**C.R. et al. v. Children's Aid Society of Hamilton et al.**
**[Indexed as: R. (C.) v. Children's Aid Society of Hamilton]**

**70 O.R. (3d) 618**
**[2004] O.J. No. 1449**
**Hamilton Registry Nos. C2229/00, C2162/02 and C86/03**
**Ontario Superior Court of Justice**
**Czutrin J.**
**April 6, 2004**

Family law -- Children -- Child welfare -- Rule 4(7) of Family Law Rules, which provides that legally represented children have "rights of a party", should be read as also providing that they and their legal representative have same "responsibilities" as party -- Children's Lawyer having obligation to comply with all rules that speak about responsibilities of parties -- Children's Lawyer being required to respond to request to admit facts pursuant to rule 22 of Family Court Rules and to request for document disclosure pursuant to rule 19 of Rules -- Family Court Rules, O. Reg. 114/99, rules 4(7), 19, 22.

Family law -- Practice -- Rule 4(7) of Family Law Rules, which provides that legally represented children have "rights of a party", should be read as also providing that they and their legal representative have same "responsibilities" as party -- Children's Lawyer having obligation to comply with all rules that speak about responsibilities of party -- Children's Lawyer being required to respond to request to admit facts pursuant to rule 22 of Family Court Rules and to request for document disclosure pursuant to rule 19 of Rules -- Family Court Rules, O. Reg. 114/99, rules 4(7), 19, 22.

The Office of the Children's Lawyer was asked to intervene in a case pursuant to the Child and Family Services Act, R.S.O. 1990, c. C.11 for two children. One of the respondents served a request to admit facts on the Children's Lawyer pursuant to rule 22(2) of the Family Court Rules and requested the Children's Lawyer to produce an affidavit listing documents pursuant to rule 19(1) of the Family Court Rules. The Children's Lawyer refused to respond to either request. The respondents sought advice and direction from the court with respect to whether the Office of the Children's Lawyer is subject to the same obligations under the Family Law Rules as other counsel or parties in the proceeding and whether the Children's Lawyer was required to respond to the requests.

Held, the Children's Lawyer should respond to the requests.

Although children are, in some circumstances, entitled to legal representation, they are not parties to child protection proceedings. Section 39(6) of the Child and Family Services Act allows a legally represented child to take part in a case "as if he or she were a party", and rule 4(7) of the Family Law Rules gives such a child the "rights of a party". The court had jurisdiction to supplement rule 4(7) by adding the word "responsibilities" to it. The silence of rule 4(7) with respect to responsibilities was not indicative of an intention that the Children's Lawyer is not to have the responsibilities of a party under the Family Law Rules. Because rule 4(7) states that the child has the rights of a party, rules that speak about rights of parties apply to the Children's Lawyer. If it is accepted that responsibilities should be read into rule 4(7), those rules that speak about obligations of parties would have to apply to the Children's Lawyer. The Children's Lawyer had an obligation to comply with the respondent's request to admit facts and to produce an affidavit of documents, and to comply with all rules that speak about responsibilities of parties.

MOTION for advice and directions.

Cases referred to Bass v. McNally, 2003 NLCA 15, 223 Nfld. & P.E.I.R. 322, 36 B.L.R. (3d) 142, 35 C.P.C. (5th) 219, [2003] N.J. No. 84 (Nfld. & Lab. C.A.); British Columbia Government Employees' Union v. British Columbia (Attorney General), 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, 87 N.R. 241, 31

B.C.L.R. (2d) 273, [1988] 6 W.W.R. 577, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 30 C.P.C. (2d) 221, 44 C.C.C. (3d) 289, [1988] S.C.J. No. 76; British Columbia Telephone Co. v. Canada (Minister of National Revenue) (1992), 139 N.R. 211, [1992] 1 C.T.C. 26, 92 D.T.C. 6129, [1992] F.C.J. No. 27 (C.A.), affg (1991), 46 F.T.R. 94, [1991] 1 C.T.C. 482, 91 D.T.C. 5342, [1991] F.C.J. No. 340 (T.D.); Canada (Attorney General) v. Public Service Alliance of Canada, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614, 123 N.R. 161, 80 D.L.R. (4th) 520, 48 Admin. L.R. 161, [1991] S.C.J. No. 19; Canada (M.N.R.) v. Crown Forest Industries Ltd., 1995 CanLII 103 (SCC), [1995] 2 S.C.R. 802, 183 N.R. 124, 125 D.L.R. (4th) 485, [1995] 2 C.T.C. 64, 95 D.T.C. 5389, [1995] S.C.J. No. 56; Chief Adjudication Officer v. Foster, [1992] 1 Q.B. 31, [1991] 3 All E.R. 846, [1991] 3 W.L.R. 473, [1991] E.W.J. No. 1572 (C.A.); Children's Aid Society of Bruce (County) v. T.R. (2000), 111 A.C.W.S. (3d) 511, [2000] O.J. No. 5645, 2000 CarswellOnt 5457 (C.J.); Children's Aid Society of St. Thomas (City) and Elgin (County) v. L.S. (2004), 2004 CanLII 19361 (ON CJ), 128 A.C.W.S. (3d) 888, [2004] O.J. No. 289, 2004 CarswellOnt 390 (C.J.); Clarke v. Clarke (2002), 2002 CanLII 78088 (ON SC), 32 R.F.L. (5th) 282, [2002] O.T.C. 611, [2002] O.J. No. 3223 (S.C.); Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, [1964] 2 All E.R. 401, [1964] 2 W.L.R. 1145, 48 Cr. App. Rep. 183 (H.L.); Deria v. General Council of British Shipping, [1986] 1 W.L.R. 1207, [1986] I.C.R. 172, [1986] I.R.L.R. 108 (C.A.); Dersch v. Canada (Attorney General), 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, 116 N.R. 340, 51 B.C.L.R. (2d) 145, [1991] 1 W.W.R. 231, 43 O.A.C. 256, 36 Q.A.C. 258, 77 D.L.R. (4th) 473, 50 C.R.R. 272, 60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1990] S.C.J. No. 113; Grini v. Grini (1969), 1969 CanLII 784 (MB QB), 68 W.W.R. 591, 5 D.L.R. (3d) 640, 1 R.F.L. 255 (Man. Q.B.); Jabel Image Concepts Inc. v. Canada (2000), 257 N.R. 193, [2000] G.S.T.C. 45, [2000] F.C.J. No. 894 (C.A.); Langley v. North West Water Authority, [1991] 3 All E.R. 610, [1991] 1 W.L.R. 697, [1991] E.W.J. No. 1498 (C.A.); Machtinger v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, 136 N.R. 40, 53 O.A.C. 200, 91 D.L.R. (4th) 491, 40 C.C.E.L. 1, [1992] S.C.J. No. 41; MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, 191 N.R. 260, 68 B.C.A.C. 161, 14 B.C.L.R. (3d) 122, [1996] 2 W.W.R. 1, 112 W.A.C. 161, 130 D.L.R. (4th) 385, 33 C.R.R. (2d) 123, 103 C.C.C. (3d) 225, 44 C.R. (4th) 277, [1995] S.C.J. No. 101; Madonia v. Mulder (2001), 104 A.C.W.S. (3d) 476, [2001] O.J. No. 1326 (S.C.); Mans v. State Farm Mutual Insurance Co. (1997), 26 O.T.C. 394, [1997] O.J. No. 850 (Gen. Div.); Martineau v. Matsqui Institution Disciplinary Board, 1977 CanLII 4 (SCC), [1978] 1 S.C.R. 118, 14 N.R. 285, 74 D.L.R. (3d) 1, 33 C.C.C. (2d) 366; Medical Centre Apartments Ltd. v. Winnipeg (City) (1969), 1969 CanLII 864 (MB CA), 3 D.L.R. (3d) 525 (Man. C.A.); Mitchell v. Peguis Indian Band, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, 110 N.R. 241, 67 Man. R. (2d) 81, [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, [1990] S.C.J. No. 63; Moore v. Assignment Courier Ltd., [1977] 2 All E.R. 842, [1977] 1 W.L.R. 638 (C.A.); Newman v. Grand Trunk R.W. Co. (1910), 21 O.L.R. 72, [1910] O.J. No. 106 (Div. Ct.), affg (1910), 20 O.L.R. 285, [1910] O.J. No. 78 (H.C.); Nolan v. Canada (Attorney General) (1997), 14 C.P.C. (4th) 314, 39 O.T.C. 205, [1997] O.J. No. 3361 (Gen. Div.); Ontario v. Canadian Pacific Ltd., 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, 183 N.R. 325, 82 O.A.C. 243, 125 D.L.R. (4th) 385, 30 C.R.R. (2d) 252, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147, [1995] S.C.J. No. 62; R. v. Barnier, 1980 CanLII 184 (SCC), [1980] 1 S.C.R. 1124, 31 N.R. 273, [1980] 2 W.W.R. 659, 109 D.L.R. (3d) 257, 51 C.C.C. (2d) 193, 13 C.R. (3d) 129, 19 C.R. (3d) 371; R. v. Charterways Transportation Ltd. (1982), 1982 CanLII 2174 (ON CA), 40 O.R. (2d) 86, 138 D.L.R. (3d) 690, 69 C.C.C. (2d) 94, 67 C.P.R. (2d) 188 (C.A.), affg (1981), 1981 CanLII 1951 (ON SC), 32 O.R. (2d) 719, 123 D.L.R. (3d) 159, 60 C.C.C. (2d) 510, 57 C.P.R. (2d) 230 (H.C.), R. v. Chaulk, 1990 CanLII 34 (SCC), [1990] 3 S.C.R. 1303, 119 N.R. 161, 69 Man. R. (2d) 161, [1991] 2 W.W.R. 385, 1 C.R.R. (2d) 1, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1, [1990] S.C.J. No. 139; R. v. Frank, 1977 CanLII 152 (SCC), [1978] 1 S.C.R. 95, 15 N.R. 487, 4 A.R. 271, [1977] 4 W.W.R. 294, 75 D.L.R. (3d) 481, 9 C.N.L.C. 532, 34 C.C.C. (2d) 209; R. v. Hunter, 2000 BCCA 363, 139 B.C.A.C. 315, 227 W.A.C. 315, 145 C.C.C. (3d) 528, [2000] B.C.J. 1145 (C.A.); R. v. Leicester Justices, ex parte Barrow, [1991] 2 Q.B. 260, [1991] 3 All E.R. 935, [1991] 3 W.L.R. 368 (C.A.); R. v. McCraw, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72, 128 N.R. 299, 49 O.A.C. 47, 66 C.C.C. (3d) 517, 7 C.R. (4th) 314, [1991] S.C.J. No. 69; R. v. McIntosh, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, 178 N.R. 161, 21 O.R. (3d) 797, 79 O.A.C. 81, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171, [1995] S.C.J. No. 16; R. v. Proulx, [2000] 1 S.C.R. 61, 2000 SCC 5, 249 N.R. 201, 142 Man. R. (2d) 161, [2000] 4 W.W.R. 21, 212 W.A.C. 161, 182 D.L.R. (4th) 1, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, [2000] S.C.J. No. 6; R. v. Schwartz, 1976 CanLII 165 (SCC), [1977] 1 S.C.R. 673, 8 N.R. 585, 67 D.L.R. (3d) 716, 29 C.C.C. (2d) 1, 34 C.R.N.S. 138; R. v. Shubley, 1990 CanLII 149 (SCC), [1990] 1 S.C.R. 3, 104 N.R. 81, 37 O.A.C. 63, 65 D.L.R. (4th) 193, 46 C.R.R. 104, 42 Admin. L.R. 118, 52 C.C.C.

(3d) 481, 74 C.R. (3d) 1, [1990] S.C.J. No. 1; R. v. Unnamed Person (1985), 1985 CanLII 3501 (ON CA), 10 O.A.C. 305, 20 C.R.R. 188, 22 C.C.C. (3d) 284, [1985] O.J. No. 189 (C.A.); Rizzo and Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 221 N.R. 241, 36 O.R. (3d) 418, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, [1998] S.C.J. No. 2; Salmon v. Duncombe (1886), 11 App. Cas. 627, 55 L.J.P.C. 69, 55 L.T. 446 (P.C.); Skoke-Graham v. R., 1985 CanLII 60 (SCC), [1985] 1 S.C.R. 106, 57 N.R. 321, 67 N.S.R. (2d) 181, 155 A.P.R. 181, 16 D.L.R. (4th) 321, 17 C.C.C. (3d) 289, 44 C.R. (3d) 289, [1985] S.C.J. No. 6; Stock v. Frank Jones (Tipton) Ltd., [1978] 1 All E.R. 948, [1978] 1 W.L.R. 231, [1978] I.C.R. 347 (H.L.); Taylor v. Attorney General, [1975] 2 N.Z.L.R. 675 (C.A.); Turgeon v. Dominion Bank, 1929 CanLII 47 (SCC), [1930] S.C.R. 67, [1929] 4 D.L.R. 1028, 11 C.B.R. 205 Statutes referred to Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 38, 39 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 89(3.1)Rules and regulations referred to Family Law Rules, O. Reg. 114/99, rules 1(7), 2(2), (3), (4), 3(5), (6), (7), 4(7), 7, 8(6), (7), (8), (9), 14, 19, 22 Authorities referred to Bell, J., and Sir G. Engle, Cross on Statutory Interpretation, 2nd ed. (London: Butterworths, 1987) Côté, P.-A., The Interpretation of Legislation in Canada, 3rd ed. (Montréal: Carswell, 1991) Dockray, M.S., "The Inherent Jurisdiction" (1997), 113 L.Q.R. 128 Grice, P., Studies in the Way of Words (Cambridge: Harvard University Press, 1989) Jacob, Sir J.I.H., "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002)

David J. Feliciant, for respondent society.

Jeffery Wilson, for C.R. and M.R., foster parents of T.

Yolanta M. Lewis, for S.G. and T.G., foster parents of K.

Ian R. Mang, for the Squamish Nation of British Columbia (Ayas Men Men Family and Children's Services -- Squamish Nation Social Development).

Catherine G. Bellinger, for the Office of the Children's Lawyer, legal representative for the children.

[1] CZUTRIN J.: -- The Squamish Nation of British Columbia (the "Band") and the Children's Aid Society of Hamilton (the "society") seek advice and direction from the court as to whether the Office of the Children's Lawyer ("OCL") is subject to the same obligations under the Family Law Rules, O. Reg. 114/99, as other counsel or parties in the proceedings.

[2] The Band and the society would like to know

(a) whether the Children's Lawyer is required to respond to a request to admit facts pursuant to rule 22 of the Family Law Rules and

(b) whether the Children's Lawyer is required to respond to a request for document disclosure pursuant to rule 19 of the Family Law Rules.

[3] On 15 April 2003, Justice Mary Jo McLaren asked the Children's Lawyer to intervene in this case pursuant to subsection 89(3.1) of the Courts of Justice Act, R.S.O. 1990, c. C.43:

> 89(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding.

[4] I confirmed the Children's Lawyer's appointment, as legal representatives of K. and T., pursuant to s. 38 of the Child and Family Services Act, R.S.O. 1990, c. C.11.

[5] Section 39 of the Child and Family Services Act defines who a party is (my emphasis added):

39(1) Parties -- The following are parties to a proceeding under this Part:

1. The applicant.

2. The society having jurisdiction in the matter.

3. The child's parent.

4. Where the child is an Indian or a native person, a representative chosen by the child's band or native community.

> (2) Director to be added -- At any stage in a proceeding under this Part, the court shall add a Director as a party on his or her motion.
>
> (3) Right to participate -- Any person, including a foster parent, who has cared for the child continuously during the six months immediately before the hearing,
>
> > (a) is entitled to the same notice of the proceeding as a party;
> >
> > (b) may be present at the hearing;
> >
> > (c) may be represented by a solicitor; and
> >
> > (d) may make submissions to the court,
>
> but shall take no further part in the hearing without leave of the court.
>
> (4) Child twelve or older -- A child twelve years of age or more who is the subject of a proceeding under this Part is entitled to receive notice of the proceeding and to be present at the hearing, unless the court is satisfied that being present at the hearing would cause the child emotional harm and orders that the child not receive notice of the proceeding and not be permitted to be present at the hearing.
>
> (5) Child under twelve -- A child less than twelve years of age who is the subject of a proceeding under this Part is not entitled to receive notice of the proceeding or to be present at the hearing unless the court is satisfied that the child,
>
> > (a) is capable of understanding the hearing; and
> >
> > (b) will not suffer emotional harm by being present at the hearing,
>
> and orders that the child receive notice of the proceeding and be permitted to be present at the hearing.
>
> (6) Child's participation -- A child who is the applicant under subsection 64(4) (status review), receives notice of a proceeding under this Part or has legal representation in a proceeding is entitled to participate in the proceeding and to appeal under s. 69 as if he or she were a party.

(7) Dispensing with notice -- Where the court is satisfied that the time required for notice to a person might endanger the child's health or safety, the court may dispense with notice to that person.

[6] This motion raises the following issues:

(1) Are children parties to the proceedings?

(2) Does the fact that subrule 4(7) confers rights of a party on a Children's Lawyer, but says nothing about responsibilities, mean that the Children's Lawyer is to have no responsibilities under the Family Law Rules?

(3) Does the fact that the Family Law Rules differentiates between "parties" and "persons" mean that, as a non-party, the Children's Lawyer is not subject to those rules that speak about responsibilities of parties?

[7] Rule 7 of the Family Law Rules also defines parties:

7(1) Who are parties -- Case -- A person who makes a claim in a case or against whom a claim is made in a case is a party to the case.

(2) Who are parties -- Motion -- For purposes of a motion only, a person who is affected by a motion is also a party, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

(3) Persons who must be named as parties -- A person starting a case shall name,

(a) as an applicant, every person who makes a claim;

(b) as a respondent,

(i) every person against whom a claim is made, and

(ii) every other person who should be a party to enable the court to decide all the issues in the case.

(4) Parties in cases involving children -- In any of the following cases, every parent or other person who has care and control of the child involved, except a foster parent under the Child and Family Services Act, shall be named as a party, unless the court orders otherwise:

1. A case about custody of or access to a child.

2. A child protection case.

3. A secure treatment case (Part VI of the Child and Family Services Act).

(5) Party added by court order -- The court may order that any person who should be a party shall be added as a party, and may give directions for service on that person.

. . . . .

1: BACKGROUND

[8] The Office of the Children's Lawyer was requested to represent K. and T. by the order of Justice McLaren, pursuant to subsection 89(3.1) of the Courts of Justice Act. The order contained a provision stating that the Children's Lawyer "shall have full power to act for the said children as though they were parties to these proceedings". That order is the form of order as requested by the Children's Lawyer's Office.

[9] The Office of the Children's Lawyer has now proposed a new form of order to deal with representation under the Child and Family Services Act.

[10] Catherine Bellinger is counsel for the children designated by the Office of the Children's Lawyer. Ms. Frances Cappe, the Children's Lawyer clinical investigator, was asked to assist Ms. Bellinger in this case.

[11] On behalf of the children, the Children's Lawyer has taken the position that the children should remain in Ontario and be adopted by their respective foster parents.

[12] On 30 October 2003, the Band served a request to admit facts on the Children's Lawyer, pursuant to subrule 22(2) of the rules.

[13] Subrule 22(2) provides:

> 22(2) Request to admit -- At any time, by serving a request to admit (Form 22) on another party, a party may ask the other party to admit, for purposes of the case only, that a fact is true or that a document is genuine.

[14] On 27 November 2003, the Band also requested the Children's Lawyer produce an affidavit listing documents pursuant to subrule 19(1) (my emphasis added):

> 19. Affidavit listing documents -- (1) Every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,
>
> (a) relevant to any issue in the case; and
>
> (b) in the party's control, or available to the party on request.

[15] The Children's Lawyer refused the Band's request to admit facts and to produce an affidavit of documents, advising that it will not respond, as the children are not parties to the proceedings.

2: POSITION OF THE PARTIES

2.1: The Children's Lawyer

[16] In its refusal to respond to the requests to admit facts and to produce an affidavit of documents, the Children's Lawyer is relying on

(a) rule 4(7) of the Family Law Rules;

(b) s. 39 of the Child and Family Services Act; and

(c) the fact that some rules speak about "parties", while others do not.

[17] As I have noted above, s. 39 of the Child and Family Services Act identifies parties to the child protection proceedings.

[18] The Children's Lawyer, therefore, takes the position as follows:

(a) according to subsection 39(1) of the Child and Family Services Act, children are not parties to child protection proceedings,

(b) because children are not parties, neither is their advocate, the Children's Lawyer;

(c) this status as a non-party affects the scope of responsibilities of the Children's Lawyer under the Family Law Rules,

(d) because subrule 4(7) refers to rights, but not responsibilities, children and their legal representative have all the rights and none of the responsibilities of a party,

(e) some rules refer to parties, while others do not. In the context of child protection proceedings, rules that speak about responsibilities of parties, including subrules 22(2)and 19(1), do not apply to the Children's Lawyer.

2.2: The Band and the Society

[19] The Band and society take the position that the general common law principle is that rights entail responsibilities. In acquiring the right to act as if it were a party, the Children's Lawyer must also bear corresponding responsibilities, including an obligation to comply with those rules of court designed to expedite litigation.

3: OVERVIEW

3.1: Are Children Parties to These Proceedings?

[20] Although children are, in some circumstances, entitled to legal representation, they are not parties to child protection proceedings [see Note 1 at end of the document]. Justice Eleanor M. Schnall commented to this effect in Children's Aid Society of St. Thomas (City) and Elgin (County) v. L.S. [see Note 2 at end of the document]:

> I agree that the child is not a party in child protection proceedings. In that regard, I disagree with the comment by Professor James G. McLeod, in his "Annotation" to Takis v. Takis (2003), 2003 CanLII 2354 (ON SC), 38 R.F.L. (5th) 422, where he said at page 424 [R.F.L.] that, once the child has legal representation, under the Child and Family Services Act, R.S.O. 1990, c. C.11, the child is a party.

Subsection 39(1) of the Act lists those who are parties to a proceeding; children are not included in that list.

Subsection 39(6) deals with participation by children, as follows (emphasis mine):

> A child who is the applicant under s. 64(4) (status review), receives notice of a proceeding under this Part, or has legal representation in a proceeding, is entitled to participate in the proceeding and to appeal under s. 69, as if he or she were a party.
>
> Had the legislators intended for children to be parties to child protection proceedings, the subsections could have been easily and clearly worded to that effect.

[21] I agree with the conclusion of Justice Schnall that the statute is specific with respect to who are parties and who are not parties.

3.2: Does the Fact that Subrule 4(7) Confers Rights of a Party on a Children's Lawyer, but Says Nothing about Responsibilities, Mean that a Children's Lawyer is to Have No Responsibilities Under the Family Law Rules?

[22] The starting point for this discussion is a presumption that legislative silence is intentional [see Note 3 at end of the document]:

> When a provision specifically mentions one or more items, but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. The reasoning goes as follows: if the legislature had intended to include comparable items, it would have mentioned them or described them using general terms; it would not have mentioned some while saying nothing of the other, because to do so would violate a convention of communication.

[23] This implied exclusion argument can be rebutted depending on the context in which it arose. As Justice Edmund L. Newcombe wrote in Turgeon v. Dominion Bank [see Note 4 at end of the document:

> The maxim, expressio unius est exclusio alterius [see Note 5 at end of the document], enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, ex abundanti cautela, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

[24] Courts are cautious in supplementing legislation. Although judges are willing to correct drafting errors [see Note 6 at end of the document], they are reluctant to read words into statutes and do so only when an exceptionally strong case for need of such exercise can be made out [see Note 7 at end of the document]. This reluctance is grounded in two factors:

(i) It may be unclear whether legislative silence is deliberate. [see Note 8 at end of the document]

(ii) The courts have limited powers to correct under- inclusiveness. [see Note 9 at end of the document]

3.3: Meaning of the Legislative Silence -- Deliberate or Inadvertent

[25] Legislative silence is not always indicative of intent to exclude those matters that are not mentioned. In some cases, there may be an alternative explanation of why the legislature expressly referred to some things and was silent with respect to others [see Note 10 at end of the document]. The following are some examples [see Note 11 at end of the document]:

> -- The legislature may have wished to emphasize the importance of the matters mentioned or, out of excessive caution to ensure that the mentioned matters are not overlooked [see Note 12 at end of the document]. This mention of some matters does not mean that others should be excluded.
>
> -- Express reference to something may be necessary or appropriate in one context, but unnecessary or inappropriate in another. [see Note 13 at end of the document]
>
> -- In certain contexts, it is more accurate to say that because something was not specifically excluded, it may be deemed to be included. [see Note 14 at end of the document]

[26] In this case, the possible explanations of failure to mention responsibilities may be that:

> -- The Family Rules Committee meant subrule 4(7) to serve as empowering, its goal being emphasis on the fact that even though the child is not a party to the proceedings, he or she should have the same rights as a party. This mention of rights and silence about obligations does not necessarily mean that the Children's Lawyer is not to have corresponding responsibilities.
>
> -- The Family Rules Committee felt that the word "responsibilities" was necessarily implied by the word "rights" that was already in the rule [see Note 15 at end of the document]. It may be up to the courts to interpret rule 4(7) in that way in accordance with the common law principle that rights entail corresponding responsibilities. [see Note 16 at end of the document]
>
> -- There is no indication in either the rules or in the Child and Family Services Act that the Children's Lawyer is not to have responsibilities of a party in child protection proceedings. Because responsibilities were not expressly excluded, they may be deemed to be included.

[27] The two standard draft orders referring the appointment to or appointing the Children's Lawyer, either under the Courts of Justice Act or the Child and Family Services Act, by their very nature, recognize the courts' inherent jurisdiction to set out the parameters for the Children's Lawyer participation. The orders as drafted by the Office of the Children's Lawyer seek to specify rights under the rules, but no corresponding obligations.

[28] Language of the Child and Family Services Act and the rules, noting that the children are not parties, does not mean that the legal representative is excused from any obligations under the Family Law Rules.

3.4: Power of the Courts to Supplement Legislation

[29] Although courts have no general jurisdiction to legislate, a judge may read in words that he or she considers necessarily implied by those that are already in the statute, so as to "prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute" [see Note 17 at end of the document]. In order to supplement under-inclusive

legislation or to otherwise fill gaps in appropriate circumstances, the courts may invoke the common law, and in particular their inherent jurisdiction. [see Note 18 at end of the document]

[30] Again, referring back to the standard form order as prepared by the Office of the Children's Lawyer, the Office of the Children's Lawyer in itself recognizes the need to include in an order what rights it acquires once it is appointed.

[31] The draft orders are not mandated by any legislation or the rules.

3.4(a): Inherent jurisdiction of courts in matters of procedure

[32] Many cases [see Note 19 at end of the document] cite Sir Jack I.H. Jacob, "The Inherent Jurisdiction of the Court" [see Note 20 at end of the document] as the authority on this subject. Sir Jack defined inherent jurisdiction as follows [see Note 21 at end of the document]:

> . . . the inherent jurisdiction of the court may be defined as being the reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[33] In regards to the court's inherent jurisdiction vis-à- vis the rules, the following has been noted:

> -- The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are rules of court governing the circumstances of such case. The powers conferred by rules of court are, generally, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative and not mutually exclusive so that, in any given case, the court is able to proceed under either or both heads of jurisdiction. [see Note 22 at end of the document]
>
> -- But of course, the creation of rule making authorities, such as the Rule Committee of the Supreme Court has not destroyed or exhausted, but only to a certain extent regulated, the inherent jurisdiction of the court to regulate its proceedings, which continues to flourish and to be exercised on a considerable scale in the form of what are called practice directions. By this means, every branch of the Supreme Court seeks to regulate its proceedings in the areas of procedure that are not directly regulated by the rules of court. [see Note 23 at end of the document]
>
> -- When the Rules Committee was established by statute and the authority of Chief Justices to issue practice directions was recognized by statute, it did not deprive the individual judges of the Superior Court of their inherent jurisdiction to regulate the court proceedings. Any statutory framework addressing the regulation of court proceedings, whether by rules or practice directions, does not supplant the inherent jurisdiction of the court, unless the exercise of such jurisdiction contravenes a statute. Under this interpretation, if the rules or practice directions are silent on an issue, then the court can make general pronouncements on the matter. Indeed, the court can still make a general pronouncement, which augments an existing rule or practice direction, as long as it does not contradict the rule or practice direction. [see Note 24 at end of the document]
>
> -- Consequently and not paradoxically, it is also correct to say that the inherent jurisdiction may supplement but cannot be used to lay down procedure that is contrary to or inconsistent with a valid rule of the Supreme Court. [see Note 25 at end of the document]

[34] The inherent jurisdiction of the courts is not unlimited and it would be inappropriate for the court to use its inherent jurisdiction to expressly contradict the rules or directions. I am satisfied that the court retains the inherent jurisdiction to regulate procedural matters and may supplement the rules as long as those rules are not contradicted. Subrule 1(7) of the Family Law Rules states:

> 1(7) Matters not covered in rules -- If these rules do not cover a matter adequately, the court may give directions, and the practice shall be decided by analogy to these rules, by reference to the Courts of Justice Act and the Act governing the case and, if the court considers it appropriate, by reference to the Rules of Civil Procedure.

[35] In this case, the court has jurisdiction to supplement subrule 4(7) by adding the word "responsibilities" to it.

[36] The silence of subrule 4(7) with respect to responsibilities is not indicative of an intention that the Children's Lawyer is not to have responsibilities of a party under the Family Law Rules.

3.4(b): Common law -- with rights come responsibilities

[37] The general common law principal is that right entitles responsibilities:

> -- in Madonia v. Mulder, when commenting on the litigants' rights to have their day in court, Master Carol A. Albert stated that "with rights come responsibilities" [see Note 26 at end of the document];
>
> -- in Mans v. State Farm Mutual Insurance Co., Justice Joseph W. Quinn stated that "assuming the mantle of solicitor of record carries with it both rights and responsibilities" [see Note 27 at end of the document];
>
> -- in Nolan v. Canada (Attorney General), Justice Quinn granted intervenor status to corporate applicants "with all of the attendant rights and responsibilities of parties" [see Note 28 at end of the document];
>
> -- in Children's Aid Society of St. Thomas (City) and Elgin (County) v. L.S., Justice Schnall found that, if the Children's Lawyer was to enjoy all the procedural benefits provided to real parties, then it is burdened with all the procedural liabilities facing lawyers for real parties [see Note 29 at end of the document]. Justice Schnall also commented that the Children's Lawyer should behave as a member of the private bar toward other lawyers in the case and toward the court. [see Note 30 at end of the document]

[38] Giving the Children's Lawyer rights of a party, but not the responsibilities, would violate a common law principle of a sense of reasonableness and fairness.

> 3.5: Does the Fact that the Family Law Rules Differentiate between "Parties" and "Persons" Mean that, as a Non-Party, the Children's Lawyer is Not Subject to Those Rules that Speak about Responsibilities of Parties?

3.5(a): Different words, different meaning

[39] The rules make reference to the Children's Lawyer, including subrules 8(6), 8(7), 8(8) and 8(9).

[40] Rule 14 allows persons or parties to bring motions and subrule 14(3) defines parties to a motion:

14(3) Parties to motion -- A person who is affected by a motion is also a party, for purposes of the motion only, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

[41] The Children's Lawyer accepts that it has responsibilities under the rules. However, it submits that it is not subject to the rules that speak about responsibilities of parties. A careful reading of the Family Law Rules reveals that some rules refer to parties, other refer to persons, while still other use generic language that refers to neither to parties nor to persons. In its submissions, the Children's Lawyer cited rule 3 as an example of this differentiation (emphasis added):

3(5) Order to lengthen or shorten time -- The court may make an order to lengthen or shorten any time set out in these rules or an order, except that it may lengthen a time set out in subrule 33(1) (timetable for child protection cases) only if the best interests of the child require it.

(6) Written consent to change time -- The parties may, by consent in writing, change any time set out in these rules, except that they may not change a time set out in,

(a) clause 14(11)(c) (confirmation of motion);

(b) subrules 17(14) and (14.1) (confirmation of conference, late briefs);

(c) subrule 33(1) (timetable for child protection cases);

(d) rule 39 (case management in Family Court of Superior Court of Justice); or

(e) rule 40 (case management in Ontario Court of Justice).

(7) Late documents refused by court office -- The staff at a court office shall refuse to file any document that a person asks to file after,

(a) the time specified in these rules; or

(b) the later time specified in a consent under subrule (6), a statute that applies to the case, or a court orders.

[42] It appears that language in subrule 3(5) is generic; subrule 3(6) speaks about parties, and subrule 3(7) refers to persons. Does this mean that words "parties" and "persons" have different meanings? There is a presumption of consistent expression, which implies that "the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meaning" [see Note 31 at end of the document]. As Appeals Justice Brian D. Malone stated in Jabel Image Concepts Inc. v. Canada [see Note 32 at end of the document]:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

[43] Accordingly, it has to be assumed that words "persons" and "parties" have different meanings. The Children's Lawyer submits that generic rules and rules that speak about "persons" are meant to refer to both parties and non-parties, while rules that speak about "parties" refer to parties only. On the face of it, this appears to be a reasonable submission. Upon examination of the rules, it appears that precise wording was deliberately chosen to make sure that rules that speak about "parties" logically

refer to situations where only parties can be involved, while rules that refer to "persons" speak to circumstances where the subject of a rule may not be a party.

[44] However, this difference in wording is not necessarily relevant to the present examination of whether rules that speak about responsibilities of parties apply to the Children's Lawyer. The real issue is whether the Children's Lawyer should have responsibilities of a party by the same token that it has rights of a party. Subrule 4(7) states that the child has the rights of a party:

> -- because subrule 4(7) states that the child has the rights of a party, rules that speak about rights of parties apply to the Children's Lawyer;
>
> -- similarly, if it is accepted that responsibilities should be read into subrule 4(7), those rules that speak about obligations of parties would have to apply to the Children's Lawyer.

[45] This conclusion is supported by the existing common law and by an examination of the absurd consequences that could result from a decision that holds that the Children's Lawyer has rights without responsibilities.

3.5(b): The Children's Lawyer has a duty to promote the primary objective

[46] The primary objectives of the rules is stated in rule 2, which states:

> 2(2) Primary objective -- The primary objective of these rules is to enable the court to deal with cases justly.
>
> (3) Dealing with cases justly -- Dealing with a case justly includes,
>
> (a) ensuring that the procedure is fair to all parties;
>
> (b) saving expense and time;
>
> (c) dealing with the case in ways that are appropriate to its importance and complexity; and
>
> (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.
>
> (4) Duty to promote primary objective -- The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.

[47] Subrules 2(2) through (4), must apply to the Children's Lawyer.

3.5(c): Consequences -- absurdity

[48] When a court is called upon to interpret legislation, it is not engaging in an academic exercise but in a practice that affects the well-being of individuals and communities [see Note 33 at end of the document]. This is the reason why "the courts are interested in knowing what the consequences will be and judging whether they are acceptable" [see Note 34 at end of the document]. The analysis begins with the presumption against absurdity, which includes the proposition that the legislature does not intend its legislation to have absurd consequences [see Note 35 at end of the document]:

-- Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted that avoid such results. [see Note 36 at end of the document]

-- It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. [see Note 37 at end of the document]

-- While I agree that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament. [see Note 38 at end of the document]

[49] Judges test consequences against a range of considerations:

-- norms of rationality, such as logical coherence and internal consistency;

-- common law norms, such as rule of law;

-- shared community norms, such as reasonableness and fairness. [see Note 39 at end of the document]

[50] Some of the currently recognized categories of absurdity are:

-- interpretations that would tend to frustrate the purpose of legislation or the realization of the legislative scheme [see Note 40 at end of the document];

-- interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme [see Note 41 at end of the document];

-- interpretations that would permit easy avoidance or abuse of the legislation [see Note 42 at end of the document];

-- interpretations that violate the court's conception of what is fair, good or sensible. [see Note 43 at end of the docu- ment]

[51] If the Children's Lawyer's submissions are accepted, the following absurd consequences would occur:

-- It would lead to confusion and inconsistency. The Children's Lawyer would be required to abide by some rules, but not by other rules. For example, the Children's Lawyer may have to file its documents on time under subrule 3(7), but would not have to admit facts (rule 22).

-- It would frustrate the primary objective of the rules. The primary objective of the rules is dealing with cases justly: subrule 2(2). This objective includes ensuring that the procedure is fair to all parties, saving expense and time, dealing with the case in ways that are appropriate to its importance and complexity, and giving appropriate court resources to the case while taking account of the need to give resources to other cases: subrule 2(3). Presumably, all of the rules are geared toward ensuring that the primary objective is achieved. Allowing the Children's Lawyer to participate as a litigant with all the accompanying rights of parties but no responsibilities would frustrate this primary objective. Consider, for example, the refusal of the Children's Lawyer to admit facts because rule 22 only addresses parties. In this way,

the Band may be forced to prove unnecessary facts at trial thereby engaging in a wasteful use of resources, time and money, and thereby thwarting the objective of expediency.

-- It would be inconsistent with the court's jurisdiction to make costs orders against the Children's Lawyer pursuant to rule 24 [see Note 44 at end of the document]. Those whose conduct flies in the face of the primary objective, including the Children's Lawyer, will be subject to costs [see Note 45 at end of the document]. The rules attempt to provide a framework for achieving the primary objective. Therefore, it seems strange that the Children's Lawyer would not be obligated to comply with rules that speak about obligations and then be sanctioned with costs at the end of the process.

-- It might allow foster parents to also refuse to abide by those rules that speak about obligations of parties. This court is presently considering, amongst other issues, the status review application under Part III (Child Protection) initiated by the Band. According to subsection 39(1) of the Child and Family Services Act, the Children's Lawyer is not a party to child protection proceedings. However, the foster parents also are not parties, according to the Child and Family Services Act, although they are applicants on proceedings that commenced and they seek orders in the court. Just as subrule 4(7) empowers the Children's Lawyer to participate as a party, subsection 39(3) of the Child and Family Services Act speaks about the foster parents' entitlement to participate:

39(3) Right to participate -- Any person, including a foster parent, who has cared for the child continuously during the six months immediately before the hearing,

(a) is entitled to the same notice of the proceeding as a party;

(b) may be present at the hearing;

(c) may be represented by a solicitor; and

(d) may make submissions to the court, but shall take no further part in the hearing without leave of the court.

[52] This subsection speaks about rights of foster parents, but is silent about obligations. Accordingly, the foster parents could make the same argument as the Children's Lawyer. Given the extent of the foster parents' involvement in the proceedings in this case, it is unlikely that such an interpretation of the rules was intended by the rules committee.

[53] I have come to the conclusion that the Children's Lawyer has an obligation to comply with the Band's request to admit facts, pursuant to rule 22, to produce an affidavit of documents pursuant to rule 19, and to comply with all rules that speak about responsibilities of parties. The Office of the Children's Lawyer shall have 30 days to comply with rules 19 and 22. The children's aid society, the Band and the foster parents shall all, within 30 days, provide affidavit[s] of documents.

[54] I should add that I recognize that the Children's Lawyer may, by necessity, be in a different position than the children's aid society or other parties in these proceedings and it may have to be exempt from some rules. It would seem appropriate for the rules committee to address the Children's Lawyer's responsibilities under the rules but, until such time as it does, except where there is specific reference to an applicant or respondent, the Children's Lawyer is to comply with the rules as I have stated. If the result of compliance would otherwise be inconsistent with my reasons herein, I am prepared to rule on any specific exemption or direction sought by the Office of the Children's Lawyer, the foster parents, the Band or the children's aid society.

Order accordingly.

Notes

1. Children's Aid Society of Bruce (County) v. T.R. (2000), 111 A.C.W.S. (3d) 511, [2000] O.J. No. 5645, 2000 CarswellOnt 5457 (C.J.), at para. 13.

2. (2004), 2004 CanLII 19361 (ON CJ), 128 A.C.W.S. (3d) 888, [2004] O.J. No. 289, 2004 CarswellOnt 390 (C.J.).

3. Ruth Sullivan, ed., Sullivan and Driedger on the Construc- tion of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 187. See also Re Medical Centre Apartments Ltd. v. Win- nipeg (City) (1969), 1969 CanLII 864 (MB CA), 3 D.L.R. (3d) 525 (Man. C.A.); R. v. Hunter, 2000 BCCA 363, 139 B.C.A.C. 315, 227 W.A.C. 315, 145 C.C.C. (3d) 528, [2000] B.C.J. 1145 (C.A.). Note that a basic convention of communication is that speakers say as much as is required but no more than that, to achieve their goal in speaking: Paul Grice, Studies in the Way of Words (Cambridge: Harvard University Press, 1989) at p. 26.

4. Turgeon v. Dominion Bank, 1929 CanLII 47 (SCC), [1930] S.C.R. 67, [1929] 4 D.L.R. 1028, 11 C.B.R. 205, at pp. 70-71 S.C.R. See also Pierre André Côté, The Interpretation of Legislation in Canada, 3rd ed. (Montréal: Carswell, 1991), at p. 337: "A contrario, especially in the form expressio unius est exclusio alterius, is widely used. But of all the interpretive arguments it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and ... it is frequently rejected.": Sullivan, supra, at pp. 192-93.

5. "To express one thing is to exclude another."

6. Sullivan, supra, at p. 136. See also Newman v. Grand Trunk R.W. Co. (1910), 20 O.L.R. 285, [1910] O.J. No. 78 (H.C.), at pp. 287-89; affirmed at (1910), 21 O.L.R. 72, [1910] O.J. No. 106 (Div. Ct.); R. v. Charterways Transpor-tation Ltd. (1981), 1981 CanLII 1951 (ON SC), 32 O.R. (2d) 719, 123 D.L.R. (3d) 159, 60 C.C.C. (2d) 510, 57 C.P.R. (2d) 230 (H.C.), affirmed at (1982), 1982 CanLII 2174 (ON CA), 40 O.R. (2d) 86, 138 D.L.R. (3d) 690, 69 C.C.C. (2d) 94, 67 C.P.R. (2d) 188 (Ont. C.A.); Stock v. Frank Jones (Tipton) Ltd., [1978] 1 All E.R. 948, [1978] 1 W.L.R. 231, [1978] I.C.R. 347 (H.L.) at p. 231.

7. John Bell and Sir George Engle, Cross on Statutory Interpretation, 2nd ed. (London: Butterworths, 1987), at p. 111.

8. Sullivan, supra, at p. 136.

9. Ibid.

10. Ibid. at p. 192.

11. Ibid. at pp. 192-93.

12. See for example, R. v. Shubley, 1990 CanLII 149 (SCC), [1990] 1 S.C.R. 3, 104 N.R. 81, 37 O.A.C. 63, 65 D.L.R. (4th) 193, 46 C.R.R. 104, 42 Admin. L.R. 118, 52 C.C.C. (3d) 481, 74 C.R. (3d) 1, [1990] S.C.J. No. 1, at p.8 C.R.; Martineau v. Matsqui Institution Disciplinary Board, 1977 CanLII 4 (SCC), [1978] 1 S.C.R. 118, 14 N.R. 285, 74 D.L.R. (3d) 1, 33 C.C.C. (2d) 366, at p. 130 S.C.R.

13. See, for example, British Columbia Telephone Co. v. Canada (Minister of National Revenue) (1991), 46 F.T.R. 94, [1991] 1 C.T.C. 482, 91 D.T.C. 5342, [1991] F.C.J. No. 340 (T.D.), at pp. 105-06 F.T.R.; affirmed at (1992), 139 N.R. 211, [1992] 1 C.T.C. 26, 92 D.T.C. 6129, [1992] F.C.J. No. 27 (C.A.). Also, in Dersch v. Canada (Attorney General), 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, 116 N.R. 340, 51 B.C.L.R. (2d) 145, [1991] 1 W.W.R. 231, 43 O.A.C. 256, 36 Q.A.C. 258, 77 D.L.R. (4th) 473, 50 C.R.R. 272, 60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1990] S.C.J. No. 113, the issue was whether the accused was entitled to have access to a so-called sealed packet that contained the evidence relied on in granting the wiretap authorization. A line of cases took the view that because the Criminal Code contained no express provisions allowing access to this packet, although American legislation did, no right of access was intended. This reasoning was rejected by the Supreme Court of Canada. It stated that, while in the United States the legislature intended statutorily to codify "specific provisions designated to protect various interests affected, [Canadian] Parliament was content to leave such protection in the hands of the judiciary", supra, at p. 1512 S.C.R., pp. 479-80 D.L.R. Thus, the failure to follow the American pattern was explained not by an intention to exclude rights found in the American legislation but by the intention to adopt an alternative regulatory mechanism.

14. British Columbia Telephone Co. v. Canada (Minister of National Revenue), supra, at pp. 106-07 F.T.R.

15. Bell and Engle, supra, at p. 96.

16. Below, notes 26-30.

17. Ibid. See also for example Deria v. General Council of British Shipping, [1986] 1 W.L.R. 1207, [1986] I.C.R. 172, [1986] I.R.L.R. 108 (C.A.), where a four-word phrase was read into the text of subsection 8(1) of the Race Relations Act, 1976 in order to prevent a result that would be contrary to the plain meaning of the rest of the statute. See also Salmon v. Duncombe (1886), 11 App. Cas. 627, 55 L.J.P.C. 69, 55 L.T. 446 (P.C.), at p. 635 where the judicial committee of the Privy Council disregarded [the] last nine words of s. 1 of the Naval Ordinance of 1856 and instead implied a phrase that would bring this section in line with existing English law. In justification for this course, Lord Hobhouse said: "it is very unsatisfactory to be compelled to construe a statute in this way, but it is much more unsatisfactory to deprive it altogether of meaning."

18. Sullivan, supra, at p. 139.

19. See for example R. v. Unnamed Person (1985), 1985 CanLII 3501 (ON CA), 10 O.A.C. 305, 20 C.R.R. 188, 22 C.C.C. (3d) 284, [1985] O.J. No. 189 (C.A.); British Columbia Government Employees' Union v. British Columbia (Attorney General), 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, 87 N.R. 241, 31 B.C.L.R. (2d) 273, [1988] 6 W.W.R. 577, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 30 C.P.C. (2d) 221, 44 C.C.C. (3d) 289, [1988] S.C.J. No. 76; MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, 191 N.R. 260, 68 B.C.A.C. 161, 14 B.C.L.R. (3d) 122, [1996] 2 W.W.R. 1, 112 W.A.C. 161, 130 D.L.R. (4th) 385, 33 C.R.R. (2d) 123, 103 C.C.C. (3d) 225, 44 C.R. (4th) 277, [1995] S.C.J. No. 101; Taylor v. Attorney General, [1975] 2 N.Z.L.R. 675 (C.A.); Bass v. McNally, 2003 NLCA 15, 223 Nfld. & P.E.I.R. 322, 36 B.L.R. (3d) 142, 35 C.P.C. (5th) 219, [2003] N.J. No. 84 (Nfld. & Lab. C.A.); Clarke v. Clarke (2002), 2002 CanLII 78088 (ON SC), 32 R.F.L. (5th) 282, [2002] O.T.C. 611, [2002] O.J. No. 3223 (S.C.).

20. (1970), 23 Curr. Legal Probs. 23.

21. Ibid. at p. 51.

22. Ibid. at p. 25.

23. Ibid. at p. 34.

24. Clarke v. Clarke, supra, at p. 57.

25. M.S. Dockray, "The Inherent Jurisdiction" (1997), 113 L.Q.R. 128. This article updates Sir Jacob's analysis, consis- tent with change in [the] use of inherent jurisdiction that Ms. M.S. Dockray observed over time in England and Wales. See also Langley v. North West Water Authority, [1991] 3 All E.R. 610, [1991] 1 W.L.R. 697, [1991] E.W.J. No. 1498 (C.A.), at p. 709 W.L.R.; Moore v. Assignment Courier Ltd., [1977] 2 All E.R. 842, [1977] 1 W.L.R. 638 (C.A.), at p. 645 W.L.R.; Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, [1964] 2 All E.R. 401, [1964] 2 W.L.R. 1145, 48 Cr. App. Rep. 183 (H.L.), at p. 1346 A.C. (per Lord Devlin); R. v. Leicester Justices, ex parte Barrow, [1991] 2 Q.B. 260, [1991] 3 All E.R. 935, [1991] 3 W.L.R. 368 (C.A.); Chief Adjudication Officer v. Foster, [1992] 1 Q.B. 31, [1991] 3 All E.R. 846, [1991] 3 W.L.R. 473, [1991] E.W.J. No. 1572 (C.A.).

26. (2001), 104 A.C.W.S. (3d) 476, [2001] O.J. No. 1326 (S.C.), at para. 52.

27. (1997), 26 O.T.C. 394, [1997] O.J. No. 850 (Gen. Div.), at para. 2.

28. (1997), 14 C.P.C. (4th) 314, 39 O.T.C. 205, [1997] O.J. No. 3361 (Gen. Div.), at para. 16.

29. Supra, note 2, at paras. 50-51.

30. Ibid., at para. 60.

31. Sullivan, supra, at p. 162.

32. (2000), 257 N.R. 193, [2000] G.S.T.C. 45, [2000] F.C.J. No. 894 (C.A.), at para. 12 N.R. See also R. v. Schwartz, 1976 CanLII 165 (SCC), [1977] 1 S.C.R. 673, 8 N.R. 585, 67 D.L.R. (3d) 716, 29 C.C.C. (2d) 1, 34 C.R.N.S. 138, at pp. 677-90 S.C.R., where Justice Brian Dickson in dissent argued that the word "wrong" in subsection 16(1)of the Criminal Code means morally wrong and not illegal because elsewhere in the Code the term "unlawful" was used to express the idea of illegality; approved by Chief Justice Antonio Lamer for the majority of the court in R. v. Chaulk, 1990 CanLII 34 (SCC), [1990] 3 S.C.R. 1303, 119 N.R. 161, 69 Man. R. (2d) 161, [1991] 2 W.W.R. 385, 1 C.R.R. (2d) 1, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1, [1990] S.C.J. No. 139, at pp. 39-41 C.R. See also R. v. Frank, 1977 CanLII 152 (SCC), [1978] 1 S.C.R. 95, 15 N.R. 487, 4 A.R. 271, [1977] 4 W.W.R. 294, 75 D.L.R. (3d) 481, 9 C.N.L.C. 532, 34 C.C.C. (2d) 209, at p. 101 S.C.R. per Justice Brian Dickson who found that "Indians of the Province" and "Indians within the boundaries thereof" do not refer to the same group because of use of different language; Mitchell v. Peguis Indian Band, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, 110 N.R. 241, 67 Man. R. (2d) 81, [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, [1990] S.C.J. No. 63, at p. 123 S.C.R. per Justice Gerald V. La Forest found that "Her majesty in right of a province" and "Her Majesty" have different meanings; R. v. Barnier, 1980 CanLII 184 (SCC), [1980] 1 S.C.R. 1124, 31 N.R. 273, [1980] 2 W.W.R. 659, 109 D.L.R. (3d) 257, 51 C.C.C. (2d) 193, 13 C.R. (3d) 129, 19 C.R. (3d) 371, at pp. 1135-36 S.C.R. per Justice Willard Z. Estey, it was found that the words "appreciating" and "knowing" in subsection 16(2) of the Criminal Code do not mean the same thing; Sullivan, supra, at p. 164.

33. Sullivan, supra, at p. 235.

34. Ibid.

35. Ibid., at p. 236.

36. Ontario v. Canadian Pacific Ltd., 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, 183 N.R. 325, 82 O.A.C. 243, 125 D.L.R. (4th) 385, 30 C.R.R. (2d) 252, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147, [1995] S.C.J. No. 62, at para. 65 (per Justice Charles D. Gonthier).

37. Re Rizzo and Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 221 N.R. 241, 36 O.R. (3d) 418, 106 O.A.C. 1, 154 D.L.R. (193), 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, [1998] S.C.J. No. 2, at p. 43 S.C.R. (per Justice Frank Iacobucci).

38. R. v. McIntosh, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, 178 N.R. 161, 21 O.R. (3d) 797, 79 O.A.C. 81, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171, [1995] S.C.J. No. 16, at p. 722 S.C.R. (per Justice Beverley McLachlin), from the dissenting judgment of Justices McLachlin, Gerald V. La Forest, Claire L'Heureux-Dubé and Charles D. Gonthier.

39. Sullivan, supra, at p. 240.

40. Ibid., at pp. 243 and 244. See also R. v. Proulx, [2000] 1 S.C.R. 61, 2000 SCC 5, 249 N.R. 201, 142 Man. R. (2d) 161, [2000] 4 W.W.R. 21, 212 W.A.C. 161, 182 D.L.R. (4th) 1, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, [2000] S.C.J. No. 6.

41. Sullivan, supra, at p. 247. See also Canada (Attorney General) v. Public Service Alliance of Canada, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614, 123 N.R. 161, 80 D.L.R. (4th) 520, 48 Admin. L.R. 161, [1991] S.C.J. No. 19.

42. Sullivan, supra, at p. 250. See for example, Machtinger v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, 136 N.R. 40, 53 O.A.C. 200, 91 D.L.R. (4th) 491, 40 C.C.E.L. 1, [1992] S.C.J. No. 41, at p. 1005 S.C.R., per Justice Frank Iacobucci: "Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny the employees their common law right...". See also Minister of National Revenue v. Crown Forest Industries, 1995 CanLII 103 (SCC), [1995] 2 S.C.R. 802, 183 N.R. 124, 125 D.L.R. (4th) 485, [1995] 2 C.T.C. 64, 95 D.T.C. 5389, [1995] S.C.J. No. 56, at pp. 826-27 S.C.R.

43. Ibid., at p. 251. See for example, Grini v. Grini (1969), 1969 CanLII 784 (MB QB), 68 W.W.R. 591, 5 D.L.R. (3d) 640, 1 R.F.L. 255 (Man. Q.B.); R. v. McCraw, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72, 128 N.R. 299, 49 O.A.C. 47, 66 C.C.C. (3d) 517, 7 C.R. (4th) 314, [1991] S.C.J. No. 69; Skoke-Graham v. R., 1985 CanLII 60 (SCC), [1985] 1 S.C.R. 106, 57 N.R. 321, 67 N.S.R. (2d) 181, 155 A.P.R. 181, 16 D.L.R. (4th) 321, 17 C.C.C. (3d) 289, 44 C.R. (3d) 289, [1985] S.C.J. No. 6, at p. 119 S.C.R.

44. Children's Aid Society of St. Thomas (City) and Elgin (County) v. L.S., supra, note 2.

45. Ibid.