents by January 31, 2000.

[41] On December 17 the parties discussed the case conference which was then scheduled for February 16, 2000. In response to the concerns of petitioner’s counsel Hogan PCJ asked counsel to obtain an earlier date from the trial co-ordinator. That was done. On December 21 petitioner’s counsel wrote to the Director’s counsel stating: "Since this matter is now set for a case conference on January 25, 2000, I look forward to receiving full disclosure from you well in advance of that date."

[42] On January 17, 2000 petitioner’s counsel wrote to the director’s new counsel repeating his request for disclosure prior to the January 25 case conference.

[43] At the January 25 case conference the issue of disclosure was reviewed as well as trial scheduling. Hogan PCJ set a pre-trial conference for February 16 and indicated he would set the trial and make orders with respect to disclosure at that time.

[44] Is there anything in the foregoing which could be said to have caused the provincial court to lose its jurisdiction? I note that Hogan PCJ was never asked to make a disclosure order. Neither does it appear the petitioner’s counsel took objection to the disclosure scheduling directed by the court.

[45] The provincial court’s jurisdiction to order disclosure is set out in the Rules. Rule 2(5)(f) provides that at a case conference a judge may “review the adequacy of disclosure by the parties, including responses to requested for disclosure under section 64 of the Act”. Rule 2(5)(q) provides that the judge "may make any other order or give any direction for the fair and efficient resolution of the issues".

[46] I accept the submission of the petitioner’s counsel that it is not a complete answer to say that no application for a disclosure order was ever made. The court at some point would be required on its own motion to make an appropriate disclosure order even in the absence of a specific application by counsel.

[47] However that point has not been reached in this case. At the January 25 case conference it is clear that Hogan PCJ addressed his mind to the issue: he told the parties that at the next conference on February 16 he would make a disclosure order, presumably if the disclosure were found to be inadequate. I see nothing in the record or the material before me to suggest that the learned provincial court judge has not conducted the proceedings in accordance with the ***Act*** and Rules, much less that it supports a finding that the court has lost jurisdiction.

[48] In none of the cases cited to me did a failure to disclose documents result in a loss of the court's jurisdiction. In ***British Columbia (Director of Family and Child Services) v. T.L.K.*** [1996] B.C.J. No. 2554 the Director was seeking a continuing care order in respect of a seven month old child. On the morning of the hearing the Director produced 130 pages of documents to the parents who then applied for an adjournment due to the untimely disclosure. In his considered reasons Stansfield PCJ set out at paragraph 14 the disclosure principles that ought to guide all parties in CFCSA matters, principles with which I am in respectful agreement.

[49] However in ***T.L.K.*** the child was removed on May 18 and the parties were to start leading evidence at the hearing on October 25. The documents were produced that morning. The remedy was an adjournment. S. 64 of the ***Act*** does set out a remedy for inadequate document disclosure: the offending party may be prevented by the court from relying on the documents during the protection hearing. As stated in ***T.L.K.*** that remedy may prove to be illusory if the documents contain information that the opposing party seeks to rely upon. That was no doubt a factor in his decision to order an adjournment. But it was not suggested in that case that the court had lost

jurisdiction because of the Director's failure to produce the documents.

[50] Counsel for the Director says that even in the context of a criminal proceeding a failure by the Crown to produce documents does not automatically result in a stay of proceedings.

[51] The right to full disclosure in a criminal proceeding is just one component of the right to make full answer and defence. It does not follow that because that disclosure right is violated that the Charter right to make full answer and defence is also violated. In such a case the appropriate remedy for the violation of an accused's right to disclosure is, at trial, an order for production or an adjournment. When a non-disclosure is raised on a conviction appeal, the accused as a threshold matter must establish a violation of the right to disclosure. If he is successful, he bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as the result of the failure to disclose. (See ***R. v. Dixon*** (1998) 122 C.C.C.(3d) 1).

[52] While the importance of adherence to the time limitations in child protection matters is apparent from the provisions of the ***Act,*** the criminal rule, in my view, supports the

conclusion that the learned provincial court judge has not lost jurisdiction by failing to make a disclosure order in this case.

PUBLIC INTEREST IMMUNITY

[53] Prior to this hearing the Director advised the petitioner's counsel that he would not produce any documents that would jeopardize the ongoing criminal investigation into Amanda's death. S. 64 of the ***Act*** requires the Director (as well as all other parties) to disclose fully and in a timely manner the orders he intends to request, the reasons for those requests and his intended evidence. As noted above, the section also provides that failure to do so can result in the evidence not so disclosed being excluded from the hearing.

[54] S. 76 of the ***Act*** provides that any person has the right to be given access to information about that person in the Director's custody or control. S. 77 provides that the Director can refuse to disclose information to a person who has a right of access under s. 76 if the disclosure could "reasonably be expected to jeopardize an investigation under section 16 or a criminal investigation that is under way or contemplated."

[55] The Director says that under s. 77 he is entitled to resist disclosure to the petitioner and the other parties

because to do so would jeopardize the investigation into Amanda's death. If her death was caused by a criminal act, such disclosure might impair the criminal prosecution.

[56] In my view s. 77 does not grant to the Director a general power to refuse disclosure because of an actual or potential criminal investigation. Rather it is a power restricted to those cases where a person seeks to exercise his s. 76 right to access information. The disclosure obligation in s. 64 is broader. It obliges the Director to disclose to the other parties not only what orders he seeks and why, but also his intended evidence.

[57] S. 77 allows the Director to refuse to disclose s. 76 information by reason of a criminal investigation. Nowhere in the ***Act*** is the director given the discretion to refuse to produce s. 64 information, except to the extent that that information can also be characterized as s. 76 information.

[58] At the hearing the Director also advanced a claim of public interest immunity. He asked for directions that either the trial judge or this court rule on this claim. In many civil and criminal disputes documents and information in the possession of the executive branch of government are relevant to the issues. Claims for disclosure can result in a conflict between public interests.

[59] The public interest in the administration of justice is promoted by providing litigants with full access to relevant information. In this case this principle is captured in s. 64 of the ***Act***.

[60] However the public also has an interest in the effective enforcement of the criminal law and in seeing that those who commit criminal offenses are brought to justice. In this case, if Amanda's fatal injuries were caused as the result of a criminal act, there is a compelling public interest in seeing the perpetrator prosecuted effectively to the fullest extent of the criminal law.

[61] There is an active, ongoing criminal investigation. Crown counsel Mitchell D. Houg has reviewed some of the documents in the Director's possession including medical reports, social worker interview notes and investigation reports. He states that: "…disclosing those documents will jeopardise the ongoing investigation into criminal charges in this matter. Specifically, I am of the opinion that information contained in those documents will alert any suspect to sensitive areas of this investigation which will irreparably harm the integrity of the investigation."

[62] So in this case the right of the petitioner to know the case against her as well as the right of the children to have

this matter decided so they can be either returned to their mother or some other disposition made conflicts with the public right to have any criminal prosecution proceed unimpeded.

[63] Public interest immunity is not a form of Crown privilege but rather is a matter that the executive branch is obliged to raise. Indeed if the Director had not raised it in the case at bar, the court itself would be under an obligation to do so. The court must assess the competing interests of confidentiality, when required for legitimate reasons of public concern and the interests of the parties and of the public in general in the proper administration of justice. (See ***S.M.E. v. Newfoundland (Minister of Justice)*** [1995] N.J. No. 172).

[64] In ***Smerchanski v. Lewis*** (1981) 31 O.R. (2d) 705 the Ontario Court of Appeal, in a case where public interest immunity was asserted, directed that the trial judge was to review the documents in question and determine whether, by reason of their contents, public interest immunity should be granted.

[65] In the case at bar there can be no question as to the compelling public interest in seeing the criminal investigation into Amanda’s death proceed without impediment.

In my view the Director's refusal to produce information and documents in his possession relating to Amanda's death to the petitioner and to the other parties pending a judicial determination of the public interest immunity assertion is well founded.

SECTION 7 ***CHARTER*** RIGHTS

[66] Following the decision of the Supreme Court of Canada in ***New Brunswick (Minister of health and Community Services) v. G. (J.)*** (1999) 177 D.L.R. (4th) 124, it is clear that a child custody hearing engages the parent's s. 7 ***Charter*** rights. Counsel for the petitioner mother says s. 7 entitles her to receive adequate disclosure so that she knows the case she has to meet. He says this has not occurred in this case and that, coupled with the delay, this constitutes a violation of her s. 7 rights.

[67] However in my view the time line along which this case has proceeded in the provincial court and the disclosure that has occurred do not contravene the petitioner's s. 7 rights.

[68] An example of the type of delay that will violate s. 7 rights is seen in ***Blencoe v. British Columbia (Human Rights Commission)*** [1998] B.C.J. No. 1092 (B.C.C.A.). In that case the appellate court held that a 30 month delay from the date of complaints to the Human Rights Commission to a hearing on

the merits was far too long when the delay was weighed against the seriousness of the charge. While the judgment of the Supreme Court of Canada on the appeal of this decision is pending, the case is nonetheless instructive as to the type of delay that will give rise to a s. 7 contravention. I am satisfied that no such delay has occurred in the case at bar.

[69] I would also note the point made by the Director's counsel: it is not only the parent whose s. 7 rights are engaged in a child protection case. The s. 7 rights of the children are also engaged.

[70] In this case I have concluded that the mother's s. 7 rights have not been violated. However if I had come to the opposite conclusion, I would have had to weigh the children's s. 7 rights before crafting an appropriate remedy.

DISPOSITION

[71] I conclude that the learned provincial court judge has not lost jurisdiction in this case because of either non-disclosure or delay. Although the s. 7 ***Charter*** rights of both the petitioner and the children are at stake in this proceeding, those rights have not been violated. This matter will be returned forthwith to Hogan PCJ who is seized in order that the protection hearing can proceed on the timetable set by the learned provincial court judge.

[72] When considering the foregoing, one must not lose sight of the most important issue in this case: are Amanda's three sisters at risk in their mother's home? If they are not, they ought to be returned as soon as that determination can be made. If they are at risk, an alternative disposition will be necessary.

[73] During his submission counsel for the petitioner argued that if he were successful in having the provincial court proceedings quashed, he expected that the Director would re-apprehend the children and the proceedings could start afresh. He stated that at the next presentation hearing the mother would contest any custody order in favour of the director. Counsel for the Director in his alternative submission stated that if I were to find a lack of jurisdiction, then the November 8 consent custody order ought to be set aside so that a new presentation hearing could proceed afresh.

[74] However I believe these alternatives would only delay a determination of the issue as to whether these children are at risk. The safety and well-being of these children is what is paramount. I note that s. 99 of the ***Act*** expressly provides that nothing in the statute limits the *parens patriae* jurisdiction of the Supreme Court.

[75] I conclude that my finding that the provincial court has not lost jurisdiction and that the protection hearing should continue in that court is in the best interests of the children. In my view this outcome will produce the most prompt and timely judicial determination as to whether they are in fact at risk in their mother's home.

[76] In returning this matter to the provincial court I do not want to make any orders which would fetter or delay the proceedings. In his submissions counsel for the Director stated that if the claim of public interest immunity was recognized that the proper procedure as outlined in ***Smerchanski*** was for the Director to bring on a formal motion for directions before the trial judge.

[77] In my view the Director should prepare and file his material in the provincial court within 10 days so that the application can be heard by the trial judge without delay. That material should include the affidavit(s) supporting the public immunity claim as well as the documents for which production is resisted by the Director so that they can be reviewed by the trial judge.

[78] Counsel for the director sought directions that either Hogan PCJ or a judge of this court make this determination. S. 37 of the ***Canada Evidence Act*** outlines the procedure where a

claim of public interest immunity is asserted. Where an objection is made before a court, person or body other than a superior court, s. 37(3)(b) provides that the determination is to be made by the superior court.

[79] I did not receive full submissions on whether it is only the superior court that has the jurisdiction of the provincial court to determine this issue. I believe that as the trial judge Hogan PCJ is best situated to determine this matter.

[80] However in order that the public interest immunity claim not unnecessarily delay the protection hearing I would direct that the Director advance the claim before Hogan PCJ. If the learned provincial court judge concludes he is without jurisdiction to determine the issue, the matter may be returned to this court on 48 hours notice for determination by a judge of the Supreme Court.

OTHER

[81] The Director advised that in the event he were successful on this application he would not be seeking costs. Accordingly there will be no order as to costs. On the application of the Director access to this file will also be restricted as is the practice with family cases.

"D. Brenner, J."