

Date: 2019 05 22

Docket: S-1-CV-2017 000151

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

IN THE MATTER OF the *Aboriginal Custom Adoption Recognition Act*,  
S.N.W.T. 1994, c. 26, as amended

AND IN THE MATTER OF the Decision of Commissioner Mary Beauchamp with  
respect to the birth registration No. 2013-59-035083, dated 30 November 2016

**BETWEEN:**

**THE BRITISH COLUMBIA DIRECTOR OF CHILD,  
FAMILY AND COMMUNITY SERVICES**

**Applicant**

**- and -**

**CUSTOM ADOPTION COMMISSIONER MARY BEAUCHAMP, THE  
PUBLIC GUARDIAN AND TRUSTEE OF BRITISH COLUMBIA, L.M.  
AND R.B.<sup>1</sup>**

**Respondents**

**Corrected judgment:** A corrigendum was issued on May 22, 2019;  
the corrections have been made to the text and the corrigendum  
is appended to this memorandum of judgment.

**Corrected judgment:** A corrigendum was issued on May 24, 2019;  
the corrections have been made to the text and the corrigendum  
is appended to this memorandum of judgment.

**MEMORANDUM OF JUDGMENT**

**NOTICE OF ORDER RESTRICTING PUBLICATION OF CERTAIN INFORMATION**

Publication of information tending to identify the Respondents L.M. and R.B. or the child, as well as information and documents respecting child protection proceedings in British Columbia is prohibited by Court order dated April 21, 2017 and confirmed May 5, 2017.

<sup>1</sup> The names of these two Respondents have been initialized in compliance with the Order of Mahar, J., dated April 21, 2017 and confirmed May 5, 2017, banning publication of information tending to identify these Respondents or the child.

## **INTRODUCTION**

[1] This is a judicial review of the decision of the Respondent Custom Adoption Commissioner Mary Beauchamp (Commissioner) to issue a Custom Adoption Certificate (Certificate) recognizing the adoption of S.S. by the Respondents L.M. and R.B. in accordance with aboriginal customary law.

[2] S.S. is a Métis child who was apprehended from her biological parents and was placed in foster care with L.M and R.B. S.S. has been the subject of court proceedings in British Columbia and on July 6, 2015, the British Columbia Provincial Court placed S.S. in the continuing custody of the Applicant British Columbia Director of Child, Family and Community Services (Director). Pursuant to the same Order, the Respondent Public Guardian and Trustee of British Columbia (Public Guardian) is the sole property guardian of S.S.

[3] The Director was not involved in the custom adoption process and is challenging the issuance of the Certificate on several grounds including that the Commissioner lacked statutory authority to issue the Certificate, there was a denial of procedural fairness, and the decision was an abuse of process.

[4] L.M., who is Métis, and R.B. are the former foster parents of S.S. and claim that S.S. was custom adopted by them in accordance with aboriginal custom and that the Certificate is simply a recognition of that process. They claim that custom adoption is a protected right under s. 35 of the *Constitution Act, 1982* which the Director is attempting to extinguish through the judicial review process. They also argue that the Director does not have standing to bring a judicial review of the Commissioner's decision, there was no denial of procedural fairness and there was no abuse of process.

[5] For the reasons that follow, I have concluded that the decision of the Commissioner must be quashed and the Certificate must be vacated.

## **BACKGROUND FACTS**

[6] S.S. was born in 2013 in British Columbia. The day following her birth, she was apprehended from her biological parents by child protection authorities. She was placed with L.M and R.B. who acted as foster parents to S.S. pursuant to a family care home agreement they entered into with the Director.

[7] Child protection proceedings were commenced in the Provincial Court in British Columbia. The Director was granted interim custody of S.S. on January 9,

2014 and a temporary custody order was granted on March 27, 2014 which was extended on June 26, 2014. These three orders were granted with the consent of S.S.'s biological parents. The Director was granted legal custody of S.S. and became her sole personal guardian by a continuing care order (referred to as a permanent custody order in the Northwest Territories) dated July 6, 2015. S.S.'s biological mother consented to this. The Provincial Court dispensed with the need to obtain the biological father's consent. Both parents had their own counsel during the proceedings.

[8] L.M. and R.B. filed a Petition (Petition #1) in British Columbia in September 2015 seeking to adopt S.S. The Director opposed the application as the Director wanted to place S.S. with her biological siblings who had been adopted in Ontario. The Petition was dismissed in December 2015. The decision was appealed and the appeal was dismissed on September 13, 2016.

[9] L.M. and R.B. filed another Petition (Petition #2) in British Columbia in January 2016 seeking relief similar to Petition #1. Petition #2 was dismissed in February 2016 on the grounds that it was *res judicata* and an abuse of process. The decision was appealed and the appeal was dismissed, along with the appeal of Petition #1, on September 13, 2016.

[10] The biological parents of S.S. filed a Petition (Petition #3) in British Columbia in May 2016 seeking various items of relief including to have S.S. returned to them so that they could place S.S. directly for adoption with L.M. and R.B. The Petition was amended in June 2016 to include adoption by custom adoption. The Petition was dismissed on September 28, 2016 as an abuse of process.

[11] L.M. and R.B., along with the biological parents, filed another Petition (Petition #4) in British Columbia in August 2016 seeking a declaration that L.M. and R.B. had already adopted S.S. by way of custom adoption. The Petition was dismissed by the Supreme Court of British Columbia, along with Petition #3, on September 28, 2016 as an abuse of process. The decision was appealed by L.M. and R.B. but is presently on hold pending the outcome of the matter in this jurisdiction.

[12] S.S. was removed from L.M. and R.B.'s care on September 29, 2016. She was placed in a foster home in another province to reside with her biological siblings and the parents who adopted them.

[13] L.M. is Métis and is a member of the British Columbia Métis Federation. L.M. and R.B. resided in British Columbia during the time S.S. was in their care. Sometime after S.S. was removed from their care, they moved to the Northwest Territories. S.S. has never been to the Northwest Territories and there is no evidence that she or her biological parents have any connection here.

[14] On November 22, 2016, L.M. and R.B. met with Custom Adoption Commissioner Mary Beauchamp. The meeting took place at their apartment in Yellowknife. On November 30, 2016 the Commissioner issued a certificate recognizing that S.S. was adopted by L.M. and R.B. in accordance with aboriginal customary law on October 24, 2013.

[15] The Commissioner filed a Record in these proceedings as required by *Rule* 601.

## **LEGISLATION**

[16] The *Aboriginal Custom Adoption Recognition Act (Act)*, S.N.W.T. 1994, c. 26 was enacted to recognize aboriginal custom adoptions. Under the *Act*, a person who has adopted a child according to aboriginal customary law can apply to a custom adoption commissioner for a certificate recognizing the adoption.

[17] Section 2(2) of the *Act* sets out what information must be provided to the commissioner by the applicant. The applicant must provide the following:

- a) with respect to the child, the name given at birth and the current name, date of birth and of adoption, place of birth, sex and the names of the mother and father, so far as is known;
- b) a statement by the adoptive parents and any other person who is, under aboriginal customary law, interested in the adoption that the child was adopted in accordance with aboriginal customary law.

[18] The role of the custom adoption commissioner is to determine whether the information is complete and in order. If the custom adoption commissioner is satisfied that it is, the commissioner prepares a certificate in the prescribed form recognizing the custom adoption and recording any change to the adopted child's name. The certificate is filed with the Supreme Court where it is deemed to be an order of the Supreme Court. The certificate is not reviewed or confirmed by a judge before it is filed.

[19] The custom adoption commissioner must decline to issue a certificate where the commissioner is of the opinion that the required information has not been provided or is not complete or is not satisfied that the child was adopted in accordance with aboriginal customary law.

[20] Custom adoption commissioners are appointed by the Minister under section 6 of the *Act*, which gives the power to appoint persons who have a knowledge and understanding of aboriginal customary law in the community or region in which they reside.

[21] There is no appeal or review process of a custom adoption commissioner's decision under the *Act*. The process to challenge a certificate issued by a custom adoption commissioner is by judicial review: *Bruha v Bruha*, 2009 NWTSC 44 at para. 26.

## ISSUES

[22] A number of issues have been raised by the parties. The issues as stated by the Director are:

- 1) Whether the Commissioner lacked statutory authority under the *Act* to render the decision;
- 2) Whether there was a denial of procedural fairness because the Director did not receive notice of the custom adoption application, the record before the Commissioner was not disclosed to the Director, and the Director was not afforded an opportunity to make submissions;
- 3) Whether there was a denial of procedural fairness due to a reasonable apprehension of bias, arising from an affidavit, sworn by Commissioner Beauchamp on March 2, 2017, that was conveyed to the Director by counsel for L.M. and R.B.; and
- 4) Whether the decision of the Commissioner was an abuse of process, because the Supreme Court of British Columbia had already struck out, as an abuse of process, a petition brought by L.M. and R.B. in which they sought recognition of an aboriginal custom adoption of S.S.

[23] L.M. and R.B. do not question the framing of the issues by the Director. However, their arguments in response to the questions raise other issues with

respect to what constitutes a custom adoption, aboriginal rights under the *Constitution Act, 1982* and the standing of the Director to challenge the Certificate.

[24] The issues that are raised in this appeal by the Director are issues of procedural fairness, abuse of process and jurisdiction. The issues raised by L.M. and R.B., what constitutes a custom adoption and the consideration of constitutionally protected aboriginal rights, are much larger substantive issues which are best considered on another occasion. In my view, the issues raised by the Director are sufficient to dispose of this judicial review and it is not necessary to consider the other issues that have been raised.

[25] I heard a series of preliminary applications which related primarily to procedural matters prior to the hearing. On March 9, 2018, I granted the Director's application striking portions of affidavits filed by L.M. and R.B. I also denied the applications of L.M. and R.B. to cross-examine Sharon Foden, a delegate of the Director in Esquimalt, British Columbia, to file additional affidavits and to strike the judicial review.

[26] In addition, I ruled on the role of the Commissioner in the judicial review and held that an affidavit filed by the Commissioner was admissible on the judicial review. The Commissioner was permitted to make submissions in the judicial review with respect to the standard of review applicable to decisions of a custom adoption commissioner pursuant to the *Act*, the scope of the geographic jurisdiction of a custom adoption commissioner and the Record.

## **STANDARD OF REVIEW**

[27] There are two possible standards of review in a judicial review of a decision made by a tribunal or administrative decision-maker: correctness or reasonableness. *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190.

[28] The standard of reasonableness is one where deference is given to the decision and there is a review of the tribunal's reasoning process and decision. The decision must be within a range of acceptable and rational outcomes. Applying the reasonableness standard involves a search for justification, transparency and intelligibility in the decision-making process. *Dunsmuir, supra* at paras. 47-49.

[29] The correctness standard involves review of the decision where the reviewing court applies its own analysis. If the reviewing court does not agree with the decision, it will substitute its own view and correct the decision.

Deference is not shown to the tribunal and the ultimate question is whether the tribunal was correct. The standard of correctness usually applies to questions of jurisdiction and other questions of law. *Dunsmuir, supra* at para. 50.

[30] Where an applicant challenges a decision on the basis that the decision-maker breached the duty of fairness, the Court must first consider whether the duty of fairness applies and if so, whether it was breached.

[31] The question of whether an administrative decision-maker complied with the duty of procedural fairness is reviewed on a standard of correctness. This requires the reviewing court to consider whether the requirements of fairness have been met, which amounts to a correctness standard. *Mission Institution v Khela*, 2014 SCC 24 at para. 79; *Heffel v Registered Nurses Association*, 2015 NWTSC 16 at para. 11.

## **PROCEDURAL FAIRNESS**

[32] Procedural fairness is fundamental to administrative law in Canada. Administrative decision-makers are required to act fairly in making decisions that affect the rights, privileges or interests of individuals. *Dunsmuir, supra* at para. 79; *Cardinal v Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653.

[33] The content of the duty of fairness is variable and will depend on the specific context of each case: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[34] In order to determine what procedural rights the duty of fairness requires in a case, the Supreme Court of Canada in *Baker* set out a number of non-exhaustive factors to consider:

- 1) The nature of the decision and the process followed in making it. Where the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required;
- 2) The nature of the statutory scheme. Where there is no appeal procedure in the statute, greater procedural protections will be required;
- 3) The importance of the decision to the individual(s) affected. The more important a decision is to those affected and the greater the decision's impact on them signifies that higher level of procedural protections will be required;

- 4) The legitimate expectations of those challenging the decision. If a person has a legitimate expectation that a certain procedure will be followed or that a certain result will occur, that procedure may be required by the duty of fairness or a higher level of procedural protections may be required; and
- 5) The choices of procedure made by the decision-maker, particularly when the statute allows the decision-maker the ability to choose its own procedure or when the decision-maker has an expertise in deciding what procedures are appropriate.

*Baker, supra* at paras. 23-27.

[35] When determining what procedural rights should be required, the overall purpose of procedural fairness should be kept in mind:

I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

*Baker, supra* at para. 22.

[36] The Director contends that procedural fairness was denied because the Director did not receive notice of the custom adoption application, the record before the Commissioner was not disclosed to the Director and the Director was not given an opportunity to appear or make submissions at the custom adoption application.

[37] The *Act*, as described above, provides a process for individuals who have adopted a child in accordance with aboriginal customary law to apply for a certificate recognizing the adoption. The certificate does not create an adoption but recognizes that an adoption has already taken place. *Bruha, supra* at para. 11.

[38] As noted in *Bruha, supra* at para. 16, the *Act* does not prescribe any procedures or guidelines to a custom adoption commissioner in carrying out their duties:

[The *Act*] does not prescribe any particular procedure to be used by the custom adoption commissioner in carrying out his or her duties and making the determination whether a child has been adopted in accordance with aboriginal customary law. Of particular relevance to this case is that [the *Act*] does not contain any requirement that the biological parents or anyone else be given notice of the application for the adoption certificate.



The only requirement is that the applicant for the certificate provide a statement from any other person who is, under aboriginal customary law, interested in the adoption: s. 2(2)(b). Presumably that law could vary from one region to another or depend on the circumstances of the case.

[39] The process of recognizing aboriginal custom adoptions is one that is intentionally vague and does not resemble judicial decision-making which indicates that the procedural protections will not be similar to those required in the trial process.

[40] There is no appeal process provided under the *Act*. The decision of the custom adoption commissioner is final, subject to judicial review. While the decision of a custom adoption commissioner is simply recognizing that a custom adoption has taken place, the importance of the decision to those affected and the impact on them is significant. Once the custom adoption commissioner is satisfied that the information required in section 2(2) is complete and in order, the custom adoption commissioner certifies that a custom aboriginal adoption has taken place. The certificate is filed with the Court where it has the effect of a court order. The issuance of the certificate permits the adoptive parent(s) to obtain a new birth certificate for the child.

[41] The implications of the decision of the custom adoption commissioner are significant and issues have arisen such as those noted in *R.A., as Guardian ad litem for her minor child, I.A. v S.K. and D.K.*, 2017 NUCJ 5 at para.17:

These issues include, as in this matter, issues relating to the consent of the biological parents. Other issues which have arisen relate to who is entitled to rely on the custom, two applications to custom adopt the same child (one by each set of grandparents), custom adoption certificates which recognize the adoption of children who are now adults after the death of an adoptive parent and amendments to custom adoption certificates which are substantive in nature.

[42] In this case, prior to the issuance of the certificate on November 30, 2016, the Director had legal custody of S.S. and was her sole personal guardian. The impact of the decision is of significant importance to S.S. and the Director. It has the potential to affect S.S.'s future, to determine her custodial status and to undermine the authority of the Director, granted by the British Columbia courts, to make decisions on S.S.'s behalf as her sole personal guardian. As the sole personal guardian of S.S., with legal custody of her, the Director had a legitimate expectation that the Director would receive notice and participate in any proceedings involving S.S.

[43] The choice of procedures, as noted above, is left largely to the custom adoption commissioner pursuant to the *Act*. The *Act* does not provide for any training or oversight of the custom adoption commissioners. Custom adoption commissioners are appointed on the basis that they already have knowledge and understanding of aboriginal customary law in the community or region in which they reside.

[44] There is no requirement for notice stated in the *Act*; the only requirement is that the applicant provide a statement of the adoptive parents and any other person who is, according to aboriginal customary law, interested in the adoption. This has been interpreted as providing some requirement for notice. In *R.A.*, *supra* at para. 69, Cooper J. of the Nunavut Court of Justice vacated a custom adoption certificate “on the basis that the fundamental concept of procedural fairness of notice to interested parties was breached.”

[45] The custom adoption process does require that there be some level of procedural fairness. While the *Act* is intentionally vague about the process to be followed in recognizing an aboriginal customary adoption, leaving the choice of procedure to the custom adoption commissioner, it does contemplate some form of notice. Given the implications of the decision of a custom adoption commissioner and the legitimate expectations of interested parties, the duty of procedural fairness requires, at a minimum, that interested parties receive notice of the application.

[46] L.M. and R.B. argue that the Director did not have standing to participate in the custom adoption process or to challenge the Commissioner’s decision through judicial review. They make several arguments including challenging the validity of the Order making the Director the sole personal guardian of S.S., that the Director is not an interested person as required by the *Act*, and that the Director is not an entity recognized pursuant to aboriginal customary law.

[47] L.M. and R.B. argue that the Director is not validly the sole personal guardian of S.S. as the continuing custody order was made after the custom adoption is alleged to have occurred. The continuing custody order was granted on July 6, 2015. The Certificate issued by the Commissioner certifies that the custom adoption occurred on October 24, 2013.

[48] This argument conveniently ignores the history of the matter. There have been several court proceedings in British Columbia regarding the custody of S.S. that L.M. and R.B. have either participated in or initiated. The continuing custody order was challenged in the Supreme Court of British Columbia and L.M. and R.B.

pursued a claim in the British Columbia courts that a custom adoption had already occurred, although the date of the claimed custom adoption was different from that alleged in this case. The application was dismissed as an abuse of process in *A.S. v British Columbia (Director of Child, Family and Community Services)*, 2016 BCSC 1788. The British Columbia decision is under appeal pending the decision of this Court.

[49] In my view, this argument is a collateral attack on the validity of the continuing custody order: see *Toronto (City) v C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at paras. 33-34; *A.S. v British Columbia (Director of Child, Family and Community Services)*, 2016 BCSC 1788 at para. 66. The continuing custody order remains a valid order placing S.S. in the continuing custody of the Director and making the Director the sole personal guardian of S.S. The order cannot just be ignored by this Court. If L.M. and R.B. want to challenge the validity of the July 6, 2015 order, then they should pursue that claim in the British Columbia courts.

[50] L.M. and R.B. argue that the Director is not an interested person as required by the *Act* as the Director is a creation of statute and not a person. Further, they argue that the Director is not recognized in aboriginal customary law.

[51] It is not clear who is considered an interested party under aboriginal customary law or whether the Director would be considered an interested party. No evidence was presented on this point. Certainly, the biological parents would be an interested party as well as possibly other biological relatives depending on the circumstances of the case.

[52] Custom adoption is a concept that has evolved over time and adjusted to changing social conditions. There has been an evolution regarding who is involved in the process, who can adopt aboriginal children, and how the process occurs. *Kalaserk v Strickland*, 1999 CanLII 6799 (NWTSC); *R.A.*, *supra*.

[53] The Director's involvement with S.S. began shortly after her birth and occurred pursuant to the provisions of the *Child, Family and Community Service Act (CFCS Act)*, RSBC 1996, c. 46. There has been a progression in the Director's duties and responsibilities from that of having S.S. in the care of the Director to interim custody to a continuing custody order. S.S. was apprehended on October 22, 2013 and placed with L.M. and R.B. by the Director pursuant to a foster placement. S.S. was removed from the care of L.M. and R.B. by the Director on September 29, 2016 and placed in a foster home in Ontario with her biological siblings. The Director has had interim custody of S.S. since January 9, 2014 and

legal custody of S.S. since July 6, 2015, which means that the Director is her sole personal guardian.

[54] While the position of Director is created by the *CFCS Act*, the Minister appoints one or more persons to fulfill that role. I am not aware of any bar preventing a statutory delegate from participating in a tribunal or other administrative decision-making process.

[55] As the sole personal guardian of S.S., with uninterrupted legal rights and responsibilities with respect to S.S. since shortly after her birth, the Director was an interested person and clearly entitled to notice of the application before the Commissioner.

[56] The Commissioner and L.M. and R.B. do not agree about what occurred during the custom adoption process and whether the Commissioner was aware of the Director's involvement with S.S. prior to issuing the Certificate.

[57] The Record filed by the Commissioner includes several documents provided by L.M. and R.B. to the Commissioner as well as e-mail exchanges between the Commissioner and L.M. Nowhere in the Record is any information that suggested the Director was involved with S.S. or that S.S. was not in the custody of L.M. and R.B. at the time of the application.

[58] The Director filed an affidavit which included as an exhibit an affidavit sworn by the Commissioner which was submitted to the Director by former counsel for L.M. and R.B. In that affidavit, the Commissioner deposed that she was aware, at the time of the application, that the Director had placed S.S. in the care of L.M. and R.B. on October 24, 2013. The Commissioner also stated that it was only after the hearing that she became aware that S.S. had been moved from the home of L.M. and R.B.

[59] The Commissioner filed another affidavit on the judicial review in which she now states that, at the time of the application, she was not told that S.S. was in the legal custody of the Director or that S.S. was not residing with L.M. and R.B. This discrepancy, according to the Commissioner, occurred because she did not prepare or fully review the first affidavit before swearing it.

[60] L.M. and R.B., however, claim that the Commissioner was aware of the involvement of the Director with S.S. at the time of the application.

[61] Whether the Commissioner was aware of the Director's role in S.S.' life or not is not an issue that needs to be resolved as it is not disputed that the Director did not receive notice of the custom adoption application in the Northwest Territories.

[62] The position of L.M. and R.B. is that the Director was not invited and was not welcome at the custom adoption application. While L.M. and R.B. may not agree, the Director was entitled to notice of the application before the Commissioner as I have already concluded.

[63] The Director has also argued that, in addition to notice, procedural fairness required that the Director receive disclosure of the Record before the Commissioner and that the Director have the opportunity to make submissions to the Commissioner.

[64] As previously noted, the Commissioner is given broad discretion in the conduct of the hearing and the determination of whether a customary aboriginal adoption has occurred. To what extent the Director should be permitted to participate in the process was not decided as the Director did not receive notice and the Commissioner was not required to make a decision about the extent of the Director's involvement. Given this, I conclude that the Director was entitled, at a minimum, to receive notice of the custom adoption application and it is not necessary to determine the full extent of the procedural rights that should have been afforded to the Director in the custom adoption process.

[65] As the Director did not receive notice of the custom adoption application, the decision of the Commissioner must be quashed and the Certificate vacated.

### **ABUSE OF PROCESS**

[66] Judges have an inherent and residual discretion to prevent an abuse of the court's process. The court has an inherent power to prevent the misuse of its procedure where it would bring the administration of justice into disrepute. The doctrine of abuse of process has been applied where allowing litigation to proceed would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City)*, *supra* at paras. 35-37.

[67] The Director also seeks to have the decision of the Commissioner quashed and the Certificate vacated on the basis that it is an abuse of process.

[68] L.M. and R.B. have commenced or participated in a number of proceedings in British Columbia in relation to the custody of S.S. In Petition #1 filed in September 2015, they sought to adopt S.S. The Petition was dismissed in December 2015. The decision was subsequently appealed and the appeal was dismissed.

[69] In Petition #2, filed in January 2016, L.M. and R.B. sought similar relief to Petition #1. This Petition was dismissed on the grounds that it was *res judicata* and an abuse of process. The decision was appealed and the appeal was dismissed.

[70] In Petition #3, filed in May 2016, the biological parents sought to have L.M. and R.B. adopt S.S. The Petition was amended to include adoption by custom adoption. The Petition was dismissed as an abuse of process.

[71] L.M. and R.B. filed Petition #4 in August 2016 seeking a declaration that S.S. had been adopted by custom adoption. The Petition was dismissed as an abuse of process. That decision has been appealed and currently on hold pending this matter.

[72] In *A.S.*, *supra* at para. 66, Fisher J., in considering Petition #3 and #4, found that:

The assertion of a past custom adoption in these circumstances can also be considered a collateral attack on the continuing custody order, which has remained in force since it was granted on July 6, 2015.

[73] Justice Fisher, in reviewing the past proceedings, was understandably concerned about inconsistencies in the evidence presented by L.M. and R.B. including the failure to assert a custom adoption until they had exhausted all other avenues (at para. 64):

I agree with the submission of the respondents that this demonstrates an attempt to adduce evidence tailored to a legal framework – one that the petitioners failed to put forward until they had exhausted all other avenues, each of which was fundamentally inconsistent with the assertion of a custom adoption having taken place.

[74] L.M. and R.B. have variously claimed differing dates as the dates when the custom adoption occurred and have also claimed that the custom adoption took place before they were even aware of the existence of the process of custom adoption. In this proceeding, they claim that the custom adoption took place in December 2014.

[75] The decision in *A.S., supra* was filed on September 28, 2016. L.M. and R.B. met with the Commissioner on November 22, 2016 and on November 30, 2016, the Commissioner issued the Certificate which listed the date of the custom adoption as October 24, 2013.

[76] Aside from L.M. and R.B.'s tenuous connection with the Northwest Territories, S.S. has never resided or been in the Northwest Territories. It is not apparent that S.S. has any connection to the Northwest Territories. Considering the circumstances surrounding the application and the history of legal proceedings in British Columbia, it is difficult to conclude that L.M. and R.B.'s application to the Commissioner was made in good faith. However, it is not necessary to reach that conclusion to decide the issue of abuse of process.

[77] Given the ruling in *A.S., supra*, and the decisions in other proceedings in British Columbia, to allow the Certificate to stand would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. In this case, the determination of whether a custom adoption occurred should be made in British Columbia where there are ongoing proceedings.

[78] In my view, to allow the Certificate to stand would result in an abuse of process. Therefore, the Certificate is vacated.

## **OTHER ISSUES**

[79] The Director has also raised the issues of reasonable apprehension of bias and whether the Commissioner lacked statutory authority to render the decision. The Commissioner swore an affidavit following the issuance of the Certificate which the Director alleges gives rise to a reasonable apprehension of bias. The Commissioner swore the affidavit at the behest of L.M. and R.B. for their use in attempting to convince the Director of the validity of the Certificate in this case. The Director also argues that the Commissioner lacked statutory authority to recognize a custom adoption that took place in another jurisdiction and that the Commissioner's jurisdiction was limited to custom adoptions that occurred in the Northwest Territories.

[80] While the swearing of the affidavit of the Commissioner was ill-advised, given my conclusions on the other issues, it is not necessary to consider whether this raised a reasonable apprehension of bias or whether the Commissioner lacked statutory authority to recognize the custom adoption. There were significant problems with this Certificate and the manner in which it was obtained, each of

which justify quashing the decision of the Commissioner and vacating the Certificate.

## CONCLUSION

[81] In conclusion, the Director was entitled, at a minimum, to receive notice of the custom adoption application. As the Director did not receive notice of the custom adoption application, the decision of the Commissioner must be quashed and the Certificate vacated.

[82] In addition, considering the history of this matter, to allow the Certificate to stand would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. To allow the Certificate to stand would result in an abuse of process and therefore, the Certificate must be vacated.

[83] For these reasons, the application of the British Columbia Director of Child, Family and Community Services is granted. The decision of the Custom Adoption Commissioner recognizing the adoption of S.S. by L.M. and R.B. in accordance with aboriginal customary law is quashed and the Custom Adoption Certificate issued by the Commissioner on November 30, 2016 is vacated.

[84] The Applicant is entitled to costs pursuant to *Rule* 648.

“The Honourable Justice S.H. Smallwood”  
S.H. Smallwood  
J.S.C.

Dated at Yellowknife, NT, this  
22<sup>nd</sup> day of May, 2019

Counsel for the Applicant:	Trisha Paradis
L.M. and R.B.:	Self Represented
Counsel for the Respondent	
Custom Adoption Commissioner:	Sheila MacPherson
Counsel for the Attorney General of the Northwest Territories:	Hayley Fitzgerald



**Corrigendum of the Memorandum of Judgment  
Of  
The Honourable Justice S.H. Smallwood**

An error occurred in Paragraph 82.

Paragraph 82 reads:

integrity of the administration of justice. To allow the Certificate to stand would result in an abuse of process and therefore, the Certificate must be vacated.

Paragraph 82 has been corrected to read:

[82] In addition, considering the history of this matter, to allow the Certificate to stand would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. To allow the Certificate to stand would result in an abuse of process and therefore, the Certificate must be vacated.

**Corrigendum 2 of the Memorandum of Judgment**  
**Of**  
**The Honourable Justice S.H. Smallwood**

1. An error occurred in Paragraph 14.

Paragraph 14 reads:

... recognizing that A.B. was adopted by ...

Paragraph 14 has been corrected to read:

...recognizing that S.S. was adopted by ...

2. An error occurred in Paragraph 22 sub 4)

Paragraph 22 sub 4) reads:

... in which they sought recognition of an aboriginal custom adoption of A.B. ...

Paragraph 22 sub 4) has been corrected to read:

...in which they sought recognition of an aboriginal custom adoption of S.S. ...

**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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IN THE MATTER OF the *Aboriginal Custom Adoption  
Recognition Act*, SNWT 1994, c 26 as amended;

AND IN THE MATTER OF the Decision of the Commissioner  
Mary Beauchamp with respect to birth registration No. 2013-  
59-035083, dated 30 November 2016

**BETWEEN:**

**THE BRITISH COLUMBIA DIRECTOR OF  
CHILD, FAMILY AND COMMUNITY  
SERVICES**

**Applicant**

**-and-**

**CUSTOM ADOPTION COMMISSIONER MARY  
BEAUCHAMP, THE PUBLIC GUARDIAN AND  
TRUSTEE OF BRITISH COLUMBIA, L.M. AND  
R.B.**

**Respondents**

**Corrected judgment:** A corrigendum was issued on May 22, 2019; the corrections have been made to the text and the corrigendum is appended to this memorandum of judgment.

**Corrected judgment:** A corrigendum was issued on May 24, 2019; the corrections have been made to the text and the corrigendum is appended to this memorandum of judgment.

**MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE S.H. SMALLWOOD**

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