

TAB 11

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Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)

Richard Ouellet (Appellant / Affected Party) and B.M. Respondent (Applicant) and Alberta (Director of Child, Youth and Family Enhancement) (Respondent / Respondent)

Alberta Court of Appeal

Catherine Fraser C.J.A., Frans Slatter J.A., and Marina Paperny J.A.

Heard: April 28, 2010

Judgment: July 30, 2010

Docket: Edmonton Appeal 0903-0247-AC

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Proceedings: Reversed, 2009 ABCA 258, 2009 CarswellAlta 1103, [2009] 11 W.W.R. 450, 70 R.F.L. (6th) 32, 9 Alta. L.R. (5th) 225, [2009] W.D.F.L. 3890, [2009] A.W.L.D. 3224, 462 W.A.C. 188, 94 Admin. L.R. (4th) 295, 460 A.R. 188, 246 C.C.C. (3d) 170 (Alta. C.A.); Affirmed, 2009 ABCA 270, 2009 CarswellAlta 1179, [2009] W.D.F.L. 3969, [2009] A.W.L.D. 3262, [2009] A.W.L.D. 3298, 460 A.R. 224, 462 W.A.C. 224, 14 Alta. L.R. (5th) 282, 71 R.F.L. (6th) 284, [2010] 2 W.W.R. 472 (Alta. C.A.)

Counsel: D.R. Cranston, Q.C., N.J. Forster for Appellant

A.C. Kellet for Respondent, B.M.

T. Hurlburt, Q.C. for Respondent Alberta (Child, Youth and Family Enhancement, Director)

Subject: Family; Civil Practice and Procedure

Judges and courts.

Civil practice and procedure.

Cases considered:

Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.) (2009), 448 A.R. 53, 447 W.A.C. 53, 2009 ABCA 40, 2009 CarswellAlta 87, 62 R.F.L. (6th) 323 (Alta. C.A.) — referred to

Alberta (Director of Child, Youth & Family Enhancement) v. M. (B.) (2010), 2010 ABCA 233, 2010 CarswellAlta 1441 (Alta. C.A.) — referred to

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Apotex Fermentation Inc. v. Novopharm Ltd. (1998), 162 D.L.R. (4th) 111, 1998 CarswellMan 318, 80 C.P.R. (3d) 449, [1998] 10 W.W.R. 455, 129 Man. R. (2d) 161, 180 W.A.C. 161, 42 C.C.L.T. (2d) 133 (Man. C.A.) — referred to

Bhatnager v. Canada (Minister of Employment & Immigration) (1990), 1990 CarswellNat 73, 36 F.T.R. 91 (note), 1990 CarswellNat 737, 44 Admin. L.R. 1, 71 D.L.R. (4th) 84, [1990] 2 S.C.R. 217, 111 N.R. 185, 12 Imm. L.R. (2d) 81, 43 C.P.C. (2d) 213 (S.C.C.) — considered

Broda v. Broda (2004), 2004 ABCA 73, 2004 CarswellAlta 181, 346 A.R. 376, 320 W.A.C. 376, 1 R.F.L. (6th) 51 (Alta. C.A.) — considered

Builders Energy Services Ltd. v. Paddock (2009), 2009 ABCA 153, 2009 CarswellAlta 553, 457 A.R. 266, 457 W.A.C. 266 (Alta. C.A.) — considered

Canada (Conseil des ports nationaux) v. Langelier (1968), 2 D.L.R. (3d) 81, [1969] S.C.R. 60, 1968 CarswellQue 44 (S.C.C.) — referred to

Constitutional Validity of Bill No. 136 (Nova Scotia), Re (1950), (sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General)*) [1951] S.C.R. 31, (sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General)*) [1950] 4 D.L.R. 369, 1950 CarswellNS 20, (sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General)*) 50 D.T.C. 838 (S.C.C.) — considered

Decock v. Alberta (2000), 255 A.R. 234, 220 W.A.C. 234, 2000 CarswellAlta 384, 79 Alta. L.R. (3d) 11, 186 D.L.R. (4th) 265, [2000] 7 W.W.R. 219, 2000 ABCA 122 (Alta. C.A.) — considered

Free Estate v. Jones (2004), 364 A.R. 384, 2004 ABQB 486, 2004 CarswellAlta 1382, 12 E.T.R. (3d) 255 (Alta. Q.B.) — referred to

Fallowka v. Royal Oak Ventures Inc. (2010), [2010] 1 S.C.R. 132, [2010] 4 W.W.R. 35, (sub nom. *Fallowka v. Pinkerton's of Canada Ltd.*) 398 N.R. 20, (sub nom. *Fallowka v. Pinkerton's of Canada Ltd.*) 479 W.A.C. 1, (sub nom. *Fallowka v. Pinkerton's of Canada Ltd.*) 474 A.R. 1, 80 C.C.E.L. (3d) 1, 315 D.L.R. (4th) 577, 2010 SCC 5, 2010 CarswellNWT 9, 2010 CarswellNWT 10, 71 C.C.L.T. (3d) 1 (S.C.C.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — considered

Huth v. Clarke (1890), (1890) L.R. 25 Q.B.D. 391 (Eng. Q.B.) — considered

M. v. Home Office (1993), [1994] 1 A.C. 377 (U.K. H.L.) — considered

Michel v. Lafrentz (1998), 1998 ABCA 231, 219 A.R. 192, 179 W.A.C. 192, 68 Alta. L.R. (3d) 140, 1998 CarswellAlta 657 (Alta. C.A.) — considered

Minister of National Revenue v. Dropsy (2009), 2009 CF 820, 2009 CarswellNat 3937, 2009 D.T.C. 6136 (Eng.), 2009 CarswellNat 2416, 2009 FC 820, [2009] 6 C.T.C. 137 (F.C.) — referred to

Morrow, Power v. Newfoundland Telephone Co. (1994), 121 Nfld. & P.E.I.R. 334, 377 A.P.R. 334, 1994 CarswellNfld 322 (Nfld. C.A.) — referred to

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Pawlowski v. Calgary (City) (2008), 2008 CarswellAlta 1016, 2008 ABQB 267, 445 A.R. 18, 48 M.P.L.R. (4th) 106 (Alta. Q.B.) — referred to

U.N.A. v. Alberta (Attorney General) (1992), [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137, 1992 CarswellAlta 10, 1992 CarswellAlta 465 (S.C.C.) — considered

Statutes considered:

Child and Family Services Authorities Act, R.S.A. 2000, c. C-11

Generally — referred to

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12

Generally — referred to

s. 1(1)(j) "director" — considered

s. 8 — referred to

s. 9 — referred to

s. 11 — referred to

s. 14 — referred to

ss. 16-19 — referred to

s. 111(2) — referred to

s. 120(3) — referred to

s. 120.1 [en. 2008, c. 31, s. 59] — referred to

s. 121 — considered

Government Organization Act, S.A. 1994, c. G-8.5

s. 2(1) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

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Generally — referred to

R. 87(b) — referred to

R. 702(1) — considered

R. 703(1)(a) — considered

R. 704 — considered

Per Curiam:

I. Introduction

1 Can liability for contempt of court be imposed personally on the holder of a public office who is in charge of a government department where the public officer is named as a party to an action and the department fails to obey a court order directing the public officer to act? Such failures are rare, but they do occur.

2 Here, child protection authorities failed to immediately return a child to his foster mother following an order of this Court. The child was eventually returned, but after a delay that a single judge of this court found to be unexplained. He found Mr. Ouellet, the Director of Child, Youth and Family Enhancement, personally liable for contempt of court.

3 Mr. Ouellet appeals the finding, submitting that he was not involved in the handling of the file and that he relied on others to take appropriate steps, specifically the Edmonton and Area Child and Family Services Authority, to which power in child protection matters is delegated.

II. Background

Statutory scheme

4 Much of Mr. Ouellet's argument, both before the chambers judge and on appeal to this Court, rests on his evidence that although the Director was named as a party in the court proceedings, the Director was not functionally responsible for compliance with the court order. Thus, it is helpful to review the nature of the Director's office and its statutory source.

5 The office of the Director is established under the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 (the *CYFE Act*). The *CYFE Act* gives the Director certain powers and responsibilities with respect to child protection matters in Alberta, including the authority to bring applications in court for orders for supervision, apprehension and guardianship of children in need of intervention (ss. 16-19). The Director is, by statute, a party to all court proceedings regarding those matters (s. 111(2)). Decisions regarding the placement of a child who is the subject of a guardianship order, such as the decision in this case, are made in the name of the Director and may be appealed to an Appeal Panel. Decisions of the Appeal Panel may in turn be appealed to the Court of Queen's Bench. The Director must be notified of and is party to all such appeals (ss. 120(3) and 120.1).

6 Mr. Ouellet relies heavily on s. 121 of the *CYFE Act* which permits the Minister or the Director to delegate any of the duties or powers conferred on the Director to a Child and Family Services Authority. Authorities have been created for each region of the province under the *Child and Family Services Authorities Act*, R.S.A. 2000, c. C-11, and they handle the day-to-day management of child protection matters. Mr. Ouellet says officials in the relevant Au-

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thority were responsible for the management of the file in this case.

Facts

7 The dispute between the Director and the respondent foster mother began when the Director removed a foster child from her care in October 2006. The child had been in the respondent's care since April 2002 when he was three months old. The respondent opposed the removal and successfully appealed the Director's decision to an Appeal Panel constituted under the *CYFE Act*.

8 The Appeal Panel described the decision under appeal as: "The Director's decision to remove [the child] from [the respondent's] foster home". The Appeal Panel concluded that the "immediate removal" of the child was "unwarranted", and that the child "could have been left in the [respondent's] home, with supports in place, in order to facilitate a more orderly transition". It did express concerns about "the presence in the home of [the respondent's spouse]" and concluded that: "His presence in the home should be carefully monitored". The Appeal Panel summarized its "Decision" as being: "The decision of the Director is reversed". No specific direction to return the child was given.

9 The Director then successfully appealed to the Court of Queen's Bench. The respondent in turn appealed the Queen's Bench decision to this Court. On January 30, 2009, this Court allowed the respondent's appeal: *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)*, 2009 ABCA 40, 448 A.R. 53 (Alta. C.A.). The Court set aside the Queen's Bench order and restored the decision of the Appeal Panel. No specific direction to return the child was given.

10 The child was not immediately returned to the respondent following the release of this Court's decision. The parties disagreed as to what the appeal decision meant for the custody of the child. Eventually, counsel for the respondent wrote to this Court seeking clarification of the January 30, 2009 decision. On June 4, 2009, this Court advised that the judgment required that the child be returned to the respondent's care: "In the opinion of the Court, the judgment filed on January 30, 2009 requires that the child be returned". No specific deadline for returning the child was given. This being so, all concerned, including the appellant, had a positive obligation to comply with reasonable diligence.

11 The child was not returned until June 22, 2009, the day before the return of the respondent's motion for contempt. The hearing of the contempt motion was conducted on June 23, 2009. Although the Director was represented by Alberta Justice at that hearing, initially, Mr. Ouellet did not personally appear. He was directed to do so by the chambers judge and appeared in person that morning. The Director had filed an affidavit of Tim Gillis, an official with Alberta Children and Family Services, in response to the contempt application. Counsel for Alberta Justice made representations on behalf of the office of the Director. That same counsel also made submissions on behalf of Mr. Ouellet personally. In addition to the affidavit material filed, Mr. Ouellet made several unsworn statements to the chambers judge.

12 Tim Gillis, who was involved in the case, deposed the following in his affidavit [emphasis added]:

16. On Thursday, June 4, 2009, I was advised by Region 6 senior manager, Ms. Diebel, that the Director's counsel had received a letter that day from the Court of Appeal indicating that in their opinion, [the child] should be returned to [the respondent's] foster home. Ms. Diebel and I immediately canvassed availability of upper management, and arranged a meeting for the following day.

17. On Friday, June 5, 2009, I met with the Director's counsel, Ms. Diebel, Region 6 senior executive Mr. Pickford, and the Director, Mr. Ouellet. We discussed how we could respond to the Court's direction in a manner that would least impact [the child].

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18. On Monday, June 8, 2009, I asked [the child's] case manager to develop a plan that would entail [the child] returning to [the respondent's] home for a period of time. I knew this would be a very challenging task, from logistical, safety and best interest of the child perspectives. [The child] lived 10 hours away by car, and was settled in his home. He had not seen [the respondent] for 1 3/4 years.

19. On Tuesday, June 9, 2009, counsel for the Director advised me that she had just received notice that [the respondent's] counsel had filed a court application the day before, asking to have the Director found in contempt of the court.

20. Over the next week, I regularly consulted with senior management and worked with the case manager to come up with concrete details for [the child's] return. I was extremely concerned about the emotional impact upon [the child], and information that [the respondent's spouse] lived in the home required safety considerations.

21. On June 18, 2009, Ms. Diebel, Mr. Pickford, and I met again with counsel for the Director. A plan for [the child] to go to [the respondent's] home no later than Monday, June 22, 2009 was finalized.

13 Submissions were made by counsel on June 23, 2009 based on the affidavits filed. The chambers judge asked Mr. Ouellet if he wished to say anything in addition. He stated:

I'll just say a few — one word, Sir, is — a few words, Sir, is that in cases of this, it is very clear that we are trying to balance the best interests of this child. This is not a widget that we move by casually or callously. And I believe that the individuals involved in the planning for this case have very carefully considered and balanced the interests of [the respondent] as well as the family and, most importantly, the child. I believe, from the information I have been provided by those involved, all efforts were made to do that quickly and efficiently. I would just submit that, Sir. (AR 34/21-35/5)

14 Later that day, after considering this matter, the chambers judge determined that Mr. Ouellet was in contempt. He provided detailed reasons for his conclusion. The chambers judge was prepared to accept that a reasonable person may have had some doubt as to whether this Court's January 30, 2009 decision required the child be returned to the respondent. He also noted that it is the duty of someone who receives a court order telling him or her to do something to obey it, and if there is some doubt as to what it means, he or she must take steps to clarify it. The chambers judge correctly noted that no such steps were taken by the Director or anyone in the Authority between January 30 and June 4, 2009.

15 The chambers judge found that prior to the June 4, 2009 letter from the Court, Mr. Ouellet did not have personal knowledge of the court order. However, the chambers judge determined that at that point, Mr. Ouellet became directly involved in the dispute with the respondent. The chambers judge concluded that from June 4 to June 22, a period of 18 days, the officials in charge of the matter and the Director were operating on what the judge termed a "misconception" that the Director and his officials had conflicting considerations and duties to consider prior to obeying the court order, including duties to various individuals, to the First Nation involved, and to the best interests of the child. The chambers judge reviewed the affidavit of Mr. Gillis and could not find any excuse, logistical or otherwise, for the 18-day delay in returning the child.

16 The chambers judge was troubled by any suggestion that the Director or his officials were entitled to "balance" countervailing considerations rather than immediately complying with the court order. He concluded that from June 4 to June 22 Mr. Ouellet knew about the order yet took no steps to ensure that it was complied with. The chambers judge concluded (F43, l.17) "... the only thing that would stand in the way of the immediate return of the child then might have been some logistics". He found the Director, Mr. Ouellet, to be personally in contempt of court.

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17 On July 14, 2009, Mr. Ouellet appeared before the chambers judge requesting that he reopen the issue, and hear further submissions and evidence on his behalf. He was represented by new counsel, not counsel for Alberta Justice. Mr. Ouellet filed an affidavit outlining his personal involvement, or lack thereof, in this case. He deposed that he was unaware of the child or the order until June 5, 2009. On that date, he met with officials of the Edmonton and Area Child and Family Services Authority and Alberta Justice. He stated that he was advised of the order and a contempt application against the Director. He was told that an "appropriate response" was being made to this Court's decision. He did not give any instructions in relation to the contempt application.

18 Mr. Ouellet's affidavit also provided information on the structure of agencies involved in child protection matters in Alberta. Mr. Ouellet was designated as Director of Child, Youth and Family Enhancement in July 2008 under the *CYFE Act*. Mr. Ouellet deposed that the Director's child protection and intervention duties and powers under the *CYFE Act* have been delegated to people in the Authorities. The Director's role, he asserted, is essentially one of leadership and policy; child intervention services are provided by the Authorities, not by the Director's office. He stated that numerous court proceedings identify the Director as a party by virtue of the office identified in the *CYFE Act*, but are handled by people in the Authorities. He confirmed that this was one such case.

19 At the July 14, 2009 hearing, Mr. Ouellet was cross-examined on his affidavit in open court. On the key issue of diligent compliance, he testified as follows [emphasis added]:

Q: When you say you've never been obliged to remind people that it is essential to comply with court orders, what do you mean by that, sir?

A: There has never been an occasion where I was concerned that the individuals in the field conducting their business needed to be reminded of the importance to comply with court orders. (AR 56/8-12)

.....

Q: Thank you. Now, on June 5 then, what was the concern that you were asked to deal with? How was it laid out for you?

A: Well, I wasn't asked to deal with it as much as it was a — a group conversation.

Q: Okay.

A: The issue presented was a clarification of a Court of Appeal decision had been provided on June 4th, the direction being that the child was to be returned to the original foster home, and it was simply discussion how — how we would then proceed with that. There was some concern whether all legal remedies had been exhausted and a commitment made by Alberta Justice to confirm that, but it was clear at the conclusion of that meeting that the child was to be returned to the care of the original foster parent.

Q: Okay. And when you say it was clear, who made it clear? What —

A: It was clear to all. It was not one individual. I did not in any way say, okay, I'm directing that this is how it shall be because it was understood by all, those delegated to make the decision, the representative from Family Law, that — that the — the position would be taken that the child would be returned.

Q: Okay.

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A: Provided all legal avenues had been exhausted.

Q: Okay. So there was still a condition at the end of that meeting upon returning?

A: My understanding was that that was going to be confirmed, but that there was no doubt that the existence and the — the clarity of the direction was clear.

Q: Okay

A: That the child was to be returned to the original foster parent.

Q: And did you at that meeting then, sir, direct the C.F.S.A. to return the child immediately?

A: No.

Q: Or within a reasonable time?

A: No, I did not.

Q: Or at any time period?

A: It was my understanding that the Edmonton region, in counsel with their lawyer, would be proceeding appropriately with that direction from the Court.

Q: So notwithstanding —

A: So I did not — I did not direct.

Q: Okay. So notwithstanding there's clearly a direction from the Court of Appeal the child must be returned, all in the meeting agreed the child must be returned, but the direct — the decision at the end of the day was after we look at all other possible legal remedies?

A: Confirming that all legal remedies had been exhausted. There — there was the suggestion that it was following that that the child would be returned.

Q: Okay. And did they give you any indication as to what — how long that would take, what things needed to be checked into?

A: No, they did not. They — there was an urgency clearly on everyone's mind and I left the meeting with that understanding. (AR 60/32-62/3)

.....

Q: And it says — Sorry. And your — your affidavit even says at paragraph 9: .SB 1 I was advised that an appropriate response was being made to the Court of Appeal's decision in this matter and believed that would happen.

A: Right.

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Q: What were you advised an appropriate response was?

A: I was advised that barring any — any legal remedy that — or legal circumstance that could change that result, that it was going — that the child was going to be returned to the foster home.

Q: Okay. What were the — you talk about balancing interests, you did in your original submissions to Justice Côté, and — and you talk in here about the appropriate response. What was the balancing that was suggested had to be done?

A: I was made aware — again, this was the first I had heard of the case. I was aware that the child was — was living some ten hours away. I was aware that there were some logistical issues and that those needed to be considered, as well as ensuring the child, who had been living out of the home for — for two and a half years. I was told, an appropriate transition to the new home would be — would be facilitated. Those were — those were the only bits of information I was given at that time at that meeting.

(AR 62/40-63/18)

20 In response to re-examination by his own counsel, Mr. Ouellet testified [Emphasis added]:

Q: Now, sir, you advised my friend that you did not think it necessary on June 5, 2009 to tell those persons present at the meeting that — expressly that they needed to comply with the terms of the Court of Appeal's direction.

A: That's correct.

Q: Why didn't you feel it necessary?

A: Because I was assured that they were — they were taking an appropriate response. I had no reason to believe that that response was not acceptable, nor did it require me to invoke any further statutory authority. I — I believed that they were managing the case appropriately.

Q: Did it affect your thinking, sir, that there was a lawyer from Alberta Justice present in that meeting assisting the Edmonton and Area C.F.S.A.?

A: Certainly. It solidified that they were not doing this as a whim. They had — they had appropriate advice.
(AR 66/25-39)

.....

Q: And I know you're aware as a result of being there and seeing the transcript that you had indicated to His Lordship at one point that there was a balancing of interests necessitated in making decisions; do you recall that?

A: Yes, I do.

Q: I wonder if you would speak briefly, sir, to that in the context of the obligation to comply with the court direction?

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A: It was simply that, that it — it was not possible to — to simply move the child within an instant to comply with the order. There were — there was — what was being balanced was as much logistics or planning to ensure that the Court order would be complied with and that — that the child would be safely moved to the new foster — back to the original foster home.

Q: How long have you been employed with the Province of Alberta in the area of Children's Services?

A: Thirty-two years.

Q: And would you tell the Court, please, your view as to the importance of complying with Court orders during that 32 years?

A: It is absolutely essential.

Q: Has that always been your view?

A: Always my view. (AR 68/28-69/9)

21 On re-cross examination, he stated [Emphasis added]:

Q: So part of the balancing wasn't — wasn't just how and when do we do this, but also the interests of these people. And were you balancing the interests of the band, too?

A: No, I was not. And I was not balancing it. What I was saying in that — in that comment was from the information I had been given, I believed that they were attempting to not only comply with the court order in an expeditious way, but in so doing, balancing those interests. (AR 70/34-39)

22 The motion to set aside the finding of contempt was denied: *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)*, 2009 ABCA 258, 9 Alta. L.R. (5th) 225, 460 A.R. 188 (Alta. C.A.). The chambers judge declined to admit the new evidence, holding at paras. 42, 107 that the new evidence "could only make it worse". He concluded (at para. 36) that the appellant and his staff were "trying to see if there was something which they could legally do to avoid returning the child, and in some fuzzy way were balancing the disadvantages of obeying the judgment". The chambers judge also noted that the appellant (at paras. 37-8) had failed to specifically direct his subordinates to return the child, failed to set deadlines, and failed to follow up on compliance with the order.

23 Mr. Ouellet appealed the finding of civil contempt to this Court, arguing that there should be no finding of contempt against him personally. He was separately represented on the appeal. Counsel for Alberta Justice appeared but made no submission other than to answer questions of the Court.

III. Issues on Appeal

24 There are four main issues on the appeal. First and foremost, the main focus of Mr. Ouellet's submission before us, as before the chambers judge, was that he ought not to have been found personally liable in contempt for the failure of the Edmonton and Area Child and Family Services Authority to comply promptly with this Court's order. Second, he submitted that he did not have an adequate opportunity to respond to the charges against him, and that the evidence he tendered in defence was not admitted. Third, he submitted that the evidence does not support the finding of contempt. Finally, he challenged the chambers judge's conclusions on sentencing.

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IV. Standard of review

25 Rule 702(1) reads:

The court may, of its own motion or upon application, declare that any person is in civil contempt.

The findings of fact and inferences of fact underlying a finding of contempt are reviewed for palpable and overriding error. What are the constituent elements of contempt or an "adequate excuse" are questions of law which, like all questions of law, are reviewed for correctness. A finding in a particular case of contempt or the presence of an "adequate excuse" involves the application of the legal standard to the facts, and so is a mixed question of fact and law reviewed for palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.); *Broda v. Broda*, 2004 ABCA 73, 346 A.R. 376 (Alta. C.A.) at para. 8; *Builders Energy Services Ltd. v. Paddock*, 2009 ABCA 153, 457 A.R. 266 (Alta. C.A.) at para. 8.

V. Analysis

1. The Director's liability for contempt of court

26 The main issue on this appeal comes down to whether, and in what circumstances, the government official in charge of a department can be held liable for the department's failure to comply with a court order. There is not a great deal of authority on the point, doubtless because it is rare for the executive arm of government to fail to comply with orders of the court. However, some principles do emerge.

27 First, liability for civil contempt cannot be vicarious because of the *quasi*-criminal nature of the charge: *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.). In *Bhatnager*, the Supreme Court of Canada held that the party alleging contempt must establish that the person being charged had actual knowledge of the existence of the order in question. Service of an order on the Minister's solicitor was not sufficient to fix the Minister with such knowledge. Accordingly, the Minister could not be held liable for contempt.

28 However, this does not mean that public officers can never be held liable for contempt. The Supreme Court made no such holding in *Bhatnager*. The Court cautioned that merely because vicarious liability does not apply in civil contempt proceedings, it does not follow that Ministers can hide behind their lawyers so as to flout court orders. The Court commented that strategies designed to keep the Minister ignorant of an order might attract liability on the basis of wilful blindness. By analogy, this could apply to members of a department who are instructed to keep the Minister uninformed. Moreover, the Court in *Bhatnager* impliedly held that a Minister of the Crown can be guilty of contempt provided all the constituent elements of contempt are proved beyond a reasonable doubt against him or her, including the requirement that the person in question have knowledge of the order that has been breached.

29 Similarly, in *M. v. Home Office*, [1993] UKHL 5, (1993), [1994] 1 A.C. 377 (U.K. H.L.) at p. 425, the House of Lords held that it can be appropriate to make a finding of contempt against a Minister personally provided that the contempt relates to his or her own default. In that case, the Home Secretary, Mr. Baker, was held personally in contempt for failing to comply with an injunction issued against him in his official capacity. Lord Woolf stated at p. 427:

While he was Home Secretary the order was one binding upon him personally and one for the compliance with which he as the head of the department was personally responsible.

Professors Hogg and Monahan agree. They cite the *Home Office* case at p. 59 of their text *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) for the proposition that contempt is available for the enforcement of many public duties, "[s]o long as the duty is imposed on a particular Minister or official". In such cases, the Crown's immunity from contempt will not be an impediment to enforcement of a court order.

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30 In this case, the chambers judge found that all the pre-conditions for contempt were proved against Mr. Ouellet and that the evidence supported those findings. There was an existing court order; Mr. Ouellet had notice of the order as of at least June 5, 2009; for 18 days there was non-compliance with the order; and Mr. Ouellet took no steps to ensure compliance within a reasonable time. The chambers judge also concluded that even though other officials or departmental employees might have been more culpable in failing to comply with the order, their possible culpability did not relieve Mr. Ouellet of his responsibility to ensure compliance. Any liability imposed in these circumstances on Mr. Ouellet for the failure to comply would not be vicarious; it would be personal and direct.

31 Mr. Ouellet nevertheless argues that the statutory regime creating the office of the Director and the Authorities, and the internal reporting structures of both agencies, somehow relieve him of that responsibility. He argues that although the Director is named as a party in child protection matters by virtue of the *CYFE Act*, the office has no direct responsibility for the operational aspects of child protection files. That responsibility has been delegated to the relevant Authorities. According to Mr. Ouellet, this means that, although the Director is a named party, he is not involved in the court proceedings and is therefore relieved of any responsibility to comply with specific court orders. In other words, Mr. Ouellet argues that although the Director is statutorily designated to assume responsibility for child protection, he is not obliged to ensure compliance with court orders in child protection matters.

32 We agree with the chambers judge that this argument is without merit. An official cannot relieve himself of ultimate responsibility to comply with court orders by delegating that responsibility to others. When an order specifically directs the public officer to do something, that person is responsible regardless of any delegation.

33 In this context, the Director retains the authority granted him in child protection matters, even though the day-to-day operational management of files has been delegated to others in the Authorities. As the chambers judge correctly noted, the Supreme Court of Canada has held that "delegation, as that word is generally used, does not imply a parting with powers by the person who grants the delegation": *Constitutional Validity of Bill No. 136 (Nova Scotia), Re (1950)*, [1951] S.C.R. 31 (S.C.C.) at p. 46, quoting *Huth v. Clarke* (1890), L.R. 25 Q.B.D. 391 (Eng. Q.B.) at p. 395. The delegator retains his or her full original powers. The Director continues to be named as a party to court proceedings and, in our view, the person occupying that office retains responsibility for compliance with orders made in those proceedings, assuming he or she has the knowledge of the order required by *Bhatnager*.

34 Of course, in carrying out that responsibility, the Director, like any other party, can rely on the defence of due diligence contained in the *Alberta Rules of Court*. Rule 703(1)(a) provides that it is civil contempt to fail to obey an order of the court "without adequate excuse". The Rule requires that the person responsible for compliance exercise due diligence by taking reasonable steps to comply with the order: *Free Estate v. Jones*, 2004 ABQB 486, 364 A.R. 384 (Alta. Q.B.) at para. 28; see also *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.) and *Minister of National Revenue v. Dropsy*, 2009 FC 820, 2009 D.T.C. 6136 (Eng.) (F.C.).

35 Delegation may be a reasonable step in one's exercise of due diligence, but it does not relieve the delegator of all responsibility. As was noted in *Michel v. Lafrentz*, 1998 ABCA 231, 219 A.R. 192 (Alta. C.A.) at para. 24, "[a]n order of a court to do an act requires reasonable care in doing the act personally, or in delegating the matter to suitable responsible persons, and then checking to see that it has been carried out in a prompt and proper fashion". If the subordinates who are instructed to implement the order do so, there will be no contempt. If the subordinates fail to do so, the delegator (who is ultimately responsible) must show that his or her selection and supervision of the subordinates reflected "due diligence", notwithstanding that failure.

36 We also agree with the chambers judge that a blanket delegation of responsibility for the operational aspects of child protection does not relieve the Director of his duty to ensure compliance with court orders directed to the Director, although it might impose a parallel responsibility on the delegatee. Delegation, without reasonable care and due diligence in following up to ensure compliance, would not provide the Director with an "adequate excuse" for failing

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to follow a court order.

37 Mr. Ouellet also takes issue with the imposition of liability on him personally, as opposed to the department he heads. He suggests that to the extent the Director is liable for contempt, it is the "office" of the Director, not the person occupying the office, that should be held liable. He argues that the House of Lords in the *Home Office* case recognized a distinction between the "office" and the person of the official, and concluded that it is possible, and sometimes more appropriate, to hold the office or department in contempt.

38 As already discussed, it is clear that in the appropriate circumstances, a government official can be held personally liable for the failure of his or her department to comply with a court order. Whether the department itself may also be held liable under Canadian law, as was suggested by the House of Lords in the *Home Office* case, is not as clear. The chambers judge in this case did not think so. When faced with the suggestion that there is some distinction between "Mr. Ouellet in his personal capacity" and his "official capacity", he said, at para. 21, that he knew of no authority for such a distinction, although he was not referred to *Home Office*. Professors Hogg and Monahan seem to share the chambers judge's view: see their comments at p. 37 of *Liability of the Crown*.

39 There is little Canadian law on the point. The Supreme Court of Canada has said that government departments are not legal entities and therefore cannot be sued: *Canada (Conseil des ports nationaux) v. Langelier* (1968), [1969] S.C.R. 60, 2 D.L.R. (3d) 8 (S.C.C.) at para. 27. In *Decock v. Alberta*, 2000 ABCA 122, 255 A.R. 234 (Alta. C.A.), Russell J.A. considered whether the Premier of Alberta and the Minister of Health are suable entities. She concluded that, in order to have status to be sued in Alberta, an entity must be recognized by either statute or under the common law. For example, labour unions can enter into contracts and be parties to litigation, and therefore are legal entities within the context in which they operate: *Fullowka v. Royal Oak Ventures Inc.*, [2010] 1 S.C.R. 132, 2010 SCC 5 (S.C.C.) at paras. 118, 121; *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.) at p. 928. In *Decock*, Russell J.A. concluded that the Premier of Alberta is a creature of convention and not law. In contrast, the Minister of Health is a statutorily recognized person by virtue of section 2(1) of the *Government Organization Act*, S.A. 1994, c. G-8.5. However, this did not lead Russell J.A. to the conclusion that the office of the Minister of Health is a suable entity. Rather, citing R. 87(b) of the *Rules*, she noted that the only reason for naming an official by his or her office would be to establish that office as representing the Crown and concluded, therefore, that the public official should not be named, either by title or office, as a defendant.

40 The Director is a statutorily recognized person by virtue of the *CYFE Act*. Section 1(j) of that *Act* defines the "director" as "a person designated by the Minister as a director for the purposes of this Act . . .". There are several statutory provisions that permit the Director to enter into various forms of agreement for custody, guardianship and access (see, eg., sections 8, 9, 11, 14) and the *CYFE Act* provides for various court applications to be made in the name of the Director (see, eg., sections 16-19).

41 However, it is unnecessary to opine on whether the office of the Director can or should be held liable. This is a more straightforward case. Nothing relieves Mr. Ouellet himself of responsibility. The facts are clear that Mr. Ouellet had a role to play in the response to the court order, having been advised by other members of the department on June 5 about the existence of the order. The law is clear that when an official in charge of a government department has the requisite knowledge, he or she can be found liable for contempt for the failure to comply with a court order.

42 There is no basis to conclude that the chambers judge misapprehended the law or proceeded on erroneous principles or on a misapprehension of the facts surrounding the role of the Director. His finding that Mr. Ouellet was personally responsible for ensuring compliance with the order discloses no error.

2. Opportunity to respond

43 Mr. Ouellet also submits he was not given adequate opportunity to respond to the contempt application, and

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that the evidence he relied on for his defence was not admitted.

44 On the return date of the motion, counsel from Alberta Justice appeared, but Mr. Ouellet did not. The Court asked if the Director was present in court, and the following exchange occurred:

Counsel: Well, Sir, I had not anticipated that he needed to be here in light of the fact that Mr. Gillis, who is the person who is the manager of the office, was present. Certainly, you know, that was — he is the person who's involved in this matter, so that was the person that we had attend today.

The Court: All right. Now, you understand that this is a motion to find the Director in contempt?

Counsel: Yes, I do, Sir.

The Court: You didn't think that the Director should be here?

Counsel: Well, Sir, and to be honest, no, I didn't, because we think of the Director as not being an individual but being the agency. That is the way we usually refer to it. There are a number of representatives of the Director who were — who are involved in various things, and so I did not consider that, and I apologize if — you know, certainly — I don't know what his schedule is today, but given that — given that the people who were involved in the day-to-day case management are here, that's who we felt was appropriate to have attend. (AR 8/17-9/12)

45 As can be seen from this exchange, counsel was proceeding on the mistaken assumption that Mr. Ouellet could not be personally responsible for any duties imposed on the "office of Director", the theory rejected earlier in these reasons. In addition to this erroneous assumption, counsel may have assumed that the contempt motion would not proceed because the child had been returned. It appears that Mr. Ouellet was also under the mistaken view that his presence at court was not required. However, when told by the Court to attend, he did so immediately.

46 As the chambers judge correctly observed, mistake of law is no defence to a charge of contempt. However, a mistake of law might well explain why a litigant did not appear in court, or appeared unprepared, or without separate representation. That there was a prospect of personal jeopardy appeared to have eluded both counsel for Alberta Justice and Mr. Ouellet. Though due to his own mistaken assumption, Mr. Ouellet appeared without evidently having reflected on the issues that might be raised or on the evidence that might be led in response to those issues. He was asked by the chambers judge if he wished to say anything further. He did and those extemporaneous statements were later relied on in finding him in contempt. He also evidently did not understand the importance of an apology in these circumstances.

47 After he was found in contempt, Mr. Ouellet retained counsel to represent him personally. He swore an affidavit to explain his conduct. That affidavit suggested that taking 18 days to comply was reasonable in the circumstances of this case. The affidavit also addressed the role of the Director in the administrative structure of child welfare matters in Alberta.

48 The chambers judge declined to admit the fresh evidence. He concluded, given the arguments advanced before him, that the fresh evidence would only make things worse. That may well have been so given the way in which the argument was framed before the chambers judge. That argument was directed to whether or not the Director was involved at all, whether the Director as an office could be held liable for contempt, and whether the Director could be held personally liable for the contemptuous acts of his delegates.

49 However, given one of the arguments now before us, that conclusion is less obvious. Specifically, the issue of "whether to comply" with a court order versus "how to comply", which is discussed later in these reasons, was not

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pursued before the chambers judge. Since the fresh evidence arguably goes to that new argument, we are of the view that the evidence ought to have been admitted and we do so.

3. The Finding of Contempt

50 The third issue is whether the evidence on this record is sufficiently clear that the finding of contempt should be maintained. This raises the issue as to the effect of the fresh evidence on the finding of contempt and specifically whether the finding can be maintained in light of it.

51 The chambers judge was prepared to accept that there were two possible interpretations of this Court's January 30 judgment. He was also aware of the Authority's resistance to returning the child to the respondent's care, despite having lost in this Court. He stated at F43 line 3:

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

This was in reference, in part, to the adoption proceedings launched in the name of the Director on behalf of the prospective adoptive parents in the face of an appeal by the respondent to this Court. The adoption would have had the effect of rendering the order of this Court moot. In addition, it allowed the prospective adoptive parents to become guardians of the child jointly with the Director, making proceedings more complicated for the respondent.

52 But as noted, liability for contempt is personal, not vicarious. There can be no contempt on the part of Mr. Ouellet prior to June 5, 2009. The record is clear that before that date, he had no knowledge of the existence of the order of this Court that admittedly had not yet been implemented. Any finding of contempt must be based on Mr. Ouellet's conduct between June 5, 2009 (when he first found out about the order), and June 22, 2009 when the child was returned.

53 There is no doubt that the duty to comply with a court order is imperative. It is not optional. As the chambers judge correctly intimated at para. 37, there is no room for litigants to weigh competing interests or considerations in deciding *whether* to comply with a court order. Compliance is compulsory. Yet there may be occasions when it is appropriate to weigh competing considerations when deciding *how* to comply with a court order. This is particularly so with mandatory orders, as opposed to prohibitory orders which merely forbid some conduct. In the context of this case, sensitivity to the needs of the child would not necessarily be inconsistent with reasonable diligence in complying with this Court's order. Of course, if a court gives precise directions or time lines as to how an order is to be implemented, they must be followed. In the absence of specific time lines, the order must be complied with by reasonable diligence having regard to the importance of complying with court orders: *Michel v. Lafrentz*, 1998 ABCA 231, 219 A.R. 192 (Alta. C.A.) at paras. 21, 24.

54 On which side of this line was Mr. Ouellet? Was he considering *whether* to comply or *how* to comply? A finding of this sort is a finding of fact and credibility uniquely within the purview of the chambers judge who heard Mr. Ouellet testify *viva voce*. Because this argument was never put squarely before the chambers judge, he did not make a finding on this point. And yet, much of the fresh evidence tendered was arguably relevant to this point. Depending on how the issue is framed, the fresh evidence takes on a different flavour. The failure to identify the issue led to the refusal to admit the fresh evidence. That fresh evidence, if accepted, could affect the finding on contempt.

55 Some of the answers and statements in the fresh evidence are not necessarily inconsistent with an intention to comply with the court order. Others may support the contempt finding. The most that can be said is that there is at least the possibility of a reasonable doubt, especially on the question of whether the reference to "balancing of interests"

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was directed at *how* to comply, rather than *whether* to comply. The fresh evidence, if accepted, may have at the very least cast the actions or apparent inaction in a different light.

56 In the ordinary course, the failure to admit fresh evidence would require the Court to return the matter for a new hearing, as the standard of review does not permit this panel to retry the case based on the record before us. For the reasons more fully explained later, we decline to do so.

4. Sentence

57 Finally, Mr. Ouellet argues that the chambers judge misapplied the principles of sentencing. Given that he has already performed all of the requirements of the sentence, and given our ultimate conclusion that a new hearing on the contempt finding is not warranted in the circumstances of this case, the sentence appeal is largely moot. However, since it was argued in full, some brief comment is appropriate.

58 The chambers judge considered that an order for community service would be appropriate in this case, but expressed some doubt as to his jurisdiction to order it under Rule 704. Accordingly, he imposed a sentence of eight days' imprisonment to commence 14 days after the date of the reasons. If Mr. Ouellet signed an undertaking and statement to the Court in certain wording, then the requirement to serve the sentence would be postponed for one year. The chambers judge further ordered that after 11 months from the date of the reasons, Mr. Ouellet could move to have the sentence cancelled on proof of good behaviour, payment of costs, and performance of the requisite community service. The sentence was subsequently cancelled as anticipated: [*Alberta (Director of Child, Youth & Family Enhancement) v. M. (B.)*] 2010 ABCA 233 (Alta. C.A.). While the chambers judge directed that costs of the contempt application were to be paid by Mr. Ouellet and that enforcement could be levied against his personal assets, he also suggested that the Court had no objection to the government's paying or reimbursing those costs.

59 Mr. Ouellet argues that the chambers judge failed to consider the sentencing principle that the response to contempt should be measured, firm and just, and that unduly severe sentences will themselves tend to depreciate both the courts and the rule of law. He argues that the chambers judge was incorrect in concluding that a finding of contempt itself, without a penalty associated, was "no real penalty at all". He relies on *M. v. Home Office* for this latter proposition.

60 McLachlin J. (as she then was) noted in *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.) at para. 50 that: "Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process." The objectives of sanctions for civil contempt are twofold. The primary purpose is to achieve compliance with court orders and a second purpose is to punish the contemnor: *Builders Energy Services Ltd. v. Paddock*, 2009 ABCA 153, 457 A.R. 266 (Alta. C.A.) at para.13; *Pawlowski v. Calgary (City)*, 2008 ABQB 267, 445 A.R. 18 (Alta. Q.B.) at para. 22; *Apotex Fermentation Inc. v. Novopharm Ltd.* (1998), 162 D.L.R. (4th) 111, 129 Man. R. (2d) 161 (Man. C.A.) at paras. 282-83.

61 Rule 704 sets out the sanctions available to achieve those objectives, including imprisonment for a term of not more than two years. However, nothing in the Rule or in the authorities mandates a term of imprisonment in order to ensure the imposition of a "real" penalty. When the contemnor is a government actor, it would be rare that an order for imprisonment would be required for the court to achieve the ultimate objective of upholding its dignity and process. In the *Home Office* case, Lord Woolf noted that in cases involving a government department, the ability to punish for contempt is often not necessary, as the Crown's relationship with the courts does not depend on coercion. He said, at p. 426, that in such cases the object of the exercise "is not so much to punish an individual as to vindicate the rule of law by a finding of contempt".

62 In our view, the chambers judge had jurisdiction to order community service as a penalty for the contempt under R. 704, and there was no need to link it to a term of imprisonment. Nevertheless, were the contempt finding to

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stand, the effective sentence imposed was not unfit, and did not reflect any error of principle.

VI. Disposition

63 For the reasons explained, the finding of contempt must be set aside. On most occasions, this would call for a fresh hearing on the contempt allegations. We note, however, the following factors:

- The most important point of these proceedings was to emphatically confirm that a public official who is directed to do something in a court order is personally responsible for ensuring compliance with reasonable diligence;
- The child has been returned; any contempt has been purged; and
- Mr. Ouellet has actually served the sentence that was imposed on him for contempt, and any further proceedings would in many respects be moot.

Given that unusual constellation of factors, it is neither appropriate nor necessary to return this matter for a fresh hearing. The appeal is allowed, the finding of contempt is set aside, and the application for a finding of contempt is permanently stayed.

64 We would not disturb the chambers judge's order granting increased costs of the application to the respondent, although we would reiterate that it might be appropriate for the government to reimburse Mr. Ouellet for those costs. As for the costs of the appeal, if the parties cannot agree on costs, all counsel are requested to provide the Court with written submissions on this issue by August 31, 2010, such submissions to be no longer than 5 pages.

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