RULE OF LAW REPORT

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NEEDED: MORE SMALL-TOWN LAWYERS

By Neha Chugh,
(Originally published in *The Lawyer's Daily*,

It was an average court appearance almost a decade ago. I was in the early stages of my new solo practice in Cornwall, Ont. I had gone to law school and articled in Toronto and spent the first two years of private practice in Ottawa. My spouse's new job had taken me to Cornwall, nestled between Ottawa and Montreal, on the St. Lawrence River.

My client, a youth from a very small Eastern Ontario village, had mental health issues and struggled with schooling. This youth's ability to access services was severely limited by availability and accessibility, the nearest interventions being over an hour away by car. My concerns were noble, arising out of the mandates from the *Youth Criminal Justice Act*. The realities of the situation were all consuming in light of my eagerness on behalf of the youth.

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I was quickly and sternly reminded that we were not in Toronto or in Ottawa.

This was part of my initiation into rural practice.

Urban criminal law issues like transit fare theft and shopping mall heists were replaced with rural issues like driving a tractor while prohibited and cultivation of marijuana on farmland.

It is exactly these disparities in services that require extra attention and tailored approaches by practitioners who are knowledgeable about local needs, procedure and practice.

Rural practice is important. End of story. As my more senior colleagues inch closer to retirement, I feel the increasing pressure of the sheer need for local lawyers.

Post-COVID, it has become blatantly obvious that the need for rural legal practitioners has grown, especially practitioners who accept Legal Aid or who are willing to work at sliding scale rates. The Toronto hourly rate has to be revisited if one wants to have a successful rural practice.

Let's take the example of a family law case in Cornwall. Very few lawyers in Cornwall accept Legal Aid Ontario mandates, and of those who do take them, there are waiting lists and caps to the number of clients on a lawyer's case load. If both sides of the litigation have certificates, the parties may not be accessing the lawyer of their first, second, or third choice. Rather, the party accepts the lawyer who is available, who has time in their calendar and is willing to work for Legal Aid rates.

Compound with this situation the following factors: French language requirements in Eastern Ontario, the urgency and complexity of a matter, Indigenous law, history and tradition, transportation and accessibility issues, and not just rural communities but remote communities as well.

These intersecting issues are part of the learning curve, not reasons to dismiss the notions of rural practice.

Consider this: the cost of living in Cornwall is lower than our major urban counterparts, with housing being affordable, available, and accessible. Access to major Metropolitan centres like Montreal, Ottawa and New York is easy. Want to jet off to Vermont for the weekend? No problem. It is a short drive over the border. Want to catch the jazz festival in Montreal or Canada Day in Ottawa? No problem. Just an hour away in either direction. Want to leave work at 5 p.m., not have to sit on the 401 for hours to get to multiple courts, and be on a first name basis with your local librarian? You got it.

It's true — we don't have a Michelin restaurant guide in Cornwall. And one of the reasons my assistant recently found herself late for work was because she was stuck behind a slow-moving truck with a trailer filled with manure. But this part of the world boasts big, wide-open spaces and restaurants where everyone knows your name and the waitress knows your favourite drink order.

With the loss of a strong, vibrant and local bar, the following issues become more prominent.

Access to justice is adversely affected as litigants may not have counsel or may have to wait for counsel. As we have seen through provincial budget cuts to youth detention centres and jails, services may be centralized in urban centres for cost-saving, affecting accessibility to local jails. Courts like Cornwall don't have a dedicated and local forensic psychiatrist, or a mental health or drug treatment court like our urban counterparts.

When I lamented about my youth client and his inability to access mental health services rurally, the court hinted that perhaps a s. 15 challenge was the answer. Essentially, the suggestion was that I should argue that our local court and youth did not benefit from the same services as an urban comparison. At the time, that particular case was not the right one. And while services have continued to be diminished throughout the years through funding cuts and under-prioritization, there are rays of hope.

Take for example *R. v. Turtle* [2020] O.J. No. 4259, 2020 ONCJ 429, where lawyers argued defendants who were unable to access jail facilities because of their rural location in Pikangikum First Nation territory, a fly-in community hours away from the nearest jail in the city of Kenora, were exposed to a breach of their s. 15 equality rights. The unavailability of intermittent sentences to on-reserve members

of the community was determined to be a breach of s. 15 of the Charter, compared to other Canadians similarly situated. My takeaway from this case? Dedicated lawyers, familiar with issues affecting rural, isolated or Indigenous communities can do amazing and unique work for Canadian communities.

Most importantly, what is needed is the presence of lawyers to provide effective representation for the cases that matter to our rural residents. It took me time to fall in love with the small city where I practise law, the vast farmland I drive past to get to work, the rural community approach. It took me time to become accustomed to the romantic notions and Canadiana that I have described. I am now the biggest advocate for bringing lawyers to rural Ontario to serve our community and fill the access to justice gap that is widening every day.

Based in Cornwall, Ont., Neha Chugh, a criminal lawyer, started ***Chugh Law*** *in 2014. She also serves as prosecutor in the Akwesasne Court, assists with provincial offences prosecutions with the City of Cornwall and is an instructor at Iohahi:io Akwesasne Education and Training Institute. Chugh was appointed as the Law Foundation of Ontario's representative on the board of governors of the Law Commission of Ontario.*

N.B. APPEAL COURT RULING EXAMINES DELAY IN TIMELINES IN CHILD PROTECTION MATTERS: LAWYER

By Terry Davidson, (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

A lawyer and a legal scholar hope a recent ruling out of New Brunswick will lead to greater compliance with timelines in child protection matters in that province.

The Sept. 29 Court of Appeal of New Brunswick decision in *R.D. v. The Minister of Social Development*, [2022] N.B.J. No. 231, 2022 NBCA 56, involved an examination of "endemic" delay "with respect to the hearing and disposition of child protection matters" at the then Court of Queen's Bench's Family Division.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "[. . .] a certain complacency has developed by both the courts, as well as the parties in child protection proceedings, because of the lack of available dates."

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

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

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

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

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

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

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

Reentovich said other things could lead to delay.

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

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

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

“There is a question of: Is that necessary? The affidavits are there, the judges say we’ve read all

this. But then it becomes a matter of … the judge, in terms of case management, saying I've read this … I don't need direct examination on the affidavits. I don't need them to regurgitate what is already in front of me."

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

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

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

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

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

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

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

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

CANADA GAZETTE EXPANDS ONLINE COMMENTING TO ALL PROPOSED REGULATIONS

By Cristin Schmitz, (Originally published in *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Lawyers, businesses and others who closely monitor federal legislation could find it easier to comment on regulations in the pipeline following the extension to all proposed regulations of the *Canada Gazette's* online commenting tool — with the government announcing that any comments made on a proposed regulation will be accessible for public online viewing "once the consultation period is over."

The online commenting tool has been available for a sample of proposed regulations since April 2021.

> "The opportunity to provide online comments on proposed regulations is an important step in modernizing the Canada Gazette and embracing how Canadians want to make their voice heard on government decisions."

However, as of Sept. 27, the feature is now available for all proposed regulations published in Part I of the *Canada Gazette*, Public Services and Procurement Canada announced on Sept. 27.

The government said the new online commenting feature fulfils one of Canada's obligations under the Canada-United States-Mexico Agreement (CUSMA) on trade.

"The opportunity to provide online comments on proposed regulations is an important step in modernizing the *Canada Gazette* and embracing how Canadians want to make their voice heard on government decisions," Helena Jaczek, federal minister of

Public Services and Procurement, said in a statement.

"Making these comments publicly available will further increase transparency and accountability, generating a better understanding of regulatory concerns and challenges for Canadians and stakeholders," the minister said.

The government noted that the comment system meets international and government of Canada accessibility standards "to ensure that all Canadians can participate in the legislative and regulatory process."

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