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The Kids are Alright (We Think)

By: Fraser Gordon

Case Commented On: *Alberta (Child, Youth and Family Enhancement, Director) v LL*, 2024 ABCJ 177

Do the provisions for initial custody under s 21.1(1), *Child, Youth, and Family Enhancement Act*, RSA 2000, c C-12 (*CYFEA*) allow a Court to deny the Director's application and return a child to his or her guardians, on conditions? Recent cases on this question, all arising out of the Alberta Court of Justice sitting in Edmonton, indicate that this is within the Court's powers; other regions, however, have not followed these cases, and continue to apply the more restrictive reading of s 21.1, holding a Court is only able to either (1) order the child into custody, or (2) return to the custody of the child's guardian.

In this blog, I want to discuss the most recent of the Edmonton cases to highlight the limits of statutory construction generally in assisting Courts, and also the problematic nature of appellate review and commentary, when application of a statute falls squarely, and exclusively, within a particular Court (in Alberta, all applications under *CYFEA* (except those contemplating administrative action) are heard by the Alberta Court of Justice, Family and Youth Division).

Initial Custody Provisions under *CYFEA*

Following the apprehension of a child (usually carried out *ex parte*), the Director must obtain a custody order within 42 days of the first appearance following apprehension. This "initial custody" order, although characterized in *CYFEA* as the Director's application, the practical effect – which aligns with the Act's emphasis on remedial (and limited) action – is to provide parents a first chance to respond to the Director's evidence and seek review by the Court.
Section 21.1(1) *CYFEA* states:

> **Initial custody**
>
> **21.1(1)** If a director makes an application to the Court under section 21(1)(b) for a temporary guardianship order or permanent guardianship order, the director must also apply for an order for custody of the child until the application for a temporary guardianship order or for a permanent guardianship order is withdrawn or disposed of.
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> **(2)** On hearing a custody application under subsection (1), the Court must
> (a) order the child into the custody of a director, or
> (b) order that the child be returned to the custody of the child's guardian

until the director's application for a temporary guardianship order or a permanent guardianship order is withdrawn or disposed of.

(3) If an order is made under subsection (2)(a), the Court may
(a) include terms for access to be provided between the child and the guardian or any other person with whom the child has a significant relationship, and
(b) require an assessment of the child and of the child's guardian and any other person who may be given custody of the child when the application for a temporary guardianship order is disposed of.

(4) Despite section 26, an application under subsection (1)
(a) is summary in nature, and
(b) may be adjourned for a period of no more than 14 days at a time unless the parties agree to a longer adjournment; however, the total adjournment period under this clause shall not exceed 42 days.

(5) If the Court adjourns a hearing under subsection (4), it must make an interim order providing for the custody of the child, and the order may include terms respecting access to the child.

(5.1) The Court may hear an application for an adjournment under subsection (4) by videoconference if the Court is satisfied that it is proper to do so.

The legislation directs that any hearing under this provision must be held no later than 42 days from the first appearance date, and this hearing is intended to be "summary in nature". I highlight these points because they emphasize, in my view, the immediate and somewhat limited opportunity for parents to challenge the Director's decision to apprehend a child. Until recently, these provisions have been interpreted strictly by the Courts, who have held that they are limited at such hearing to either (1) order the child into the Director's custody (i.e., confirm the apprehension), or (2) order that the child be returned to the custody of his or her guardian (at s 21.1(2), *CYFEA*).

Four recent cases, each decided by the Alberta Court of Justice sitting in Edmonton, have departed from this interpretation, and have found that a Court hearing an application under s 21.1 may return a child to his or her guardians, with conditions; in other words, the Court may substitute the Director's application (usually for a Temporary Guardianship Order) with a Supervision Order. It is the most recent of these I want to consider (*Alberta (Child, Youth and Family Enhancement, Director) v LL*, 2024 ABCJ 177 (CanLII)), although this case adopts, and endorses, the reason of three previous cases (again made in Edmonton): *Alberta (CYFEA, Director) v RN*, 2022 ABPC 157 (CanLII), *Alberta (CYFEA, Director) v SB*, 2022 ABPC 207 (CanLII), and *Alberta (CYFEA, Director) v AM*, 2023 ABPC 93 (CanLII).

These cases each originate in Edmonton, and relatively recently, and I am unaware of a Court in any other region in Alberta applying these cases. Moreover, in Calgary (where I practice), Courts have declined to apply this reasoning, although in fairness there have been no reported cases in Calgary responding to these decisions (the Court in *LL* refers to an unfortunately unreported

decision of Marriott J of the Court of King's Bench (Calgary), see *SE v The Director of Child and Family Services*, (4 May 2023) Calgary FLO1-38131 (ABKB)) which it indicates that the King's Bench has confirmed this interpretation).

To date, no Alberta Court of Justice sitting in Calgary has commented on this new interpretation of s 21.1(1) and it is my general experience that the Edmonton approach is not currently followed by the Calgary Court. This is in and of itself problematic, as it suggests that parents in different regions in Alberta will receive very different judicial treatment, in that avenues for "less intrusive measures" are available to parents in Edmonton but not Calgary.

Origins of Initial Custody and Recent Experience

Before considering *LL* and the limits of statutory interpretation, I provide some background on the concept of 'initial custody'. These provisions were first enacted in 2004, when the *Child, Youth and Family Enhancement Act* replaced the *Child Welfare Act*. The provisions in s 21.1 replaced earlier provisions around custody; the most notable change in my view was that the new provisions placed an obligation on the Director, within 42 days of the first appearance date, to determine custody, whereas before it was for the parents to request such a hearing. These more robust provisions – which in some sense reverse the onus as to who must establish that the apprehension was appropriate – are of a piece with *CYFEA* general, which emphasizes, overall, the primacy of the family unit and importance of cultural and familial connection for children, and mandate that, when child welfare action is taken, it is done in as least intrusive a manner as possible. That any child welfare action must be informed by these notions is stated at the outset of *CYFEA,* under s 1.1 ('Guiding Principles) and s 2(1) ('Matters to be considered').

However, and notwithstanding the very different aims of *CYFEA* in protecting children in the Province, no Court in Alberta has interpreted the provisions under s 21.1 in a manner other than allowing for either (1) custody to the Director, or (2) return to the parents. This was, until the decision of Justice Ho in *RN*. I find this astounding, that in the 18 years since *CYFEA* replaced the *Child Welfare Act*, the application of these sections was uncontroversial, and uniformly applied.

We may wonder at this point *why* the issue of initial custody has become so salient (and contested), in that four cases emerge in the space of 2 years that depart significantly from the previous interpretation. If I was to speculate, I would suggest that it is because initial custody has become so pressing (and fraught) as a result of the increased judicial backlogs and the difficulty – if not impossibility -- of obtaining trial dates before the expiry of the six-month temporary guardianship period (typically, but not always, the Director first seeks temporary guardianship of children in need of intervention). Courts – and parents – know this and recognise that if they cannot deal with custody at the outset, a parent will be placed in the position of either consenting to the Director's application, or awaiting a trial date that will likely be well past this six month period. Indeed, the Court in *RN* stresses the need for a "prompt and fair post-apprehension hearing" (at paras 18-22).

In other words, a provision that was designed as a something of a stop-gap and interim measure has evolved, effectively, to the only meaningful opportunity for a parent to review the Director's apprehension decision. I am not so sure the legislation is well-designed for what has become an "all or none" hearing: the Act states that hearings under s 21.1 are "summary in nature" and, while

in my experience the Courts have recognised the seriousness of the matter and extended as much hearing time as reasonably available (again, within a 42 day window!), the hearing is typically held over a judicial half-day.

***LL* and the Purposive Interpretative Approach**

So, how does *LL* and the three preceding cases justify a significant departure from earlier readings of this section? It does so generally by adopting what could be termed a purposive and contextual reading of s 21.1, in that it holds that any order under this section must be informed by the general principles articulated by the *CYFEA* (family remediation and support). The reading under *LL* adopts what they term a 'two-step' approach, in which whether or not a child is in need of intervention is considered as but the threshold question for the Court to consider; after that, any order made – including orders under s 21.1(2), must be made mindful of the purpose of *CYFEA* generally, which emphasizes as I have said the importance of family stability and cultural continuity for a child, and that child welfare action must be made in as minimally intrusive a manner as possible (and, of course, informed by the paramount consideration of a child's best interest).

Without abridging to the point of simplicity the interpretive approach of *LL* and its predecessor cases, the Court 'reads in' the purpose of *CYFEA* to the provisions of s 21.1*,* such that any order under this provision must accord more generally with the purpose and aim of the Act. Such a reading represents a marked expansion of the Court's powers to oversee the Director's powers, in that it allows them – on their own motion – to substitute their own application for the one advanced by the Director.

There is certainly some support for such a reading: the Supreme Court (as noted in *Alberta (Director, Child, Youth and Family Enhancement) v SB*, 2022 ABQB 446 (CanLII)) has urged that "the words of Act are to be in their entire context, in their grammatical and ordinary sense, *harmoniously* with the scheme of the Act, the object of the Act, and the intention of Parliament" (at para 46, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)). It is clear when *LL,* and the previous cases, expand the powers of the Court under s 21.1 they are relying on what I would call a purposive and contextual reading of *CYFEA*, and there is clear appellate authority on statutory construction generally around such an approach.

While I impressed with the chain of reasoning applied in *LL* and the previous cases to reach this conclusion, I am not persuaded. I have two difficulties, one specific and the other more general, with such statutory construction. First, s 21.1(2) presents the Court with one of two choices which they *must* make; the nettlesome word 'must' would appear, on a 'plain meaning' interpretation, to require the Court to make this binary choice. This problematic word is not addressed in the Edmonton cases. The second more general objection is that if this was truly the intent of the legislature – i.e., that the Court had powers to substitute its own application for that of the Director on initial custody – it would have said so more explicitly. And finally, while it could be argued that a purposive interpretation should generally be encouraged, any reading of a statute that does not recognize its clear (and I would say specific) direction does so at the risk of undermining the separation of powers and the notion of the rule of law altogether.

What is to be Done?

Currently, the law on initial custody in Alberta is in a state of uncertainty. And there appears to be no 'right' answer, with the result that parties are left with uncertainty as to their remedies under *CYFEA*. The prospect of varying judicial treatment by regions, moreover, has the tendency to undermine public confidence in the Courts, who will see – with justification – the discretionary nature of judicial action around initial custody.

There are potential avenues for resolution, none of which, however, are ideal. The first is perhaps to look to existing appellate authority. This is, however, unsatisfactory: the 'leading' case on this question in Alberta is *Alberta (Child, Youth and Family Enhancement, Director) v QF*, 2008 ABQB 653 (CanLII), which indicates (at para 5) that is not possible under *CYFEA* to return a child to his or her guardians on conditions (in although notably, the Court expressed concern at the very stark, and limited, choice the legislation grants to the Court on these applications). Of course, this case does not address the recent cases (which, notably, do not attempt to distinguish themselves from *QF*) but it is the leading appellate authority, and binds the Alberta Court of Justice. The solution, then, would for parents to appeal a decision of the Alberta Court of Justice which refused a return 'on conditions', relying on the Edmonton cases. One question that such an approach raises, however, would be why it is for the least-resourced party in these matters to clarify an uncertainty in application the Court itself has created. This seems to me unfair and places an unreasonable burden on parents.

The second difficulty I have with the notion of appellate authority more generally on *CYFEA* is that while the Court of King's Bench does hear appeals under this Act, it is the Alberta Court of Justice that is tasked exclusively with the interpretation and application of this law. They are, in other words, the specialist Court, who hear these matters daily, while the Court of King's Bench hears only appeals, which arise sparingly. And how does the notion of the binding nature of appellate courts square with the notion that Courts should be granted autonomy to control their own processes (as it does with practice directions, for example)? One answer would be for the Alberta Court of Justice to issue something in the nature of an 'interpretation bulletin', indicating how these provisions are to be applied. But perhaps this has been considered, and rejected, on the basis that members of the Court cannot arrive at an agreed-upon interpretation.

The final and perhaps ultimate solution would be legislative review of this provision. Given how legislation is only periodically reviewed by the legislature, this seems a fairly thin and unpromising reed to rely on, and may in itself be contested terrain. So, for now, Courts – and the parties who appear before them (and the children who are subject to these applications) – are left in a state of uncertainty that has no clear path to resolution, on an exceedingly urgent and significant matter.

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