Date: 2000 01 18
Docket: CW 0126

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Child and Family Services Act*,
S.N.W.T. 1997, c.13, as amended;

AND IN THE MATTER OF the child,
K., (B.)
Born on October 23, 1990

APPREHENDED May 1, 1998

MEMORANDUM OF JUDGMENT (COSTS)

Counsel for the Father: John U. Bayly, Q.C.

Counsel for the Director: Paul Smith

Counsel for the Mother: Andrew Fox

Counsel for the Child: Catherine Stark

MEMORANDUM OF JUDGMENT (COSTS)

[1] This memorandum of judgment addresses the issue of costs, claimed by the applicant father against the Director. Costs against the mother and the child are not in issue.

[2] On October 21, 1999, after a two day trial which took place earlier in the month in Yellowknife, I issued Reasons for Judgment. Counsel were permitted to address the issue of costs by filing submissions by November 22; after November 22, I gave counsel the opportunity of filing supplementary submissions by January 14, 2000.

[3] With respect to the issue of costs, I said at paragraph 15 of the Reasons for Judgment:

> B.'s father says that at least some of his costs in bringing this matter to court should be paid by the Director. I agree.

[4] The use of the word "should" in paragraph 15 was deliberate. I chose this word in its most commonly understood usage, as defined in the 1982 edition of the *Houghton Mifflin Canadian Dictionary of the English Language*:

> Usage: *Should*, in indicating obligation or necessity, is somewhat weaker than *ought* and appreciably weaker than *must* and *have to*.

[5] The law in this jurisdiction is clear. As stated in *Gerriann Donahue v. Gabriel Mantla* CV 07096, 1999 NWTSC at paragraph 9:

> Thus, the Director cannot be equated with a successful or unsuccessful litigant. In such circumstances, considering the public mandate imposed on the Director, costs should not be imposed unless it can be said that the Director (and the Director's officials) acted, before and during the litigation, in a manner that was improper, vexatious or unconscionable.

[6] The court has a wide discretion to determine the circumstances in which costs are awarded, and the measure and extent of costs. Before the court is entitled to determine the measure and extent of costs, there must exist circumstances in which, in law, costs may be awarded. The Director, in child protection proceedings, is in a distinctly different position than litigants in other civil proceedings. I adopt the *Donahue* reasoning as setting the boundaries in which the court is permitted to make an award of costs against the Director.

[7] Has the *Donahue* threshold been met on my assessment and weighing of the evidence? If the answer is in the affirmative, I would have the power to exercise my discretion by awarding costs against the Director. It would only be if I were to exercise this discretion in favour of the applicant that the measure and extent of costs could be determined.

[8] The applicant lists at paragraph 5 of his supplementary submissions a number of triggering events which, he says, show that officials acting on behalf of the Director behaved in an improper, vexatious or unconscionable manner. There is no need to repeat the entire list. Some comment, however, is required.

[9] The first complaint [sub-para. 5(a)] is without merit. It is argued that the Director's officials "deliberately" excluded the applicant from the discussions "of whether it was in B.'s best interest to be apprehended. This is despite Mr. B.'s

record of being an active, concerned and cooperative parent." To impose on the Director (and the Director's officials) the requirement of including parents, cooperative or otherwise, at the critical stage where the Director is considering apprehension would not be prudent. There are many reasons why such discussions should not be open to the parents. To afford parents this opportunity as a right could hinder or frustrate the apprehension process and ultimately interfere with the best interests of the child. Private discussions which exclude the parents must continue to remain a necessary part of the decision making process by child protection officials. This case is no exception.

[10] There are other grounds of complaint which have merit. These include sub-paragraphs 5(b) to (j) inclusive. The only change I make in accepting these grounds is to change the opening words in sub-paragraphs 5(c),(e),and (f) from "Deliberately" to "Deliberately, negligently, or carelessly....." The remaining grammar in each sub-paragraph would have to be changed to conform to the opening words.

[11] Sub-paragraphs 6(a) to (f) inclusive also have merit, although I do not accept them in their entirety. The changes I make are: firstly, to sub-paragraph (c) by adding after the word "deliberately," the following: "..... negligently or carelessly.....", and secondly, to sub-paragraph (e). With respect to sub-paragraph 6(e) I note that in her Affidavit of Consent sworn May 12, 1998, the mother consented to a temporary care and custody order "for a period not exceeding one year." In an Amended Affidavit of Consent sworn June 25, 1998, the mother consented to "a period of one year....." With respect to sub-paragraph 6(f) I decline to attach any weight to the specific allegations surrounding the suspension of Dinah Carnogursky because they are not relevant to the issue of costs.

[12] The complaints which I accept as having merit and the principles of law which I apply satisfy me that this is an exceptional case. I conclude that there are

special circumstances of improper conduct on the part of the Director's officials who were acting at all material times in the course of their duties on behalf of the Director. It would be inappropriate, in the unusual circumstances, to deny the application for costs. The substantive issue in this proceeding has been the child's best interests, an issue which does not focus on fairness to parents. At this stage, however, fairness to the parents becomes more significant with hindsight coming into focus. The father was not treated with the fairness, procedural and otherwise, which he deserved. His cooperation was betrayed by officials acting on behalf of the Director at the time of apprehension and afterwards. The Director, and those acting on behalf of the Director must be continually vigilant in fulfilling their demanding and important responsibilities. These include the need to recognize the respective rights of children and their parents, and the ensuing requirement of ensuring that those rights are not compromised by the state. It is in these areas that the Director's officials, acting on behalf of the Director, have fallen short. They did so both before and during these proceedings. (For the purposes of this ruling the proceedings began with the filing of the Notice of Motion on May 1, 1998.) For the sake of clarification, I incorporate for purposes of this Memorandum of Judgment paragraphs 14 and 15 of the Reasons for Judgment.

[13] I accept the applicant's submission that the just and fair way to deal with the issue of costs is on a solicitor and client basis. I also agree that the *Territorial Court Civil Claims Rules* are inapplicable for the reasons argued on behalf of the applicant. To these I add that Rule 1 expressly restricts the application of the *Rules* to claims where money (and the like) are being sought. The *Rules* have no application to recovery of costs in proceedings under the *Child and Family Services Act*.

[14] I have reviewed the affidavit in support of costs sworn by Judith V. Anderson on November 9, 1999. The details, including the cost amounts, have not been disputed by counsel on behalf of the Director. I note the affidavit does

not take into consideration the unanticipated preparation of supplementary written submissions on the issue of costs. It was at the court's invitation following November 9 that further material was prepared by counsel. Based on the November 9 affidavit and the work which went into the preparation of the necessary, thorough, and helpful supplementary submissions, costs are awarded pursuant to Rule 643 on a lump sum basis in the amount of $25,000.00 which includes all fees and necessary disbursements. Given the fact that counsel on behalf of the Director does not contest Ms. Anderson's affidavit, there is no need to embark upon the costly and time-consuming exercise of taxing costs; consequently, further delay is avoided.

[15] I begin my conclusion by quoting from paragraph 5 of the Director's supplementary submissions:

> ..... It would be contradictory to hold that the Director acted in the best interests of the child, as is his duty, and yet still deserved a costs sanction for his or his officials conduct.

[16] I am ordering costs to address improper conduct. Improper conduct in this context is the failure by the Director's officials, in the course of acting on behalf of the Director, to deal with the applicant in a fair and just manner before and during the course of litigation in this unusual child protection proceeding. Their actions go beyond mere errors in judgment. The fact that the child was in need of protection at the time of the apprehension and the placement of the child in an appropriate facility do not excuse the improper conduct of the Director's officials toward the father. It would be neither fair nor just to rule against the application for costs simply because the Director ultimately placed the child in a proper facility. Improper conduct on the part of the Director's officials toward parents must be addressed firmly. The father took a lawful course of action to address his treatment by the Director's officials. His course of action revealed significant failings in the apprehension and in the procedure before the court in May, 1998.

[17] The measure and extent of costs would not be adequately addressed by an award which is not on a solicitor and client basis. It will be the taxpayers who will ultimately pay the price. The price tag is affixed to the notion of protecting the rights of parents. It will alert the Director in future apprehensions to maintain close scrutiny at all times of the rights of parents; parents are not bit players in the drama of child protection cases.

[18] I thank counsel for their assistance. They have represented their clients well.

Dated at Yellowknife, NT
January 20, 2000

B.A. Bruser, J.T.C.