Procedural Fairness & the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12

Prepared For: Legal Education Society of Alberta

Child Welfare

Presented by:

Diane Parken

Legal Aid Alberta

Calgary, Alberta

For Presentation In:

Edmonton – February 4, 2014

Calgary – February 6, 2014

Procedural Fairness & the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12

Diane Parken, Legal Aid Alberta

For the Legal Education Society of Alberta

February 04, 2014 Calgary and February 06, 2014 Edmonton

Introduction

[1] The topic I will be addressing today is Procedural Fairness under the *Child, Youth and Family Enhancement Act* (*CYFEA*). I will first review what the general principles of law are in this area; then look at the specific sections of the CYFEA to see how these principles are addressed in the legislation, and finally consider what significance or use – if any – this information has to you as a practitioner.

[2] Before we do this, I would like to briefly tell you why I felt compelled to talk or write about this topic and it starts with a mantra that I live by "Do Not Play the *Yes But* Game". Dr. Eric Berne coined that phrase in his book Games People Play (1964 Random House Inc.: New York p.116 – 117). My understanding of the game is that every time you preface your response to a question or a suggestion with the words "yes, but", you are likely:

a) Making an excuse, or

b) Condescending to someone you believe may be incapable of understanding or may be hurt by the answer, or

c) In the case of most adult communications – lying.

[3] The theory is that if you want to be the best that you can be, if you want to be honest and a person of integrity, you will stop, rethink, and rephrase.

[4] For many years I have tried to conduct myself by these rules and so it was in February 2008 that I started acting as Duty Counsel to parents in Child Welfare docket court in Calgary. I read and studied the legislation and dutifully marched into court with them and demanded the dismissal of the Director's applications or the immediate return of the children because:

"These parents were not served with the documents", or

"These parents were not served within the legislated time line", or

"There is inadequate information in this affidavit to suggest that the child is in need of intervention", or

"There is absolutely no information in the affidavit", or

"There's no affidavit", or

"There is another guardian who is quite capable of caring for the child and is here today".

[5] I met with absolutely no success. Inevitably my applications were all dismissed and I learned that my role was to convince people to consent or pick an adjournment date. This seemed to make everyone happy except the clients and I constantly heard the same things from them over and over,

"Aren't they supposed to serve me"?

"Aren't I entitled to be given 5 days' notice"?

"This affidavit is incorrect, can't I respond"?

"My mother is here to take the kids, can she have them"?

[6] And I heard myself saying over and over and over again "YES BUT". And frankly, I was not the only person saying "yes but". Many of the senior lawyers that I turned to for advice responded with "yes buts" and so did some of the judges.

[7] So I became keenly interested in the law and the practice in this area. I have come to the conclusion that all of the protections parents should have when faced with a government applications for custody of their children, exist. We simply have been ignoring them or failing to argue or apply them. So let's turn to the law.

General Principles

[8] Two SCC decisions lay the foundation for the drafting of Child Welfare legislation in Canada: *New Brunswick (Minister of Health and Community Services) v. G. (I)*, [1999] 3 SCR 46 and *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 SCR 519 .

[9] From *New Brunswick* [69] – [72], we know that a child custody application by government constitutes a potential restriction of a parent's right to security of the person and therefore protected by section 7 of the Charter - the right not to be deprived of the right to security of the person except in accordance with the principles of fundamental justice, to wit: a fair hearing before a neutral and impartial arbiter, and that the interests of fundamental justice in child protection proceedings are both substantive and procedural.

[10] *Winnipeg* confirmed for us that governments may apprehend children with or without a warrant "provided that the threshold for apprehension is, at a minimum, that of a risk of serious harm to the child" and, that justification of this infringement in accordance with the principles of fundamental justice requires that a fair and <u>prompt</u> post-apprehension hearing is mandated. (*Winnipeg* at [131])

[11] In Alberta, the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 provides the statutory authority for government intervention in the lives of families and their children. The statute must be drafted in compliance with the general principles noted above and, <u>in fact, the drafters have diligently incorporated these principles into the *Act* through prescribed tests and time limits</u>. Division