

Family

N.B. Appeal Court ruling examines delay in timelines in child protection matters: lawyer

By **Terry Davidson**

(October 6, 2022, 12:29 PM EDT) -- A lawyer and a legal scholar hope a recent ruling out of New Brunswick will lead to greater compliance with timelines in child protection matters in that province.

The Sept. 29 Court of Appeal of New Brunswick decision in *R.D. v. The Minister of Social Development*, 2022 NBCA 56, involved an examination of "endemic" delay "with respect to the hearing and disposition of child protection matters" at the then Court of Queen's Bench's Family Division.

At the centre of the appeal was delay in the case of a parent identified as R.D., whose children had been placed into protective care by the province's minister of social development.

On Feb. 16, 2022, after taking the children into protective care, the minister filed an application for an order which would mean the children could be kept there for up to six months.

As is laid out in New Brunswick's *Family Services Act*, a court must "dispose" of a minister's application for custody within 30 days after it is filed, unless it deems there are "exceptional circumstances" causing delay. The court must also provide reasons.

On Feb. 18, R.D. and the children's other parent objected to the application for the six-month custody order.

Even at this stage, the court handling the case noted it was apparent the minister's order would not be disposed of within the required 30 days, according to the Appeal Court's written decision.

The case was adjourned so the parents could retain a lawyer. However, it remained unclear whether the court was satisfied that exceptional circumstances required a delay beyond the 30 days.

On March 17, the judge issued a procedural order, setting dates for a case conference and pretrial conference at June 24 and 26, respectively. A trial was scheduled for Aug. 2, 3 and 5.

During that appearance, legal counsel for the parents expressed concern about delay. The minister acknowledged the hearing dates fell "well outside" the 30-day limit called for in the Act, and that the judge failed to identify any exceptional circumstances justifying the length of time it was taking.

Days later, a court clerk wrote to the parties involved, explaining that a lack of "judicial resources" was the reason for the delay; in this case, it was simply a lack of available court dates.

On March 29, the court clerk came back to offer earlier dates between May 9 and 11.

On March 30, the parents successfully sought leave to appeal the order. But in early May, R.D. and the children's other parent ended up consenting to the minister's six-month custody order.

With that, the main issue in the case was rendered moot. Nonetheless, R.D. asked the Appeal Court "to exercise its discretion to make a declaration that the procedural order violated s. 53(3) of the Act and was incorrect at law," and also asked that the court provide clarity as to the types of exceptional circumstances that would allow a judge to deviate from the timeline rules.

Appeal Court Justice Barbara Baird, with Justices Raymond French and Charles LeBlond in agreement, found the lower court judge to have broken the Act's timeline rules.

"In this case, it is not disputed that the judge's procedural order, adjourning the application for a hearing beyond 30 days without having identified exceptional circumstances in the order, was an error of law," found Justice Baird, who noted that "the Act specifically states that the best interests and safety of children are paramount; therefore, procedural defects should not permit a derogation from this prevailing consideration."

"R.D. argues, however, that a certain complacency has developed by both the courts, as well as the parties in child protection proceedings, because of the lack of available dates. The delay in this case was confirmed by the clerk of the court, who wrote to the parties on March 22, 2022, to explain that the lack of judicial resources was the reason for the delay. The Minister understandably submits this is a problem beyond his control. I agree."



Ben Reentovich acted for R.D. at appeal

Justice Baird noted R.D.'s argument that this type of delay "is symptomatic of a larger problem in New Brunswick with respect to the hearing and disposition of child protection matters, and that non-compliance with the Act in the Court of King's Bench, Family Division, is endemic."

Justice Baird noted that exceptional circumstances warranting delay include: parents' request — or consent to — a brief adjournment for reasons laid out in the Act; an agreement that the parents need time to "put their lives in order"; medical emergencies or other "unforeseen events"; and if a case is "particularly complex."

Ben Reentovich, who acted for R.D. at appeal, told *The Lawyer's Daily* that the 30-day rule is not regularly being followed in his province.

"The Court of Appeal basically said, look, the 30 days needs to be respected — we've said it before, we're saying it again — and lack of resources and lack of availability of court is not an exceptional circumstance to warrant going outside of those 30 days," said Reentovich, appellate counsel with N.B. Legal Aid who also teaches part-time at the University of New Brunswick.

He went on to say that both judges and lawyers are aware there is a problem.

"Everyone is aware of the problem. Judges are alive to it, but there's this sense that nothing can be done, like hands are being thrown up. [But] we are trying. I know the chief justice, the clerks, they are all alive to it. They are all trying to do their best, [but] there is a disconnect between the legislation and the reality."

Reentovich said other things could lead to delay.

"Sometimes it is the parents delaying. Sometimes the minister is looking for an assessment, and they're asking for a delay to make that happen. But in this case ... [it] is because you had the father's lawyer saying, OK, he's ready to go, let's get this done, and the court saying, well, here's the earliest date you have, which is almost the end of the order, and the lawyer saying, that's not OK — that's too late. And they are, like, well, too bad, there is nothing earlier than that. This case really was about limited court resources, and a willingness to accept that and say, well, [if] we don't have the court time, we don't have the court time — notwithstanding what the legislation clearly says."

Reentovich said little things could be done by all the parties involved to lessen delay.

One would be to eliminate duplication in court processes, he said. For example, after the minister's lawyers have their affidavits before the courts, there likely isn't need for them to present their entire case in court through oral evidence.

"There is a question of: Is that necessary? The affidavits are there, the judges say we've read all this. But then it becomes a matter of ... the judge, in terms of case management, saying I've read this ... I don't need direct examination on the affidavits. I don't need them to regurgitate what is already in front of me."

Lawyers acting for parents can also do their part, he said.

"There has got to be focused cross-examination: What do I need to get out of this? I don't need to ask every question possible. For this witness, how does their testimony hurt my client? Therefore, I'm going to focus on that. These cases, they can become huge. ... The records can be two [or] three hundred pages with multiple affidavits."



Rollie Thompson, Dalhousie University

Professor Rollie Thompson, of Dalhousie University's Schulich School of Law, says debate can be had as to whether the 30-day provision is a realistic timeline, but the fact remains that it is currently the law.

"Even though we all know timelines are critical, as an abstract idea, their implementation drives lawyers and trial judges crazy in practice," said Thompson. "Lawyers on both sides are always juggling their schedules, judges or courtrooms or both aren't always available on short notice, and court staff have to manage all these competing demands. In most Unified Family Courts in the country, child protection matters take up more than 50 per cent of the court docket, but there are also other pressing matters, like family violence or abducted children or interim parenting orders, that need court time too."

Like Reentovich, Thompson hopes this Appeal Court decision will have some sway in similar matters.

"The result of this decision will presumably be greater compliance with time limits, at least for a while. New Brunswick has a new child protection statute coming into effect next year, the *Child and Youth Well-Being Act*. Its timelines appear a bit more flexible than the soon-to-be-old *Family Services Act*, but this decision may offer an opportunity to think about how best to make the new timelines work, to avoid the need for decisions like R.D."

The Crown at appeal, Corry Anne Toole, was asked for comment, but the request was forwarded to a government spokesperson.

"The Department of Justice and Public Safety is reviewing the New Brunswick Appeal Court's recent decision," said New Brunswick Department of Justice and Public Safety communications officer Judy Désalliers. "The chief justice has the ability to schedule cases as she sees fit. The department supports her decision to focus on child protection matters."

If you have any information, story ideas or news tips for The Lawyer's Daily, please contact Terry Davidson at t.davidson@lexisnexis.ca or call 905-415-5899.

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