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2002 BCPC 0190

Director v. D.L. - CFCSA

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Burnaby

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

**IN THE MATTER OF
THE *CHILD FAMILY AND COMMUNITY SERVICE ACT*, R.S.B.C. 1996 c. 46
AND THE CHILD:**

C. M., born June 25, 1985

BETWEEN:

DIRECTOR OF FAMILY AND CHILD SERVICES

APPLICANT

AND:

D. L.

RESPONDENT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T.J. GOVE**

Counsel for the Director:
Counsel for the Parent:
Place of Hearing:
Date of Hearing:
Date of Judgment:

K. Chen
F. Potts
Burnaby, B.C.
May 21, 2002
May 31, 2002

Background

[1] The Director has made an application for an order under *Child, Family and Community Service Act*, Section 98, for:

(1) A restraining order prohibiting D. L. for a period of six months from contacting or interfering with or attempting to contact or interfere with C. M. or from entering any premises that the said child attends pursuant to Section 98(1) and 98(2)(a); and

(2) An order authorizing a police officer to arrest, without a warrant D. L. if the police officer has reasonable grounds to believe that D. L. has contravened or is contravening the restraining order, pursuant to Section 98(4.1).

[2] The *Child, Family and Community Services Act* provides:

98 (1) *On application, the court may make a restraining order if there are reasonable grounds to believe that a person*

(a) has encouraged or helped, or is likely to encourage or help, any of the following to engage in

prostitution:

(i) a child in care;

(ii) a child in the custody of a person under a temporary custody order;

(iii) a youth who has made an agreement with the director under section 12.2,

(b) has inveigled or coerced, or is likely to inveigle or coerce, a child or youth mentioned in paragraph (a) into engaging in prostitution, or

(c) has otherwise exploited, abused or intimidated, or is likely to otherwise exploit, abuse or intimidate, a child or youth mentioned in paragraph (a).

(2) *In a restraining order under subsection (1), the court may do one or more of the following:*

(a) prohibit the person for a period of up to 6 months from contacting or interfering with or trying to contact or interfere with the child or youth or from entering any premises or vehicle or boarding any vessel that the child or youth attends;

.....

(4.1) *In a restraining order, the court may include an order authorising a police officer to arrest, without a warrant, the person against whom the restraining order is made if the police officer has reasonable grounds to believe that the person has contravened or is contravening the restraining order.*

[3] The hearing of the Director's application is set for June 21, 2002. At the hearing, Mr. L. intends to ask for the application to be dismissed and for costs.

[4] On May 21, 2002, at a pre-trial conference, counsel on behalf of Mr. L. made an application for disclosure, pursuant to Section 64 of the **Act**. Counsel for the Director said that she is withdrawing the section 98 application and submitted, therefore, that there would be no hearing on June 21st and no need for disclosure. Counsel for Mr. L. submits that there is no authority for the Director to withdraw an application under Section 98. He further says that the application stands until June 21, 2002 where, at the hearing, he will ask that it be dismissed, with costs. Counsel submits that it is important to Mr. L. that the application and allegations that support it be dismissed on their merits, not that the allegation of his impropriety be "withdrawn" without a finding of exoneration.

Issues Considered

[5] The issues before me are:

(i) Is the Director able to withdraw an application made under Section 98, prior to a hearing, without the consent of other parties?

(ii) If the application remains for hearing, what disclosure would the respondent be entitled to pursuant to Section 64 of the **Act**.

[6] Most applications under the **Act** are as a result of the removal of a child for protection purposes. The Director is usually applying for an order of custody or supervision. The Director can withdraw from a proceeding pursuant to section 33 of the **Act** after the removal of a child but before a presentation hearing. This is done without a court order. However, once an order is made at a presentation hearing, there is no authority for the Director to withdraw the proceedings. Orders, even by the consent of all parties, require judicial approval.

[7] Section 98 applications are different than any other under the **Act**. They are quasi criminal in nature and procedure. Unlike criminal proceedings, however, there is no mechanism set out for the Director, once an application is made, to withdraw. There is no provision for the Director to enter a stay of proceedings. The **Act**, however, gives some guidance:

2 *This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:*

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) the cultural identity of aboriginal children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner.

66 (1) *A hearing under this Act*

(a) is civil in nature,

(b) may be as informal as a judge may allow, and

(c) must be held at a different time or at a different place from the usual time or place for sittings of the court relating to criminal matters.

(2) *No order under this Act may be set aside because of any informality at the hearing or for any other technical reason not affecting the merits of the case.*

Rule 8 (11) *A judge may give a direction on any procedural matter that is not provided for in the Act or these rules.*

[8] In the absence of specific enactments to the contrary, the Court has the authority to control its own process. The Court could allow the Director to withdraw. If all parties to a proceeding consented, a judge would normally allow an application to be withdrawn, but only if the principles in section 2 were being followed. A judge may not allow an application to be withdrawn, with the resulting effect that the Court would have no jurisdiction or authority over the child, if to do so would place the child at risk. All decisions by the Court in child protection cases are guided by consideration of a child's safety and well being.

Decision

[9] On the facts before me, the application appears to merit a hearing. The allegations against Mr. L. are serious and have effected his ability to do the work that he has done for the past ten years. Other than a hearing under section 98, it would be difficult, if not impossible, for him to clear his reputation. I conclude that the Director cannot withdraw an application under section 98 of the **Act**, without the consent of all parties.

[10] Counsel for Mr. L. has made a request for disclosure pursuant to section 64 of the **Act**. It reads:

64 (1) If requested, a party to a proceeding under this Part, including a director, must disclose fully and in a timely manner to another party to the proceeding

(a) the orders the party intends to request,

(b) the reasons for requesting those orders, and

(c) the party's intended evidence.

(2) The duty to disclose under subsection (1) is subject to any claim of privilege.

(3) Evidence may be excluded from a hearing under this Part if no reasonable effort was made to disclose the evidence in accordance with this section.

The Director, therefore, must disclose the evidence that the Director intends to lead at the hearing. As the hearing is set for June 21, 2002, I conclude that disclosure in a timely manner would require the information to be forwarded to counsel for Mr. L. by June 6, 2002.

[11] The application is adjourned to June 21, 2002 in courtroom 102, 9:30 am Robson Square Courthouse, Vancouver for hearing. I am directing counsel for the Director to consult with counsel for Mr. L. and, one week prior to the June 21, 2002 notify the Judicial Case Manager as to how long counsel expect this hearing to take.

Thomas Gove, PCJ

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