IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *J.R. v. Nunavut (Family Services)*, 2025 NLCA 11
Date: March 19, 2025
Docket Number: 202301H0047

RESTRICTION ON PUBLICATION: There is a Publication Ban on the names and any other identifying information of the children referred to herein, as well as the names of their biological parents, relatives, and foster families pursuant to section 55 of the *Children, Youth and Families Act*.

BETWEEN:

J.R.	APPELLANT

AND:

GOVERNMENT OF NUNAVUT DEPARTMENT OF FAMILY SERVICES (DIRECTOR OF CHILD AND FAMILY SERVICES)	FIRST RESPONDENT

AND:

MANAGER OF CHILDREN, SENIORS AND SOCIAL DEVELOPMENT, NEWFOUNDLAND AND LABRADOR	SECOND RESPONDENT

AND:

S.V.	THIRD RESPONDENT

AND:

J.Q.	FOURTH RESPONDENT

Coram: D.E. Fry C.J.N.L., L.R. Hoegg and F.P. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, Family Division 202302F0549
Appeal Heard:	December 18, 2024
Judgment Rendered:	March 19, 2025
Reasons for Judgment by:	D.E. Fry C.J.N.L.
Concurred in by:	L.R. Hoegg and F.P. O'Brien JJ.A

Counsel for the Appellant:	Melissa M. Saunders and J. Michael Collins
Counsel for the First Respondent:	Peter Roberts, K.C. and Stefanie Laurella
Counsel for the Second Respondent:	Krista M. Atkins
Counsel for the Third Respondent:	Did not Participate
Counsel for the Fourth Respondent:	Did not Participate

Authorities Cited:

CASES CITED: *J.R. v. Nunavut (Family Services)*, 2023 NLCA 30; *B.J.T. v. J.D.*, 2022 SCC 24; *L.H v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2023 NLCA 32; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA); *T.R. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2014 NLCA 19; *M.K. and R.P. v. Newfoundland and Labrador (Child and Youth Services)*, 2018 NLCA 34; *RJR−MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *P.G. v. C.C.*, 2018 NLCA 73; *W.S. v. J.B.*, 2022 NLCA 52; *M.G. v. S.P.*, 2021 NLCA 18; *A.H. v. R.B.*, 2020 NLCA 15; *Lee v. Lee*, 2019 NLCA 75; *J.H. v. C.C.*, 2019 NLCA 38; *E.M. v. Y.C.*, 2018 NLCA 21; *Hynes v. Wellon*, 2017 NLCA 5; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Beson v. Director of Child Welfare (NFLD.)*, [1982] 2 S.C.R. 716; *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388.

STATUTES CONSIDERED: *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24, sections 9, 10, 12, 13, 16(1), 16(2).

D.E. Fry C.J.N.L.:

INTRODUCTION

[1] On September 1, 2023, J.R., the foster mother, filed an Originating Application and an Emergency Interim *ex parte* Application in the Supreme Court of Newfoundland and Labrador, Family Division. The foster mother was seeking injunctive relief to prevent the removal of her foster child until the Originating Application could be heard. The Director of Child and Family Services, Department of Family Services, Government of Nunavut (the "Nunavut Director") who had legal custody of the child, was seeking to remove the child from the foster mother's home in St. John's, NL on September 8, 2023, to provide a new placement in Ottawa with two of the child's siblings.

[2] On September 5, 2023, a family court judge denied the Emergency Interim *ex parte* Application, which was dealt with by way of a desktop Endorsement following the judge's consideration of the written materials filed. There were no appearances by counsel, no oral submissions or argument. The foster mother appealed the decision.

[3] The foster mother then filed an Application for a Stay in this Court to prevent the child's removal from this jurisdiction until the appeal was heard and decided by this Court. The Stay was granted on September 7, 2023 (*J.R. v. Nunavut (Family Services)*, 2023 NLCA 30).

[4] In granting the Stay, this Court ordered that the appeal of this matter be expedited, and that counsel file their materials in an expeditious manner. Once all materials were filed, the parties submitted a Request for dates on August 20, 2024, seeking December 18, 19 or 20, 2024, for the hearing of the appeal. The appeal was heard on December 18, 2024.

[5] On appeal, the foster mother asks this Court to order that the Nunavut Director not remove the child from her care until the Originating Application in the court below has been decided on the merits.

[6] The foster mother, the Nunavut Director, and the Manager of Children, Seniors and Social Development, Newfoundland and Labrador (the "Manager") have all filed Applications for this Court to admit additional evidence.

BACKGROUND

[7] This Indigenous child, born in Nunavut in the spring of 2016, has been in the custody of the Nunavut Director since he was approximately six months old. The Nunavut Director obtained a permanent custody order for this child in July of 2018. S.V. and J.Q. are the birth parents of the child and have not participated in these proceedings.

[8] In January 2018, when the child was less than two years old, he was placed with the foster mother in Nunavut where she was working as a public health nurse. In October 2019, the foster mother and the child moved to St. John's with the consent of the Nunavut Director. The foster mother/foster child relationship has continued uninterrupted since that time. The child is now nearly nine years old.

[9] The judge had before him the Originating Application and the Emergency Interim *ex parte* Application, both of which contained sworn statements of the foster mother, when he considered whether to grant the injunctive relief sought. These documents outlined how the foster mother became the foster parent, the circumstances surrounding her lengthy tenure as a foster parent, and how the child's circumstances had improved while in her care.

[10] In the materials provided to the judge, the foster mother said she was advised by social workers that the child had 35 unsuccessful placements in Nunavut prior to her being approached to provide foster care for him when he was 20 months old. She said that when the child was initially placed in her care, she understood he had been diagnosed with childhood trauma, potential brain injury, FASD and failure to thrive. She said that he could not speak, and that she taught him sign language and they communicated in this manner while continuing to work on his verbal communication skills.

[11] The foster mother provided information to the judge as to her attempts to facilitate family and cultural connections. She visited Nunavut in March 2023 so the child could meet his father. The child's birth mother was unavailable. The foster

mother had been advised that the child had a sibling living in Nunavut and she hoped to introduce him to that sibling. However, she had not been advised in advance that that child had been placed in care and relocated to Ottawa. The foster mother made several other attempts to arrange visits with siblings in Ottawa, as well as in Nunavut, but for a variety of reasons most did not occur. She said she remains committed to ensuring that the child maintains connections with his siblings, all of whom are in care.

[12] The foster mother stated that she and the child frequently attend the Inuit program at First Light St. John's Friendship Centre in their neighbourhood where, among other activities, Inuit drumming and dancing occur. In addition to attending school, the foster mother said that the child is a physically gifted and strong athlete who participates in many extracurricular activities, including soccer, gymnastics, taekwondo, hiking and swimming. The child has developed a community of friends and family at his school and in the neighbourhood.

[13] The foster mother indicated that she and the child have a strong bond and that she is the only parent he has ever known. She stated that he requires one-on-one attention and expressed concern that he may find it difficult to communicate and continue to develop communication skills in a setting where there are multiple children or caregivers. The foster mother said she has dedicated years to meeting the child's developmental needs and that he has access to excellent primary medical care and a speech pathologist in St. John's.

[14] The foster mother says she has always been committed to maintaining and strengthening the relationship between the child and his siblings. She says she has facilitated, on her own accord, virtual meetings with his siblings. The foster mother agrees that the child should visit his siblings in Ottawa and have extended visits over the summer. The foster mother says she would facilitate visits with the siblings and care givers in Newfoundland and Labrador at any time.

[15] On July 25, 2023, with no warning, the foster mother was advised that her services were no longer needed and the child would be moved to Ottawa. The date for pick up and relocation was August 25, 2023. Following receipt of the notice, the foster mother had meetings with social workers in Newfoundland and Labrador assigned to the child's care, as well as the Advocate's Office in Nunavut in an attempt to change the proposed plan of removing the child. The foster mother stated in her affidavit that there was a shared concern that the plan was too rushed. At this point, the foster mother had been the child's only caregiver for more than five and a half years.

[16] On August 10, 2023, the foster mother was provided with a list of calls that the child was to have with his siblings, which she facilitated. August 25, 2023 came and went, and the foster mother says she was under the impression that the relocation was no longer imminent. She went ahead and purchased school supplies and prepared the child for the start of school in St. John's.

[17] On August 29, 2023, the foster mother was advised that the child was to be relocated on September 8, 2023, and he would start school in Ottawa on September 11, 2023. The transition plan, filed with the affidavit of the foster mother, was for two individuals to arrive in St. John's on September 5, 2023, to meet the child and the foster mother and spend some time together over the following two days. On September 8, 2023, they, and the child, would return to Ottawa with the foster mother, who would spend two days in Ottawa before returning to St. John's on September 11, 2023.

[18] The foster mother says that she is a retired public health nurse and has been a full-time parent to the child for the past seven years. Given the length of time that this child has lived with her, and the loving bond that exists between them, she suggests that the child will suffer harm from being removed, abruptly and permanently, from her care. She says his best interests are protected by maintaining the status quo or altering the status quo by her becoming the child's guardian or custodian. The foster mother also indicated a willingness to adopt. In her view, moving the child to another foster placement does not provide for a permanent home while her continued parenting of this fragile child does.

[19] I have summarized the information that was contained in the two Applications before the judge, being the Originating Application (Family Law) in Form F4.03A and the Emergency Interim Application−For a Temporary Order (Family Law) in Form (F17.03A) with affidavit. There were no other materials filed in the Family Division. Neither the foster mother nor her lawyer was present. The judge did not seek any further information or request the presence of the foster mother or counsel.

[20] The judge denied the Emergency Interim *ex parte* Application and issued a written Endorsement.

THE ENDORSEMENT

[21] As the judge's Endorsement of September 5, 2023 is short and succinct, I have included it verbatim as follows:

> **Re: Emergency Interim Application by [J.R.] filed September 1, 2023**
>
> Although the Applicant has been a long-time foster parent for the child, she does not have legal custody of the child.
>
> Given this fact, the numerous parties involved, as well as the interaction of the various jurisdictions, governing legislation and, no doubt, agreements that are relevant to the child's status in the care of the Applicant in this jurisdiction, it is inappropriate to grant injunctive relief on an *ex parte* basis as requested by the Applicant. Procedural fairness dictates otherwise.
>
> Further, implied in the Applicant's Supporting Affidavit, is that the child is in the legal custody of the Department of Family Services Planning of the Government of Nunavut. That Department has plans to reunite this Indigenous child with his siblings in a new foster placement outside of this province. Assessing the Supporting Affidavit as a whole, the Applicant has not demonstrated a *prima facie* case of irreparable harm if the Application was denied, nor that the balance of convenience favours granting injunctive relief.
>
> This determination is made in the context of the provisions of *An Act respecting First Nations, Inuit and Métis children, youth and families*. This federal legislation greatly expands the role of cultural continuity for the placement of Indigenous children. While best interests of the child remains the paramount objective as in the *Children, Youth and Families Act* of Newfoundland and Labrador, s. 10(2) of the federal *Act* recognizes the primary importance of the Indigenous child "having an ongoing relationship with his or her family and with their Indigenous group, community or people to which he or she belongs and of [preserving] the child's connections to his or her culture".

> Under 16(1) of the federal *Act*, the placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent it is consistent with best interests of the child, is to occur in the following order:
>
> (a) with one of the child's parents;
>
> (b) with another adult member of the child's family;
>
> (c) with an adult who belongs to the same Indigenous group, community or people as the child;
>
> (d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or
>
> (e) with any other adult.
>
> According to section 16(2), when applying the aforementioned priorities of placement, the federal legislation mandates the consideration of placing the child with or near children who have the same parent as the child. In short, adults that are members of the same or different Indigenous groups of the child are expressly preferred over "(e) … any other adult" and placement with that Indigenous child's siblings is to be considered a priority when determining a placement in their best interests.
>
> In the context of this governing legislation, the alleged facts in the Supporting Affidavit do not support the requested *ex parte* injunctive relief.
>
> As such, the *Ex Parte* Order for injunctive relief is denied.

THE APPEAL

Additional Evidence

[22] The foster mother, the Nunavut Director, and the Manager all filed applications in this Court to admit additional evidence on the appeal. As is the usual practice, the

parties were advised that the Court would consider the applications and affidavits pertaining to the proposed additional evidence at the time of the appeal hearing.

[23] The Court gave an oral decision declining to accept additional evidence. This decision was read into the record at the hearing and is reproduced below:

> **Oral Decision on Applications for Additional Evidence:**
>
> This appeal arises out of an *ex parte* Emergency Application which was sought at the same time as an Originating Application was filed in the Supreme Court Family Division. It was dealt with as a desktop Order. No one appeared.
>
> The judge who decided the *ex parte* application declined the injunctive relief sought by a foster mother with respect to the removal and new placement of the foster child. The judge issued a desk Order, and his written Endorsement was appealed to this Court along with an Application for a Stay. The Stay was granted pending the hearing of the appeal.
>
> That is the appeal that we are ready to hear today; whether the trial judge made any errors in his Endorsement and if so, what remedies are available.
>
> There has been no *inter partes* hearing as of this date. The Originating Application has not been heard as far as we know. There has been no evidence considered or tested at the Court below.
>
> In this rather unique situation, all the parties have asked this Court to consider "additional evidence". One might ask, additional to what?
>
> **The Appellant** made an application, and has included in their factum, in paragraphs 32-38 and 66-68, the additional evidence it requests this Court to consider. This evidence, generally speaking, goes to the merits of the Appellant's position, that it is in the best interests of the child for him to remain in the Appellant's care. This evidence was not before the applications judge.

Response of the Nunavut Director:

The First Respondent takes the position that none of the Appellant's evidence has been subjected to cross-examination or rebuttal. It is an attempt to bolster and re-litigate the same issue on appeal. None of it was before the applications judge. It may contain inadmissible hearsay evidence and has significant credibility issues. The Director argues it should not be admitted but that if it is, the hearing should be adjourned to allow the opportunity for it to respond to the evidence and allow for cross-examination.

Response of the Manager for Newfoundland and Labrador:

The Second Respondent also opposes the Appellant's application for additional evidence noting that none of the additional materials were before the judge on the *ex parte* application, are unsubstantiated and their accuracy disputed.

The Manager maintains that the affidavits filed for the interim Stay Application were filed with this Court for the limited purpose and scope of the Stay Application. They should not be treated as evidence on appeal.

Further, these materials would expand the court record far beyond what the judge had before him and seem to have been filed so that this Court will assess the merits of the foster mother's application for custody "without this issue having been heard *inter partes* by any lower Court." (Paragraph 26 of the Manager's factum)

The Manager goes on to say at paragraphs 42 and 43 of their factum:

The only *inter partes* proceeding in this matter was on Sept 7, 2023 (the stay application) which the Appellant did not attend in person (her lawyer appeared). She has never appeared before any court - she has never testified on direct examination or been cross-examined. Admitting the additional evidence allows the Appellant to establish her desired narrative without challenge or scrutiny.

The Manager says an appeal court is not designed as a court of first instance, particularly on the nuanced and fact-based question as to what is in the child's best interests. If the Appellant's litigation continues in Newfoundland and Labrador, a full hearing would be required with the participation of Nunavut's Director.

The Manager concludes: "It would be premature for the Court of Appeal to take on this role and make assessments of best interests of [the child] given the lack of any proceeding at a lower court. This court's role now is to decide whether or not [the Judge's] denial of the *ex parte* Emergency application will be upheld" (para. 43).

The Nunavut Director's Application for Additional Evidence:

The Director also makes an application for the admission of additional evidence for the purposes of the appeal. That is:

- The permanent custody order of the Nunavut Court of Justice for the child;
- The foster parent agreement between the Appellant and the Nunavut Director; and
- The agreement between the Nunavut Director and the Manager of CSSD Newfoundland and Labrador relating to the care of the child.

The Court finds it is not necessary to admit this additional evidence for the purposes of this appeal. Furthermore, it appears that the substance of these facts was considered by the judge dealing with the *ex parte* application. No party in this Court takes issue with these facts and the Director's argument before this Court can proceed unimpeded.

The Manager for Newfoundland and Labrador's Application for Additional Evidence:

The Manager, also by application, seeks to have additional evidence admitted for the purposes of appeal, specifically:

- An affidavit by the Manager for Children and Youth Services, Zone A;

- A policy from CSSD's Protection and In Care Policy and Procedure Manual and Appendix B referenced therein titled "Provincial/ Territorial Protocol on Children, Youth and Families Moving between Provinces and Territories"; and

- An Interprovincial Placement Agreement between Newfoundland and Labrador and Nunavut dated February 7, 2022.

The fulsome 36 paragraph affidavit filed by the Manager of Zone A provides information regarding the foster mother's personal situation from 1991-2006 and file information related to her care of this child.

The Manager defers to Nunavut for specifics related to the medical and developmental needs of the child prior to the child residing in Newfoundland and Labrador but disputes much of the foster mother's information pertaining to the child's medical and health issues in this province.

The Manager also disputes much of the information regarding the proposed placement in Ottawa or that the child would be placed at risk by removal from a long-term foster placement with a move to Ottawa.

The Court finds that the policy and procedure manuals and agreements between jurisdictions may be information that a judge of first instance would be interested in receiving but are not necessary as additional evidence for the purposes of this appeal.

The Manager and the Director support each other's position. The Appellant has not provided a response to the applications, but it is expected that the Appellant would oppose.

The Court's Decision and Direction:

Each of the parties has proposed additional evidence that was either already before the applications judge or is the type of evidence that would be presented initially at an *inter partes* hearing and be subject to admissibility,

hearsay challenges, etc. and as well, if admitted, subject to examination, cross-examination and submissions.

There has not been an *inter partes* hearing at first instance where evidence has been received through normal channels and been subjected to examination or cross-examination.

We do not intend to hear from witnesses or provide for cross-examination of potential witnesses or affiants at this appeal. In light of this, the Court will only consider the appeal on the basis of the materials before the applications judge.

This Court's role now is only to decide whether or not the Judge's Endorsement denying the desktop *ex parte* Emergency Application will be upheld.

If this Court assesses error, a possible remedy which has been suggested by all parties would be to remit the matter to a judge of the Family Division for an *inter partes* hearing on the Originating Application that was originally filed on September 1, 2023, the same day as the *ex parte* Emergency Interim Application was filed.

ISSUES ON APPEAL

[24] This appeal will address the following issues:

1. Did the Judge err in identifying or in applying the test for injunctive relief?

2. Did the judge err in denying injunctive relief on grounds of procedural fairness?

3. Did the judge err in his application or interpretation of the provisions of *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24 (the "*Federal Act*")?

4. Jurisdiction of the Courts of Newfoundland and Labrador.

STANDARD OF REVIEW

[25] In considering the issues on this appeal, once it was determined that additional evidence would not be heard and that the appeal would proceed based on the record before the judge on the *ex parte* Emergency Interim Application, the Court must determine the standard of review to be applied to a discretionary decision to grant or refuse an *ex parte* request for injunctive relief.

[26] Family law jurisprudence directs that an appellate court will not interfere with a lower court's decision solely on the basis that it would have exercised its discretion differently. Further, in child protection matters, an appellate court is not entitled to intervene unless there has been "a material error, a serious misapprehension of the evidence, or an error of law." (See: *B.J.T. v. J.D.*, 2022 SCC 24, at para. 51; *L.H. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2023 NLCA 32, at para. 51).

[27] The Nunavut Director states that the best interests of the child is the guiding principle in child protection matters. Further, at paragraph 73 of its factum, the Director submits that "[a]bsent a material error, an appellate court is not permitted to redo a lower court's analysis to achieve a result that it believes is preferable in the best interests of the child. That is the role of the trial court."

[28] I would agree that the trial courts are best placed to make findings on the best interests of the child when they have heard tested evidence from the litigants and any witnesses. That was not the case here. On the *ex parte* interlocutory injunction, the judge did not have the benefit of tested evidence from the foster mother, any evidence from the Nunavut Director, or any other witnesses, and therefore had no opportunity to do a proper analysis of the best interests of the child.

[29] At paragraph 74 of its factum, the Nunavut Director describes that "the [rationale] for the narrow scope of appellate review is to promote finality in child protection law litigation, recognize the importance of the highly discretionary nature of the decision and the appreciation of the facts by the trial judge, and avoid giving parties an incentive to appeal in the hope the appeal court will have a different appreciation of the relevant factors and evidence."

[30] Again, I agree with the submissions of the Director regarding these statements of principle in matters where there has been an *inter partes* hearing and a decision

made by a judge following appropriate consideration of the evidence. This was not the case in the matter before this Court on appeal.

[31] In *B.J.T.*, the Supreme Court of Canada confirmed that the same standard of review applies to both child protection and child custody matters:

> [58] The *Van de Perre* standard reflects the significant deference that the decision of a judge at first instance as to a child's best interests attracts, owing to the polymorphous, fact-based, and highly discretionary nature of such determinations (*Hickey*, at para. 10). In my view, absent something specific in the governing legislation, this same standard applies to custody decisions pursuant to child protection legislation.

[32] The Supreme Court of Canada goes on, at paragraph 59 of *B.J.T.*, to stress the importance of a fact-based analysis of the child's best interests, by a first instance judge, when an appellate court is applying the principle of deference:

> … In both cases, what is needed is an approach that promotes finality in family law litigation, recognizes the importance of the highly discretionary nature of the decision and the <u>appreciation of the facts by the judge at first instance who heard the parties directly,</u> and avoids giving parties an incentive to appeal judgments in the hope that the appeal court will have a different appreciation of the relevant factors and evidence (*Van de Perre*, at para. 11; *Hickey*, at para. 12).
>
> (Emphasis added.)

[33] The foster mother submits, at paragraph 41 of her factum, that an appellate court should not interfere with a discretionary decision "unless it can be said that the discretion was exercised beyond jurisdiction, contrary to principle, or on the basis of palpable error in appreciation of the facts, or would cause a manifest injustice."

[34] The standard of review of a discretionary decision was recently described in *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48:

> [41] ... A discretionary decision...is generally entitled to deference and may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being "so clearly wrong as to amount to an injustice"). ...

[35] This Court has repeatedly applied and affirmed the following statement of law set out in *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA) that the Court:

> [33] …will therefore only interfere with a discretionary order where the judge who made it has exceeded his or her jurisdiction or has failed to apply or has misapplied an applicable principle or made a palpable and overriding error in his or her appreciation of the facts, or the failure to interfere would otherwise cause a manifest injustice.

[36] In considering whether there was a material error, the appellate court will not retry the case but will review the record generally to satisfy itself that there is evidence to support the conclusions the hearing judge reached (*T.R. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2014 NLCA 19, at para. 18; *M.K. and R.P. v. Newfoundland and Labrador (Child and Youth Services)*, 2018 NLCA 34, at para. 10; and *L.H.*, at paras. 50-53).

[37] These are the principles that I will apply to the review of this decision.

ISSUE 1: Did the Judge err in identifying or in applying the test for injunctive relief?

The Test for Injunctive Relief

[38] The Supreme Court of Canada in *RJR−MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, identified three factors to be assessed when considering a stay or an injunction application. These are:

> (i) a consideration of whether there is a serious issue to be tried;
>
> (ii) a consideration of whether irreparable harm would result from refusing to grant the stay or injunction; and
>
> (iii) an assessment of the relative harm to the parties resulting from granting or denying the stay or injunction. This factor has been described as assessing whether the balance of convenience (alternatively referred to as the balance of inconvenience) favours granting or refusing the stay or injunction.

[39] Further, the Supreme Court of Canada observed in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824, at paragraph 1, that, in applying the three factors set out in *RJR−MacDonald*, "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case".

[40] Additionally, this Court has recognized that a modified approach is used when applying the *RJR–MacDonald* factors in a stay/injunction application in the context of parenting proceedings in a family law matter.

[41] This modified approach recognizes that, in a parenting matter, the best interests of the child must be considered when applying the factors in the *RJR–MacDonald* test.

[42] The modified approach was summarized in *P.G. v. C.C.*, 2018 NLCA 73, as follows:

> [20] In family proceedings involving children, this test must be modified to take into consideration the best interests of the child. While this generally applies as an overarching principle to the entire analysis, it specifically modifies the framework such that the concepts of irreparable harm and the balance of inconvenience are considered from the child's perspective, not the perspective of the parties (*R.E. v. N.G*, 2010 NLCA 60, 301 Nfld. & P.E.I.R. 240, at para.33).

[43] This Court has followed the modified approach set out above when considering applications involving children. See, for example: *W.S. v. J.B.*, 2022 NLCA 52, at para. 3; *M.G. v. S.P.*, 2021 NLCA 18, at para. 5; *A.H. v. R.B.*, 2020 NLCA 15, at para. 2; *Lee v. Lee*, 2019 NLCA 75, at para. 29; *J.H. v. C.C.*, 2019 NLCA 38, at para. 3; *E.M. v. Y.C.*, 2018 NLCA 21, at para. 5; and *Hynes v. Wellon*, 2017 NLCA 5, at para. 2.

[44] Accordingly, the three factors outlined in *RJR–MacDonald*, namely, whether there is a serious issue to be tried, the consideration of irreparable harm, and the assessment of the balance of convenience, should not only be identified by the judge but also applied by the judge in his consideration of the *ex parte* application.

[45] The judge's analysis of the factors will be considered by this Court in the factual context of the Application that was before him, recognizing that the test is to be applied from the perspective of the child's best interests.

[46] The judge was requested to provide interlocutory injunctive relief on an *ex parte* basis to prevent the removal of the child pending the hearing of an *inter partes* Application filed with the Court. I will consider whether the judge correctly identified the elements of the test for injunctive relief and secondly, whether he analyzed the submissions and facts before him and applied the test to them.

[47] While the judge did not reference *RJR–MacDonald* or any other legislative authority explicitly, it is not necessary to do so as long as it is clear that the judge was aware of the factors to be analyzed in the test for injunctive relief and that he applied them to the facts.

[48] In the Endorsement, the judge's only reference to what could be described as factors outlined in the *RJR–MacDonald* test, is as follows:

> Assessing the Supporting Affidavit as a whole, the Applicant has not demonstrated a *prima facie* case of irreparable harm if the Application was denied, nor that the balance of convenience favours granting injunctive relief.

[49] In the judge's Endorsement, there is no mention of whether there is a serious issue to be tried. There is nothing in the Endorsement to support that he considered any of the circumstances outlined in the sworn Application and affidavit before him relating to the circumstances of this child and whether they raised a serious issue. The threshold is low and the question is not whether the applicant is likely to succeed at trial but whether the application is frivolous or vexatious (see *RJR–MacDonald*, at p. 335).

[50] The judge mentions the words "irreparable harm" and "balance of convenience" in his Endorsement, but these conclusions were not supported by analysis.

[51] The Judge should have considered the applicant's sworn application and affidavit which contained the only relevant factual evidence before him, and he should have explained how the evidence provided to him did not meet the *RJR–MacDonald* test. In particular, he concluded that the sudden and abrupt removal of a child from the only parent he had ever known, in the circumstances described in the affidavit, would not cause irreparable harm, and stated, with no analysis, that the balance of convenience did not favor injunctive relief. Further, there is no analysis of the best interests of the child.

[52] The Judge's skeletal conclusion shows that he erred in identifying and applying the test for injunctive relief, in this matter involving a child. He erred in principle in dismissing the foster mother's Application for temporary relief without adequate reasoning to illustrate consideration and analysis of the appropriate factors. An endorsement is appropriate and encouraged for relatively simple matters, but it must still include adequate reasoning to allow for appellate review.

ISSUE 2: Did the judge err in denying injunctive relief on grounds of procedural fairness?

[53] The judge, in denying the Application, also wrote of the circumstances surrounding the request for the *ex parte* Application for injunctive relief pending the hearing of the *inter partes* Application as follows:

> Although the Applicant has been a long-time foster parent for the child, she does not have legal custody of the child.
>
> Given this fact, the numerous parties involved, as well as the interaction of the various jurisdictions, governing legislation and, no doubt, agreements that are relevant to the child's status in the care of the Applicant in this jurisdiction, it is inappropriate to grant injunctive relief on an *ex parte* basis as requested by the Applicant. Procedural fairness dictates otherwise.
>
> (Emphasis added.)

[54] The judge was aware that the child was in the legal custody of the Nunavut Director and also aware of the lengthy period of time that child had resided in Newfoundland and Labrador with the consent of the Nunavut Director. The style of cause and the affidavit before the judge also referred to the role of the Manager of Child Protection in Newfoundland and Labrador. The judge stated that it would be inappropriate to grant injunctive relief on an *ex parte* basis as requested by the Applicant. He concluded that procedural fairness dictated otherwise. His reasons do not disclose what was procedurally unfair or how it could be remedied.

[55] The judge's reasons do not show why he did not consider setting the matter for an *inter partes* hearing of the filed Originating Application on an expedited basis, which would have provided additional evidence from the other named parties in the Originating Application and the *ex parte* Application. If the judge had questions about procedural unfairness, he could have heard from the Appellant's counsel or sought submissions.

[56] A judge's reasons should provide parties and the reviewing court with a sufficient basis to permit appellate review and provide clarity as to why, in this case, there could not be an *inter partes* hearing to untangle the issues identified by the judge and ensure that the child's best interests would be addressed.

[57] The fact that the Director had flights arranged for the child to go to Ottawa does not trump a court's obligation to properly decide what is in the child's best interests. It was an error in principle to refuse *ex parte* relief because of a lack of time to provide notice to other parties in this instance. Although the judge did not dismiss the Originating Application, which would have provided for an *inter partes* hearing, his decision had the same effect.

ISSUE 3: Did the judge err in his application or interpretation of the provisions of *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c. 24 (the "*Federal Act*")?

[58] Following the judge's conclusions on the above issues, he went on to make findings on the merits of the child's best interests in light of the new *Federal Act*.

[59] The judge determined that "[i]n the context of this governing legislation," the alleged facts do not support the requested *ex parte* injunctive relief. The judge's Endorsement states:

> This determination is made in the context of the provisions of *An Act respecting First Nations, Inuit and Métis children, youth and families*. This federal legislation greatly expands the role of cultural continuity for the placement of Indigenous children. While best interests of the child remains the paramount objective as in the *Children, Youth and Families Act* of Newfoundland and Labrador, s. 10(2) of the federal *Act* recognizes the primary importance of the Indigenous child "having an ongoing relationship with his or her family and with their Indigenous group, community or people to which he or she belongs and of [preserving] the child's connections to his or her culture".
>
> Under 16(1) of the federal *Act*, the placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent it is consistent with best interests of the child, is to occur in the following order:
>
> (a) with one of the child's parents;
>
> (b) with another adult member of the child's family;
>
> (c) with an adult who belongs to the same Indigenous group, community or people as the child;
>
> (d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or

(e) with any other adult.

> According to section 16(2), when applying the aforementioned priorities of placement, the federal legislation mandates the consideration of placing the child with or near children who have the same parent as the child. In short, adults that are members of the same or different Indigenous groups of the child are expressly preferred over "(e) … any other adult" and placement with that Indigenous child's siblings is to be considered a priority when determining a placement in their best interests.

[60] This part of the judge's Endorsement raises procedural fairness concerns. The record demonstrates that this legislation was not provided to the judge by the applicant nor was it referenced in the sworn Application or the affidavit. The judge applied the legislation without notice to the affected party, determined that it governed the situation, and made findings of fact respecting it without any evidence to support them. An assessment of this legislation as applied to this Application, in the absence of notice to the applicant, was inappropriate, premature and possibly factually unsustainable.

[61] Sections 9 and 10 of the *Federal Act* provide that the *Act* must be interpreted and administered in accordance with the principle of the child's best interests. The best interests of the child must be either a "primary consideration" when making decisions or taking actions in the provision of child and family services, or the "paramount consideration" in decisions or actions related to child apprehension.

[62] Further, in section 10(3), the *Act* outlines multiple factors which must be considered when determining the child's best interests, among them:

- the child's need for stability,
- the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life,
- the child's views and preferences, giving due weight to the child's age and maturity.

(Emphasis added.)

[63] Section 12 of the *Act* appears to recognize the role of care providers in that care providers may receive notice of any significant measures related to a child in their care.

[64] Section 13 of the *Act* provides that in a civil proceeding involving an Indigenous child, the care provider has the right to make representations and to have party status.

[65] The *Act* defines a "care provider" as "a person who has primary responsibility for providing the day-to-day care of an Indigenous child, other than the child's parent…". In this case, the child's long-term care provider was the foster mother.

[66] The judge referenced the priorities for placement of an Indigenous child as set out in section 16(1) of the *Act*. The record before him did not suggest that the child was being placed with a parent, adult family member, Inuit adult or other Indigenous adult. The judge had no information with whom the child would be placed in Ottawa. The only thing that the judge knew is that the foster mother would fall under section 16(1)(e) "any other adult" and the judge concluded that all other categories take priority over her. He then determined that placement with a child's siblings under section 16(2) is to be considered a "priority" when considering a placement in the child's best interests.

[67] Section 16(1) says that the child's best interests must be considered in the placement of an Indigenous child when the order of priority is being considered. Unlike section 16(1), section 16(2) does not establish a priority on placing a child with siblings, in the same way it does with placing a child with a parent or other adult family member. The judge erred by elevating the possibility of placing a child with siblings to be a <u>priority</u> consideration when placing the child, rather than a factor which should be considered in determining best interests. As noted above, the judge had no information as to the type of placement under section 16(1) in Ottawa. Further, he had no evidence of the best interests of the child other than what was provided by the foster mother.

[68] The *Federal Act* provides an important response to decades of harmful placement decisions of Indigenous children, whether in the foster care system or residential schools. Determining the best interests of the child underpins all child protection legislation in Canada and is also the primary and paramount consideration in the new federal legislation respecting Indigenous children.

[69] It is trite to say that children do not have the ability to assert their legal rights. They must depend on adults to do so. When a child is placed with a child protection agency, the Manager or Director is required to apply the best interest consideration to the placement of a child. For many children in care, their foster parents are often well-positioned to provide valuable input and/or question the proposed state plan. In this case, the *Act* does recognize the role of the care provider to provide this input.

[70] There may also be a question as to the retroactive application of the *Act*. The policy objectives of the legislation favour placement of Indigenous children with a parent, adult family member, another adult of the same Indigenous group, community or people, or other Indigenous adult where possible. A question arises as to whether and how to weigh an Indigenous child's best interests in considering removal from a long-term, stable foster placement.

[71] None of these factors were considered by the judge. The judge appears to have considered the child's best interests on his own cursory review of the *Act* and concluded that the facts in the supporting affidavit did not support the requested *ex parte* relief. It is difficult to determine whether the judge thought the record did not raise concerns about the proposed relocation or whether he concluded that any concerns were obviated by the *Act*. An evidentiary record and submissions of the parties are required to answer these questions.

[72] Consideration of the *Act* in the circumstances of a desktop Application, without notice to the parties, and without hearing from them, and then using his interpretation of the legislation to support his dismissal of the Application constitutes an error in principle. Further, to dismiss an Application for temporary relief based on a cursory examination of the merits without a sufficient evidentiary basis, also constitutes an error in principle.

ISSUE 4: Jurisdiction of the Courts of Newfoundland and Labrador

[73] I have examined the judge's Endorsement but have not commented on an argument put forward at this hearing by the Nunavut Director.

[74] Once it was determined by this Court that no new evidence would be heard and that this Court was not prepared to hear arguments on the merits, the Nunavut Director urged the Court to deal with whether Newfoundland and Labrador courts had jurisdiction over this matter. The Director argued that this province has no jurisdiction, and the only appropriate jurisdiction was in Nunavut.

[75] In its factum, at paragraph 50, the Nunavut Director submitted that the judge was correct in the result by dismissing the *ex parte* Application but submitted that the judge erred in law by assuming jurisdiction. The Director argued that the judge ought to have dismissed the Application for want of jurisdiction. The Director further submitted in its factum that this Court could determine the question of jurisdiction even though it was not addressed by the judge.

[76] Conversely, during oral argument before this Court, the Director asserted that, in fact, the judge in his Endorsement had recognized that he had no jurisdiction and that this was the reason that he dismissed the *ex parte* Application.

[77] I cannot conclude, having fully reviewed the judge's Endorsement, that the judge dismissed the Application because he found he had no jurisdiction. The judge said nothing about his jurisdiction to hear the matter in the Endorsement and, in fact, delved into the merits of the Application. I cannot accept the Director's speculative argument that one could infer the judge found that he had no jurisdiction and had dismissed the *ex parte* Application on that basis.

[78] The Nunavut Director submitted that the jurisdiction of Newfoundland and Labrador courts may be founded on a real and substantial connection and, where jurisdiction is challenged, the onus is on the applicant to establish that a real and substantial connection exists.

[79] The Director cited principles found in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, by reference to the following four presumptive but non-exhaustive questions relevant to tort claims:

- Is the defendant domiciled or resident in the province?
- Does the defendant carry on business in the province?
- Did the cause of action arise in the province? and
- Is there a contract connected with the dispute that was made in the province?

[80] Whether or not this analysis is the appropriate one when a child is involved is an open question. It is certainly not the usual test for determining the habitual residence of a child.

[81] The Nunavut Director submits that, of the four factors, the only connecting factor is the child's physical presence in Newfoundland and Labrador. However, the Director argues that the child is not a habitual resident of Newfoundland and Labrador because he is in the legal custody of the Nunavut Director.

[82] In the context of the situation and the circumstances of this case, it is difficult to conclude that the child's habitual residence is not, in fact, in Newfoundland and Labrador. The child has now lived in this province for seven years, attends school, activities, receives medical services, has a long-term foster family, a home, friends, acquaintances and community connections, including with Indigenous communities through First Light. The child, although born in Nunavut, has not lived in Nunavut for many years. Furthermore, he has never resided in Ottawa, the proposed relocation site.

[83] The Director argues that there is no substantial connection to Newfoundland and Labrador because the Nunavut Director is based in Nunavut, empowered by Nunavut legislation, and because the foster parent agreement was made in Nunavut.

[84] The foster mother asserts that an extra-provincial order dealing with a child's custodial arrangement (the Nunavut order) does not deprive this province's courts of jurisdiction to modify the order. The Nunavut Director argues that the Appellant position is incorrect. The Director submits that this is because the authority to modify child custody orders between jurisdictions, based on habitual residence, is determined on family law "child custody" principles, not on "child protection" law principles.

[85] None of these arguments or submissions appear to consider the best interests of the child. The Director has placed this child with the foster mother and has continued for seven years to support this arrangement as being in the best interests of the child. In these circumstances, a full examination of the best interests of this child is warranted and should be fully explored in a family court setting with submissions and evidence from those who may provide insight into the psychological, developmental and physical needs of this particular child.

[86] Jurisdiction with respect to children, particularly in circumstances such as this, raises complex questions, including *parens patriae* jurisdiction, and must be determined in context.

[87] Making a decision regarding the best interests of this child in context would be preferable to an approach which seems to suggest that the Nunavut Director "owns"

this child because of the custody order and therefore knows what is best for this child. How the Director has determined what the best interests of this child are is unknown and unexplored. To resolve this matter solely on the question of jurisdiction, without considering the evidentiary context and the child's best interests in these most unusual circumstances, would be a disservice to this child.

[88] I would conclude that it is not appropriate for this Court to determine the jurisdictional issue without the benefit of a full contextual *inter partes* hearing. The court below will have to consider whether the geographic location of the Director's custody order (i.e. Nunavut) ousts the jurisdiction of the courts of the geographic location (i.e. Newfoundland and Labrador) where the child is settled and has resided for many years.

[89] Additionally, the errors identified in the analysis of the first three issues on this appeal also dictate that an *inter partes* hearing of the Originating Application is necessary. All parties submitted in this Court that the evidentiary record was incomplete.

A Full Evidentiary Record is Required

[90] A full evidentiary record will assist the first instance court to adequately examine the Nunavut Director's plan for this child and determine whether, in these particular circumstances, the plan is in the child's best interests, and that his best interests are paramount in this examination. The Appellant has raised several questions that will require the attention of the court below.

[91] This child has lived with the foster mother, with the Nunavut Director's consent, since January 2018 and is now nearly nine years old. The Nunavut Director asserts that, based on its statutory mandate and in the best interests of the child, it was decided that child be moved to Ottawa. The Director states that it "has the sole discretion to determine placement of a child in its custody" (Nunavut Director's Factum, at para. 88). The Director asserts that its decision is immune from judicial oversight as it was based on the best interests of the child. This assertion requires further examination.

[92] In *B.J.T.*, the Supreme Court of Canada determined that decisions of child protection agencies are not immune from judicial oversight and, in some circumstances, a court may be required to review their actions:

> [63] No general principle prevents a judge on a best interest of the child analysis from considering the actions of a child protection agency. Such inquiries are not only permissible, they may also in some circumstances be *required* on account of the court's essential oversight role in child welfare matters and its *parens patriae* jurisdiction.
>
> …
>
> [65] … Hence, even in the assessment of a child's best interests, an agency's decision-making process remains the proper subject of inquiry as part of the court's oversight role. Similarly, the jurisdiction under *parens patriae* to act in the best interests of a child gives ambit to a superior court to take due notice of an agency's conduct insofar as it impacts a child's best interests.

[93] In an earlier decision, *Beson v. Director of Child Welfare (NFLD.)*, [1982] 2 S.C.R. 716, the Supreme Court of Canada, at pages 728-729, determined that the Director's behaviour was at issue by ignoring a suggested remedy from both the trial judge and Court of Appeal, each of whom felt powerless to make the Order that they believed to be in the best interests of the child. Wilson, J. determined that an exceptional remedy was required in the best interests of the child. The Supreme Court of Canada stated that while *parens patriae* jurisdiction is generally confined to making custody awards, the exceptional circumstances of that case, and the security and best interests of that child, required it being exercised to make the adoption order that the court below should have made.

[94] Further in *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, at pages 425-426, La Forest, J., for the Supreme Court of Canada, determined that *parens patriae* allows the Court to act "for the protection of those who cannot care for themselves". It is to be exercised in the "best interests" of the protected person or, again, for his or her "benefit" or "welfare". This jurisdiction is very broad and can be applied in a wide variety of situations.

[95] La Forest, J., at page 427, noted that *parens patriae* jurisdiction is to be exercised in appropriate circumstances for the protection of an individual:

> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised.
> …

[96] The Nunavut Director also argued that the foster mother has no standing to bring the matter before the courts. Standing is applied differently in civil and criminal cases. Standing in family proceedings may engage different principles given that courts have rejected the traditional theory that custody is a parental right in favour of an approach that emphasizes the child's best interest and emotional and psychological bonds (See *B.J.T.*, at paras. 88-90).

[97] The Director and Manager have argued that various amendments to the provincial legislation have potentially limited the foster mother's status to bring the matter before the courts. If this is so, then the court may have to consider whether there is relief available pursuant to its *parens patriae* jurisdiction. As well, as noted above, the *Federal Act* specifically provides for a role for the care provider in litigation involving a child in their care (ss. 12-13).

[98] The foster mother has suggested that legislative amendments impacting her right to contest this matter (described as "apparent limits") may be unconstitutional. This argument may be raised in the court below. While foster parents may or may not have constitutionally protected rights, it bears consideration that a child's right to stability, permanency and security of their person may also raise constitutional issues.

[99] In *B.J.T*, Martin, J. noted, at paragraph 103, that the biological relationship between a parent and child "is a presumed proxy for the parent with whom a child has the closest emotional or psychological bond". During the discussion in paragraphs 88-108 of *B.J.T.*, Martin, J. concludes that when the state removes a child from their only parental figure, the psychological impact of that separation is determined by the child's actual bonds and ties, and not by a legal distinction between foster, adoptive or natural parents.

[100] Where there is a real concern about the best interests of the child by removing him from a long-term foster parent, the foster parent may be an important and necessary party to bring these issues before the court and to provide evidence relating to the child's best interests. The Nunavut Director advised this Court that the change in foster placement by moving the child to Ottawa was not for the purpose of a permanent adoptive placement. Consideration of the right of a child to a safe, secure, permanent placement, is an issue that may be engaged when the matter is heard in the court of first instance.

CONCLUSION

[101] I would conclude that the judge made errors in determining the Appellant's request for injunctive relief. He failed to identify and apply the appropriate test for interlocutory injunctive relief; he failed to set the matter over for an *inter partes* hearing after finding that it would be procedurally unfair to grant *ex parte* relief; and he engaged in an assessment of the merits of the Appellant's position by applying the *Federal Act* in circumstances that were inappropriate, premature and possibly factually unsustainable.

[102] The circumstances of this case are unusual. The child has been in a long-term foster placement where the current record indicates he has thrived. Thus far, there has been limited, if any, opportunity to consider the proposed impact of the removal on this child's best interests. The stability or permanency of the proposed new placement, in comparison to the status quo, and many other factors, must be considered in determining the best interests of this child.

[103] For all of the above reasons, I would remit the matter to the Supreme Court, Family Division for an *inter partes* hearing of the Originating Application, on all issues relevant to the child's best interests, including any jurisdictional issue.

[104] For greater certainty, it is not the Emergency Interim *ex parte* Application for injunctive relief that is remitted for further consideration by the Supreme Court, Family Division. Rather, it is the Originating Application that is to be considered. The Stay previously imposed by this Court remains in place until the matter is concluded in the Family Division. The Disposition that follows contains the relief necessary to ensure that the merits of the Originating Application and associated issues can proceed expeditiously.

DISPOSITION

[105] I would allow the appeal and remit the matter to the Supreme Court Family Division for an *inter partes* hearing of the Originating Application.

[106] Neither the First nor Second Respondent shall remove the child from the care of the Appellant until the Originating Application in the Family Division has been decided on its merits.

[107] Further, in the interim, the child shall not be removed from Newfoundland and Labrador unless the parties are in agreement.

[108] There shall be no order as to costs.

_____

D.E. Fry C.J.N.L.

I Concur**:** _____

L.R. Hoegg J.A.

I Concur**:** _____

F.P. O'Brien J.A.