

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	C. A. Kennedy
	)	<i>for the Appellant</i>
)	
	)	J. A. Guiboche
	)	<i>for the Respondent</i>
METIS CHILD, FAMILY AND	)	<i>Metis Child, Family and</i>
COMMUNITY SERVICES	)	<i>Community Services</i>
)	
<i>(Petitioner) Respondent</i>)	
	)	No appearance
<i>- and -</i>	)	<i>for the Respondents</i>
	)	<i>C.P.R and S.J.M.</i>
C.P.R. and S.J.M. (Deceased))	
	)	D. J. Henderson
	)	<i>for the Respondent</i>
<i>(Respondents) Respondents</i>	)	<i>D.D.</i>
)	
<i>- and -</i>)	
	)	H. A. Khan
A.D.M.	)	<i>for the proposed</i>
	)	<i>Intervener</i>
<i>(Guardianship Applicant) Appellant</i>	)	<i>Peguis Child and Family</i>
	)	<i>Services</i>
<i>- and -</i>)	
	)	Z. M. Jones
D.D.	)	<i>as amicus curiae</i>
	)	<i>for the child A.D.R.</i>
<i>(Guardianship Applicant) Respondent</i>)	
	)	<i>Chambers motion heard:</i>
	)	April 28, 2022
)	
	)	<i>Decision pronounced:</i>
	)	May 6, 2022

NOTICE OF RESTRICTION ON PUBLICATION: No press, radio or television report shall disclose the name or any information likely to identify any person involved in the proceedings as a party or a witness (see section 75(2) of *The Child and Family Services Act*, CCSM c C80).

MAINELLA JA

Introduction

[1] This chambers proceeding arises from a private guardianship dispute. However, in actuality, it raises important questions about the governing legal framework for Indigenous children and families in Manitoba.

[2] Peguis First Nation (Peguis FN) is a self-governing Treaty 1 First Nation, led by chief and council, located in Manitoba. Peguis Child and Family Services (Peguis CFS) is the legal representative of Peguis FN in matters of child and family services.

[3] Peguis CFS moves, pursuant to r 46.1 of the MB, *Court of Appeal Rules*, MR 555/88R (the *CA Rules*), for leave to intervene in the appeal of an order of guardianship in relation to A.D.R., a vulnerable 10-year-old Indigenous child (the child).

[4] For the following reasons, I am persuaded that the interests of justice would best be served by granting Peguis CFS leave to intervene in the appeal upon terms and conditions.

Background

[5] Relevant to this litigation is new federal Indigenous child and family services legislation—*An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (the *Act*). The *Act* came into force on January 1, 2020. This Court has not commented on the *Act* previously.

[6] Tragically, the child has been in and out of state care her entire life. Her father died by suicide in 2019; her mother “effectively abandoned her” (2021 MBQB 228 at para 2).

[7] The child was apprehended in the fall of 2019 by Metis Child, Family and Community Services (MCFCS) and was under its legal guardianship pursuant to a series of temporary orders of guardianship under *The Child and Family Services Act*, CCSM c C80 (the *CFSA*).

[8] In the fall of 2021, a family court heard a trial of competing private guardianship applications under the *CFSA* in relation to the child. The applications were brought by A.D.M., the paternal aunt of the child, and D.D., the former partner of the child’s father. Although not a blood relative of the child, D.D. considers her and the child to be of the same family.

[9] The child is eligible to become registered and to be a member of Peguis FN through the paternal side of her family. A.D.M. has status under the *Indian Act*, RSC 1985, c I-5, and is a member of Peguis FN although she lives in British Columbia where she proposed to move the child to if granted guardianship. D.D. identifies as Métis but has had little connection to her Indigenous ancestry and culture until recently.

[10] MCFCS supported the application of A.D.M. over that of D.D.—primarily on the basis that A.D.M., in MCFCS’s view, is better suited to maintain and promote the Indigenous ties of the child to her culture, community and extended family. An exhibit in the guardianship trial was a letter from the chief and council of Peguis FN to the Court whereby they expressed support for A.D.M.’s application over that of D.D. They also provided their view that the *Act* applied to the guardianship trial and that it

created a legal “priority” for “placement” of Indigenous children with “adult family members . . . over others.”

[11] Ultimately, the judge awarded guardianship of the child to D.D. In his discussion of the best interests of the child, he found that the evidence did not establish a “marked superiority” (at para 71) of A.D.M. fostering a better cultural and community connection for the child, particularly given A.D.M.’s plan was to relocate the child to British Columbia.

[12] In his reasons, the judge noted that reference to the *Act* had been made during the course of the guardianship trial. He stated that, in order to decide the competing guardianship applications, he was not required to decide whether the *Act* applied to a private guardianship application under the *CFSA*, but he “doubt[ed] the applicability” (at para 26) of the *Act* save for foundational principles that are common to both the *Act* and the *CFSA*, such as the paramount consideration of the best interests of the child, respect for cultural and linguistic heritage, and participation of Indigenous communities in matters relating to their families and children.

[13] In her notice of appeal, A.D.M. alleges that the judge erred in law by not applying the *Act* to the guardianship proceeding and by not giving adequate weight to the foundations, objectives, intent and overarching principles set out in the *Act* which she says favour her guardianship application over that of D.D.

[14] In its motion for intervention, Peguis CFS says there are two reasons for it to be granted intervention in A.D.M.’s appeal of the guardianship order.

[15] First, it says it has a direct interest in the outcome of the appeal because the child's ancestry is associated to Peguis FN. Peguis CFS says that, because the child is entitled to be registered as a band member of Peguis FN, she is entitled to services from Peguis CFS and falls within its mandate. Peguis CFS underlines that children are the future of any community and, thus, it has an obligation to ensure the welfare of the child and that her best interests are protected.

[16] Second, Peguis CFS points out that the *Act* is new and important legislation. According to the preamble of the *Act*, it is intended to address legal structures and practices which have caused harm to Indigenous peoples historically and to advance reconciliation. The *Act* is part of Canada's implementation of international obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007 (entered into force 2 October 2007), online (pdf): *United Nations* <documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement> (date accessed 5 May 2022) (*UNDRIP*). Few cases have been decided under the *Act* in Canada and none by this Court.

[17] Peguis CFS highlights that the applicability of the *Act* to private guardianships is an unsettled question of law both in Manitoba and across Canada. Peguis CFS cites the different approaches taken in Alberta and New Brunswick. In Alberta, the courts have not been receptive to the *Act* applying to private guardianship litigation, while the opposite is the case in New Brunswick (see *MSD v AC and KV and Eel River Bar First Nation*, 2021 NBQB 14; and *SL v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2021 ABPC 202).

[18] Peguis CFS asserts that it has expertise and a perspective that will be useful to this Court and that is different from the parties. Peguis FN is the first Indigenous governing body in Manitoba to have passed its own child and family legislation pursuant to the *Act* and one of only five currently in Canada (see *Peguis First Nation Honouring our Children, Families and Nation Act*, 2022, enacted pursuant to Peguis First Nation Council Resolution FY 2021/2022-117, online (pdf): *Peguis Child & Family Services* <irp.cdn-website.com/8a5c0cb0/files/uploaded/2021-11-16%20%20-%20PFN%20HOCFNA%20%283%29.pdf> (date accessed 5 May 2022) (the *Peguis CFS Act*)).

[19] Peguis CFS says carving out private guardianships from the applicability of the *Act* is not only detrimental to individual Indigenous children and families, but also to the jurisdiction of Indigenous governing bodies in relation to child and family services. The position of Peguis CFS is that the *Act* recognizes its inherent right to be notified of the guardianship applications, the right to make representations at the hearing itself, and the right to the principles and standards set out in the *Act* being considered by the judge.

[20] If granted leave to intervene, Peguis CFS undertakes not to broaden the issues or the record on appeal, cause unnecessary delay or prejudice any party.

[21] A.D.M. consents to the intervention application of Peguis CFS.

[22] MCFCS and the child, represented by *amicus* counsel, take no position on the intervention application of Peguis CFS. The child's mother has not participated in the guardianship litigation to date.

[23] D.D. expressed objection to the intervention application of Peguis CFS primarily on the basis that Peguis CFS did not participate in the guardianship trial, its participation on the appeal would prejudice D.D. and A.D.M. is fully able to argue the legal issues on the appeal as to whether the *Act* applied to the guardianship trial and, if so, to what extent.

Analysis

[24] There is no dispute as to the relevant principles to consider in the exercise of the discretion under r 46.1 (see *Interlake Reserves Tribal Council Inc et al v The Government of Manitoba*, 2020 MBCA 126 at paras 17-19). An application for intervention must not be looked at narrowly, but more broadly with the overriding concern being whether the interests of justice would best be served by granting leave to intervene.

[25] In terms of the nature of the case and the issues that it raises, while the appeal, at first blush, appears to be a purely private matter, it is not. The governing framework for Indigenous children and families in Manitoba is an important matter of public interest. The law as to the boundaries of federal, provincial and Indigenous jurisdiction and standards is not settled. As Peguis CFS puts it in its memorandum, this area of law is “special, evolving, and expanding.” I am also mindful of the fact that Parliament has now implemented *UNDRIP* in areas of federal jurisdiction (see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14). The fact that there is disagreement in other provinces as to whether the *Act* applies to a private guardianship confirms that this appeal engages important questions not just to the parties, but to the public generally.

[26] In my judgment, Peguis CFS has a direct interest in this case, one that cannot fully be protected by A.D.M. (see *Interlake Reserves Tribal Council Inc* at para 46). While Peguis CFS and A.D.M. share the same ultimate objective in the private guardianship dispute, Peguis CFS has wider concerns as to “an Indigenous perspective” (at para 58) about the *Act* and the overall legal framework for Indigenous children and families in Manitoba that A.D.M. could not reasonably speak to at the appeal.

[27] Peguis CFS is a sophisticated litigant with knowledge of the reality of child and family services litigation involving Indigenous peoples in Manitoba. Its expertise and perspective would be useful to this Court in deciding this appeal.

[28] I am convinced that this is not a situation whereby Peguis CFS seeks to expand the appeal (*ibid* at para 42). It is important to note that the child’s ancestry is not a disputed fact and was a matter in the record before the judge in coming to his decision. If Peguis CFS is granted leave to intervene in the appeal, the factual record will not be expanded in any way. Also, the legal issues related to the applicability of the *Act* to private guardianships has implications beyond simply the guardianship dispute involving the child.

[29] While D.D. expressed a reasonable concern that there is the potential for Peguis CFS and A.D.M. to make duplicative submissions, in my view, terms and conditions placed on the intervention will prevent that from occurring. I have been persuaded that Peguis CFS will make sufficiently useful and different submissions than A.D.M. about the applicability of the *Act* given that Peguis FN has a clear perspective as to its exercise of

jurisdiction relating to child and family services by enacting the *Peguis CFS Act*.

[30] In my view, the intervention of Peguis CFS in the appeal will not unduly delay proceedings and, given the nature of the case and the issues arising, will not prejudice any of the parties.

[31] In summary, I am satisfied that Peguis CFS should be granted leave to intervene as it has both a direct interest in the outcome of the appeal and special expertise or a unique perspective relating to the subject matter of the appeal—the application of the *Act* to matters of private guardianship. Either reason is sufficient basis to grant it leave to intervene.

[32] The terms and conditions of Peguis CFS's intervention in the appeal shall be:

- 1) Peguis CFS may file a factum not exceeding 20 pages;
- 2) Peguis CFS's factum is to be filed and served within 14 days of the filing of A.D.M.'s factum;
- 3) the period for filing and service of D.D.'s factum will not begin to run until the date that Peguis CFS has filed and served its factum;
- 4) Peguis CFS is bound by the case on appeal and is not to add to the record or the issues;

- 5) subject to the discretion of the panel, Peguis CFS may make oral submissions at the hearing of the appeal not exceeding 30 minutes; and
- 6) subject to the discretion of the panel, no costs shall be awarded in favour of or against Peguis CFS on the appeal.

[33] At the hearing of the intervention motion, it was brought to my attention that there are some procedural issues relating to the perfection of the appeal. I would encourage counsel to discuss the matters amongst themselves and, if necessary, seek a meeting for directions pursuant to r 37.1 of the *CA Rules* at the earliest opportunity.

Disposition

[34] In the result, the motion of Peguis CFS to intervene in the appeal is granted on the terms and conditions as set out. There will be no order as to costs.

Mainella JA
