

2008 CarswellAlta 457, 2008 ABQB 94, [2008] A.W.L.D. 2366, [2008] W.D.F.L. 2912, 53 R.F.L. (6th) 342, 444 A.R. 18

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M. (F.), Re

The Director of Child and Family Services In Right of the Province of Alberta (Respondent) and S.D.M.
(Appellant)

Alberta Court of Queen's Bench

J.D.B. McDonald J.

Heard: January 23, 2008

Judgment: February 6, 2008

Docket: Calgary FL01-02980

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Proceedings: affirming *M. (F.), Re* (2007), 2007 ABPC 44, 2007 CarswellAlta 213 (Alta. Prov. Ct.)

Counsel: Ms Lesley Cooney-Burk for Appellant

Ms E. **Logie** for Children, F.M., D.M.

Mr. C. Ford for Respondent

Ms Lillian H. Riczu for Intervener, Minister of Justice, Attorney General of Alberta

Subject: Family

Family law --- Children in need of protection — Application for permanent custody — Relation to third party's application for custody

Children were apprehended by director from care of other party during mother's incarceration — Director's application for supervision order was dismissed and apprehension order for children was issued — Director's application for permanent guardianship order was granted — During trial, judge concluded that Family Law Act ("FLA") guardianship applications commenced by family members were suspended for as long as director had custody of children and that hearing would proceed on merits of director's application under Child, Youth and Family Enhancement Act ("CYFEA") — Mother appealed — Appeal dismissed — Court could not grant private guardianship application brought pursuant to provisions of FLA when children were in custody of director pursuant to provisions of CYFEA — Private guardianship provisions contained in FLA did not apply — Division 5 of CYFEA created complete code with respect to guardianships in situations where child was in care of director — Mother's argument regarding constitutionality of Division 5 of CYFEA was not considered on appeal as it had not been before lower court.

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Cases considered by J.D.B. McDonald J.:

Aftergood v. Alberta (Minister of Municipal Affairs) (2006), 367 W.A.C. 189, 384 A.R. 189, 22 M.P.L.R. (4th) 175, 141 C.R.R. (2d) 157, 2006 ABCA 154, 2006 CarswellAlta 592 (Alta. C.A.) — referred to

Alberta (Director, Child, Youth & Family Enhancement Act) v. C. (G.) (2005), 2006 ABPC 23, 2005 CarswellAlta 2053, 26 R.F.L. (6th) 200, (sub nom. *Director of Child, Youth & Family Enhancement Act (Alta.) v. G.C.*) 395 A.R. 89 (Alta. Prov. Ct.) — not followed

Alberta (Director of Child & Family Services) v. S. (L.) (2006), (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services)*) 384 W.A.C. 270, (sub nom. *S. (L.) v. Alberta (Director of Child & Family Services)*) 397 A.R. 270, 2006 ABCA 319, 2006 CarswellAlta 1423, 68 Alta. L.R. (4th) 110, 33 R.F.L. (6th) 1 (Alta. C.A.) — considered

Alberta (Minister of Public Works, Supply & Services) v. Nilsson (2002), 2002 CarswellAlta 1491, 2002 ABCA 283, 14 C.C.L.T. (3d) 163, 320 A.R. 88, 288 W.A.C. 88, 8 Alta. L.R. (4th) 83, 220 D.L.R. (4th) 474, 77 L.C.R. 241, [2003] 2 W.W.R. 215, 5 R.P.R. (4th) 159 (Alta. C.A.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — referred to

Innovative Health Group Inc. v. Calgary Health Region (2006), 2006 ABCA 184, 2006 CarswellAlta 720, 384 A.R. 378, 367 W.A.C. 378, 70 Alta. L.R. (4th) 15 (Alta. C.A.) — referred to

J. (J.), Re (2005), (sub nom. *Nova Scotia (Minister of Health) v. J. (J.)*) 250 D.L.R. (4th) 1, (sub nom. *Nova Scotia (Minister of Health) v. J.J.*) [2005] 1 S.C.R. 177, 2005 SCC 12, 2005 CarswellNS 114, 2005 CarswellNS 115, (sub nom. *Nova Scotia (Minister of Health) v. J.J.*) 331 N.R. 103, (sub nom. *Nova Scotia (Minister of Health) v. J.J.*) 231 N.S.R. (2d) 1, (sub nom. *Nova Scotia (Minister of Health) v. J.J.*) 733 A.P.R. 1, 15 E.T.R. (3d) 217 (S.C.C.) — not followed

Pointe-Claire (Ville) c. Syndicat des employées & employés professionnels-les & de bureau, local 57 (1997), 1997 CarswellQue 86, [1997] L.V.I. 2841-1, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) 97 C.L.L.C. 220-039, (sub nom. *Pointe-Claire (Ville) v. Syndicat des employées & employés professionnels-les & de bureau, section locale 57 (S.E.P.B. - U.I.E.P.B. - C.T.C. - F.T.Q.)*) 211 N.R. 1, 28 C.C.E.L. (2d) 177, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) 146 D.L.R. (4th) 1, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) [1997] 1 S.C.R. 1015, 46 Admin. L.R. (2d) 1, 1997 CarswellQue 87 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — considered

U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare) (2003), 34 R.F.L. (5th) 181, 13 Alta. L.R. (4th) 1, 223 D.L.R. (4th) 662, 2003 ABCA 66, 2003 CarswellAlta 300, (sub nom. *C.U. v. McGonigle*) 327 A.R. 25, (sub nom. *C.U. v. McGonigle*) 296 W.A.C. 25, [2003] 6 W.W.R. 629 (Alta. C.A.) — considered

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W. (K.V.) v. Alberta (Director of Child Welfare) (2006), 2006 CarswellAlta 1773, 2006 ABCA 404, [2007] 3 W.W.R. 626, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 391 W.A.C. 175, (sub nom. *K.W. v. Director of Child Welfare (Alta.)*) 401 A.R. 175, 69 Alta. L.R. (4th) 215 (Alta. C.A.) — not followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — referred to

s. 15 — referred to

Child Welfare Amendment Act, 2003, S.A. 2003, c. 16

Generally — referred to

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

Generally — referred to

Pt. 1, Div. 5 — referred to

s. 39 — referred to

s. 52 — referred to

ss. 52-57.1 — considered

s. 52(1) — referred to

s. 52(1.1) [en. 2003, c. 16, s. 55(a)] — referred to

s. 52(1.2) [en. 2003, c. 16, s. 55(a)] — referred to

s. 52(2) — referred to

s. 55 — referred to

s. 56 — referred to

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 17(1)(c) — referred to

s. 23 — referred to

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s. 23(5) — referred to

s. 23(5)(b) — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 24(1) — referred to

APPEAL by mother from judgment reported at *M. (F.), Re* (2007), 2007 ABPC 44, 2007 CarswellAlta 213 (Alta. Prov. Ct.), granting director's application for permanent guardianship order.

J.D.B. McDonald J.:

Introduction

1 This is an appeal from the decision of Lipton, PCJ delivered orally on February 7, 2007 and supplemented by written reasons released on February 20, 2007 and reported at 2007 ABPC 44 (Alta. Prov. Ct.). In his decision, Lipton PCJ held that the applications for private guardianships brought pursuant to the revisions of the *Family Law Act*. S.A. 2003, Chapter F-4.5 (the "*FLA*") were to be suspended for as long as the Director had custody of the children in question.

Facts

2 The Appellant, S.D.M., is the mother of the two subject children in question, namely, F.M. and D.M.

3 The children were apprehended by the Director on March 24, 2006. The Appellant was incarcerated for a brief period of time and had left the children in the care of another party from whom they were removed.

4 The Director applied for a supervision order which was opposed by the parents and the matter came before Lipton PCJ who rejected the Director's proposal and instead issued an apprehension order for the children.

5 The Director subsequently brought an application for a temporary guardianship order (TGO) and later revised the application to apply for a permanent guardianship order (PGO).

6 The Director's application for a PGO was brought pursuant to the provisions of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, Chapter C-12 (the "*CYFEA*").

7 The Appellant opposed the Director's application and the matter proceeded to trial on January 15, 2007.

8 During the trial, the Court considered whether the applications for private guardianship filed by various family members pursuant to the provisions of the *FLA* should be heard at the same time as the Director's application. The Court received both oral and written submissions in this regard.

9 On February 7, 2007, the Court delivered judgment on these interlocutory matters and held that the *FLA* guardianship applications must be suspended for as long as the Director had custody of the children and that the hearing would proceed on the merits of the Director's application under the *CYFEA*.

10 On July 20, 2007, the Court granted the Director's applications under the *CYFEA* for a PGO of the children.

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11 For the reasons set out hereafter, I hereby dismiss the within appeal.

Issues on Appeal

1. Can the Court grant a private guardianship application pursuant to the provisions of the *FLA* when the children who are the subject of that application are in the custody of the Director pursuant to the provisions of the *CYFEA*?
2. Are the private guardianship provisions contained in Division 5 (Sections 52 to 57.1) of the *CYFEA* a violation of the *Canadian Charter of Rights and Freedoms*, Section 7 and/or Section 15?

Standard of Review

12 The first issue requires interpretation of statutory provisions and therefore, the applicable standard of review is correctness : *Innovative Health Group Inc. v. Calgary Health Region*, 2006 ABCA 184, 384 A.R. 378 (Alta. C.A.) at para. 13.

13 The second issue was not addressed in the Court below and therefore there is no decision to be reviewed by this Court.

Law and Analysis

1. Can the Court grant a private guardianship application pursuant to the provisions of the FLA when the children who are the subject of that application are in the custody of the Director pursuant to the provisions of the CYFEA?

14 The *Child Welfare Amendment Act* S.A. 2003 c.16, amended the *Child Welfare Act* R.S.A. 2000 ch.C-12 (the "CWA"). On November 1, 2004, almost all of the changes made to the CWA were proclaimed into force including changing the name of the Act to the *CYFEA*. However, the private guardianship provisions contained in Division 5 (Sections 52 to 57.1) of the *CYFEA* were not proclaimed into force until October 1, 2005 at which time the *FLA* also became law.

15 Prior to October 1, 2005, Section 52 of the *CYFEA* stipulated that any adult who had the continuous care of a child for more than 6 months could apply to the Court for a private guardianship. This time period requirement could be waived by the Court. A private guardianship order could not be made in respect of a child who was the subject of a TGO or if the purpose of the application was to facilitate an adoption. An application with respect to a child subject to a PGO could not be made until the appeal period expired.

16 Section 55 of the *CYFEA* stipulated that a private guardianship could not be made without the consent of the child's guardian and the child if that child was twelve years of age or older. The Court could dispense with the consent of a guardian other than a Director or the child, if the Court was satisfied that it was in the best interest of the child to do so.

17 Effective October 1, 2005, both Section 52 and 56 of the *CYFEA* were amended. Sections 52 and 56 now read as follows:

52(1) Any adult who for a period of at least one month has had the continuous care of a child who is in the custody of a director or is the subject of a temporary guardianship order or a permanent guardianship agree-

ment or order may apply to the Court in the prescribed form for a private guardianship order in respect of the child.

(1.1) An application under subsection (1) must include a report in the prescribed form prepared by a qualified person respecting

- (a) the suitability of the applicant as a guardian,
- (b) the ability and willingness of the applicant to assume the responsibility of a guardian with respect to the child, and
- (c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(1.2) If the child is the subject of a permanent guardianship agreement or order, the report required under subsection (1.1) must be prepared by a director.

(2) A director may, on behalf of an applicant, make an application under subsection (1) if

- (a) the applicant consents in writing, and
- (b) the director is satisfied that it is in the best interests of the child for the child to be placed under the guardianship of the applicant.

56(1) If the Court is satisfied that

- (a) the applicant is able and willing to assume the responsibility of a guardian toward the child,
- (b) it is in the best interests of the child, and
- (c) the child has been in the continuous care of the applicant for a period of at least 3 months immediately prior to the hearing,

the Court may make a private guardianship order appointing the applicant as a guardian of the child.

(1.1) On making an order under subsection (1), the Court may include terms respecting custody of and contact with the child.

(2) The clerk of the Court shall provide a certified copy of an order made under subsection (1) to

- (a) the applicant,
- (b) any person who was a guardian of the child immediately before the making of the order,
- (c) the child, if the child is 12 years of age or older, and
- (d) a director, if a director was not the guardian of the child immediately before the making of the order.

18 There is no provision in either section for the Court to waive the time periods.

19 Section 23 of the *FLA*, dealing with private guardianship orders came into effect on October 1, 2005 and provided as follows:

23(1) The court may, on application by a person who

(a) is an adult and has had the care and control of a child for a period of more than 6 months, or

(b) is a parent or other than a guardian of a child, make an order appointing the person as a guardian of the child.

(2) The court may, on application by a child, make an order appointing a person as a guardian of the child if

(a) the child has no guardian, or

(b) none of the child's guardians is able or willing to exercise the powers, responsibilities and entitlements of guardianship in respect of the child.

(3) The court on hearing an application for a guardianship order shall consider, and may require the applicant to provide the court with a report prepared by a qualified person respecting,

(a) the suitability of the proposed guardian as a guardian,

(b) the ability and willingness of the proposed guardian to exercise the powers, responsibilities and entitlements of guardianship in respect of the child, and

(c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

(4) Subject to subsection (5), a person may not apply for a guardianship order unless the child or proposed guardian resides in Alberta.

(5) If it is satisfied that there are good and sufficient reasons for doing so, the court may waive the requirement

(a) that the child or proposed guardian reside in Alberta, or

(b) in the case of an application under subsection (1)(a), that the applicant has had the care and control of the child for a period of more than 6 months.

(6) Subject to the regulations, the court may at any time on its own motion make a guardianship order appointing a guardian of a child, other than a director under the *Child, Youth and Family Enhancement Act*, to act jointly with another guardian of the child.

(7) The court may, in making a guardianship order under this section or terminating the guardianship of a guardian under section 25, make a parenting order on its own motion or on application by one or more of the parties.

(8) No order may be made under subsection (1) or (2) if the purpose of the application is to facilitate the adoption of the child. (*emphasis added*)

20 In *U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare)*, 2003 ABCA 66 (Alta. C.A.), the Alberta Court of Appeal considered the refusal of parents and child to consent to blood transfusion. The child was found in need of protective services and blood transfusions were authorized. On appeal, the child fought, among other declarations that as a mature minor that she was entitled to refuse treatment. The Court held that the mature minor rule does not apply to child welfare proceedings where a child does not consent to essential medical treatment recommended by a doctor. At para. 37 of its decision, the Court of Appeal agreed with the decision of the Queen's Bench Judge that held that the CWA provided a complete code respecting that particular issue.

21 More recently, in *Alberta (Director of Child & Family Services) v. S. (L.)*, 2006 ABCA 319 (Alta. C.A.), the Alberta Court of Appeal held that the CYFEA creates a complete code concerning appeal procedures.

22 Lipton, PCJ in the court below suggested that the reasoning in *Alberta (Director of Child & Family Services) v. S. (L.) supra* should be extended to the entire CYFEA. He held that the moment a Director obtained custody of a child, the Director has met the test of "need for protective services" and only guardianship applications which meet the requirements of Section 52 of the CYFEA can be considered by the Court in those circumstances.

23 On the other hand, it has been argued (and indeed accepted by O'Gorman, PCJ in *M.J. and D.S.*) that Section 17(1)(c) of the FLA at least implicitly recognizes that an application can be made pursuant to Section 23 of the FLA even in a situation where the child is in the custody of a Director.

24 Counsel for the Director Respondent takes the position that this section is meant to do nothing more than require that notice be given to the Director so that he can then intervene in those proceedings to inform the Court that the child is in his custody and hence must be dealt with in accordance with the requirements of the CYFEA.

25 Counsel for the Appellant cited the decision in the Court of Appeal in *W. (K.V.) v. Alberta (Director of Child Welfare)*, 2006 ABCA 404 (Alta. C.A.), at para. 37, as follows:

Although both the aunt's application for private guardianship and the Director's application for permanent guardianship could be heard together, there being sound reasons for doing so in many cases, the Court should have considered the merits of the aunt's application for private guardianship first. Once this was resolved, only then could the Court properly assess whether Baby M was in need of protective services.

26 This decision dealt with the legislation as it existed prior to the amendments that came into effect on October 1, 2005. As such, it does not deal with the current legislative regime and in my view is of limited assistance for that reason.

27 Counsel for the Appellant also cited the decision of the Supreme Court of Canada in *J. (J.), Re*, 2005 SCC 12 (S.C.C.) and in particular, quoted Madame Justice Abella, at para. 23 as follows:

The significance of independent judicial review of state action when a vulnerable adult has been deprived, at the instigation of the state, of the right to function autonomously, cannot be overstated. The court's statutorily assigned supervisory role emerges from the adult's vulnerability. The corollary of a judicial determination that an adult is in need of protection is a corresponding limitation on that adult's autonomous decision making and liberty. It is the function of the court to monitor the scope of that limitation. The legislation

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must, therefore, be interpreted in a way which acknowledges the intrusiveness of the determination and offers muscular protection from state intervention incompatible with the adult's welfare. Section 9(3)(c) should not be applied in a way that frustrates that responsibility.

28 Notwithstanding Madame Justice Abbella's strong comments quoted above, it seems to me that the case turned more on the particular wording of the Nova Scotia statute and the decision is not to be taken as authority for the Courts to willy-nilly re-write legislation, in the absence of a properly brought *Charter* application.

29 Counsel for the Respondent Director cites the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re, 1998 CarswellOnt 1* (S.C.C.), at para. 21, wherein the Court in turn quotes from Driedger in *Construction Statutes* (2nd Ed.) 1983 at pg. 87, as follows:

Today there is only one principle or approach, namely, that the words of an Act are to be read in their entire context and in a grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

30 Furthermore, there is a presumption in statutory interpretation that the Legislature did not intend to create conflicting or contradictory statutes or provisions: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) at para. 50. The provisions must be presumed to be coherent, urging an interpretation that favours harmony: *Pointe-Claire (Ville) c. Syndicat des employées & employés professionnels & de bureau, local 57*, [1997] 1 S.C.R. 1015 (S.C.C.).

31 In particular, the Director argues that the specific (namely the guardianship provisions contained in Division 5 of the *CYFEA*) should govern over the general (being the provisions of Section 23 of the *FLA*) since the former only applies to those children who are in the custody of a Director.

32 It is, I believe, not without significance that the *FLA* and the amendments to Sections 52 and 56 of the *CYFEA* both became law on the same date, i.e., October 1, 2005.

33 I have mentioned previously the Alberta Court of Appeal decision in *Alberta (Director of Child & Family Services) v. S. (L.) supra* which held that the *CYFEA* creates a complete code concerning appeal procedures, even though there is no specific language in the *CYFEA* mandating such a result. In my view, the legislature also intended that Division 5 of the *CYFEA* and the provisions of the *FLA* were to be congruent and not in conflict one with the other.

34 Regard should also be had to the provisions of Section 39 of the *CYFEA*. This section, in my view, makes it clear that a PGO will take precedence over other orders not made under the *CYFEA* with respect to custody, access, contact, parenting time or place of residence.

35 Accordingly, I hold that Division 5 (Sections 52 to 57.1) of the *CYFEA* creates a complete code with respect to guardianships in those situations where the child is in the care of the Director and that the private guardianship provisions contained in the *FLA* do not apply.

36 By this decision, I am not to be taken as suggesting the entire *CYFEA* is a complete code. Such, in my view, is not the case. For example, the Director is obliged to resort to the provisions of the *FLA* to obtain support payments.

2. Are the private guardianship provisions contained in Division 5 (Sections 52 to 57.1) of the *CYFEA* a viol-

ation of the Canadian Charter of Rights and Freedoms, Section 7 and/or Section 15?

37 This issue was not raised in the Court below. Indeed, notice of this issue was only raised for the first time on appeal here.

38 As a result, counsel for the Minister of Justice and Attorney General of Alberta made a preliminary objection to this issue being dealt with on appeal as it had not been raised in the trial below.

39 Section 24(1) of the *Judicature Act* RSA 2000 Chapter J-2 provides as follows:

If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and the Attorney General of Alberta.

40 The Alberta Court of Appeal has made it very clear the constitutional arguments should not be raised for the first time on appeal, particularly in the absence of a contextual evidentiary foundation: *Aftergood v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 154 (Alta. C.A.) para.4, and *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283 (Alta. C.A.), at para. 170-172.

41 In light of the fact that this issue was not raised in the Court below, I hold it cannot be raised for the first time on appeal.

42 I might add in passing, that counsel for the Appellant has placed considerable emphasis on the decision of Dalton, PCJ in *Alberta (Director, Child, Youth & Family Enhancement Act) v. C. (G.)* (2005), 395 A.R. 89 (Alta. Prov. Ct.). I would simply state that Dalton, PCJ's comments regarding the constitutionality of the private guardianship provisions is purely obiter and of no legal force.

Conclusion

43 I dismiss the within appeal and hold as follows:

(a) A court cannot grant a private guardianship application brought pursuant to the provisions of the *FLA* when the children who are the subject of that application are in the custody of the Director pursuant to the provisions of the *CYFEA*;

(b) The Appellant's argument regarding the constitutionality of Division 5 of the *CYFEA* having not been before the Court below, will not be considered by this Court on appeal.

Appeal dismissed.

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