2006 CarswellAlta 126, 2006 ABQB 78, [2006] A.W.L.D. 1482, [2006] A.W.L.D. 1466, [2006] A.W.L.D. 1477, [2006] A.W.L.D. 1478, [2006] A.W.L.D. 1558, [2006] W.D.F.L. 1577, [2006] W.D.F.L. 1646, [2006] W.D.F.L. 1576, 24 R.F.L. (6th) 41, 57 Alta. L.R. (4th) 59, [2006] 7 W.W.R. 533, 392 A.R. 282

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P. (N.) v. LDS Adoption Services

In the Matter of the Family Law Act, S.A. 2003, c. F-4.5

N.P. (Applicant) and LDS Adoption Services and J.L. (Respondents)

Alberta Court of Queen's Bench

Langston J.

Heard: November 30, 2005
Judgment: January 26, 2006
Docket: Lethbridge/Macleod FL06-00189

Counsel: Patricia A. McMillan for Applicant

Richard A. **Low** for Respondent, J.L.

F. Matthew Kirchner for Squamish Nation

Subject: International; Family; Public; Civil Practice and Procedure

Conflict of laws --- Family law — Children — Guardianship or tutorship

Jurisdiction — While living in British Columbia, mother and father had relationship which resulted in mother's pregnancy — Mother and father never married and did not live together — When child was three days old, mother placed child in care of couple who were residents of Alberta — Mother signed Alberta form of adoption consent which had effect of making couple joint guardians of child with mother — Father was notified in writing that child had been placed for adoption in Alberta — Father applied to be appointed guardian of child under Family Law Act ("FLA") — Application dismissed — Both British Columbia and Alberta have statutes dealing with guardianship of children — Neither statute provides expressly for which court has jurisdiction over guardianship of given child — Guardianship provisions of Family Relations Act ("FRA") make no reference to territorial jurisdiction — Section 23(4) of FLA states that person may not apply for guardianship order unless child or proposed guardian resides in Alberta — Child had been living in Alberta — Arrangement was sufficient to satisfy requirements — Provisions did not give complete answer to question of jurisdiction — Matter of jurisdiction

to deal with guardianship of child fell to be determined on basis of nature and scope of parens patriae jurisdiction of court — Mother removed child from British Columbia by allowing child to be taken to Alberta and placed in couple's care — This was done without father's consent — At time of child's birth, mother was child's sole guardian — Mother had authority to place child in couple's care in Alberta — Child was not unlawfully removed from British Columbia — Child was not "habitually resident" in British Columbia and British Columbia courts would not assert jurisdiction on that basis — Child was not physically present in British Columbia and had been resident in Alberta since child was three days old — There was nothing to prevent alteration of child's initial residence — Court had jurisdiction to deal with issue of guardianship of child.

Aboriginal law --- Family law — Custody and guardianship

While living in British Columbia, mother and father had relationship which resulted in mother's pregnancy — Father was member of First Nation — Mother and father never married and did not live together — When child was three days old, mother placed child in care of couple who were residents of Alberta — Mother signed Alberta form of adoption consent which had effect of making couple joint guardians of child with mother — Father was notified in writing that child had been placed for adoption in Alberta — Father applied to be appointed guardian of child under Family Law Act ("FLA") — Application dismissed — Issue arose as to status of First Nation in proceedings — Child's aboriginal heritage was factor that must be taken into account in considering father's application for guardianship — It was not necessary or appropriate for First Nation to be granted status as party or intervenor — First Nation did not have legal interest sufficient to make it party to this kind of proceeding — Granting intervenor status to First Nation was not necessary for determination of issue of guardianship of child — Evidence could be put to court by father without necessity of naming First Nation as intervenor — Father's interests and those of First Nation were convergent and father's counsel could address aboriginal issue fully.

Civil practice and procedure --- Parties — Adding or substituting parties — General principles

First Nation — While living in British Columbia, mother and father had relationship which resulted in mother's pregnancy — Father was member of First Nation — Mother and father never married and did not live together — When child was three days old, mother placed child in care of couple who were residents of Alberta — Mother signed Alberta form of adoption consent which had effect of making couple joint guardians of child with mother — Father was notified in writing that child had been placed for adoption in Alberta — Father applied to be appointed guardian of child under Family Law Act — Application dismissed — Issue arose as to status of First Nation in proceedings — Child's aboriginal heritage was factor that must be taken into account in considering father's application for guardianship — It was not necessary or appropriate for First Nation to be granted status as party — First Nation did not have legal interest sufficient to make it party to this kind of proceeding — Father's interests and those of First Nation were convergent and father's counsel could address aboriginal issue fully.

Civil practice and procedure --- Parties — Intervenors — General principles

First Nation — While living in British Columbia, mother and father had relationship which resulted in mother's pregnancy — Father was member of First Nation — Mother and father never married and did not live together — When child was three days old, mother placed child in care of couple who were residents of Alberta — Mother signed Alberta form of adoption consent which had effect of making couple joint guardians of child with mother — Father was notified in writing that child had been placed for adoption in Alberta — Father applied to

be appointed guardian of child under Family Law Act — Application dismissed — Issue arose as to status of First Nation in proceedings — Child's aboriginal heritage was factor that must be taken into account in considering father's application for guardianship — It was not necessary or appropriate for First Nation to be granted status as intervenor — Granting intervenor status to First Nation was not necessary for determination of issue of guardianship of child — Evidence could be put to court by father without necessity of naming First Nation as intervenor — Father's interests and those of First Nation were convergent and father's counsel could address aboriginal issue fully.

Family law --- Guardianship — General principles

While living in British Columbia, mother and father had relationship which resulted in mother's pregnancy — Father was member of First Nation — Mother and father never married and did not live together — When child was three days old, mother placed child in care of couple who were residents of Alberta — Mother signed Alberta form of adoption consent which had effect of making couple joint guardians of child with mother — Father was notified in writing that child had been placed for adoption in Alberta — Father applied to be appointed guardian of child under Family Law Act — Application dismissed — Family Law Act mandates that only criterion upon which court may rely in making determination about guardianship is best interests of child — Child's interests were to be ascertained using certain criteria enumerated in s. 18 — Couple were able to offer child stable and caring home — Father's ability to provide suitable parenting for child was in much greater question — Important aspect of parenting plan did not appear to be well thought out — Child's aboriginal heritage was one factor and could not be decisive on its own — Child's best interests mandated against granting guardianship to father — Couple had offered father "openness" agreement — Consultation with First Nation was not required — Legislation did not require consultation in all circumstances.

Cases considered by *Langston J.*:

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co. (1993), 10 Alta. L.R. (3d) 325, 140 A.R. 244, 18 C.P.C. (3d) 275, 1993 CarswellAlta 32 (Alta. Q.B.) — followed

Anson v. Anson (1987), 10 B.C.L.R. (2d) 357, 1987 CarswellBC 9 (B.C. Co. Ct.) — considered

CPCS Ltd. v. Western Industrial Clay Products Ltd. (1995), 31 Alta. L.R. (3d) 257, 1995 CarswellAlta 247 (Alta. C.A.) — considered

Eve, Re (1986), 13 C.P.C. (2d) 6, *(*sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773, 1986 CarswellPEI 37, 1986 CarswellPEI 22 (S.C.C.) — considered

Fink v. British Columbia (Public Guardian & Trustee) (2002), 2002 BCSC 438, 2002 CarswellBC 770 (B.C. S.C.) — considered

G. (A.P.) v. A. (K.H.) (1994), 120 D.L.R. (4th) 511, 164 A.R. 47, 1994 CarswellAlta 478 (Alta. Q.B.) — considered

Klachefsky v. Brown (1987), [1988] 1 W.W.R. 755, 11 R.F.L. (3d) 249, 1987 CarswellMan 241 (Man. C.A.) — considered

L. (W.Y.K.) v. T. (F.Y.) (2002), 2002 BCPC 222, 2002 CarswellBC 1411, 27 R.F.L. (5th) 109 (B.C. Prov.

Ct.) — considered

Lau v. Ng (1998), 1998 CarswellBC 2409 (B.C. Prov. Ct.) — considered

Mr. Pawn Ltd. v. Winnipeg (City) (1998), 1998 CarswellMan 500, [1999] 2 W.W.R. 521, 49 M.P.L.R. (2d) 208, 132 Man. R. (2d) 211 (Man. Q.B.) — considered

Peigan Indian Band v. Alberta (1998), 1998 CarswellAlta 938, 231 A.R. 201, 26 C.P.C. (4th) 357 (Alta. Q.B.) — considered

Q. (N.), Re (2003), 2003 YKTC 35, 2003 CarswellYukon 32, [2004] 3 C.N.L.R. 262, 39 R.F.L. (5th) 171 (Y.T. Terr. Ct.) — followed

R. (A.N.) v. W. (L.J.) (1983), [1984] 1 W.W.R. 1, [1983] 2 S.C.R. 173, 1 D.L.R. (4th) 193, 48 N.R. 362, 24 Man. R. (2d) 314, 36 R.F.L. (2d) 1, 1983 CarswellMan 147, 1983 CarswellMan 186, [1984] 1 C.N.L.R. 161 (S.C.C.) — considered

S. (L.) v. British Columbia (Ministry of Children & Family Development) (2004), 4 R.F.L. (6th) 443, 196 B.C.A.C. 81, 322 W.A.C. 81, 27 B.C.L.R. (4th) 62, 238 D.L.R. (4th) 655, 2004 BCCA 244, 2004 CarswellBC 944 (B.C. C.A.) — considered

Sawan v. Tearoe (1993), 48 R.F.L. (3d) 392, [1994] 1 W.W.R. 419, *(*sub nom. *Tearoe v. Sawan)* 32 B.C.A.C. 133, *(*sub nom. *Tearoe v. Sawan)* 53 W.A.C. 133, 84 B.C.L.R. (2d) 223, 1993 CarswellBC 280 (B.C. C.A.) — considered

Sawan v. Tearoe (1994), [1994] 2 W.W.R. lxv, 87 B.C.L.R. (2d) xxxiii (note), 3 R.F.L. (4th) 196 (note), *(*sub nom. *Tearoe v. Sawan)* 168 N.R. 195 (note), *(*sub nom. *Tearoe v. Sawan)* 45 B.C.A.C. 160 (note), *(*sub nom. *Tearoe v. Sawan)* 72 W.A.C. 160 (note), [1994] 1 S.C.R. vi (S.C.C.) — referred to

Veterinary Medical Assn. (Alberta) v. Pequin (2002), 2002 ABQB 115, 2002 CarswellAlta 178 (Alta. Q.B.) — considered

Wong, Re (2000), 2000 BCSC 1536, 2000 CarswellBC 2115, 81 B.C.L.R. (3d) 362, 11 R.F.L. (5th) 450 (B.C. S.C.) — considered

Statutes considered:

Adoption Act, R.S.B.C. 1996, c. 5

s. 7(1)(a) — considered

s. 7(2)(b) — considered

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12

Generally — referred to

s. 60(1) — referred to

s. 67(2) — considered

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

Family Law Act, S.A. 2003, c. F-4.5

Generally — considered

s. 3(3) — considered

s. 16(b) "place of residence" — considered

s. 18 — considered

s. 23(1) — considered

s. 23(4) — considered

s. 23(5) — considered

s. 24 — referred to

Family Relations Act, R.S.B.C. 1996, c. 128

Generally — considered

s. 5(3) — considered

s. 25(3) — considered

s. 27(5) — considered

s. 44 — considered

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 38(3) — considered

APPLICATION by father to be appointed guardian of child.

***Langston J.*:**

Facts

2006 CarswellAlta 126, 2006 ABQB 78, [2006] A.W.L.D. 1482, [2006] A.W.L.D. 1466, [2006] A.W.L.D. 1477, [2006] A.W.L.D. 1478, [2006] A.W.L.D. 1558, [2006] W.D.F.L. 1577, [2006] W.D.F.L. 1646, [2006] W.D.F.L. 1576, 24 R.F.L. (6th) 41, 57 Alta. L.R. (4th) 59, [2006] 7 W.W.R. 533, 392 A.R. 282

1 This matter concerns the guardianship of a baby girl born September 1, 2005. I will refer to her herein as "Baby Girl A". Baby Girl A is the biological child of the Applicant ("N.P."), who is now 20 years old, and the Respondent ("J.L."), who is now 17 years old. N.P. is $^{1}/_{2}$ aboriginal and is a member of the Squamish Nation. J.L. is not aboriginal.

2 From September 2004 to January 2005, N.P. and J.L. had a relationship which resulted in J.L.'s pregnancy. There is some dispute between the parties as to when J.L. told N.P. of the pregnancy and what his reaction was but, in my view, little turns on those points. During the relationship, both parties were residents of British Columbia. Indeed, J.L. has always been a resident of British Columbia and Baby Girl A was born at Lions Gate Hospital in Vancouver.

3 At some point prior to the birth, J.L. decided to place Baby Girl A for adoption. While there is also some dispute between the parties as to when N.P. became aware of this decision, the evidence established that he knew of it at some point during the summer of 2005.

4 J.L. contacted an adoption agency, LDS Adoption Services ("LDS"), and was provided with profiles of a number of prospective adoptive couples. From these profiles, she chose M. and S. P., who are residents of Edmonton, Alberta. J.L.'s evidence was that, at the time she chose the P.'s, she did not know where they lived.

5 In the summer of 2005, Gloria Robbins, a social worker representing LDS, made attempts to contact N.P. to discuss the proposed adoption. According to her affidavit, she initially left several messages, which were unreturned, before she was able to contact him by telephone on August 8, 2005. She states that N.P. at first questioned whether he was the father of Baby Girl A and then stated that he would support the adoption plan. Ms. Robbins sent him some medical information forms to complete. Ms. Robbins states in her affidavit that she had no further contact with N.P. until September 3, 2005. At that time, she called to inquire about the status of the medical forms and states that N.P. hung up on her.

6 On September 4, 2005, when Baby Girl A was three days old, J.L. placed her in the care of the P.'s. At that time, she signed an Alberta form of adoption consent. Pursuant to subsection 60(1) of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, this had the effect of making the P.'s joint guardians of Baby Girl A along with J.L.. Baby Girl A has been with the P.'s in Alberta ever since.

7 In his affidavit, N.P. stated that on September 16, 2005, he forwarded a letter to Ms. Robbins objecting to the adoption. However, he admitted on cross-examination that the letter was never sent.

8 On September 20, 2005, N.P. was notified in writing by LDS that Baby Girl A had been placed for adoption in Alberta and that the adoption would proceed under the provisions of the *Child, Youth and Family Enhancement Act*.

9 On November 8, 2005, N.P. commenced this action in Alberta. He seeks to be appointed a guardian of Baby Girl A under the *Family Law Act*, S.A. 2003, c. F-4.5 and to be given a parenting order granting him sole custodial care of her.

Jurisdiction

10 Before the question of guardianship can be determined, there are some preliminary issues which must be addressed. First, notwithstanding the fact that N.P. brought this application, his counsel has questioned whether

this Court has jurisdiction to deal with the guardianship of Baby Girl A. As noted above, she was born in British Columbia to a mother who was and still is resident there. N.P., though he was resident in Alberta at the time Baby Girl A was born, was previously resident in British Columbia, currently resides in Vancouver and, if granted guardianship, intends to reside in Kelowna. N.P. argues that, though Baby Girl A has been in Alberta in the care of the P.'s since she was three days old, she was wrongfully removed from British Columbia without his consent and that, therefore, this Court has no jurisdiction.

11 Both British Columbia and Alberta have statutes dealing with the guardianship of children, being the *Family Relations Act*, R.S.B.C. 1996, c. 128 and the *Family Law Act*, respectively. Perhaps surprisingly, however, neither statute provides expressly for which court has jurisdiction over the guardianship of a given child. The guardianship provisions of the *Family Relations Act* make no reference to territorial jurisdiction. By contrast, subsections 23(4) and (5) of the *Family Law Act* provide as follows:

> 23(4) Subject to subsection (5), a person may not apply for a guardianship order unless the child or proposed guardian resides in Alberta.
>
> (5) If it is satisfied that there are good and sufficient reasons for doing so, the court may waive the requirement
>
> > (a) that the child or propose guardian reside in Alberta, or
> >
> > (b) in the case of an application under subsection (1)(a), that the applicant has had the care and control of the child for a period of more than 6 months.

12 Further, para. 16(b) of the *Family Law Act* provides that the "place of residence" of a child means "the place where a child is living, either temporarily or permanently".

13 In this case, the child has been living in Alberta since September 2005. Whether that arrangement is considered to be temporary or permanent, it is sufficient to satisfy the above requirements. However, I do not believe that these provisions give a complete answer to the question of jurisdiction. I note, first, that subsection 23(4) is phrased in negative language. It excludes jurisdiction of the Alberta courts where neither the child nor the proposed guardian is resident in Alberta; it does not necessarily follow that the courts of this Province have jurisdiction in every case where the child or proposed guardian is resident here, even temporarily. Were that to be the case, I am concerned that the statute could be open to abuses. For instance, a child could be unlawfully brought to Alberta, as indeed is alleged to be the case here. Alternatively, a person resident in Alberta could purport to apply to this Court for guardianship of a child who has never resided, or perhaps never even set foot, in Alberta. Thus, it seems to me that the issue of jurisdiction requires more detailed analysis.

14 It is significant, in my view, that both the *Family Relations Act* and the *Family Law Act* expressly preserve the *parens patriae* jurisdiction of the superior courts. Subsection 5(3) of the *Family Relations Act* provides that "This Act must not be construed as limiting or restricting the inherent jurisdiction of the Supreme Court to act in a *parens patriae* capacity respecting a child before the court." Subsection 3(3) of the *Family Law Act* provides that "Nothing in this Act gives the Provincial Court the inherent jurisdiction of the Court of Queen's Bench to act in a *parens patriae* capacity respecting a child before the Court."

15 I conclude, then, that the matter of jurisdiction to deal with the guardianship of Baby Girl A falls to be

determined on the basis of the nature and scope of the *parens patriae* jurisdiction of the court.

16 The *parens patriae* jurisdiction is quite ancient in origin and derives from the power of the sovereign. In the recent case of *S. (L.) v. British Columbia (Ministry of Children & Family Development)* (2004), 27 B.C.L.R. (4th) 62, 2004 BCCA 244 (B.C. C.A.), the British Columbia Court of Appeal discussed the origin of the jurisdiction as follows at paras. 43, 44 and 47:

> The *parens patriae* jurisdiction is but an aspect of the ancient jurisdiction of the Sovereign the origins of which are described in W. Holdsworth, *A History of English Law*, vol. I, 7th ed. (London: Methuen & Co., 1956) pp. 33-34:
>
> > The Norman kings always regarded themselves as the successors of Edward the Confessor. They were lawful kings of the English; and, as such, they were entitled to exercise those powers of government which men believed were put into their hands for the preservation of peace, the protection of the weak, and the maintenance of justice. Because they were kings they had powers which transcended the powers of a mere feudal suzerain. No doubt these powers were vague. But, because they were vague, they were of the greatest value to kings who were in a position to exploit them to the uttermost, firstly because they were in effect conquerors, and secondly because they were men of exceptional ability and force of character. It was by the help of these prerogative powers, which were regarded as inherent in the office of king, and as belonging to them as the successors to Edward the Confessor, that the Norman and Angevin kings so developed the powers of the feudal Curia Regis that they made it the most efficient organ of centralized government that existed in Western Europe.
>
> The notion of the king as the fount of justice was not invented by the Norman kings. See *I Kings*, c. 3, v. 16-28 the last verse of which is, "And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God *was* in him, to do judgment."
>
> . . . . .
>
> When we speak of the Supreme Court of British Columbia as a court of inherent jurisdiction we are really saying that for all purposes of administering justice the judges are exercising all the ancient rights, powers, duties and privileges of the Sovereign. Hence the locution "Her Majesty's Judges".

17 An excellent analysis of the development of the *parens patriae* jurisdiction with respect to children is to be found in the Supreme Court of Canada's judgment in *Eve, Re*, [1986] 2 S.C.R. 388 (S.C.C.) at paras. 32 ff.:

> The origin of the Crown's *parens patriae* jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, *The Law Relating to Lunacy* (1924). *De Prerogativa Regis*, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, *supra*, p. 1.
>
> In the 1540's, the *parens patriae* jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the

Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.

When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its *parens patriae* jurisdiction... . In time wardship became substantively and procedurally assimilated to the *parens patriae* jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its *parens patriae* jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the *parens patriae* jurisdiction.

. . . . .

Theobald (*supra*, pp. 7-8, 362) appears to be quite right when he tells us that the Crown's prerogative "has never been limited by definition". The Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.

... In *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's *parens patriae* power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them." He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law, but for the practical reason that the court obviously had no means of acting unless there was property available.

The discussion on appeal to the House of Lords (*Wellesley v. Wellesley* (1828), 2 Bli. N.S. 124, 4 E.R. 1078) is also instructive. Far from limiting the jurisdiction to children, Lord Redesdale there adverted to the fact that the court's jurisdiction over children had been adopted from its jurisdiction over mental incompetents. He noted that "Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way"; 2 Bli. N.S. at p. 131, 4 E.R. at p. 1081. The jurisdiction, he said, extended "as far as is necessary for the protection and education"; 2 Bli. at p. 136, 4 E.R. at p. 1083. It continues to this day and even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit; see *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716.

... it seems clear from *Wellesley v. Wellesley*, *supra*, that the situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed

> cannot, be defined. I have already referred to the remarks of Lord Redesdale. To these may be added those of Lord Manners who, at Bli. pp. 142-43, and 1085 respectively, expressed the view that "It is ... impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances."

18 Given the above comments with respect to the breadth of the *parens patriae* jurisdiction, it is beyond doubt that whatever court has jurisdiction over Baby Girl A has the ability to deal with guardianship appointments. This is also clear from the provisions of the *Family Relations Act* and the *Family Law Act*. The question remains, though, do the courts of this Province have jurisdiction over this particular child?

19 The evidence establishes that Baby Girl A is within the territorial jurisdiction of this Court and has been since she was three days old. Is this sufficient to cloak this Court with jurisdiction to address her guardianship, particularly in light of subsection 23(4) of the *Family Law Act*, discussed above?

20 In this regard, there is a useful discussion to be found in Castel & Walker, *Canadian Conflict of Laws*, 6th ed., vol. 2 (Markham, Ontario: LexisNexis, 2005) at §18.1.d (footnotes omitted):

> Various provincial statutes deal with custody when it is sought independently from a divorce. Canadian courts also have an inherent jurisdiction, which is derived from the position of the sovereign as *parens patriae*, to make orders concerning the custody and guardianship of minors who owe allegience to the Crown and are entitled to its protection. This jurisdiction applies to all minors living in Canada, whatever their nationality or domicile and whether or not they possess property within the jurisdiction. It is sufficient if the minor is physically present within the jurisdiction, even if for a brief period or in transit. This inherent jurisdiction is not subject to federal legislation but to some extent it is subsumed in provincial legislation, though not exhaustively defined by it.
>
> Where the court is acting outside the *Divorce Act*, in the absence of specific statutory rules, ordinary conflict of laws rules apply. The primary basis of jurisdiction is the ordinary residence of the child within the province. Thus, if the child is no longer ordinarily resident in the province and his or her removal was untainted by any element of kidnapping, the court will decline jurisdiction. On the other hand, where the child was ordinarily resident in the province but was unilaterally removed by one parent, the court often will take jurisdiction on the ground that the child's ordinary residence in the province continues.
>
> If the court finds that making the order would be in the best interests of the child, it may exercise jurisdiction on the basis of its presence in the province. Physical presence and ordinary residence of the child within the province are not the only grounds for the exercise of jurisdiction. The court may also use the residence within the province of the person who has control of the child. The domicile of the child within the province once gave the court jurisdiction but it is a ground that has been discredited in recent years.
>
> Ordinary residence has been defined as the last place in which the child resided with his or her parents. Such ordinary residence cannot be changed by the surreptitious removal of the child by one parent. However, if the child has been removed from the jurisdiction with the consent of both parents or by the parent who has lawful authority to do so, the child is no longer resident in that jurisdiction. The inability to enforce an order where the person controlling the child and the child are beyond the territorial jurisdiction of the court must be given weight by the court when exercising jurisdiction. In such a case the making of the order is discretionary. It is only in exceptional circumstances that a court will make a custody order in respect of a child who is neither ordinarily resident nor present within the jurisdiction.

> The court may exercise jurisdiction where the child has a real and substantial connection with the province.
>
> Where the child has been abducted, the court of the province to which such child has been taken will either decline to exercise its jurisdiction or order the child to be returned to the province or state in which he or she was ordinarily resident. The court where the child is ordinarily resident may decline to exercise jurisdiction where the court of the province or state to which the child has been taken exercised jurisdiction and awarded custody to the abductor. In other words the issue of abduction may be disregarded for purposes of jurisdiction where it is in the child's best interests to hear the case.

21 As noted above, Baby Girl A is present in Alberta. The relevant questions, therefore, are (1) was she lawfully removed from British Columbia? and (2) is she ordinarily resident in Alberta?

22 The evidence establishes that J.L. removed Baby Girl A from British Columbia by allowing her to be taken to Alberta and placed in the care of the P.'s. While there may be some uncertainty as to what notice N.P. had of this, it is clear that it was done without his consent. Was J.L. entitled to take this action?

23 Because Baby Girl A was born in British Columbia, her guardian or guardians at birth must be determined with reference to the *Family Relations Act*. The relevant provision is subsection 27(5), which provides as follows:

> 27(5) Subject to section 28, if the father and mother of a child
>
> > (a) have not been married to each other during the life of the child or 10 months before the child's birth,
> >
> > (b) are living separate and apart, and
> >
> > (c) do not share joint guardianship under this section or under an order of a tribunal of competent jurisdiction,
>
> the mother is the sole guardian unless a tribunal of competent jurisdiction otherwise orders.

24 As N.P. and J.L. were never married, never lived together and were not made joint guardians by any tribunal, it is clear that at the time of Baby Girl A's birth, J.L. was her sole guardian. Did this give her the authority to place the child in the care of persons resident outside British Columbia?

25 Regrettably, the provisions of the *Family Relations Act* in this respect give us little useful guidance, at least on their face. Subsection 25(3), entitled "Authority of guardian", provides that "Subject to this Act, a guardian of the person of a child has all powers over the person of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 17, section 4." In *Fink v. British Columbia (Public Guardian & Trustee)*, 2002 BCSC 438 (B.C. S.C.), Dillon J. set out the meaning of these ancient provisions as follows:

> Acts 12, Charles the Second, chapter 24 is 1660 legislation taking away the court of wards and fetting revenue upon the king in lieu thereof. It is grande olde English law that puts the profits from the lands of a child into the hands of the guardian who has custody of the child for the use of such child. It said:

> IX. And be it further enacted, That such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children; and also the custody, tuition and management of the goods, chattels and personal estate of such child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition aforesaid; (2) and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do.

49 and 50 Victoria, chapter 27 is referred to as the *Guardianship of Infants Act, 1886*. S. 4 of this Act preserved the powers of a guardian over the estate of an infant as the same as had existed in 1660. By s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, all English law as it existed on November 19, 1858 is in force in British Columbia except as that law has been modified or altered by British Columbia legislation.

26 In addition to this elucidation, there is case law to clarify the powers of a guardian in British Columbia. Huddart Co. Ct. J. (as she then was) discussed the nature of guardianship in *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (B.C. Co. Ct.). The following instructive comments are to be found at pp. 361-2:

> Guardianship is an ancient concept. Known to Roman law, it evolved to protect certain interests of a child whose father was absent or untrustworthy. While the father was the natural guardian of the child (as are *both* parents under the *Family Relations Act*), the functions of a guardian could be entrusted legally to another person: W. White, "A Comparison of Some Parental and Guardianship Rights" (1980), 3 Can. J. Fam. L. 219, at p. 222, citing Blackstone's Commentaries (1765-1769), vol.1, at p. 463. Originally guardianship related only to the estate of the child; however, over time the concept of guardianship of the person also developed.
>
> . . . . .
>
> Today guardianship is regarded generally as the full bundle of rights and duties voluntarily assumed by an adult regarding an infant akin to those naturally arising from parenthood: *Hewar v. Bryant*, [1970] 1 Q.B. 357, [1969] 3 W.L.R. 425, [1969] 3 All E.R. 578 (C.A.), Law Reform Commission of British Columbia, Report on the Authority of a Guardian (1985), at p.3. That seems to be the effect of s. 25 of the *Family Relations Act*. See *Mathew v. Brise* (1851), 14 Beav. 341at 345, 51 E.R. 317. The *Tenures Abolition Act, 1660*, had made guardianship an office of trust and responsibility rather than one of profit. By 19th May 1917, in England a guardian, like a parent, had the general power and duty to raise a child in a manner befitting the child's position and expectations. Guardianship implies the voluntary assumption of a duty to maintain, protect and educate the ward. It includes the power to correct, to grant or withhold consent to marriages and, if the guardian is also the parent, to delegate parental authority. It does not require the guardian to spend personal funds on the ward. That obligation is purely statutory and falls on a guardian in this province because a "parent" includes a guardian or guardian of the person of the child for the purposes of the *Family Relations Act*.
>
> . . . . .
>
> Generally speaking, however, these statutory provisions do not detract from the general principle that the guardian or guardians of a child have the full bundle of rights and responsibilities relating to a child. Thus,

> subject only to specific statutory restrictions or to limits imposed by a court, the guardian of the estate of a child has the full bundle of parental rights and duties regarding the child's property and the guardian of the person has the full bundle of parental personal rights, including necessarily the entitlement to physical possession of the child.

27 This reasoning was adopted by Davis Prov. Ct. J. in *Lau v. Ng*, [1998] B.C.J. No. 974 (B.C. Prov. Ct.) as follows at paras. 12, 13 and 15:

> Before arriving at my decision in this matter, I believe it is necessary to determine what is guardianship, what are parental rights, and how does guardianship differ from custody because it is important to understand what is being asked for.
>
> The best, and perhaps only place to start is the decision of Madam Justice Huddart in [*Anson*]. This was a decision that Madam Justice Huddart decided when she was sitting as an appellate judge of the County Court, and it was an appeal from this court. In that case, custody, guardianship and access are reviewed quite thoroughly and in my humble opinion correctly reflects the law today. Subsequent cases have not affected its validity regarding how it deals with custody, access and guardianship. I am mindful that Madam Justice Huddart, now sitting in the Court of Appeal delivered the judgment of the court in *Robinson v. Filyk*, 28 B.C.L.R. (3d) 21 and as I said in a previous decision, "I am mindful that Huddart, J.A. had stepped back somewhat from her position in *Anson* by virtue of her statement in *Robinson v. Filyk* but the statements she made regarding the evolution of law of guardianship and custody are as valid today as they were then".
>
> . . . . .
>
> After reading *Anson* and other literature including the *Family Relations Act*, it seems to me that as this relates to the *Family Relations Act*, the concept of guardianship and custody, if I may be so bold, is just this simple:
>
> > 1. If you have sole guardianship you have everything, the "whole bundle of rights", the "whole bundle of powers".

28 Judge Davis reiterated his position in *L. (W.Y.K.) v. T. (F.Y.)* (2002), 27 R.F.L. (5th) 109, 2002 BCPC 222 (B.C. Prov. Ct.), saying at p. 110 "[I]f you have guardianship, you have 'everything'. You have the right to determine many aspects of the child's life — healthcare, whether the child is to have the operation or not, where the child goes to school, with whom the child resides, what books the child may read, even who is to have custody of the child — in short you have 'everything'."

29 The decisions of Huddart, J.A. and Davis Prov. Ct. J. were referred to by Stromberg-Stein J. in *Wong, Re* (2000), 81 B.C.L.R. (3d) 362, 2000 BCSC 1536 (B.C. S.C.) in which she stated at p. 365 that "The importance of guardianship cannot be overstated. It is a broad concept that encompasses the concept of custody and goes further, to include a collection of rights and responsibilities relating to a child, subject to specific statutory limitations. These rights and responsibilities are wide-ranging and relate to all matters that affect the best interests of children. They include, for example, education, religious and health decisions."

30 Based on the foregoing, I am satisfied that J.L., as Baby Girl A's sole guardian at birth pursuant to the *Family Relations Act*, had the authority to place her in the care of the P.'s in Edmonton. Therefore, it cannot be said that Baby Girl A was unlawfully removed from British Columbia.

31 As discussed above, Castel states that the primary basis of jurisdiction for a court acting outside the *Divorce Act* is the ordinary residence of the child within the province. He states that ordinary residence has been defined as the last place in which the child resided with his or her parents. In this case, Baby Girl A never lived with both parents and lived with her mother only for the first three days of her life. Since then, she has been with the P.'s.

32 The *Family Law Act* does not address the concept of ordinary residence. The *Family Relations Act*, however, refers to the place where a child is "habitually resident", albeit in the context of custody and access rather than of guardianship. S. 44 of the *Family Relations Act* provides, in part, as follows:

> 44(1) A court must exercise its jurisdiction to make an order for custody of or access to a child only if
>
> (a) the child is habitually resident in British Columbia at the commencement of the application for the order, or
>
> (b) although the child is not habitually resident in British Columbia, the court is satisfied that
>
> (i) the child is physically present in British Columbia at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
>
> (iii) no application for custody of or access to the child is pending before an extraprovincial tribunal in another place where the child is habitually resident,
>
> (iv) no extraprovincial order in respect of custody of or access to the child has been recognized by a court in British Columbia,
>
> (v) the child has a real and substantial connection with British Columbia, and
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.
>
> (2) A child is habitually resident in the place where the child resided
>
> (a) with both parents,
>
> (b) if the parents are living separate and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order, or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred.
>
> (3) The removal or withholding of a child without the consent of the person who has custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in com-

mencing due process by the person from whom the child is removed or withheld.

33 Applying these criteria, I am satisfied that Baby Girl A is not habitually resident in British Columbia and that the British Columbia courts would not assert jurisdiction on this basis. She is not physically present in British Columbia and has been resident in Alberta with the P.'s since she was three days old. As I concluded above, she was not wrongfully removed from British Columbia and there is nothing to prevent alteration in her initial, very brief residence there.

34 Thus, in light of all of the foregoing analysis, I am satisfied that this Court has jurisdiction to deal with the issue of guardianship of Baby Girl A.

Status of the Squamish Nation

35 The next threshold issue that was raised is the status, if any, of the Squamish Nation in these proceedings. The Nation are not named in the proceedings. Nevertheless, they take the position that they should be given status either as a party or as an intervenor. The Nation refer to Rule 38(3) of the Alberta Rules of Court, which provides as follows:

> 38(3) The Court may, either upon or without the application of any party and with or without terms order that the name of any party improperly joined be struck out and that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.

36 In their brief, the Nation argue that it is necessary that they participate in the proceedings "...in order to protect the rights or interests of the child as a Squamish aboriginal person" and "...to protect the rights and interests of [N.P.], as a Squamish parent, and the collective rights and interests of the Squamish people as an aboriginal collective with a unique culture and identity." The Nation argue that the child's aboriginal culture is a critical factor to be considered in addressing the matter of her guardianship. They point out that the legislation in both British Columbia and Alberta requires that a child's aboriginal heritage be considered as a factor in making determinations with respect to guardianship.

37 As I shall discuss later in these reasons, there is no doubt that Baby Girl A's aboriginal heritage is a factor that I must take into account in considering N.P.'s application for guardianship. That notwithstanding, I do not believe that it is necessary or appropriate for the Nation to be granted status as either a party or an intervenor in these proceedings.

38 The test for adding a party was set out by Virtue J. of this Court in *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* (1993), 140 A.R. 244 (Alta. Q.B.). The following discussion of the test to be applied appears at paras. 13-16:

> The addition of parties to actions by order of the court is a subject which has been dealt with more extensively in the Courts of England than Canada. Some controversy still exists as to whether the proper test is a narrow or a broad one. The narrow test is best exemplified in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. In that case Devlin, J., with painstaking thoroughness, traces the cases dealing with the English rule, and concludes that what he describes as the narrow test, is the correct interpretation of the rule. My understanding of the test enunciated by Devlin, J., which, for the reasons set out below, I respectfully adopt, is

this: Would the order for which the plaintiff is asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights. And secondly, the only reason which makes it necessary that a party be added is that the question to be settled cannot be effectually and completely settled unless he is a party. Unless these tests are met the court has no jurisdiction to add a party within the rule.

For those who are interested in tracing the history of English legal analysis and application of the rule the whole of Devlin, J.'s reasons are commended, but I refer in particular to the expression adopted by him at pp. 378-379:

> ... that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

At p.380 he elaborates on this further:

> ... The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

With respect to the other aspect of the test: commercial interest versus legal interests, Lord Devlin says, at p. 381:

> On the wider construction of the rule, I do no understand where the line is to be drawn — it is conceded that it must be drawn somewhere — between a commercial interest in the question involved in the case and a legal one. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally — that is by curtailing his legal rights.

And finally at p. 386:

> ... the test is: 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?'

39 This test was accepted by the Alberta Court of Appeal in *CPCS Ltd. v. Western Industrial Clay Products Ltd.* (1995), 31 Alta. L.R. (3d) 257 (Alta. C.A.). In that case, the Court of Appeal allowed an insurer to be added as a party to two special applications saying at p. 259 that "It is apparent that, absent the Appellant at the applications, no one will adequately oppose them." The Court of Appeal went on to say that "The question arising on the special applications will not be effectively and completely settled without the participation of the Appellant as there is no other party in a position to oppose them. The outcome of the special applications may affect the Appellant's legal position with respect to the scope of coverage under its policy."

40 In *Peigan Indian Band v. Alberta* (1998), 231 A.R. 201, 1998 ABQB 850 (Alta. Q.B.), Moore J. of this Court applied the *Amoco* test and refused to permit the addition of The Queen in Right of Canada to that proceeding. He found that, while Canada might be affected by the decision, it did not have any legal rights to the disputed interests that could be affected. He also found that any evidence in Canada's possession could be obtained from Canada as a witness, rather than as a party.

41 This issue was also considered by the Yukon Territorial Court in *Q. (N.), Re* (2003), [2004] 3 C.N.L.R. 262, 2003 YKTC 35 (Y.T. Terr. Ct.), a case involving a permanent care order over an aboriginal child. The Taku River Tlingit First Nation applied to be added as a party. Faulkner Terr. Ct. J. refused to add the Nation as a party and made the following comments at p. 264-5:

> ... a person will be entitled to be added as a party:
>
> > ... if their presence is necessary to determine the issues and that person has a clear legal interest in the proceedings.
>
> A person has a legal interest in a proceeding when an order could be made in favour of, or against, that person. All other persons who may be affected indirectly or consequentially by the litigation are persons interested, but they are not parties. ... Where, as here, the child and his mother are members of a First Nation the First Nation may have an interest in the proceedings, but it does not have a legal interest.
>
> . . . . .
>
> This last requirement, that the party will be legally bound by the result, presents an insuperable obstacle to adding the First Nation as a "party" to the cause.

42 In Alberta, in contrast to some other jurisdictions, there are no specific rules with respect to intervenor status and resort must be had to the common law. Oddly enough, the test that has been applied appears to be substantially similar to the test for determining party status. In W.A. Stevenson & J.E. Côté, *Civil Procedure Encyclopedia*, vol. 1 (Edmonton: Juriliber, 2003) it is said at p. 10-11 that "The test [for intervention in private disputes] is whether the proposed intervener would be directly affected by the decision, and whether its presence is necessary for the court properly to decide the matter." This was also the view taken by Gallant J. of this Court in *Veterinary Medical Assn. (Alberta) v. Pequin*, 2002 ABQB 115 (Alta. Q.B.).

43 Two interesting cases out of Manitoba indicate that the second criterion requires the proposed intervenor to demonstrate that it will bring before the court something that will not be brought forward by the parties. In *Klachefsky v. Brown* (1987), [1988] 1 W.W.R. 755 (Man. C.A.), the Women's Legal Education and Action Fund sought intervenor status to raise the issue of sexual equality in a custody matter. The trial judge refused and the Manitoba Court of Appeal dismissed the appeal, making the following comments at p. 758:

> Counsel for the wife is entirely capable of raising and ventilating any issue relative to the Charter of Rights and Freedoms should counsel consider that such an argument would advance the cause of her client.
>
> ... I can well understand an intervention where counsel for one of the parties is unwilling or unable to raise an issue of substance which could affect the development of the law in future cases. Those are not the circumstances here. Counsel for the wife labours under no restraints in raising those arguments which might find favour with the court, including any argument based upon Charter principles.

> The intervention of a third party into what is essentially a private dispute is not to be lightly entertained. An intervention adds unnecessarily to the cost of proceedings and might well also add to the length of litigation. It constitutes an inconvenience to the parties which ought not to be imposed upon them except under compelling circumstances, which do not exist in this case.

44 In *Mr. Pawn Ltd. v. Winnipeg (City)* (1998), [1999] 2 W.W.R. 521 (Man. Q.B.), a community interest organization sought to intervene in an application challenging the city's authority to pass certain by-laws relating to pawn shops. Steel J. noted at p. 524 that it was not clear that the community group would make arguments different from those made by the city, but that the group took the position that its concerns were unique:

> Counsel did not identify a specific argument or issue that would be advanced by the intervenor over and above the proposed argument by the City of Winnipeg. The intervenor indicated that at the present time it was not familiar with all the arguments that might be presented on behalf of the City, nor had it decided upon the extent of its own arguments. Rather, the intervenor contended that it would be placing emphasis on different points of law or different cases than might be put forward by the City of Winnipeg. This argument may be summarized by referring to Reverend Lehotsky's affidavit where he states:
>
> > We believe that the neighbourhood affected by this Application has unique and special concerns that may not necessarily be expressed by the City of Winnipeg, as the latter can be expected to take a position and frame its arguments on behalf of the whole city and all its constituents. For example, we believe that the pawn-shop licensing by-law can and should be interpreted in a manner that affords greater scope for public participation in decision-making, enables the City of Winnipeg to consider the density of pawnshops in a particular area in determining whether granting such license (sic) is injurious to the public interest, and takes greater account of Plan Winnipeg, the City's main planning document.

45 Though he acknowledged that the extent to which a proposed intervenor's interests must diverge from those of the parties will depend upon the circumstances of the case, Steel J. found at p. 529 that there must be some difference in the arguments sought to be made:

> Depending on the circumstances, it may not be necessary for the proposed intervenor to put forward a substantially different issue. In *Charter* cases, for example, different nuances in argument may be important to be heard, not because they affect the outcome of the case but because they may affect the reasons for decisions and therefore the precedential authority of the case. Where policy issues are being decided within a *Charter of Rights* framework, presentations that provide different perspectives and assist in identifying consequences and ramifications can be especially helpful to the courts.
>
> . . . . .
>
> Yet, no purpose is served by having intervenors duplicate the arguments of the parties. At a minimum, the applicants must be able to show how their submissions will be useful and different from those of the other parties in some way.

46 In *Q. (N.), Re*, the Director of Family and Children's Services conceded granting intervenor status to the First Nation. While Faulkner Terr. Ct. J. appeared to agree with that concession, he nevertheless placed a number of restrictions on the First Nation's participation in the proceeding, commenting as follows at pp. 265-6 and 268:

> Whenever a court grants intervenor status, the court may set or fix the terms of the intervention. At bottom, an intervenor might only be allowed to file a written brief. ...
>
> In making this determination, the court should examine whether or not extending such a privilege [to examine witnesses] to the intervenor is necessary in order that a just result will be reached. This would presuppose that:
>
> > (a) the intervenor is possessed of information and evidence relevant and vital to the proceedings which will not reach the judge unless the intervenor presents it, and, or,
> >
> > (b) the intervenor has a unique point of view not represented by any of the other parties.
>
> This would seem to me to suggest that, before it would be necessary to allow the intervenor to call witnesses and cross-examine others, it would need to appear that the intervenor, in this case the First Nation, and the applicant, the mother, have somewhat divergent interests. Otherwise, the information possessed by the First Nation can be provided to the applicant and presented to the court by the applicant. The witnesses the intervenor intends to call can, likewise, be called by the applicant. Since the viewpoint of the applicant and the intervenor is the same, the Director's witnesses can be cross-examined by the applicant's counsel without there being a danger that necessary questions will remain unasked.
>
> . . . . .
>
> I am, therefore, of the view, that no case has been made out to add the First Nation as a party rather than as an intervenor, and that no case has been put forward to order that the intervenor be given blanket authority to call witnesses or to cross-examine the witnesses called by the parties. To permit the intervenor such wide latitude raises the substantial risk that the hearing will become both protracted and confused of purpose through dealing with issues, including the relationship between the First Nation and the Director or the sufficiency of the Director's efforts to date to address the First Nation's concerns respecting the care of N.Q., which are not particularly relevant to the present proceedings. It needs to be mentioned that, in any event, counsel for the First Nation has already been afforded a substantial opportunity to cross-examine on these matters during the hearing on this application. Other issues, for example, the adequacy of the Director's plan of future care for N.Q., can be adequately tested and examined by counsel for the child's mother, S.Q.
>
> On the other hand, I welcome the participation of the First Nation with respect to the real issue in the case — the future best interests of N.Q. The First Nation represents that it has both the willingness and the means to play a role in N.Q.'s future. To that end, it will be of benefit to permit the intervenor to call witnesses (whom the mother could have called in any event) to provide evidence regarding the resources it has available to support the mother and to provide care for N.Q. The First Nation may also call evidence with respect to the heritage of the child, the importance of that heritage, and the means available to sustain and promote it. It will likewise be permissible for counsel, on behalf of the First Nation, to cross-examine witnesses to the limited extent necessary to bring out or clarify evidence on these points. It will be for the trial judge to determine whether there is a necessity for counsel for the First Nation to ask any additional questions.

47 In this case, the Squamish Nation argue that they are "uniquely situated" to speak to Baby Girl A's status as an Indian person under the *Indian Act*, to her entitlement to membership in the Squamish Nation and to the

Squamish culture.

48 Applying the *Amoco* test, I find that the Squamish Nation is not entitled to be named a party to these proceedings. In this regard, I am in agreement with Faulkner Terr. Ct. J.'s conclusion in *Q. (N.), Re* that a First Nation, while it is unquestionably interested in the welfare of aboriginal children, does not have a legal interest sufficient to make it a party to this kind of proceeding.

49 Turning to the question of intervenor status, I am satisfied based on the materials put before me by counsel that granting intervenor status to the Squamish Nation is not necessary for the determination of the issue in this case, namely, the guardianship of Baby Girl A. In their submissions seeking party or intervenor status, the Squamish Nation raised the history and culture of the Squamish people, the importance of that culture, the social programs available to members of the Squamish nature and the assistance the Nation could provide to N.P. if he were to parent Baby Girl A. I do not in any way underestimate the importance of this evidence. As I have already noted and will discuss in more detail further in these reasons, all of these things are of importance in taking into account Baby Girl A's aboriginal heritage, as required by the *Family Law Act*. Nevertheless, I am satisfied that this evidence can be put before the court by N.P. without the necessity of naming the Squamish Nation as intervenor.

50 The Applicant, N.P., is represented by counsel and has raised the issue of the child's aboriginal heritage. There is no suggestion that, without the Squamish Nation as intervenor, this issue would be disregarded. Indeed, the *Family Law Act* would not permit it. I am satisfied that N.P.'s interests and those of the Squamish Nation are convergent and that N.P.'s counsel can address the aboriginal issues fully. The Nation can provide evidence through N.P.'s counsel and, in fact, has already done so in the form of Chief Bill Williams' affidavit. I am confident that there will be no question unasked, no voice unheard in the absence of intervenor status for the Nation.

51 Therefore, I decline to grant party or intervenor status to the Squamish Nation. In doing so, I am cognizant of the fact that I am disagreeing with the view of Faulkner Terr. Ct. J. in *Q. (N.), Re* that intervenor status was properly conceded to the First Nation and I do this with the greatest respect.

52 Counsel for J.L. raised some procedural issues in respect of the Squamish Nation's desire to be added to these proceedings. However, in light of my decision on this issue, I need not address those points.

Guardianship of Baby Girl A

53 Now, at last, we come to the crux of the matter. N.P. seeks to be named a guardian of Baby Girl A and asks for a parenting order giving him sole custodial care of her. This application is brought pursuant to subsection 23(1) of the *Family Law Act*, which provides as follows:

> 23(1) The court may, on application by a person who
>
> (a) is an adult and has had the care and control of a child for a period of more than 6 months, or
>
> (b) is a parent other than a guardian of a child,
>
> make an order appointing the person as a guardian of the child.

54 I mention at this point that there was much discussion of adoption in the materials filed in this proceed-

ings. It is acknowledged by all parties that J.L.'s intention in placing Baby Girl A in the care of the P.'s was that the child be adopted by them. Nevertheless, the matter of adoption is not before me. What I am called upon to consider is whether or not N.P. should be named a guardian of Baby Girl A.

55 The *Family Law Act* mandates that the only criterion upon which this Court may rely in making a determination about guardianship is the best interests of the child. The child's interests are to be ascertained using certain criteria enumerated in s. 18:

> 18(1) In all proceedings under this Part, the court shall take into consideration only the best interests of the child.
>
> (2) In determining what is in the best interests of a child, the court shall
>
> > (a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and
> >
> > (b) consider all the child's needs and circumstances, including
> >
> > > (i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,
> > >
> > > (ii) the history of care for the child,
> > >
> > > (iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,
> > >
> > > (iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,
> > >
> > > (v) any plans proposed for the child's care and upbringing,
> > >
> > > (vi) any family violence, including its impact on
> > >
> > > (A) the safety of the child and other family and household members,
> > >
> > > (B) the child's general well-being,
> > >
> > > (C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and
> > >
> > > (D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,
> > >
> > > (vii) the nature, strength and stability of the relationship
> > >
> > > (A) between the child and each person residing in the child's household and any other significant person in the child's life, and
> > >
> > > (B) between the child and each person in respect of whom an order under this Part would apply,
> > >
> > > (viii) the ability and willingness of each person in respect of whom an order under this Part

> would apply
>
> (A) to care for and meet the needs of the child, and
>
> (B) to communicate and co-operate on issues affecting the child,
>
> (ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,
>
> (x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and
>
> (xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

56 It is clear on the evidence that the P.'s are able to offer Baby Girl A a stable and caring home. The home study demonstrates this and, indeed, there seems to be little dispute among the parties that the P.'s would be highly suitable parents for the child, but for the issue of her Squamish heritage.

57 N.P.'s ability to provide suitable parenting for Baby Girl A is, sadly, in much greater question. He is young and some of his prior choices demonstrate a lack of maturity. This is perhaps understandable, but it does not give one confidence in his ability to provide a suitable home for an infant. His ability to provide for the child financially is unclear. He has just completed high school, was not employed at the time of the hearing and does not have a stable employment history. His childcare plan is also unclear. He deposed in his affidavit that he would rely on his sister to care for Baby Girl A while he worked, but later took the position that he would stay home with the child while his sister worked to support them. It is fair to say that this important aspect of N.P.'s parenting plan does not appear to be well thought out. The Squamish Nation indicated that they would provide support to N.P. in his parenting efforts. However, Chief Williams indicated in his affidavit that the Nation's Ayas Men Men program is not available in Kelowna, where N.P. intends to reside, and that Ayas Men Men would "co-ordinate with local family service providers" to ensure that N.P. received the required support. The details of this plan are unclear. Chief Williams also indicated that the Squamish Nation would provide financial assistance to help with the local services but details of how this would occur were not provided.

58 The primary consideration upon which N.P., and with him the Squamish Nation, relies is the child's aboriginal heritage. As I have already acknowledged, this is an important factor and must not be disregarded. However, it is but one factor and cannot be decisive on its own. Where the child's best interests require it, this factor must give way. I am supported in this conclusion by cases such as *R. (A.N.) v. W. (L.J.)*, [1983] 2 S.C.R. 173 (S.C.C.), *Sawan v. Tearoe* (1993), 84 B.C.L.R. (2d) 223 (B.C. C.A.), leave to appeal dismissed [1994] 1 S.C.R. vi (S.C.C.) and *G. (A.P.) v. A. (K.H.)* (1994), 164 A.R. 47 (Alta. Q.B.).

59 In this case, I can only conclude that it is in Baby Girl A's best interests that N.P.'s application for guardianship and for a sole parenting order be denied. In doing so, I do not wish to discount the sincerity of N.P.'s intentions to improve himself and to be involved in the child's life. I note that the P.'s have offered N.P. an "openness" agreement. In the event that the contemplated adoption takes place, it is to be hoped that N.P. will take advantage of this opportunity.

60 I recognize that the Squamish Nation takes issue with the P.'s expressed intention to support Baby Girl A

in understanding and appreciating her aboriginal heritage. They argue that, while the P.'s may have an appreciation for some aspects of aboriginal culture, they have no knowledge of Squamish culture in particular. Nevertheless, I am of the view that Baby Girl A's best interests mandate against granting guardianship to N.P. However, I would again express the hope that, in the event of the contemplated adoption, arrangements can be made, through an openness agreement with N.P. or otherwise, that will allow not only Baby Girl A, but the P.'s as well, to benefit from learning and experiencing the Squamish culture.

61 Finally, it was argued that the Squamish Nation was not properly consulted in respect of the placement of Baby Girl A with the P.'s. Both N.P. and the Squamish Nation argue that Baby Girl A's aboriginal heritage was disregarded. Both British Columbia and Alberta require consultation with First Nations in certain circumstances. British Columbia's *Adoption Act*, R.S.B.C. 1996, c. 5 provides as follows in s.7:

> 7(1) Before placing an aboriginal child for adoption, the director or an adoption agency must make reasonable efforts to discuss the child's placement with the following:
>
> > (a) if the child is registered or entitled to be registered as a member of an Indian band, with a designated representative of the band;
> >
> > . . . . .
>
> (2) Subsection (1) does not apply
>
> > . . . . .
> >
> > (b) if the birth parent or other guardian of the child who requested that the child be placed for adoption objects to the discussion taking place.

The corresponding provision in Alberta is s.67 of the *Child, Youth and Family Enhancement Act*:

> 67(2) If a director or an officer of a licensed adoption agency, as the case may be, has reason to believe that a child who is being placed for adoption is an Indian and a member of a band and that the guardian who is surrendering custody of the child is not a resident of a reserve, the director or officer shall
>
> > (a) request the guardian who is surrendering custody of the child to consent to the involvement of a person designated by the council of the band in decisions relating to the adoption of the child, and
> >
> > (b) if the guardian consents to the involvement under clause (a), involve the person designated by the council of the band in decisions relating to the adoption of the child.

62 Both of these provisions pertain to adoption rather than guardianship and, therefore, this issue is not directly before me. Nevertheless, I am of the view that consultation with the Squamish Nation was not required in this case. I understand that the Nation is disappointed at not having been consulted. Nevertheless, the legislation does not require that they be consulted in all circumstances. In this instance, J.L., as guardian of Baby Girl A, refused her consent for such consultation. This was her right. If that were not so, the provisions requiring her consent for consultation would be meaningless. I am satisfied that the legislation was complied with.

2006 CarswellAlta 126, 2006 ABQB 78, [2006] A.W.L.D. 1482, [2006] A.W.L.D. 1466, [2006] A.W.L.D. 1477, [2006] A.W.L.D. 1478, [2006] A.W.L.D. 1558, [2006] W.D.F.L. 1577, [2006] W.D.F.L. 1646, [2006] W.D.F.L. 1576, 24 R.F.L. (6th) 41, 57 Alta. L.R. (4th) 59, [2006] 7 W.W.R. 533, 392 A.R. 282

63 Counsel for J.L. raised a number of procedural issues with respect to N.P.'s application for guardianship. It was argued, for instance, that s. 24 of the *Family Law Act* does not allow an order to be made appointing a guardian unless each existing guardian consents or the court dispenses with such consent. As noted above, the existing guardians of Baby Girl A are J.L. and, by virtue of the adoption consent signed by her, the P.'s. The evidence clearly establishes that none of these people consented to N.P.'s being made a guardian of Baby Girl A. Nevertheless, in light of my decision, I need not address these points.

64 In conclusion, N.P.'s application for guardianship is dismissed. I think it is appropriate in this case that all parties bear their own costs.

Application dismissed.

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