Citation:	The Director v. D.L.	Date:	20021101
2002 BCPC 0472	File No:		F7540
	Registry:		Vancouver

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.

BETWEEN:

DIRECTOR OF FAMILY AND CHILD SERVICES

APPLICANT

AND:

D.L.

RESPONDENT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE C. J. BRUCE

Counsel for the Director:	D. Dunn
Counsel for the Respondent:	F. G. Potts
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	September 25, 2002
Date of Judgment:	November 1, 2002

INTRODUCTION

[1] This is an application by the Respondent for a dismissal order and an order for costs that arises out of the Director's application for a restraining order prohibiting contact between the Respondent and the child, C.M. pursuant to Sections 98(1) and 98(2)(a) of the ***Child, Family and Community Service Act***. The Director opposes the application and seeks the Court's permission to withdraw its application for a restraining order. The Director maintains the Court has no jurisdiction to award costs to the Respondent in the circumstances of this case.

[2] This dispute raises two issues: (1) whether the Court should exercise its discretion to allow the Director to withdraw its application or dismiss the application on the basis of no evidence; and (2) in either case, does the Court have jurisdiction to award costs against the Director, and if so, are costs appropriate in this case.

BACKGROUND

[3] The Respondent was a foster parent under contract with the Provincial Government and in the summer of 2001 had in his care the child, C. M. The child left his care and moved to a different foster home. In January 2002, the child reported to the police that she was being contacted by the Respondent in a manner that made her feel uncomfortable and did not wish any further contact with him. The police arrested the accused and charged him with criminal harassment contrary to Section 264 of the ***Criminal Code***.

[4] The information, sworn January 25, 2002, alleged that the accused harassed the child between December 22, 2001 and January 23, 2002. The Respondent appeared in Provincial Court on January 25, 2002 and was released a $1000 recognizance

without deposit or surety. The conditions of his bail included a prohibition against any contact, directly or indirectly, with the child C.M. and an area restriction of 200 meters from any residence where she may reside, her school, or place of employment.

[5] On March 21, 2002 the Director filed its application for a restraining order pursuant to Section 98 of the ***Act*** and a police assistance clause pursuant to Section 98(4.1) of the ***Act***. The Director sought a six-month order. A first appearance was set down for March 25, 2002. The Respondent immediately suggested the Director's application was motivated by an improper purpose and expressed a requirement for full disclosure. He also indicated that an order for costs would be sought. The matter was set down for a pre-trial conference on May 21, 2002.

[6] Prior to the pre-trial conference the parties exchanged correspondence which addressed a number of issues. The Director requested an interview with the Respondent to complete its investigation. The Respondent was willing to meet with the Director; however, he was concerned that the Ministry had already decided the issue. The Respondent's contract as a foster parent had been terminated and the children in the home removed. The assigned social worker had already interviewed the Respondent and his wife and the Director had not yet disclosed the materials supporting its application for a restraining order.

[7] In a letter dated April 25, 2002 the Respondent made a formal demand for disclosure and itemized the material he expected the Director to produce. By letter dated May 9, 2002 the Director advised the Respondent that it intended to withdraw its application under Section 98 of the ***Act*** at the upcoming pre-trial conference. The Director was not, however, withdrawing its allegations against the Respondent and was not reinstating his contract as a foster parent.

[8] At the pre-trial conference on May 21, 2002 the parties appeared before His Honour Judge Gove. The Director indicated that the Ministry was withdrawing its application and the Respondent opposed this position. The Respondent argued the matter should be dismissed on the merits with costs on the trial date, now set for June 21, 2002, to allow the Respondent to clear his reputation. In any event, the Respondent argued the Director could not withdraw without leave of the Court.

[9] On May 31, 2002 Judge Gove issued a decision that appeared to say the Director could not withdraw without the consent of all parties. Further, Judge Gove ordered the Director to make full disclosure to the Respondent and ruled that the matter should proceed to a hearing on the date set.

[10] The Director filed an appeal of Judge Gove's decision and sought a stay of proceedings pending the appeal. The Respondent took the position that the Director had misinterpreted the decision and continued to demand full disclosure. The Director responded that since it was not calling evidence at the trial, no disclosure would be forthcoming.

[11] The trial date was adjourned pending the appeal; however, the parties decided to re-appear before Judge Gove and ask for clarification of his decision. On June 11, 2002 Judge Gove clarified that he concluded, based on his reading of the ***Act***, that the Director could not unilaterally withdraw its application under Section 98. Further, Judge Gove directed the matter proceed to hearing where the Director could make an application to withdraw before the trial judge as it was within the Court's discretion to allow a withdrawal or dismiss the application.

[12] Lastly, Judge Gove clarified that he did not make an order for production and, instead, turned his mind only to the time frame in which disclosure should take place. In this regard, Judge Gove held that there was no necessity for a production order because Section 64(1) of the ***Act*** already required the Director to disclose its evidence to the Respondent. The following passage from the transcript of proceedings indicates Judge Gove's intentions in regard to disclosure:

> I then turned by mind to the issue of disclosure, and although I did not make an order of disclosure, because one is not necessary, I turned my attention to the fact that disclosure must be done in a timely manner, and I set what I thought was a reasonable point in time by which disclosure should take place. That's all I did.

[13] The Director abandoned its appeal of Judge Gove's decision and the matter was set down for hearing on September 25, 2002. The Respondent renewed his demand for disclosure and the Director chose not to accede to it.

[14] On July 16, 2002 the Crown entered a stay of proceedings on the criminal harassment charge against the Respondent. The Respondent consented to a common law peace bond imposed by the Court by way of a recognizance in the amount of $500 without deposit or surety for a period of six months. The only condition of the peace bond is that the Respondent is to have no contact directly or indirectly with the complainant.

ARGUMENT

[15] The Respondent maintains the ***Act*** does not give the Director a unilateral right to withdraw its application. The Court retains jurisdiction to control its own process, including a discretion to allow withdrawal in the appropriate circumstances, and the onus rests with the applicant to prove dismissal is not the proper remedy.

[16] In the circumstances of this case, the Respondent argues the Director should not be allowed to withdraw and a dismissal on

the merits should be recorded. The Respondent says the Court should draw an adverse inference from the fact that the Director has chosen not to call any evidence and has failed to make disclosure pursuant to a demand under Section 64(1) of the ***Act***. The Respondent says that in any event the Director knew or ought to have known that its application could not be successful in view of the authorities confining Section 98 of the ***Act*** to situations where the perpetrator involves the child in prostitution: ***Director v. M.M.Z.*** [1999] B.C.J. No. 3087 (B.C. Prov. Ct.).

[17] The Respondent says that if the Director is allowed to withdraw he will be unable to clear his name and will have no remedy against the Ministry for the cancellation of his foster parent contract.

[18] The Respondent also argues the Director's application should be dismissed with costs. The Respondent says an order for costs can be made where there has been a breach of the Rules: ***Director v. child*** (not named) Unreported May 29, 2001 (B.C. Prov. Ct.) and ***Director v. T.L.K.*** [1996] B.C.J. No. 2554 (B.C. Prov. Ct.). The Respondent maintains a breach of the Rules occurred when the Director failed to comply with Judge Gove's direction to make disclosure pursuant to Section 64(1) of the ***Act*** by a fixed date. Lastly, the Respondent says that by applying the factors set down in ***Children's Aid Society of Algoma v. McFadden et al*** Court file No. 170/99 (March 5, 2001) Unreported (Ont. Ct. of Justice) an order for costs is warranted in this case.

[19] The Director says its application under Section 98 of the ***Act*** was a parallel proceeding to the criminal process. If the Crown stayed the proceedings, the Director would be left without a remedy unless such an application was filed.

[20] The Director asks the Court to allow a withdrawal and, in the event this application does not succeed, the Director says it will not call evidence. The Director says that on May 9, 2002 it advised the Respondent that the application would be withdrawn and any expense incurred since that date must therefore be born by the Respondent. With the withdrawal of the application, the allegations were gone as well. Thus, had the Respondent agreed to the withdrawal, no further costs would have been incurred.

[21] On the issue of withdrawal versus dismissal, the Director says it is arguable that Section 98 is broader than prostitution. Further, the appeal of Judge Gove's decision was not to derail the hearing but stemmed from an honest, but mistaken belief that his judgment precluded all but consensual withdrawals. Lastly, the fact the Court agreed a peace bond was appropriate is evidence that the Director had some cause to be concerned about the Respondent's conduct: ***Regina v. Taylor*** [2001] B.C.J. No. 1653 (B.C. Prov. Ct.). Now that the Respondent has been subject to the peace bond for some months and has not breached the no contact order, the Director considers the risk to the child is no longer present. As a consequence, it is withdrawing the application for a restraining order.

[22] In regard to disclosure, the Director says none is necessary because it is not calling any evidence in support of its application. Section 64 of the ***Act*** only requires the Director to disclose evidence that it intends to rely upon. The Director says the authorities do not support a requirement to disclose where it is not proceeding with an application. Further, as a foster parent, the Director says the Respondents' rights are only contractual. He is not in the position of a natural parent with continuing rights in regard to the child. In these circumstances, the Director says the disclosure sought by the Respondent can only be relevant to any civil claim he has against the Ministry.

[23] On the issue of costs the Director argues there is no jurisdiction under the legislation to make such an award. Further, the Director says that costs should only be ordered in the most egregious circumstances and this case does not fall within that category. The Director says it did not breach any direction from Judge Gove as the minimum required under Section 64 of the ***Act*** was produced.

DISCUSSION AND CONCLUSIONS

[24] Addressing the Director's application to withdraw, I find it helpful to quote the following passage from Judge Gove's ruling:

> 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 the application is made, to withdraw. There is no provision for the Director to enter a stay of proceedings. The Act, however, gives some guidance. [Section 2- governing principles] ...
>
> 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 proceedings consented, a judge would normally allow an application to be withdrawn, but only if the principles in s. 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.

[25] In my view, the primary reason the Court retains jurisdiction to restrict the right of the Director to withdraw in appropriate circumstances is the need to ensure the safety and well being of a child who may be the subject of concern in a Section 98 application. If the Court is satisfied the child is no longer at risk, it should allow the Director to withdraw unless there are cogent

reasons for insisting that there be an adjudication on the merits. Because the Respondent is an interested party in the Director's application, the impact of a withdrawal on his personal life, his family, and his employment situation are properly considered in determining whether there are otherwise cogent reasons for denying the Director's application to withdraw.

[26] Based on the Director's submissions, I am satisfied that the child will not be put at risk by allowing a withdrawal of the Section 98 application. The Respondent voluntarily entered into a common law peace bond that precludes contact with the child for a period of six months. There has been no contact since January 2002. Thus there is no reason to deny the Director's application based on a continuing need to protect the child.

[27] The Respondent says that an adjudication or, in effect, a dismissal on the merits of the Director's application is necessary because by its very nature an application for a restraining order under Section 98 has an adverse impact on his reputation and his work as a foster parent. If the Director is allowed to withdraw its application, the serious allegations against him will continue to interfere with the Respondent's ability to carry on his work as a foster parent.

[28] While I agree entirely with the Director's submission that the termination of the Respondent's foster parent contract is a separate matter between the Ministry and the Respondent, and should have no bearing on the outcome of this application, it cannot be doubted that the allegations against the Respondent are serious and have effectively prevented him from continuing as a foster parent in this Province. Further, notwithstanding the Director's decision to withdraw, it is apparent the Ministry intends to conduct itself in future on the basis that the allegations were factual. I have only to refer to the Director's May 9, 2002 letter to the Respondent in support of this conclusion. In that letter the Director advises the Respondent that it will be withdrawing the application for a restraining order and, further, says:

> As your client is no doubt aware, the Director regards Mr. L.'s past conduct toward C as extremely serious. As C's guardian, the Director hereby instructs your client not to contact C directly or indirectly whether or not there are criminal proceedings in place prohibiting contact.

[29] Notwithstanding the submission of the Respondent, the reasons behind the decision to withdraw remain unclear. Although the Director maintains the peace bond entered into by the Respondent led to its decision to withdraw, that decision was communicated to the Respondent on May 9, 2002, well prior to the signing of the peace bond on July 16, 2002. There is no doubt in my mind that the terms of the peace bond constitute sufficient protection for the child; however, there appears to be other factors at play in the Director's decision to seek a withdrawal that have not been disclosed to the Court.

[30] It may well be the Director did not wish to subject the child to a court proceeding and the trauma of giving evidence. It may be the Director did not wish to disclose personal and confidential information about the child. It may be the Director realized that its application would have little chance of success. These possible reasons for the Director's actions are only speculation because there is no evidence before the Court on these matters.

[31] The Director says that if forced to proceed with its application, it will call no evidence. Thus if I were to deny the application for withdrawal there would be no adverse impact on the child and no prejudice to the Ministry.

[32] On the other hand, the Respondent's rights may be affected adversely by the withdrawal. The allegations will still exist, whether the application is dismissed or withdrawn; however, a withdrawal may allow the Director to reapply for a restraining order based on the same circumstances at some later date. When an application is withdrawn there has been no adjudication on the merits and thus no claim of *res judicata* can be made.

[33] A dismissal of the Director's application would bring some certainty and finality to the issue for the Respondent. Once a dismissal is entered, it is my view that the Director could not bring another application under Section 98 of the ***Act,*** based on the same facts, except perhaps with leave of the Court.

[34] Based on a consideration of all of these circumstances, I find there are cogent reasons to deny the Director's application for withdrawal and to dismiss the Section 98 application on the basis that there is no evidence to warrant a restraining order.

[35] Turning to the issue of costs, it is apparent that there is no provision in the ***Act*** or ***Rules*** that expressly deals with the Court's jurisdiction to award costs. There are also no provisions in the ***Provincial Court Act*** or the ***Regulations*** that pertain to this matter. The issue has been addressed, however, in a provincial court judgement dated May 29, 2001 out of the Victoria Registry. In that case, His Honour Judge Neal held that where there has been a violation of the ***Rules*** enacted pursuant to the ***Child, Family and Community Services Act***, the Court has a discretion to award costs if this is an appropriate remedy in all of the circumstances.

[36] Judge Neal's decision is founded on ***Rule*** 8(16)(b) which provides as follows:

> If a party does not comply with these rules, the judge may, after considering the principles of s. 2 of the Act, make any order or give any direction that the judge thinks is fair including an order dismissing the application.

[37] On the facts of case before Judge Neal, an award of costs was within the Court's jurisdiction because the Director had been found in breach of ***Rule*** 8(11) which grants a judge authority to give directions on procedural matters not provided for in the ***Act***. Moreover, Judge Neal found the conduct of the Director warranted an order for costs in the amount of $2000. The multiple failures to disclose relevant material to counsel, the excessive delays caused by the Director's inaction, the many unnecessary court appearances, the destruction of documents by the assigned social worker, and a complete failure to adhere to the directions of the Court on the matter of disclosure led the Court to make the award of costs. Judge Neal characterized the Director's actions as a serious failure in the administration of the file.

[38] In the case at hand, the Respondent argues an award of costs is within the jurisdiction of the Court because of the Director's failure to make proper disclosure in accordance with Judge Gove's direction which is contained in the May 31, 2002 judgment. Judge Gove, as he later clarified, did not make any orders concerning disclosure. Instead, Judge Gove directed the Director to "disclose the evidence that the Director intends to lead at the hearing" pursuant to Section 64 of the Act by June 6, 2002. Thus the Court would have jurisdiction to make an order for costs against the Director if it was satisfied that the Director failed to comply with this direction.

[39] It should be noted that in my view Section 64 of the ***Act*** has no application to the case at hand. Section 64 is expressly restricted to a proceeding under Part 3 of the ***Act*** which deals with all varieties of child protection hearings. Hearings that address applications for restraining orders under Section 98 are found in Part 8 of the ***Act***. Nevertheless, Judge Gove gave a direction to the Director in regard to disclosure of evidence and that direction has neither been challenged nor appealed. Consequently, I find the Director continued to be bound by the Court's direction.

[40] The question, then, is whether the Director failed to comply with the direction in violation of ***Rule*** 8(11). The Director maintains it complied strictly with Judge Gove's direction because it had no intention of leading any evidence at the hearing of this matter. The Respondent argues there is an overarching duty of fairness imposed on the Director which compels not just the minimum disclosure under Section 64, but all material in its possession or control that is potentially relevant to the dispute. The Respondent says he was entitled to any material whether or not helpful to the Director and until the Director was given leave to withdraw that obligation to disclose remained operative.

[41] The scope of disclosure required under Section 64 was addressed by the Court in ***Director v. T.L.K., supra*** in the context of a child protection hearing under Part 3 of the ***Act***. After concluding that Section 64 represented only the minimum disclosure required to ensure the parties a fair hearing, Judge Stansfield held there is a greater duty on the Director to accord fairness to the respondent parents and likened their situation to that of a person accused of a criminal offence:

> The section does not say the duties imposed under section 64 are the only duties of disclosure. There is no suggestion that the court cannot define what is reasonable and fair in particular cases, or in particular classes of cases. All courts, including courts of inferior jurisdiction, are competent to determine their own process. Section 64 defines a statutory minimum disclosure that applies equally to all parties to the proceedings.
>
> ... it is not surprising to me that the Court of Appeal would see in reference to the matter of pre-trial disclosure a parallel with the criminal law. While there may not be a *lis* as such in protection proceedings, there is no question but that parents often find themselves in a position not unlike that of a criminal accused person in that they:
>
> (a) are "accused" of various sorts of conduct;
>
> (b) deserve full opportunity to understand the case they have to meet, and
>
> (c) find themselves pitted against an agency of the State which frequently is possessed of substantially greater resources than they, and which has access to information to which they do not have access ...

[42] Although the Respondent is not a parent seeking to oppose an intervention by the Ministry in the care and upbringing of his own child, his situation may also be compared to that of an accused person. The Respondent has clearly been accused of misconduct in relation to a foster child and, consequently, fairness demands that he know the case to be met and have access to any potentially relevant evidence. Moreover, the restraining order sought by the Director is at the very least a quasi-criminal remedy, particularly when one considers the police assistance clause also included within the scope of the Director's application. Lastly, the Respondent is in the position of someone embroiled in a dispute with a state authority that is in possession of information to which he has no direct access. Further, this state agency has substantially greater resources at its disposal.

[43] Thus it is my view that the Respondent is entitled to expect the Director to disclose at his request, and in a timely manner, any evidence in its possession or control that may be potentially relevant to the application. The Director may, of course, dispute the disclosure of certain evidence based on privilege, confidentiality, or relevance. Any dispute with regard to disclosure would be resolved at a pre-trial conference.

[44] Further, I am satisfied that the obligation placed on the Director to make proper and timely disclosure to the Respondent

subsists until the Director has received leave to withdraw its application. Until the Court has addressed the issue, the Director, having filed its application, must continue to abide by the provisions of the ***Act*** and ***Rules*** and cannot assume unilateral control over its application in the face of the Court's supervisory role. Where the Director intends to apply for a withdrawal, and considers disclosure at this early stage would be prejudicial for any reason, it would be incumbent upon the Director to act expeditiously to have the matter heard by the Court. The Director cannot refuse to produce relevant evidence, sit back, and wait for the application to come on for trial.

[45] Judge Gove's ruling was in essence a direction to comply with the disclosure requirements of Section 64 of the ***Act*** by a fixed date. The direction was thus not limited to the evidence to be called by the Director at a hearing of the application. As a consequence, I find the Director has violated Judge Gove's direction. The Court thus has jurisdiction to consider an award of costs against the Director. In this regard, I have considered the authorities cited by the Respondent and the principles that guided those courts in awarding costs.

[46] The Ontario judgement in ***Children's Aid Society v. McFadden, supra*** sets out a rather broad test for the exercise of the Court's discretion to award costs; that is, "would the society be perceived by ordinary persons as having acted fairly." Judge Neal's decision, in an unreported case dated May 21, 2001, does not describe a test for the award of costs against the Director. Instead, an award of costs is made as part of a comprehensive remedy designed to correct the prejudice created by the action and inaction of the Director and its delegates. Among the circumstances taken into account by the Court were a serious failure in the administration of the file by the Director, a wholesale refusal to disclose evidence and the destruction of evidence, and inordinate delays for which the Director had to accept full responsibility. In addition, Judge Neal comments on the steps taken by the Respondents to address the Director's dilatoriness:

> [they] have endured significant frustration and stress in dealing with these matters to date. Taking into account the need to ensure that such a fact pattern is not repeated, and the extensive efforts of counsel to protect their clients' rights, it is fair and appropriate to consider an award of costs in connection with all matters arising since the first pre-trial hearing in November of 2000 to and including today's proceedings. Having considered the provisions of s. 2 of the Act, the facts in connection with this matter and the time devoted by counsel in speaking to this application, there will be an award of costs against the Director in the amount of two thousand dollars...

[47] From Judge Neal's reasoning, it is my view that the Court would not have considered an award of costs if the facts had shown anything other than a serious failure by the Director to carry out its statutory responsibilities and a situation of costs thrown away by the respondent. In short, it is not every case in which the Director or its delegates violates a ***Rule*** that the Court should order costs against them.

[48] In my view the facts before me do not reveal bad faith, an abuse of process, or a systematic failure to perform the duties and responsibilities under the ***Act*** on the part of the Director or its delegates. The Director took the position that disclosure was rendered moot because the application for a restraining order would either be withdrawn with the leave of the Court or dismissed for a lack of evidence. If the Court ordered the Director to proceed with its application, a decision had been made to call no evidence. In these circumstances, it was not unreasonable for the Director to believe it would be in compliance even if no disclosure was forthcoming. Further, the Director's position was not kept from the Respondent; he knew as early as May 9, 2002 that the Director was going to withdraw and would not be proceeding with its application. Lastly, the Director's arguments on the scope of Section 98 and the obligation to make disclosure were not entirely indefensible.

[49] In summary, I find the Director's actions in this case are not so egregious as to warrant an award of costs.

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The Honourable Judge C. J. Bruce,

Provincial Court Judge