In the Court of Appeal of Alberta

Citation: Alberta (Child, Youth and Family Enhancement, Director) v. B.M., 2009 ABCA 258

Date: 20090723
Docket: 0703-0362-AC
Registry: Edmonton

Between:

Alberta (Director of Child Youth and Family Enhancement)

Respondent/Applicant
(Respondent)

- and -

B.M.

Applicant/Respondent
(Appellant)

Restriction on Publication: No one may publish any information serving to identify a child or guardian of a child who has come to a Minister's or a director's attention under the *Child, Youth and Family Enhancement Act*. See the *Child, Youth and Family Enhancement Act*, s. 126.2.

Reasons for Decision of
The Honourable Mr. Justice Jean Côté

Application to Vacate/Vary Civil Contempt

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A. Introduction

[1] On June 23, 2009, I convicted the Director of Child, Youth and Family Enhancement, Richard Ouellet, of civil contempt of court. That involved failure to obey a Court of Appeal judgment, 2009 ABCA 40, 448 A.R. 53 (Jan. 30), *sub nom.* "B.M.". The reasons which I gave then were oral, but they have since been transcribed, and a copy of them is attached as Appendix A to the present Reasons.

[2] After giving those reasons for conviction, I then heard oral argument on penalty and reserved decision on penalty. Before I could give a decision on penalty, the Court received a letter on June 26 from Mr. Cranston, Q.C., the new lawyer for Mr. Ouellet. A copy of that letter is attached as Appendix B. It proposed to reopen and upset the contempt conviction on one topic. On July 10 a similar notice of motion was filed by Mr. Cranston, Q.C. on behalf of Mr. Ouellet, relying on proposed new evidence in the form of an affidavit by Mr. Ouellet.

[3] At the beginning of oral argument of this motion to reopen, it was agreed that I could decide all together the three questions before me:

(a) whether to hear further argument,

(b) whether to receive further evidence, and

(c) whether to set aside the conviction for contempt in part or in whole.

So none of these questions would be decided separately. There was a request to cross-examine Mr. Ouellet on his affidavit, and similarly that cross-examination evidence would be heard tentatively.

[4] Mr. Ouellet then took the stand and was sworn, and Ms. Kellett cross-examined him live in front of me. There was re-examination by Mr. Cranston, Q.C., and further cross-examination by Ms. Kellett. After that, I heard oral argument from Ms. Kellett and Mr. Cranston, Q.C., and very briefly from Ms. Harwardt. (Counsel for the child and the Band were served, but did not attend.) I then reserved decision. My decision is found below.

B. Facts

[5] Sufficient facts appear in the original Oral Reasons for Decision, Appendix A. But those oral Reasons were vague on one point, which was who was the appellant. In the Court of Queen's Bench, the Director was, and got a stay; in the Court of Appeal, B.M. was and got a stay.

[6] Mr. Ouellet was present for the June 23 contempt motion (except the first preliminary minutes). He was seated beside his lawyer, Ms. Harwardt, at the counsel table. He heard everything that she said about liability and penalty, and indeed he spoke some words himself.

[7] There is one loose end in the oral Reasons, Appendix A. On pp. 39-40 of them, I referred to a British Columbia decision about a union holding a discussion or taking a vote about whether to obey a court order. No name or citation was given in the oral reasons, but I believe that the decision to which I was referring is ***R. v. United Fisherman & Allied Workers' Union*** (1967) 62 W.W.R. 65 (B.C. C.A.), leave den. [1968] S.C.R. 255.

[8] Other facts are mentioned below under the specific legal topics to which they relate.

C. Reopening a Decision

1. The Tests

(a) General Tests

[9] The question here is what are the tests for reopening and varying a decision made by a judge before the formal order or judgment resulting from his or her decision has been signed and entered. It is not necessary to discuss here either

(a) reopening one party's case before any decision has been pronounced by the judge, nor

(b) attempts to reconsider or amend decisions which have been reduced to a signed entered order or judgment, nor

(c) reopening or setting aside judgments or orders which were given *ex parte* or were obtained through fraud or perjury.

[10] It is usually impossible to open up, reconsider, or vary a decision after the formal judgment has been signed and entered. In that case, the judge simply has no jurisdiction to do so. That bar does not exist where the judgment has not been formally entered, and some cases simply make that point and say no more. But a number of more recent cases have pointed out that it is not enough simply to say that the judge has jurisdiction to reopen the matter. The question is whether he or she **should** reopen the matter, and under what circumstances.

[11] Leaving aside those cases which do not discuss the point, or simply go off on want of jurisdiction because of formal entered order or judgment, the cases all seem to agree on one thing. That is that the Courts should be very sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held

back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings will result: ***Kay v. Wirstiuk*** (1977) 8 A.R. 405 (para. 18); ***Simpson v. The Co-operators***, 1998 ABCA 302, 228 A.R. 96 (C.A.); ***Sagaz Ind. Can. v. 671122 Ont.***, 2001 SCC 59, [2001] 2 S.C.R. 983, 274 N.R. 366 (para. 61).

[12] Much the same is true of the question of whether to admit further evidence on that motion to vary the earlier pronounced judgment or order. Indeed, most of the cases say that the rules as to when that should or should not be done are very similar to the well-known rules for receiving new evidence on appeal to the Court of Appeal. (Doubts on that in ***Stevenson v. Dandy*** (1918) 43 D.L.R. 238 (Alta. C.A.) are overruled by ***Sagaz Ind. Can. v. 671122 Ont.***, *supra*). Those rules for new evidence are variously stated, but usually boil down to the following:

1. Could the evidence have been obtained earlier if due diligence had been observed? ***Nat. Arts v. Bank of B.C.*** (1981) 31 A.R. 205, 214 (para. 32); ***Guaranty Tr. Co. of Can. v. Bailey*** (1986) 72 A.R. 303 (C.A.); ***Sagaz Ind. v. 671122 Ont.***, *supra* (paras. 59, 62); ***Re Petruik Est.*** (2002) 314 A.R. 330 (para. 35). That the evidence was available to the applicant but not looked for because it was hard to access and because other matters pressed, is fatal: ***Nat. Arts v. Bank of B.C.***, *supra* (para. 33).

2. Is the evidence credible? ***Re Petruik Est.***, *supra* (para. 38).

3. Would the evidence have been practically conclusive in producing the opposite result to that earlier pronounced? ***Friesen v. Braun*** [1926] 2 D.L.R. 1032 (Sask. C.A.); ***Kay v. Wirstiuk***, *supra* (para. 22); ***F.B.D.B. v. Silver Spoon etc.***, 2000 NSCA 138, 189 N.S.R. (2d) 133 (paras. 8-9). A debatable matter of opinion is not sufficient: ***Kay v. Wirstiuk***, *supra* (para. 33). Nor is controvertible evidence which would open up an extremely complex and convoluted exercise: ***Luscar v. Pembina (#2)*** (1992) 128 A.R. 77 (para. 13). Some criminal cases use a test less strict, such as likely to produce a different result. The difference does not matter here. Neither version of this test is met.

4. Is the evidence in its present form admissible under the ordinary rules of evidence? ***R. v. R.S.D.L.***, 2009 NSCA 74, [2009] N.S.J. #289, file CAC 277660 (June 24) (para. 17).

[13] A number of the cases give various criteria for deciding whether to reopen a decision, and vary it on the merits. The cases do not disagree, but no one case lists all the criteria. Among those commonly listed are the following:

1. Would there be a miscarriage of justice without the reopening? ***Caisse Pop. de Morinville v. Pasay*** (1982) 47 A.R. 311, 317 (M.) (para. 39); ***Fullowka v. Royal Oak Ventures***, 2002 NWTSC 14, File CV 05408 (para. 4) (Feb. 20),

affd. 2002 NWTCA 3, [2003] 2 W.W.R. 213. This is similar to the requirement that new evidence be practically conclusive in changing the result: ***Caisse Pop. de Morinville v. Pasay***, *supra*.

2. The power to reopen is to be used sparingly, and the pronounced decision is not to be taken away without very solid grounds: ***Luscar v. Pembina Res. (#2)***, *supra* (para. 8, subparas. 4,5); ***Fullowka v. Royal Oak***, *supra* (paras. 4-5); ***Alta. Turkey Prod. v. Leth (#2)***, 2006 ABQB 283, 399 A.R. 259 (para. 24).

3. Is the applicant trying to raise a new issue which he could have raised earlier? ***Luscar v. Pembina Res. (#2)***, *supra* (para. 10).

4. A new argument alone is not enough; new important facts are necessary: ***Public School Boards Assn. v. A.-G. Alta. (#3)*** (1998) 209 A.R. 384 (one J.A.) (para. 13); ***Becker v. Dir. of Empl. Stds. (#2)***, 2003 ABCA 130, Calg. 01-17856 (one J.A. Apr. 16); ***Proprietary Ind. v. Workum***, 2006 ABCA 226, 391 A.R. 137 (para. 6); ***Chevron Can. Res. v. Dir. of Indian Oil etc.***, 2006 ABQB 946, [2007] 7 W.W.R. 696, 701, 418 A.R. 166 (paras, 6, 10).

5. Has any other party relied on the order to its detriment? (Discussed in subpart (g) below.)

6. Does the applicant's new factual stance contradict his earlier factual assertions or evidence? (Discussed in subpart (e) below.)

[14] However, the law in this area is developing, and few of the reported cases say that the criteria which they list are exclusive. To put it another way, few of those cases say that meeting all those criteria is sufficient and should lead the judge to reopen his or her decision. As the case law develops and more fact situations are considered by the Courts, I have no doubt that further criteria will be developed.

(b) The Test in Contempt

[15] It has been suggested that the Courts should be more willing to reopen a pronounced but unentered decision finding civil contempt than they would be for other types of order. See ***Berube v. Wingrowich (#4)***, 1999 ABQB 698, 2 Alta. L.R. (4th) 59 (affirmed orally on unrecorded grounds C.A. Nov. 26 '02, Edm. file #9903-0432-AC). I have three reservations about that distinction. First, there might be some exceptions to it. For example, a purely procedural decision, especially one dealing with logistics and practicalities, would probably be easier to reopen. However, there may be something to be said for the philosophical approach of being more receptive to reopening pronounced but unentered finding of civil contempt on the merits, than for doing so for another type of substantive judgment such as debt or liability in tort.

[16] Second, however, in my view any different approach for contempt must be handled on an issue-by-issue basis. There may be certain types of criteria which should be more laxly applied in a contempt case, but not other bars such as dishonesty, holding a point in reserve to see if it is needed, election or estoppel, or (especially) prejudice to the other side. In those cases, I can see no reason why the reopening rules should be more lax in the case of civil contempt.

[17] Third, I would also draw a distinction as to whether the contempt is ongoing, or whether it has finished and performance has been given or the harm done has been repaired. Someone who temporarily violated a court order and has since repaired the harm, is not in the same position as someone who is still refusing or neglecting to perform a court order against him or her.

[18] For about 12 days after the contempt motion was filed here (and 18 days after the Court of Appeal clarified its judgment), everyone concerned on the government side was in clear and obvious breach of the Court of Appeal judgment.

2. Obstacles to Reopening the Contempt Motion Here

(a) No Legal Error

(i) General

[19] The grounds advanced for reconsidering the contempt conviction are factual, not legal. I did not understand any error of law to have been suggested by counsel. Nor has one come to my attention during argument of the reopening motion.

[20] In any event, none of the points raised could get anywhere without further evidence, maybe even without removing or somehow impairing some of the facts given to the Court during the earlier proceeding. That makes the tests for admitting new evidence doubly important.

(ii) Personal Liability

[21] On this motion to reopen, counsel for Mr. Ouellet constantly referred to "Mr. Ouellet in his personal capacity" and contrasted that with his official capacity. He cited no authority for such a distinction, and I know of none in law.

[22] Consider an example. If the Director, without lawful authority, seizes some private clothing or documents (or instructs an official to do so), that is the tort of conversion. The Director is personally liable for that tort, and his own bank account can be garnished to pay the judgment. That also extends to criminal liability. And it is a key rule of our constitution. Hence my quotation from Dicey's authoritative text, and its approval in ***Roncarelli v. Duplessis*** [1959] S.C.R. 121. See my June 23 oral judgment, Appendix A.

[23] I am beginning to wonder whether Mr. Ouellet paid much attention to that portion of my decision, though he sat at the counsel table during its pronouncement.

(iii) Mandatory Court Orders

[24] I must also discuss disobedience of mandatory court orders or judgments.

[25] A great deal of case law on what is contempt of court by disobeying an injunction or other court order, is not so general as it appears on the surface. Most of those decisions are about disobeying a negative injunction; in other words, an order forbidding someone to do something either expressly or by implication. But the present case involves disobedience of positive judgment directing someone to do something (return the child to the previous foster home). Therefore, many aspects of the cases on negative injunctions and their disobedience are distinguishable.

[26] If a negative injunction is issued **forbidding** someone to do something (such as using someone else's name or trade name in connection with his own business), what need the person so enjoined do? He or she need do nothing whatever (unless he or she has already set in motion steps to do the forbidden act). And if someone else disobeys that injunction, the party enjoined is not liable unless he or she has done something to aid, abet, assist, encourage or instruct that (or has earlier instructed it and not cancelled those instructions).

[27] But it is very different when a court judgment or order is given directing someone to **do** something. Then doing nothing is not an alternative. Simply doing nothing is itself contempt. Furthermore, it is not enough to take feeble and ineffective steps. For example, to simply ask someone else to follow the order without sufficient steps to ensure that that person is reliable, understands the task, will give it sufficient priority, has sufficient resources and understanding, and so forth. In other words, negligent or inadequate attempts to obey the court order or to obey it in due course, are themselves contempt of court. Such a failure to obey by relying carelessly on others, is in no sense vicarious liability. The duty is that of the person commanded.

[28] The rule of law is not disputed by anyone in the present motion, and indeed ***Michel v. Lafrentz***, 1998 ABCA 231, 219 A.R. 192 was reproduced and cited by new counsel for Mr. Ouellet. It reviews the authorities holding that due diligence is contempt where the order disobeyed is mandatory rather than negative. And since then, that proposition in ***Michel v. Lafrentz*** has been approved by a panel of the Alberta Court of Appeal. See ***Broda v. Broda***, 2004 ABCA 72, 346 A.R. 372 (para. 7).

[29] I mention this because it is important to note the narrow scope of the motion to reopen the contempt conviction here. It was simply based on the theory that Mr. Ouellet never was involved with this child. The implication was that the judgment should not have been made against him, or that somehow, despite its wording, he need not have carried it out.

(b) Lack of Due Diligence in Adducing Evidence

[30] All the facts raised on behalf of Mr. Ouellet by his counsel on the motion to reopen were matters very well known to Mr. Ouellet for a long time. He is the only person whose new evidence was adduced, and he does not suggest that any of the substantive matters which he raises were brought to his attention, or learned through other people. It is true that his new evidence says that at the relevant times he did not know certain things, but he has known for a long time that he did not know them. He knew on June 10 and June 23 that he did not know them. In other words, it is his own personal knowledge or ignorance which is at issue. He sought no adjournment on June 23.

[31] In my view, due diligence is one of the criteria to be weighed when deciding whether to take the rare step of reopening a pronounced decision. Litigation will rarely have any finality if a party can keep disclosing another part of his or her case, confident in the knowledge that if that does not work, he can wait, hear the judge's decision, and then adduce some more evidence, and try again to plug whatever holes in the case that the judge has identified. There is already far too much tendency in Alberta in the last ten years to relitigate decided points.

[32] The matter is even clearer when the issue is adducing new evidence not adduced at the first hearing. Case law is unanimous that that is the first hurdle to be overcome when someone seeks to adduce new evidence to reopen a pronounced decision (or on appeal). (See para. 12(1) *supra*.)

[33] This also ties in with a number of the other points below, especially point (e). Lack of diligence in raising the argument or the additional evidence becomes acute when there is any indication that there is any inconsistency between the two positions, or that a tactical or strategic choice has been made.

(c) New Evidence of June 5 Contempt Not Favorable

[34] The June 23 conviction for civil contempt was based on conduct or inaction at two periods of time. One of them was the period from June 5 to the actual return of the child on June 22.

[35] The new evidence adduced with respect to that period is not practically conclusive, and would not have likely produced the opposite result (acquittal) if adduced promptly before June 23.

[36] Indeed, the opposite is correct. The new evidence would be fatal for Mr. Ouellet on this point if adduced. It shows that on June 5 he learned the following. A Court of Appeal decision of January 30 had not yet been obeyed, though the Court of Appeal on June 4 had clarified what should be done. None of the various officials directly concerned had yet returned the child, and they were still considering legal alternatives to returning the child, i.e. trying to see if there was something which they could legally do to avoid returning the child, and in some fuzzy way were balancing the disadvantages of obeying the judgment.

[37] The officials asked for direction from Mr. Ouellet. He simply told them that he was satisfied with the course which they were following. He did not tell them that they could not wiggle out of obeying the order, nor that wasting time looking for alternatives to obedience was wrong. He did not say to return the child. Indeed he told me in open court on June 23 that the officials' task on June 5 was to balance the conflicting interests of the two foster families and the child. The totality of his written and oral evidence on July 10 and 14 was largely consistent with that (though he went back and forth on that). So is Mr. Gillis' affidavit (para. 17) consistent. Nor did Mr. Ouellet set any deadlines, nor inquire into how quickly the child would be returned, nor the methods which would be used. He was content to leave it with the debating officials.

[38] Nor did Mr. Ouellet ask them to report, nor set up any checking or diarization methods.

[39] Yet Mr. Ouellet admitted that he had full power to give those other officials binding directions, and that he had a duty to act if he saw something wrong, including a court order not obeyed. The warning to all staff to comply with court orders by his successor (Acting Director) was within that official's powers. It is freely admitted (and in evidence) that Mr. Ouellet was at all relevant times the Director, and he knew that he was.

[40] Worst of all, just before the meeting Mr. Ouellet was given a packet of material relating to this problem, but never read it, whether before or after the meeting.

[41] I must emphasize that Mr. Ouellet knew throughout this time that counsel for the successful appellant to whom the child was to be returned was seeking a finding of contempt.

[42] Therefore, it would be no kindness to Mr. Ouellet to admit this new evidence, nor to reconsider contempt on June 5 or thereafter. To do so would only make matters worse for Mr. Ouellet.

[43] I do not want to give the impression that only Mr. Ouellet's evidence supports a finding of contempt on June 5 or later. As noted, Mr. Gillis' affidavit (filed June 22 to resist the contempt motion) contains similar statements confirming the contempt.

(d) New Evidence not Favorable Respecting Events Before June 5

[44] For this period also, the overall effect of the new evidence tendered would do Mr. Ouellet very little good. It would be the opposite of conclusive, and in considerable part admitting the new evidence would simply confirm the findings of contempt before June 5. I discuss below five particulars.

(i) No System or Diligence

[45] The new evidence (if received) confirms that Mr. Ouellet had no system whatsoever for follow-up or supervision of whether court orders against the Director were being obeyed; not even

when the litigation had got as high as an appeal to the Court of Appeal. The Court of Appeal judgment was issued January 30, clarified June 4, contempt threatened June 4, formally moved for June 10, and the child was not returned until June 22. Yet throughout that period of almost five months, Mr. Ouellet had no idea whether or when the child had been returned, and did not ask. Apparently no one was supposed to tell him. The last that Mr. Ouellet knew (on June 5) was that the child had **not** been returned, and that whether to return the child was being discussed. He still knew nothing and made no inquiries up to June 23.

[46] That posture continued despite the fact that systems in place within the government required that the Director make a recommendation to the Deputy Minister before an appeal could be launched even to the Court of Queen's Bench (and such an appeal was launched here).

[47] Crown officials have a duty to respect private legal rights, and to have the court clarify its injunctions, not to disregard court orders in cases of doubt: ***E. Tr. Co. v. McKenzie Mann & Co.*** [1915] A.C. 750, 84 L.J.P.C. 152, at p. 156 (P.C.(Can.)).

[48] It cannot be suggested (and no one did) that Mr. Ouellet was ignorant of the fact that he was the party named in most or all Alberta court proceedings involving child protection. Indeed he more or less swears to that in para. 7 of his July 10 affidavit for this motion to reopen. Examination of a database for Court of Queen's Bench and Alberta Provincial Court judgments for the last two years reveals 40 and 44 relevant judgments respectively naming the Director of Child Welfare or the Director of Child, Youth and Family Enhancement. (Because of appeals, probably some cases appear more than once.) There is only one relevant case naming any Child and Family Services Authority.

[49] Even if obeying a court order takes time and preparation, that is still no excuse for non-performance, where previous time to prepare or begin the task has not been used: ***Whitemud Hills etc. v. Balogun***, 2005 ABQB 541, [2005] A.R. Uned. 540 (July 7) (paras. 13, 16). On the need for diligence to obey a court or order, see ***Michel v. Lafrentz***, *supra*; ***Harding v. Tingey*** (1864) 12 W.R. 684, 685; ***Bird v. Hadkinson*** [2000] C.P. Rep. 21, [1999] B.P.I.R. 653, *Times* Apr. 7 (1999) (Mar. 4)*;* ***Broda v. Broda***, 2004 ABCA 72, 346 A.R. 372; ***Dreco Enr. Serv. v. Wenzel***, 2004 ABQB 517 (paras. 55-58); ***Free Est. v. Jones***, 2004 ABQB 486, 364 A.R. 384 (paras. 28-31).

(ii) Ignorance of the Law is No Defence

[50] The best that can be said is that Mr. Ouellet seems to have had some grave misunderstandings of the law respecting Court judgments, their obedience, and contempt of court. It is even possible that he even got bad legal advice, but evidence of that is limited, and no one has waived privilege, so I cannot pursue that aspect. I emphasize that the legal advice in question was not given by Ms. Harwardt.

[51] Ignorance of the law or even bad legal advice is not a defence to contempt of court by disobeying an order: ***Free Est. v. Jones***, *supra* (para. 32); ***Glazer v. Union Contractors*** (1960) 33

W.W.R. 145, 173 (B.C.), affd. (1960) 34 W.W.R. 193, 201 (B.C. C.A.); ***Baxter Travenol Labs of Can. v. Cutter (#2)*** (1986) 14 D.L.R. (4th) 641, 649, affd. on this point (1987) 81 N.R. 220, 225 (F.C.A.). The ***Glazer*** case involved a Cabinet Minister, not a party to the suit, who helped a party violate an injunction.

[52] The act or omission need not be wilful to be contempt, and there need be no intent to disobey: ***R. v. Daye*** [1908] 2 K.B. 333, 339 (D.C.); ***Baxter Travenol*** case, *supra*; ***A.-G. Man. v. Groupe Quebecor*** [1987] 5 W.W.R. 270, 282-83, 47 Man. R. (2d) 187 (C.A.); ***Bird v. Hadkinson***, *supra*, at pp. 8, 9, 10-11; ***Topgro Greenhouses v. Houweling***, 2003 BCCA 355, 35 C.P.C. (5th) 313 (para. 6); ***Stancomb v. Trowbridge U.D.C.*** [1910] 2 Ch. 190; ***Broda v. Broda***, *supra* (para. 7).

[53] But reliance on bad legal advice, or good intent, can mitigate the punishment.

(iii) Mistaken Order is not a Defence to Contempt

[54] The new defence to the contempt motion which is raised on this motion to reconsider boils down to the following. Other branches of the government, or other entities or people authorized by the government such as regional authorities, are the ones who were involved with this child. So the Courts, especially the Court of Appeal, should not have made an order that Mr. Ouellet as Director return the child.

[55] But that is the old fallacy of the ***Poje*** defence. See ***R. v. Poje*** [1953] 1 S.C.R. 516, 527-28, affg. ***Cdn. Tpt. v. Albury*** [1953] 1 D.L.R. 385 (B.C. C.A.). It is simply a suggestion that the order of the Court of Appeal was mistaken, or may have been mistaken, and that therefore the order need not be obeyed. It has been settled long before ***Poje***, held then, and since repeatedly by every court in Canada, that an error or lack of foundation in the court order or injunction in question is no defence to the charge of contempt for disobeying that court order. See ***E. Tr. Co. v. McKenzie Mann & Co.***, *supra*, at 157 (L.J.P.C.); ***Cdn. Human Rts. Comm. v. Cdn. Liberty Net*** [1998] 1 S.C.R. 626, 224 N.R. 241, 295 (para. 50); ***Regina (City) v. Cunningham*** [1994] 8 W.W.R. 457, 460-61, 123 Sask R. 233; ***Cdn. Tpt. (U.K.) v. Albury***, *supra*, affd. as ***Poje v. A.-G. B.C.***, *supra*; ***Isaacs v. Robertson*** [1985] A.C. 97, [1984] 3 W.L.R. 705, 708-09 (P.C.(St. V.)); ***R. v. Bridges (#2)*** (1990) 78 D.L.R. (4th) 529, 544 (B.C. C.A.).

[56] For government officials to refuse to obey an order, especially one about a person's custody, because the government thought that the order was wrong, was "unprecedented in this Court and the whole history of British law." Even at the height of the Irish rebellion, the officials concerned were ordered imprisoned, until the government relented and obeyed the order: ***Egan v. General Macready*** [1921] 1 Ir. R. 265, 280.

(iv) He Had and Exercised His Duties and Powers in Law

[57] There is some evidence that in law the Director of Child, Youth and Family Enhancement was the one who had the rights and powers and duties here. Even instructions from the Child and

Family Services Authority (delegate) to Alberta Justice were in effect from the Director through delegation, testified Mr. Ouellet (p. 12, ll. 20-26). And the Act which sets up the Child and Family Services Authority says that each is "an agent of the Crown in right of Alberta under the Minister's direction." (s. 6 of 2000, c. C-11). So they are not autonomous. Nor has anyone sworn that their staff do not work for the Government of Alberta.

[58] And the Director appears to have acted in this case.

[59] The current affidavit and submissions given by Mr. Ouellet on the motion to reopen would give the impression that Ms. Kellett had launched all the court proceedings using a sloppy or out-of-date style of cause, and that she is now using that technicality against Mr. Ouellet, instead of against some Child and Family Services Authority.

[60] That is not so. The court proceedings were begun by the Director, not by Ms. Kellett, and the Director chose the style of cause naming himself. (The Director was presumably Mr. Ouellet's predecessor.) I have examined the Court of Queen's Bench file #FL03 09572 and note on it these papers, filed in the name of and for the Director:

1. Notice of appeal July 19, 2007,

2. Notice of motion for stay of execution in favor of Director July 19, 2007,

3. Affidavit in support July 20, 2007,

4. Formal order granting Director a stay September 24, 2007,

5. Memorandum in support of appeal to Court of Queen's Bench September 14, 2007, and

6. Formal order allowing appeal in favor of Director November 30, 2007.

The evidence on the contempt motion shows clearly that the Director has taken the fruits of that stay and that appeal.

[61] Mr. Ouellet's testimony said that formal policy required that he advise and recommend any such appeal to the Deputy Minister, though he could not find paperwork on that for this appeal.

[62] The style of cause in the Court of Appeal is identical to that chosen and used by the Director in the Court of Queen's Bench.

[63] I am not willing to assume (without strong evidence) that counsel in the Court of Queen's Bench filing all these papers, and making all the statements in them, acted without authority and so

practised a gross deception on the Court of Queen's Bench. Rather, I must take it that these papers were true and authorized.

[64] Furthermore, the sworn affidavit (item 3) used to get the Court of Queen's Bench stay (item 4) is by a case worker with personal knowledge. She speaks only of the Ministry, not of any Child and Family Services Authority, and says that the decisions under appeal were by the Director (paras. 7-10), and that the Director was then opposing the (present appellant's) application to change guardians.

[65] Even in the Court of Appeal, counsel signed and filed a factum in the name of the Director.

(v) Legal Rights, Powers and Duties Do Not Depend on Administrative Reporting Pathways

[66] Administrative structure is not the same as law.

[67] New evidence was tendered as to the extremely convoluted and puzzling structure of who administratively is involved with child protection in Alberta, and the various ways that Mr. Ouellet as Director of Child, Youth and Family Enhancement was involved in child protection proceedings, including adoption proceedings.

[68] Mr. Ouellet seems to think that because the people involved on the ground were not reporting directly to him in a functional sense, that the Court should ignore the fact that he had full legal and administrative powers (as his July 14 evidence would confirm) to see to obedience of court orders like the one in question. And his counsel's argument ignores the fact that changing administrative set-ups or introducing other people cannot change what in law are the powers and duties of the Director, particularly to obey a court order. Administrative arrangements cannot remove legal duties.

[69] That someone is only a party named in the style of cause, and is not really involved in running the lawsuit, does not exempt him from obeying an order of the court against him in that suit: ***Seal & Edgelow v. Kingston*** [1908] 2 K.B. 579, 582-83 (C.A.).

[70] New counsel for the Director places great stress on the fact that there is legal power to "delegate" the powers of the Director to various other bodies such as regional agencies. He produces a precedent for a memorandum of understanding purporting to do some of that, and extracts from some website as to others. One website entry is vague and unhelpful (except for citing a section in the legislation), and the other merely says that the Child and Family Services Authority boards "oversee the delivery of services." The precedent says that the Child and Family Services Authority in question is "an integral part of the Ministry of Children's Services", and its Chief Executive Officer is an employee of the Government of Alberta and reports both to the Deputy Minister and to the Child and Family Services Authority Boards, and ultimately the Minister governs. I find

nothing in it which (if signed) would remove legal powers or duties from the Director, nor take from him any status as guardian which he was formerly given.

[71] Counsel for Mr. Ouellet seems to assume that the Director no longer has those powers (though that is not what Mr. Ouellet's cross-examination before me said). However, the Supreme Court of Canada has held that

> the extent of the delegation depends upon the language of the grant, but full original powers are retained.
>
> ***A.-G. N.S. v. A.-G. Can.*** [1951] S.C.R. 31, 46

The Supreme Court of Canada there cites and quotes with approval ***Huth v. Clarke*** (1890) 25 Q.B.D. 391, 395. The full passage from ***Huth*** is as follows:

> Delegation, as that word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, Delegatus non potest delegare, as to the meaning of which it is significant that it is dealt with in Broom's Legal Maxims under the law of contracts: it is never used, by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word "delegate" means little more than an agent.

[72] In Manitoba, a defendant was ordered by the court not to operate a certain business or profession. He continued notwithstanding the order, and then sought to defend himself against a contempt charge by swearing that the business was now carried on by an incorporated company. That was no defence, absent evidence that he was not in control and not at the relevant time responsible for conduct of the business: ***Macievich v. Anderson (#2)*** 6 W.W.R. (ns) 488, 491-92, [1952] 4 D.L.R. 507 (Man. C.A.).

[73] It is useful to keep in mind the policy underlying the legal rules here. Even where the person who has been a party to breach of a court order is not a true party to the suit, why do the courts punish his or her contempt?

> . . . it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of Court not be disregarded, and that people

> should not be permitted to assist in the breach of those orders in what is properly called contempt of Court . . .
>
> Rigby L.J. in ***Seaward v. Paterson*** [1897] 1 Ch. 545, 558, 66 L.J. Ch. 267, 272 (C.A.)

[74] Therefore, the Director lost none of his powers, and had no legal obstacle to obeying the Court of Appeal judgment. Mr. Ouellet's cross-examination evidence would (if admitted) confirm that.

(e) Contradictory Stance

[75] If one compares the original defence tendered on June 23 with this July 14 motion to reopen, Mr. Ouellet was not attempting to blow hot and hotter, nor to amplify the position which he took in June, simply to fill in a gap. Instead, his positions on those two dates were inconsistent.

[76] Yet he had warning: the contempt motion heard June 23 was the hearing of a notice of motion filed on June 10. And there had been written warnings before the notice of motion from the appellant's lawyer, Ms. Kellett, that such a motion would be brought, and an almost identical motion filed in the Court of Queen's Bench on June 8 and served. At the meeting on June 5, Mr. Ouellet was told personally that that contempt motion was pending. He did not read the papers and ignored the matter, and did not even bother to come to the contempt hearing on June 23 until I ordered him to attend. So at best he is the author of his own misfortune by his neglect.

[77] On June 23, Mr. Ouellet sat next to the lawyer who appeared for him. She made arguments in his favor. He never once contradicted her authority to speak for him. Indeed, when he was told that he did not have to say anything but could address the Court on the subject of guilt, he did address the Court. He then spoke along the same lines as she had previously.

[78] There was no hint then of any of the factual matters which were raised in the reopening motion heard on July 14.

[79] I have very considerable difficulty in reconciling a number of the things which Mr. Ouellet said in his affidavit filed in July for the reopening motion, and said in his cross-examination and re-examination on July 14, with

(a) what he and his counsel had earlier said on June 23 re liability or when speaking to penalty after the conviction had been entered, or

(b) what was said in a sworn affidavit of Mr. Gillis which was filed by his first counsel to oppose the motion, and referred to in his presence during the June 23 hearing.

[80] Mr. Ouellet's July 10 affidavit, filed to reopen the contempt conviction, in essence says that all these matters are and were run by Child and Family Services Authorities, independent bodies which he did not supervise, and so he had no connection. (He took some of that back in his July 14 cross-examination.)

[81] But the June 23 submissions of Ms. Harwardt as to liability were different. She said merely that there were many children in care, and that Mr. Ouellet could not personally be familiar with every case, and that he delegated responsibility to many people (pp. 8, 26). (Similar was p. 51 on penalty.) Obviously Mr. Ouellet had to make the final determination how to return the child, she said (p. 27, ll. 26-27).

[82] Significantly, Ms. Harwardt emphasized that the Director was and is the guardian of this child (p. 28, ll. 1-6). That may well be true. Examination of the Court of Queen's Bench adoption file shows certified copies of two Provincial Court orders dated September 24, 2003. One says that "a director" successfully applied for permanent guardianship, and the other grants an application by "the director" for a no-access order.

[83] Then when Ms. Harwardt spoke to me about penalty, she said (with Mr. Ouellet beside her) that the lesson to all was to make sure that the Director is better informed as to what is going on (p. 52, ll. 2-5). She said that he relied on "other people in his ministry to make sure" that court orders were obeyed (p. 53, ll. 2-8). She also said they recognized that the Director could have and should have done things differently, and accepted that finding, but that he relied on legal advice (p. 54, ll. 6-15). She said, "Mr. Ouellet in particular recognizes the need to comply with this court order. There is no question." (pp. 56-57).

[84] Those statements are not consistent with the July 13 and 14 factual statements by and for Mr. Ouellet.

[85] Though Mr. Ouellet now suggests that before June 5 everything was done by a Child and Family Services Authority and not by his Ministry, that is not at all what Mr. Gillis swears to. Mr. Gillis' affidavit was filed June 22 to resist the contempt motion.

[86] Mr. Gillis never mentioned Child and Family Services Authorities, and gave a strong implication that he and another named official were officials of the Ministry of which Mr. Ouellet was senior management. Mr. Gillis' affidavit clearly states that he and that other official were making the decisions with respect to the child in question.

[87] The inference during argument by new counsel for Mr. Ouellet on July 14 seems to have been that his July evidence was more accurate, and that the June 22 and 23 statements sworn and unsworn were no longer operative (to use a phrase which became famous in the United States in the 1970s). In my view, that is just the sort of change of direction which the case law is designed to prevent by putting considerable restrictions on reopening a pronounced order or judgment.

[88] I am not criticizing Mr. Cranston, Q.C. who had nothing to do with the matter on June 23 or earlier, and had to do the best he could with the instructions which he was given thereafter.

[89] It is possible that some of the evidence given for the rehearing on July 14 was closer to the truth in some respects than some of the evidence and the unsworn statements given in Court and by way of affidavit on June 23.

[90] However, no Court should be placed in the position of choosing between the two inconsistent successive stories told by a litigant before and after an unfavorable judgment. If he or she tells one version to the Court at the definitive hearing where he or she is supposed to present the full case, and loses, it would set a lamentable example and backwards incentives and disincentives, to let him or her then try a second time with inconsistent factual allegations. (There could be exceptional circumstances of due diligence and unavoidability in rare cases, but not here.)

[91] The Supreme Court of Canada has held that a litigant who gives evidence to one effect and then loses, should not be allowed afterwards to reopen the verdict with new contradictory evidence, especially as the incentives shift once the first decision is pronounced: ***Sagaz Ind. v. 671122 Ont.***, *supra* (paras. 63-64).

[92] Along the same lines, I again cite ***Berube v. Wingrowich***, *supra*. In that case, someone who had been given money to hold in trust went quietly all through a hearing about staying an order to turn the money over. Only after he lost did he reveal that he had parted with the money before the hearing even started. The Court properly said that that in itself was contempt by misleading the Court.

[93] In several contexts, the Alberta Court of Appeal has said that a party's position or objections in court are

> not . . . a game of linguistic hide-and-seek, the object of which is to conceal the real meaning of the spoken word from the judge and see whether the judge can find it before counsel leaves the courtroom. A presiding justice is entitled to treat a statement by counsel as having that meaning which a reasonable person would infer from the statement. The presiding justice is not there to cross-examine counsel concerning the subtleties or nuances of a statement to the court . . .
>
> ***R. v. Heikel*** (1992) 125 A.R. 298, 305 (para. 24) (C.A.); ***R. v. deKock***, 2009 ABCA 225 (June 16)

[94] Here of course I am not criticizing Mr. Cranston, Q.C. (nor even Ms. Harwardt). I refer to Mr. Ouellet who stood by and even took a similar tack to Ms. Harwardt's.

(f) Suggestion that the Director Had No Duties

[95] The repeated argument on the motion to reopen was that this child had not been apprehended by the Director of Child, Youth and Family Enhancement, and that he was not the one who was pursuing the appeals, and not the person to whom the court order was directed.

[96] The latter suggestion is patently wrong. The Court of Appeal order, whether it is correct or not, named him and no one else as respondent in the style of cause. (It copied his use of librarians' style of citation, and instead of saying Director of Child, Youth and Family Enhancement of Alberta, said "Alberta (Director of Child, Youth and Family Enhancement)." That is a small clerical difference. Someone mentioned this point in passing as a curiosity. It is less than that, and not worthy of extended discussion.)

[97] Mr. Ouellet admittedly knew all along that various pieces of litigation and appeals in various children's cases constantly were taken in the name of the Director, i.e. in his name.

[98] That was not confined to other litigation. Copies of the papers for this case were handed to Mr. Ouellet just before he came to the meeting about the Court of Appeal judgment on June 5. He chose to shut his eyes and not even read the papers, though he was told they were about obedience of a court order and contempt. So he has himself to blame for the result.

[99] Extended failure to have the parties to the lawsuit corrected to reflect the appropriate people, barred a motion to reopen, in ***Caisse Pop. de Morinville v. Pasay***, *supra* (paras. 41, 44).

(g) Change of Position

[100] In many areas of civil litigation, including the law of appeals, there is a rule that a party cannot approbate and reprobate an order or a remedy. If there is a choice or election to be made, once the party has taken a benefit, or the other side has relied upon it, he or she cannot change his or her election. So if the opponent would suffer detriment, the Court cannot undo the order later. For example, that reliance or detriment may bar an appeal: see the cases cited in the *Civil Procedure Encyclopedia*, Chap. 74, Part I.4 (pp. 74-38 to 74-39). Or it may bar opening up default judgment: see the cases cited *op. cit. supra*, Chap. 17, Part J (p. 17-29). That is a mere example of the more general principle that a party will not be relieved of his or her slip or granted an indulgence, where that would prejudice the other side.

[101] That general rule applies here. Applying that bar to motions to reopen is ***McNiven v. Pigott*** (1914) 19 D.L.R. 846, 858-59 (Ont. C.A.).

[102] When the contempt conviction had been entered here, and the question of penalty was pending, it was pointed out that there had been considerable confusion as to what remedy could be sought for the non-return of the child and, in particular, what Court should be resorted to. Two other parallel proceedings to this contempt motion in the Court of Appeal had been launched. One was

a motion for *mandamus* in the Court of Queen's Bench, and the other was a very similar motion for contempt in the Court of Queen's Bench. As a result of my finding of contempt, it was agreed on all hands that the two enforcement motions in the Court of Queen's Bench should be ended. (See transcript pp. 49-50).

[103] Though they have not been formally discontinued, I understand that those parallel motions have been taken off the list, and nothing has been done to pursue them or advance them over this whole time, in reliance upon that. And counsel for the appellant B.M. has given an undertaking to discontinue those proceedings.

[104] That is a change of position to the detriment of that innocent appellant.

[105] A deserving litigant is sometimes allowed to resile from a position and cure a slip on appropriate terms. Possibly some terms along those lines could be worked out here, but I see little reason to give this litigant an indulgence, given his shifts in position.

[106] If this were the only impediment to opening up the contempt finding, and if the contempt finding would otherwise be unjust, then I might try to devise such terms and conditions. None of those things is so, and I leave this question of election or change of position as one more thing to weigh.

3. Conclusion

[107] I will not admit any of the new evidence, and I will not reopen the conviction for civil contempt.

[108] There has been no miscarriage of justice in the conviction for contempt; indeed the opposite. To reopen the matter and receive the new evidence would simply make things worse for Mr. Ouellet.

D. Action by Others

1. Introduction

[109] Several things lead me to say more: the disturbing nature of some of the events and arguments here, and the similar comments of judges on breaches or evasions by the previous Director: see ***Re L.S., A.B. and K.S.***, 2007 ABPC 274 (Sept. 18), and ***C.B. v. Director of Child, Youth and Family Enhancement Act***, 2008 ABQB 165, JDC FL 01-02601 (Mar. 13). Mr. Cranston, Q.C.'s argument that the view of the law found above would necessitate restructuring the whole child protection administration (which argument I do not accept) nudges me the same way.

[110] The contempt here was lengthy and undisputed. Only the name of the exact culprits has been questioned.

[111] Children's well-being and care should not be delayed or made uncertain by failures of communication or disobedience of court orders. And parents often have rights too.

2. Counsel and Judges

[112] Counsel opposing the child protection authorities henceforth in the near future might be well advised to take care to learn what government officials are involved in such litigation, and consider naming them all in the style of cause or in court orders. And court orders may be best served personally on the officials. Similarly, judges in Alberta may need to take care about names of officials and the style of cause. Some things should not be assumed. Avenues to escape obedience may be undesirable for a time.

3. Cabinet Ministers

[113] Her Majesty's government of Alberta, in my 42 years' experience, has not been in the habit of hiding identities, equivocating, nor evading court orders against it. And purely technical defences have been rare.

[114] But the present case raises doubts about whether everyone in the child protection parts of the government now shares those high standards, or even fully understands court orders. The complex administrative structure suggested by the evidence tendered here must exacerbate opacity and the opportunities for deniability.

[115] The government is established under the Constitution to administer the law, including the law about children. Counsel have become used to relying upon the government's trustworthiness and fairness in obeying court orders. That should remain possible. Counsel should not fear that they should deal with the Crown and its lawyers the way that they would when their opponent was a fly-by-night small business with a scofflaw history. The government's obedience to court orders should be and be seen to be willing, prompt and automatic, not strained through the mesh of contempt motions.

[116] Any contempt of court which included shuffling off responsibility to obey a court order among different officials (at times like the dried pea under three walnut shells) would be almost unprecedented. The closest parallel which I can find is ***Re Thompson (R. v. Woodward)*** (1889) 5 T.L.R. 565 and 601 (D.C.). There the Divisional Court, including that fairest of judges, Mathew J., was scathing in its language about the government officials concerned, and rightly so.

[117] It is highly undesirable that the courts and Bar of Alberta even contemplate having to assume all the burden of enforcing court orders in child protection cases. After all, the parents or foster parents often lack resources and rely on Legal Aid. So the taxpayers would suffer too if government officials were to play a game of hide-and-go-seek.

[118] After this judgment, ignorance or neglect by such officials will be a smaller excuse for disobeying court orders than before. A repetition might lead to litigation over whether those higher up were not immune.

[119] The affidavit of the successful appellant, and her counsel's argument on June 23, suggested that the government was stalling the return of this child while hastening countervailing adoption. I lack enough evidence to make any fact finding about that, but it deserves careful investigation.

[120] Mr. Cranston, Q.C. several times mentioned in his argument that other people may have been guilty of contempt here. That sounds likely, as the disobedience was lengthy and undenied, and other people seem to have had day-to-day conduct of these files. I cannot be sure who those responsible are, but clues may be found in the Court of Queen's Bench adoption file, in the affidavit filed here by the Director's counsel on June 22 to oppose the contempt motion, in Ms. Harwardt's submissions on June 23 (especially pp. 5-6), and in Mr. Ouellet's oral evidence on July 14 about the June 5 meeting (pp. 7-8). Doubtless government files would tell more.

[121] The Court is poorly equipped to investigate or prosecute contempt. And Ms. Kellett presumably has no investigative resources. I invite the Attorney-General to investigate and follow up.

[122] The Deputy Registrar will send a copy of these Reasons to the Minister of Children and Youth Services, and to the Minister of Justice and Attorney-General of Alberta.

E. Procedure for Penalty Phase

[123] On June 23, I heard argument on penalty and reserved decision on penalty. Given subsequent events, Mr. Cranston, Q.C. may make further submissions on that topic. His submissions on penalty should be written and should be filed within 10 days of the date of these reasons. Those submissions may cover any aspect of penalty (given the change of counsel). They should include:

(a) whether Mr. Ouellet wants his evidence given to the court in his affidavit and live on July 14 taken into account or not;

(b) the apparent dilemma (jail seems harsh but a fine could be circular) raised with Ms. Harwardt in the June 23 transcript; and

(c) what hourly rate (or other basis) should be used if any of the costs are to be taxed on a solicitor-client basis.

[124] I intended on June 23 to give Mr. Ouellet a chance (if he wished) to speak to penalty after Ms. Harwardt had spoken. I see that I forgot to do so, so I extend that invitation now. It would be in writing, with the same deadline. He is not obliged to do that.

Application heard on July 14, 2009

Reasons filed at Edmonton, Alberta
this 23rd day of July, 2009

Côté J.A.

Appearances:

D.R. Cranston, Q.C.
for the Respondent/Applicant (Respondent) Ouellet

D.B. Harwardt
for the Respondent/Applicant (Respondent) Director of Child, Youth and Family Enhancement

A.C. Kellett
for the Applicant/Respondent (Appellant) B.M.

APPENDIX A

THE COURT: I can give my decision now.

This is a motion for contempt arising out of Appeal No. 07030362 AC.

The Applicant is who was the successful Appellant in the substantive appeal, and the Respondent is the Director of Child Youth and Family Enhancement, whose name is Richard Ouellet, and he is before me.

The facts here are long and many facetted. For present purposes, it will be enough to say that the Director took from the foster home of the Appellant the child in question, and his decision to remove was appealed to an Appeal Panel, which gave fairly extensive written reasons which are in the material for this motion as an exhibit to an affidavit. That panel came to the conclusion that the child should not have been removed from the home.

The Director appealed to the Court of Queen's

Bench against the decision of that Appeal Panel and got a stay of execution at a later stage. In any event, the child stayed where the Director had the child. The Director's appeal to the Court of Queen's Bench was successful.

The other side then, that's the foster parent, appealed to the Court of Appeal. There was a partial stay only and the child in the interval remained where the Director had put the child.

The appeal was argued last September, that's September, 2008. On January 30th of this year, 2009, the Court of Appeal gave written reasons allowing the appeal and reinstating the decision of the Appeal Panel and, as I mentioned, that decision of the Appeal Panel was some pages long and contained reasons. Since then the decision of the Court of Appeal has been reduced to a written entered formal judgment.

The time for seeking leave to appeal to the Supreme Court of Canada is long past. No one has done so. No one has sought any kind of a stay of the decision of the Court of Appeal. Though, ironically, the Director has acted on the fact that the stay awaiting the Court of Appeal decision ended when the Court of Appeal spoke.

Very promptly after the Court of Appeal's decision, counsel for the successful Appellant, the foster mother, made it plain in writing to the

Director that she interpreted the decision of the Court of Appeal as requiring restoration of the child to her. The Director disagreed. Plainly, there was a difference of opinion. No one seems to have looked very carefully at the decision of the Appeal Panel which was restored by the Court of Appeal.

I am prepared to accept that a reasonable person in the shoes of the Director could have had some doubt as to whether the January 30th decision of the Court of Appeal required the restoration of the child to the Appellant foster mother or not. That being so, I am prepared to accept that the Director could and may have had such a reasonable doubt.

We have no evidence from the Director himself, and his counsel submits that he cannot immerse himself in every file for every child within the purview of his office in Alberta. At some stage, he personally did become involved in the matter of this child and this appeal. It is not completely plain when that happened. We certainly know that he was acting on the advice of his officials, and one of them, Mr. Gillis, has filed a lengthy affidavit in response to this motion for contempt. It was not filed until late yesterday in violation of the Rule which calls for the filing of response affidavits at least 24 hours before the hearing.

Ms. Kellett, do you have any objection to my

looking at Mr. Gillis's affidavit?

MS. KELLETT: Not particularly, Sir.

THE COURT: No? Thank you.

I will therefore shorten the time for the Court's receiving that affidavit filed on behalf of the Director and take it into account.

However, it must have been apparent to any reasonable person that counsel for the Appellant foster mother was strongly urging the proposition that the Court of Appeal decision of January 30th meant that the child should be returned. Anyone who took legal advice or took care to read the papers, especially the decision of the Appeal Panel, would have seen that that position taken by counsel for the foster mother was also arguable.

It is the duty of someone who receives a court order telling him or her to do something, to obey that court order. If there is some doubt as to what the court order means, then steps must be taken to clarify the doubt. Now, various steps in various circumstances might be reasonable or pardonable, but something must be done.

The evidence before me in the form of an affidavit from the foster mother attaching many documents, and the affidavit from Mr. Gillis, an intermediate official of the Respondent, also attaching many documents, does not conflict much and

does not conflict on anything of any real importance to the present motion.

It is evident that between January 30th and June the 4th, the Director did nothing of any consequence toward obeying the order of the Court of Appeal, or to clarify what it meant and what he was required to do. He and his officials, however, did find the time to take many steps to make it more difficult for the foster mother ultimately to win.

Counsel for the foster mother pursued the matter and sought clarification. On June the 4th of this year, the Deputy Registrar of the Court of Appeal, after a due application to the Court, gave notice to both parties in writing that the panel which had heard the appeal considered that their judgment meant that the child was to be returned.

One would have thought that the only thing that would stand in the way of the immediate return of the child then might have been some logistics. I accept that the child was in a comparatively remote Northern Alberta community at the time, and it was not just a matter of a 20-minute drive across Edmonton to get him to the foster mother. The child was not returned until yesterday, the 22nd of June, five minutes before noon. Now, I am not sure that the precise hour is in the sworn material and, in any event, nothing turns on it. It is common ground that the child was returned

yesterday.

It is very interesting that that was the day before the return of the contempt motion. If one looks at the affidavit filed yesterday afternoon by Mr. Gillis, the official in charge of this matter, it is evident that that was no coincidence. The instruction was that the child had to be returned before the contempt motion. That indicates an interest in sanctions, but not very much interest in duty. I have spoken of what and was not done between January 30th and the 4th of June.

If we now switch our focus to the period from June 4th to June 22nd, a period of approximately 18 days, one finds both in the sworn Affidavit of Mr. Gillis, the official in charge of this matter, and also in the voluntary statement before me a few minutes ago by the Director, Mr. Ouellet, a conception which, I must say, is a misconception. That misconception is that the Director and his officials had conflicting considerations and duties before him. Duties to the child, duties to the Band, duties to various people, considerations of the best interests of the child, and so forth. When a Court, still more a Superior Court, gives a direction to a person, the duty of that person is to obey the order without hesitation and without delay.

Many years ago contempt was found on the part of

a union. I believe it was in British Columbia. The union had been served with an injunction telling them to stop something, probably picketting. The union held a meeting to decide whether to obey the Court order. That was in itself held to be contempt.

Obviously, the order of the Court of Appeal did not mean that the child had to be returned within the hour. It did not mean that the Director had to charter a private jet and bring the child to Edmonton within two or three hours. Obviously not. But I have looked at Mr. Gillis's affidavit carefully, and I cannot find in it any excuse, logistical or otherwise, for taking 18 days to bring the child back.

I am very disturbed at the suggestion that the Director or any of his officials decided that they should weigh various countervailing considerations, and weigh on the one hand the direction of the Court of Appeal and on the other hand the directions in their own consciences or their own views of the law as to what were the best interests of the child.

Ever since in *Re Poje*, P-O-J-E, a decision of the Supreme Court of Canada about 1953, upholding a decision of the British Columbia Court of Appeal, the law in Canada has been extremely plain. When faced with a mistaken and erroneous Court order, one's duty is simply to obey it. Whether or not one thinks that the Court order was mistaken and should not have been

granted, and whether or not it is, in fact, mistaken or should not have been granted, one's duty is the same, to obey without question.

Now, I am not for a moment suggesting that I think that there was anything wrong with the decision of the Court of Appeal. All I am saying is that any belief that may have been harboured by the Respondent Director or his officials along those lines or partly along those lines avails them nothing in law.

I am tempted to point out that the Court of Appeal of Alberta is the top Court in Alberta, but it is not necessary to go into that, because the same respect is to be accorded to any order of any judge or any Court in Alberta.

Now, at the beginning of these proceedings, I learned from counsel for the Respondent Director, and I learned also from her during her argument, that the view in the office of the Director is that this is a large organization, and that there is no one person responsible. I want to point out a decision of the Supreme Court of Canada in *Roncarelli v. Duplessis*, [1959] Supreme Court Reports, beginning at page 121. One of the members of the majority of that panel of the Supreme Court of Canada was Mr. Justice Abbott, the former Federal Minister of Finance. He quoted in his judgment what he called the well-known passage from the Dicey's Law of the Constitution, 9th Edition,

which says.

> ...every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

While it is not directly on point, the decision in *Roncarelli v. Duplessis* was to hold personally liable to pay damages for acts done as the Premier of Quebec.

In 1918, at the height of the conscription crisis in Canada, in general, and in Alberta in particular, the Alberta Court of Appeal, which was then the Appellate Division of the Supreme Court of Alberta, granted orders for habeas corpus releasing several conscripted men on the grounds that the amending Order

in Council under which they had been conscripted was ultra vires. The military authorities under wartime emergency and facing a shortage of men simply refused to obey the Sheriff who came to get the men.

The decision from Chief Justice Harvey on the duty of all to obey orders of the Court, including the highest officials, is very educational. It is entitled *In Re Norton*, and it is reported in 1918, Vol. 2 Western Weekly Reports, 865. If who would win the war and the sinews of war necessary were still subject to obeying the orders of this Court then a fortiori when an official wishes to take into his own hands a decision as to what are in the best interests of a child.

The whole point of Courts is to have the law govern and not the big battalions govern, and that takes us back to Dicey's Law of the Constitution which I quoted earlier.

There is one other gap in the law which I have been citing. Some of the propositions of law I have given are (on reflection to a lawyer) obvious enough that it is not necessary to cite authority for them. But I wish to close my discussion of the law by quoting from another decision of the Supreme Court of Canada, *Baxter Travenol Laboratories v. Cutter* [1983] 2 Supreme Court Reports 388.

That was a case where an injunction was given in

patent litigation against, I believe, selling something. The Rules of the Federal Court of Canada at that time said that Court orders had no effect until they were entered. That is not what the Alberta Rules say, but that is what the Federal Court Rule said at that time. The Defendant, therefore, thought that in the week before the formal entry of the judgment, a golden opportunity was before him and he sold goods. I say "he", I think it was a company. I should say "it".

And I will quote a few passages from the Supreme Court of Canada which held that that was no obstacle whatever to finding contempt. The Supreme Court sent it back to the Federal Court of Appeal to try the merits.

I quote from Mr. Justice Dickson, later Chief Justice Dickson, on page 396.

> The inquiry does not end with a consideration of whether the injunction as such has been breached.
>
> The general purpose of the court's contempt power is to ensure the smooth functioning of the judicial process. Contempt extends well beyond breach of court orders.
>
> . . .
>
> Contempt in relation to injunctions has always been broader than actual breaches of

injunctions.

It is pointed out that someone who is not even named as a party, and one thinks here of Mr. Gillis,

> ...could still be found in contempt if he, with knowledge of its existence, contravened its term. Although technically not a breach of an injunction, such an action would constitute contempt because it would tend to obstruct the course of justice.

And one of the authorities he cites is the *Poje* case, which I referred to earlier, and he gives the proper citation, [1953] 1 Supreme Court Reports 516. Carrying on with the quotation,

> The same kind of analysis applies to the period between reasons for decision and the pronouncement of judgment. To accept an argument [that there is a period of grace]...

And I am leaving out a few words

> ...would completely...defeat the injunction. That would subvert the whole process of going to court to settle disputes. That is precisely what the contempt power is designed to prevent.
>
> . . .
>
> Once a judge has rendered his decision by

giving reasons, and assuming any prohibitions contained therein are clearly worded, it is not, in my view, open to any person to flout his disposition of the case on the ground that there is no judgment yet in effect... Once reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the Court and may amount to contempt of court.

The motion here is for civil contempt, and it has two substantive particulars. One is not obeying the decision of January 30th, 2009 and, second, not obeying the clarification of June 4th, 2009.

I have explained why the failure to get clarification after June 30th is contempt, and I have explained why the obedience after June 4th was not prompt.

Some cases take a very picky and technical and procedural view of contempt and consider any little flaw in the paperwork to be like a flaw in 17th Century criminal law permitting the accused to walk away free. I do not take that view.

If one points out the lack of a precise deadline on either January 30th or June 4th, then it is obvious

that the most lenient interpretation in favour of the Director was that the child should be returned within a reasonable time. I have no hesitation in finding that the 22nd of June was long after the expiry of a reasonable time.

Stand up, Mr. Ouellet.

For the reasons given, I find you guilty of civil contempt. You may sit down.

THE COURT: Good afternoon. Please be seated.

Two loose ends from this morning.

One, I had just meant to mention one other case on the subject of negligence leading to contempt, and that's no surprise. It's the one, which is tab 1 to Ms. Kellett's material, *Michel*, M-I-C-H-E-L *v.* *Lafrentz*, L-A-F-R-E-N-T-Z (1998) ABCA 231.

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APPENDIX B

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June 26, 2009

Delivered via facsimile – 780.422.4127

The Honourable Mr. Justice Jean E.L. Côté
Court of Appeal of Alberta
Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

Dear Sir:

Re: Appeal Number: 0703 0362 AC

We have been retained to represent the personal interests of Mr. Richard Ouellet, who we understand was the subject of a personal contempt Order by Your Lordship on Tuesday, June 23, 2009.

We have contacted the Court Transcription Management Services and have asked that we receive a copy of the transcript as soon as possible. It is our current intention to make application to Your Lordship to ask that Your Lordship hear further submissions solely on the question whether or not Mr. Ouellet ought to personally be the subject of a contempt Order.

It is our understanding from speaking with those present that certain important facts concerning the role of Mr. Ouellet were not brought to Your Lordship's attention.

We have copied this letter to all other counsel and would propose to bring forward the application as soon as the transcript is available.

Yours truly,

BENNETT JONES LLP

Donald R. Cranston
DRC/lms

copy: Mr. Farrel Shadlyn, Q.C. (Goldsman Ritzen)
Ms. April C. Kellett
Ms. Denise Harwardt (Alberta Justice)