IN THE SUPREME COURT OF NOVA SCOTIA

Citation: A.R. v. Nova Scotia (Community Services), 2008 NSSC 20

Date: 20080125

Docket: S.AR. CFSA - 053871

Registry: Annapolis Royal

Between:

A. R. and R. R.

Applicants

v.

Minister of Community Services

Respondent

and in the Matter of the proposed adoption of
J.P.R. (D.O.B. * 2005)

Restriction on Publication:
Publishers of this case please take note that s. 94(1) of the ***Children and Family Services Act*** applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

> "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child."

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Allan P. Boudreau

Heard: at Annapolis Royal on November 6, 2007

Written Decision: January 31, 2008

Counsel: Darren MacLeod, for the applicants
James C. Leiper for the Minister of Community Services
John H. Armstrong for the proposed adoptive parents

By the Court:

Introduction:

[1] This case deals with the rights, if any, of the natural parents of a child who is in the permanent care and custody of the Minister of Community Services ("the Minister") and who is being adopted while the natural parents have an access order in place; which access is being and has been exercised in a faithful manner. There is a provision in the Adoption Section of the ***Children and Family Services Act*, S.N.S. 1990, Ch. 5** of the ***Acts* of 1990**, as amended ("*the Act*"), which states that the court may, where it is in the best interests of the child, continue or vary an order for access.

[2] A. R. and R. R. (Mr. And Mrs. R.), the child's natural parents, have applied for standing in the Adoption Proceedings of J.P.R. in order to make representations to this court that it should find that continuing their access after adoption is in the best interests of the child. The Minister takes the position that Mr. and Mrs. R. have no standing in adoption proceedings resulting from a permanent care and custody order in favour of the Minister. The Minister also contends that the

section of the *Act* which permits courts to continue access orders after adoption does not and should not apply to situations where the child being adopted is in the permanent care and custody of the Minister, one of the reasons being that the consent of the natural parents is not required for such adoptions. The Minister also points to privacy and confidentiality considerations which will be discussed later.

[3] The parents contend that, unless they can have some standing before the court, they have no way of attempting to satisfy the court that continuing their access is in the best interests of the child, and that there is no other party officially advancing those interests, as far as access is concerned. The Minister contends that the best interests of the child should now be in the hands and control of the adopting parents, who, I am told, do not wish to adopt if access by the natural parents is continued.

Background Facts:

[4] The child, J.P.R., was born to Mr. and Mrs. R. on * 2005. Judge Levy of the Family Court described the parents as “having pronounced intellectual deficits”. Moreover, J.P.R. is a Down Syndrome child whom Judge Levy

described as a “child with profound and complex needs”. As a result of these circumstances, the child was apprehended at birth by Family and Children’s Services of Annapolis County (“the Agency”), and the Agency sought permanent care and custody.

[5] A disposition hearing was held before Judge Levy; and on July 12, 2006 he granted the Agency’s application for permanent care and custody. At that time, the judge reserved his decision regarding access to the child by Mr. and Mrs. R.. On or about July 27, 2006, Judge Levy rendered his written decision on access. In that decision, at paragraph 1, he commented on the circumstances of the parents and the child as follows:

> “ . . . On July 12 of this year, following a disposition hearing under the Children and Family Services Act, in an oral decision I found, briefly stated, that the combination of the Respondents’ limited capacity to learn even the basics of appropriate child care and child rearing skills together with the particular needs of their child necessitated a disposition of permanent care and custody of the child to the agency. A decision on access for the Respondents was reserved . . .”

With regard to the question of access by Mr. and Mrs. R., Judge Levy said the following at paragraphs 24, 25, 26, 27 and 28 of his decision:

24. In this respect the evidence is consistent and clear. The Respondents, although unable to grasp and apply the essentials of the actual care of their child, were faithful in their availability, eager to see their child and attentive to her. They always asked about how she was doing. They complied with all agency requests as to the access and in fact, albeit with a little reservation now and again, with all agency requests throughout the whole process. The child was obviously a priority with them and they demonstrated only devotion and affection with her. There were never any unpleasant incidents marring the access. There is no evidence of the visits having any adverse effects on the child, although she is so young and developmentally delayed that that might be hard to detect. There is no evidence, on the other hand, suggesting that the child is bonded to either of her parents, and again her age and possibly her own mental impairments, likely account for that.

25. The Respondents seemed to me to be fine people. They doted on their child and were patient and gentle with her. The impact on the child, if for reasons stated it cannot be said as yet have been beneficial, was at least benign. As J. gets older and as she becomes more cognizant of the world around her it would be hard to imagine that continuing contact from her natural parents who love her immensely and who, I'm certain, would never intentionally harm her, would do the child anything but good. I can't see the Respondents undermining the primacy of the role of the adoptive parents should these parents be found. I recognize that the agency vetted other perceived negatives of the Respondents, but the evidence was not particularly compelling on these points. J. was placed in the permanent care of the agency was simply because the evidence overwhelmingly pointed to their lack of capacity to assess, comprehend or provide the care their child needs.

26. There are few, if any, steps more serious than ordering the removal of a child from her parents. If it is necessary in order to secure the proper care for the child, so be it. But to go from ensuring that the child will receive proper care to absolutely eradicating any trace of her natural parents in her life just because the parents are mentally challenged, amounts to the abject denial of her parent's humanity, and, by extension, because she is similarly disabled, of the child herself.

27. To repeat, there is no quarrel with the supremacy of the child's best interests. If I am wrong and the Respondents' access otherwise proves to be inimical to the

> child's best interests, then it must be terminated and there are procedures in the Act for doing so. There is no question also that if it should in fact come down to an either - or situation, access or adoption, that for the child's sake the adoption option has to have priority. In a situation such as this let those decisions be made when and if, and only when and if, they have to be. In the meantime the Respondents strike me as 'worthy visitors in the child's life" and that is, in my view, a "special circumstance" justifying an order for access.
>
> 28. I will order that the Respondents will enjoy reasonable access to the child, which, in the absence of agreement to the contrary, shall be taken to mean access, supervised by someone approved by the agency, a minimum of at least once every two weeks for one hour, going to two hours after the child's second birthday. Any cost associated with the access shall be borne by the agency.[Emphasis added.]

[6] It is my understanding that Mr. and Mrs. R. have continued to exercise the access ordered by Judge Levy very faithfully and without any problems being raised by anyone. By letter dated April 25, 2007, the agency wrote to Mr. and Mrs. R. advising them that the child was being placed for adoption. The letter stated as follows:

> "RE: J. . .'s Plan of Care
>
> We are writing this letter to let you know that J. . . is being placed for adoption.
>
> When the adoption is finalized you will not be able to have any more regular visits.

> Her adoptive parents have agreed to send you pictures of her as she grows. They will also send you letters about her. They have also agreed that you can write letters to her.
>
> We know you have enjoyed your visits with J. . . . It is our hope that you will be glad that J. . . is living with parents who love her very much and will keep her safe.
>
> The access order will no longer be in effect on the date that the adoption order is granted. If you have any questions about this information, please contact your lawyer."

[7] The access by Mr. and Mrs. R. continued as ordered by Judge Levy until some time in early August of 2007, when the R.s were told that, that would be their last visit. The R.s had not taken any steps as a result of the April letter and it was not until they were advised that their access was ending that they consulted Legal Aid. Given their reported intellectual capacity, it is not surprising that they did not react until they were told they would no longer be able to see their child. Shortly after the R.s had consulted counsel at Legal Aid, counsel was present in court when the proposed adoption of the child came before the chambers judge; whereupon counsel advised the judge that he represented clients who may have an interest in the adoption proceedings. The chambers judge adjourned the adoption hearing, after which Mr. and Mrs. R. filed an application for standing in the adoption

proceedings. The R.s are requesting that they may be heard and make representations in order that the court may determine, pursuant to **subsection 78(6)** of the *Act*, whether it is in the best interests of the child to continue, vary or terminate the access order of Judge Levy.

[8] An affidavit has been filed on behalf of the Minister on the application of Mr. and Mrs. R. for standing. In that affidavit sworn to on October 25, 2007, Pamela Gale Longmire, Social Worker in the Adoption Program, confirms the circumstances of the natural parents and the child. Ms. Longmire gives the following opinion in her affidavit:

> "We have determined, as an agency, that ongoing contact with the birth family is not in the child's best interest . . .[Emphasis added.]

Ms. Longmire also stated other facts, or a mixture of facts and opinions, in support of the position stated above. One of those statements is that "the adoption applicants are not prepared to proceed with their application" if there is a possibility of any continued access by the natural parents. While the affidavit of Ms. Longmire does not name the adoption applicants, it appears to identify them by reference to certain facts.

[9] The question to be decided in the present application is; what rights, if any, do Mr. and Mrs. R. have?

[10] **ISSUES:**

1.Does **subsection 78(6)** of the *Act* apply only to children who are not in the permanent care and custody of the Minister?

2. If the answer to question 1 is No; then what rights, procedural or otherwise, do the natural parents who have court ordered access to a child being adopted, while that child is in the permanent care and custody of the Minister, have pursuant to **subsection 78(6)** of the *Act*? For example: do Mr. and Mrs. R. have a right to present evidence regarding access and the best interests of the child, or to question Ms. Longmire on the content of her affidavit?

[11] **ANALYSIS:**

Mr. and Mrs. R. have not only pleaded to have their alleged rights pursuant to **subsection 78(6)** of the *Act* vindicated; but they have, in the alternative, requested that they be granted intervenor status pursuant to Civil Procedure Rule 8.01. I shall first deal with this latter aspect of the application. CPR 8.01 states:

> 8.01 (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,

> (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
>
> (b) his claim or defence and the proceeding have a question of law or fact in common;
>
> (c) he has a right to intervene under an enactment or rule.
>
> (2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just."

[12] While the above quoted Rule can be said to have general application, it must be kept in mind that the Adoption Provisions of the *Act* address a very sensitive social issue. In keeping with that objective, Adoption Proceedings are not entirely public, and they are subject to the very strict and detailed regime provided for in the *Act*. In Re: D.T. (1992), 113 N.S.R. (2d) 74, para 13, our Court of Appeal described the Adoption Provisions of the *Act* as follows:

> [13] Sections 67 - 87 of the *Act* is a detailed statutory code relating to the process of adoption in this province. It replaces the Children's Services Act, S.N.S. 1976,

> c. 8, which in turn replaced the Adoption Act, R.S.N.S. 1967, c. 2. The first act respecting the Adoption of Children was enacted in 1896 . . . [Emphasis added.]

[13] If any rights regarding adoption proceedings are to be asserted, they must, in my opinion, be found within the text of the Adoption Provisions of the *Act*. To rule otherwise could permit numerous classes of persons to intervene in proceedings which are essentially private. Therefore, only **sub-rule 8.01 (c)** can be resorted to by Mr. and Mrs. R. for assistance. This takes us back to the *Act* itself and the questions posed earlier.

[14] Some of the sections and clauses of the *Act* which are pertinent to this application were amended in 2005; therefore, it is useful to look at the state of the *Act* before the recent amendments. Prior to 2005, the natural parents of a child subject to a permanent care and custody order did not receive notice of a proposed adoption. This would have been largely due to the fact that, prior to the 2005 amendments, the *Act* prohibited adoption applications for a child in permanent care and who was subject to an access order (see repealed **subsection 70(3)**). This was the situation, unless the access order had been terminated prior to placement for adoption (see **Section 48** of the *Act*). When the Legislative Prohibition to adoption

placement of children in permanent care and subject to an access order found in former **subsection 70(3)** was repealed, **subsection 47(8)** was added as follows:

> (8) At least thirty days prior to consenting to an order for adoption, the Minister shall inform any person who has been granted an order for access under subsection (2) of the Minister's intention to consent to the adoption.

It is useful here to cite the relevant clauses of **Sections 47** and **48** of the *Act*:

> 47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> (2) where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that;
>
> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

> (3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48. [Emphasis added.]
>
> . . .

[15] In this case, Judge Levy found that a "special circumstance" existed and he made the access order; which remained in place until the adoption hearing proposed for August 2007. The pertinent clauses of **Section 48** are the following:

> 48(1) An order for permanent care and custody terminates when
>
> . . .
>
> (b) the child is adopted;
>
> . . .
>
> (d) the court terminates the order for permanent care and custody pursuant to this Section
>
> . . .

(3) A party to a proceeding may apply to terminate an order for permanent care and custody or to vary access under such an order, in accordance with this Section**. . .**

(4) Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application to terminate an order for permanent care and custody or to vary or terminate access under such an order may be made during the continuance of the adoption placement until

(a) the application for adoption is made and the application is dismissed, discontinued or unduly delayed; or

(b) there is an undue delay in the making of an application for adoption.

(5) Notwithstanding subsection (4), the agency may apply at any time to terminate an order for permanent care and custody or to vary or terminate access under such an order.

. . .

(7) On the hearing of an application to vary access under an order for permanent care and custody, the court may, in the child's best interests, confirm, vary or terminate the access. [Emphasis added.]

. . .

The pertinent clauses of **Section 78** are the following:

78(1) Where the court is satisfied

(a) as to the ages and identities of the parties;

(b) that every person whose consent is necessary and has not been dispensed with has given consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive the parent permanently of all parental rights; and

(c) that the adoption is proper and in the best interests of the person to be adopted,

The court shall make an order granting the application to adopt.

. . .

In 2005, **subsections (5)** and **(6)** were added as follows::

(5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.

(6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child. *1990, c. 5, s. 78; 2005, c. 15, 2. 6.* [Emphasis added.]

[16] It is the interpretation and meaning of **subsection (6)** which is at the heart of the current application for standing by Mr. and Mrs. R.. The Minister contends that the only "logical" interpretation is to find that **subsection (6)** does "not apply" to adoption proceedings where the child is in the permanent care and custody of an agency or the Minister. The R.s contend that they must have a forum where they can present their evidence, and challenge the evidence and opinion of the Agency or the Minister in order that the court may determine what "is in the best interests of the child". The R.s do not accept that, that determination can be made unilaterally by the Agency or the Minister, or simply because the proposed adoptive parents may not be agreeable to continuing access after adoption. They say that, that determination is for the Court, based on all the evidence available, and they claim a right to be heard and to test the evidence presented by the Agency or the Minister.

[17] As I stated earlier, the Minister contends very strongly that the only logical interpretation of **subsection 78(6)** of the *Act* is that it is not meant to apply to permanent care and custody situations. The primary argument in support of this position is because the only consent required for an adoption in that circumstance is that of the Minister. There can be no question that, on a plain reading of that

subsection, there is no exclusion of permanent care and custody situations. The Minister would have the Court read that in the provision. The Minister also points to the fact that, since a permanent care and custody order has already been made, the natural parents have already been found blameworthy and unfit parents. While that may be so in the large majority of cases, it is certainly not so in the present case. As Judge Levy pointed out, Mr. and Mrs. R. have lost the right to bring up their child through no fault of their own. It is simply a product of their intellectual capacity and ability to learn and apply the required parenting skills. If the Legislature intended to limit the application of **subsection 78(6)**, it could have easily done so. This would be especially important if it intends to limit the rights of any class of persons with access orders or access agreements in place.

[18] Other aspects of the 2005 amendments which may also cast some light on the intention of the Legislature are the amendments to **Sections 70** and **48**. As I mentioned earlier **subsection 70(3)** which prohibited children in permanent care and custody from being placed for adoption while an access order was in place was repealed. In other words, those children can now be placed for adoption. At the same time, the prohibition regarding applications to terminate permanent care orders in **subsection 48(4)** was expanded to include applications to vary or

terminate access orders. Therefore no variation or termination applications can be made by any parent, relative or guardian where a child has been placed and is residing in home of a person who has given notice of proposed adoption in the required form; unless there is delay in proceeding with the adoption. However, this prohibition does not apply to the Minister. The Minister, with the 2005 amendment to **subsection 48(5)**, has been empowered to make an application to terminate an access provision of a permanent care order at any time. It would appear the Minister may apply to terminate an access order at any time prior to the adoption hearing; in which case the forum would not be this Court. It would be an application in the Child Protection file in either the Family Court or the Family Division of this Court. The adoptive parents would not necessarily be party to those proceedings. This would resolve the privacy concerns of the Minister. If the Minister chooses not to apply to terminate access pursuant to **subsection 48(5)**, then the Minister may very well find that the Court has to grant standing at the adoption hearing to persons who want the Court to continue or vary an access order after adoption, pursuant to **subsection 78(6)** of the *Act*.

[19] **Subsection 78(6)** clearly mandates that it is for the court to determine if it is in the best interests of the child to continue access after adoption. This is not a

determination which can be unilaterally made by the Agency or the Minister, as has been done in this case. If the court is required by statute to make that determination, surely this can only be done by following the principles of natural justice and allowing for procedural fairness. This cannot be achieved in the context of the present provisions of the *Act* without persons such as Mr. and Mrs. R. having a forum in which to advance their position regarding the best interests of the child.

[20] What then is the power of this court to ensure that natural justice and procedural fairness are complied with when it comes to determining the best interests of the child pursuant to **subsection 78(6)** of the *Act*? As I questioned earlier, who has an interest in and the right to advance, before the court, what is in the child's best interests? There can be no doubt that the Agency or the Minister have such a right, even an obligation, because they are charged with the custody and guardianship of the child. Surely, the natural parents who have an Access Order in place, and here a long standing Order which has been exercised faithfully for some two years, have a right to petition, before the court, what is in the child's best interests. The adoption applicants may also wish to be heard, but that would be at their discretion. One also has to question whether the child's interests should

be represented by appointing independent counsel for her, as was apparently done in *Benson v. Director of Child Welfare (NFLD)*, [1982] 2 S.C.R. 716; however, the best interests of children are routinely being debated in our courts without such independent representation. In our jurisdiction we allow the parties to advance what they believe is in the best interests of children, with the court as the protector and arbiter of that question.

[21] In this case the court is appointed the arbiter by **subsection 78(6)** of the *Act*; however, that subsection does not elaborate on the procedure to be followed, except that the determination of the best interests of the child takes place "where an order for adoption is made". This would be the adoption hearing before the Chambers Judge.

[22] Justice Wilson, at page 724 of the *Benson* decision, *supra*, quoted the following from the House of Lords' decision in *A. v. Liverpool City Council and Another*, [1981] 2 A11 E.R. 385::

> But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. The court's

> general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority. [Emphasis added.]

She then went on to summarize the proposition as follows:

> It would seem then that in England the wardship jurisdiction of the court (*parens patriae*) has not been ousted by the existence of legislation entrusting the care and custody of children to local authorities. It is, however, confined to "gaps" in the legislation and to judicial review. Is there room for the Court's *parens patriae* jurisdiction in this case?

[23] One could describe the absence of procedure in **subsection 78(6)** as a "Gap" in the legislation. One thing is clear however; it is that **subsection 78(6)** has not given the power to the Agency or the Minister to decide whether continuing or varying an Access Order after Adoption is in the best interests of the child. That power or discretion has been vested in "the court".

[24] It has long been accepted that superior courts in Canada possess inherent jurisdiction to control their own procedures. In *Halifax (Regional Municipality) v. Ofume*, 2003 NSCA 110, para 21, Saunders, J.A. quoted extensively, and it appears with approval, from the decision in *Montreal Trust Co. v. Churchill Forest*

Industries (Manitoba) Ltd. (1971) 21 D.L.R. (3d) 75 (Man.C.A.). The following excerpts from para. 21 are pertinent to the case at hand:

> Certain other features of inherent jurisdiction pointed out by Master Jacob are relevant for us to note. Inherent jurisdiction is derived not from any statute or rule but from the very nature of the Court as a superior Court of law: "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law." (p. 27). Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.
>
> Master Jacob concludes his very helpful analysis with the following definition at p. 51:
>
> > In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
>
> *Vide* also the paper 'Inherent Powers of the Court" by Hartt, J., of Ontario delivered to the Canadian Judicial Conference in August 1970.
>
> Finally, we refer to the following apt language of Lord Morris in *Connelly v. Director of Public Prosecutions*, [1964] 2 AII E.R. 401 at 409:
>
> > There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. [Emphasis added.]

[25] Saunders, J.A. went on to confirm the powers of the superior courts of this Province as follows:

> This court in its recent decision in *Goodwin v. Rodgerson* (2002), 210 N.S.R. (2d) 42 (N.S.C.A.) at p. 48, affirmed the principle of inherent jurisdiction as it applies to the Supreme Court of this province.
>
> > The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not to be used to effect changes in substantive law.

[26] With regard to adoption proceedings, MacDonald, A.C.J.S.C. (as he then was) stated the following in *B. (H.J.) v. B.(A.C.)* [1999] N.S.J. No 233:

> 1 This is an Application by a natural father for access following a stepparent adoption.
>
> 2 Initially, the Applicant sought to set aside the relevant adoption Order but I have earlier rules against him on this issue.
>
> 3 At the same time however I held that this Court retained its equitable jurisdiction to order post adoption access to a natural parent, in appropriate circumstances.

> 4. In confirming this jurisdiction, I referred to the recent decision of the Supreme Court of Canada in *Nouveau-Brunswick (Ministre de la santé & des services communautaires) c. L. (M.),* [1998] 2 S.C.R. 534 (S.C.C.). In that case, the Supreme Court acknowledged the right of the natural parent to apply for access following adoption (albeit in the context of New Brunswick legislation).
>
> 5 It was on that basis that I agreed to hear the Applicant's request for access on its merits.

[27] Although Mr. and Mrs. R. are not relying on this Court's inherent jurisdiction regarding post adoption access, the foregoing quote is a very strong indication of the courts' inherent jurisdiction, even in adoption proceedings.

[28] This is a case in which it is not only appropriate, but it is required that the Court exercise its inherent jurisdiction to assure that procedural fairness and the principles of natural justice are followed. There are other avenues open to an agency or the Minister if it wishes to avoid an adversarial process at the adoption hearing stage. In fact, Judge Levy appears to have anticipated that the Minister would employ those procedures if it was believed that access should be terminated. Judge Levy said the following at para. 27 of his access decision:

> 27. To repeat, there is no quarrel with the supremacy of the child's best interests. If I am wrong and the Respondents' access otherwise proves to be inimical to the

> child's best interests, then it must be terminated and there are procedures in the Act for doing so. [Emphasis added.]

[29] As an aside, the adoption documents filed in this case included a copy of the permanent care and custody order of Judge Levy dated August 24, 2006, which order provided access to the natural parents of the child to be adopted. In view of the provisions of **subsection 78(6)**, which states that where an adoption order is made, "the court may, where it is in the best interests of the child", continue or vary such order, it would be required that the court be placed on clear notice that such an access order exists. The court will obviously want to explore whether it is in the best interests of the child to continue or vary such order. In my opinion, clear notice and information regarding access orders and access agreements should be provided in the affidavit to the court and not simply form part of an order that is attached to an affidavit. This would avoid this vital piece of information being overlooked.

CONCLUSION:

[30] In conclusion, persons with access provisions in a permanent care and custody order have a right to be heard in some forum if they wish to continue

access after adoption. Those access provisions are not presently terminated automatically. This is by virtue of the "best interests" test mandated by **subsection 78(6)** of the *Act*. The Minister or an Agency have three options; they can request that the persons with the access consent to the termination of their access so the adoption can proceed without the court having to make a determination pursuant to **subsection 78(6)**; or, they can apply to terminate access pursuant to **subsection 48(5)**; or, they can wait and have that determination made at the adoption proceedings pursuant to **subsection 78(6)**. Either way, persons such as Mr. and Mrs. R. have to have a forum in which to present or challenge evidence on the issue of whether it is in the best interests of the child to continue access after adoption. In the latter case, the person or persons seeking to continue an access order after adoption would have to be granted standing in the adoption proceeding. Otherwise, those persons would have no forum in which to present or challenge evidence on the very issue before the court; the forum which determines the best interests of the child and their right of access after adoption. To rule otherwise would amount to a complete denial of procedural fairness and natural justice.

[31] Therefore, the Minister shall have forty (40) days from the date of this decision during which to commence an application to terminate the access

provisions of Judge Levy's August 24, 2006 permanent care and custody order, pursuant to **subsection 48(5)** of the *Act*. If the Minister fails to make such an application, I will grant Mr. and Mrs. R. standing in these adoption proceedings in order that they may make representations on whether it is in the best interests of J.P.R. that any access by them continue after adoption.

[32] I will grant an order accordingly.

Boudreau J.