S.C.C. File No. 39533

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ASHLEY SUZANNE BARENDREGT

APPELLANT
(Respondent)

- and -

GEOFF BRADLEY GREBLIUNAS

RESPONDENT
(Appellant)

- and -

OFFICE OF THE CHILDREN'S LAWYER and,
WEST COAST LEAF ASSOCIATION and
RISE WOMEN'S LEGAL CENTRE

INTERVENERS

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. The Office of the Children's Lawyer (the "OCL") intervenes in this appeal because this Court's decision regarding further evidence could have significant implications for the rights, interests, and lives of children at the heart of disputes before appellate courts. This factum will outline: 1) the rationale for a flexible approach to the admission of fresh and new evidence in family law cases; 2) specific considerations for the admission of fresh and new evidence; and 3) an approach to the use of new evidence on appeals that appropriately balances finality in the adjudicative process and the need for courts to act on up-to-date information about children's lives.

PART II – QUESTIONS IN ISSUE

2. The OCL intervenes in response to the following questions posed by the Appellant:

a) How does the *Palmer* test to admit fresh and new evidence apply in the "slightly more elastic" conditions of parenting cases? Are different conditions applicable to "fresh" as opposed to "new" evidence?

b) What is the impact of fresh or new evidence on deference owed to a trial judge's parenting decision?

PART III – ARGUMENT

(A) The rationale for a flexible approach to the admission of "fresh" and "new" evidence in decisions involving children's lives

3. As recognized by this and other appellate courts, children are entitled to special care and legal protection and to specific consideration of their interests, needs, and rights. This includes ensuring that their best interests are a primary consideration in all decisions affecting their lives.[1] Given the inherent vulnerabilities of children, the law recognizes the need for different approaches in cases involving them. Some examples include:

a) There is a separate criminal justice system for youth that is premised on young people's diminished moral blameworthiness or culpability;[2]

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[1] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCR 817 (SCC) at para 71; *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at para 58 [*OCL v IPC*].

[2] *Youth Criminal Justice Act*, SC 2002, c. 1, s 3(1)(b).

b) Courts take a more active role in litigation in parenting and child protection cases to ensure that children's best interests are protected;[3]

c) Courts have recognized the heightened privacy rights of children as compared to similarly situated adults in a number of contexts;[4]

d) In dealing with applications for permanent residence on humanitarian and compassionate grounds, this Court has recognized that "unusual and undeserved hardship" is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for relief since "[c]hildren will rarely, if ever, be deserving of any hardship";[5] and

e) Various statutes mandate legal or other representation for children in different types of proceedings, including subject children and minor parents in child protection proceedings, adoption consents for children, secure treatment matters, and in proceedings before the Immigration Appeal Division, including the Immigration and Refugee Board.[6]

4. The jurisdiction courts have over children has been described as a "sacred trust."[7] This trust is particularly important in parenting and child protection cases that affect vulnerable children who are involved in litigation through no fault of their own. They become the subject of litigation because the adults in their lives cannot agree on what is in their best interests or, alternatively, have abused them or neglected to attend to their needs. While children are the most significantly impacted by the decisions made in these proceedings, they are often not parties, lack legal representation, and have little or no control over the direction of the litigation. Their inherent vulnerabilities in the litigation process require courts to step in and ensure that their current best interests are always at the forefront of decision-making in these proceedings.

5. Not only do parenting and child protection cases involve decisions about vulnerable children, they are also inherently different from other types of cases in our legal system. Criminal and civil cases are generally concerned with historical events (e.g. whether a person committed a crime or

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[3] *KH v EH*, 2021 ONSC 899 at para 58; *Children's Aid Society of the Regional Municipality of Waterloo v RC*, 2009 ONCA 840 at paras 1-2; *Farrar v Farrar*, [2003] OJ No 181 (ONCA) at para 27.

[4] *R v Jarvis*, 2019 SCC 10 at para 86; *AB v Bragg Communications Inc*, 2012 SCC 46 at para 17; *OCL v IPC* at paras 51 and 73.

[5] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 41.

[6] *Child, Youth and Family Services Act*, 2017, SO 2017, c. 14, Sched 1, ss 78, 180(6), (7), (11), 161(6); *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 at s 167(2).

[7] *Thompson v Thompson*, [1993] 8 WWR 385 (MBCA).

was negligent at a certain date in the past). New evidence (i.e. evidence about events that occurred after the hearing) is rarely relevant in those types of cases. Cases about where children will live and who will make parenting decisions for them are forward-looking. They involve an analysis of what will be in the best interests of children after the orders are made. These difficult decisions necessarily involve a predictive element based on the current information before the court.

6. Despite best efforts by trial/motion courts, orders may no longer reflect the child's reality or living situation by the time an appeal is heard. A flexible approach to the admission of further evidence recognizes the need to be aware of children's updated circumstances to understand how appellate decisions will impact their current lives, not the lives they had when the original decision was made. As noted by the Nova Scotia Court of Appeal, "[a] child's welfare is ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context."[8] In cases involving the welfare of children, this Court has also recognized the importance of up-to-date evidence that "bridges the gap" between the evidence submitted in the proceedings below and the appeal.[9]

7. The United Nations *Convention on the Rights of the Child* also provides support for a flexible approach to the admission of further evidence in cases involving children's lives. Article 12 makes specific provision for children to be given the opportunity to be heard in "any" judicial or administrative proceeding affecting them.[10] There is no limitation in relation to appeals. Further, Article 3 provides that the best interests of the child must be appropriately integrated and applied in every judicial proceeding that impacts children.[11] It is a dynamic concept that requires an ongoing assessment of the continuously evolving circumstances of the child to ensure that judicial decisions reflect their current realities.[12] A "frozen in time" approach to children's lives will rarely ensure that their evolving best interests are being served. Consistent with these principles, the OCL routinely

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[8] *Nova Scotia (Community Services) v TG*, 2012 NSCA 43 at para 82.
[9] *Catholic Children's Aid Society of Metropolitan Toronto v M(C)*, [1994] 2 SCR 165 (SCC) at page 190 at g [*M(C)*].
[10] Article 12, *Convention on the Rights of the Child*, 28 May 1990, 1577 UNTS 3, Can TS 1992 No 3 [UNCRC].
[11] Article 3, UNCRC; Committee on the Rights of the Child, General Comment No. 14 (2013): On the right of the child to have his or her best interests taken as a primary consideration, CRC/GC/2013/14 (29 May 2013) at para 14(a) [UNCRC General Comment No. 14].
[12] UNCRC General Comment No. 14 at para 11; *Protection de la jeunesse* — 2023, 2020 QCCQ 61 at para 77.

files new evidence about children's updated circumstances on its own motion or at the request of appellate courts.[13]

8. While new or fresh evidence may not be necessary in every appeal, there should be sufficient flexibility for appellate courts to admit such evidence where it provides credible and reliable information regarding the children's current circumstances, and/or where its admission is consistent with the children's best interests and the interests of justice.

(B) Considerations for admitting "fresh" and "new" evidence

9. All provinces and territories have legislation and/or rules of court that allow for the admission of further evidence on appeals.[14] This reflects a recognition that appellate courts may require fresh or new evidence to properly decide appeals. In cases involving children's best interests, the wide discretion given to appellate courts to accept this type of evidence on appeals should remain flexible without undue restrictions.

(i) *Fresh evidence*

10. Neither party in this appeal disputes the need for a more flexible approach to the admission of fresh and new evidence on appeals in parenting cases. For *fresh* evidence, it is generally agreed that the factors considered in *Palmer* apply in family law appeals with some flexibility. If the evidence is relevant and credible and may have been reasonably expected to have affected the assessment of the child's best interests, it should be admitted. If it could have been adduced at trial

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[13] *Moreton v Inthavixay*, 2021 ONCA 501 at para 13 [*Moreton*]; *MAA v DEME*, 2020 ONCA 486 at para 36 [*MAA*]; *Bruce Grey Child and Family Services v AM*, 2020 ONCA 525 at paras 45-47; *LM v Peel Children's Aid Society*, 2019 ONCA 841 at paras 83-85; *Simcoe Muskoka Child, Youth and Family Services v LV*, 2019 ONSC 1366; *Huron-Perth Children's Aid Society v JL*, 2019 ONCA 809 at paras 19-24; *Ojeikere v Ojeikere*, 2018 ONCA 372 at paras 41-50 [*Ojeikere*]; *Decaen v Decaen*, 2013 ONCA 218 at paras 11-13 [*Decaen*]; *AMRI v KER*, 2011 ONCA 417 at paras 41-44 [*AMRI*]; *Kincl v Malkova*, 2008 ONCA 524 at para 3 [*Kincl*].

[14] *Court of Appeal Rules*, BC Reg. 297/2001, s 31(1); *Alberta Rules of Court*, Alta. Reg. 124/2010, s 14.75(1); *The Court of Appeal Rules*, Rel. No 19, August 2012, ss 58, 59; *The Court of Appeal Rules*, CCSM c. C240, s 21(1); *Courts of Justice Act*, RSO 1990, Chapter C.43, s 134(4); *Code of Civil Procedure*, chapter C-25.01, s 380; *Rules of Court*, NB Reg 82-73, s 62.21(2); *Rules of Civil Procedure*, Royal Gaz Nov 19, 2008, s 90.47; *Judicature Act*, 2008, c.20, s 21(5); *Court of Appeal Act*, SNL2017, Chapter C-37.002, s 8(2)(c); *Court of Appeal Act*, RSY *2002*, c.47; SY 2013, c.15, s 12; *Judicature Act*, Rules of the Court of Appeal for the Northwest Territories Respecting Civil Appeals, R-091-2018, s 61(1); *Judicature Act*, Rules of the Nunavut Court of Appeal Respecting Civil Appeals, SNWT (Nu) 1998, c34, R-091-2018, s 61(1).

with due diligence, the appeal court retains the discretion to refuse the admission of the proffered evidence, in this way discouraging litigants from appealing when they are simply hoping for a different result.

(ii) *New evidence*

11. In terms of *new* evidence, the Appellant suggests that *if* there is going to be a distinction between the test for the admission of fresh and new evidence, the test for new evidence should be approached more strictly. Without addressing the specific circumstances of this case,[15] the OCL submits that such an approach fails to consider the broader purpose of new evidence on appeals involving children. It also fails to consider the importance of appellate courts "having accurate and up-to-date information on children whose fate often hangs on the determination by judges of their best interests." [16]

12. While the principles in *Palmer* remain relevant to the admission of new evidence, there should be a greater scope for its admission given the broader purposes for which it is used on appeals. With that in mind, appellate courts should be flexible in admitting new evidence that is credible, relevant to the children's best interests, and "bridges the gap" between the trial and the appeal. This enables appellate courts to make determinations based on an accurate picture of the situation at hand.

13. In *Catholic Children's Aid Society of Metropolitan Toronto v M (C)*, this Court commended a flexible approach to the admission of new evidence without undue restrictions in cases involving the welfare of children, noting that "an accurate assessment of the present situation of the parties and the children, in particular, is of crucial importance."[17]

14. While *M(C)* was a child protection appeal, the need for a sufficiently flexible approach to new evidence to ensure courts have up-to-date information about children's current circumstances has equally been applied in parenting appeals.[18] This reflects a recognition that decisions in parenting cases also have profound effects on children's lives and well-being.

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[15] The OCL notes, however, that there does not appear to be any updating evidence regarding the children's circumstances since their relocation and the stay of the judgment of the British Columbia Court of Appeal was granted by this Court on February 12, 2021.

[16] *M(C)* at page 188 at c.

[17] *M(C)* page 188 at c, citing *Re Généreux*, 53 OR (2d) 163 (ONCA).

[18] *HE v MM*, 2015 ONCA 813 at para 71 [*HE*]; *Decaen* at para 13; *JWS v CJS aka CJH*, 2019 ABCA 153 at paras 37, 38; *ST v JT*, 2019 SKCA 116 at paras 94, 95; *MAA* at para 33.

15. New evidence about children's current circumstances serves many purposes for appellate courts, including:

a) understanding the impact of the court's decision on the children's current circumstances;[19]

b) assessing whether mootness is an issue in the appeal or whether some or all the issues still need to be determined (e.g. if part of the appeal involves a decision about a specific medical decision to be made for the child and the child's medical professionals have since determined that the child has capacity to make those decisions on their own);[20]

c) understanding whether the parties have been following the existing orders and how the children's current living arrangements differ from those orders;

d) updating the court about impending events that may require the court to issue a decision more urgently (e.g. an intended move, religious event, or a medical need that may be impacted by the court's decision);

e) confirming that the decision was correct and that any errors would not have changed the result (e.g. despite an alleged error the children are thriving under the current arrangements), or alternatively confirming that an error negatively impacted the child's life such that the order cannot stand;[21]

f) in certain circumstances, being dispositive of the appeal;[22] and

g) where applicable, to craft an appropriate remedy or order for the children involved in the appeal,[23] or to determine whether to send the matter back for a new hearing.[24]

16. A flexible approach to the admission of new evidence does not mean that all evidence will be admitted or considered by appellate courts. Courts always have discretion to refuse admission where the proffered evidence is not credible or reliable, it does not assist the court in making its

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[19] *Moreton* at para 13.
[20] See also: *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at para 3; *Richardson v Richardson*, 2021 SCC 36.
[21] *MAA* at paras 32 to 36, and 59.
[22] *Kincl* at para 3; *M(C)* at page 207 at b; *Ojeikere* at para 94.
[23] *Ojeikere* at para 94-97.
[24] *AMRI* at paras 9, 130.

determination, it simply continues the "affidavit war" or the litigation from the courts below,[25] its prejudicial effect outweighs its probative value, or it is otherwise not in the interests of justice to admit it. Further, even when new evidence is admitted, it need not "lead inexorably to reversal of the trial judgment or ordering a new trial".[26] Rather, it must be reviewed with the other evidence to determine the proper disposition of the appeal. In many cases, it may simply serve to confirm the correctness of the impugned decision having regard to the children's current circumstances. [27]

17. The real concerns about new evidence in the jurisprudence, and of the Appellant in this appeal, are not about appellate courts having up-to-date information about children's current circumstances. Rather, the concerns relate to:

a) the *use* of new evidence by appellate courts without proper deference to lower courts. For instance, there is concern regarding the admission of new evidence as a gateway to conducting a *de novo* hearing or setting aside findings of fact that are unrelated to the new evidence. Since the real concern in those situations is a lack of deference to lower courts, that issue should be dealt with discretely rather than discouraging the admission new evidence about children's current circumstances that may be invaluable to appellate courts;

b) the source of the new information. Children in many jurisdictions across Canada lack independent legal representation and the consequent ability to adduce trustworthy information about their current circumstances. Parents may seek to adduce self-serving new evidence under the guise of children's best interests. Care must be taken to ensure threshold credibility and reliability and also to distinguish evidence that is truly new from evidence that could, with due diligence, have been adduced at trial (and to which the first prong of the *Palmer* test would therefore apply);[28]

c) finality in the adjudicative process. The tension between finality in the adjudicative process and not turning a blind eye to current circumstances was discussed by this Court in *R v Sipos* where Justice Cromwell stated: "On one hand, we must recognize, as Doherty J.A. put it in *R.*

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[25] *Goldman v Kudelya*, 2017 ONCA 300 at para 28.
[26] *Children's Aid Society of Oxford County v WTC*, 2013 ONCA 491 at para 44 ; *Kagan v Brown*, 2019 ONCA 495 at paras 9-11; *Children's Aid Society of Owen Sound v RD*, [2003] OJ No 3999 (ONCA) at paras 17-22; *Windsor-Essex Children's Aid Society v EW*, 2020 ONCA 682 at paras 59-61.
[27] *Moreton* at para 13.
[28] *HE* at paras 73-74; *Moreton* at para 14.

v. Hamilton (2004), 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1, at para. 166, that '[a]ppeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event.' However, we must equally pay attention to the institutional limitations of appellate courts and the important value of finality."[29] As outlined further below, an appropriate balance can be struck that respects finality in the adjudicative process while ensuring that appellate courts are not unduly restricted from exercising the broad powers given to them by legislatures to intervene when it is in the interests of justice and within a legislative context where children's best interests are the paramount consideration.

(C) The proper use of "new" evidence in appeals involving children's best interests

18. As noted above, new evidence is important to provide context and updated information about children's current circumstances to appellate courts. Two other uses of new evidence, in particular, require further discussion: 1) when a court uses it to help determine the appropriate remedy after the court has found a material error; and 2) when the new evidence itself is used as a basis to intervene. Different considerations apply in each of these situations.

(i) *Where a material error is found*

19. As noted by this Court in *Hickey v Hickey*, appellate courts may intervene when there is an error in principle, a significant misapprehension of the evidence, or when an order is clearly wrong.[30] When a material error is found in a trial/motion decision based on the original record, the use of new evidence to determine how to respond to the error does not offend the principles of deference or finality in the adjudicative process. This is because the appellate court has already established, irrespective of the new evidence, that it may be appropriate to intervene. The new evidence is simply used alongside the lower court record to help determine the appropriate remedy in the circumstances (i.e. to set aside the order(s) or confirm the order(s) and/or to substitute its own decision or send the matter back for a new hearing). The admission and use of credible and relevant evidence should be encouraged for these purposes.

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[29] *R v Sipos*, 2014 SCC 47 at para 30 [*Sipos*].
[30] *Hickey v Hickey*, [1999] 2 SCR 518 (SCC) at page 525 at para 11.

20. Without updated evidence about children's current circumstances, an appellate court's intervention could have the unintended effect of causing harm or negatively affecting their best interests. This would thwart the primary purpose of parenting legislation.

(ii) *Where no material error is found*

21. Even absent a material error based on the original record, there may be situations where it is appropriate for a court to act based on new evidence. In particular, an appellate court's broad discretionary powers to intervene should not be curtailed where the new evidence materially impacts the children's best interests and the appellate court is best placed to make the determination (i.e. it will avoid delay for children and promote finality in their lives, it is not procedurally unfair, and it is the most proportionate and cost-effective way to deal with the matter).[31] Situations where this might be appropriate include, but are not limited to:

a) where there is no other appropriate or effective forum to consider the new evidence. For example, where a child will be removed to another jurisdiction through a "return order" in a cross-border removal case and the new evidence demonstrates that the child would be at risk of harm if returned, or where a child's imminent placement for adoption will prevent a parent from bringing a status review in a child protection proceeding;

b) where it would serve no useful purpose to have the parties continue to litigate the matter through a variation application or motion to change in parenting matters or a status review application in child protection matters. For example, where the result is obvious (e.g. where the court was previously considering two placement options and one of the available placements has broken down), or where an amendment to a term or condition of an order is needed to reflect the child's current circumstances;

c) where the appeal involves an imminent medical or other decision that requires an immediate determination; or

d) where a child faces a deprivation of liberty through placement in a secure treatment facility and the new evidence demonstrates that the criteria for admission are not met.

22. Given the variety of unique circumstances that can arise in family law cases, it is not possible to predict every situation where it might be appropriate for an appellate court to intervene based on

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[31] *Hryniak v Mauldin*, 2014 SCC 7 at para 4.

new evidence and absent a material error.[32] In light of the court's special role in protecting children and their interests, flexibility should be maintained to allow courts to be responsive to the vast array of situations in children's lives.

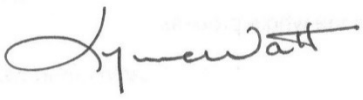
23. Finally, the OCL submits that whenever a determination is made that a lower court decision cannot stand, appellate courts should not be discouraged in appropriate circumstances from amending the order or substituting their own decision in accordance with the best interests of the child. This is consistent with the broad discretion afforded to appellate courts in rules of court/legislation across Canada. It can often alleviate the negative effects of further delay and prolonged litigation on children. It can also promote finality for children while saving valuable judicial resources and additional litigation costs to the parties.

PART IV – COSTS SUBMISSIONS

24. OCL does not seek costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Toronto, Province of Ontario this 16th day of November 2021.



for:

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[32] *Sipos* at para 31; *E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447 at para 23.

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