Citation: *Re: D.G.I* and *In the Matter of S.C. and D.C.*, 2004 YKTC 15

Date: 20040316
Docket: 02-T0032
93-0734
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Barnett

IN THE MATTER OF the *Children's Act*, R.S.Y. 2002, c. 31, as amended

AND IN THE MATTER OF D.G.I.

And

IN THE MATTER OF the *Children's Act*, R.S.Y. 2002, c. 31, as amended

AND IN THE MATTER OF S.C. and D.C.

Ban of Publication:
PUBLICATION OF IDENTIFYING INFORMATION IS PROHIBITED BY SECTION 172 OF THE *CHILDREN'S ACT*.

Appearances:

Zeb Brown	Appearing for the Director
David Christie	Appearing on behalf of the mother (E.I. – 02-T0032)
	Appearing on behalf of the father (F.C. – 93-T0734
Debbie Hoffman	Appearing on behalf of the Child Advocate (C matter only)[i]

REASONS FOR JUDGMENT

[1] In each of these matters, the Director of Family and Children's Services seeks orders committing children to her permanent care and custody.

[2] Mr. Christie, who acts for one parent only in each matter, has filed applications for orders that the Director disclose "all relevant documents in the possession of the Director" *and that such documents be delivered to him without*

cost. The principal issues concern Mr. Christie's submission (with which Ms. Hoffman concurs) that the Director be required to deliver the disclosed documents to him and to do so at no cost to him or his clients.

[3] The Director has filed cross-applications and seeks orders requiring the parents in each matter to make disclosure to her. The Director's applications are supported by the Official Guardian upon whose instructions Ms. Hoffman appears.

[4] The law concerning the disclosure of documents in criminal and child protection cases has substantially developed since the decision of the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; 68 C.C.C. (3d) 1.

[5] The other seminal decision which bears upon the present applications is that of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. J.G.*, [1999] 3 S.C.R. 46. This decision established, *inter alia*, the following principles concerning child protection hearings:

1. The interests at stake are of the highest order (para. 76).
2. Child protection proceedings are neither criminal nor administrative: "they do not admit of easy classification". But they are "effectively adversarial" and fair hearing procedures are a constitutional requirement (para. 44, 70, 73, 78, 79 and 119).

The court ruled that the government of New Brunswick could not justify its policy of denying legal aid to indigent parents in child protection cases. The objective of saving money was not "of sufficient importance to deny the appellant a fair hearing" (para. 100 and 110).

[6] Mr. Christie and Ms. Hoffman assert that the disclosure policies which presently prevail in the Yukon Territory are not appropriate and adequate.

[7] The *Children's Act* does not specifically provide for disclosure. There are no relevant regulations or rules of court specific to the Yukon Territory. In these circumstances, until 1997, the Director was unwilling to disclose her files to parents or their counsel and would only disclose the documents that she intended to rely upon during court hearings. That practice was challenged and on September 26, 1977, Judge Jackson delivered a reserved decision in *Re: R.I.,* [1997] Y.J. No. 90. Her decision was given in response to an application that "the Director of Family and Children's Services make full and complete disclosure of her files and any other documentation in her possession with respect to this matter". Judge Jackson ruled that this court does have the jurisdiction and authority to determine the process of disclosure which must be made during the course of child protection proceedings and that:

> All relevant documents and information that are in the possession of the Director as a result of the performance of his or her duties … ought to be disclosed subject to privilege (para. 34).

[8] The Director and her counsel claim that the current disclosure policies and procedures comply with Judge Jackson's decision.

[9] Although the application before her did not require that she do so, Judge Jackson went on to consider what she termed "the mechanics of disclosure". She said:

> (I)t is my view that such an order for disclosure may be complied with by the Director, or its designate, allowing counsel or the parents, if not represented by counsel, to inspect and review these files at the office of the Director, or its designate, as opposed to giving copies of each of the documents to counsel or the parents (para. 36).…With respect to money, counsel for the parents, or the parents, will not be entitled to have copies of every document (para. 33).

[10] It is not entirely clear from these comments that Judge Jackson anticipated that parents or their counsel would be required to pay for copies of relevant documents. I presume that was her intention, following the decision of Judge Stansfield in *British Columbia (Director of Family and Child Services) v. T.L.K.*; November 5, 1996; [1996] B.C.J. No. 2554. Judge Stansfield said:

> "Disclosure" need not include photocopying and delivering all documents; subject to any order to the contrary, it is sufficient if the other parties are provided with a reasonable and timely opportunity to inspect all documents, and to copy at their own expense such of them as they require. (para. 14, #10)

[11] Mr. Christie and Ms. Hoffman say that disclosure upon these terms and conditions is not satisfactory. Mr. Christie relies principally upon the decision of Bielby J. in *S.D.K. v. Alberta (Director of Child Welfare)*; January 18, 2002; [2002] A.J. No. 70; 1 Alta. L.R. (4^{th}) 48.

[12] In that case, the Director of Child Welfare had apprehended three children from their father and was seeking a temporary guardianship order. Counsel for the mother requested that the Director provide "full disclosure". The Director was willing to permit the mother's counsel to attend at its offices (without his client) to examine the entire un-vetted file and was also willing to provide copies of documents requested by him after vetting. The Director was not willing to simply deliver copies of the relevant documents to the mother's counsel. He, therefore, applied to the court and when the application was dismissed, he appealed to the Alberta Court of Queen's Bench. Bielby J was specifically asked to order that the Director be required to review and vet the file, copy the relevant documents, and deliver them.

[13] In the *S.D.K.* case counsel for the mother submitted ten reasons (para. 42) why the order he sought should be made. In the context of the present applications, I believe that the following of those reasons are the most significant:

1. The request does not require the expenditure of more time and effort. The file must be carefully reviewed before the scheduled hearing in any event (para 42(a)).
2. The fact that inspection and review appointments are available only during the Director's office hours (or, possibly, at other times by special arrangement) limits the ability of counsel to properly prepare for hearings in a very real way because, of necessity, much of this work must be done outside "normal" working hours (para 42(c)).
3. The procedures presently required by the Director can lead to avoidable delays (para 42(d)).

In the present matters, Mr. Christie and Ms. Hoffman submit that there are other reasons why the present policies in the Yukon are unsatisfactory and even unfair:

4. Mr. Christie submits that it is demeaning to require that he and his clients attend at the Director's offices. There are, he submits, "power imbalance" issues involved. And, as Judge Jackson observed in the *Re: R.I.,* case, *supra*, relationships between parents and members of the Director's staff are often very strained in these cases.
5. Mr. Christie submits that his clients in the present matters (and most of his clients in other similar cases) are genuinely indigent as is well known to the Director and as they have sworn in affidavits filed in support of these applications. Mr. Christie submits that the requirement that payment be made for copies is an intentional, practical, and effective bar to his obtaining full disclosure.

[14] In the *S.D.K.* case, *supra*, Bielby J decided that, in Alberta, when the Director receives a request for disclosure in a child protection case, the "proper disclosure process" includes, *inter alia*, the following steps:

1. "Departmental personnel" should vet their file, identify and remove any irrelevant or privileged material; and then
2. "The balance of the information should be copied and forwarded to the parent or … counsel" and that this should be done at no cost to the parent or counsel for the parent (para 50 & 51).

[15] The Director's counsel, Mr. Brown, contends that decision in the *S.D.K* case draws largely upon provisions in the Alberta Rules of Court providing for the "discovery of records" and upon a specific Alberta Regulation which authorizes a judge to design disclosure practice and procedure in proceedings under the *Child Welfare Act* of Alberta and he therefore submits that the case has no application in the Yukon Territory. This argument is not without merit but in my opinion it cannot prevail. Madam Justice Bielby wrote her decision in the *S.D.K.* case having had the very real benefit of the guidance given by the Supreme Court of Canada in the *New Brunswick* case, *supra*. She very clearly understood that disclosure practice and procedure in child protection cases needs to be customized "to reflect the unique features of child protection matters". She said that "neither the criminal nor civil disclosure process in their entirety meet its requirements" but that "the proper starting point in the design of a disclosure process should be the process which has been endorsed by the Supreme Court of Canada … in the *Stinchcombe* decision" (para 38, 43 & 48). The foundation underlying the *S.D.K.* decision is not legislation, regulations, or rules of court unique to the Province of Alberta.

[16] Mr. Brown also correctly submits that certain rules of court conceivably can be said to have application to child protection proceedings in the Yukon Territory. The tortuous route is as follows:

1. There are no rules respecting the practice and procedures of the Territorial Court of Yukon made pursuant to ss. 64 & 65 of the *Territorial Court Act*, R.S.Y. 2002 c. 217. The rules of practice and procedure followed in the Supreme Court of the Yukon Territory, *modified as suits the case*, are to be followed: see s. 76(1).
2. The *Rules of the Supreme Court of British Columbia* are followed in the Supreme Court of the Yukon Territory: *Judicature Act*, R.S.Y. 2002 c. 128, s. 38.
3. The *Rules of the Supreme Court of British Columbia* regulate civil practice in British Columbia. Disclosure is governed by Rule 26 and Rule 26(9) does provide that copies of discoverable documents are to be delivered to the demanding party "on payment in advance of the cost of reproduction and delivery".

[17] The *Rules of the Supreme Court of British Columbia* do not apply in child protection cases in British Columbia and I have no hesitation in saying that they do not "suit the case" for matters brought before the Territorial Court of Yukon pursuant to the *Children's Act*. (I also note that in the Director's Supplementary Memorandum of Argument, filed March 5, 2004, Mr. Brown concedes that the *Rules of the Supreme Court of British Columbia* are substantially inconsistent with the nature of child protection proceedings).

[18] Mr. Brown does not concede that this court has the authority to make the sort of order or give the sort of directions that Mr. Christie seeks. He correctly observes that no legislation specifically authorizes the Territorial Court of Yukon (which is, of course, a statutory court) or a judge of the court "to devise its own rules of procedure for child protection matters". I am satisfied however that the

authorities make very clear the fact that this power does exist and that the *de facto* procedural rules which Mr. Brown suggests have evolved in the Yukon can be varied by an order of this court. See *R. v. Felderhof*, Ontario Court of Appeal; December 10, 2003; [2003] O.J. No. 4819 (esp para 33, 36, 38, 40, 41, 42 and 43): *Re R.I.*, *supra*, (esp para 19 to 22) and *British Columbia (Director of Family and Child Services) v. T.L.K.),* supra, (esp para 9 and 12).

[19] Mr. Brown suggests that the *de facto* procedural rules which have evolved in the Yukon include the following:

1. The Director's case is fully disclosed in detailed affidavits which are filed with the court, served upon the parents, and delivered to parents' counsel.
2. The Director will allow parents' counsel (and parents also) to attend at her offices and to there review the relevant portions of her file.
3. The Director will provide copies of relevant documents from her files providing however that parents or their counsel pay the costs of copying.

[20] The Director's belief is still that the affidavits which her staff prepare and file with the court should provide sufficient disclosure for most parents in most cases. She is anxious – understandably so – about providing copies of documents which may be very sensitive. She therefore favours practices which "minimize the circulation of copies of our files". The Director's position is that "requiring the applicant to bear the cost of making copies of the file is a necessary incentive to limit the distribution of copies to those parts of the file that are required". The Director is also concerned that if she were required to provide a "premium" disclosure service it would be very expensive (Her concerns are more fully expressed in her affidavit filed February 12, 2004 (Ex 2 upon this application) and the memoranda of argument submitted by Mr. Brown).

[21] The Director's concerns in the present matters mirror those expressed by the Director in the *S.D.K*. case, *supra*. Bielby J summarized the reasons advanced by the Director in Alberta for the limiting practices and policies that the Director in that province favoured. They were:

> (a) cost-saving – Departmental personnel do not need to vet the file to remove irrelevant information or that which might identify informants before allowing defence counsel an opportunity to attend and review the file; also, photocopying costs are reduced by copying less than the entire file;
> (b) potential for misuse – while disclosure could be provided on the written condition that it be used only in regard to the matter before the Court, if the entire file passed into the hands of one of the parents the potential is present for the information therein to be misused; Department counsel gave an anecdotal example of a resident in a small community using file contents to harass and embarrass a neighbor;
> (c) full and frank exchange of information between parents and Departmental personnel is in the best interest of children and is encouraged by advising parents and others that there will be limited circulation of the resulting information. (para 26)

[22] In the *S.D.K*. case Madam Justice Bielby observed that the Director's policies gave "the appearance of the Department attempting to discourage counsel from seeking proper disclosure by erecting a time-consuming barrier". (para 51)

[23] In the *New Brunswick* case, *supra*, which Mr. Christie correctly suggests "changed everything" the Supreme Court of Canada rejected the notion that the objective of limiting legal aid expenditures and thus achieving modest/minimal

budgetary savings was “of sufficient importance to deny the appellant a fair hearing”. (para 100)

[24] The Director cannot fairly be faulted for her policies: they were established to comply with Judge Jackson’s 1997 decision in the *Re: R.I.* case, *supra*. But I cannot accept Mr. Brown’s submission that some of these policies have evolved and been “adopted voluntarily by the Director and counsel”. The fact is that, excepting the procedures required by Judge Jackson’s decision, the present policies were established by the Director and by her alone.

[25] Ms. Hoffman appears specifically for the Child Advocate appointed in the C case but tells me that her submissions express the views of all Yukon lawyers who appear as child advocates in child protection cases. She submits that “the present system does not work”, is not fair, and is wasteful of time and money. In making these submissions Ms. Hoffman relies, in part, upon the Director’s own affidavit where it is stated that, “the last time counsel attended to review our files in preparation for a permanent application was prior to June 2001”.

[26] While Ms. Hoffman was making her submissions I asked if child advocates were required to pay for copies of documents disclosed by the Director. I was told that the answer to that question is “no”. That policy is clearly discriminatory and unfair to parents.

[27] In the *New Brunswick* case, *supra*, the Supreme Court of Canada said:

> For the (child protection) hearing to be fair, the parent must have an opportunity to present his or her case effectively. (para 73)

[28] When a permanent order is sought a fair hearing cannot happen if an indigent parent is denied the right to be represented by state-funded counsel. But neither can a fair hearing be anticipated if procedural barriers make it

unnecessarily difficult for parents' counsel to prepare his or her clients' case effectively.

[29] That is the effect of the present policies and practices in the Yukon.

[30] In his supplementary memorandum of argument Mr. Christie says that:

> It is ironic, unfair, and unreasonable that the state in this case is intervening in the parent's liberty and security of their person, then charging them to photocopy documents necessary to challenge that intervention.

[31] I would not express my opinion in such harsh words but I do agree with the thrust of Mr. Christie's submission. It is fundamentally important to recall and acknowledge (as did Madam Justice L'Heureux-Dubé in the *New Brunswick* case, *supra*, at para 114) that:

> The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system….

[32] In *R.* v. *Stinchcombe, supra*, Sopinka J. traced the evolution of the law concerning disclosure from historical times and observed that this "wholly natural evolution of the law" is a continuing process with "many details … that remain to be worked out in the context of concrete situations". (*S.C.R*. pp 338b & 341h; C.C.C. pp. 10f & 13b)

[33] The law has similarly evolved since Judge Jackson's 1997 decision in the *Re: R.I.* case, *supra*. In cases where the Director seeks permanent care and custody orders, she and counsel will be guided by the following:

1. Counsel for the parents (or the parents themselves) will trigger the disclosure process by making a written request to counsel for the

Director. (An application to the court is not necessary or appropriate at this stage.)

2. The request should be made well in advance of the pre trial conference: 45 days would be an appropriate time and the Director will be expected to comply by delivering copies of all relevant documents and information to counsel for the parents (or the parents themselves) within 30 days.
3. It is the professional responsibility of counsel for the Director to review the Director's files and determine what material is to be disclosed. This is not a task which can be delegated: it must be performed or overseen by counsel, he or she being an officer of the court.
4. Those documents which counsel for the Director considers to be relevant are to be copied and delivered at the Director's expense.
5. Counsel for the Director will concurrently deliver a list of those documents which he or she considers should not be disclosed by reason of privilege or otherwise.
6. If counsel for the parents (or the parents themselves) wish to attend at the Director's offices to review the files, that is to be permitted. If further relevant documents are identified they are to be copied and delivered. (If however counsel for the Director asserts a claim of privilege, the issue is to be reviewed upon an application to the court.)

[34] These guidelines are predictated upon certain understandings which are:

1. The Director will continue to provide detailed affidavits and "will say" statements.
2. In those cases – such as that concerning the children S.C. and D.C. – where there is a long history involving many apprehensions, the Director is not required to disclose "everything". The

requirement is that all relevant material be disclosed. That will normally be limited to disclosure of materials supporting the current originating application (in the C case that is the application filed by the Director July 9, 2002) and any material concerning previous applications and orders that the Director intends to introduce at the hearing. The Director will not normally be expected to bear the cost of providing additional materials.

3. These guidelines specifically apply in those cases where the Director seeks permanent orders. Mr. Christie and Ms. Hoffman limited their submissions to such cases. It may be that in the Yukon, where it is the practice for the Director's applications to be supported by quite detailed affidavits at all stages of child protection proceedings, that different disclosure practices and procedures will be appropriate in those matters where the Director seeks interim, temporary, or supervisory orders.

[35] The Director takes the position that if this court can order her to disclose her files, it can and should also order that parents disclose any relevant documents and other materials that may be in their possession. I agree. And I specifically observe that the responsibility of parents is no different than that of the Director: relevant documents include those which are adverse to their interests and are not limited to those they may intend to introduce during the hearing. See the *T.L.K.* case, *supra*, at para 14.

[36] I want to comment upon the Director's understandable concerns that some documents she is required to disclose are very sensitive and might be used for improper purposes.

[37] Mr. Christie's applications are for disclosure "subject to the following restraints":

(a) names of informants other than the parties or any information tending to disclose the identity of informants shall be deleted;
(b) information given to the Director by third parties in confidence on the basis that it would not be disclosed shall not be disclosed;
(c) information with respect to which a claim of privilege is otherwise advanced such as documents prepared in contemplation of litigation or information subject to solicitor client privilege shall not be disclosed;
(d) no information regarding any youth record shall be disclosed unless authorized by a Youth Court Judge;
(e) no information relating to any person including any child in care or former child in care not involved in this proceeding shall be disclosed where such disclosure would be an unreasonable invasion of personal privacy;
(f) any and all information disclosed by the Director shall be limited to use in these proceedings and its parties and their counsel shall not use the information for purposes outside these proceedings and, on the conclusion of litigation, counsel for the Applicant shall return to counsel for the Director, all copies of the disclosed documents except for documents filed with the Court, or provided to an investigator retained or appointed with the consent of the parties or court order, upon demand by the Director; and
(g) the Director shall have liberty to apply with respect to any issue arising from a claim of privilege. [ii]

[38] These conditions are appropriate and are to be included in the order now made. I expect that the Director will wish to receive undertakings with similar conditions when she provides disclosure in accordance with these reasons. And I observe that in particularly sensitive cases the court may impose more stringent conditions.

[39] I want finally to comment briefly upon the nature of this decision. It is a decision concerning issues of practice and procedure only. Counsel are agreed upon the nature of the material which must be disclosed from the Director's files.

[40] I wish to thank counsel for their comprehensive submissions.

Barnett T.C.J.

[i] Ms. Lynn MacDiarmid is the Child Advocate appointed pursuant to s. 122(2) of the *Children's Act*. The official guardian instructed Ms. Hoffman to participate in and make submissions during the hearing of these applications only.

[ii] I have taken the liberty of editing/correcting the list of "restraints" somewhat.