

CANADA / JUDGMENT

Lewis v. Eaton

2023 BCCA 338

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 338 Lewis v. Eaton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lewis v. Eaton,

2023 BCCA 338

Date: 20230811

Docket: CA49032

Between:

Roger Henry Lewis

Appellant

(Plaintiff)

And

Alaina Susanne Eaton

Respondent

(Respondent)

Before:

The Honourable Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

April 13, 2023 (Lewis v. Eaton, Vancouver Docket E203164).

Oral Reasons for Judgment

Counsel for the Appellant:

J.M. Reid

J.M. Duncan

Counsel for the Respondent:

J.M. Werb

Place and Date of Hearing:

Vancouver, British Columbia

August 11, 2023

Place and Date of Judgment:

Vancouver, British Columbia

August 11, 2023

Summary:

The separated father and mother had a consent order with equal parenting time for their child, and were managing shared parenting fairly well. Some time later the mother's lawyer sent the father's lawyer two letters stating that the letters were notice of intended relocation. However, the first notice did not contain the date of the move as required by s. 66 of the Family Law Act and the second notice said it was to be "immediate". The father's lawyer did not forward the letters to the father but belatedly told the father he needed to bring a motion to object if he objected to the relocation. The father immediately filed a motion to contest the removal of the child, within the 30 days of the second notice. During the hearing in Provincial Court, the mother's lawyer told the judge that the mother fulfilled her notice obligations under s. 66 of the Family Law Act and was legally entitled to relocate the child since the father had not responded in time. The judge simply accepted this incorrect submission, and without considering the father's objections or the best interests of the child, issued the relocation order. This allowed the mother to move the child an approximately 12 hour drive away from the father. The relocation made it difficult for the father to exercise parenting time, impacting the relationship between the child and her father and impeded the child's connection to her Indigenous community. The father filed a notice of appeal of the relocation order in BC Supreme Court but did not proceed in a timely way with the appeal. More than two years later, he applied for an extension of time to take further steps in the appeal. The chambers judge dismissed the application, citing the passage of time since the relocation and the ability of the parties to return to Provincial Court to address any contested parenting arrangements.

Held: Leave for appeal dismissed. The father's underlying appeal challenging the relocation order itself has strong merits given that the Provincial Court judge did not permit the father to make submissions opposing the relocation, the judge did not inquire into the child's best interests, and simply imposed the relocation order based on the erroneous submissions of counsel for the mother. Nevertheless, the current application is for leave to appeal the Supreme Court chamber judge's denial of the application to extend time to prosecute the appeal, not the relocation order. The interests of justice are difficult to balance here but, ultimately, favour not granting leave. The father is Indigenous and a diligent parent who experienced great injustice from the relocation proceedings and wishes to share time and his rich heritage with his child. On the other hand, the child has lived in the new location for almost two and a half years and the father's delay in prosecuting the appeal raises real practical problems. Any court granting a remedy will need to consider the child's present circumstances and both parents' circumstances since the move. This will require evidence and findings of fact and will be best determined in a trial court rather than in an appeal proceeding. While leave is not granted, there is no prejudice to the father in seeking a change in the parenting arrangements in Provincial Court. Many material changes in circumstances have taken place since the original consent order that provided for equal shared parenting, and given that the relocation order was made without any consideration of the child's best interests or what parenting arrangement would be suitable, a Provincial Court judge will not be entitled to make presumptions that increase the burden of proof on the father to seek changes to the present parenting arrangements, in the best interests of the child.

GRIFFIN J.A.:

Overview

- [1] Mr. Lewis, the applicant and the father of the child, seeks leave to appeal a decision of the Supreme Court Chambers judge made April 13, 2023 (the "SC Decision"). The SC Decision dismissed his application for an extension of time to file necessary documents in order to proceed with his appeal of a Provincial Court judge's order that allowed the respondent and the mother of the child, Ms. Eaton, to relocate with the parties' child. Currently the child is approximately 10 years' old.
- [2] The Provincial Court decision was made November 20, 2020. It allowed Ms. Eaton to relocate with the parties' child to Houston, BC. I will refer to it as the Relocation Order.
- [3] After obtaining the Relocation Order, Ms. Eaton moved with the child to Telkwa, BC, which is close to Houston, in December 2020. It is approximately a 12-hour drive from where Mr. Lewis lives and is often undriveable in the winter. Prior to the move, Mr. Lewis exercised his rights to equal parenting time with the child pursuant to a consent order. Since the move, his parenting time has been severely curtailed.

- [4] The Relocation Order was made without any discussion of the child's best interests or hearing from Mr. Lewis as to his reasons for opposing the relocation. Rather, the decision was made on the judge's acceptance of Ms. Eaton's lawyer's submissions that Mr. Lewis had received proper formal notice of the desire to relocate, pursuant to s. 66 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], more than 30 days prior to the hearing, and had not applied to oppose the relocation, and so had lost all opportunity to do so pursuant to s. 68 of the FLA.
- [5] On December 10, 2020, Mr. Lewis filed an appeal of the Relocation Order in BC Supreme Court. His filing of the appeal was within the required time limits.
- [6] However, Mr. Lewis did not move forward with the appeal in accordance with the time limits in the Standard Directions for Appeals from Provincial Court--Family Law Act, FPD #10 (the "Standard Directions"). When he did decide to move forward with the appeal, he was required to seek an extension of time to do so. In February 2023, Ms. Eaton was served with the application for extension of time. It was this application for an extension of time that was dismissed in April 2023 by the SC Decision.
- [7] Mr. Lewis gives several reasons for his delay in moving forward with the appeal. He was self-represented, did not fully understand his rights, tried to challenge the relocation (unsuccessfully) in subsequent Provincial Court applications, and for a long time did not have the financial means to hire a lawyer, as his employment and finances were in part affected by the pandemic.
- [8] Mr. Lewis seeks to persuade this Court that, despite not moving forward with the appeal in a timely way, because of the errors and serious injustice that occurred when the original Relocation Order was made, he should be permitted leave to appeal the SC Decision that denied him an extension of time to proceed with his appeal.
- [9] I turn now to a more detailed background.

Background

- [10] Mr. Lewis and Ms. Eaton were in a relationship and lived together in Squamish from November 2012 until they separated in September 2017. The child was born in late 2012 and lived in Squamish, BC from her birth until December 2020 when she moved with her mother to Telkwa, BC.
- [11] Mr. Lewis is a special projects superintendent of forestry who currently lives in Squamish while Ms. Eaton is a farmer who lives in Telkwa.
- [12] Mr. Lewis is Indigenous and a member of Squamish Nation. The child often stayed with her Indigenous grandmother in Squamish, and they appeared to have a close relationship.
- [13] Ms. Eaton (who is not Indigenous) eventually re-partnered and had another child with her spouse, and Mr. Lewis also re-partnered with his spouse who has two children.

The Consent Order

- [14] Mr. Lewis commenced family law proceedings in Provincial Court.
- [15] On January 14, 2019, Judge Oulton made a consent order in that proceeding (the "Consent Order"). The Consent Order detailed a parenting agreement with both Ms. Eaton and Mr. Lewis sharing generally equal parenting time with alternating weeks in each parent's care. One of the terms of the Consent Order was that the parties would attempt to resolve parenting disputes using a jointly-retained parenting coordinator or mediator if they could not come to an agreement.
- [16] In coming to the Consent Order, Mr. Douglas Chiasson was Mr. Lewis's lawyer and Ms. Karen Redmond was Ms. Eaton's lawyer.
- [17] The parties continued in a shared parenting arrangement according to the Consent Order. There were occasional disputes, particularly after the COVID-19 pandemic began in 2020. From Mr. Lewis's perspective, Ms. Eaton took advantage of his expressed concern about the health of his other vulnerable family members by withholding the child from him on the ostensible grounds that she was protecting his family, even though he had not asked for her to do this.
- [18] After the pandemic began, Mr. Lewis moved to a home in Chilliwack with his partner on a part-time basis for work purposes but continued to exercise his parenting time with the child. This arrangement did not appear to impact Ms. Eaton's own parenting time with the child.

The Relocation to Telkwa

- [19] On September 10, 2020, Ms. Redmond sent Mr. Chiasson a letter stating that Ms. Eaton intended to relocate with the child to Houston, BC, where she wanted the child to primarily reside and attend school. The letter stated it was notice pursuant to "Rule 66 [sic] of the Family Law Act".
- [20] Presumably Ms. Redmond intended the letter to be notice as required by section 66 of the FLA.
- [21] Relevant sections of the FLA are ss. 66 and 68, which provide:

Notice of Relocation

66 (1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with the child at least 60 days' written notice of

- (a) the date of the relocation, and
- (b) the name of the proposed location.

- (2) The court may grant an exemption from all or part of the requirement to give notice under subsection (1) if satisfied that
- (a) notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or
 - (b) there is no ongoing relationship between the child and the other guardian or the person having contact with the child.

Child may be relocated unless guardian objects

68 If a child's guardian gives notice under section 66 [notice of relocation] that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.

[Emphasis added.]

- [22] Contrary to the requirements of s. 66, the notice did not contain the date of the proposed relocation. Further, Ms. Eaton ultimately moved to Telkwa not Houston, although is not a strong argument as to a deficiency in the notice since the two communities are in close proximity.
- [23] Ms. Redmond wrote to Mr. Chiasson again on October 26, 2020. Clearly, she did not know whether Mr. Chiasson had provided the September 10 letter to Mr. Lewis, because she asked if he had done so. Ms. Redmond attempted to recharacterize her earlier letter, describing it as notice of her client's "immediate intention to relocate to Houston" and added that "this" was notice pursuant to s. 66 of the FLA.
- [24] There was some indication that, in the meantime, Mr. Lewis learned that Ms. Eaton wanted to move, as he told her he did not agree with it. But he says he was not given Ms. Redmond's letters. His evidence is consistent with an email that Mr. Chiasson sent him on November 18, 2020.
- [25] In his email to Mr. Lewis on November 18, 2020, Mr. Chiasson indicated that Ms. Redmond had been asking if he represented Mr. Lewis, and he needed instructions and had not been able to tell her whether he did so. He then advised that Ms. Eaton had:

started the process to apply for the rights to move with [the child]. You need to contact me immediately if you oppose this as an application must be started in Provincial Court to deal with this, otherwise, if we do [n]ot apply, she will be free to leave.

- [26] There are two important points to take from Mr. Chiasson's email, which have not been refuted. One is that he had not confirmed with Ms. Redmond that he had instructions to represent Mr. Lewis on the relocation issues. The second is that this was the first time he told Mr. Lewis that a process to move the child had been started and, if opposed, a response was needed.
- [27] Mr. Lewis says he then tried to get in touch with Mr. Chiasson but was unable to reach him.
- [28] That same day, Mr. Lewis filed his own notice of motion in Provincial Court to deal with parenting arrangements. He ticked a box seeking "an order that a person not remove, or that a person be allowed to remove, a child from a geographical area". He also indicated that he wanted to enforce the existing Consent Order. The context of both make it clear that this was an application opposing the relocation, as new counsel for Ms. Eaton now acknowledges on the present application.
- [29] Technically, no notice pursuant to s. 66 had properly been given because no date for the relocation had been indicated in either one of Ms. Redmond's letters, even if one was to say that Ms. Redmond's letter to Mr. Chiasson was notice to Mr. Lewis. Reading Ms. Redmond's letters generously, it was not until the October 26, 2020 letter to Mr. Chiasson that the timing of an "immediate" relocation was mentioned and so at best that would be the first time "notice" compliant with s. 66 might be considered given. Mr. Lewis filed his application well within 30 days of October 26, when he filed his application on November 18, 2020. Mr. Lewis, therefore, has a strong argument that he complied with s. 68 of the FLA.
- [30] On November 20, 2020, Mr. Lewis and Ms. Redmond appeared by telephone before the judge in the Provincial Court. The judge heard submissions from Ms. Redmond that proper notice of relocation was sent to Mr. Chiasson and that Mr. Lewis did not respond in accordance with the FLA. Ms. Redmond was relying on the September 10 letter as notice and did not advise the court of its deficiencies. Ms. Redmond suggested that, because Mr. Lewis knew of Ms. Eaton's desire to move, that was enough to prove formal notice had been given, and he was in default in responding. Ms. Redmond did not take the Court to Mr. Lewis's form of motion seeking an order that opposed a move of the child.
- [31] Mr. Lewis tried to explain to the judge that Mr. Chiasson did not give him the notice, but the judge told him that was something he could take up with the Law Society. Accepting without any further inquiry Ms. Redmond's submissions that proper notice had been given and no proper response opposing relocation had been received, the judge simply approved Ms. Eaton's relocation. The judge made no inquiry about the best interests of the child and did not allow Mr. Lewis to make submissions opposing the relocation. The judge told Mr. Lewis, over his objections, that Ms. Eaton "is leaving, sir. She is entitled to do so at law. She complied with the statutory requirements". The judge accepted that no parenting arrangement based on the relocation had been proposed by Ms. Eaton but left it to Ms. Eaton to propose one in the future.

- [32] Thus, it was that in the space of a few rushed minutes over the telephone, everything changed in Mr. Lewis's relationship with his then almost 8 year old daughter, without him having any chance to speak against it and creating uncertainty as to what parenting arrangements would be made in the future. Mr. Lewis had been an active co-parent of his daughter since birth.
- [33] On November 25, 2020, Ms. Redmond sent the proposed parenting plan to Mr. Lewis. The plan allowed him one weekend every month of parenting time (without taking into account the long drive) and both spring break and Christmas to be divided equally. This was a vast reduction of the fairly equal parenting time that Mr. Lewis had previously enjoyed under the Consent Order. There was no suggestion that Mr. Lewis should be compensated for the loss of time with the child during the school weeks by giving him extra time during the holidays.
- [34] I should add that Mr. Lewis subsequently did make a complaint against Mr. Chiasson to the Law Society. Mr. Chiasson has been professionally sanctioned by the Law Society in relation to other matters, including neglecting other clients and failing to respond to their communications. Nevertheless, Mr. Lewis's counsel does not rely on any alleged failings of Mr. Chiasson. She considers it would be an unnecessary distraction to do so because there already exists obvious errors in the making of the Relocation Order and the hearing was manifestly unfair to Mr. Lewis.
- [35] At the end of 2021, Ms. Eaton sold her townhouse in Squamish. She did so, she says, after waiting for a period of time to see if the appeal would be advanced. She says it will be very difficult to get back into the real estate market there at this date. Ms. Eaton is apparently living with her spouse and the two children rent-free on a farm property owned by her spouse's parents, in Telkwa.

Post-Relocation Parenting

- [36] There were parenting issues after the Relocation Order and no satisfactory resolution of them from Mr. Lewis's perspective. He considers that Ms. Eaton has thrown obstacles in his way when he has sought increased time and contact with his child. He also considers that Ms. Eaton has not paid due heed to his desire to share his Indigenous heritage with the child.

The Appeal

- [37] As mentioned, on December 18, 2020, Mr. Lewis filed an appeal of the Relocation Order in BC Supreme Court. Because he did not proceed in a timely way, he gave notice in February 2023 of his application to extend time for subsequent filings that were due in the appeal.
- [38] The Supreme Court judge dismissed the application. His reasons for judgment were brief, as follows:

- [1] Ms. Eaton's application to adjourn Mr. Lewis' application is dismissed. In other words, the application of Mr. Lewis, which is in his notice of application filed February 17, 2023, can proceed at this time.
- [2] However, I deny Mr. Lewis' application on its merits. In my opinion, given the 25-month delay, and the fact that the appeal is now academic because it involves parenting time for a girl who is now 10, and the order in question was made in 2020, the chance of the appeal succeeding is remote.
- [3] Today's ruling is without prejudice to the rights of both parties to seek or oppose parenting time in the Provincial Court, where, I am advised, proceedings have been commenced and can be revived.
- [4] Mr. Werb, as counsel for Mr. Eaton, accepts that today's ruling is without prejudice to any Provincial Court parenting time applications by either party.

[Submissions re costs]

- [5] Under the rules, as you know, costs are supposed to follow the outcome. And that provision is stated in compulsory terms. I order total costs and disbursements, for all proceedings in this Court to this point, of \$1,000, payable by Mr. Lewis. Thank you.

[Emphasis added.]

- [39] I now turn to the test on a leave to appeal application.

Leave to Appeal

- [40] The legal test for an application for leave to appeal requires the consideration of four factors:

- a) the significance of the appeal to the practice;
- b) the significance of the appeal to the action;
- c) the merit of the appeal; and
- d) the potential for delay of the action.

Raiwal Holdings Ltd. v. Fraser Valley Packers Inc., 2023 BCCA 46 at para. 18; Chemainus Gardens RV Resort Ltd. v. British Columbia (Attorney General), 2020 BCCA 298 at paras. 41-44 (Chambers). The onus is on the appellant to establish that leave should be granted: British Columbia Teachers' Federation v. British Columbia (Attorney General), 4 B.C.L.R. (2d) 8, 1986 CanLII 1089 (B.C.C.A.) at para. 5 (Chambers). Even where the criteria have been met, leave may still be denied where it is not in the interests of justice: Movassaghi v. Aghtai, 2010 BCCA 175 at para. 27 (Chambers).

- [41] In the circumstances of this case, I will consider these factors together as in my view the result of the application is dictated by the interests of justice.

Legal Framework

[42] For ease of reference, I will also set out some relevant aspects of the statutory legal framework.

[43] Section 233(4) of the FLA provides that parties may appeal from Provincial Court orders made under that Act, to the Supreme Court:

Appeals from Provincial Court orders

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

(2) The time limit for starting an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

- (a) confirm or set aside the order of the Provincial Court;
- (b) make any order that the Provincial Court could have made;
- (c) direct the Provincial Court to conduct a new hearing.

(4) On application by a party, the Supreme Court may extend the time limit for starting an appeal.

[44] Further, ss. 6-8 of the Supreme Court Standard Directions instruct an appellant, seeking to appeal a Provincial Court order, to do the following:

6. Within 30 days after filing the Notice of Appeal, the appellant must:

- a. file an affidavit of service indicating that:
 - i. the Notice of Appeal has been served on the respondent(s)
 - ii. the required transcript has been ordered.
- b. request a date for hearing of the Appeal from the Registrar
- c. file a Notice of hearing of Appeal in Form F81
- d. serve, by ordinary service, the Notice of Hearing on any person who has filed a Notice of Interest.

7. If the appellant has not filed the affidavit required under paragraph 6a within 30 days of filing the Notice of Appeal, the appellant must apply to the court for an order extending the time for filing the affidavit. No date for hearing of the appeal may be set or any further step in the appeal may be taken until the order is granted extending the time for filing the affidavit. Once the affidavit is filed, the appellant may request a date for the hearing of the appeal from the Registrar and may proceed as set out in subparagraphs 6(c) and 6(d).

8. Within 45 days after filing the Notice of Appeal or such longer period as may be ordered by the court as provided for in paragraph 7, the appellant must:
 - a. file the original transcript with the court
 - b. serve, by ordinary service, a copy of the transcript on any person who has filed a Notice of Interest
 - c. file a written outline as described in paragraph 9.

[45] I have already referred to ss. 66 and 68 of the FLA regarding notice of a plan to relocate. In addition, s. 69 provides:

Orders respecting relocation

69 (1) In this section, "relocating guardian" means a guardian who plans to relocate a child.

- (2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.
- (3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.
- (4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,
 - (a) the relocating guardian must satisfy the court that
 - (i) the proposed relocation is made in good faith, and
 - (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and
 - (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise.
- (5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court
 - (a) of the factors described in subsection (4) (a), and
 - (b) that the relocation is in the best interests of the child.

[Emphasis added.]

[46] Section 37 of the FLA directs courts to consider the best interests of the child in making orders respecting parenting arrangements or contact with a child:

Best interests of child

37(1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

- [47] The proposed appeal of the Relocation Order raises numerous issues, including the failure of the judge to undertake a relocation analysis in accordance with the best interests of the child. Instead, the judge simply treated the relocation decision as equivalent to a default judgment: Ms. Redmond told the judge that Mr. Lewis did not file a response in time, and so the judge accepted the lawyer's submissions that the Relocation Order could be made without any other consideration and Mr. Lewis had lost his right to object.
- [48] In *S.B. v. N.L.*, 2013 BCPC 233, the mother gave notice to the father under s. 66 of the FLA. The father filed an application pursuant to s. 68 to prohibit her relocation 59 days after the notice was sent to him. He said he had never received the notice. Before undertaking the relocation analysis, the judge noted that there was still an obligation to conduct an analysis even if the objection was received too late:
- [20] Given the clear and unambiguous wording of section 69 (2), the court continues to have the authority to issue an order prohibiting the relocation notwithstanding the application was filed after the 30 day time limit
- [22] To give effect to the goal of section 68, and to allow guardians to properly plan for relocations, I am of the opinion the court should give full recognition to the 30 day time limit set out by the legislature. However, there will be situations where it will be clear a full best interests analysis pursuant to section 69 (3) should be undertaken, notwithstanding the section 68 application to prohibit relocation was filed after the 30 day limit.
- [23] To address the tension between the goal of section 68 and a possible desirability for a full section 69 (3) analysis, it seems appropriate to be guided by the following.
- [24] To allow a full hearing of an application to prohibit relocation that was filed after the 30 day time limit, the court will consider the reasonableness of the explanation for the late filing of the objection, the length of delay in filing, and the degree to which the relocating guardian would be prejudiced by allowing the late filed application to be heard. The degree of prejudice will relate to, among other things, the date of the proposed relocation and the planning already undertaken. In the absence of a reasonable explanation, the court should require cogent and compelling evidence indicating relocation is not in the children's best interests. This should be a significant test to meet, and not simply a road bump that would nullify the intent of the legislature.

[Emphasis added.]

Analysis

- [49] Mr. Lewis has provided strong arguments in this Court that he was denied a fair hearing at the time of the original Relocation Order: that he was not in fact provided with proper notice pursuant to s. 66 of the FLA, but if notice to his lawyer is considered, the earliest he was given notice was October 26, 2020; that he did file an application within 30 days to oppose moving the child within the requirements of s. 68, but the judge who made the

Relocation Order did not permit him to make submissions opposing the application. The judge who made the Relocation Order did so without any inquiry into the child's best interests and knowing that no new parenting plan had yet been proposed by Ms. Eaton. Mr. Lewis effectively lost what had been equal parenting time with his child without any other parenting arrangement in place. It is not difficult to understand why he feels that the Relocation Order was a significant injustice and should be corrected.

- [50] However, it must be kept in mind that the application before me is for leave to appeal from the decision that denied Mr. Lewis an extension of time to file the documents that are necessary to proceed with his appeal of the Relocation Order. An order dealing with an extension of time on appeal is a highly discretionary decision, entitled to some deference.
- [51] The legal test for an extension of time on appeal requires consideration of whether the appellant had a bona fide intention to appeal; when the respondents were informed of the intention; whether the respondents would be unduly prejudiced by an extension of time; the merits of the appeal; and whether an extension of time is in the interests of justice: *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-261, 1987 CanLII 2608 (B.C.C.A.) [Davies]. The interests of justice is the overriding question which encompasses the first four questions.
- [52] It is clear that the Supreme Court judge was concerned about the interests of justice in making his order.
- [53] The interests of justice here are very difficult to balance.
- [54] I have already indicated that there is strong merit to Mr. Lewis's arguments that he did not have a fair hearing when the Relocation Order was made and that the Provincial Court judge made numerous errors.
- [55] Mr. Lewis has always taken an active interest in co-parenting the child. The fact that he appears to have suffered a serious injustice when the Relocation Order was made weighs heavily in his favour. Mr. Lewis is an Indigenous man who wishes to share his rich heritage with his child, and his Indigenous community lives in closer proximity to him than to the child's mother, who is not Indigenous. This too is an important factor that weighs on his side of the scales of justice. I am very sympathetic to Mr. Lewis's position.
- [56] But on the other side of the scales of justice is the fact that the child has lived in her new location with her mother and other family members, for approximately 2.5 years, as well as the interests of Ms. Eaton and other family members. When the appeal did not advance, Ms. Eaton sold their home in Squamish.
- [57] The circumstances of the child, and the parents, are clearly not the same as they were in the time frame from November 2020 to early 2021, when the Relocation Order was made and when the appeal could have been set down and heard had it been advanced in accordance with the practice directions and with the priority that should be given to court proceedings about relocation decisions.

- [58] The length of time that has lapsed since the Relocation Order was made and the relocation took place raises very real practical problems on appeal. Even if error in the making of the Relocation Order is established, what will be the remedy? Any court faced with making a decision as to the remedy will need to consider the best interests of the child and will not do so from the perspective of the position the parties and the child were in back in November 2020. Instead, a court will need to know what has happened with the child since she moved to Telkwa, including her day-to-day life, her schooling, and her relationships with both parents and extended family. Both parties will need to provide evidence as to the child's best interests, based on the child's and parties' present circumstances.
- [59] Importantly, weighing evidence and making findings of fact as to the child's best interests is the role of the trial court.
- [60] Mr. Lewis's concern animating the proposed appeal is that if he seeks to challenge the existing parenting arrangements in Provincial Court, he will be met with the argument that he has to show a material change in circumstances, that somehow there will be a presumption that the Relocation Order is in the best interests of the child, and it will be difficult to overcome this. In other words, he is concerned that the unfair Relocation Order prejudices his future applications to change parenting arrangements, as it increases the burden of proof on him.
- [61] Ms. Eaton's argument in response is that Mr. Lewis is free to challenge parenting arrangements and free to seek to have the child reside in Squamish, in Provincial Court applications. Ms. Eaton concedes that there has been a material change in circumstances since the Relocation Order was issued. Ms. Eaton submits that an appeal will simply delay what is necessary here--the trial court hearing about parenting arrangements.
- [62] A similar position was taken by Ms. Eaton before the Supreme Court, and it is clear that it had influence on the Supreme Court judge's decision.
- [63] In my view, given the position and concessions made by Ms. Eaton and what happened during the Relocation Order hearing, I have difficulty accepting that the mere fact of the Relocation Order will prejudice Mr. Lewis's ability to argue in a trial court that the present parenting arrangements need to be changed based on the best interests of the child.
- [64] It is important to keep in mind that prior to the Relocation Order, the Consent Order provided for equal parenting time. The Relocation Order did not deal with parenting arrangements: the judge simply put the parenting arrangements to one side for the parties to discuss.
- [65] The judge made the Relocation Order in the absence of any proposal from Ms. Eaton as to how the parenting arrangements should work going forward, or consideration of the Consent Order and its terms regarding shared parenting. The Relocation Order was made in a hearing where Ms. Redmond, for Ms. Eaton, advised the judge that the parties had managed a week-on/week-off parenting arrangement for a long time, and had done "fairly

well in co-parenting". Ms. Redmond advised the judge that Ms. Eaton was not opposed to Mr. Lewis having "a fulfilling ongoing parenting relationship". The child was then almost 8 years' old. It was left that Ms. Redmond would be making a proposal to Mr. Lewis as to a new parenting arrangement.

- [66] Thus, it is important to remember that the judge making the Relocation Order did not make a ruling that it is in the best interests of the child that Mr. Lewis have less than equal time with his child or that their relationship should take a back seat to Ms. Eaton's relationship with the child. The judge making the Relocation Order did not contemplate how it might change parenting arrangements and did not decide what parenting arrangements will be in the best interests of the child. Ms. Eaton's counsel clearly decided to take on the risk that a subsequent judge would not agree with her client's proposed parenting arrangements. Subsequent judges hearing a dispute over the parenting arrangements should not consider their hands tied by the mere fact that the Relocation Order was made.
- [67] Furthermore, a lot has changed since the Consent Order was made: the pandemic occurred; the child has grown older; the parties have different living arrangements; and Ms. Eaton has moved to Telkwa. In my view, if the Relocation Order is not working out from Mr. Lewis's perspective, he is unconstrained in his ability to seek to change the parenting arrangements by seeking new orders for parenting in the Provincial Court.
- [68] For example, Mr. Lewis is free to argue, as he does in advancing this application, that the previous equal parenting time arrangements have been rendered impossible because of the move, and that Ms. Eaton has taken advantage of the move to be unduly obstructionist and is not allowing the child to foster a good relationship with Mr. Lewis, and to have a strong connection to her Indigenous heritage and extended Indigenous family. He is free to take the position that, to adjust the situation, he should be given the majority of holiday time with the child or even change the primary residence of the child. I am reflecting his perspective without making any findings and do not, of course, suggest that is the only position he can take or prejudge the outcome of those applications.
- [69] Of course, on any application to address the parenting arrangements, the Provincial Court will consider evidence regarding what has happened since the Relocation Order was made. The facts of the child's life in Telkwa will need to be considered. But if it was the task of the Supreme Court on appeal of the Relocation Order to consider the best interests of the child when considering any remedy, that court would either need to send the matter back to Provincial Court to consider these same matters, or would need to take the same matters into account if making its own order regarding parenting.
- [70] In other words, given the passage of time there is no other practical solution to what has occurred other than a hearing in a trial court on the question of what parenting arrangements are in the best interests of the child now, unrestrained by any incorrect assumption that the Relocation Order approved of the present parenting arrangements as in the best interests of the child.

[71] Weighing the various factors, despite the apparent injustice that occurred to Mr. Lewis at the time the Relocation Order was made, because of the long lapse of time that has occurred, it cannot be said the SC Decision was in error in refusing to extend the time for Mr. Lewis to appeal. Given the passage of time, it is in the interests of justice that any challenge to parenting arrangements be taken now in the trial court.

[72] For these reasons, and despite acknowledging that Mr. Lewis has very strong arguments that he suffered an injustice at the hearing of the Relocation Order, I must conclude that Mr. Lewis's application for leave to appeal the SC Decision be dismissed.

[Discussion with parties re costs]

[73] GRIFFIN J.A.: There will be no costs. Thank you for your helpful submissions.

"The Honourable Justice Griffin"

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