Citation: *Re: Y.S. and S.B.-S.*, 2006 YKTC 49 Date: 20060515
Docket: 04-T0055
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

IN THE MATTER of the Children's Act, R.S.Y. 2002, c. 31, as amended, and in particular s. 130

AND IN THE MATTER OF an application for conversion of the existing temporary care and custody order to a permanent care and custody order pursuant to s. 130(1)(c) of the Act;

AND IN THE MATTER OF Y.S. AND S.B.-S.

Publication of identifying information is prohibited by section 172 of the *Children's Act*.

Appearances:

Lana Wickstrom	Counsel for the Director
Debra Hoffman	Counsel for the Selkirk First Nation
Elaine Cairns	Counsel for the mother
David Christie	Counsel for the father

REASONS FOR DECISION

[1] By notice of motion dated March 22, 2006, the Selkirk First Nation sought intervenor status to participate in the hearing of the Director's application to convert an existing temporary care and custody order to a permanent care and custody order in relation to Y.S. and S.B.-S. Both of the children and their father are members and beneficiaries of the Selkirk First Nation.

[2] The application was argued on Thursday, March 23, 2006. The hearing was scheduled to commence on Monday, March 27, 2006. Accordingly, the

Selkirk First Nation also sought an adjournment of the hearing should intervenor status be granted.

[3] Counsel for the parents indicated their support for both of the First Nation's applications. The Director did not take issue with the application for intervenor status beyond discussing the appropriate parameters of that status, but argued strongly against an adjournment of the scheduled hearing.

[4] As an added wrinkle, counsel for the mother, L.B., while willing to represent L.B. for the limited purposes of the First Nation's applications, brought her own application to be removed as counsel of record for the purposes of the hearing, on the basis that she was unable to adequately prepare due to L.B.'s failure to provide instructions.

[5] Given the time constraints, I delivered a brief oral decision on March 23, 2006, with written reasons to follow.

1. Application for Intervenor Status:

[6] As noted above, all parties are in agreement that the Selkirk First Nation should be granted intervenor status, and by implication, that this court has the jurisdiction to make such an order. In reviewing the application and submissions, I can see no reason why I ought not grant intervenor status to the Selkirk First Nation in this case.

[7] What remains at issue are the appropriate parameters of the intervenor status to be granted.

[8] The Selkirk First Nation seeks to participate fully in the proceedings by calling and cross examining witnesses, by making submissions, and by participating in pre-trial conferences and settlement discussions. In submissions,

counsel for the Selkirk First Nation indicated that the First Nation seeks the right to call evidence regarding the cultural heritage of the children, and the role the Selkirk First Nation would play in the future of the children. In addition, the Selkirk First Nation seeks the right to cross-examine the Director's witnesses regarding the Director's efforts to involve the First Nation, to place the children in a First Nation home, and to place the children with extended family.

[9] The Director contends that the parameters of the status granted should be more limited, suggesting that an order akin to that granted by His Honour Judge Lilles in the *C.K.W. (Re)*, [2002] Y.J. No. 3, decision, would be appropriate. In *C.K.W.*, Lilles J. granted intervenor status for the purpose of:

- Being present and observing the court proceedings involving C.K.W.;
- Making submissions with respect to the relevant issues as and when determined by the court. (p. 10)

[10] Upon further discussion, the Director did not take strong opposition to the First Nation being granted the right to call witnesses on the issues of cultural heritage and the role the First Nation could play in the children's future. However, the Director did take exception to the First Nation being granted the right to cross-examine the Director's witnesses on the Director's efforts to involve the First Nation, to place the children in a First Nation home, and to place the children with extended family. Counsel for the Director argued that, as the court has no authority to order specific placements, seeking to cross-examine on these issues is an attempt to bring something before the court which the court has no power to control.

[11] In the N.Q. case, 2003 YKTC 35, His Honour Judge Faulkner addressed the considerations to be examined in determining whether to grant a First Nation the right to call witnesses and to cross-examine the witnesses called by the parties:

…

> [15] In making this determination, the court should examine whether or not extending such a privilege to the intervenor is necessary in order that a just result will be reached. This would presuppose that:
>
> (a) the intervenor is possessed of information and evidence relevant and vital to the proceedings which will not reach the judge unless the intervenor presents it, and, or,
> (b) the intervenor has a unique point of view not represented by any of the other parties.
>
> [16] This would seem to me to suggest that, before it would be necessary to allow the intervenor to call witnesses and cross-examine others, it would need to appear that the intervenor, in this case the First Nation, and the applicant, the mother, have somewhat divergent interests. Otherwise, the information possessed by the First Nation can be provided to the applicant and presented to the court by the applicant. The witnesses the intervenor intends to call can, likewise, be called by the applicant. (p.5)

…

[12] In the case at bar, counsel for the Selkirk First Nation indicated that the interests of the father and the mother are different from those of the First Nation. While the parents are opposing a permanent order, the First Nation sees permanent care as appropriate but wants to ensure that the cultural identity and heritage of the children are respected while they are in care. It was further noted that the father, while a member of the Selkirk First Nation, is not currently a resident of the community and thus not in a position to provide information regarding the community. The mother is not a member of the Selkirk First Nation, and thus equally not in a position to provide the type of information contemplated.

[13] Section 133(k) of the *Children's Act* makes it clear that a child's cultural heritage is one of the factors that must be considered in deciding whether to make a permanent care and custody order. The Selkirk First Nation is uniquely

placed to provide the court with valuable information concerning the cultural heritage and home community of these two young children, and concerning the role the Selkirk First Nation could play in these children's future.

[14] Given the divergent positions between the father and the First Nation, and the fact the father is a non-resident of the community, I am satisfied that it is both necessary and appropriate to allow the First Nation to call evidence with respect to both the cultural heritage of the children, and the role the First Nation could play with respect to the children's future. I am also satisfied that this should include the limited right to cross-examine the witnesses of other parties on these specific issues.

[15] Concerning the First Nation's request to cross-examine the Director's witnesses on the efforts of the Director to involve the First Nation, to place the children in a First Nation home, and to place the children with extended family, I am hard pressed to see, at this point, where such issues would be relevant and vital to the matters to be determined by the court. There were no compelling arguments put to me in this regard by counsel. However, it is at least conceivable that during the process of the hearing that specific circumstances could arise in relation to which relevance could be established. The trial judge would clearly be best placed to address such circumstances if and when they should arise. Accordingly, I am not prepared to grant the request of the First Nation to cross-examine the Director's witnesses on the foregoing points at this time, but I would leave it to the trial judge to entertain further argument on this issue should appropriate circumstances arise.

[16] The Director also took issue with the First Nation's request to participate in settlement discussions, though I believe that those concerns were somewhat assuaged with counsel for the First Nation's recognition that, as the First Nation would not be a party, they could not present an impediment to settlement proceedings.

[17] I am of the view that there is real value to having the First Nation participate in settlement discussions. It will not only ensure that issues of the children's cultural heritage are discussed and respected, but it will ensure that the ability of the First Nation to play a role in the children's future and any resources they have to offer on behalf of the children would form a part of the settlement discussions.

[18] I am inclined to grant the Selkirk First Nation the right to participate in settlement discussions on the clear understanding that, as an intervenor, their consent is not required to settlement, nor would they have a veto in relation to any settlement reached between the parties.

[19] In conclusion, the Selkirk First Nation is hereby granted intervenor status in these proceedings for the following enumerated purposes:

- Being present and observing court proceedings involving Y.S. and S.B-S.;
- Participating in pre-trial conferences and in settlement discussions or conferences;
- Presenting evidence, including calling witnesses, on the issues of the cultural heritage of the children and the role the Selkirk First Nation could play in the children's future, plus a limited right to cross-examine the witnesses called by the parties on these same issues;
- Making submissions to the court, orally or in writing, on the relevant issues before the court; and
- Such other participation as may be deemed appropriate by the trial judge.

2. Application of the Selkirk First Nation to adjourn the hearing set for March 27, 2006:

[20] In my brief decision on March 23, 2006, I indicated that, absent other factors, I would not have been inclined to grant the Selkirk First Nation's application to adjourn the scheduled hearing. It is important, in my view, to give clear reasons for that position.

[21] One cannot lose sight of the fact that the overriding consideration in any decision made pursuant to the *Children's Act,* is the best interests of the child. It is in the best interests of every child to be in a safe, stable, caring, and permanent home. The importance of stability and certainty for children, particularly young children, is such that delay in reaching a final determination is presumed to be contrary to the best interests of the child.

[22] This is inherently recognized throughout the *Children's Act*. For example, section 133(c) mandates the court to consider "the length of time, according to the child's sense of time, that a child has been in care and the effect on the child of any delay in the final disposition in the proceedings". Similarly, section 131 limits the length of time for temporary care and custody orders.

[23] Most importantly, for the purposes of this application, section 172 requires the following:

> Without limiting the generality of section 1, the paramount consideration in granting adjournments shall be the best interests of the child and the child's right to an early disposition of the case, compatible with the child's sense of time.

[24] This underscores the fact that avoiding delay and reaching an early resolution are clearly contemplated by the *Act* as being in a child's best interests.

[25] Against this backdrop, counsel for the Selkirk First Nation argues that it is in the best interests of the children for the trial judge to have all available, relevant evidence upon which to base his or her decision, including that evidence which the First Nation is uniquely placed to provide to the court. It is further noted that there would be little impact on the children occasioned by an adjournment as there are no plans to alter their existing placement.

[26] This latter argument is not persuasive in my view. Some stability in placement does not equate to long term certainty. It is important that children not

be kept in limbo for any longer than absolutely necessary. The nature of relationships will necessarily change following a final resolution, and every attempt must be made to ensure an early start in developing stable permanent relationships for children in care.

[27] Dealing with the primary argument, there is no doubt in my mind that the evidence which can be provided by the First Nation would be of value to the court in these proceedings, and that it would be preferable to have that evidence before the court than not. The question for me is whether the value of that information outweighs the prejudice to the children of further delaying a final determination of their situation.

[28] I am of the view that it does not.

[29] In reaching this conclusion, I am mindful of the fact that the First Nation has known for some time that these children are in the care of the Director and that the Director is seeking a permanent care and custody order. The Director has filed copies of three letters sent to the First Nation in this regard. They are dated January 4, 2005, August 4, 2005, and October 5, 2005.

[30] When asked about the delay in launching the application for intervenor status, the First Nation cited severe limitations in resources, both human and financial, and difficulties in retaining counsel. While I sympathize fully with the resource difficulties encountered by the First Nation and, in particular, the burden placed on Milly Johnson, Social Director of the Selkirk First Nation, I must note that these proceedings are not about accommodating the needs of the First Nation, of the Director, of the parents, or of this court. Rather, they are about meeting the needs of these two young children.

[31] All children, including Y.S. and S.B.-S., should be entitled to expect that any and all individuals or organizations that have something of benefit to offer

them will become involved in child protection proceedings at the earliest possible opportunity to maximize the potential for early resolution and long term stability. With delay, there is a very real danger that the long-term needs of the children will not be met and that they will be at increased risk of developing associated problems.

[32] In my view, granting an adjournment in such circumstances as these would only serve to encourage or condone delaying involvement and last minute applications. This would clearly not be in the best interests of any child in care.

[33] The Selkirk First Nation's application to adjourn the hearing is denied.

3. Application of counsel for the mother to be removed as counsel of record:

[34] These written reasons are intended to address the two applications brought by the Selkirk First Nation. The following comments included under this heading are provided solely for the purposes of clarity and completeness.

[35] As noted above, Ms. Cairns brought an application to be removed as counsel of record for the mother, L.B. on the grounds that L.B. had failed to provide her with the necessary instructions to prepare for the hearing. I was satisfied on the information provided to me that it would be inappropriate to force counsel to proceed in such circumstances. The application to be removed as counsel was granted.

[36] Given L.B.'s background, her personal circumstances, and the nature of these proceedings, all parties, including the Director, indicated a serious concern about the scheduled hearing going ahead with L.B. unrepresented. I concurred. Accordingly, I adjourned the hearing to allow L.B. to retain and instruct new counsel. It was made clear to L.B. that more is expected of her than simply showing up at court. Instead she needs to be diligent in providing her counsel

with the information and instructions required to adequately prepare to represent her. It was also made clear to L.B. that, should she again fail to maintain contact with her counsel and provide the necessary instructions, the court would not likely be sympathetic to a future application to adjourn the hearing on the same basis.

[37] In the result, while I did not grant the First Nation's application to adjourn, the hearing is, nonetheless, adjourned to enable the mother to retain and instruct new counsel.

Ruddy T.C.J.