

U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare)

C.U. v. Marley McGonigle and the Director of Child Welfare for the Province of
Alberta

Supreme Court of Canada

Arbour J., Fish J., Iacobucci J., Major J., McLachlin C.J.C.

Judgment: February 26, 2004

Docket: 29432

Counsel: David C. Day, Q.C., Shane H. Brady (written) for Applicant

G. Alan Meikle, Q.C., Margaret Unsworth (written) for Respondents

Per Curiam:

1 On September 18, 2003, a panel of this Court composed of Gonthier, Major and Arbour JJ. dismissed an application for leave to appeal brought by the Applicant. The Applicant now applies for reconsideration of her application for leave to appeal.

2 In her Amended Notice of Motion for Reconsideration of Application for Leave to Appeal, the Applicant argues that, in view of Gonthier J.'s retirement on August 1, 2003, this Court did not have jurisdiction to dismiss her application for leave to appeal on September 18, 2003. The Applicant submits that s. 27(2) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, applies only to appeals and not to applications for leave to appeal. In the alternative, the Applicant submits that her application for leave to appeal was not "heard" prior to August 1, 2003.

3 Section 27(2) must be read in conjunction with s. 27(1) of the *Supreme Court Act*. These provisions read as follows:

27.(1) A judge who has heard a case for which judgment is delivered pursuant to paragraph 26(1)(a) and who is absent from the delivery of judgment may sign a copy of the opinion with which the judge concurs or, where the judge has written an opinion, give the opinion to a judge present at the delivery of judgment, which concurrence or opinion shall be announced or read in open court and then left with the Registrar or reporter of the Court.

(2) A judge who has resigned the office of judge, or who has ceased to hold office under section 9, shall, within six months thereafter, for the purposes of this section, be deemed to be absent at the delivery of judgment in any case heard by that judge in which judgment has not been delivered during his tenure of office.

4 For the reasons that follow, however, it is unnecessary, in our view, to deal with the Applicant's arguments under s. 27(2) of the *Supreme Court Act*.

5 Section 41.1(1) of the *Judges Act*, R.S.C. 1985, c. J-1, adopted in 2001 by s. 20 of *An Act to Amend the Judges Act and to amend another Act in consequence*, S.C. 2001, c. 7, disposes of this matter. This provision represents Parliament's most recent expression of intent in this area and reads as follows:

41.1 (1) A judge of the Supreme Court of Canada who has retired may, with the approval of the Chief Justice of Canada, continue to participate in judgments in which he or she participated before retiring, for a period not greater than six months after the date of the retirement.

6 In our view, it is evident that s. 41.1(1) of the *Judges Act* applies equally to applications for leave to appeal and appeals.

7 The Applicant's application for leave to appeal was submitted to Gonthier, Major and Arbour JJ. on July 14, 2003, prior to Gonthier J.'s retirement. Judgment was subsequently issued on September 18, 2003, well within the six month window established by s. 41.1(1) of the *Judges Act*. As a result, we are all of the view that under s. 41.1(1) of the *Judges Act*, Gonthier J. was entitled to participate in the judgment dismissing the application for leave to appeal.

8 We are further of the view that the Applicant's other arguments do not warrant reconsideration of her application for leave to appeal.

9 The Motion for Leave to File an Amended Notice of Motion for Reconsideration of Application for Leave to Appeal is granted and the Amended Motion for Reconsideration of Application for Leave to Appeal is dismissed.

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