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is prohibited by s. 172 of the *Children's Act*.

Citation: *Re: Matter of N.Q.*
AND an application by the
Taku River Tlingit First Nation, 2003 YKTC 35

Date: 20030501
Docket: T.C. 97-T0189
Registry: Whitehorse

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

IN THE MATTER OF the *Children's Act* R.S.Y. 1986, c. 22, as amended

AND IN THE MATTER OF N.Q.

AND IN THE MATTER OF AN APPLICATION BY THE
TAKU RIVER TLINGIT FIRST NATION

Appearances:

Rita Scott	Appearing for the Taku River Tlingit First Nation
Sheri Hogeboom	Appearing for the Director of Family and Children's Services
David Christie	Appearing for S.Q., the mother

DECISION

[1] In 2000, I made an order committing the child, N.Q., to the permanent care and custody of the Director of Family and Children's Services. S.Q., the child's mother, has now made an application under s. 144(1) of the *Children's Act*, R.S.Y. 1986, c. 22 to terminate the permanent care order.

[2] The child, his mother and his grandmother are all members of the Taku River Tlingit First Nation based in Atlin, British Columbia. The First Nation has applied to be added as a party to the proceedings. Mr. Christie, who appeared on behalf of the mother, supported the First Nation's application.

[3] It should be noted that the First Nation was given notice of the Director's application for permanent care back in 2000. However, no representative of the

First Nation appeared or otherwise took an interest in the proceedings. Nevertheless, there was evidence presented to the Court that, since that time, the First Nation has been actively supporting rehabilitative efforts by the mother and has attempted to provide input into the plan of care for the child.

[4] The first step in determining who should be a party to proceedings under the *Children's Act* is to look at who is entitled under that *Act* to notice of the proceedings. Only the Director and the "concerned parent" or guardian are required to be notified, although s.118(4) of the *Act* provides that the Director can give notice to:

> … the school which the child attends and any community groups or other persons who the director thinks should be advised of the action.

[5] However, this provision only applies to a so-called "notice to bring" application where the child is not apprehended but the parent is required to appear or bring the child to court for a need of protection hearing. What role, if any, the school or other groups and persons would play in the proceedings is not spelled out. As previously indicated, the Taku River Tlingit First Nation was given notice of the permanent wardship application in 2000, however, this notice was provided as a result of Departmental policy and not because of any requirement of the *Children's Act*.

[6] The second key is to consider the scope of the orders that the Court can make. An order may be made granting care and custody of a child to the Director of Family and Children's Services, or granting the Director supervisory power with respect to the child. The only other orders that can be made are to return the child to the parent or other person legally entitled to custody. The return may be with or without conditions. No order can be made in favour of any other person, and no other persons beyond the Director, the parents or guardian and the child are bound by any order under the *Act*. In the specific case of an application under s.144(1) to terminate a permanent care and custody order, the

powers of the Court are even more restrictive. The Court can dismiss the application, thus leaving the child in the Director's care, or order the permanent wardship be terminated. In the latter case, the Director must return the child to its parent or guardian.

[7] It follows that any other person, agency, body or group other than the Director, the parent or the child (in the form of a child advocate) will have great difficulty in making a case that they should be added as a "party" to the proceedings.

[8] The applicant seeks to rely on the decision of Lilles J., as he then was, of this Court in *R: C.K.W.*, [2002] Y.J. No. 3 (Terr.Ct.). In my view, such reliance is based on a misreading of *C.K.W., supra*. Lilles C.J. was quite clear in his ruling. He held that a person will be entitled to be added as a party:

> …if their presence is necessary to determine the issues and *that person has a clear legal interest in the proceedings.* (emphasis added)

[9] A person has a legal interest in a proceeding when an order could be made in favour of, or against, that person. All other persons who may be affected indirectly or consequentially by the litigation are persons interested, but they are not parties. As already stated, the only persons who may be legally bound by an order under the *Children's Act* are the Director, the parents or guardian and the child. Where, as here, the child and his mother are members of a First Nation, the First Nation may have an interest in the proceedings, but it does not have a legal interest.

[10] The Taku River Tlingit have an interest in what happens to N.Q. and to his mother. They have an interest as well in the overall administration of the child welfare program insofar as it may affect the members of the First Nation. Recognizing this, the Director has, quite properly, conceded that the First Nation should be afforded intervenor status. This would allow the First Nation to make

submissions to the Court and so make its concerns known. Moreover, the presence of representatives of the First Nation in Court would allow the First Nation to be fully informed of the information presented and of any rulings the Court may make both in interlocutory matters and with the respect to the ultimate merits of the mother's application to set aside the permanent wardship.

[11] When a person is added as a party, that person, like an intervenor, has a right to make submissions, but is also able to cross-examine witnesses, to call evidence and be part of any settlement of the action. The new party is also legally bound by the result.

[12] This last requirement, that the party will be legally bound by the result, presents an insuperable obstacle to adding the First Nation as a "party' to the cause.

[13] In some other Canadian jurisdictions, legislation provides for applications by First Nations to be added as parties in child protection cases involving children of that First Nation. In my view, a similar provision in the *Children's Act* would be necessary to allow a First Nation to be made a party to proceedings under that *Act*. It should be noted as well that the Yukon First Nations, with final land claim settlements, have the power to enact laws respecting guardianship, custody, care and placement of First Nation children, although this power to make child welfare laws does not, at present, apply to the Taku River Tlingit.

[14] That is not the end of the matter, however, because the First Nation is, as the Director concedes, entitled to intervenor status. Whenever a court grants intervenor status, the court may set or fix the terms of the intervention. At bottom, an intervenor might only be allowed to file a written brief. In this case, it was conceded that the First Nation would be entitled to be present throughout all court proceedings (including pre-trial hearings) and to make oral as well as written submissions. What is really at issue here is whether or not the First

Nation will be allowed to call witnesses and to cross-examine the witnesses called by others.

[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. Since the viewpoint of the applicant and the intervenor is the same, the Director's witnesses can be cross-examined by the applicant's counsel without there being a danger that necessary questions will remain unasked.

[17] When I asked counsel for the First Nation what it was that necessitated making her client a party, she argued that it was necessary in order for the First Nation to advocate for and fully support the child, his mother and his grandmother as well as to correct a "power imbalance" between the applicant and the Director. It is difficult to understand why the First Nation cannot fully support its members and fully address any power imbalance between the parties by making its resources available to the applicant and her counsel. If the First Nation was of a view that the applicant's counsel would be unable to do an adequate job of representing her, then it could assist the applicant to obtain other

counsel. I hasten to add, first, that Ms. Scott made no such allegation and, second, that Mr. Christie is both competent and experienced in child protection matters.

[18] From the evidence Ms. Scott presented, and the questions she asked the Director's witness during this application, it appears that there are two other reasons underlying the First Nation's attempt to be given status in these proceedings. The first is the First Nation's frustration in dealing with the Department in all matters respecting N.Q.'s care. The evidence presented by Ms. Wood, who is the Family Support Worker for the Taku River Tlingit, was to the effect that she felt ignored by the Department. She couldn't get timely responses to her requests for information and there appeared to be no interest on the part of the Department in pursuing placement options proposed by the First Nation. Lastly, she felt that the Department was not making a reasonable effort to keep N.Q. connected with his family and his culture. Secondly, the First Nation disagrees with the Director's plan for N.Q. which is to leave him in the care of his present foster parents – who have expressed an interest in adopting the child. The First Nation wants the child placed in a First Nation foster home in Atlin with a view toward his eventually being reunited with his mother.

[19] Ultimately, the real basis of the application may be found in paragraph 12 of Ms. Wood's affidavit:

> It is my position that if the Taku River Tlingit First Nation had legal standing in this matter, it would be possible to exert the required force needed to ensure that Yukon Health and Social Services does those things necessary to maintain this child's cultural identity and family connection.

[20] There are two difficulties with reliance upon these issues as a basis for participation by the First Nation in the present application. Firstly, it is not the purpose of this hearing to sort out the relationship – or lack thereof—between the Director and the First Nation. It is perfectly understandable that the First Nation

wants to be treated as a party to decisions affecting its citizens. However, this is a matter to be settled through negotiations between the parties or, alternatively, by the political process. Moreover, there is a clear danger that the hearing will be unduly prolonged or become side tracked should the issue of intergovernmental relationships be injected into the proceedings.

[21] The First Nation's disagreement with the Director regarding the future care of N.Q. *is* relevant to the issues before the court. The competing plans for future care are relevant because the court must determine if setting aside the permanent order will be prejudicial to the best interests of the child. Moreover, the court must assess whether or not there has been a "material change in the circumstances" since the making of the permanent order. The existence of care options that were not available at the time of the original hearing could constitute a material change in circumstances. However, it appears that the position of the First Nation on these issues is in support of, and identical to, the position of the applicant, S.Q.

[22] Nevertheless, I am persuaded that the First Nation does have a role to play in this aspect of the proceedings. The unwavering support of the First Nation for S.Q. is vital to the credibility of any plan of care she may present. The existence and extent of family support, child welfare and other programs within the First Nation is clearly material to the determination of the application. There will be a clear benefit if the First Nation is positively engaged in N.Q.'s future welfare.

[23] There are other benefits as well. As Lilles, C.J. said in *Re: C.K.W., supra,* in considering the involvement of the Selkirk First Nation in wardship proceedings involving one of its citizens:

> Participation in child welfare proceedings, like the case before the court, will serve to educate the Selkirk First Nation, not only with respect to the legal procedures involved, but also with respect to

> the problems that exist within their community that result in children being taken away from their parents. In this way, the First Nation will better understand what should be done to reduce the level of dysfunction in their community. Participating in this and other court proceedings will assist the Selkirk First Nation to decide whether it wants to take on the responsibilities of child welfare as permitted by their self-government agreement. They may choose not to do so if they are able to work closely and effectively with the Director.

[24] I am, therefore, of the view, that no case has been made out to add the First Nation as a party rather than as an intervenor, and that no case has been put forward to order that the intervenor be given blanket authority to call witnesses or to cross-examine the witnesses called by the parties. To permit the intervenor such wide latitude raises the substantial risk that the hearing will become both protracted and confused of purpose through dealing with issues, including the relationship between the First Nation and the Director or the sufficiency of the Director's efforts to date to address the First Nation's concerns respecting the care of N.Q., which are not particularly relevant to the present proceedings. It needs to be mentioned that, in any event, counsel for the First Nation has already been afforded a substantial opportunity to cross-examine on these matters during the hearing on this application. Other issues, for example, the adequacy of the Director's plan of future care for N.Q., can be adequately tested and examined by counsel for the child's mother, S.Q.

[25] On the other hand, I welcome the participation of the First Nation with respect to the real issue in the case – the future best interests of N.Q. The First Nation represents that it has both the willingness and the means to play a role in N.Q.'s future. To that end, it will be of benefit to permit the intervenor to call witnesses (whom the mother could have called in any event) to provide evidence regarding the resources it has available to support the mother and to provide care for N.Q. The First Nation may also call evidence with respect to the heritage of the child, the importance of that heritage, and the means available to sustain and promote it. It will likewise be permissible for counsel, on behalf of the First Nation, to cross-examine witnesses to the limited extent necessary to

bring out or clarify evidence on these points. It will be for the trial judge to determine whether there is a necessity for counsel for the First Nation to ask any additional questions.

[26] In the result, the application of the Taku River Tlingit First Nation is allowed in part. While I deny their application to be added as a party in the cause, I grant them intervenor status with leave to attend all hearings and make submissions to the court. The intervenor will also have leave to call and examine witnesses respecting the role the First Nation might play in the future care of the child, N.Q.

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Faulkner T.C.J.