

## COURT OF APPEAL

Citation: *The Director of Family and Children's Services*  
v. *Iwaniw*, 2005 YKCA 0003

Date: 20050525  
Docket: C.A. No. 04-YU529  
Registry: Whitehorse

BETWEEN:

**THE DIRECTOR OF FAMILY  
AND  
CHILDREN'S SERVICES**

Appellant

AND:

**ELAINE IWANIW**

Respondent

CORAM: The Honourable Mr. Justice Mackenzie  
The Honourable Mr. Justice Thackray  
The Honourable Mr. Justice Gower

Appearances:  
Zeb Brown  
David Christie  
Debbie Hoffman

For the Appellant  
For the Respondent  
Child Advocate

### REASONS FOR JUDGMENT

[1] MACKENZIE J.A. (Oral): The issue on this appeal involves the authority of a judge of the Territorial Court to order disclosure of documents in permanent child protection cases by the Director of Family and Children's Services to the parents of the child and the official guardian acting as a child advocate.

[2] Territorial Court Judge, Judge Barnett, ordered that the Director copy and deliver to the parents and the child advocate at no cost all relevant documents relating to the parents and the child taken into care, excepting documents subject to claims of solicitor/client privilege and certain other restrictions that are not in issue.

[3] The Director appealed the order to the Supreme Court. Mr. Justice Veale dismissed the appeal and the appeal to this court followed. The terms of the order under appeal are appended as Schedule A to the reasons of Mr. Justice Veale, 2005 YKSC 4. The authority relied on to support the order is s. 176(2) of the *Children's Act*, R.S.Y. 2002, c. 31, and it reads:

No person shall be compelled to disclose any information or document obtained in the course of the performance of duties under Part 3 or 4 except:

- (a) in the course of proceedings before the court or a judge under Part 3 or 4; or
- (b) in any other case, with the consent of the director or on the order of the court.  
*R.S., c. 22, s. 175.*

[4] Judge Barnett relied on the inherent jurisdiction of the Territorial Court and he did not refer directly to s. 176, although he did rely on *Re: R.I.*, 1997 Y.J. No. 90 (QL), which did in turn rely on s.176(2). Mr. Justice Veale upheld the order as a valid exercise of authority under s. 176(2) and that conclusion is the threshold issue on this appeal.

[5] The Director submits that s. 176(2) does not authorize the order and there is no authority elsewhere in the Territorial Court to make the order. The Director contends that her disclosure procedure, which was not accepted by the court, guarantees fairness

and fundamental justice while complying with her statutory duties under the *Children's Act* and minimizing the risk of breaches of confidentiality. The Director's procedure provided copies of all important evidence including comprehensive affidavits dealing with the Director's involvement with the parents and copies of expert assessments and other relevant reports. The Director's file was otherwise made available for inspection and the Director agreed to provide copies of any additional material upon request, with discretion to charge a photocopying fee.

[6] The Director asserts that her procedure complies with the direction of the Territorial Court in *Re: R.I., supra*. The difference between the parties' position in practice is whether counsel for the parents are required to attend the Director's office to get access to the complete file of relevant documents and whether the Director can require payment of a charge for photocopying.

[7] The Director submits that s. 176(2) does not contain an independent grant of authority to the court and only refers to the exercise of an otherwise valid power. She relies on *R. v. Dedman*, [1985] 2 S.C.R. 2. That case involved the power of police officers to stop motor vehicles for licence inspection under s. 14 of the *Ontario Highway Traffic Act*. Mr. Justice Le Dain, delivering the opinion of the majority of the court, distinguished at paragraph 62 between the duty of a driver to surrender a licence for inspection on demand and the power in the police officer to stop a vehicle for such purpose.

[8] In my view, *Dedman* is of little assistance in interpreting s. 176 of the *Children's Act*. The section has general application to custody disputes between the Director and parents in which the interests involved are hard to overstate.

[9] In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, Chief Justice Lamer C.J. described these interests in the strongest of terms:

The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

[10] The ability to obtain full disclosure of relevant documents is a necessary incident of the exercise of those interests. Section 176(1) modifies the right to disclosure otherwise applicable by generally prohibiting disclosure of information and documents in the Director's file. Section 176(2) (a) makes an exception for disclosure "in the course of proceedings before the court or a judge under Part 3 or 4." The exception recognizes the importance of disclosure in custody proceedings. By necessary implication, the court or judge controls the process of that disclosure. Section 176(2)(a) effectively creates an exception to the general prohibition on disclosure for court proceedings and the court or judge determines the manner in which disclosure under the exception is to be exercised.

[11] The Director's next submission is that the exercise of any authority under s. 176(2) must be in accordance with regulations governing its exercise. Section 176(1)

contemplates regulations under the *Children's Act* that could modify the prohibition on disclosure, but no regulations under the *Act* have been promulgated. Judge Barnett referred to the *Rules of Civil Procedure* in the Supreme Court which follow the rules of the Supreme Court of British Columbia, but he concluded that they did not suit the case for matters in the Territorial Court pursuant to the *Children's Act*.

[12] On appeal, Mr. Justice Veale concluded that Judge Barnett's rejection of the Supreme Court rules was presumably based on the requirement in Rule 26(9) that the party requesting documents pay the costs of reproduction and delivery of the documents in advance. Mr. Justice Veale concluded that as s. 76(1) of the *Territorial Court Act*, R.S.Y. 2002, c. 31, directs the Supreme Court rules are to be followed, "modified as suits the case", Rule 26 should be followed with the modification that the Director is not required to prepare a list of documents, but the Director will pay the expenses of the copying and delivering the documents. Mr. Justice Veale upheld the order.

[13] Once the authority to make an order for disclosure of documents is recognized and the terms of the order are not inconsistent with the statute, the particular terms of the disclosure order are a matter of discretion for the judge making the order. The Director submits that the judge erred in not making an order in the term sought by the Director in accordance with the terms approved by the Territorial Court in *Re: R.I.* Judge Barnett and Mr. Justice Veale both referred to *S.D.K. v. Alberta Director of Child Welfare*, [2002] A.J. No. 70, as support for the terms under the appeal.

[14] A discretionary order may only be disturbed in this court if there is an error of law or principle or if it is clearly wrong. For the reasons above, I am satisfied that the order does not involve any error of law or principle. In my view, the order was within the discretion of the Territorial Court and on that basis this court should not disturb it. I would dismiss the appeal.

[15] THACKRAY J.A.: I agree.

[16] GOWER J.A.: I agree.

[17] MACKENZIE J.A.: The appeal is dismissed.

“ The Honourable Mr. Justice Mackenzie”