Date: 2017 01 27
Docket: S-1-FM-2012-000100

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

MARIE-SOLEIL LACOURSIÈRE

Applicant

-and-

MARCO PENK

Respondent

Application for variation of access

Heard at Yellowknife, NT: December 19 and 21, 2016

Oral decision at Yellowknife, NT: December 21, 2016

Written Reasons Filed: January 27, 2017

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K.M. SHANER

Counsel for the Applicant:	Margo Nightingale
Counsel for the Respondent:	Self – Represented
Counsel for the Children:	Michael Hansen

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REASONS FOR JUDGMENT

NATURE OF THE APPLICATION AND PROCEDURAL MATTERS

[1] Ms. Lacoursière applied to vary the terms of a Final Order granted by Schuler, J., on April 30, 2015. Specifically, she asked that it be varied to:

a. terminate Mr. Penk's access to the parties' two children until such time as he is able to meet certain conditions;
b. restrain Mr. Penk from having any contact with the children, Ms. Lacoursière, her husband;
c. prohibit Mr. Penk from being within 50 feet of their residence, workplaces or schools, as the case may be;
d. require Mr. Penk to seek leave from the Court before filing any future applications; and
e. set out the pre-requisites to be met before leave will be granted.

[2] The children are represented by Mr. Hansen, appointed through the Office of the Children's Lawyer. They were previously represented by Ms. Wilford at trial and by Ms. McIlmoyle. Mr. Hansen supported Ms. Lacoursière's application.

[3] Ms. Lacoursière was required by the Final Order to obtain leave to bring this application. Leave was granted on an *ex parte* basis.

[4] The application was brought on short notice on December 19, 2016. It was filed December 15, 2016 and served on Mr. Penk December 16, 2015. The Court heard submissions from Ms. Lacoursière's counsel and the children's lawyer on December 19, 2016. The matter was then adjourned to December 21, 2016 at Mr. Penk's instance to allow him an opportunity to file and serve his own affidavit materials. He made his arguments on December 21, 2016. I ruled on the application later that day, giving brief oral reasons, and indicated written reasons would follow.

[5] Ms. Lacoursière's application to terminate access was granted.

BACKGROUND

[6] Mr. Penk and Ms. Lacoursière have two children, E., aged 9, and F., aged 4. The parties' history and the terms of the Final Order, which Ms. Lacoursière sought to vary in this application, are set out in *Lacoursière v Penk*, 2015 NWTSC 19.

[7] The parties' relationship has been difficult. Schuler, J. described some unfortunate incidents between Mr. Penk and Ms. Lacoursière's partner, Tony Collins. She also found that Mr. Penk had a propensity to criticize and complain about Ms. Lacoursière. Based on what was before me in this application, that continues to be the case.

[8] Mr. Penk is a German citizen. His current status in Canada is unclear. Ms. Lacoursière is Canadian.

[9] At trial, Mr. Penk sought joint custody, with parenting time to be shared if he was living in Canada, generous access and, assuming he was not living Canada, the ability to take the children to Germany.

[10] Ms. Lacoursière's position was the polar opposite. She sought an order for sole custody with no access for Mr. Penk. This was based on her concerns about his mental health and how this might affect the children. It also appears she was

worried Mr. Penk's animosity towards her and the conflict between them would have a detrimental effect on them.

[11] On the issue of Ms. Lacoursière's concerns about Mr. Penk's mental health, Schuler, J. indicated that she would require expert evidence before drawing the conclusion that he had "mental health issues". No expert evidence was adduced on this point at that trial. Nevertheless, Schuler, J. highlighted a number of behaviours demonstrated by Mr. Penk which caused her concern about his judgment and his ability to control his anger. These included, but were not limited to, the following:

- inundating Ms. Lacoursière with email on an array of issues and complaining when she did not respond immediately;

- being highly critical of Ms. Lacoursière in the presence of the children and others;

- involving Ms. Lacoursière 's friends and work colleagues in the parties' relationship matters;

- sending an email to counsel for Ms. Lacoursière and counsel for the children to which he attached photographs of Adolph Hitler, Sir Winston Churchill, then Prime Minister Stephen Harper and myself, describing them as "destructionists" of his family and for which he could offer no logical explanation;

- his continued position that a court-ordered restriction on the children having contact with one of his close associates, Ron Tecsy, who was convicted of sexual assault against a minor was unreasonable;

- creating an expectation in E. that the children and Mr. Penk would take a trip to Germany, but for Ms. Lacoursière standing in the way of it; and

- Creating a high-conflict atmosphere which had the potential to interfere with the children's well-being, particularly that of the older child, E.

[12] On the last point, Schuler, J. stated:

> [93] I find as a whole that the conflict between Mr. Penk and Ms. Lacoursière is likely having a significant effect on E. and that this is manifested mainly in a change in his relationship with Ms. Lacoursière and what may appear to him to be a requirement that he choose between his parents. There are indications that E. has become unhappy with life in his mother's household and is expressing views also expressed by Mr. Penk, for example, that he wants to go to Germany and that his mother is preventing him from doing so because she is mean, that she and Mr. Collins have lied in court to prevent him from going to Germany, that he wants to be a Penk and not a Lacoursière. Common sense leads to the conclusion that there is potential for harm to E.'s emotional well-being if this continues. The evidence also persuades me that it is Mr. Penk who is responsible for this state of affairs.

Lacoursière v Penk, supra

[13] Based on the evidence in this application, it appears Mr. Penk has continued to engage in many of these behaviours since the trial concluded.

[14] On the question of whether Mr. Penk could take the children to Germany, Schuler, J. acknowledged that being exposed to their heritage and getting to know their relatives in Germany could well benefit the children. Ultimately, however, she determined that allowing Mr. Penk to take them to Germany would not be in their best interests. She based this on having insufficient information about Mr. Penk's circumstances in Germany and his plans for taking care of the children while there. She was also concerned that Mr. Penk would initiate litigation in Germany if allowed to take them there, creating yet more conflict, and that he would be insensitive to their emotional needs arising as a result of being separated from Ms. Lacoursière and their community. Specifically, she stated:

> [121] I also have a significant concern that if Mr. Penk is permitted to take the children to Germany, there will be more litigation in this case, possibly on an international level. I say this because of the amount of distrust between the parties and Mr. Penk's unwillingness to accept court orders and his quick resort to the Court when he does not get his way (9 of the 15 notices of motion in this matter have been filed by him). Mr. Penk is quick to involve or threaten to involve authorities such as Social Services and the police when he is not happy with what Ms. Lacoursière is doing. I do not have any confidence that he would not similarly try to involve German authorities if he is allowed to take the children to that country, making the children's situation more complicated and stressful.
>
> [122] In addition, the children are still young and I am not at all confident that Mr. Penk would be sensitive to, and handle well, the emotional effect on them by reason of the separation from their mother. They have ready access to her in Yellowknife, where she is able to visit their school and attend their recreation activities. In Yellowknife the children also have access to people they know, such as hockey and soccer teammates, coaches, daycare providers and teachers. In

> Germany, they have no supports and know no one except for Mr. Penk. Nor is it likely that skype access would work well; I have no doubt that Mr. Penk would view management of skype access from Germany as a way to "pay back" Ms. Lacoursière by making it a very difficult experience.

[15] Schuler, J. described the overall responsibility before her in these terms:

> […]There can be no doubt that there is a great deal of conflict in this family's situation. The difficult question is how the Court can fashion a custody and access regime that will not increase the conflict, and is designed instead to keep the conflict from negatively affecting the children's lives, so far as that is possible.

Lacoursière v Penk, supra, para 94

[16] Ultimately, Schuler, J. awarded sole custody to Ms. Lacoursière. She declined to grant Ms. Lacoursière's request that Mr. Penk be denied access, however. Instead, Mr. Penk was granted specified access, subject to certain prerequisites, conditions and limitations. The stated goal was to maintain the relationship between Mr. Penk and his children, while at the same time lessening and controlling the negative influence he had on them and minimizing the level of conflict.

[17] The Final Order included the following terms respecting access:

- A term outlining blocks of time during which Mr. Penk could exercise access, including approximately two weeks in July of 2015 and Spring and Christmas breaks in 2016. He would also have access on the third Sunday of the month if he was living in Canada, save for those months where he had larger blocks of access;

- A requirement that Mr. Penk exercise access within a 120 kilometre radius of Yellowknife and a prohibition against removing the children from that area;

- A requirement that Mr. Penk stay with the children at one of two designated homes in Yellowknife during access visits or, if neither of those was available, a requirement that he provide Ms. Lacoursière with forty days' notice of where he would be staying, along with the complete address, landlord's or owner's name and contact information;

- A direction that Mr. Penk not allow the children to have contact with Ron Tecsy;

- A requirement that Ms. Lacoursière drop off and pick up the children at the home where Mr. Penk would be staying and a term prohibiting Ms. Lacoursière 's partner, Mr. Collins, from accompanying her to drop off and pick up the children for access visits;

- A term requiring Mr. Penk to deposit his passport with the RCMP for the duration of access visits;

- A term prohibiting Mr. Penk from attending at the children's schools or daycares;

- A provision that Skype communications between Mr. Penk and the children would be at Ms. Lacoursière's discretion entirely;

- A term allowing Mr. Penk to communicate with the children in writing or through video, subject to Ms. Lacoursière screening such communications and, if dissatisfied as to their suitability, returning them to Mr. Penk;

- A direction that neither party was to file any further applications for two years from the date of judgment, except with leave of the Court (which was granted for the purpose of this application);

- Restrictions on the subject matter on which the parties may communicate;

- A term prohibiting the parties from criticizing one another in the presence of or within hearing distance of the children; and

- A term prohibiting Mr. Penk from taking the children to Germany.

[18] Schuler, J. impressed upon the parties the need to comply with the terms of the order and, despite the specificity of the order, the need to use common sense and to put the children first in the event of unforeseen circumstances.

[19] Mr. Penk was ordered to pay retroactive and ongoing child support, a monthly contribution for childcare expenses and costs in the amount of $25,000.00. As of the date of the hearing, none of these amounts had been paid. He was also ordered to provide Ms. Lacoursière a copy of his income tax return and any notices of assessment, or the German equivalent of same, by June 1 each year for the preceding taxation year, beginning on July 1, 2016.

[20] Mr. Penk appealed Schuler, J.'s decision and Final Order. That appeal is pending and, subject to variations I made following this application, the Final Order remains in effect.

THE EVIDENCE IN THIS APPLICATION

[21] The evidence presented by Ms. Lacoursière in support of this application consisted of her own affidavit and affidavits from Marie Adams and Alan Bowerman. Mr. Penk filed his own affidavit in response. The key points of the evidence are summarized below.

Ms. Lacoursière's Affidavit

[22] Ms. Lacoursière deposes to several things happened following the Final Order which have led her to believe Mr. Penk now poses an unacceptable risk to the children's well-being and that of herself and Mr. Collins. She feels access should be terminated.

[23] Ms. Lacoursière indicated that although the younger child does not display behavioural changes after access with Mr. Penk, the eldest child has made remarks which cause her concern. These are:

- Following an extended access visit in July of 2015, E. asked her why she would not allow Mr. Penk to buy him presents.

- After the same visit, when Ms. Lacoursière was driving in the car with E. and another child, he stated "calmly and seriously" and, apparently, without any precipitating event, that when he is ten he will throw himself in front of a bus and die. He has said this several times since, once in response to being told by Ms. Lacoursière he was being grounded.

- Following a visit in September of 2015, Ms. Lacoursière asked E. if he had fun, to which he responded he should not answer the questions

> because she would use the information against Mr. Penk in court proceedings. Ms. Lacoursière deposed E. told her Mr. Penk did not tell him that, but that it was his own idea.

[24] Exhibit "A" to Ms. Lacoursière's affidavit is a document Mr. Penk filed with the Court of Appeal. It is entitled "Memorandum to Judge" and dated June 14, 2016, attached to which is an Appendix. The document sets out Mr. Penk's unfavourable views of the trial process and the result, along with assertions the trial judge was biased and used "degrading language" about him in her written decision. He also makes a plethora of accusations of unprofessional and criminal conduct on the part Ms. Wilford, Ms. McIlymole, and Ms. Lacoursière's lawyer, Ms. Nightingale. These include (but are not limited to) allegations that:

- Ms. Nightingale's husband stalked and spied on Mr. Penk for the purpose of gaining information to use against him at the trial;
- Ms. Nightingale stocked Mr. Penk electronically;
- Ms. Nightingale falsified a court order;
- Ms. Wilford fabricated an affidavit to ". . . alienate the court against me and in order to manipulate the outcome of the proceedings",
- Ms. Wilford sought to destroy Mr. Penk's relationship with the children, the children's connection with their German family and culture and Mr. Penk's "good standing in the community"; and
- Mr. Collins and Ms. Lacoursière's mother fabricated complaints about Mr. Penk to the RCMP.

[25] Exhibit "B" is a copy of a letter and drawings (herein the "Letter") which Mr. Penk sent to Ms. Lacoursière, ostensibly for the children.[1] She received it on September 15, 2016. It was written in German. Ms. Lacoursière was alarmed by the contents of the Letter and gave copies of it to her lawyer and the lawyer acting for the children at that time, Ms. McIlmoyle. She says she mailed the original back to Mr. Penk. She had a copy of the letter translated to English by a certified translator. The translation is included as part of Exhibit "B". The translation is below:

[1] Mr. Penk admits he wrote and sent this letter in his own affidavit.

> Yellowstone Prison, [day and month cut off on scan][2] 2016
>
> Dear (E), dear (F),[3]
>
> I was unable to catch another fish – I was too busy breaking us free.
>
> After all, we want to be going to Germany, and there is still a lot I have to do to achieve that.
>
> Manuel Neuer is the new captain of the world championship team, and we want to see him play soon. I wonder if Schweini [Bastian Schweinsteiger] and [Marco] Reuss will grumble when they hear what bad things the Canadians are doing to us?
>
> Weinalden [Weihnachten – Christmas?] is soon upon us, and then two weeks in this Yellowknife Prison.
>
> I actually think we should draw a picture of it. We'll send it to all the people so that they realize all the bad things that are being done to us.
>
> Right, kids? We'll fight! We won't let them get us down. [see hand-drawn faces]
> I love you a lot.
>
> Your dad
>
> P.S. I've made copies of all the letters so that we can prove that the privacy of correspondence is being violated, and censorship exists.

[26] Included with the letter was a hand-drawn illustration of what appear to be a bat, a fox and a lion. There are words in German on the page, which are translated as follows:

> If papa is a fox, then (F) and (E) also have to be little animals. Does (F) want to be a lion? What about (E)? Do you want to be a bat?
>
> [drawing of bat] [drawing of fox] [drawing of lion]
> Dad (F)
>
> Each one of us can bite, and we are dangerous.

[27] Exhibit "C" is a 259-paragraph affidavit Mr. Penk executed on October 20, 2016 and filed with the Court of Appeal. An exhibit of some 28-pages in length, entitled "Canada's Dysfunctional Acts against Children, Families and Cultures – Canada's Crimes Against Humanity" is attached to it. This affidavit and exhibit

[2] The words in square brackets appear to be the translator's
[3] I have initialized the names of the children

contain numerous bizarre statements and serious allegations of abuse, conspiracy and criminal conduct against Ms. Lacoursière, Mr. Collins, Ms. Nightingale and her husband, Ms. Wilford and Ms. McIlmoyle, for which there is no apparent foundation. Many of the allegations Mr. Penk made in his Memorandum to the Judge (discussed above) are repeated in Exhibit C. In addition, Mr. Penk makes a number of statements regarding Canada's treatment of First Nations children, equating to it his and his children's current situation:

> When my children and I celebrate 2016 Christmas in unlawful Canadian detention we celebrate this with the knowledge that the criminals who committed the crimes against the First Nation*[sic]* children and the alleged criminals and their helpers-helper who destroy family and culture live amongst us.
>
> *Exhibit "C" to the Affidavit of Ms. Lacoursière, at Page A8*

[28] Ms. Lacoursière pointed to statements Mr. Penk made which suggest he intends to take the children to Germany. These include the following:

> My children will return to Germany with me to be protected from the Canadian regime, to experience unrestricted opportunities, quality and free education, culture, humanity and protection of families, heritage and environment.
>
> *Exhibit "C" to the Affidavit of Ms. Lacoursière, at Page A16*

[29] Also attached to Ms. Lacoursière's affidavit are pieces of email correspondence between Mr. Penk and Ms. Nightingale and Mr. Hansen. In one email, dated November 21, 2016 (Exhibit "E") he makes reference to a "Canadian disease", and a number of other bizarre statements:

> In my previous communication I introduced vocabulary to define the problems accurately. I introduced the term Canadian disease. The Canadian disease is very virulent and I will make every effort to contain it, including taking the matter to international authorities. I found Mr. Hansen's introduction into the case very interesting and a good representation of the case's past and future. Ms. Lacoursière and all her helpers lied in the witness stand and RCMP, which led to grave consequences for my children and me. One lier *[sic]* gives the door handle to the following lier, *[sic]* on which the virus seems to dwell.
>
> [Referring to Ms. McIlmoyle] . . .Typical Canadian culture, harass and dominate other people and when resistance forms, the Canadian fell sick and cry out "now I am hurt". You will understand that I as a German have no sympathy for your Canadian culture of domination and dishonesty, especially in view of the circumstances that you Canadians destroy other cultures and families.

> I believe that his case is not a case individual vs. individual. I believe that you Ms. Nightingale and Mr. Hansen have embarked on a crusade against me, my children and our culture. Despite my concerns about your conduct, I will accept your apologies regarding the lies of October 28, 2016. If you decide not to apologies, I will proceed with legal and administrative action to address your unprofessional conduct. I will include media, the United Nations, international governments to address the unprofessional conduct and alleged corruption. At this point, Ms. Wilford, [Justice] Schuler, [Justice] Smallwood, Ms. McIlmoyle, Ms. Nightingale, Mr. Hansen and [Ms. Nightingale's husband] have committed dysfunctional conduct that is obviously systematic and thus requires appropriate responses.

[30] The correspondence again contained a number of allegations and accusations, including the suggestion that Ms. Nightingale and Mr. Hansen lied in a court proceeding and that the presiding judge and Mr. Hansen have an "intimate, corrupt" relationship. At the hearing of this application Mr. Penk said he based this latter claim on the judge having been a Crown prosecutor prior to being appointed to the bench and being involved in criminal cases in which Mr. Hansen acted as defence counsel.

[31] Exhibit "H" to Ms. Lacoursière's affidavit is a copy of email correspondence to Mr. Hansen, Ms. Nightingale and another individual dated December 9, 2016. Mr. Penk starts by making reference to an "RCMP Complaint" (which appears to be an exhibit to the affidavit he filed in response to this motion). Mr. Penk then states Mr. Collins will "murder" the children if they remain in Ms. Lacoursière's care:

> The violence escalates and the Canadian regime has no authority as we witness to stop the abuse and violence. I am very concerned that Collins will harm my children and murder my children and the other children when he again will spin out of control when the pressure in the court process intensifies. Especially when the children return in my custody I believe that Collins will murder them to prevent this.
>
> We witnessed Lacoursière respond with an email yesterday that accuses me of violating the final order. This is the behavior pattern that dysfunctional and criminal individuals often exhibit. Bank robbers often take hostages and kill people when their option would only be surrender. Lacoursière is now under pressure by the RCMP Complaint and further legal steps. Lacoursière responds with aggression instead of admitting the offenses. The children are in harms *[sic]* way if they remain in Lacoursière's house.

[32] Cumulatively, these things have created a great deal of concern in Ms. Lacoursière. She fears Mr. Penk's attitudes and actions put the children's

emotional well-being at risk. She fears he may try to remove them from Canada. She has new and elevated concerns about what Mr. Penk is telling the children about Canada. She is particularly distressed about Mr. Penk's suggestion that Mr. Collins will murder the children and about what Mr. Penk might do as a result of his belief.

[33] Ms. Lacoursière also describes conduct by Mr. Penk which, on its face, is in breach of the Final Order, in particular the requirement that if Mr. Penk is not exercising access at one of two designated homes, he must provide Ms. Lacoursière with forty days' notice of where he is proposing to stay as well as contact information for the owner or tenant, as the case may be. Ms. Lacoursière says Mr. Penk has only once provided her with the required forty days' notice of where he will be staying with the children during access visits and further, he does not provide complete contact information. For example, he will provide an email contact address, but not a telephone number.

[34] Further, for the July 2015 access period, Mr. Penk advised Ms. Lacoursière he would be staying with the children at Marie Adams' home in Yellowknife. Ms. Lacoursière arranged to drop off and pick up the children there. Shortly after arriving to pick them up, she learned from Ms. Adams that the children had not been staying there. In fact, they had stayed outside of Yellowknife (although within the prescribed 120 km radius) at Prelude Lake for the duration of the access period. Mr. Penk did nothing to disabuse Ms. Lacoursière of the idea the children were staying at Ms. Adams home in Yellowknife when, in fact, they were not.

[35] Ms. Lacoursière has received none of the child support Mr. Penk was directed to pay under the Final Order.

Marie Adams' Affidavit

[36] Marie Adams deposed she met Mr. Penk in the spring of 2015 and, at his request, she offered to let him use her home as a place where he could pick up and drop off the children when he had access that June. She said she did not realize at the time Mr. Penk wanted to use her house for pick up and drop off every month. She also deposed she did not, at any time, consent to Mr. Penk and the children living at her house or being there for more than a few hours at a time.

[37] Mr. Penk used Ms. Adams' home for pick up and drop off for summer access in July, 2015. This access was for an extended period, *per* the Final Order. Mr. Penk and the children did not stay at Ms. Adams' home but rather, camped at

Prelude Lake. Ms. Adams was surprised to learn Ms. Lacoursière thought Mr. Penk and the children were living at Ms. Adams' home during that access period.

Alan Bowerman's Affidavit

[38] Alan Bowerman is a registered psychologist practicing in Yellowknife. He has held nine counseling sessions with E. since July of 2015. Mr. Bowerman deposed he has no reason to believe E. has been ill-treated in any way by Mr. Penk, Ms. Lacoursière or Mr. Collins. He notes, however, that E. has indicated he feels "caught in the middle" between parent groups and he feels bad when a parent says something bad about the other parent.

[39] Mr. Bowerman also formed and offered an opinion suggesting Mr. Penk suffers from mental illness and that he could, consequently, pose a danger to the children, Ms. Lacoursière and Mr. Collins. He deposes Mr. Penk displays irrational thought patterns, a problem which he feels has escalated, and that Mr. Penk shows little connection with reality. Alternatively, Mr. Penk is deliberately making up a story to meet his perceived needs.

[40] Mr. Bowerman indicated he has not met Mr. Penk, nor corresponded with him. He formed the opinion based on documents provided by Ms. Lacoursière, namely the Memorandum of Judgment issued by Schuler, J. on April 30, 2015, the translated letter, Mr. Penk's affidavit sworn October 20, 2016 (Exhibit "C" to Ms. Lacoursière's affidavit)[4] and the email from Mr. Penk to Ms. Lacoursière's lawyer and Mr. Hansen, dated December 9, 2016 (Exhibit "H" to Ms. Lacoursière's affidavit). Mr. Bowerman recommends Mr. Penk undergo a psychological or psychiatric evaluation before having any further unsupervised access to the children.

[41] In reaching my conclusion respecting termination of Mr. Penk's access, I gave no weight to Mr. Bowerman's opinion respecting Mr. Penk's mental health. This was based on the four factors in *R v Mohan,* [1994] 2 SCR 9 not being met. These are: a properly qualified expert, logical relevance, necessity in assisting the trier of fact to reach a conclusion and the absence of any exclusionary rule. The first three are relevant here.

[42] First, Mr. Bowerman was not properly qualified as an expert. To be clear, I do not question Mr. Bowerman's qualifications and abilities as a practicing psychologist. Nevertheless, I am unable to conclude he can be properly qualified in law as an expert to give opinion evidence respecting Mr. Penk's mental health in

[4] Mr. Bowerman states that due to the length of this document, he read only portions of it.

this case. The opinion, as well as his qualifications and experience, were presented in affidavit form. He was not present at the hearing and there was no opportunity for the Court to learn test his background through examination and cross-examination and thus draw a conclusion on whether he could be qualified to give the opinion. Mr. Penk made it clear in his own affidavit that he disagreed with the opinion, so there was no possibility that Mr. Bowerman could be qualified on consent.

[43] Second, although Mr. Penk's mental state may have been in issue in this application, the opinion is not "logically relevant" in the sense that it tends to prove Mr. Penk has a mental disorder. The opinion itself is highly qualified. Mr. Bowerman did not have an opportunity to meet with Mr. Penk and the materials he was provided, and upon which he formed his opinion, are limited. Perhaps more important, the opinion does not offer a diagnosis of any particular mental disorder which could render Mr. Penk more likely to cause harm to the children, nor is there any explanation of methodology or the results of the application of any risk assessment tools upon which the conclusion is based.

[44] Third, the opinion is unnecessary. Whether Mr. Penk's statements regarding Ms. Lacoursière, Mr. Collins, the lawyers, the judges and Canadian society are irrational and concerning is a matter I am able to determine from the other evidence.

Mr. Penk's Affidavit

[45] Mr. Penk affidavit in response to this application bears significant similarity to the documents supplied by Ms. Lacoursière. Much of it focuses on issues which were determined by Schuler, J.

[46] Among other things, Mr. Penk deposes the children live in an abusive home and that the children have come to him with injuries. These "injuries" were brought up during the trial and ruled upon by Schuler, J. She did not find that the children were injured or otherwise victimized by Mr. Collins and Ms. Lacoursière. Mr. Penk also claims E. told him he was assaulted by Mr. Collins. He believes Mr. Collins is violent and should not be allowed to have contact with the children. He says Mr. Collins kicks the children and makes them hit each other. He believes Ms. Nightingale and her husband have stalked him through social media and by use of a telescope he has seen in their living room window which he claims they use to peer into his bedroom.

[47] Mr. Penk addresses the issues of the use he made of Marie Adams' home, his failure to give Ms. Lacoursière forty days' notice of where he and the children would be staying during access visits and the matter of the Letter.

[48] With respect to the need to provide forty days' notice, Mr. Penk deposes he is unable to comply with this term. He lives with Mr. Tecsy, with whom the children are to have no contact. Thus, he must find other accommodation to exercise access. He suggests the forty day requirement does not reflect reality and that it is almost impossible to secure accommodation that far ahead of time.

[49] With respect to Ms. Adams' home, Mr. Penk deposes there was confusion about the address. He attributes this to Ms. Adams being under medical treatment at the time, which he suggests led to her being confused. He also says he believed the official "access address" was Ms. Adams' home in Yellowknife, even though he and the children departed for Prelude Lake directly after drop off and stayed there for approximately two weeks.

[50] On the matter of the Letter, Mr. Penk deposed this:

> 153. The letter that Ms. Lacoursière now uses in the court proceedings was sent and extra marked outside on the envelop *[sic]* to allow Ms. Lacoursière to identify it as a special letter that was not sent *[sic]* as a normal letter to the children. I was concerned about the conduct in the appeal process and I was interested to learn where Ms. Lacoursière had developed in regards to the general situation.
>
> 154. I was sure the letter would not be shown to the children. I never read the letter to the children. This can be confirmed by the witnesses who attended the access.
>
> 155. The Final Order specified that letters that Ms. Lacoursière finds inappropriate can be returned to me. Instead of returning the letter, I witnessed Ms. Lacoursière is willing and highly motivated to use any item that is presented to her to return to the court, invest in translations, hire psychologists and any other conduct in order to advance negativity.

[51] Mr. Penk contends Ms. Lacoursière has breached the Final Order in failing to return the letter to him. As well, she once had her mother drop off the children for access with Mr. Penk and he deposes they were once dropped off by a taxi. He views Ms. Lacoursière's failure to personally deliver the children for access on these two occasions as breaches of the Final Order.

[52] Mr. Penk did not address non-payment of child support and costs in his affidavit. During the hearing he indicated he had started a tour company in

Germany to bring tourists to the Northwest Territories and that he was earning an income from it. He said he has invested approximately $20,000.00 in advertising for the company.

[53] Mr. Penk has not provided his income tax information to Ms. Lacoursière as directed by the Final Order, although he has had it in his possession since sometime in the fall.

THE LEGAL FRAMEWORK

[54] These proceedings fall under the *Children's Law Act,* SNWT 1997, c 14 (the "*CLA*"). The *CLA* provides at s. 22(1) that an order for custody or access will not be varied "unless there has been a material change in circumstances that affects, or is likely to affect, the best interests of child". This is a two-step process. If it is determined that there has been a material change in circumstances, then the Court may go on to consider if that material change is such that it is in the child or children's best interest that the terms of custody or access are varied.

[55] The meaning of "material change", and how it factors into a variation application, was considered by McLachlin, J., as she was then, in *Gordon v Goertz, infra:*

> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

Gordon v Goertz, [1996] 2 SCR 27 at 43-44

[56] Although *Gordon v Goertz* fell under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), the definition of "material change" set out therein has been to applied by

this Court to variation applications decided under the *Children's Law Act*. (See, for example, *Sound v Bernhardt,* 2014 NWTSC 51).

[57] A variation application is not a re-trial, nor is it an indirect route to appeal the original order. A court hearing a variation application must presume the previous order was correct when made. *Gordon v Goertz, supra; Williams v Williams*, 1996 CanLII 3180 (NWTSC) at para 4. This does not mean what has happened in the past is irrelevant or unimportant, however. As stated by Charbonneau, J., in *Sound v Bernhardt,* 2015 NWTSC 39 at para 20:

> […] the role of the Court is not to revisit events and matters that have been the subject of earlier decisions. Of course, the overall context and history of the matter are relevant and should not be overlooked. At the same time, what is most critical is the evidence of what has transpired between the time the last Order was made, and now. And, as is always the case, the overarching consideration is what is in the best interests of the children.

[58] As noted, a material change in circumstances alone will not suffice to justify a variation. It is the first, or threshold, phase of a two part process. If the "material change" threshold is met, the Court must move to the next step, which requires it to determine what is in the children's best interests going forward. Factors to be considered are set out in s. 17(2) of the *Children's Law Act,* as follows:

> (2) In determining the best interests of a child for the purposes of an application under this Division in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including:
>
> (a) the love, affection and emotional ties between the child and
>
> (i) each person entitled to or seeking custody and access,
> (ii) other members of the child's family,
> (iii) persons involved in the care and upbringing of the child;
>
> (b) the child's views and preferences if they can be reasonably ascertained;
> (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
> (d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and provide for any special needs of the child;
> (e) the ability of each person seeking custody or access to act as a parent;
> (f) who, from among those persons entitled to custody or access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;

> (g) the effect a change of residence will have on the child;
> (h) the permanence and stability of the family unit within which it is proposed that the child live;
> (i) any plans proposed for the care and upbringing of the child;
> (j) the relationship, by blood or through adoption, between the child and each person seeking custody or access; and
> (k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access.

[59] This is not an exhaustive list, nor are all of the factors listed in s. 17(2) relevant and of equal weight in every case. Relevance and weight will vary as the overall circumstances of the children and the parents require.

[60] Finally, an order denying access is a remedy of last resort. Regular access between a parent and a child is generally considered to be in the best interests of children. As stated by Blishen, J. in *VSJ v LJG,* [2004] OJ No. 2238; 2004 CarswellOnt 2159:

> 128 There is a presumption that regular access by a non-custodial parent is in the best interests of children. The right of a child to visit with a non-custodial parent, to know and maintain or form an attachment to a non-custodial parent is a fundamental right and should only be forfeited in the most extreme and unusual circumstances. To deny access to a parent is a remedy of last resort. See *Jafari v. Dadar*, [1996] N.B.J. No. 387 (N.B. Q.B.).

[61] Blishen, J. provided an inventory of cases from which she summarized the factors which have been most commonly considered in terminating access. These include long term harassment and harmful behaviours towards the custodial parent which cases that parent and the child stress or fear; a history of violence; unpredictable, uncontrollable conduct; alcohol and drug abuse witnessed by the child or which places the child at risk; extreme parental alienation; a lack of a relationship or attachment between the non-custodial parent and the child; neglect or abuse during visits; and preferences expressed by older children to terminate access. *VSJ v LJG, supra,* para 135. Blishen, J. also stated:

> 135 None of the above cited cases deal with one factor alone. In every case, there are a multitude of factors which must be carefully considered and weighed in determining whether to terminate access is in the best interests of the child.

[62] I would add to this that the factors in *VSJ, supra,* although very thorough, should not be treated as an exhaustive list. There are any number of other factors which, when combined with a child's and/or custodial parent's circumstances, could lead a court to consider making an order to terminate access.

ISSUES

[63] The issues are these:

- Has there been a material change in circumstances?
- If so, is it in the children's best interest that the terms of access are varied?
- If access is to be varied, are there other reasonable options besides terminating access?

[64] The timing of Ms. Lacoursière's application must be addressed as well and I will do so first.

[65] The timing was unfortunate. It came on the eve of a school break and during the Christmas season, a time when great expectations are created, particularly for children. The children were no doubt expecting to spend the school break with their father. They had activities planned, including a model plane building party which E. planned to host for his friends. Mr. Penk's materials suggested it was suspicious that Ms. Lacoursière brought the application on short notice, on the eve of what is to be an extended period of access.

[66] It is true some of the things upon which Ms. Lacoursière based her concerns transpired some months ago: Mr. Penk filed his "Memorandum to Judge" in the Court of Appeal in June of 2016; Ms. Lacoursière received the Letter on September 15, 2016; and Mr. Penk's "Affidavit of the Applicant" was executed October 20, 2016 and, presumably, filed shortly thereafter. That said, the more alarming materials, which no doubt precipitated the decision to bring this application, came into being relatively recently. These are Mr. Penk's email correspondence of November 21, 2016 in which he made a number of bizarre allegations against Mr. Hansen, Ms. Nightingale, Ms. Nightingale's husband, Ms. McIlmoyle and Smallwood, J. and his email correspondence of December 9, 2016 in which he suggested Mr. Collins will murder the children.

[67] In the circumstances, I am satisfied Ms. Lacoursière was motivated by a sincere belief that she had to take this action to ensure the children's safety and well-being. That these events came to a head just prior to the children's Christmas break and scheduled access with their father was an unfortunate coincidence over which she had no control.

Has there been a material change in circumstances?

[68] A key consideration in this application is whether the events which have transpired since the trial were unforeseen. These parties have had an extremely difficult relationship and, as Schuler, J. indicated, it is Mr. Penk who causes the most difficulty. Some level of continued difficulty could be foreseen. Mr. Penk's extreme dislike for Mr. Collins is not new, nor is his criticism and disapproval of Ms. Lacoursière's parenting. His desire to take the children to Germany and his dissatisfaction with having a geographic limit placed on his access are both known issues. Ms. Lacoursière's concern about Mr. Penk's mental health is not new. It was raised many times by Ms. Lacoursière throughout the proceedings and it was considered by Schuler, J. at the trial. In looking at and considering the evidence before the Court now, however, I find there has been a material change in circumstances.

[69] This conclusion is not based on just one or two things, but rather, on the cumulative effect of conduct of and statements by Mr. Penk, which raise new and greater concerns about Mr. Penk's ability to control his anger and exercise rational judgment, and which manifest a flagrant disregard for the Court's authority and directions.

[70] Since the trial Mr. Penk has made a number of statements, described earlier, against an ever increasing number of people and organizations, including Mr. Collins, Ms. Lacoursière, Ms. Nightingale, Ms. Nightingale's husband, Mr. Hansen, Ms. McIlmoyle, a former Minister of Justice with the Government of the Northwest Territories, judges of this Court, the military, the RCMP and the Canadian government. The statements are not restricted to criticism of Ms. Lacoursière's parenting, nor expressions of dislike and disapproval about Mr. Collins. They now include claims and accusations of fabricating evidence and Court documents, conspiracies, stalking and imminent harm to the children. Mr. Penk has made these statements in documents filed with this Court, the Court of Appeal, with the RCMP Complaints Commission and in numerous pieces of correspondence. His claims are baseless and, by any standard, completely irrational.

[71] The Letter, as well as Mr. Penk's explanation as to why he sent it, also demonstrates extremely poor judgment. His explanation is that he wrote this letter, addressed to the children, with the expectation Ms. Lacoursière would read it, not show the children, but not return it to him. He was setting some sort of trap to see if she would keep the letter and thus breach the Final Order.

[72] I do not accept Mr. Penk's explanation to justify this conduct. In the circumstances here, where one of Mr. Penk's most serious grievances is his

inability to take the children to Germany, the logical conclusion is that Mr. Penk intended to taunt, provoke and threaten Ms. Lacoursière with the possibility of taking the children away. Further, the contents of the letter suggest strongly that Mr. Penk has communicated to the children that but for Ms. Lacoursière and "the Canadians", they would be free to travel to Germany. In my view, this is meant to undermine the relationship between the children and their mother by casting her in a negative light. This runs contrary to the requirement that the parties refrain from criticizing one another in the presence or within earshot of, the children.

[73] Even if one accepts Mr. Penk's explanation that he never intended the children to see the letter and sent it as part of some sort of "trap", it reflects very poorly on him. It calls his judgment into question. It demonstrates that he is unable to see "the big picture", that is, the children's well-being. It is evidence of a continuing and escalating pattern of abusive conduct directed at Ms. Lacoursière.

[74] Another material change is Mr. Penk's demonstrated disrespect for, and unwillingness to comply with, the Court's Final Order. As noted, Schuler, J. crafted a very specific order which included a provision requiring Mr. Penk to advise Ms. Lacoursière, forty days in advance of where he and the children would be staying during any given access visit, if not at one of two designated homes. The justification for this is clear upon reviewing Schuler, J.'s Memorandum of Judgment. First, Mr. Penk's status in Canada was unclear at the time (and this remains so) and he had no permanent address. Second, Mr. Penk had a close relationship with Ron Tecsy, a resident of Yellowknife, who, as noted, has a conviction for a sexual offence against a minor. Schuler, J., expressed concern about Mr. Penk's judgment with respect to Mr. Tecsy:

> [58] A significant area of concern has to do with Mr. Tecsy, a friend of Mr. Penk. In the summer of 2013, Mr. Penk proposed that he and the children would stay in Mr. Tecsy's home. He and Ms. Lacoursière were made aware of Mr. Tecsy's criminal record for sexual assault and assault on a child and since early 2014 there have been orders made by the Court on an interim basis that the children not have contact with Mr. Tecsy and his children. Before those orders were made, Mr. Penk initially accepted that there should be no contact, and represented to the Court that there would be no contact, however at trial he admitted that he and the children spent time with Mr. Tecsy during the fall of 2013.
>
> [59] Although the Court has made it very clear to Mr. Penk that the children are not to have contact with Mr. Tecsy and that the Court is of the view that the best interests of the children require that condition, Mr. Penk has continued to insist that because he has made inquiries and does not view Mr. Tecsy as a danger, there should be no restriction on contact. At trial, Mr. Penk made it very clear that he regards the restriction as unreasonable […]

[75] Mr. Penk deposes he currently resides with Mr. Tecsy in a property owned by the latter. He states the children have not had contact with Mr. Tecsy. This living arrangement requires him to exercise access to the children elsewhere, however. As a parent, as well as by the terms of the Final Order, Ms. Lacoursière has the right to know where that will be. She also has the right to be given this information forty days in advance, presumably to allow her time to satisfy herself the proposed accommodation is suitable.

[76] Mr. Penk feels the notice period directed in the Final Order is unrealistic and unattainable. Thus, he has but for one occasion, not complied with it, and it appears he does not plan to do so in future. There is no evidence he has taken steps to try and vary this provision of the Final Order, by application or on consent. There is also no evidence he has tried to find accommodation with someone other than Mr. Tecsy, which would likely remove the burden of the notice requirement altogether. He has chosen to simply ignore it.

[77] The incident with respect to Marie Adams' home in Yellowknife and the alleged confusion respecting whether he was staying at the cabin or the house in Yellowknife is another example of a flagrant disregard for the Court's direction. Mr. Penk intentionally led Ms. Lacoursière to believe that he would staying at Ms. Adams' home *in Yellowknife* with the children. He did nothing to disabuse her of this idea. He deposes he went with the children to the cabin at Prelude Lake directly following the drop off and stayed there for approximately two weeks. I cannot imagine this was by accident, nor do I accept it was due to any "confusion" on Ms. Adams' part. It was incumbent upon Mr. Penk to tell Ms. Lacoursière where he and the children would be staying over the access period, and it was also incumbent on him to do so in advance. He did not do this and, based on the evidence, it does not appear he ever intended to do so. It only came out by chance. My conclusion is that he deliberately misled Ms. Lacoursière.

[78] Mr. Penk has failed, without valid reason, to comply with the terms of the Final Order requiring financial disclosure and payment of child support. Mr. Penk indicated at the hearing that he has had his income tax return documents since the fall. Yet, he has taken no steps to provide those to Ms. Lacoursière as required by the Final Order.

[79] Nor has Mr. Penk made any effort to pay child support or the costs ordered against him. This is despite earning an income. Ms. Lacoursière has throughout been, continues to be, the sole financial provider for the children.

[80] It is well-established that access is not dependent on child support. The two are generally considered mutually exclusive. In this context, however, Mr. Penk's failure to pay support further demonstrates his disregard for this Court's authority, as well as a fundamental misunderstanding of his moral and financial obligations as a parent. Considered with the other circumstances, it is a factor which contributes to a finding that there has been a material change in circumstances.

Should Access be Terminated?

[81] It is in the best interests of these children that access be terminated.

[82] Schuler, J. sought to construct an order which would allow Mr. Penk to maintain a relationship with his children while at the same time controlling his demonstrated negative influence on them. In imposing conditions on the nature of the communications between the parties, she obviously sought to try and keep the animosity between Mr. Penk and Ms. Lacoursière to a minimum. In directing access be exercised within certain geographic parameters and that Ms. Lacoursière should know where the children would be staying during any period of access, Schuler, J. was clearly attempting to compensate for Mr. Penk's living situation and questionable judgment, as well as providing Ms. Lacoursière peace of mind in knowing where and with whom the children would be staying during any period of access.

[83] In making orders for custody and access, courts address what is in the best interests of the children. Those interests can only be served if the parties obey what is ordered. Court orders are not suggestions. They are not guidelines. While recognizing that a certain amount of context-driven flexibility may be required in interpreting orders in a family law setting, there is an expectation that the parties will follow the terms of the order. To do otherwise is, simply, illegal and will, in almost all cases, attract consequences.

[84] Mr. Penk has demonstrated he is unwilling to abide by simple, yet fundamental terms ordered by this Court. If he will not abide by the simplest of its conditions, then this Court can have no confidence that he is prepared to abide by any of it, including the requirement that the children remain in Yellowknife or within a 120 km radius thereof. It can have no confidence that he will refrain from denigrating Ms. Lacoursière and those close to her to the children. It can have no confidence he will obey the requirement that he not remove the children to Germany. Further, Ms. Lacoursière can have no confidence that Mr. Penk will

uphold his obligations and that the children are in a suitable and safe environment while in his care.

[85] I am troubled by Ms. Lacoursière's evidence that E. has asked her why she does not allow Mr. Penk to buy him presents, that he has told her he cannot talk about visits because the information will be used against Mr. Penk in court and the repeated statement he will throw himself under a bus when he is ten years old. It is reasonable to conclude, based on all of the evidence before me, that the first two statements are a result of Mr. Penk discussing custody and access with E., something which should not be placed on his shoulders.

[86] With respect to the statement about throwing himself under a bus, I acknowledge it could be driven by from any number of factors. It is reasonable to conclude, however, that the animosity between E.'s parents, and particularly that displayed by Mr. Penk towards Ms. Lacoursière, is contributing to a very stressful existence for E.

[87] Mr. Penk's bizarre and escalating accusations and claims about Ms. Lacoursière and others, as well as his conduct in sending the Letter, also call into question his judgment and his overall suitability to act as a parent. In my view, his Court documents, correspondence and complaints are designed to harass Ms. Lacoursière and anyone he views as being on her "side". They manifest an intention to "win" the children's affections and undermine the relationship they have with Ms. Lacoursière. Unfortunately, Mr. Penk's efforts serve only to place further strain the relationship between the parties and put the children in a position where they feel they must choose between their parents and their respective nationalities. None of this can be in their best interests and access must be terminated as a result.

Are there other reasonable options besides terminating access?

[88] Terminating access is a drastic measure. The children love their father and they have relationship with him. Therefore, I considered very carefully the possibility of imposing additional conditions, including a term requiring access be supervised.

[89] Supervised access is not a viable option. If Mr. Penk will not comply with the authority of the Court, then it is unreasonable to expect he will comply with the directions of a civilian supervisor.

[90] Terminating access is the only viable option in the circumstances. Mr. Penk has demonstrated he is unwilling to accept the terms the Court has ordered and his

actions and claims indicate he is unwilling to promote a healthy relationship between the children and *both* of their parents. On the contrary, he demonstrates an intention to continue to undermine the children's relationship with their mother. He displays irrational opinions and extremely poor judgment. There are no terms any court can impose to remedy this or prevent it from continuing, nor to prevent the inevitable risk his conduct poses for the children. Terminating his access is the only viable option.

CONCLUSION

[91] For the foregoing reasons it is in the children's best interest that access with Mr. Penk be terminated.

ORDER

[92] I confirm the following order was made:

- Mr. Penk's access to the children is terminated as of December 21, 2016;

- The Final Order of this Court dated April 30, 2015 is accordingly varied to delete paragraphs 2(a) to 2(m) and 2(o) to 2(p);

- With the exception of communication with the children in writing or by video as contemplated by paragraph 2(q) of the Final Order, Mr. Penk is restrained from communication with Ms. Lacoursière and the children, and he shall not be within 50 metres of their home, Ms. Lacoursière's workplace or their school, as the case may be.

- The Respondent must seek leave to file any further materials or applications in this matter.

K.M. Shaner
J.S.C.

Dated in Yellowknife, NT this
27th day of January, 2017

Counsel for Ms. Lacoursière:	Margo Nightingale
Counsel for the Children:	Michael Hansen
Marco Penk:	Self-Represented

S-1-FM-2012-000100

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARIE-SOLEIL LACOURSIÈRE
Applicant

-and-

MARCO PENK
Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. M. SHANER
