



MEMORANDUM

DATE: April 13, 2021

TO: Distribution List

FROM: Tracy Downes
Judicial Executive Assistant
Territorial Court Judges' Chambers

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ERRATUM

On the cover page, the Counsel for the Children should be amended to read:

K. Allison

Please replace the original first page with the attached.

Tracy Downes
Senior Judicial Executive Assistant

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

X.

REASONS FOR DECISION OF THE

HONOURABLE CHIEF JUDGE ROBERT GORIN

There is a ban on the publication, broadcast or transmission of any information that has the effect of identifying (a) a child who is (i) the subject of the proceedings of a hearing under this Act, or (b) a parent or foster parent of a child referred to in paragraph (a) or a member of that child's family or extended family. *s.87 CHILD AND FAMILY SERVICES ACT*

Date of Hearing: March 8, 2021

Date of Decision: March 12, 2021

Date of Written Judgment: April 9, 2021

Appearances:

A. Thibodeau Counsel for the Director of Child and Family Services

J. Lattie Counsel for the Parents

K. Allison Counsel for the Children

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[1] The parents of X. ask that solicitor/client costs be awarded against the Director of Child and Family Services in respect of an apprehension that was carried out on November 25, 2020. The apprehension was carried out primarily as a result of an allegation by X. of a dated sexual assault by a family member in the home and the fact that another family member at the home had a past conviction for sexually touching a minor, which was certainly somewhat dated.

[2] At the first court appearance on the apprehension confirmation application which was on December 7, 2020, the Director requested an adjournment of the matter to allow X. the opportunity to consult with a lawyer and also to allow the father an opportunity to do so as well. The application was opposed by counsel for the mother but the application was granted nonetheless.

[3] On the next return date of December the 14th, the Director was prepared to proceed with the apprehension confirmation application sometime that week. However, counsel for the mother advised that he was now representing the father as well and that both parents were consenting to X.'s placement outside the home for the time being and were also considering a plan of care agreement. He also advised that the matter was not urgent. The matter was adjourned until January the 4th.

[4] On January 4th, counsel for the parents advised that his clients were consenting to an adjournment until January the 11th to determine if the matter could be resolved. The adjournment was accordingly granted.

[5] On January the 11th, counsel advised that an agreement was not possible and asked that the confirmation hearing be set until January the 18th. Once again, that adjournment was granted.

[6] On January 18th, due to the unavailability of the judge who was scheduled to hear the matter and the fact that I was now having to deal with two separate dockets at the same time, I adjourned the matter over to the following date in order to read the materials but also just to ensure that I had adequate time to consider the matter.

[7] After hearing the application, I advised that in my view the child protection worker carrying out the apprehension had on his own admission simply been carrying out the instructions of his superior and had not formed his own opinion and that, therefore, the second part of the legal test that must be met in order to confirm an apprehension had not been satisfied; see section 12.4(1)(b) of the *Child and Family Services Act*.

[8] I held that while he could have formed his reasonable grounds for carrying out the apprehension by relying on the information provided by his superior, it was clear that he had not done so, had not formed his own opinion and was simply following his superior's directions. I also stated that if his superior had formed the grounds herself and that he was simply acting as her agent, that may have sufficed as well. However, I was of the view there was insufficient evidence before me in order for me to make that finding.

[9] Due to threats and comments made by X.'s sister and mother following the apprehension, I determined that the first part of the test set out in section 12.4(1)(a) had been met. Based on those factors, I found that there were now reasonable grounds for me to believe that the safety of X. was presently in danger. However, the fact that the second part of the test had not been established meant that it was necessary for me to dismiss the application given the provisions of section 12.4 of the *Child and Family Services Act*. I will point out that my ruling on the unlawfulness of the apprehension was based on the narrow point I have outlined having to do with the second part of the test.

[10] However, the concerns I now had with X.'s safety at the time of the application being made before me ultimately led to me allowing an application by

the Director that was made immediately following my ruling on the confirmation application.

[11] The Director applied for X. to be placed in the temporary care and custody of the Director and I granted that application, albeit for a brief period of time. I ultimately found that I was satisfied on a balance of probabilities that she was in danger and ordered that the order applied for be granted but for a duration of only one month.

[12] Counsel for the parents now argues that costs should be awarded against the Director and that those costs should be solicitor/client costs for a number of reasons. He points out that I found that the Director exceeded its jurisdiction or powers when it carried out the apprehension I ultimately found to be unlawful.

[13] While it is true that I made that finding, if I were to accept such a standard as being dispositive, it would mean that such costs would be granted on all occasions when a confirmation application is dismissed on the second grounds, as I have outlined.

[14] Counsel for the parents argues that costs should be awarded because the Director did not follow its own policies and disobeyed or ignored certain statutory imperatives that are set out in the *Act*. That may or may not be so. However, my ruling was clear as to why I dismissed the Director's application. It had to do with the necessity of the individual carrying out the application having the reasonable grounds set out in 12.4(1)(b) of the *Child and Family Services Act* at the time of the apprehension.

[16] Once again, the child protection worker on his own admission did not possess those grounds. Moreover, if he was acting as an agent for his superior, I was unable to find that she had those grounds based on the evidence that I had before me at the time. That said, it may or may not be the case that she had those grounds. But as stated, I was unable to make that finding.

[17] While it certainly may be that when a case is decided on the basis of the Director not following the principles and duties set out in the *Child and Family Services Act* or, for that matter, an act respecting First Nations, Inuit and Metis children, youth and families as SC2019 c. 24, such breaches will be relevant to the question of costs.

[18] However, in this case the basis of my ruling was, as I have said, narrow. Much of the misconduct on the part of the Director alleged by the parents is not as clear or obvious as has been suggested. As well, the Director does not concede the

misconduct and argues against my making the findings against it that were requested by the parents. There is at the very least some substance to the Director's submissions on these points.

[19] Given my finding concerning the grounds the child protection worker had at the time of the apprehension, determining those issues was completely unnecessary for me in that I had already determined that I was dismissing the Director's apprehension confirmation application as there was clearly noncompliance with the second part of the test based on the evidence I had before me.

[20] I do not intend at this point to expand the scope of the factual inquiry simply to deal with the question of costs. In my view, this sideshow should not become the main event. Furthermore, if the parents wish to launch civil proceedings against the Director, there is nothing barring them from doing so.

[21] In reviewing the law concerning costs against the Director of Child and Family Services, I will begin with reviewing section 69 of the Child and Family Services Act. The section states at subparagraph (1):

The Director, Assistant Directors, child protection workers, authorized persons and any other person having powers or duties under this Act or the regulations shall not be liable for anything done or not done by him or her in good faith in the performance of his or her duties or in the exercise of his or her powers.

[22] This provision shields the Director from liability in civil suits launched against it. However, I completely accept that it does not shield the Director from a costs award in proceedings that arise under the Act.

[23] That said, even though bad faith is not a prerequisite, conduct that is so egregious that it deserves sanction is necessary before any order of costs, let alone solicitor/client costs, can be granted. As stated by Vertes, J. in *Donahue v Mantla*, 1999 NWTJ 140 (NWTSC), on the issue of costs against the Director:

There is no statutory impediment to awarding costs against the Director. If the Director chooses to participate in private litigation, then the Director may be liable for costs as any other litigant would be. But, as some cases have noted, the Director is not really like any other litigant. The Director has a much broader role than an ordinary litigant. The Director is a public officer appointed to act in the interest of the public generally and in the interest of children specifically. The statute gives the Director broad powers to intervene into private lives to ensure that children are protected. Society, through the *Act*, has sanctioned that intervention. 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.

[24] I note that the foregoing reasoning is substantially consistent with much of that set out in the later case of the *Children's Aid Society of Hamilton v K.L.* 2014 OJ 2860. This is the Ontario Superior Court of Justice at paragraph 14:

The following general principles apply when a claim is advanced for costs against a child protection agency:

1. Child protection agencies do not enjoy immunity from a costs award.
2. However, the starting point in analyzing a claim for costs against a child protection agency is that child welfare professionals should not be penalized for carrying out their statutory obligation to protect children.
3. The approach to costs as against child welfare agencies must balance the importance of encouraging child protection professionals to err on the side of protecting children and the need to ensure that those professionals exercise good faith, due diligence and reason in carrying out their statutory mandate.
4. The high threshold of “bad faith” is not the standard by which to determine a claim for costs against a child protection agency.
5. Costs will generally only be awarded against a Children’s Aid Society in circumstances where the public at large would perceive that the Society has acted in a patently unfair and indefensible manner.
6. A Society should not be sanctioned through costs for an error in judgment, or in cases where the nature of the case makes it very difficult to weigh and balance the evidence and predict the legal outcome.
7. Important factors to consider in deciding whether costs against a Society are appropriate include the following:
 - (i) Has the Society conducted a thorough investigation of the issues in question?
 - (ii) Has the Society remained open minded about possible versions of relevant events?
 - (iii) Has the Society reassessed its position as more information became available?
 - (iv) Has the Society been respectful of the rights and dignity of the children and parents involved in the case?
 - (v) In cases involving procedural impropriety on the part of a Society, the level of protection from costs may be lower if the irregularity is not clearly attributable

to the Society's efforts to diligently carry out its statutory mandate of protecting children.

[25] From the foregoing jurisprudence, it can be seen that unless the Director is involved in private litigation, the threshold for a costs award against her is substantially higher than would be the case in a matter where only private litigants are involved.

[26] Moreover, an award of solicitor/client costs such as that being sought by the parents requires an even higher threshold to be met. As pointed out at paragraph 19 of *B.K.*, 2000 NWTJ 60, a case decided by the Supreme Court of the Northwest Territories and a case binding on this Court since it was decided by that court in its capacity as an appeal court:

19. In his remarks the Territorial Court judge did not differentiate between the test for an award of costs against the Director as stated in *Donahue* and the test for an award of solicitor/client costs. The latter test has been referred to in a number of cases. The general rule is that solicitor/client costs should not be awarded except in special circumstances which justify a departure from the usual award on a party and party scale. The type of conduct by a party which may lead to an award of solicitor and client costs has been described as reprehensible, scandalous or outrageous (*Young v. Young*, 1993 4 S.C.R. 3); also as -- "some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of "chastisement." The words "scandalous" and "outrageous" have also been used" [*Stiles v. Workers' Compensation Board of British Columbia*, [1090] B.C.J. No. 1450 B.C.C.A.)].

20. In *Meek v. Northwest Territories* (1992), 14 C.P.C. (3d) 360 (S.C.), de Weerd J. added that an award of solicitor and client costs should be made "only in rare and exceptional circumstances to mark the court's disapproval of the conduct of a party in litigation."

21. Although the Territorial Court Judge found that the conduct of the Director's officials was improper, he did not go on to consider whether it was "reprehensible, scandalous or outrageous." He said that he was awarding solicitor and client costs to address improper conduct. In doing so, he simply used the *Donahue* test again and therefore, with respect, erred.

[27] To this point I will also note that the specific costs requested by the parents' lawyer – an \$8,000 estimate for time spent by lawyers working for the Legal Aid Commission and the time that X.'s parent or parents have missed work in order to attend court - is well outside the scope of a proper award for solicitor/client costs.

[28] Given the narrow and relatively straightforward basis for my dismissal of the Director's confirmation application, it was unnecessary for me to consider the other arguments and allegations made against the Director during the parents' lawyers' submissions, both oral and written. I appreciate that he would like me to take into account all of these arguments - based on what he says are the facts - when determining whether the cost thresholds I have referred to are made out. However, as I have indicated, I do not propose to broaden the factual inquiry at this time to make further findings that are outside of the parameters of my initial ruling in order to do so. This is especially so given that the specified costs being sought would not be an appropriate award even if I were to find solicitor/client costs warranted.

[29] Certainly, the child protection worker should have formed his own grounds or, alternatively, if he was acting as his superior's agent, I should have had complete evidence placed before me concerning the grounds possessed by his superior. These were errors on the part of the Director. However, I am unable to find that they were committed in bad faith. More to the point, I am unable to find that the error was one which was "improper, vexatious or unconscionable." I note that "improper" in the foregoing context appears to require that the Director's actions were carried out for an improper purpose such as, for example, to harass or drain the other party of resources; see *Foy v. Foy*, 1979 CanLII 1631 (ONCA) and *Potocnik v. Thunder Bay (City)*, [1997] O.H.R.B.I.D. No. 18. I do not make that finding. That being the case, it goes without saying that the even higher standard for solicitor/client costs is not made out. I do not find that the Director's conduct was "reprehensible, scandalous or outrageous."

[30] Therefore, the costs application is denied in its entirety. There will be no order for either party or party costs or solicitor/client costs. Each party will bear their own costs. As stated, my decision does not bar the parents from launching separate proceedings of a civil nature against the Director. However, this final observation should not be seen as in any way encouraging or discouraging the parents from doing so.

Robert Gorin
Chief Judge of the
Territorial Court

Dated at Yellowknife, Northwest Territories, this
9th day of April 2021.

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