

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DONOVAN BOUCHER

Applicant

- and -

JENALL MCKAY

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] A trial was held in this matter from May 2 to May 5, 2016, in Fort Resolution, Northwest Territories. Counsel advised the court at the beginning of these proceedings that the only issue was the primary residence of the child Edward Boucher. Any other issues can and will be sorted out by counsel. This is a case that would very likely have been settled without a trial were it not for the difficulties posed by one parent living in Yellowknife and the other living in Fort Resolution. I want to say at the outset that both parents are obviously capable of providing a loving home for this little boy and, were it not for the great distance between their residences, this would have been a case where equal, shared parenting would have been ideal.

BACKGROUND

[2] Edward Jameson Louis Boucher, born September 1, 2009, was conceived after an encounter between Donovan Boucher (the Applicant) and Jenall McKay (the Respondent), (collectively the Parties). They were not at the time and have

never been in a relationship. They both grew up in Fort Resolution, Northwest Territories and both of their extended families live there. Ms. McKay continues to reside in Fort Resolution with a toddler from a subsequent relationship. Mr. Boucher moved to Yellowknife in 2013, where he lives with his fiancée Kristan Marion and her daughter Whitney, who is the same age as Edward.

[3] In 2014 Ms. McKay decided to upgrade her education in Fort Smith. She asked Mr. Boucher if he would be willing to take care of Edward during what was to be his kindergarten year. While there is some limited dispute about what exactly was intended, I find as a fact that the intention was that Edward would reside in Yellowknife for that year only and not permanently.

[4] Edward moved to Yellowknife in September of 2014 and the first 3 months went very well. He went back to Fort Resolution to spend the Christmas holidays with his mother and extended family. During the holidays, Ms. McKay had a change of heart. It's not entirely clear if this was due to her becoming pregnant or was simply a matter of missing Edward too much, but either way she decided that she did not want him to return to Yellowknife.

[5] She texted this intention to Mr. Boucher, who was at that moment on his way to Fort Resolution. Mr. Boucher found Edward at his great-grandfather's residence, told the older man that he was taking Edward to see Whitney, and took Edward back to Yellowknife. Ms. McKay was distraught. The relationship between the parties has been very difficult since then.

[6] Edward has continued to live with his father in Yellowknife, attending the French Immersion Program at J.H. Sissons School. He has spent summers and all extended holidays with his mother in Fort Resolution.

[7] The Parties filed competing claims for custody and primary care of Edward. The Applicant, Mr. Boucher, filed an Originating Notice on February 25, 2015, and the Respondent, Ms. McKay, filed a Notice of Motion on March 10, 2015.

EVIDENCE

[8] The court heard from the following witnesses and heard the following evidence:

For the Applicant:

[9] **Kristan Marion** is 34 years old. She has just completed the 4 year Nursing Program at Aurora College, obtaining a Bachelor of Nursing. She has applied for a surgery internship in Yellowknife.

[10] She and Donovan Boucher have been together for two and a half years. They have a good relationship and are happy together. They got engaged in February. She has sole custody of her daughter Whitney, who is the same age as Edward. Donovan and Whitney also have a good relationship, and she described him as “a good dad to Whitney”. Mr. Boucher works seasonally and his work takes him away from home.

[11] They are currently living in subsidized student accommodations, in a 2 bedroom apartment with the laundry room set up as a room for Edward. They will have to find somewhere else to live by the end of June and are looking for a 3 bedroom place.

[12] Ms. Marion’s understanding of Edward coming to live in Yellowknife was that it was to be for kindergarten; that only kindergarten was discussed. She says that Edward has been doing well and that he appears to be happy in both of his homes.

[13] Things were going well for the first three months. The first Christmas, while they were en route to Fort Resolution to pick up Edward, Ms. McKay contacted Mr. Boucher, telling him that she had decided to keep Edward in Fort Resolution; that her plans had changed, it was too hard being away from him, and she wanted him with her. After Christmas, everything changed and became very tense and dramatic. Ms. McKay was very upset.

[14] Under cross-examination by Ms. McKay’s counsel, Ms. Fitzgerald, Ms. Marion conceded that Edward has far more connection to Fort Resolution than he does to Yellowknife, but that she and Mr. Boucher would prefer to be in Yellowknife.

[15] Under cross-examination by Mr. Hansen, counsel for the child, Ms. Marion was asked about the last minute change of plans to leave Edward in Yellowknife for the trial. This occurred Saturday, the day before they were to leave, when they found someone to babysit the children. She was the one who made the decision and said she thought it would be a good idea that they not miss their week of school. Ms. McKay was neither consulted nor advised. Both of the children were disappointed.

[16] **Donovan Boucher** is 29. He is from Fort Resolution and is Edward's father. Before Edward moved to Yellowknife, the child would often stay with Mr. Boucher's parents in the afternoons. After Mr. Boucher moved to Yellowknife in 2013, he did not see Edward very often.

[17] Mr. Boucher graduated from high school in Fort Resolution and has completed numerous diploma and certificate programs since. He is an active volunteer and appears to be very civic-minded.

[18] He works on major construction sites, primarily highway construction, as an engineering technician, which takes him on the road for much of the spring, summer and fall. He was employed in this manner in Fort Resolution and continues in the same vein in Yellowknife.

[19] The reason for his move to Yellowknife in 2013 was that he had lost his trapping incentives from the Band in Fort Resolution. He has highly developed skills on the land and is anxious to impart his knowledge to Edward.

[20] He and Edward have a great relationship. This was obvious in his testimony and in the photographs I was shown and I accept it as a fact. Edward will be involved in numerous activities in Yellowknife that would not be available in Fort Resolution, although he does not appear to have many friends outside of school, with the exception of Ms. Marion's daughter Whitney. Mr. Boucher is worried that Edward will not thrive in Fort Resolution, given what he stated to be the low graduation rate from the high school and the general lack of opportunities.

[21] He agrees that Ms. McKay has always made it clear that she wants him to be a part of Edward's life. He also agrees that Ms. Marion will do most of the work with the kids. He has some relatives in Yellowknife, but doesn't see them all that often.

[22] **Martine Bergeron** is Edward's homeroom teacher in the French immersion program. Edward is doing very well in the program and has been improving greatly. She thinks he's having a great time. Most of the time at recess he and Whitney are playing together. She believes that a transition to the English stream may prove difficult, because there had been no instruction in the English curriculum this year. There are some cultural programs at the school, but they are related to the Dene culture, not Chipewyan.

[23] She think Edward is "a lovely little boy". Her affection was obviously genuine.

For the Respondent:

[24] **James Balsillie** is 80. He is Jenall McKay's grandfather and Edward's great-grandfather. Edward calls him "Papa Zoom Zoom" because of his snowmobile. He sees Ms. McKay about every other day. When Edward lived in Fort Resolution, he saw him every day and said he is just like a son to him.

[25] At Christmas time in 2014, he was taking care of Edward when Donovan Boucher arrived and told him he wanted to take Edward to see Whitney. Mr. Boucher took Edward to Yellowknife and Ms. McKay "cried her head off".

[26] He and the rest of Ms. McKay's family will support her and Edward in every way possible. About the relationship between Edward and his mother, he said: "he loves his mother and she's a good mother".

[27] **Minnie Whimp** is Jenall McKay's aunt and has been close to her since she was born. When Edward lived in Fort Resolution, she used to see him and his mother every day. Now she just sees him on holidays. Concerning Edward's relationship with his mother, she described her as a loving and caring mother with a really good relationship with her child. She speaks the Chipewyan language and it has great value for her. She believes that many positive things have been happening in recent years in Fort Resolution, both culturally and in the education system.

[28] Ms. Whimp believes that Donovan Boucher, Kristan Marion and Whitney should all play a role in Edward's life. There is no problem between Mr. Boucher's family and Ms. McKay's family and she said, and I could not have put it better, that "communication and respect are important for all the people who love Edward".

[29] **Lorraine Villeneuve** is Jenall McKay's mother and Edward's grandmother. She lives next door to her daughter and has seen her every day since she was a baby. The understanding between Jenall and Donovan was that Edward would move to Yellowknife for one year.

[30] Ms. Villeneuve has two children who are in grades 8 and 5 at the local school. She believes it is a good school and testified that they both speak Chipewyan. She values the role that Donovan Boucher and Kristan Marion play in Edward's life. She also believes that both, her daughter and Mr. Boucher, need to

work on their relationship as Edward's parents and that the matter should never have come to court. "They should have worked it out".

[31] **Fraser McTurk** has worked at the Deninu School in Fort Resolution for 6 years, most recently as the program support teacher; essentially seeing to the implementation of the curriculum throughout the grades. He was a very impressive witness. He described Deninu as a great school which is very progressive and welcoming. While the school follows the Northwest Territories wide curriculum, there is also a regional goal to encourage the speaking of the Chipewyan language. This has been improving over the last few years.

[32] **Jenall McKay** is 25 years old. She has spent her entire life in Fort Resolution with her parents, siblings, aunts, uncles, cousins and her grandparents and great grandfather. She has worked at various entry level jobs.

[33] During the first 5 years of Edward's life, she got a lot of help from Donovan Boucher's parents. She had a great relationship with them, although the last year and a half has made this relationship challenging.

[34] Social Services has never been involved in her family and she occasionally acts as a foster mother for the children of one of her cousins.

[35] When she decided to go to Fort Smith to try to get better qualified, she saw it as an opportunity for Edward to bond with his father and his father's new family. She was clear that this was only to be for a year. After she became pregnant, and after seeing Edward at Christmas, she decided that she did not want him to go back to Yellowknife and that she did not want to return to Fort Smith. After Edward was taken back to Yellowknife, communication has been difficult as has everything else.

[36] She loves her son and would do anything for him. She cares about his education and even after everything that's happened is willing to consider the possibility of him going to high school in Yellowknife. She wants him to have every opportunity to spend time with his father but believes that Edward's life would be better, at this stage, in Fort Resolution.

ANALYSIS

[37] This is a custody application. The test to be applied is that of the best interests of the child, as set out in s. 17 of the *Children's Law Act*, SNWT 1997, c.14, with mandatory considerations enumerated in s. 17(2), as follows:

17(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 or access,
 - (ii) other members of the child's family, and
 - (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.

[38] In reference to paragraph 9 above, I am now going to state my analysis.

The love, affection and emotional ties between the child and

- (i) each person entitled to or seeking custody or access,**
- (ii) other members of the child's family, and**
- (iii) persons involved in the care and upbringing of the child:**

[39] Edward spent the first 5 years of his life with his mother, in a small community where he had near constant contact with a large number of relatives, all of whom love him. He has a good and loving relationship with his mother and his little sister. He also has a good relationship with his father and Ms. Marion and her daughter Whitney, who he has clearly grown very close with over the year and a half he has been living in Yellowknife. While I can state, with confidence, that Edward is loved in both of his homes, his connection to Fort Resolution is much broader and deeper.

The child's views and preferences, if they can be reasonably ascertained:

[40] Michael Hansen was appointed by the Office of the Children's Lawyer to represent Edward in these proceedings. Acting for the child is delicate. This is particularly true when the child is very young. In the Northwest Territories, counsel for the child take the position that they are there to advocate for the child, assisting in making the child's wishes known to the court. This does not mean that counsel are blind to the pressures the children may be under in acrimonious family law situations, or take no account of what outcome may actually be in the best interest of the child. Through the subtle examination and cross-examination of the parties as well as through nuanced submissions to the Court, both the position of the child and his or her best interests are put forward.

[41] Edward is blessed and having two families where he feels comfortable and loved. When he's with his dad he wants to live with his dad, and when he is with his mom he wants to live with his mom. This is not surprising in a happy little boy of six.

[42] I was impressed by the sensitive, thorough and obviously caring manner in which Mr. Hansen carried out his responsibilities.

The child's cultural, linguistic and spiritual or religious upbringing and ties:

[43] I consider Edward's enrolment in the French Immersion program in Yellowknife to be a neutral factor. It shows a commitment by Mr. Boucher and Ms. Marion to Edward's education, but it can be a mixed blessing, especially when

none of a child's parents speak French. It also has to be offset against the loss of an opportunity to both learn the Chipewyan language and be part of the Chipewyan culture in Fort Resolution. It was suggested by counsel for Mr. Boucher that the court consider Chipewyan to be a dying language. This I will not do. The fact that Edward is receiving some limited instruction in the Dene culture in Yellowknife does not take the place of the opportunity to learn the language of the culture he was born into.

[44] Languages only die when people stop speaking them and caring about them. Language is also the primary medium for the transmission of culture. I was impressed by the testimony of the teacher from the school in Fort Resolution. It is clear that the school and the community are committed to the students and the Chipewyan culture. If Edward loses this opportunity as child it will be almost impossible for him to regain it as an adult, no matter how badly he wants to.

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:

[45] Mr. Boucher has shown over the year and a half that Edward has primarily been in his care that he, in concert with Ms. Marion, is able to properly provide for Edward in all the ways listed above. Ms. McKay, over the five years that she was entirely responsible for Edward, and over the extended access periods she has had since, has shown the same.

The ability of each person seeking custody or access to act as a parent:

[46] If I was considering the actions of the Parties prior to 2014, I would have had concerns about Mr. Boucher's commitment to his role as a parent. Since he has had Edward in his care, however, he has been a good father and a strong, positive influence in Edward's life. Ms. McKay, as well, shows every indication of being a caring and loving parent.

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:

[47] For the first five years of his life, Ms. McKay was primarily responsible for every aspect of Edward's life. During the time that Edward was primarily resident in Yellowknife, Ms. McKay continued to have primary responsibility for Edward during her extensive periods of access. While Edward has been resident in Yellowknife, given that Mr. Boucher's work often takes him away from home, I find that he has shared this responsibility with Ms. Marion. Clearly, Ms. McKay has been, of the two parties seeking custody, primarily responsible for Edward to a greater degree.

The effect a change of residence will have on the child:

[48] I see this as a non-issue. While Edward will have to adjust to a new school if he returns to Fort Resolution, he will be in the place that is most familiar to him and surrounded by family and friends. He is comfortable in his home in Yellowknife and comfortable in his home in Fort Resolution.

The permanence and stability of the family unit within which it is proposed that the child live:

[49] Ms. McKay is essentially a single mother with two young children. The father of her daughter, with whom she continues to have a relationship, does not reside with her all the time. Taking into account her extensive extended family in Fort Resolution, she provides a very stable home environment, in that it depends on relationships which are, by their nature, unchangeable. Mr. Boucher's home environment depends largely on the stability of his relationship with Ms. Marion, without whom he would likely not have been in a position to make this application. They appear to have a loving and lasting relationship. It is, however, still a relatively new relationship and the level of permanence and stability it provides must be viewed through that reality. While Mr. Boucher does have some relatives in Yellowknife, they do not appear to be close enough to factor into this analysis in any meaningful way.

Any plans proposed for the care and upbringing of the child:

[50] Mr. Boucher has the money, time and interest to engage Edward in many educational, developmental and fun activities. He has shown a willingness to take the time to do so. Ms. McKay is perhaps less equipped in this way, but through her extensive family in Fort Resolution, she is in a position to ensure that Edward receives the sort of guidance and support that every child should have.

The relationship, by blood or through adoption, between the child and each person seeking custody or access:

[51] Ms. McKay is Edward's mother and Mr. Boucher is his father. This consideration is entirely neutral as between the Parties.

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:

[52] There was an issue that arose during the course of the trial, referred to in the summary of the evidence earlier that caused me serious concern. For months prior to the trial, it was planned that Edward would accompany his Yellowknife family to Fort Resolution for the duration of the hearing and that he would stay with his mother during this time. Ms. McKay was understandably very much looking forward to this.

[53] A few days before leaving Yellowknife for Fort Resolution, Mr. Boucher and Ms. Marion unexpectedly bumped into some fellow students in the nursing program. This couple also has children and had socialized occasionally with Mr. Boucher and Ms. Marion. They were asked and agreed to take care of Edward and Ms. Marion's daughter. Mr. Boucher never thought to include Ms. McKay in this discussion and did not bother to tell Ms. McKay about the change in plans until after his arrival in Fort Resolution for the trial. Ms. McKay was devastated. Mr. Boucher's evidence was that he felt it was more important that Edward not miss a week of school, if at all possible. Edward was six at the time.

[54] This incident is both troubling and telling. First, it speaks very clearly to the level of family and social connection Mr. Boucher has in Yellowknife. Mr. Boucher speaks about family and friends, but in the end, the best he could do on short notice was leaving Edward with friends of Ms. Marion's that he accidentally came into contact with at the last minute.

[55] Second, it displays a profound lack of concern for both Ms. McKay's feelings and more generally for Edward's relationship with his mother. It is entirely in keeping with what I saw to be a general lack of respect for Ms. McKay throughout these proceedings. I was shown photographs of a messy entranceway to Ms. McKay's home, taken weeks after she'd given birth. I was shown photographs taken from Ms. McKay's Facebook page, basically selfies of Ms. McKay in a party dress, and asked to make negative inferences from these pictures. Both directly and through innuendo she was accused of promiscuity. Her level of education and work history were attacked, ignoring the fact that she had primary

care of Edward from birth until his fifth birthday, from the time she was 19 until she was 24.

[56] This is to be contrasted with the way Ms. McKay and her counsel treated Mr. Boucher and Ms. Marion. Apart from suggesting that Mr. Boucher's interest in Edward during the first few years of his life was more sporadic than he suggests, there were no attacks on Mr. Boucher either personally or in his capacity as a father. Ms. McKay clearly values Mr. Boucher's contribution to Edward's life, as well as that of Ms. Marion.

[57] I hope that the difference in the way Edward's two families treated each other during the course of this trial is a function of different litigation styles and strategies as opposed to a real indication of the position of the parties. The person who will suffer most from an ongoing lack of respect shown by one parent to the other is Edward.

CONCLUSION:

[58] The best possible outcome for Edward would be one in which he could spend the maximum amount of time with both of his parents. The applicant, Mr. Boucher, proceeds on the assumption that this is impossible, that the choice is between Yellowknife and Fort Resolution. I take a slightly different view. Mr. Boucher chose to leave Fort resolution in 2013. He said that this was due to an issue that had arisen with respect to support from the band for his trapping activities. He was gainfully employed in Fort Resolution in what by the standards of the community was a high-paying job. He has an equally good job in Yellowknife, perhaps with brighter prospects. He could easily find reasonable employment in Fort Resolution again. Ms. Marion will be a nurse in a year. There may be some transitional considerations, but I find it hard to believe that she would not also be employable in Fort resolution, or at least in Hay River, which would make access much easier.

[59] It became obvious during this trial that Mr. Boucher and Ms. Marion want to live in Yellowknife. They don't want to live in Fort Resolution. This cannot be taken, however, as an indication that they have no control over where they live and no ability to locate themselves in such a way that Edward would have the full benefit of both of his families and all of his extended family.

[60] It was suggested that Ms. McKay should move to Yellowknife. As I believe I indicated when this arose, this would be tantamount to her taking a vow of abject

poverty. She has limited education, limited skills, and a toddler to take care of. Yellowknife is dramatically more expensive than Fort Resolution and I would go as far as to suggest that her job prospects are actually much better in Fort Resolution than they would be in Yellowknife. In Fort Resolution she has a large, supportive and well-connected family. She has been able to find part-time and full-time employment when she is free to do so. There is no reality to the suggestion that she should or could deal with a move to Yellowknife.

[61] If Edward were to reside primarily in Yellowknife, he would lose the benefit of not only Ms. McKay's extended family but also Mr. Boucher's. Both sets of grandparents live in Fort Resolution. In Fort Resolution Edward is surrounded by people who love him. His great-grandfather, both sets of grandparents, aunts and uncles and cousins are all people he should have the benefit of growing up with.

DECISION:

[62] I was considering ordering that Edward spend his holidays with his father. Given Mr. Boucher's work schedule, connection to Fort Resolution and the desirability of Edward spending some of his holiday time with his extended family in Fort Resolution, I decided to leave the issue at "liberal and generous access". Ms. McKay has shown that she is willing to facilitate contact and my assumption is that, whenever possible, Edward should be able to spend time with his father, Ms. Marion and Whitney. I therefore order the following:

1. The child's primary residence shall be with the Respondent, Jenall McKay, in Fort Resolution, NT;
2. The Applicant, Donovan Boucher, shall be given liberal and generous access, and;
3. The Applicant shall pay the Respondent child support according to the guidelines in force in the Northwest Territories.

A.M. Mahar
J.S.C.

Dated in Yellowknife, NT, this

16th day of February, 2017

Counsel for the Applicant:
Counsel for the Respondent;
Counsel for the Office of
The Children's Lawyer:

Mr. Donald P. Large
Ms. Hayley Fitzgerald Smith

Mr. Michael E. Hansen

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MEMORANDUM OF JUDGMENT OF
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