

CANADA / JUDGMENT

J.R.A. v. British Columbia (Attorney General)

2020 BCSC 759

COURT

Supreme Court of British Columbia

DECIDED

21 May 2020

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2020 BCSC 759 J.R.A. v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.R.A. v. British Columbia (Attorney General),

2020 BCSC 759

Date: 20200521

Docket: E1956432

Registry: Prince George

Between:

J.R.A.

Petitioner

And

Attorney General of British Columbia, the Director under the Child, Family and Community Services Act, and the Honourable Judge S. Keyes

Respondents

Before: The Honourable Mr. Justice Tindale

On judicial review from: An order of the Provincial Court of British Columbia, dated June 18, 2019 (A. v. British Columbia (Attorney General) and British Columbia (CFCS), Prince George Registry No. 1649990)

Reasons for Judgment

In Chambers

Counsel for petitioner:

P.D. Leblanc

Counsel for respondent, Attorney General of British Columbia:

K. Chewka

Place and Date of Hearing:

Prince George, B.C.

December 11, 2019

Place and Date of Judgment:

Prince George, B.C.

May 21, 2020

- [1] The petitioner J.R.A. seeks an order in the nature of certiorari setting aside part of the order of the Honourable Judge S. Keyes (the "Hearing Judge") made on June 18, 2019 in the Provincial Court of British Columbia dismissing the petitioner's claim for costs as a remedy pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms.
- [2] The petitioner brings this review pursuant to ss. 2 and 3 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 ("JRPA").
- [3] The respondents are opposed to this relief.

Background

- [4] The petitioner is the biological mother of:
 - (i) A.R.C., born November 2, 2012; and
 - (ii) T.R.P., born August 29, 2014.(the "Children")
- [5] T.P. was the petitioner's spouse. He passed away on July 28, 2017.
- [6] T.P. is the biological father of T.R.P.

History of legal proceedings

- [7] The Children were removed from the care of the petitioner and T.P. on September 13, 2016 pursuant to s. 30 of the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 (the "CFCSA"). The removal was due to an incident of intimate partner violence and substance abuse concerns.
- [8] On November 10, 2016 an order was made by consent that the Children remain in the custody of the Director pending a protection hearing.
- [9] By January 25, 2017 the Children began having unsupervised overnight visits with the petitioner and T.P. under an informal arrangement with the Director.
- [10] On February 6, 2017, the Children were returned to the petitioner and T.P. under an extended family visit. On February 8, 2017 the petitioner, T.P. and the Director entered into a mediated agreement (the "Agreement"), pursuant to CFCSA s. 22, where the Director agreed to seek an order at the next scheduled court appearance, on February 23, 2017, to return the Children to the parents under supervision.
- [11] However, on February 20, 2017 the Director ended the extended family visit between the Children and the petitioner and T.P. because of concerns that the parents were not addressing their alcohol abuse issues. The Children were placed with their maternal grandmother, a four-hour drive from where the petitioner and T.P. lived at the time.
- [12] The petitioner states the Director violated the Agreement by removing the children, failing to provide notice, and failing to provide the petitioner with an opportunity to respond to the Director's decision.
- [13] On January 15, 2018 the petitioner filed a second amended notice of application in the Provincial Court of British Columbia seeking a s. 24(1) Charter remedy as a result of the application of allegedly unconstitutional provisions of the CFCSA (the "Second Application").
- [14] On February 8, 2018 the Attorney General of British Columbia ("AG") filed a notice of application seeking to strike the Second Application (the "First Application to Strike").
- [15] The petitioner filed a response to application in relationship to the First Application to Strike on May 10, 2018.
- [16] On May 22, 2018 the petitioner filed a third amended notice of application in the Provincial Court of British Columbia seeking a s. 24(1) Charter remedy for an alleged s. 7 Charter infringement (the "Third Application").
- [17] On May 28, 2018 First Application to Strike came on for hearing before the Hearing Judge.
- [18] On June 26, 2018 the AG filed an application to obtain an order seeking to summarily dismiss portions of the Third Application ("Second Application to Strike").

- [19] On July 13, 2018 the petitioner filed an application response to the Second Application to Strike.
- [20] On July 17, 2018 the Second Application to Strike came on for hearing before the Hearing Judge.
- [21] The parties did not call any evidence on either May 28, 2018 or July 17, 2018 but rather relied on a number of documents which were marked as exhibits during the hearings.
- [22] On February 11, 2019 an order was made pursuant to s. 54.01 of the CFCSA transferring custody of T.R.P. permanently to the maternal grandmother.
- [23] On May 16, 2019 an order was made pursuant to s. 54.01 of the CFCSA transferring custody of A.R.C. permanently to the maternal grandmother.
- [24] On June 18, 2019 the Hearing Judge pronounced reasons dismissing the relief sought by the petitioner in the Second Application and the Third Application (the "Reasons").
- [25] On August 15, 2019 the petitioner filed a petition seeking a judicial review of the Reasons. On October 22, 2019 petitioner filed an amended petition.
- [26] On October 7, 2019 the respondents filed their response to petition.

The Reasons

- [27] The Hearing Judge dealt with two questions in the Reasons namely:
- 1) Can the Provincial Court make a finding that s. 22 and s. 47 of the CFCSA are unconstitutional in order to grant a remedy of damages and or costs under s. 24(1) of the Charter?
 - 2) Assuming (without deciding) that s. 22 and s. 47 of the CFCSA are valid legislation, and that the actions of the Director, taken pursuant to s. 22 and s. 47 infringe [J.R.A.]'s rights under the Charter, does the Provincial Court have jurisdiction to grant a remedy under s. 24(1) of the Charter, specifically costs and damages?
- [28] The Hearing Judge, in answering the question of whether or not the Provincial Court can make a finding that the various sections of the CFCSA are unconstitutional in order to grant a Charter remedy, stated the following at paras. 16, 18 and 19 of the Reasons:
- [16] The parties agree that the Provincial Court does not have jurisdiction to declare a piece of legislation unconstitutional. The only way the Provincial Court can make a provisional finding of invalidity is to do so while in the course of making a decision on a matter over which the Provincial Court does have jurisdiction. For example, a Provincial Court might make an informal determination that a particular piece of mandatory minimum sentence legislation infringed the Charter, and was therefore invalid, in order to impose a fit sentence on an offender before the Court for a particular offence. Another example might be that a Provincial Court, hearing an impaired driving trial, might be required to make an informal

determination of whether a piece of impaired driving legislation infringed the Charter, in order to decide whether the accused was guilty of the offence as charged.

- [18] The remedy sought (damages and costs) is dependent on the determination of invalidity; that is, the decision sought (to grant damages and costs under s. 24(1) of the Charter) is derived solely from [a] declaration of invalidity. Essentially, in order to apply Lloyd to the case at bar, the Court would have to make a decision to grant a remedy which (if it could be granted at all) could only be granted if the court determines that the legislation is unconstitutional, and which is to be granted to compensate the applicant for the fact that the legislation is unconstitutional. The reasoning is circular. Thus, I find, Lloyd has no application to this case.
- [19] Accordingly, I find that the Provincial Court has no jurisdiction to provisionally declare the impugned sections of the CFCSA to be invalid in order grant a remedy of costs and damages to [J.R.A.] under s. 24(1) of the Charter.
- [29] The Hearing Judge, in answering the question of whether or not the Provincial Court has jurisdiction to grant costs and damages as a Charter remedy, stated the following at paras. 24 and 31 - 34 of the Reasons:
- [24] While I am sympathetic to [J.R.A.]'s plight, the Provincial Court is a Court of statute. The Crown Proceeding Act expressly excludes from Provincial Court jurisdiction any claim for Charter relief against the Government. Clearly Charter damages have been awarded in appropriate cases, like Ward, but such cases have always been heard in Supreme Court. The parties concede that they were unable to find any cases in Provincial Court in which Charter damages were awarded against the government-presumably because the Crown Proceeding Act precludes any such claim.
- [31] [J.R.A.] argues that costs will serve to hold the state accountable for its misconduct in failing to adhere to mediated agreements. However, she has not specified how she was put to additional legal costs as a result of state conduct. Given that she has been provided legal representation by the Legal Services Society throughout the conduct of the child protection litigation, she could have made application, in the course of that proceeding, under s. 55 for access, or under s. 93.1 for a review of the director's actions, with the assistance of her state-funded counsel, but she did not. Since her actual legal costs incurred have been covered by the Legal Services Society, it appears to me that in seeking costs "to hold the Director accountable," she is actually seeking damages, for the very same conduct for which she is seeking damages.
- [32] However, if she is seeking costs, (as in, to cover legal expenses not already covered by the LSS retainer) I assume the costs she is seeking are those associated with pursuing her claim for damages for the alleged breach of her Charter rights. That application has nothing to do with the course of the CFCSA litigation involving her children; [J.R.A.] does not seek a different outcome in the child protection proceedings. Rather, her application stands outside the child protection issues that were the subject of the litigation and instead attacks

the legislation enabling the Director's behaviour or the Director's behaviour in acting under its enabling legislation. If she wishes to obtain an order for future legal representation unavailable through the Legal Services Society, she can make an application for that representation-but that is not the application before me.

- [33] Further, since I have already found that, according to the Crown Proceeding Act, the Provincial Court has no jurisdiction to hear her claim for Charter damages, I fail to see how the Provincial Court would have jurisdiction to award costs for the pursuit of such a claim. In any event, [J.R.A.]'s claims for both costs and for damages are framed as a remedies for the breach of her Charter rights, so in my view, her claim cannot be anything other than "a matter involving the Canadian Charter of Rights and Freedoms." Thus, I find the Crown Proceeding Act is squarely engaged with respect to [J.R.A.]'s application.
- [34] [J.R.A.] argues that, if the Crown Proceeding Act excludes jurisdiction from Provincial Court to hear her application for Charter relief, she is effectively precluded from seeking such relief at all. As an [I]ndigenous woman who lives in poverty, she is among the most disadvantaged of Canadian citizens. She argues that [I]ndigenous women are disproportionately subjected to Child Protection proceedings. She argues that she is incapable of making an application to any Court without legal representation. Since the Legal Services Society does not fund proceedings in both Provincial Court and Supreme Court, she argues that she, and other [I]ndigenous women like her, are effectively precluded from applying to Supreme Court. [J.R.A.] therefore ask this court to find that the Crown Proceeding Act is contrary to the Charter precisely because it denies access to Charter relief in Provincial Court and asks me to decline to apply it. For the reasons given earlier, I find I do not have jurisdiction to declare those sections of the Crown Proceeding Act to be invalid, provisionally or otherwise.

Positions of the Parties

Petitioner

- [30] The petitioner argues that the Hearing Judge committed an error in law in finding that the Provincial Court had no jurisdiction to grant a Charter remedy in CFCSA matters.
- [31] The petitioner states this error was based upon the following three errors of law: 1) the Hearing Judge's finding that the Court was prevented from granting Charter relief by the Crown Proceeding Act; 2) the Hearing Judge did not apply the Supreme Court of Canada's analysis in *R. v. 974649 Ontario Inc.*, [2001] 3 SCR 575 (Dunedin) to determine its jurisdiction to award costs as a s.24(1) remedy; and, 3) the Hearing Judge erred in applying the formulation of the test for Charter costs in the child protection context.

[32] The petitioner abandoned their argument that certain provisions of the CFCSA are unconstitutional for the purposes of this judicial review. The petitioner also did not make any arguments with regard to procedural fairness and as such I will not address that ground for review.

[33] The petitioner says that the appropriate standard of review is correctness. The respondent agrees with this position.

Error 1: Charter relief and the Crown Proceeding Act

[34] Section 5 of the Crown Proceeding Act reads as follows:

- 1) Without limiting section 4 but subject to subsections (3) and (4) of this section, proceedings may be brought against the government in the Provincial Court.
- 2) Subject to this Act, all proceedings against the government in the Provincial Court must be instituted and proceeded with under the Small Claims Act.
- 3) Nothing in this Act extends the jurisdiction of the Provincial Court beyond the jurisdiction available to it under section 3 of the Small Claims Act.
- 4) In a proceeding against the government under the Small Claims Act, the Provincial Court does not have jurisdiction over
 - a) a matter for which notice under section 8 of the Constitutional Question Act is required, or
 - b) a matter involving the Canadian Charter of Rights and Freedoms.

[35] The petitioner argues that the Provincial Court can make an order for costs because the Crown Proceeding Act, R.S.B.C. 1996, c.89 ("Crown Proceeding Act"), correctly interpreted, cannot shield the government from Charter claims in Provincial Court.

[36] The petitioner submits that, when applied to parents in child protection matters who are mostly disadvantaged and disproportionately Indigenous, the principles from the case law support the position that the Crown Proceeding Act may not be used to deny Charter relief in Provincial Court. To do so, would effectively shield the government from judicial oversight for unconstitutional actions.

[37] The petitioner further argues that Crown Proceeding Act s. 5(4)(b) only applies to "proceedings against the government". She submits that her claim in the Provincial Court was not a "proceeding against the government" but rather a claim for costs as a Charter remedy within an existing proceeding to address procedural misconduct by the government.

Error 2: Application of the Dunedin analysis

[38] The petitioner notes that Dunedin stated the following at para 80:

Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Costs awards have a long history as a traditional criminal law remedy

[39] The petitioner submits that the Hearing Judge erred in law in not applying, or incorrectly applying, the Dunedin analysis in determining whether it had jurisdiction to award costs as a Charter remedy. She argues that a correct application would result in a conclusion that the Provincial Court administering the CFCSA can award a remedy of costs under s. 24(1).

[40] A court can grant a Charter remedy if it is a court of competent jurisdiction. A court of competent jurisdiction is a court that possesses (Dunedin, at para. 15):

- i. jurisdiction over the person;
- ii. jurisdiction over the subject matter; and
- iii. jurisdiction to grant a remedy.

[41] The petitioner notes that the issue before the Hearing Judge was the third criteria, whether or not the Provincial Court has jurisdiction to grant a remedy pursuant to the Charter.

[42] The petitioner argues that that the Hearing Judge erred by failing to engage in the "functional and structural" analysis in determining that the Provincial Court in a child protection hearing does not have jurisdiction to make an order for Charter costs.

[43] The petitioner argues that the following factors weigh heavily in favour of a finding that the Provincial Court administering CFCSA is a court of competent jurisdiction to award costs as a Charter remedy:

- i. The Provincial Court's function in a proceeding under the CFCSA is to adjudicate applications involving the removal of children from their parents by the state;
- ii. Costs awards are attaining prominence as a remedy in child protection proceedings;
- iii. If the Provincial Court cannot award costs in CFCSA proceedings it will have no way to control its trial process particularly if the state disregards a parent's Charter rights;
- iv. If a parent cannot bring a Charter remedy in Provincial Court, that would effectively deny many parents access to a remedy;
- v. The Provincial Court in a CFCSA proceeding is structurally a "court" as described in Dunedin; and
- vi. Provincial Court Judges administering the CFCSA will be able to determine appropriate costs awards.

Error 3: Formulation of the test for Charter costs

- [44] The petitioner argues that the Hearing Judge erred in law in its formulation of the test for Charter costs in relationship to the child protection context. The petitioner says that the breach of the Agreement and transfer of the Children to another community destabilized the parents and undermined their prospects for return of the children to their care.
- [45] The petitioner therefore submits that the Hearing Judge erred in restricting the availability of Charter costs as a remedy.
- [46] The petitioner submits that it was particularly important that the Hearing Judge be able to respond to procedural misconduct concerning the Agreement. Mediated agreements play a central role in child protection proceedings.
- [47] The petitioner says that there is no precedent in establishing a specific test for Charter costs in child protection proceedings. The petitioner argues that it should be less difficult to access costs awards in the child protection context because there are no other tools for the court to provide remedies for misconduct by the state in these cases. They point to Dunedin, where the Court states the purpose of s. 24(1) remedies of costs are to discipline and discourage procedural misconduct in the course of a proceeding (at paras. 80-81).
- [48] The petitioner argues that the Hearing Judge erred in law by finding that a remedy of Charter costs is only narrowly available to specific types of state misconduct (e.g. lack of disclosure), and to where there are expenses incurred, which would not have been, but-for the impugned behaviour of the government in the litigation. The petitioner says costs are available regardless of the other party has been put to an additional expense.

Respondents

- [49] The respondents argued that the Hearing Judge was correct in finding that the Provincial Court does not have jurisdiction to order Charter relief in the form of costs or damages.
- [50] The respondents agree that the standard of review is correctness. The respondents say this is because the petitioner's issues on this application are of central importance to the legal system which fall outside the Hearing Judge's specialized expertise.
- [51] The respondents note that the only question for review is whether or not the Hearing Judge had jurisdiction to grant Charter costs or Charter damages pursuant to s. 24(1) of the Charter.
- [52] The Hearing Judge correctly found that the actions of the Director, for which the petitioner was seeking Charter relief, were not conduct in the litigation.

Crown Proceeding Act properly limits jurisdiction

- [53] The respondents argue that the Hearing Judge was correct in concluding that she lacked jurisdiction to hear the petitioner's claim for Charter relief. The respondents say that the Crown Proceeding Act limits the jurisdiction of a Provincial Court from pursuing a Charter claim against the government, but the petitioner could have pursued her claim before a court with the requisite jurisdiction. The Hearing Judge correctly decided this issue at para. 24 of the Reasons.

Charter costs not available

- [54] The respondents argue that the Hearing Judge was correct in finding that the Provincial Court did not have jurisdiction to grant Charter costs in a child protection matter under the CFCSA. They state the Hearing Judge correctly distinguished the cases relied upon by the petitioner for the proposition that Charter costs are available.

Test for jurisdiction applied properly

- [55] The respondents argue that a court of competent jurisdiction must meet the test in *Mills v. The Queen*, [1986] 1 S.C.R. 863. A court of competent jurisdiction is one that possesses jurisdiction over the subject matter, jurisdiction of the person, and jurisdiction to grant the remedy.
- [56] The respondents concede that the Provincial Court possesses jurisdiction over the subject matter and jurisdiction over the person, however, they argue that the Provincial Court does not have jurisdiction to grant the remedy sought by the petitioner.
- [57] In *Dunedin* the court considered the third part of the test in *Mills* and stated the following at paras. 50 - 52:
- [50] Although this holding disposed of the specific issue on appeal in *Mills*, McIntyre, Lamer and La Forest JJ. proceeded to consider the availability of Charter remedies in the criminal process more generally, both at the preliminary inquiry and at trial. Here functional and structural concerns dominated. McIntyre, Lamer and La Forest JJ., in defining the remedial jurisdiction of criminal courts under s. 24(1), were predominantly concerned with identifying the arsenal of remedies that would best fulfil the function of the provincial criminal court, as a court of first instance, without straining its competence as an institution.
- [51] In this regard, the function of statutory criminal courts in the broader criminal justice system was a paramount consideration. As McIntyre J. observed, "most of the criminal work at first instance is done in these courts, therefore most of the applications for a remedy under s. 24(1) of the Charter will be made to them" (p. 955). He emphasized the need for complete resolution, wherever possible, at the trial level, where the court is best situated to rule on Charter issues arising before it and to fashion appropriate and just remedies. This

role, in his [p. 601] opinion, demanded an expansive remedial jurisdiction for statutory criminal courts under s. 24(1), unconstrained by the lesser array of remedies they might enjoy under statute. In his words, "[a] claim for a remedy under s. 24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process" (p. 955). He contemplated resort to the Superior Court of the province for a Charter remedy only where prerogative relief is sought.

- [52] The only limit McIntyre J. placed on a statutory criminal court's "power to grant the remedy sought" under s. 24(1) was that imposed by the constitutional division of powers: "[s]uch remedies must remain within the ambit of criminal powers" (p. 955). One finds no requirement in McIntyre J.'s reasons that the statute under which the court is acting expressly authorize the remedy sought, or empower the court to order remedies of the same "type". Rather, the emphasis is on creative and complete resolution at the trial level. To this end, he contemplated the widest possible discretion in provincial trial judges to fashion appropriate and just remedies, circumscribed only by the requirement that these remedies fall within the criminal sphere. It is in this manner that the function of the court, as a criminal court of first instance, is best fulfilled.
- [58] The respondents submit that the function of the Provincial Court in CFCSA matters precludes it from granting Charter costs. The purpose of the Provincial Court in child protection matters is to protect the child and consider their best interests. It is not the function of the Provincial Court to compensate parents whose rights may have been infringed.

Conduct at issue not part of litigation

- [59] The respondents state that the Director's impugned conduct was the decision to end an extended visit with the parents, and that this did not arise in the context of the child protection litigation. Therefore, it was not linked to the Provincial Court's ability to control its own processes.
- [60] The respondents argue that the Director is statutorily required to act in the best interests of the child and exposing the Director to liability for costs in future litigation proceedings would affect the Director's ability to carry out these public functions.
- [61] The respondents' position, therefore, is that that the Hearing Judge correctly applied the factors in Dunedin to conclude that the Provincial Court did not have jurisdiction to grant Charter costs.
- [62] Additionally, in the application of the "structural and functional" analysis, the respondents argue that the structure of the Provincial Court supports a finding that is a court of competent jurisdiction; however, it is the function of the Provincial Court that would negate such a finding. In that regard, the respondents say the following factors are important to that analysis:

- i. The Provincial Court's mandate to consider the best interests of the child;
 - ii. the nature of the legislative scheme of the CFCSA;
 - iii. workload considerations;
 - iv. no cost provisions in the CFCSA; and
 - v. the cost claim by the petitioner is ancillary to the child protection proceedings.
- [63] The respondents argue that the petitioner's claim for Charter costs was a "freestanding" cost claim.

Decision

Standard of Review

- [64] Both the petitioner and the respondents agree that the applicable standard of review is correctness.
- [65] I agree that the question as to whether or not the Provincial Court has jurisdiction to grant Charter relief in CFCSA matters is of central importance to the legal system as a whole and requires the courts to provide a greater level of legal certainty than a reasonableness review allows.
- [66] The question as to whether or not the Provincial Court has jurisdiction to grant Charter relief in CFCSA matters requires a uniform and consistent answer because of the significant impact on the administration of justice as a whole when determining parental rights in a CFCSA matter.
- [67] The applicable standard of review on this hearing is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 58 - 62.

Did the Hearing Judge err in finding that the Crown Proceeding Act prohibits the Provincial Court from granting Charter relief?

Crown Proceeding Act is not a shield

- [68] The petitioner argued that the Crown Proceeding Act cannot be used to shield the government from Charter damages. The petitioner also argued that in the specific context of a child protection hearing parents would not have the resources to commence a separate action in a superior court.
- [69] The Crown Proceeding Act does not shield the government from Charter claims. It does however limit the jurisdiction of the Provincial Court. It does not preclude an applicant from pursuing an action in the Supreme Court of British Columbia.

- [70] The Hearing Judge came to this conclusion at para. 24 of the Reasons. The Hearing Judge acknowledged that Charter damages have been awarded in appropriate cases though they are heard in the superior courts.
- [71] In my view the Hearing Judge was correct in this regard. It was open to the petitioner to seek Charter relief in the Supreme Court of British Columbia.

Proceedings against the government

- [72] The petitioner argued that their application for Charter costs was brought as part of ongoing litigation, and therefore was not a proceeding against the government. Thus, they say that s. 5(4)(b) of the Crown Proceeding Act, limiting the Provincial Court's jurisdiction does not apply here.
- [73] The petitioner brought their applications before the Hearing Judge for Charter damages and costs based on the Director's decision to terminate the extended visit with the Children despite the Agreement which had been mediated by the parties.
- [74] The Director has the authority and obligation pursuant to the CFCSA to terminate visits if it is in the best interests of the Children. The visits with the Children were cut short because of concerns that arose after the Agreement was mediated.
- [75] In the circumstances of this case the petitioner's complaints relating to the Agreement were separate and distinct from the child protection litigation.
- [76] The impugned behaviour of the Director did not, for instance, relate to a lack of disclosure or failing to give notice regarding the litigation.
- [77] The finding of the Hearing Judge that the petitioner's applications were not part of the ongoing litigation was correct.

Did the Hearing Judge err in concluding that the Provincial Court does not have jurisdiction to grant Charter costs?

Charter costs and the CFCSA

- [78] The petitioner argued that it is settled law that the Provincial Court can grant costs as a s. 24(1) remedy. In that regard the petitioner relied in part on the decision in *Director v. L.*, 2009 BCPC 293.
- [79] The *Director v. L.* is a decision where parents in a CFCSA matter were granted an order appointing counsel for a continuing custody hearing. This was a remedy granted within an existing proceeding.

- [80] In my view this case is distinguishable from the case at bar because, in that case, and the other cases relied on by the petitioner which were reviewed in the Reasons, the costs were awarded as part of the trial court's obligation to control its own processes. That was not the nature of the petitioner's applications before the Hearing Judge.
- [81] The petitioner's applications before the Hearing Judge for Charter relief based on the impugned actions of the Director in ending the extended visit with the Children was a separate proceeding and it did not involve the Provincial Court controlling its own processes.

Dunedin and test for jurisdiction to award Charter costs

- [82] The petitioner argued that the Hearing Judge did not apply, or alternatively, incorrectly applied, the Dunedin analysis in determining whether the Provincial Court had the jurisdiction to make an order for costs as a Charter remedy in a child protection proceeding.
- [83] In applying the three factors from Dunedin the parties do not disagree that the Provincial Court in this case had jurisdiction over the person and over the subject matter. However, they disagree as to whether or not the Provincial Court has jurisdiction to grant the remedy requested.
- [84] The Supreme Court of Canada in Dunedin provided guidance on the third element of the Mills test at para's 43 - 45 (emphasis in original):
- [43] The content of the "functional and structural" approach may also require elaboration. Framed broadly, this test asks whether the court or tribunal in question is suited to grant the remedies sought under s. 24 in light of its function and structure. The assessment is contextual. The factors relevant in the inquiry and the weight they carry will vary with the particular circumstances at hand. Nonetheless, it is possible to catalogue some of the considerations captured under the general headings of "function" and "structure".
- [44] The function of the court or tribunal is an expression of its purpose or mandate. As such, it must be assessed in relation to both the legislative scheme and the broader legal system. First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy sought under s. 24(1) frustrate or enhance this role? How essential is the power to grant the remedies sought to the effective and efficient functioning of the court or tribunal? Second, what is the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of Charter rights?
- [45] The inquiry into the structure of the court or tribunal relates to the compatibility of the institution and its processes with the remedies sought under s. 24. Depending on the particular remedy in issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial: the role of counsel: the applicability or otherwise of traditional roles of proof and evidence: whether the court or tribunal can issue

subpoenas: whether the evidence is offered under oath: the expertise and training of the decision-maker: and the institutional experience of the court or tribunal with the remedy in question: see *Mooring*, supra, at paras. 25-26. Other relevant considerations may include the workload of the court or tribunal, the time constraints it operates under, its ability to compile an adequate record for a reviewing court, and other such operational factors. The question in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedies sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.

- [85] The petitioner and the Director entered into the Agreement pursuant to s. 22 of the CFCSA. The petitioner says costs are required so that the court can hold the state accountable when there is procedural misconduct in relationship to mediated agreements.
- [86] The role of the Provincial Court in CFCSA matters is to make orders for the protection of children, taking account the children's best interests. Costs awards are made to address the parties conduct within the litigation hearing itself. In the case at bar the petitioner was seeking damages and costs in relationship to the Agreement which was not part of the litigation proceeding.
- [87] The Provincial Court hears all of the CFCSA matters in the province. In my view, to require the Provincial Court to hear applications for costs awards in CFCSA matters, which are not directly related to the Provincial Court's ability to control their proceedings, would impede the Provincial Court's intended function in these matters. Mediated agreements are not proceedings within the Provincial Court's function or control. The Director's actions and decisions that violate the rights of the parties in relation to these agreements are properly subject to judicial review in the superior courts.
- [88] The Hearing Judge was correct to conclude that costs awards made in the Provincial Court should be a result of the court controlling its own process, or for making orders for legal representation for participants in CFCSA matters which are underway.
- [89] Neither of these circumstances existed in the context of the petitioner's applications before the Hearing Judge.
- [90] The Hearing Judge stated the following at para. 28 of the Reasons:
- [28] [J.R.A.] also points to an award of costs made against a social welfare agency for failing to comply with their statutory obligations regarding timely disclosure in *NCNFCS & ANCR v. KB 2018 MBCA 1*. I note, however, that this case was heard and decided in the court of Queens Bench (not Provincial Court) and costs were awarded specifically for [a] failure to comply with specific statutorily mandated timelines which affected the father's ability to conduct the litigation involving the children-which is not the case here. [J.R.A.]'s claim is that the fact that the Director interrupted the access visit violated her Charter rights, but she does not argue that it affected her ability to proceed in the litigation regarding the children.

- [91] I agree with the petitioner that a costs award cannot be limited to parents who have paid out-of-pocket expenses for the litigation and I also agree that costs awards are used to dissuade the state from procedural misconduct. However, costs awards made by the Provincial Court in CFCSA matters must relate to impugned conduct within the ongoing litigation that relate to the court's ability to control its own trial processes.
- [92] The Hearing Judge was correct to dismiss the petitioner's application for costs based on the factual circumstances of this case.

Conclusion

- [93] For all of the above noted reasons the petition is dismissed.

"The Honourable Mr. Justice Tindale"

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Prepared on 26 October 2026 · Esheria