NOVA SCOTIA COURT OF APPEAL
Citation: *B.A.J. v. J.S.V.*, 2018 NSCA 49

Date: 20180612
Docket: CA 468531
Registry: Halifax

Between:

B.A.J.

Appellant

v.

J.S.V.

Respondent

Restriction on Publication: pursuant to s. 94(1) *Children and Family Services Act,* S.N.S. 1990, c. 5

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	May 31, 2018, in Halifax, Nova Scotia
Subject:	**Family Law. *Parenting and Support Act,*** R.S.N.S. 1989, c. 160**. Custody.**
Summary:	By Consent Order dated May 28, 2015, the appellant, B.A.J., was granted sole care and custody of the parties' child. The order further provided that B.A.J. was authorized to travel with the child at any time, in or outside of Canada, without the need for consent from any person, including J.S.V. The order did not provide for access between the child and J.S.V. J.S.V. filed a Notice of Variation application on March 11, 2016, seeking access to the child. On October 12, 2016, he filed a new application seeking custody. Ten appearances were held before the Supreme Court, Family Division. The main issue discussed in the appearances was the ability to serve B.A.J. As it turns out, B.A.J. was being protected by a police agency because it had concluded she

was a potential victim of domestic violence at the hands of J.S.V.

It was never established that B.A.J. was properly served with the court process.

Approximately four months following the last court appearance, without any indication that he was going to do so, the judge issued a decision and order which required the child to be returned to Nova Scotia to be placed in the primary care of J.S.V. He also issued a warrant for B.A.J.'s arrest. B.A.J. appealed.

Issues:

(1) Was B.A.J. properly served with the court process?
(2) Did the judge err in removing the child from the custody of B.A.J.?
(3) Did the judge err in issuing an arrest warrant?

Result:

The appeal was allowed and the arrest warrant quashed. B.A.J. was never properly served with the court process. The judge made a decision without hearing evidence from any party with respect to the best interests of the child. His failure to ensure that B.A.J. was aware of the proceedings, making a decision without hearing evidence and changing the custody agreement, resulted in a substantial wrong or miscarriage of justice.

Furthermore, the judge had no evidentiary basis upon which he could determine the best interests of the child.

Finally, there was no basis in law or in fact which would justify an arrest warrant in these circumstances. There was no evidence B.A.J. breached any court order. There were no contempt proceedings brought against her. The appellant did not seek costs and none were awarded.

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Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	May 31, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, arrest warrant quashed without costs per reasons for judgment of Farrar, J.A.; Bryson and Bourgeois, JJ.A. concurring.
Counsel:	Linda M. Tippett-Leary, for the appellant David Dalrymple, for the respondent

[Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

Overview

[1] By Consent Order dated May 28, 2015, the appellant, B.A.J. was granted sole care and custody of her and the respondent, J.S.V.'s, child. The order further provided that B.A.J. was authorized to travel with the child at any time, in or outside of Canada, without the need for consent of any other person, including the respondent. The Order did not provide for access between the child and J.S.V.

[2] Around the end of December 2015, following a domestic dispute, B.A.J. left the apartment the parties previously shared. It later became known that she had left Nova Scotia with the child. Since then J.S.V. has not seen their child.

[3] J.S.V. filed a Notice of Variation application on March 11, 2016, seeking access to the child. On October 12, 2016, he filed a new application seeking custody.

[4] Ten appearances were held before the Supreme Court, Family Division. Nine of those appearances were before Associate Chief Justice Lawrence I. O'Neil. One was before Justice Moira Legere Sers. The last appearance occurred on April 11, 2017. On August 17, 2017, ACJ O'Neil rendered a decision (2017 NSSC 222) and order which required the child to be returned to Nova Scotia to be placed in the primary care of J.S.V. He also issued a warrant for B.A.J.'s arrest.

[5] B.A.J. appeals from the order of ACJ O'Neil. The appeal was heard on May 31, 2018.

[6] At the conclusion of the appeal hearing we set aside the Order of August 17, 2017, restored the Consent Order of May 28, 2015, and quashed the Arrest Warrant with reasons to follow. These are those reasons.

[7] As the appellant did not seek costs on the appeal, none were awarded.

Background

[8] B.A.J. and J.S.V. were in a common law relationship. They are the parents of one child who, at the time of J.S.V.'s Application for Access, was three years old. He is currently five years old.

[9] The parties were subject to a proceeding under the *Children and Family Services Act*, S.N.S. 1990, c. 5 from February 2014 to April 7, 2015. On May 28, 2015, Justice Beryl MacDonald issued an order terminating the *CFSA* proceedings.

[10] Also on May 28, 2015, Justice MacDonald issued the Consent Order granting custody of the couple's child to B.A.J., on the terms I referred to earlier.

[11] In ACJ O'Neil's decision, he refers extensively to the running notes from the *CFSA* file, including a psychological assessment on B.A.J. prepared on November 17, 2014, which factored predominately in his decision. I will come back to this assessment later.

[12] On December 29, 2015, B.A.J. made an *ex parte* application before a justice of the peace for an Emergency Protection Order (EPO) under the *Domestic Violence Intervention Act*, S.N.S. 2001, c. 29. In the application she gave evidence (under oath), about: being chased by the respondent with his car being verbally abused by the respondent calling her names such as "bitch"; J.S.V. threatening to harm her if she left him; being locked out of the apartment they had shared, not allowing her out of the washroom in the apartment; and a very nasty argument two or three days before Christmas where J.S.V. got very angry.

[13] The justice of the peace concluded that B.A.J. had a reasonable fear of bodily injury at the hands of J.S.V. and issued the EPO. The EPO required that a police officer accompany B.A.J. to the apartment to allow her to remove her personal belongings between 6 and 8 p.m. on December 29, 2015, or between 10 a.m. and 4 p.m. on December 30, 2015.

[14] The EPO was served on J.S.V. on December 29, 2015.

[15] The order further provided as follows:

> You have the right to apply for a hearing to the Supreme Court of Nova Scotia to either set aside or change this ORDER.

[16] J.S.V. did not seek to have the order set aside or varied.

[17] Under the *Domestic Violence Intervention Act*, a justice of the peace who makes an EPO is required to send, within two working days, a copy of the order and the supporting evidence to a justice of the Supreme Court of Nova Scotia.

[18] A justice of the Supreme Court then reviews the evidence and determines whether the order was justified under the circumstances. Section 11 of the *Act* provides:

> 11 (1) As soon as practicable after making an emergency protection order and in any event within two working days, the justice shall forward a copy of the order and all supporting documentation, including a transcript or tape recording of the proceedings, to the court in the prescribed manner.
>
> (2) Within such period of time, as the regulations prescribe, of the receipt of the emergency protection order and all supporting documentation by the court, a judge shall review the order and, where the judge is satisfied that there was sufficient evidence before the justice to support the making of the order, the judge shall
>
> (a) confirm the order; or
>
> (b) vary the order
>
> and the order as confirmed or varied shall be deemed to be an order of the court.
>
> [Emphasis added]

[19] On December 31, 2015, Justice Jamie Campbell confirmed the EPO, concluding there was sufficient evidence to support the making of the order.

[20] On March 11, 2016, J.S.V. filed a Variation Application seeking access to the parties' child. In support of his application he swore an affidavit saying the following:

> 8. I am requesting that the court make an order that allows me to have specified access to my son.

[21] At this point, J.S.V. was not seeking custody of the child.

[22] This set off the series of appearances before the Family Division. I will address the particulars of those appearances later when addressing the grounds of appeal.

[23] On September 1, 2016, J.S.V. swore a second affidavit where he says:

> 34. I am seeking an order for custody and visitation as follows:
>
> **Custody**: physical custody to the respondent [B.A.J.], with joint legal custody for us to make major decisions about our son's schooling, medical and dental care.

> **Visitation:** 2-3 days a week, with overnights every other weekend from 5pm Friday to 5 pm Sunday.
>
> **Other terms:** for both parents to have access to their sons medical and dental records, and for the child not to be removed from the Halifax Regional Municipality without the permission of both parents.

[24] As will become apparent, it is significant that, as of September 1, 2016 J.S.V.'s application was only for access to the child with physical custody remaining with B.A.J.

[25] On September 1, 2016, a subpoena was issued out of the Family Division requiring B.A.J. to attend court on September 28, 2016, at 9:30 a.m. The subpoena is addressed to Constable H.S. Mandru of the Halifax Regional Police.

[26] J.S.V.'s evidence was that Constable Mandru had indicated to him that if he served the subpoena on Constable Mandru he would ensure it was received by B.A.J.

[27] In an affidavit sworn by J.S.V. on October 12, 2016, he said he had met with Constable Mandru on September 2, 2016, in a parking lot in Cole Harbour and provided him with a copy of the subpoena for B.A.J. and the affidavit which he had prepared. Although he does not say this, I am assuming the affidavit that he is referring to is the one dated September 1, 2016, referred to above, where he was only seeking access. There is no indication in J.S.V.'s affidavit that Constable Mandru was provided with a copy of the Variation Application filed in March.

[28] Whether the subpoena and information provided to Constable Mandru found its way to B.A.J. was subject to much discussion before the judge.

[29] At some point, J.S.V. was informed that B.A.J. was in the Witness Protection Program. That was a bit of a misnomer. As the matter progressed it became apparent that, although it was referred to as the Witness Protection Program, B.A.J. was actually being protected by the Quebec Provincial Police because it concluded she was a potential victim of domestic violence at the hands of J.S.V.

[30] Constable Mandru provided the subpoena to a Detective Constable with the Halifax Regional Police (his name has been redacted for confidentiality) who was on secondment with the RCMP. The Detective Constable was the liaison with the QPP.

[31] On March 15, 2017, the Detective Constable filed a Confidential Affidavit which, in addition to redacting his name, redacted the names of his contacts. On the issue of whether B.A.J. had been provided with the documents, he says:

> 14. In early September of 2016, I received a subpoena from Cst. Mandru. My recollection is that this subpoena was issued by the Nova Scotia Supreme Court Family Division and was issued to Ms. [J.] at the request of Mr. [V.]. As I recall, the subpoena to appear was in relation to a family court hearing to be held in Halifax on September 28, 2016.
>
> 15. Upon receipt of this subpoena, I contacted ___ who provided me with an address and instructed me to mail the subpoena to his office at the ___ and told me that they would inform the client and ask them what her wishes were. I note I did not know, as I did not ask, whether the ___ considered the address given to me to be public as it is possible, given the nature of their work, that this was a covert address.
>
> 16. In any event, on September 15, 2016, I spoke to ___ who stated that he had received the subpoena and that Ms. [J.] had been made aware of it.

[32] In this affidavit reference is only made to the subpoena, there is no reference to the Detective Constable having received J.S.V.'s affidavit from Constable Mandru. Further, all he testified to is that B.A.J. had been made aware of it, whatever "aware" may mean. Presumably, "it" means the subpoena. There was never an affidavit of service filed.

[33] Returning to the chronology, J.S.V. filed a new Notice of Application on October 12, 2016. In that Application he seeks full custody of the child – a remedy which he had not previously sought. There was no evidence, and no discussion during any of the court appearances, that B.A.J. could have been aware, even if she had received the documentation provided to Constable Mandru that J.S.V. was, as of October 12, 2016, seeking custody of the child.

[34] Of the ten appearances before the Family Division, on only one, February 21, 2017, was J.S.V. sworn in to give evidence. On that occasion, the judge simply asked him to confirm what he had said earlier in that appearance.

[35] At the final court appearance on April 11, the matter was adjourned without any indication that the judge was going to render a decision on J.S.V.'s application. However, on August 17, 2017, the judge did exactly that, filing a written decision and order providing the relief which I have previously outlined.

[36] B.A.J. appeals.

Issues

[37] The Notice of Appeal raises 19 grounds. It is not necessary to address every ground of appeal. I will only address those which I consider necessary to dispose of the appeal or which I think need to be addressed in light of some of the comments of the judge.

Standard of Review

[38] The often-cited case of *Van de Perre v. Edwards*, 2001 SCC 60 sets out the standard of review in custody decisions:

> 15 As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.
>
> [Emphasis added]

[39] The application judge's decision will be reviewed on this standard.

Analysis

[40] The following grounds of appeal have a common thread. They raise issues about whether B.A.J. was aware of the nature of the proceedings. I will address them jointly:

#4 The judge made a reviewable error that the Appellant was aware of any application to remove the child from her care and patently ignored it, failing to subject herself to the jurisdiction of the court.

#12 The judge made a reviewable error by accepting hearsay evidence from Constable Mandru stating his "belief" that the Appellant was served and aware of all that was going on in court.

#13 The judge made a reviewable error by finding that the Appellant was aware of all that was going on before the Supreme Court Family Division and simply chose not to participate or that she was in any way aware of the dire consequence and remedies available to the court should she not do so.

#14 The judge made a reviewable error that the Appellant had been made properly aware of all that was going on in court in light of the evidence of [redacted name] indicating that he had no knowledge as to whether or not the Appellant knew of the proceeding or where she lived.

#15 The judge made a reviewable error by accepting hearsay evidence from [redacted name] as to the actions of the Surete de Quebec in confirming the Appellant's receipt of documents.

#16 The judge made a reviewable error by concluding that the Appellant was aware of the proceedings, based on hearsay or unproven evidence, and that she had "repeatedly chosen to not appear, is ignoring this process, and continues to conceal her whereabouts and that of the child".

[41] There was no evidentiary basis to conclude that B.A.J. was aware that an order could be issued removing the custody of the child from her and placing him in the care of J.S.V. There was never even a hearing on the issue of custody where evidence was led relating to the factors to be considered when determining custody issues.

[42] I will review the court appearances in some detail to illustrate why I come to this conclusion.

[43] J.S.V. made an appearance before the judge on July 27, 2016. At that time, J.S.V. informed the judge that he had been in touch with Constable Mandru in an effort to find B.A.J. Constable Mandru advised J.S.V. that B.A.J. was in the Witness Protection Program and that if J.S.V. provided him with a subpoena or summons for her, he would make sure she got it.

[44] As a result of that appearance, J.S.V. prepared a handwritten subpoena which was issued September 1, 2016 returnable for September 28, 2016, at 9:30 a.m.

[45] On September 28, 2016, there was another appearance, this time before Justice Moira Legere Sers.

[46] Krista Forbes, counsel for Nova Scotia Legal Aid, was in attendance at that appearance. Ms. Forbes was asked why she was in attendance. She indicated she was there for observation reasons only on behalf of Nova Scotia Legal Aid. At that time, Justice Legere Sers expressed concerns about proof of service on B.A.J. She indicated to J.S.V. that if the court was not satisfied or if he could not serve B.A.J. then it would be necessary to make an application to the court for substituted service. Justice Legere Sers made it clear that the next court appearance was just to establish whether B.A.J. had been served. It was not for the hearing itself. She said:

> THE COURT: Yes, because this is just for service. And I want you to be aware of if you come back, this is just to establish service. It's not the hearing itself.

[47] The next appearance takes place before ACJ O'Neil on October 21, 2016.

[48] At that appearance there was a discussion between the judge and J.S.V. about subpoenaing Constable Mandru to appear before the court. A date of November 17, 2016, was set for the next court appearance.

[49] Ms. Forbes was present at the November 17, 2016 court appearance and indicated to the court that she was observing the file on behalf of Nova Scotia Legal Aid. She made it clear that she had not been retained by B.A.J.

[50] Constable Mandru was not in attendance and there was discussion, initiated by the judge, about subpoenaing the Chief of the Halifax Regional Police.

[51] On December 13, 2016, J.S.V. was back in court. Krista Forbes, again, was present maintaining a watching brief on behalf of Nova Scotia Legal Aid. On this occasion, Constable Mandru was in attendance.

[52] Constable Mandru was placed under oath and examined by the court. During his examination he indicated that he had been provided with documents by J.S.V. and that he had given those documents to the RCMP Liaison Officer who,

he understood, would forward them to the agency that had B.A.J. under witness protection.

[53] In his testimony he said:

> To the best of my knowledge, those documents were served on her.

[54] He indicated he had no direct access to B.A.J. Nor did he identify the basis of his knowledge or belief.

[55] On February 21, 2017, another appearance was held before ACJ O'Neil. At this hearing, Melissa Grant, counsel for the Department of Justice, was present representing the RCMP. It was at this appearance Ms. Grant provided the Confidential Affidavit, to which I had referred to earlier, to the court (¶31).

[56] Ms. Grant also provided a letter to the court which shed light on the reasons for the difficulty in accessing B.A.J. The letter provides, in part:

> I understand from [redacted name] that Ms. [J.], the Respondent, has sought protection from police in respect of concerns about her safety *vis à vis* Mr. [V.]. As such, both the RCMP and [redacted name] are concerned that [redacted name] must not be placed in a position where he would be asked to disclose information in respect of a person he knows to have received assistance under a witness protection program.

[57] At this point, Ms. Grant informed the court that B.A.J. was being protected as a result of concerns for her safety because of J.S.V.

[58] After a fair amount of discussion, the judge expressed concern about B.A.J.'s motives and the participation of the police forces:

> **THE COURT**: …So I'm putting all this on the record, should other people have to read what … what has happened here. I'd like them to understand what the thought process is. So we have *Criminal Code* provisions dealing with child abduction. And it would be such a shame to have worthwhile programs designed to protect victims of crime … it would such a shame to have those types of programs abused and misused and to have the witness protection program abused or the resources that are dedicated unnecessarily because we have a parent who doesn't want the other parent to see the child which is, by the way, most of what we do is adjudicating when things do go to an adjudication contests between parents as to how much time each will have with the child and it's not uncommon for one parent to not want the other parent to see the child at all. They just usually don't go to the witness protection program or have the support or … it

> appears cooperation, of two or three police forces to accomplish that. So .. and the court … the court … the court can't allow that to happen. So we can … we can get … chase and rabbit tracks or we can stay with the big game and [redacted name] is a bit of a rabbit track. However, that … I have to reflect on what I … what the court can do because this matter has to be adjudicated and it might … it might mean an inquiry by somebody. It's not … not me to find out what really went on here. It's not my role. I'm not impressed on the face of it. But right now Mr. [V.] is interested in seeing his child. …
>
> [Emphasis added]

[59] The judge continued, suggesting that Ms. Forbes and Legal Aid may have been complicit with the police agencies in efforts to avoid the hearing:

> **THE COURT**: So…. And just for the record, Krista Forbes was here on a number of occasions, from Nova Scotia Legal Aid. On one occasion I asked her why she … if she had any interest in the proceeding. She said she was observing for Nova Scotia Legal Aid. Now you don't have to have a vivid imagination to believe that she was here, whether for Nova Scotia Legal Aid indirectly on behalf of Mr. [V.]'s former partner. I'm putting that on the record too. I might as well put it all together … saying it. So this is part, Ms. Grant, on what has happened in this proceeding. And the RCMP … or the police told Mr. [V.] … I think it was Constable Madru that, well, Krista Forbes will tell you all about it or she'll be in court and she knows all about it. So the record shows that Nova Scotia Legal Aid … counsel for Nova Scotia Legal Aid was in communication with the Halifax Regional Police who are in communication with [redacted name] and they all …those three parties were aware of each other, were aware of the proceeding, as far back as I think last summer. Wasn't it, Mr. [V.]
>
> [Emphasis added]

[60] Not only is the judge calling into question the motives of B.A.J. but also those of Legal Aid and the various police forces. All of this without any evidence before him that there was any kind of collusion between these agencies.

[61] There was another short appearance on April 7, 2017, where Lieutenant Benoit Vigneault of the QPP was present by telephone. Lieutenant Vigneault indicated that until two weeks previous to that date he had been in charge of the Witness Protection Program for the QPP. Lieutenant Vigneault requested he be able to be present, with his solicitor, by video conference on April 11, 2017 at 2:30 p.m. His request was granted.

[62] At the appearance on April 11, 2017 the court was informed of the nature of the police intervention with B.A.J. Ms. Grant was again present on behalf of the Department of Justice, Lieutenant Vigneault was present with Francis Brabant, in-house counsel with the QPP. The court was advised of the following by Lieutenant Vigneault and Mr. Brabant:

1. The QPP did not consider the September 1, 2016 subpoena directed to B.A.J., as valid as it did not comply with the Nova Scotia *Interprovincial Subpoena Act*, S.N.S. 1996, c. 1 nor the *Quebec Code of Civil Procedure*.
2. Mr. Brabant and Lieutenant Vigneault wanted to facilitate the court's issues. If a subpoena were issued which complied with both the Nova Scotia and Quebec law, Lieutenant Vigneault would serve it on B.A.J.
3. The QPP would also provide B.A.J. with advice and resources to deal with what would then be a justice issue and not a police issue.
4. What the QPP was offering, it felt, was a good balancing between the victim's safety, the rights of J.S.V. and the issue before the court.

[63] Further discussion took place between the court and Mr. Brabant. The court asked if it was being suggested that B.A.J. was a victim of J.S.V. Mr. Brabant responded that the QPP did consider her to be a victim. Mr. Brabant went on to explain the process in Quebec:

> **MR. BRABANT**: No, we … we …we are acting at this moment under our general mission which is to protect people's safety as such. So actually we provided her some assistance with you know basis measures to … to protect her safety. At this moment this is what we … are. And so we won't … you know, unless we proceed in-camera … let's say that …it will be safe to say that we assisted her in a number of basic measures but we … so … so …this is it. It's not under a program as such. It's under our general duty because as you know the Sùrte du Québec has a general jurisdiction for the entire province of Québec to make sure that people's safety is … we … and you know and I … I … I … I don't think we have to be very long. We have a … we had a few very unfortunate incidents … tragic incidents, last … in the last months where you know women would call the police and police would not do the due diligence to protect them and a few hours after those women were killed. And we are very sensitive to … to both the need to protect the respondent, make sure that the rights of the plaintiffs are … are respected and that the court's needs are fulfilled also. So we are also in a kind of a balancing situation where we want to accommodate everyone. And I think that our presence here this afternoon speaks for that.

[Emphasis added]

[64] After receiving this information from Mr. Brabant, the judge expressed concerns about the veracity of the information which had been provided and how the police agency came to the conclusion J.S.V. posed a threat to B.A.J. Again, Mr.Brabant explained precisely how they came to that conclusion:

> **MR. BRABANT**: (…) Well, then maybe … you know, what we .. what we did… actually what … the way to answer that, we … we've been contacted by victim's services because the respondent called a line (One-eight-hundred) 1-800 and …
>
> **THE COURT**: Excuse me …
>
> **MR. BRABANT**: And this …
>
> **THE COURT**: …is that victim's services in Nova Scotia or somewhere else?
>
> **MR. BRABANT**: No, no, somewhere else. And … and then it was referred to us and then we … she … she … actually she … she's told a police officer that she's been abused by her former partner and wanted protection. And actually that … that the plaintiff was looking for her. And actually what we got afterwards is … is an email where the … the plaintiff said that he would find her whenever …wherever she is and the child also and that she couldn't escape. So what we did, is that we checked with Halifax Regional Police because this is the … you know what we know … we know from the Halifax Regional Police. So if the court wants to have further details about this that the prime source of information is … is the HRP. So … so we have a number of incidents here ranging from 2012 to 2015 of you know complaints and even charges and … and eight-ten … you know a peace bond and a series of incidents that were sufficient for us to be satisfied that her safety was … was in jeopardy. So actually it … it's … we have the right to … to move on hearsay, but if the court wants to have a … a better idea of the … of the … of the situation I … I respectfully suggest that the Halifax Regional Police would be in a better … in a better position to … to inform the court about the true state of things.

[Emphasis added]

[65] In his response he explained that the police had been contacted by victim services. They were also provided with an email from J.S.V. to B.A.J. which indicated that he would find her wherever she went and that she could not escape.

[66] As a result of B.A.J.'s call to victim services, the QPP contacted the Halifax Regional Police. They found there were a number of complaints from 2012 to 2015 and even charges. As a result of their inquiries, QPP was satisfied that her safety was in jeopardy and placed her under protection.

[67] It was clearly explained to the judge that the QPP had a protocol when faced with this type of complaint, it followed the protocol and came to the conclusion that B.A.J.'s safety was in jeopardy.

[68] Finally, Mr. Brabant told the court that although they had an address for B.A.J., she was free to move at her will and they had not had any contact with her for a few months.

[69] That hearing concluded with a discussion of hearing further testimony from other witnesses and the matter was adjourned. There was no indication up to this point that the judge was considering rendering a decision.

[70] I pause here to comment that there was no evidence before the judge to support his musings about B.A.J. orchestrating her contact with the police to avoid the court proceedings and keep J.S.V. from seeing his child. He says this in his decision:

> [1] … The child's mother, who is also J.S.V.'s former partner, has been hiding since December 2015. She has his son with her. Their whereabouts are or have been known by one or more police forces. It also appears police forces have aided B.A.J. in her efforts to not be found and to conceal the location of the subject child born in October 2012. I am satisfied on a balance of probabilities that this has been and continues to be the case. No satisfactory legal authority or explanation to support the decision making of these police forces or their continuing role in preventing J.S.V. from knowing where his son is located has been offered to this Court. …
>
> [6] Over the past year, the Court has been subjected to tactics, that delay or frustrate J.S.V.'s efforts; and involving three police forces, the Respondent and possibly Nova Scotia Legal Aid. As troubling as that is for the Court in terms of the attitude it displays about the Court system and as troubling as it is for J.S.V., the true victim of the tactics has been a child, deprived of an opportunity to see his father for eighteen months, a significant part of his young child's life.

[71] He also calls into question B.A.J.'s motives for seeking an EPO. He suggested that it was in response to J.S.V.'s efforts to locate his son and not because she felt threatened by J.S.V.:

> [17] ... In response to J.S.V.'s efforts to locate his son, B.A.J. applied for and was granted an emergency protection order in January 2016.
>
> [18] Clearly, in reality, B.A.J. was contemplating a way to exclude J.S.V. from the child's life and hers. By seeking an emergency protection order 'EPO', she accomplished this objective immediately. An 'EPO' is an '*ex-parte*' order,

> i.e. one that can be sought and granted solely on the evidence and submission of one party to a Justice of the Peace and considered and granted in the absence of the other party. It is provided for by the provisions of the *Domestic Violence Intervention Act*, S.N.S. 2001, c 29. The statute provides that the order may be reviewed/challenged before a Supreme Court Judge within thirty days of its issuance.

[72] It is with his belief that there was collusion with police agencies and that B.A.J. had improper motives in seeking protection, that the judge set about making his decision.

[73] I will now turn to the judge's decision where he said he was satisfied that notice had been provided to B.A.J.:

> **Notice to the Respondent**
>
> [22] I am satisfied the Respondent is aware of these proceedings. This has been confirmed by witnesses who gave evidence on behalf of the police. These witnesses confirmed what J.S.V. told the Court of his conversations with them in which they confirmed that she had knowledge of these proceedings.
>
> [23] I am satisfied the Respondent has repeatedly chosen to not appear; is ignoring this process and she continues to conceal her whereabouts and that of J.S.V.'s child. I am further satisfied that her efforts have been and continue to be aided by 'the police'.

[74] With respect, there is no evidence that B.A.J. was aware of the nature of the proceedings:

1. The only evidence that she had any knowledge of the proceedings came from the Confidential Affidavit where the unnamed individual says he believes she had knowledge of the proceedings. It does not identify the source of the knowledge, or that he verily believes it to be true. On its very face, the affidavit does not provide admissible evidence as to the service of any process on B.A.J.
2. The extent of the assertions to the court (I fall short of calling it evidence because it was not) was that J.S.V. provided an affidavit and a subpoena to the police. There is no mention in the record that a variation application had ever been provided by J.S.V. to the police. Certainly, he could not have provided the variation application where he was seeking custody as that did not come into existence until October 12, 2016. Any alleged service occurred prior to September 28, the date of the subpoena.

3. The judge was advised, from the QPP's point of view, what it considered necessary in order to have a valid subpoena served on B.A.J. in Quebec. At a minimum, it had to comply with the *Interprovincial Subpoena Act* in Nova Scotia and the Quebec *Civil Code*.

4. There was never a motion made for substituted service on B.A.J. This was referred to in the September 28, 2016 appearance before Justice Legere Sers. Obviously, if service is going to be made on someone other than B.A.J., particularly in circumstances such as this where the custody of the child is at stake, it is imperative that the court be satisfied that not only is the party aware that there may be some proceedings ongoing in Nova Scotia but the nature and extent of those proceedings. None of that was present here.

[75] Recently, this Court in *Lavy v. Hong*, 2018 NSCA 28 , commented on the non-compliance with basic participatory requirements in a legal proceeding:

> [41] Donald J.M. Brown, Q.C., in his text *Civil Appeals*, loose-leaf, vol. 1 (Thomson Reuters, 2017) comments on the issues of fairness in the trial process:
>
> ***1:1210 Non-Compliance with Basic Participatory Requirements***
>
> *1:1211 Per Se Fairness Errors*
>
> Where the basic requirements of the adjudicative process have not been complied with, appellate intervention will be necessary. For example, where there has been a straightforward error such as attributing the burden of proof to the wrong party, excluding evidence that is both relevant and material, refusing to permit cross-examination**, deciding a matter without allowing a party to make submissions**, **or undertaking an evidence-gathering exercise *ex parte*, the usual result will be for the appellate court to set aside the decision** and require the adjudicative process to be started anew. [Footnotes omitted]
>
> [Emphasis added]
>
> [42] Mr. Brown continues, concluding that an error in the process of trial or in a decision-making process will almost always be characterized as one resulting in a substantial wrong or a miscarriage of justice.
>
> ***6:2120 The Requirement of a Substantial Wrong or Miscarriage of Justice***

> […] However, unless the error is harmless or the result inevitable, **an error in the process of the trial or in decision-making will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice**.
>
> [Emphasis added]

[76] In this case, the most basic requirement has not been complied with by J.S.V., B.A.J. has not been served with the process of the court under which she is being judged. Further, anything that came before the court was on an *ex parte* basis. B.A.J. was not able to address why custody of the child should remain with her. She could not have known J.S.V. was even seeking custody.

[77] Any attempts by the police forces to explain why they conducted themselves in the way they did was ignored or not accepted by the judge.

[78] There can be no other conclusion but that the manner in which this matter proceeded resulted in a substantial wrong or miscarriage of justice.

[79] The custody of a child was changed without any evidence or input from B.A.J. In fact, there wasn't even any evidence from J.S.V. on the merits of the application.

[80] For these reasons, I would allow this ground of appeal.

[81] The appellant alleges a number of errors on the part of the judge relating to the factors he took into consideration in changing the custody of the child. I will address this one ground of appeal being:

The judge erred in awarding custody of the child to J.S.V.

[82] The judge starts out his analysis with an erroneous view of the relationship between J.S.V. and the child. In his decision he says that the parties, after the May 28, 2015 order giving sole custody to B.A.J., lived together and the "Respondent was a daily caregiver of the child for almost six months thereafter." It is unclear on the record where the judge could have come to the conclusion that J.S.V. was the daily caregiver for the child during this six month period. It is not borne out by the record.

[83] The unsworn evidence of J.S.V. was that he saw him at least every other day. On July 27, 2016, the following exchange took place between the court and J.S.V.:

> **J.S.V.:** Right, right. I was in his life almost each and every day until like I said, December, so.
>
> **THE COURT:** Until December of 2015?
>
> **J.S.V.:** Yeah, yeah. I pretty much saw him at least every other day even when her … like I … I didn't reside in the same place as her because you know it would be on and off. Our relationship was never good.
>
> **THE COURT:** Well, you'd better prepare an affidavit in which you outline your involvement with the child.
>
> [Emphasis added]

[84] There was never any suggestion that J.S.V. was the daily caregiver of the child at any time. Nor did J.S.V. prepare an affidavit which outlined his involvement with the child.

[85] The judge then goes on to reference the *Parenting and Support Act* (*"PSA*"), R.S.N.S. 1989, c. 160, and, in particular s. 18(6) which outlines the factors to be considered when considering the best interests of the child. After reciting the factors, he concludes, based on the evidence before him, J.S.V. offered the most stable and secure circumstances:

> {35] Given the evidence before me, J.S.V. offers the more stable and secure circumstances (s.18(6)(a)); obviously, B.A.J. does not support the child having a relationship with J.S.V. but the reverse is true of J.S.V. (s.18(6)(b) and (i)); J.S.V. has a history (s.18(6)(c)) and J.S.V. offers a stable and predictable life for the child (s.18(6)(d)).

[86] The problem with the trial judge's conclusion is there was absolutely no evidence before him on the best interests of the child. The extent of J.S.V.'s evidence was that he had an apartment and two jobs working seven days a week. There was no consideration of the child's physical, emotional, social and educational needs including the child's need for stability (s. 18(6)(a)).

[87] In his decision the judge makes reference to B.A.J.'s mental health issues citing mental health assessments going back to 2004 and 2005 which suggests they were a relevant factor in making his decision:

> [12] The report prepared details a history of serious mental health conditions experienced by her. Mental health assessments dated 2004 and 2005:
>
> > "indicate Axis II personality features and traits including personality disorder and Cluster B (erratic and dramatic) features and traits. Her

> reported history is consistent with the early childhood experiences, which create such character disturbances in individuals with borderline and Cluster B personality disturbances.
>
> Clearly the history reported above does not match what B.A.J. reported to the current assessors. Rather than characterize B.A.J. as being untruthful to the undersigned, her unrealistic reports of her childhood may be more indicative of her psychological defenses, and unconscious factors. However, it is also possible that she likely realized the present assessment could impact her parental rights and she may have chosen to misrepresent her history, consciously or unconsciously."

[88] The way the report is set out in the decision makes it appear as though the judge is quoting from mental health assessments in 2004 and 2005. However, he is referring to a psychological assessment which was prepared on November 17, 2014 as part of the *CFSA* proceedings which is referring to historical assessments in 2004 and 2005. This report was not before him in evidence.

[89] In fact, at the April 11, 2017 court appearance, J.S.V. had the psychological assessment with him but did not want to put it into evidence. For good reason, as it is not particularly complimentary of him. The following exchange took place between the court and J.S.V.:

> **J.S.V.:** I do. I also have a psychological report on her which I'm . . . I'm not going to enter as evidence, nor do I believe you would accept it. But there is a psychological report that was put in with this affidavit.
>
> **THE COURT:** And what does it say?
>
> **J.S.V.:** The psychological report?
>
> **THE COURT:** Yes. Bottom line.
>
> **J.S.V.:** Bottom line. Here I'll read you some.
>
> **THE COURT:** No, no, just tell me.
>
> **J.S.V.:** It says that she's borderline personality disorder. She has emotional irregularity. And it says in the affidavit of Anne Simmons, sworn on November 21st, 2014, and this … as I said, the reason he was taken was because his … our … my son's mother, the respondent in this case, left him alone. So … and I had unsupervised visits to our son before she did. I'll just find something here.
>
> **J.S.V.:** No, no… it also indicated that while [M.] [phon.] may not be in risk of immediate neglect or physical harm, his well being could be negatively impacted as a result of [A.]'s untreated psychology pathology and they take a shot at me. Unhealthy relationship choices. She needs to address her mental health

> issues and enhance her parenting skills. But anyway, I wouldn't enter that as evidence.
>
> **THE COURT:** Okay, we're going to make copies of that document. And I'm going to date stamp it today. And I'm going to put it in the file here. And you should make a request to see your child protection file downstairs. There's a process.

[Emphasis added]

[90] As can be seen, J.S.V. was indicating that he had the report but he was not asking that it be entered into evidence. In fact, quite appropriately, he said that he did not think the court would accept it.

[91] Not only did the judge accept it, he relied on it in making his decision.

[92] The judge was also selective in the parts of the report which he used in his decision. For example, in his decision, he finds that B.A.J. was threatening or planning to commit suicide triggering the *CFSA* proceedings in 2014 (¶11). The report actually says that B.A.J. denied any intention to commit suicide. A medical assessment done at that time highlighted that there was no intent to commit suicide.

[93] Putting aside the fact that the report was not in evidence before him, there is no basis upon which the judge could have used it for the purposes of determining that B.A.J. had mental health issues in 2017 when he was making his decision.

[94] His statement that J.S.V. offers more stable and secure circumstances is simply a conclusion without any evidence.

[95] This is not a case where the judge misapprehended the evidence or made palpable and overriding errors based on the evidence, there was simply no evidence to support his conclusion it was in the best interests of the child to change the custody arrangements.

[96] I would allow this ground of appeal.

Other Grounds of Appeal

[97] It is not necessary to address any of the other grounds of appeal. However, I would point out the judge reaches a number of conclusions that are not borne out by any evidence including:

- The mother would not respond to court processes (¶31);
- She has chosen to take steps to conceal the location of the subject child from his father and to avoid the reach of any court interested in having the merits of the father's application considered (¶31);
- The police forces involved have not satisfactorily explained their issues in assisting the mother to hide J.S.V.'s son (¶32); and
- The involved police forces were duped by or on behalf of the subject mother (¶32).

[98] All of these statements are problematic and were raised as grounds of appeal by B.A.J. Although I need not address them individually, I will say that the judge's characterization of B.A.J.'s motives and the conduct of the police forces is untenable and not supported on the record.

[99] It is not for the court to question the motives of police agencies (and indeed a justice of the peace and another Supreme Court judge) in protecting individuals who claim they are the potential subject of violence. It suggests that police agencies should view threats of violence against individuals with skepticism and attempt to ascertain the true motive behind the complaints. The QPP, here, did not act in a vacuum. They, obviously and appropriately, treated the complaint seriously. They had made inquiries of the Halifax Regional Police and based on their protocol determined that B.A.J. was a person in need of protection.

[100] The QPP also provided the judge with a roadmap of how the issues before the court could be addressed, including how B.A.J. could be properly served. For whatever reason the judge declined to take them up on their offer and issued a decision without ever having a hearing on the merits.

Arrest Warrant

[101] Finally, I will address the arrest warrant. I cannot ascertain from a review of this record why the judge felt it was necessary to issue an arrest warrant. There was no evidence of B.A.J. breaching any court order. The evidence was to the contrary. She had sole custody of the child and was permitted to travel inside and outside of Canada without the permission of J.S.V. There were no contempt proceedings taken against her. The judge seemed to be of the impression that B.A.J. had somehow abducted the child and left the province with him. As I noted earlier, he referred to the provisions in the *Criminal Code* involving abducting a

child during the court appearances before him. In his decision he returns to the *Criminal Code*:

> [33] A warrant authorizing the arrest of the mother will issue. She is to be brought before this court. Obviously, a determination as to whether criminal charges are warranted given provisions of the *Criminal Code* dealing with child abduction is not for me to make.

[102] I am at a complete loss to understand the judge's reasoning on this issue. There was no evidence that B.A.J. had contravened the custody order or had failed to appear after being properly served. There was no basis upon which the judge could have issued the arrest warrant.

[103] In these circumstances the warrant should never have been issued and it cannot stand.

Conclusion

[104] The appeal was allowed, the order dated August 17, 2017 set aside. The arrest warrant issued that same day was quashed. As no costs were sought, none were awarded.

Farrar, J.A.

Concurred in:

Bryson, J.A.

Bourgeois, J.A.