IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: S.*Q. et al.* v. *Director of Family and Children's Services* 2004 YKSC 61

Date: 20040915
Docket No.: S.C. No. 04-A0083
Registry: Whitehorse

Between:

S.Q. and A.D. and the TAKU RIVER TLINGIT FIRST NATION

Plaintiffs

And

THE DIRECTOR OF FAMILY AND CHILDREN'S SERVICES

Defendant

Publication of the name of a child, the child's parent or identifying information about the child is prohibited by section 173(2) of the *Children's Act.*

Before: Mr. Justice L.F. Gower

Appearances:

Emily R. Hill	For the Plaintiff, S.Q.
James Van Wart	For the Plaintiff, A.D.
Rita Scott	For the Plaintiff, Taku River Tlingit First Nation
Zeb Brown	For the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiffs are S.Q., the natural mother of the child N., A.D., the current common-law partner of S.Q., and the Taku River Tlingit First Nation ("TRTFN"), of which S.Q., N. and N.'s maternal grandmother are members. The plaintiffs have applied for access to the child, both generally and for the particular purpose of updating a court recommended assessment in related child protection proceedings in the Territorial

Court. They also ask that I adjudicate both the access application and the child protection proceedings. For the latter, I would have to sit as a judge of the Territorial Court.

[2] The child protection proceedings are under the *Children's Act*, R.S.Y. 2002, c. 31, and arise from S.Q.'s application to the Territorial Court for an order terminating a permanent care order made in 2000. The TRTFN has been granted intervenor status in those proceedings. The application is scheduled for trial on a peremptory basis in Territorial Court in October 2004.

ISSUE

[3] Before litigating the merits of the question of access by the plaintiffs on the current application in this Court, the parties have agreed that the threshold issue is whether I have jurisdiction to adjudicate *both* the access application *and* the child protection proceedings in the Territorial Court.

ANALYSIS

Plaintiffs' Position

[4] The plaintiffs principally rely on the doctrine of *parens patriae* and the inherent jurisdiction of this Court as providing me with authority to decide both matters, more or less at the same time, that is, to have them "joined". *Parens patriae* literally means "parent of the country" and refers to the historical role of the high courts, as representative of the Sovereign, to act as guardians and make decisions for children and other persons not legally able to represent themselves.[1] The plaintiffs submit that I can

[1] Black's Law Dictionary, 5th Ed. p. 1003

sit as a Supreme Court judge for the purpose of deciding the access issue, and concurrently as judge of the Territorial Court, pursuant to s. 5 of the *Territorial Court Act*, R.S.Y. 2002, c. 217, for the purpose of deciding the application to terminate the permanent care order.

[5] Interestingly, as I understand their submissions, the plaintiffs did not specifically argue that access may be ordered by this Court in a permanent care situation solely pursuant to its *parens patriae* jurisdiction. Such an argument was made in *K.L.* v. *British Columbia (Superintendent of Family and Child Services)*, [1996] B.C.J. No. 966 (B.C.S.C.), a case supplied by the plaintiffs, where the court purported to recognize the practice of the Supreme Court of British Columbia in exercising its *parens patriae* jurisdiction when it felt there was a "gap" in that province's family legislation. This may occur, for example, when the legislation providing for permanent care neither specifically allows nor prohibits access by a natural parent.[2]

[6] The plaintiffs primarily rely upon s. 33(1) of the *Children's Act* for seeking access. That subsection provides:

> A parent of the child, or any other person, including the grandparents may apply to the court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

The "court" referred to is the Supreme Court, under Part 2 of that *Act*. Therefore, if this Court applies s. 33(1) as the plaintiffs suggest, it would be exercising statutory jurisdiction under the *Children's Act*, and not its *parens patriae* jurisdiction.

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[2] *K.L.* cited above, at paras 8, 9, 16 and 20

[7] Nevertheless, the plaintiffs argue there is a “gap” in the *Children’s Act* in that the *Act* is silent about the granting of access after a permanent care order has been made under Part 4, while s. 33(1) allows the parent or any other person to apply to the Supreme Court, and only the Supreme Court, for access to the child under Part 2. At the same time, there is nothing in either Part 2 or Part 4 of the *Act* which specifically prohibits a parent against whom a permanent care order has been made from making an application for access under s. 33(1). Thus, the plaintiffs submit that this Court may exercise its *parens patriae* jurisdiction to order access because no such statutory procedure is present for the Territorial Court, acting under Part 4 of the *Children’s* Act, to do so. However, I repeat that the plaintiffs say that I should specifically apply s. 33(1) to grant the access sought, which would be exercising statutory not *parens patriae* jurisdiction.

[8] In the alternative, the plaintiffs rely on the case of *R.A. (Re)*, [2002] Y.J. No. 48, a decision of Stuart C.J.T.C. That case held that what is now s. 139 of the *Children’s Act* violated ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* by not providing for access applications by the natural mother and immediate family of a child who has or is about to become the subject of a permanent care order. As a result, Stuart C.J.T.C. imposed an “open” permanent care order, which allowed for the natural mother’s continuing involvement in the child’s life. He also directed the Yukon Government to amend the *Children’s Act* to enable parents, when the best interests of a child warrant, to have access to their children after a permanent order and to participate as a co-parent. No such amendment has yet been made.

Director's Position

[9] The defendant Director of Family and Children's Services submits this Court has "no jurisdiction to make access orders in a child protection matter" and particularly not after a permanent care order has been made. However, the Director did not specifically respond to the plaintiffs' submission inviting me to sit as a judge of the Territorial Court for the purpose of adjudicating the application to terminate the permanent care order, other than implicitly suggesting I should decline that jurisdiction.

[10] The Director's counsel submitted that *R.A.* (which was not appealed by the Director) authorizes access orders in the Territorial Court following or in conjunction with a permanent care application. He therefore questioned why the plaintiffs felt it necessary to apply to this Court for such an order.

[11] The Director's counsel also submitted, apparently in the alternative, that S.Q. could have applied for access to the child solely under this Court's *parens patriae* jurisdiction, rather than under Part 2 of the *Children's Act*, which would conflict with the child protection provisions of Part 4, as discussed below. Although he conceded the *parens patriae* jurisdiction of this Court could be exercised to allow access, the Director's counsel went on to say that this jurisdiction has been restricted by the British Columbia Court of Appeal in *L.S.* v. *British Columbia (Ministry of Children and Family Development)*, [2004] B.C.J. No. 862, such that the Court must not simply substitute its own opinion of what is in the best interests of the child for that of the guardian

empowered by the legislature.[3] I will discuss *L.S.* further in these reasons under the heading *"Parens Patriae Jusrisdiction"*.

Section 148 of the Children's Act

[12] The Director's counsel says that the Legislature did not intend that Parts 2 and 4 of the *Children's Act* to be used interchangeably, as suggested by the plaintiffs. On the contrary, he submits s. 148 specifically indicates that the Legislature intended "no proceedings of any kind" would be taken to set aside or vary orders for permanent custody, with the exception of those enumerated by the section, which states:

> No proceedings of any kind other than an application under section 145 or 143, [as written] or an appeal under section 144 [as written] or under the *Court of Appeal Act* or the *Supreme Court of Canada Act* (Canada), shall be taken on any grounds to set aside or vary an order committing a child to the temporary care and custody or to the permanent care and custody of the director.

However, there are a couple of wrinkles with the interpretation of s. 148.

[13] First, according to the Director's counsel, in the previous consolidation of the *Children's Act*, reference was made to "s. 145 or 146". However, when the *Act* was consolidated in the *Revised Statutes* in 2002, s. 146 was mistakenly referred to as s. 143. It seems obvious on its face that this was a typographical error, since s. 143 does not contain any provision for an application or an appeal. There is also a typographical error in referring to an appeal under section "144", when the correct section is 147.

[3] *L.S.*, cited above, at paras 52 and 53

[14] Second, the plaintiffs argue that, even accepting that there may be typographical errors in the most recent consolidation of s. 148, the provision is not complete because it does not specifically include a reference to applications under s. 139(5) of the *Act*. That subsection entitles a parent or other person entitled to access who alleges that the Director has unreasonably refused access to apply to a judge of the Territorial Court for an order "settling the terms and conditions of reasonable access by that person to the child". Thus, say the plaintiffs, s. 148 does not comprehensively prevent *all* but the enumerated proceedings to set aside or vary a permanent care order.

[15] While I agree that s. 148 is deficient in these respects, I also agree with the Director's counsel that it is more likely the result of poor legislative drafting than evidence of legislative intent. In my view, s. 148 indicates the Legislature intended that permanent orders can only be challenged or varied by provisions within Part 4.

[16] The plaintiffs argued alternatively that an application for access under s. 33(1) of the *Children's Act* is not an application "to set aside or vary" the permanent care order, and therefore is not prohibited by s. 148. Once again, I am unable to accept this submission. Subject to finding that s. 139 is unconstitutional (see *R.A.*, cited above), a Territorial Court judge ordering a child into permanent care does not have jurisdiction under Part 4 of the *Act* to order access to that child. On the other hand, that Court *can* order access for a child in temporary care. According to the Hansard excerpts filed by the Director, this was not possible under the previous legislation and was noted by the government of the day to be a "major change" resulting from the enactment of the *Children's Act*. It is therefore reasonable to presume that if the Legislature had intended that access could be ordered for children in permanent care, then the relevant provisions

in Part 4 would have expressly said so. Since they do not, I conclude the legislative intention was that no one would have entitlement under the *Children's Act* to apply for access to a child in permanent care. And yet, by relying on s. 33(1), that is exactly what the plaintiffs are asking this Court to do. In my view, that amounts to an attempt to effectively vary the permanent care order.

[17] Incidentally, I note that s. 162 of the *Children's Act* provides that an order made by a Territorial Court judge under Part 4 may be filed in the Supreme Court of the Yukon Territory and enforced as an order of this Court. Consequently, if I were to accept the plaintiffs' argument that I can apply s. 33(1) of the *Children's Act* after a permanent care order has been made under Part 4, if that permanent care order has been filed with this Court, then an incongruous situation could arise, with apparently inconsistent orders within the same Court.

[18] I conclude that s. 148 was intended to prohibit the application sought by the plaintiffs under s. 33(1) of the *Children's Act*.

Parens Patriae Jurisdiction

[19] The Supreme Court of Canada in *Beson* v. *Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716, held that the *parens patriae* jurisdiction of the superior courts may be invoked to fill gaps or to supplement the powers of local government agencies. Wilson J., delivering the judgment of the Court, stated:

> It would seem then that in England the wardship jurisdiction of the court (parens patriae) has not been ousted by the existence of legislation entrusting the care and custody of

> children to local authorities. It is, however, confined to "gaps" in the legislation and to judicial review.[4]

She went on to apply that jurisdiction in the case under appeal.

[20] The Supreme Court of British Columbia has primarily relied upon *Beson* as authority for suggesting the Court has *parens patriae* jurisdiction to grant access if there is a gap in their legislation.[5]

[21] Esson J.A., in his concurring reasons in *Superintendent of Family and Child Service and Public Trustee* v. *D.S.* (1985), 46 R.F.L. (2d) 225, agreed at p. 234, that the Supreme Court of British Columbia may have *parens patriae* jurisdiction in certain cases:

> There can, as a general proposition, be little doubt that permanent wardship by the superintendent is intended to be a preliminary step towards adoption, and that an order for parental access would be inconsistent with the concept of adoption, and so not in the best interests of the child. ***But there may be individual cases in which those considerations will not apply.*** As the matter was not before us, I refer to it only to make clear that ***this case cannot be taken as deciding that an order for access could not be made under the dens*** [as written] ***parens patriae jurisdiction of the Supreme Court.***
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> (emphasis added)

[22] In *Spokes* v. *British Columbia (Superintendent of Family and Child Services)*, [1993] B.C.J. No. 1108, at para. 18, Parrett J. of the British Columbia Supreme Court

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[4] *Beson*, cited above, at p. 6 Quicklaw report

[5] *L.E.M.* v. *Superintendent of Family and Child Services for British Columbia* (1983), 1 D.L.R. (4th) 743 (B.C.S.C.);
C.(C.) v. *British Columbia (Superintendent of Family and Child Service)*, [1984] B.C.J. No. 3022; and *K.L.*, cited above

quoted with approval Prowse, Co. Ct. J. sitting as a local judge of the Supreme Court in *M.(S.J.)(Re)* (1990) 26 R.F.L. (3d) 173 at 178, where she said:

> … Alternatively the court derives this power [to make a parental access order] from their inherent jurisdiction of parens patriae which, in the circumstances of this case, can be invoked either because there is a gap in the legislation or because it is necessary to do justice between the parties and in the best interests of the child.

[23] The case of *L.S.*, referred to earlier, essentially involved an application for judicial review of the Ministry's treatment of a child in foster care. Southin J.A. discussed the history of the *parens patriae* jurisdiction of the superior courts at some length and concluded that, in the context of that case, the real question was whether the Ministry, as guardian of the child, had gone beyond what the statute empowered it to do. If so, Southin J.A. continued, the next question was whether the statute provides a remedy for abuse of office by the guardian. It is only where there is no statutory remedy for such abuse of office that the *parens patriae* jurisdiction should be invoked and, as previously stated, the court must not simply substitute its discretion for that of the guardian. However, these comments were all *obiter dicta*, that is, unnecessary for the decision of the case. The *ratio*, or point which determined the judgment, was the irregularity of the proceedings in the court below. Specifically, there were disputed facts surrounding a hearing to determine a point of law. Thus, there should have been a trial of the issue and cross-examination on affidavits. Esson J.A. agreed with Southin J.A. on this main point and therefore found it unnecessary to agree or disagree with her discussion of *parens patriae* jurisdiction.

[24] I conclude generally that this Court has the *parens patriae* jurisdiction to grant the plaintiffs access in the face of a permanent care order. My particular order will follow in the conclusion of these reasons.

The Constitutional Issue

[25] Although *R.A.*, cited above, was filed by the plaintiffs and is referred to in the alternative in their written submissions, it did not form a major part of the oral argument at the hearing of this application. Perhaps that is because the Director's counsel seems to concede that it is good law. Thus, he says, there is nothing stopping the plaintiffs from making their application for access within the existing Territorial Court proceedings.

[26] In response, the plaintiffs raise two points. First, they need their access orders now, because they want an opportunity for the retained social worker doing the updated assessment to observe S.Q. and A.D. interacting with the child. If they do not get greater access until trial, it will prejudice their application to terminate the permanent care order. Limited access is already being allowed for S.Q. and the maternal grandmother; the Director currently denies access only to A.D. Second, the plaintiffs concede that the Territorial Court may only have authority to remedy a C*harter* breach on the matter before the Court, and no authority to generally declare legislation invalid. I take it that Stuart C.J.T.C. shared this view, based upon the following of his comments:

> ***On the facts of this case***, s. [139], in preventing an outcome that serves the child's best interests, violates the s. 7 rights of both the parent and the child.[6]
>
> …

[6] *R.A.*, cited above, at para. 174

> ***In this case***, it is not the child's best interests that denies M.A. the ability to have a court provide for her involvement, but s. [139]. For all parents without similar disabilities, it is the child's best interests that prevents them from retaining a relationship with their children.[7]
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> …
>
> ***In regard to both M.A. and R.A. (1)***, s. [139] offends society's commitment to the equal worth of all persons and fails to rectify the unique challenges both encounter due to their disadvantages.[8]
>
> …
>
> ***R.A. (1) and M.A. have established*** not only that their Charter rights were violated, but that, as a group, the Charter rights of all parents and children in similar circumstances are violated by s. [139].
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> …
>
> ***In this case***, reading into s. [139], an open permanent care order on balance best addresses immediate Charter violations of M.A. and R.A. (1) and overall serves the best interests of R.A.(1).[9]
>
> (emphasis added)

[27] The Supreme Court of Canada, in *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570, apparently confirmed that a statutory court, such as the Territorial Court, may not make general declarations that enactments are invalid. I say "apparently" because the majority cited with approval the following comments of MacFarlane J.A., speaking for the British Columbia Court of Appeal in *Re Shewchuk and Ricard*; *Attorney-General of British Columbia* (1986), 28 D.L.R. (4th) 429, at pp. 439-40:

> It is clear that the power to make general declarations that enactments of Parliament or of the Legislature are invalid is a

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[7] *R.A.*, cited above, at para. 179
[8] *R.A.,* cited above, at para. 190
[9] *R.A.,* cited above, at paras. 203 and 205

> high constitutional power which flows from the inherent jurisdiction of the superior courts.
>
> But it is equally clear that if a person is before a court upon a charge, complaint, or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the Canadian Charter of Rights and Freedoms, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the court. It does not trench upon the exclusive right of the superior courts to grant prerogative relief, including general declarations.

[28] However, as the pleadings are presently drafted, the plaintiffs have not sought a general declaration from the Supreme Court of the Yukon Territory on the constitutionality of any provisions in the *Children's Act*. Thus, the following suggestion in the plaintiffs' written argument, at p. 6, that this Court *could* do so, does not follow:

> Superior Courts have inherent jurisdiction to decide constitutional questions. A decision from the Yukon Supreme Court on the validity of s. 139 of the *Act* will result in clarity and consistency on the application of the law in the Yukon.

[29] Furthermore, if I sit as a judge of the Territorial Court for the purpose of adjudicating the application to terminate the permanent care order, I will not be able to exercise the full jurisdiction of a superior court.[10] Rather, I would be limited as a Territorial Court judge to making a determination about the constitutionality of s. 139 within the specific context of those proceedings, as was the case in *R.A.* As a result, I can see no tangible advantage to the plaintiffs in having a judge of this Court decide that

[10] See s. 183 *Children's Act*

application, while sitting as a judge of the Territorial Court, as compared with the plaintiffs continuing to trial in the Territorial Court.

CONCLUSION

[30] Although there is evidence in the current application that the Director has been providing regular access to S.Q. as well as the child's maternal grandmother, S.Q. seeks greater access than is currently allowed within the Director's discretion, at least for the purposes of completing the updated assessment report. The Director is opposed at the present time to any access by A.D. The plaintiffs submit that access by each of them is imperative in order for the updated assessment to be as comprehensive and balanced as possible.

[31] The plaintiffs currently have no alternative recourse in the Territorial Court, as Part 4 of the *Children's Act* does not authorize a judge of that Court to order access after a permanent care order has been made and prior to the hearing of an application to terminate such an order. While that limitation might be challenged on the basis of *R.A.*, it would require a more complicated pre-trial motion in the Territorial Court, which may not be capable of being heard and decided in time for the trial.

[32] I am satisfied that the *parens patriae* jurisdiction of this Court authorizes me to consider ordering access in favour of one or all of the plaintiffs for the purpose of assisting the retained social worker with the completion of the recommended update to the assessment report. I am prepared to hear the plaintiffs' application for that limited purpose.

[33] However, I dismiss that part of the plaintiffs' application which seeks to "join" the access question with the application to terminate the permanent care order. There is little, if any, tangible benefit to the parties for this Court to do so. The potential remedies that could be granted by this Court sitting as a Territorial Court judge would be identical to that of an existing Territorial Court judge. Further, if this Court purports to hear the application to terminate the permanent care order, a fairly lengthy adjournment from the existing October trial dates in Territorial Court would be necessitated. That would not likely be in the best interests of the child.[11]

[34] I am also not prepared to exercise this Court's jurisdiction on the plaintiffs' more general application for "additional access". Given that I have determined the Territorial Court should continue to adjudicate the application for termination of the permanent care order, and given that *R.A.* bestows upon the Territorial Court the authority to include access as part of the relief which may be ordered, it would be premature for this Court to entertain such an application at this stage.

[35] I expect that the plaintiffs should be able to proceed with their access application in this Court in fairly short order. It would appear that much of the relevant affidavit material has already been filed and the application would be a continuation of the existing hearing. While I acknowledge that this course may still create a bit of a time crunch for the retained social worker, it hopefully will not be insurmountable. In the event he has insufficient time to complete his written report, given the importance of his evidence, he could be subpoenaed to give oral evidence. In saying that, I do not wish to

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[11] Affidavit of Mary-Jane Oliver, filed May 27, 2004, TC 97-T0189;
Barnett, J. Transcript, May 27, 2004, TC 97-T0189, p. 18; and
Barnett, J. Transcript, April 22, 2004, TC 97-T0189, pp. 31-32

prejudge in any way the admissibility of that evidence under the *Rules of Court* and the *Evidence Act*, R.S.Y. 2002, c. 78.

[36] As the plaintiffs' application has resulted in mixed success, I make no order as to costs.

[37] The plaintiffs should approach the Trial Coordinator for a date to continue with their application for access relating to the completion of the recommended updated assessment. No further application by notice of motion is required. Rather, I direct that the plaintiffs file a requisition upon obtaining a date for the continuation of this hearing, which is hopefully mutually agreeable to the parties. Of course, the parties may wish to file supplementary affidavit material. If they do so, it should be done in a timely manner. If further directions are required, the parties should promptly seek an appearance before this Court. For greater certainty, given the time constraint, I do not consider myself seized, in the event another judge can hear the application sooner than I.

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GOWER J.