S. N. F. H. No. C00-35

IN THE SUPREME COURT OF NOVA SCOTIA

FAMILY DIVISION
[Cite as: M.C.S. v. R.L.F. et al, 2001 NSSF 27]

BETWEEN:

MINISTER OF COMMUNITY SERVICES
-Applicant

-and-

R.L.F. and B.B. and D.D. and S.W.J.
-Respondents

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 04, 2008.

DECISION

BEFORE THE HONOURABLE JUSTICE R. JAMES WILLIAMS

PLACE OF HEARING: Halifax Nova Scotia

DATE OF HEARING: May 22, 23, 24, 25, 2001

DATE OF DECISION: August 23, 2001

COUNSEL: Gordon Kelly, counsel for the Applicant
Susanne Litke, counsel for R.L.F., Respondent
Peter Crowther, counsel for B.B., Respondent
Eldon Lindgren, Q.C., counsel for S.W.J.
D.D., self-represented at trial

Fitzroy Eddy, counsel for Mi’kmaq Family and Children’s Services

OUTLINE OF DECISION

WILLIAMS, J. S. C. (F. D.)

This is a proceeding concerning the future care of two young girls:

K.J.F. (b. [in 1996]); and
S.N.F. (b. [in 1998]).

The proceeding started as a child protection proceeding under the Children and Family Services Act, S. N. S. 1989, c. 5. That proceeding is coming to a conclusion. There are, in addition to this proceeding, cross-applications for custody of the children under the Family Maintenance Act (now An Act Respecting the Maintenance of Spouses, Common-law Partners and Dependents) R. S. N. S. 1989, c. 160 brought by B. B. and S. W. J. The proceedings were consolidated for purposes of hearing.

R.L.F. is the mother of both children. She supports the application(s) brought by her cousin, S.W.J. R.L.F. and the children are registered Indians. She seeks access to both children.

B.B. is K.J.F.'s father. By application dated February 6, 2001, he seeks leave of the court pursuant to s. 18(2) of the Family Maintenance Act to apply for custody of S.N.F. He seeks custody of K.J.F. and S.N.F. pursuant to s. 18(2) of the Family Maintenance Act). He has sought to join the proceeding under the Children and Family Services Act (pursuant to s. 36(1)(f)) as it concerns S.N.F. B.B. is French Canadian. He resides in Quebec.

D.D. is S.N.F.'s father. He supports the application brought by S.W.J. He seeks access to both children.

S.W.J. is R.L.F.'s cousin, the second cousin of the children. S.W.J. is aboriginal. She lives on the [...] Reserve in Saskatchewan. She seeks an order granting leave to be joined as a party to the child protection proceeding pursuant to s. 36(1)(f) of the Children and Family Services Act and for an order placing the children with her pursuant to s. 42(1)(c) of the Children and Family Services Act; and an order granting leave to apply for custody of the two children pursuant to s. 18(2) of the Family Maintenance Act and for custody of the two children pursuant to s. 18(2) of the Family Maintenance Act.

The Department of Community Services supports the plan of B.B. It seeks a dismissal of the proceeding under the Children and Family Services Act.

A. THE PROCEEDING IN COURT

This proceeding has come to and evolved through the Court with appearances as follows:

1. April 7, 2000

The children were taken into care by Wendy Bernier, an agent of the Department of Community Services.

2. April 11, 2000

The Protection Application was signed, alleging that K.J.F. and S.N.F. were in need of protective services pursuant to s. 22(2)(a), (b), (e), (k), (j)(a) and (k) of the Children and Family Services Act.

3. April 13, 2000

The initial court hearing was held. R.L.F. was present but did not have legal counsel. Justice Hood found there were reasonable and probable grounds to believe the children were in need of protective services and adjourned the Interim Hearing to April 27, 2000.

4. April 27, 2000

R.L.F. was present with counsel. While she "opposed" the children remaining in the care of the agency, R.L.F. consented to an order leaving the children in the temporary care and custody of the agency. Also consented to was a parental capacity assessment, in-home services, and anger management counselling. Direction was given to R.L.F. to file an affidavit that addressed the paternity of the children, involvement of their fathers and setting out her background and plan for the care of the children. The matter was adjourned to May 3, 2000.

5. May 3, 2000

Through counsel, R.L.F. consented to a finding that the children were in need of protective services pursuant to s. 22(2)(e) of the Children and Family Services Act.

Section 22(2)(e) provides:

> **s. 22(2)(e)** a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;

The matter was adjourned to a pre-trial on May 9 to address the issue of placement through a settlement pre-trial.

6. May 9, 2000

A settlement pre-trial was held before Justice Campbell. It addressed the issue of placement of the children. No resolution was obtained that day.

7. May 10, 2000

A pre-trial was held. R.L.F.'s counsel sought a hearing on the temporary custody of the children. She indicated that D.D., S.N.F.'s father, wished to participate in the proceeding. The matter was scheduled for a hearing on May 18, 2000.

8. May 18, 2000

By Agreement, a consent order was reached concerning the temporary care of the children. Day to day care was to be with R.L.F. under the supervision of the agency, she was not to remove the children from the jurisdiction without permission of the Court. D.D.

indicated he was seeking party status, and agreed to participate in the assessment process.

9. July 12, 2000

The matter returned to Court. The placement of the children with R.L.F. had been terminated on July 6th. The agency filed an Agency Plan seeking a Temporary Care disposition order. The matter was contested. The children were placed in the care of the Agency and the matter adjourned to July 14 for the purpose of setting hearing dates.

10. July 14, 2000

R.L.F., through counsel consented to a disposition order placing the children in the temporary care and custody of the agency with access to R.L.F. D.D. indicated he would seek counsel and apply for standing.

11. September 6, 2000

R.L.F., through counsel, indicated she consented to a further Temporary Care and Custody Order. The court was advised that a family named O. from California (who had adopted another child of

R.L.F.'s) may be interested in seeking adoption placement of K.J.F. and S.N.F.

12. November 20, 2000

By consent a further temporary care and custody order was granted by Justice Gass, leaving the children in the care of the agency. The O.'s had counsel present and planned to pursue an adoption.

13. January 16, 2001

The matter returned to Court. B.B. was present with counsel. The O.s had counsel present. Counsel for the Mi'kmaq Children and Family Services was present. R.L.F. had registered her aboriginal status in the late fall. The children were in the process of being registered (this was completed in February 2001).

Counsel for the Mi'kmaq agency was asked to advise as to their position with respect to the proceeding within two weeks. Section 36(3) of the Children and Family Services Act provides:

> **s. 36(3)** *[Re Indian children]* Where the child who is the subject of a proceeding is known to be Indian or may be Indian, the Mi'kmaq Family and Children 's Services of Nova

> Scotia shall receive notice in the same manner as a party to the proceedings and may, with its consent, be substituted for the agency that commenced the proceeding. (1996, c. 10, s. 5)

Counsel for the Mi'kmaq agency was essentially invited to outline the role that his agency sought, desired in the proceeding. Directions were given to the parties regarding the filing of affidavits and disclosure of positions.

14. February 7, 2001

Counsel for R.L.F. indicated she was prepared to consent to an order of permanent care and custody - premised it appears on an understanding that the Mi'kmaq Children and Family Services would intervene and take responsibility for the "agency role" in the proceeding pursuant to s. 36(3) of the Children and Family Services Act upon a permanent care order being made. B.B. sought custody of both children. The O.s' counsel continued to be present. There was consent to an order continuing the children's placement in the temporary care and custody of the agency.

15. March 6, 2001

The matter returned to Court. Counsel for the Mi'kmaq Children and Family Services indicated that that agency would not intervene unless and until there was an order for permanent care and custody. R.L.F.'s counsel indicated she opposed B.B. having standing with respect to S.N.F.

16. April 2, 2001

Counsel for R.L.F. indicated she opposed both B.B.'s and the O.s' plans. R.L.F. sought an order for an assessment of the children and (her) access. The O.s opposed B.B.'s plan. B.B. opposed the O.'s plan. The O.s indicated they would apply for leave to join the proceeding. B.B. sought leave with respect to S.N.F. The temporary care order was renewed by consent.

17. April 4, 2001

Counsel for D.D. indicated he was not putting forward an independent plan. The assessment request of R.L.F. was discussed further. Trial dates of May 22, 23, 24 and 25 were set.

18. April 9, 2001

The pre-trial memo arising from this appearance reads, in part, as follows:

1. The children before the court are K.J.F., born [in 1996] and S.N.F., born [in 1998]. R.L.F. is the mother of both children, B.B. is the father of K.J.F. and D.D. is the father of S.N.F.. K.O. and S.O. are residents of California who are the adoptive parents of a half sibling of K.J.F. and S.N.F.

2. The matter is set for trial on May 22, 23, 24 and 25 commencing at 10:00 May 22, 2001.

3. The parties' positions, <u>at this time</u> are as follows:

   (a) R. L. F. seeks an Order placing both children in the permanent care and custody of the Department of Community Services with an order of access in her favour,
   (b) B.B. seeks an Order placing both children in his custody,
   (c) D.D. takes no position,
   (d) S.O. and K.O. seek an Order of custody with respect to both children,
   (e) The agency will possibly support the application of B.B..

4. A limited access assessment has been ordered requesting that John Manning undertake an assessment of the current circumstances of the Respondent, R.L.F., and her relationship with the children as opposed to the children's relationship with her. It is anticipated that he, insofar as possible, make recommendations to the court with respect to the matter of access between R.L.F. and the children following the final disposition of this proceeding.

Mr. Manning has agreed that the assessment will be filed on or before May 13, 2001. It is not anticipated that the assessment will involve individual assessments of the children or assessments of the competing plans for the care of the children.

5. (a) The agency is the applicant under the Children and Family Services Act.

(b) R.L.F. is a party to the proceedings in all respects.

(c) B.B. makes application for care and custody of K.J.F. under the Children and Family Services Act requesting placement of his daughter with himself and seeking a custody Order under the Family Maintenance Act. He applies for leave to apply for and make the same applications with respect to the child S.N.F. Counsel have agreed that these applications are properly before the court and that there is no further requirement of documentation to fix the court with jurisdiction under the Children and Family Services Act and Family Maintenance Act with respect to B.B. (subject, however, to the leave application insofar as it is necessary with respect to S.N.F.).

(d) The O.'s make application for leave to join the Children and Family Services proceeding as parties and for leave to make application for custody of both children under the Family Maintenance Act. Again, all counsel have agreed that these application are properly before the court without the necessity of filing further documentation.

(e) D.D., at this point, has not taken a position. He is the father of the child S.N.F. and subject to further application to clarify his status he will be treated as a party to the Children and Family Services Act proceeding and a party to the applications under the Family Maintenance Act as they relate to S. N. F.

6. Mr.Campbell, Mr. Nickerson, who appears for Mr. Crowther, and Ms. Jones respective clients shall be treated as parties to the action for the purpose of disclosure and provided with copies of all relevant materials.

(Mr. Campbell acted for D.D., Mr. Crowther for B.B. and Ms. Jones for the O.s.)

19. April 30, 2001

The pre-trial memo arising from this appearance reads, in part, as follows:

1. Ms. Jones has advised by letter dated April 23rd, 2001, that K.O. and S.O. have withdrawn their application in this proceeding and will not be participating in the trial.

2. Ms. Litke has advised that Kevin MacDougall will not be called as an expert witness but will be called in relation to the affidavit which is currently on file. The direction with respect to production of his agency file remains in place. The agency file and his curriculum

vitae will be provided to the other counsel no later than the close of the work day on Friday, May 4, 2001. The original direction on April 9th was that this material be filed and produced by Friday, April 27th.

3. Ms. Litke indicates that her client's plan has changed. She anticipates supporting the placement of the children with an extended family member in Saskatchewan. It is somewhat unclear as to how from a legal perspective it is proposed that this be effected. R.L.F. shall file an affidavit by 1:00 p.m. on Friday, May 4th, 2001 providing the particulars of the plan she is putting forward and relative details concerning her and the children's recent and past contact with the extended family member in question, including outlining what visit, if any, and when she and the children have had to the family member and reserve in question. Accompanying the affidavit will be a letter from Ms. Litke's office indicating the nature of the order being sought by her client. On or before the close of the work day on Thursday, May 10th, Ms. Litke will file any other supporting material she plans to file with respect to her client's new plan, including affidavits or reports from any witnesses she is calling in support of that plan. She will advise other counsel as to who, if any witnesses, she is calling in addition to her client by the close of the work day on Wednesday, May 9th, 2001.

4. Mr. Kelly has questioned the necessity of the Manning report given the change in plan. The Court directs that the Manning report be completed on its original terms.

20. <u>May 15, 2001</u>

The pre-trial memo arising from this appearance reads, in part, as follows:

1. Since April 30, 2001, S.W.J. of the province of Saskatchewan, has made an application to the Court. She is represented by Eldon Lindgren, Q. C., of [...], Saskatchewan. Ms. Morris has appeared at this pre-trial as Mr. Lindgren's agent.

2. Since the April 9th Pre-Trial Conference, the position of the parties has changed. The relative positions of the parties is as follows:

   (a) R.L.F. supports the application of S.W.J. R.L.F. seeks, no matter what the order of the Court, an order of access in her favour.

   (b) B.B. seeks an order placing both children in his custody pursuant to the *Family Maintenance Act* and/or the *Children and Family Services Act*. B.B. acknowledges that should he be successful, it would be appropriate that there be an access order in favour of D.D. with respect to the child, S.N.F., and in favour of R.L.F., with respect to both children. B.B. is also prepared to discuss cultural issues.

   (c) S.O. and K.O. have withdrawn from the proceeding.

   (d) S.W.J. has made an application to the Court seeking leave to apply or join the proceeding under the *Children and Family Services Act*, leave to make an application under the *Family Maintenance Act* and seeking a supervision order under the *Children and Family Services Act*. The agency takes no position between the two applications.

   (e) D.D. is seeking access not only to his natural child, S.N.F., but also to the child, K.J.F.

   (f) The order of presentation of evidence will be:

(i) Gordon Kelly on behalf of the Minister of Community Services;
(ii) Peter Crowther on behalf of B.B.;
(iii) Suzanne Litke on behalf of R.L.F.;
(iv) D.D.; and
(v) Eldon Lindgren, Q. C. on behalf of S.W.J.

The Court has been advised that Mr. Lindgren does not expect his witnesses to be available until Thursday or Friday of next week.

21. May 22, 23, 24, 25, 2001

The trial proceeded. Witnesses called included T.J., H.W., J.S., D.E.D., Kandi Swinehammer, R.B., B.B., D.D., John Manning, Kevin MacDougall, R.L.F., S.W.J., E.S., D.P., Chief M.A.S., and Calvin Albright.

My decision was reserved. As the first disposition order in the child welfare proceeding was made July 14, 2000, the Court's jurisdiction pursuant to s. 45(1)(a) of the Children and Family Services Act extended statutorily to July 14, 2001. On completion of the evidence, I concluded that it was in the best interests of the children that the Temporary Care Order placing the children with the agency continue until a decision was made and that the statutory timeline be extended to permit me additional time to review the

evidence and come to a decision. (See Children and Family Services of Colchester County v. H. W. [1996] N. S. J. No. 511 (N. S. C. A.); C. A. S. of Halifax v. R. and B., C. A. 169315, June 15, 2001.)

B. THE EVIDENCE

I do not intend to review the evidence of each and every witness in the body of this decision. I have reviewed the evidence of each witness and appropriate affidavits and documentation in coming to this decision.

1. R.L.F.

R.L.F. is the mother of three children: T.O., K.J.F. and S.N.F.

> T.O. was born [in 1993]. Her father was R.J.. When T.O. was an infant, she and R.L.F. had contact with a child welfare agency in Calgary. It was a Native child welfare agency and R.L.F. and T.O. were referred to and identified as "aboriginal" in their files. T.O. was placed (privately) for adoption by R.L.F. with the O.s, a family in [...], who were friends of R.L.F.'s adoptive mother.

R.L.F. met and dated B.B. in 1995. She became pregnant and K.J.F. was born [in 1996] in [...], B. C. There appears to have been some question as to K.J.F.'s paternity.

Following K.J.F.'s birth, R.L.F. "moved around a lot". The following summary of moves between early 1996 and early 2000 is taken from her evidence:

- left [...] shortly after K.J.F.'s birth;
- to Calgary;
- to Halifax
    - a "shelter to shelter transfer" as T.O.'s father was feared;
    - commenced relationship with D.D., became pregnant with S.N.F.;
- to Calgary (October 1997)
    - connected with Mr. R. (December 1997);
    - married early 1998 (Mr. R.);
- to [...]
    - January 12, 1998 - to get K.J.F.'s birth certificate;
- to Honolulu
    - Mr. R. stationed with [...] there;
    - [in 1998] S.N.F. is born;
- to Louisiana

- Mr. R. discharged from [...] they go to his home;

- to Calgary
    - separated from Mr. R., who was “abusive”;
    - "harassed by him";
- to Hamilton
    - August 1999;
- to Halifax/Dartmouth (to try to “reconcile” with D.D.)
    - January 2000;
    - April 7, 2000 - children taken into care.

R.L.F. stated she had received assistance from the Department of Community Services (the Agency) in [...] between January and April 2000. The children were removed from her care on April 7, 2000. They were returned to her care on May 18, 2000. They were removed by the Agency again July 6, 2000 upon receipt and following the express recommendation of the Assessment Report of that date.

R.L.F. contacted Kandi Swinehammer, the Agency social worker with responsibility for the children on July 14, 2000. In this call R.L.F. suggested to the Department that an adoption placement (of K.J.F. and S.N.F.) with the O.s (T.O.’s adoptive parents) might be appropriate. R.L.F. described the call in her evidence:

> I felt like I wasn't going to succeed in the process of all this. So I then in turn made a phone call to Ms. Swinehammer and discussed with her about the adoption of K.J.F. and S.N.F. to K.O. and S.O..

In the early fall of 2000 R.L.F. pursued, through counsel, securing registered Native status for herself. This was obtained November 14, 2000.

K.J.F. and S.N.F., it became evident, were eligible for registered Native status also. The Department of Community Services notified the Mi'kmaq Children and Family Services Agency and a case conference was held in January 2001. The Mi'kmaq agency did not seek to enter the proceeding but suggested they would intervene in the event of a permanent care order, becoming "the agency" only in that eventuality. The Mi'kmaq agency was clear in stating it would not support an adoption placement outside the country with a non-Native family. The O.s' plan (which was predicated on a permanent care order and agency adoption placement) was then in jeopardy.

R.L.F. decided to, nonetheless, support a permanent care order. She now hoped it would lead to assumption of responsibility for the children by the Mi'kmaq agency and her (R.L.F.) having access to the children. In her testimony she stated:

Q. ..then you learned that the placement plan made with the O.s may not work.
A. I found it out at a case conference.
Q. ..And that case conference had been referred to..in January, early January of 2001. And what did you then want to do with the children?
A. I wanted a permanent care order done for Mi'kmaq to come in play on this.
..
..on a permanent care to my understanding they would offer services..
..My hope at that time was access.

Later in January 2001 B.B., K.J.F.'s father, came forward with a plan. R.L.F. testified that her response to this was:

..I disagreed.
I disagreed but only on a couple of reasons, which in turn goes back to, you know..I guess I was more or less disagreeing on a grudge on where he's been for five years..
..just the question on where he's been for five years and why all of a sudden the sudden interest was really what was annoyed with..
I don't believe there a connection between them..

Upon securing her Native registration and status (in November 2000), R.L.F. contacted the [...] Reserve (part of the Cree Nation) in Saskatchewan and made contact with her cousin, S.W.J. The cousins had not met before this trial. They have talked by phone and e-mail since the initial contact.

On January 18, 2001, R.L.F. wrote a "To Whom It May Concern" letter and apparently faxed it from a Pharmasave Post Office to the [...] Tribal Council Human Resources Corporation (the Native child welfare agency serving the [...] Reserve - [...]). In it R.L.F. refers to there having been an assessment. She also states "I do not deserve to have my children taken from me.. Please help me as I love my children and they belong home with myself and Mr. G.." (Mr. G. is R.L.F.'s common-law partner).

R.L.F. testified on May 24 at trial. She outlined her then plan:

> Q. Eventually you came to the plan that you were looking at S.W.J. to place your children..whose idea was that?
> A. That was my idea.
> - communicated back and forth with S.W.J.
> Q. And at what point did you actually make the decision that you wanted to put forward a different plan?
> A. About three weeks ago, I think.

R.L.F. stated that she began to pursue the idea of a family placement after the April 9 Court appearance and a statement by the Department of Community Services' counsel that B.B.'s plan might "possibly" be viewed favourably (affidavit of May 3).

R.L.F. was asked more about this plan (with S.W.J.):

Q. What did you think your connection or that your contact would be with the children..?
A. If that became the plan I guess they would assess access..
Q. Was it part of your plan to have the children returned to your care?
A. At one time, yes.
Q. You say that they belong home with you. What's your position now, R.L.F.?
A. Right now perhaps I cannot give them what they need.

R.L.F. indicated her access to the children would be determined by the ([...] Tribal Council) agency. Her testimony was that she may relocate to the [...] Reserve, but would not decide until after completion of these proceedings. Her affidavit of May 3rd said "I intend to relocate to [...]..I intend to continue with supervised access until such time as unsupervised access is allowed."

She indicated she would follow Mr. Manning's recommendations regarding services. The recommendations of Mr. Manning are contained in his May 14, 2001 report and are similar to those made in the July 6, 2000 assessment report prepared by the I. W. K. Grace Assessment Services (which were not taken up).

R.L.F. indicated that she felt she would have an easier time with access if the children were with S.W.J. (as opposed to B.B.).

With respect to (her) access should the children be with B.B., she stated:

Q. Do you anticipate difficulties with B.B.
A. A few, but nothing major.
Q. And what would the few problems be?
A. I think between myself..and this is from my view - and K.J.F.'s father, there's alot of unresolved issues. And that's really - the issues that surround that are really my only concern.
Q.` ..what do you see as those unresolved issues?
A. Again, nothing major. Just, you know, where he's been where his lack of interest has been the last five years. I think communication skills between the two of us need working on..

With respect to B.B.'s lack of access/contact with K.J.F., R.L.F. stated:

Q. From your point of view, what was the reason no access occurred?
A. Again, I don't think it's anybody's fault. At times I was hard to find. There's no denying that.

R.L.F. indicated that K.J.F. and S.N.F. had had no exposure to Native culture. She was asked:

Q. How important is it to you, R.L.F., that the children have some connection to their Native roots, to their home?

A. I think it's very important as I didn't get the opportunity.. I think it's important to them to know both sides wherever they may end up..

Finally, R.L.F. was unequivocal in stating firmly that K.J.F. and S.N.F. should not be separated.

2. Kevin McDougall

Mr. McDougall is a social worker with the Mi'kmaq Family and Children's Services agency. Mr. McDougall indicated that "our agency doesn't have a position with regards to any other plan other than permanent care". His agency would step in and assume responsibility for K.J.F. and S.N.F. if there was a permanent care order (pursuant to s. 36(3) of the Children and Family Services Act). They would maintain the current foster placement "if it was working". They would review the issue of R.L.F.'s access.

Mr. McDougall was asked:

Q. ..there are means of addressing issues of heritage and culture apart from a placement that is racially and culturally homogeneous?

A. Definitely. And I would think our agency, being a Native-based agency, we've had a lot of success with that just based on my own experience.

3. BB. and R.B.

While B.B.'s documentation is in his name alone, B.B. and R.B. indicated that they were effectively making a joint application for custody of K.J.F. and S.N.F. R.B. has indicated she supports his application.

They acknowledged that they met K.J.F. only once, in 1998 when she and R.L. . briefly visited [...], and that they have never met S.N.F.

R.L.F. made a support application against B.B. in 1996 but failed to personally appear to prosecute it. B.B. had flown home from a Forces posting to deal with it.

B.B. indicated there was some question about K.J.F.'s paternity. This is reinforced by R.L.F.'s reports to the Calgary agency that K.J.F.'s father was a Mr. P. and the fact that legal proceedings initiated by R.L.F. on June 3, 1997 in Halifax named, alternatively, Mr. P. and B.B. as K.J.F.'s father. Blood testing was undertaken and B.B. was found to be the father. The proceeding was withdrawn by R.L.F.'s counsel in October 1997, when or after R.L.F. left Halifax for Alberta.

In 1998 B.B. apparently indicated he would not oppose an adoption of K.J.F. by Mr. R., then R.L.F.'s husband.

Proceedings were again initiated against B.B. in June 1999 in Calgary. R.L.F. left Calgary but a consent order was taken out in December 1999 providing for payments of $167.50 on the 1st and 15th of each month commencing January 2001. The payments were made until the order was suspended through a consent order dated April 15, 2000. The order was consented to by the parties' respective counsel.

B.B. has been, until recently, less than diligent in pursuing involvement in K.J.F.'s life. That said, R.L.F. has moved frequently, and, to use her phrase, been difficult to find at times.

B.B. and R.B. met in 1995, began dating in early 1996 and married [in 1996]. They resided in [...], B. C. He was in the Armed Forces. She was a community/home support worker.

R.L. F. and K.J.F. visited them briefly on January 12, 2001.

They have two children - M.B. (b. [in 2000]) and D.B. (b. [in 1998]).

They indicated that in the spring of 2000 when these proceedings began they were in a new house, somewhat strapped financially, and that R.B. (who was pregnant with M.B.) was suffering from gestational diabetes.

On July 11, 2000 they spoke to Kandi Swinehammer of the Department of Community Services regarding the legal proceeding, indicating that there wasn't much they could do, that their "hands were tied". The consent order suspending support followed on July 13, 2000. Inexplicably they made no contact with the Agency again until January 2001.

When they contacted the Agency again in early January 2001, they were told of the "O. adoption plan". B.B. was angry and let Ms. Swinehammer know it. B.B. and R.B. travelled to Nova Scotia and appeared at the next court date - January 16, 2001. They have participated fully in the proceeding since then.

B.B. left the Armed Forces when his contract was up [in 2000]. B.B. worked as a painter for part of the summer of 2000, then was injured in an accident. They sold their house in [...] and left B.C. on September 24th, 2000, moving to [...], Quebec. They lived with his

parents until after M.B. was born ([in 2000]), then moved into their own home.

They state that B.B. left the Forces so that he could have more contact with the children (he had to go to sea with the Forces) and moved to Quebec to be closer to his family and to K.J.F.

They have purchased a six passenger vehicle in anticipation of the possibility of having K.J.F. and S.N.F. They are a hard-working couple, their only debt a $32,000.00 mortgage on their $71,000.00 home.

B.B. is looking for better work in [...]. If he secures it, they are likely to move. They have family and friends in [...].

They do not appear to have any financial difficulties but do have financial limits. Their family income is currently $24,000.00 to $35,000.00 depending on when and how one calculates it. R.B. is receiving monies for taking a course.

They are seeking custody of both K.J.F. and S.N.F., accepting (as all do) that the two children should not be separated.

B.B. is Francophone and states that the French language and culture is important to him.

They both acknowledge the importance of Cree culture to K.J.F. and S.N.F. and expressed a willingness to encourage and facilitate their learning of and experiencing it.

B.B. indicated (when asked) that he felt it important that S.N.F. continue to see her father, but indicated he would want there to be a paternity test (Mr. R.'s name, not D.D.'s appears on S.N.F.'s birth certificate). B.B. indicated they would follow Mr. Manning's recommendations regarding access by R.L.F.

B.B. did say that with respect to access in Quebec for R.L.F.: "I would ask it to be supervised for the first couple of months, that's for sure." He stated he would get someone to do the supervision.

The Department of Community Services supports B.B.'s plan. They conducted a homestudy report. Ms. Swinehammer's report, dated March 28, 2001 concludes:

> The Minister of Community Services has not identified any significant child protection concerns such that he would oppose the plan of B.B. and R.B. to have care of K.J.F. and S.N.F. It appears that this placement would be able to meet

> with educational, emotional, social and physical needs of the children.
>
> It is the position of the Minister of Community Services that it is in the best interests of the child, K.J.F. and S.N.F., that they remain together as a sibling group.
>
> Should the court determine that placement of these children shall be with the B.'s, the Minister of Community Services would recommend that a process be put in place whereby there would be a series of pre-placement visits monitored by the Agency.

While the body of the homestudy report seems to assume they will remain in the [...] area, the B.s have, as stated, expressed a willingness to move if the family's financial circumstances can be improved. They appear conscious of the need to and capable of making appropriate educational arrangements should this occur.

4. D.D.

The evidence before me indicates that D.D. is S.N.F.'s father. He is in the Armed Forces (the Navy). He was at sea July 27th to December 15th, 2000.

He has two children by his wife, who resides in Ontario. He pays her support (spousal and child) of $1,000.00 per month. His income is $48,000.00.

S.N.F. was conceived during a period when he was separated. There is no support order with respect to S.N.F. He has had contact with and a relationship with R.L F., K.J.F. (and S.N.F.) on two primary occasions - first around the time of S.N.F.'s conception, and then in early 2000. He continues to be a friend of R.L.F.

He had counsel for a portion of these proceedings and has visited the children with R.L.F.

D.D. supports the S.W.J. plan. He feels there is some prejudice against Anglophones by Francophones in Quebec. He appears to base this on what appears to be limited personal experience. The language differences appear to be his major (only) concern about exercising access should the children be with the B.s.

He testified:

> As we all know, the children, they don't look Native, they look predominantly Caucasian. And the S.W.J. family does not live right on the reserve, they live outside the reserve. The children go to a school - a white school or Caucasian school. It's not on the reserve.

He was incorrect about where they live.

D.D. did a five-day military alcohol intervention program in 1997 at the request of a superior.

He acknowledged that he has as recently as April 2000 denied paternity of S.N.F. Based on the evidence before me, I am satisfied that he should be treated as S.N.F.'s father, subject to results of testing I will later refer to.

D.D.'s cultural background is French and Irish. He was born in Newfoundland.

5. S. W.J. and Those Supporting Her Plan

S.W.J. is R.L.F.'s cousin. When R.L.F. secured registered status she was advised that she was a member of the [...] Band. She contacted the Band and one of the first persons she spoke to was S.W.J. The evidence indicates they spoke, corresponded and/or e-mailed from at least December 2000 forward.

In support of her "plan", evidence was called from S.W.J. herself, E.S. (a social worker with [...] Tribal Council Human Services - [...] Human Services), D.P. (Executive Director of [...] Human Services), Chief M.A.S. (of the [...] Reserve) and Calvin Albright (a social worker with the Federation of Saskatchewan Indian Nations).

(a) S. W. J.

S.W.J. is 32 years old. She is a member of the [...] (Saskatchewan) Band. She has four children, ages 14, 13, 12, 11 and is active in her community. She is divorced or separated from her husband, who was abusive. She has lived with R.I. for five years. He is 52 years old. He has three children, ages 27, 26 and 13. The 13-year old child lives with his/her mother, the others live independently.

S.W.J. and R.I. live on the [...] Reserve in a very comfortable home. She works as a [...] for the band. He works as a pasture rider for the P.... Their employment appears secure. They appear to have no financial concerns.

Their household is busy with work, school, soccer, team penning, round dances (winter) and pow wows. They have ongoing contact with extended family on the reserve and participate in a variety of Native cultural activities. Their band is part of the Cree nation. Cree is taught at the school the children attend, which is off reserve. S.W.J. stated “there is no prejudice” at this school.

S.W.J. herself was raised by her grandparents for a time, apparently “taken” from them at age 7, spent some time in foster homes on and off reserves, and at age 9-9 ½ was adopted by a non-Native family in [...] whom she remains close to. They (her adoptive parents) now reside in New Brunswick. She returned to her natural mother in her mid-teens, started her family young, separated, returned to school and the reserve and has persevered, worked hard and done well.

She had, it appears, ongoing contact with R.L.F. from November or December 2000 forward, though had never met R.L.F. until she (S.W.J.) came to Nova Scotia for the trial of this matter. She had not met the children (K.J.F. and S.N.F.) prior to the trial either. S.W.J. attended the third and fourth days of the four day trial.

On April 27th, 2001 (a Friday), she wrote (faxed) Susanne Litke (R.L.F.’s lawyer), stating in part:

> This letter is to confirm that I, S.W.J., am in agreement to keep the two children belonging to my cousin, R.L.F., if circumstances need be. The two children in question are, S.N.F. and K.J.F..

R.L.F. testified that the placement was her idea.

It is apparent from the material before me that Ms. Litke's office also prepared the application that was filed by S.W.J. on May 10, 2001, seeking the relief earlier referred to. The application is brought in her name alone.

It is also apparent that while obviously very well intentioned, S.W.J. is somewhat confused by the role she is being asked and is asking to take on. It is apparent that [...] Human Services Corp. and R.L.F. have, while encouraging and supporting her coming forward, not helped S.W.J. clarify the role she is seeking to put forward or to have with the children. To be fair, her application came forward very late in this process (less than a month prior to the trial dates) and was put together of necessity with some haste in rather complex legal circumstances.

Her application seeks party status under the child welfare proceeding and an order pursuant to s. 42(1)(c) of the Children and Family Services Act - placement under the supervision of the agency. The time period for the child welfare proceeding has expired. To make this order I would have to extend the statutory time frames, authorize the placement out of the

province and have the matter supervised by the/an agency, and be the subject of further review by this Court. The [...] agency has aligned itself with S.W.J. It states it would supervise or provide whatever services were necessary.

Alternatively her application seeks leave to apply for and obtain custody (pursuant to s. 18(2)(a)of the Family Maintenance Act) of the two children.

When asked the reason for her application, S.W.J. stated she did not want the children shuffled around in foster care and wanted them to know their (Native) cultural heritage.

A homestudy report was done by [...] Human Services as a result of (though prior to its filing) S.W.J.'s application. It is generally positive but is incomplete on its face - R.I. having not provided or made arrangements for a Criminal Record Check, or Medical. He has not spoken to the author of the homestudy. He has not testified in any fashion. S.W.J. indicated he was too busy with his employment.

S.W.J. indicated in her testimony:

(i) when questioned about the homestudy:

Q. ..a section there that says..motivation..second last sentence it says, ‘S.W.J. is trying to help her cousin til she is able to get back to a better and healthy lifestyle..?

A. Well just from my discussions with R.L.F., what I was assuming as better and healthy was I told her if - in order to get the kids back she would have to meet certain criteria. So if it means going and getting parenting classes, anything, just to try and help herself out..

It is unclear who would set these criteria.

(ii) She made reference to the need for a province to province transfer, it seemed she was referring to agencies.

(iii) She stated she knew R.L.F. feels she would have easier access to the children if they were with her (S.W.J.).

(iv) Regarding the arranging of access (for R.L.F., D.D. and B.B.), she stated:

> They'd have to go through the same process R.L.F. would, through [...] and Family Services. Anything to do with foster kids that are put in permanent care would have to go through the [...] protocol.

It seems she anticipates a permanent care, not a private custody order.

(v) She acknowledged the Court's authority to order access and would facilitate any such order.

(vi) She indicated she would defer access decisions to [...].

(vii) She indicated in the [...] records that she would take other foster children "after these children go back to R.L.F.".

(viii) She had seen a letter from R.L.F. dated January 18, 2001 stating:

> I do not deserve to have my children taken from me.. Please help me to have my children where they belong, home with myself..

(ix) She said, when questioned:

> Q. ..with respect to the homestudy, do you recall being asked the question, ‘what do you think will be the hardest part? and giving the answer ‘Letting the kids go after getting attached to them’.
> A. Yes.

(x) She indicated she would have the kids long term.

(xi) S.W.J. indicated she did not see this “winner take all”, that what was really important was that they connect with their culture:

> All that I’m here for is I want what’s best for the children. I just want to be able to acknowledge their culture, their family..

S.W.J. had no plan with respect to K.J.F.’s (or S.N.F.’s) Francophone heritage. She had <u>not</u> reviewed the extensive background of the proceeding.

S.W.J. indicated R.I. supported her application.

(b) <u>E.S.</u>

E.S. is a mature Native woman who has worked as a foster care/home support worker for [...] Human Services in [...], Saskatchewan for two years. She does homestudies for foster placements and “persons of sufficient interest” (P. S. I.) placements.

On April 27th at 4:25 p.m. she was asked to do a homestudy regarding S.W.J.

She met with S.W.J. for most of the day on May 1, 2001. She was not able to speak to R.I.. Page 2 of the [...] Human Services file is a checklist for a "P. S. I. file". it indicates the file is incomplete - having no check by "Criminal Record Check" or "Medical". Handwritten by each respectively is "Need R.I.'s CPIC", "Need R.I.'s medical". These two pieces of information are apparently required for approval of a home by her agency - even where, as here, the application in name is by only one adult in the home. Despite this the homestudy was apparently approved by her supervisor(s). There is not evidence of any continued effort to "complete" the homestudy.

E.S.'s testimony included the following:

(i) Well, when I done the homestudy, I thought this home was going to be used for a child, for the children to be placed until the mother was able to lead a healthier lifestyle.

When asked, she said she “guessed” it would be a long term placement, though she had not reviewed the background of the file or the children.

(ii) Q. ..The report, itself, there is an expectation that S.N.F. and K.J.F. will be returning to their mother. Correct?

A. Yeah, if its..it’s not for me to say if they’re going to be.

(iii) Q. I would draw your attention to the very last sentence of the second paragraph: ‘S.W.J. and R.I. met the needs of the child’s mental - mentally by showing them that everything is going to be all right, and when possible they will be back with their mommy soon’. Those are your words?

A. Yeah. Well, I just wrote down what S.W.J. said.

The homestudy is on its face positive.

(c) <u>D.P.</u>

D.P. is the Executive Director of [...] Human Services. The agency serves six reserves, and is a social service agency providing social service and child welfare services.

The agency could provide services to S.W.J. and/or the children. When asked what would happen if "the mother wanted the children back" he said, in part:

> if the children were to be placed with..S.W.J.., then this process..would need to be dealt with and applied. Where a case plan would need to be put in place.. And if there are any issues, any problems that the mother may have, would need to deal with, and you know, to address, but you know its not where, you know, these would need to be dealt with first before..the children..to be returned or there has to be..a case plan in there where problems are addressed..

It was unclear under what authority such a case plan might be developed.

In the [...] file there is an undated, unsigned note "Re R.L.F." which reads in part:

> I don't know much about this case. [...] are trying to help her. She is a recent discovery of [...]..
> She needs help to get her kids back, however, we need to know

> how she came to get her kids taken away..

There is no indication that this agency made any attempt to contact either the agency responsible for the children in this proceeding or the Mi'kmaq agency - who had the full file and background at its disposal from January 2000 forward. I do not understand why such contacts would not be routinely made. The involvement of the Mi'kmaq agency was later known to [...] - it is referred to in an April 27th note in the [...] file.

On March 27, 2001 a file note states:

> File was open for informational purpose. No further contact has happened, unable to find mother.
> M.O., Supervisor

On April 27th there is a contact with Susanne Litke, R.L.F.'s counsel. The resulting file note reads:

> Possible extended family involvement and placement for her two children with R.L.F.'s cousin, S.W.J. Suzanne needs a letter of support from [...]..
> M.O.

That same day, April 27th, a letter was prepared on [...] Human Services Corp. letterhead reading:

> DATE: April 27, 2001
> TO: Susanne Litke
> ~~FAX:~~ (902) 423-XXXX
> RE: R.L.F. [... 1974]
> Children: S.N.F. [...1998]
> K.J.F. [... 1996]
>
> We intend to put forward a Family Placement for the F. children within their extended family in [...] Reserve located near [...] Saskatchewan. On behalf of [...] Human Services Corporation, Indian Child and Family Services, we are interested on children placement here with their extended family, S.W.J. from [...] Band. Should you need further information you may reach me at (306) 445-XXXX.
>
> Sincerely,
>
> D.P., Executive Director

At this point, there is nothing to indicate anyone at [..] Human Services Corp. knew S.W.J.. Indeed, the evidence indicates they did not.

Their file indicates that this letter was written at the behest of Ms. Litke, R.L.F.'s counsel. R.L.F.'s May 3rd affidavit then asserts that this letter is "indicating that they ([...]) wished to be involved in this proceeding".

The [...] file also contains notes from a “case conference” between D.P., M.O. and Susanne Litke” which occurred on May 4th, 2001. It is a planning conference - discussing how to proceed, what witnesses to call and so on. It refers to S.W.J.:

> - to make an application to Court to have status..
> - mini home-study to be completed by Thursday - May 10/01
> - S.W.J. will need an Agency’s lawyer

Elsewhere the same note states:

> May set precedency for out of province child welfare.

S.W.J. was <u>not</u> part of this conversation. The note refers to the “white” agency in Nova Scotia.

Ms. Litke prepared S.W.J.’s application and sent it to D.P..

No one from [...] Human Services Corp. appears to have had a conversation with R.L.F. prior to the trial.

Ms. Litke sent the [...] agency portions of the Court file. This did not include the Assessment Report of July 6, 2000 with respect to R.L.F. (which had been referred to in R.L.F.'s January letter). No one from [...] sought a copy of the assessment.

D.P. said where children are in a private placement, no case plan would be developed without it being requested by the caregiver.

(d) Chief M.A.S.

Chief M.A.S. is the elected Chief of the [...] Reserve. She is dignified, intelligent and capable.

The [...] Band has (about) 1,464 members - 65-70% of them live off the reserve.

Chief M.A.S. grew up with R.I., has known him all her life and speaks of him positively. She knows and speaks positively of S.W.J.

She has assisted the Cree Nation in Quebec in developing educational programs concerning language and culture. She briefly pointed out differences between the Quebec Cree and those in Saskatchewan.

Chief M.A.S. spoke of her band's involvement in this trial as being a "whole new process".

She stated that "we cannot allow our children to live outside our culture anymore.." She acknowledged that many, perhaps most, [...] children live off the reserve. She outlined some of the advantages of Native status.

She stated she opposed the adoption or placement of Native children with non-Native families. She supported the application of S.W.J. When asked if her position would change if one of the fathers were Native, she answered "yes". When asked what if the father were black, she acknowledged he would bring cultural imperatives to the situation.

(e) Calvin Allbright

Mr. Allbright is a social worker with the Federation of Saskatchewan Indian Nations. His mother was Native, his father was not. He was non-status until 1985's Bill C-31 corrected the gender discrimination inherent in attributing Native status prior to that time.

Mr. Allbright was in a long term non-Native foster home for most of his childhood and youth. He clearly loves and respects his (foster) parents. That said, he poignantly described his return to, development of and discovery of his own Native identity in his young adulthood.

He described the history of the “Sixties Scoop” (a phrase used by Patrick Johnston in his 1983 publication Native Children and the Child Welfare System to describe the massive involvement of child welfare agencies in removing Native children from their families and communities in the 1960s and placement in non-Native homes) and its impact on Native individuals, families and communities. He was clear in his desire to stop such a cycle, and to have children maintain “identity and connection” to Native culture and community.

Mr. Allbright did not know B.B. was Francophone. He thought he was “an English person living in Quebec”.

6. THE JULY 6, 2000 ASSESSMENT REPORT

Linda MacEachern, M.S.W. and Maureen Carew, M.S.W. prepared a parental capacity assessment on R.L.F. It is dated July 6, 2000. They work for I.W.K. Grace Assessment Services, an agency independent of the Department of Community Services.

R.L.F. reported to them that D.D. was a heavy drinker. She felt the many moves she had made had had little or no effect on the children as they “weren’t in school”.

R.L.F.’s Native status was referred to in the report.

R.L.F. had a turbulent adolescence. T.O. was born [in 1993] when she was 18 years of age. Her parents, she said, encouraged her to place T.O. for adoption with the O.s.

The assessment describes the children and R.L.F. as follows:

K.J.F.

K.J.F. is reported to be meeting her developmental milestones. She presents as a very social child, affectionate and talkative. She was described by the foster parent as well-behaved. She was described by collateral sources as a child who would go with anyone, that she was 'too social', would open her arms to anyone in an affectionate manner. K.J.F. has not had any major health difficulties, with the exception of requiring significant dental work.

K.J.F. has been noted to be very nurturant with her mother, as well as her younger sister S.N.F. She appears to take on a parentified role with her mother, nurturing her when she is upset, comforting her if she is hurt, reprimanding her if she perceives R.L.F. is doing something wrong. There is evidence of an attachment between K.J.F. and R.L.F, as K.J.F. was upset upon separation from her mother. While in care, K.J.F. slept with S.N.F. for comfort, and was often observed with S.N.F.'s bottle in her mouth.

On observation of a home visit, K.J.F. was very aggressive with her mother. She was upset with her because she was not permitted to go outside. K.J.F. kicked her mother and was engaging in a lot of attention seeking behaviour. K.J.F. was also observed to be very rough with their family cat. When K.J.F. was in care, no behaviour problems were noted, and she responded well to structure and routine.

S.N.F.

S.N.F. also seems to be meeting her developmental milestones. She is described by R.L.F. as a more difficult child. R.L.F. reports that S.N.F. has had severe temper tantrums in which she would bang her head against the floor, bite, kick. R.L.F. said that she just lets S.N.F. "wear herself out'. R.L.F. presents as a very social child, also a child who is indiscriminate regarding affection with others and described as too social'. While in care, no behaviour problems were noted in S.N.F., and she was said to respond well to structure. S.N.F. required significant dental work as a result of 'bottle mouth' recently. S.N.F. does not demonstrate as strong an attachment with her mother as

K.J.F., as it was noted that S.N.F. sometimes remained with the access facilitator during visits and chose not to interact with her mother. R.L.F. has stated that her adoptive father does not accept S.N.F. to the degree he accepts K.J.F. as a result of her Native features. Because of R.L.F.'s desire to please her father, and possible internalized self-loathing as a result of her own experiences with racism in her family, there is potential that R.L.F. could reject S.N.F. on this basis.

The assessment concluded:

R.L.F. is a 26-year old mother of 2-year old S.N.F. and 4-year old K.J.F. R.L.F. was also the primary caregiver for T.O., a child previously given up for adoption at a young age. R.L.F.'s family history has been lacking in needed warmth and acceptance. R.L.F. has experienced a theme of loss and rejection in her life, having been placed for adoption as an infant, and subsequently adopted into a family who to a large degree rejected her due to her Native culture. R.L.F. experienced herself as the outcast in this family, and never felt as though she fit in or was accepted. Having received some degree of warmth and nurturance by her adoptive mother, R.L.F. was devastated when her parents separated and she remained with her father, who remarried. Again, R.L.F. faced enormous rejection, was perceived by all family members as the problem in this blended family, resulting in her placement in care.

R.L.F. coped with these experiences of rejection by seeking self-worth and nurturance through sexualized behaviour, and through developing a tough, seemingly numb exterior. R.L.F.'s intimate relationships have been very dependent in nature. R.L.F. suffered violence at the hands of partners, which further eroded her sense of self-esteem. R.L.F. became a lone parent at a young age, and giving this child up for adoption was undoubtedly very traumatic for R.L.F., given her own experience of being rejected by biological parents. It is evidence that R.L.F. has not dealt with her

feelings as a result of all the numerous losses she suffered in her life. R.L.F. continues to struggle with acknowledging any feeling other than anger. Therapy with R.L.F. would need to be intensive and long-term in order to see R.L.F. realize any sense of empowerment and self-esteem independent of a partner or pleasing others.

R.L.F. has demonstrated consistently throughout this assessment in many ways that she is not committed to parenting her daughters. She has repeatedly asked the Agency for respite, citing that she needs a break from her children, she is easily frustrated by their behaviours, and she has looked into alternate long-term care options for them. While it is apparent that R.L.F. genuinely loves her daughters, she has indicated an ambivalence about having her children in her day to day care.

R.L.F. presents with many deficits in her parenting with respect to being able to meet the day to day physical and emotional needs of her children. Her complete lack of insight into the impact of such a transient lifestyle on her children indicates a high probability that this degree of transience would continue, especially given that R.L.F. is ambivalent about where she lives, and her transience is used as a form of coping with stressful situations. R.L.F. presents with limitations in the areas of child management, ability to provide cognitive stimulation, setting consistent limits, nutrition, budgeting, inappropriate role assignment, and ensuring her children's safety. She has also demonstrated an inability to modulate her temperament with her children when upset with others.

R.L.F.'s own needs for nurturance and acceptance are so great that they take precedence over her daughters' needs. She has historically had and continues to have a pattern of feigning illness to seek attention and nurturance, even if this comes from her children. It is probable that R.L.F. will continue a pattern of seeking acceptance in sexual/intimate relationships, likely resulting in future pregnancies. Because of R.L.F.'s inability to put her children's needs ahead of her own, combined with her deficits in parenting, any child born

> to R.L.F. in future would undoubtedly be at risk of harm. Therefore, an alert should be made to the hospital should she again become pregnant. The prognosis is also high that R.L.F.'s children will become permanent wards. R.L.F.'s ability to work with intervention services is limited, due to her defensive posture in the fact of any type of challenge. R.L.F. has only been open to direction to a limited degree, and demonstrates that she does not have the ability to consistently follow through with learned skills, as she is easily overwhelmed and gives up.

The Assessment Report recommends, at p. 38, that:

> ..K.J.F. and S.N.F. be placed in the same home, as there is an obvious bond between the sisters and to ensure some sense of security and continuity..

A variety of services for R.L.F. were also recommended. For the most part, R.L.F. has not undertaken these services.

7. JOHN MANNING'S ACCESS ASSESSMENT

Mr. Manning is a Clinical Therapist. He was requested, upon the motion of R.L.F.'s counsel (in April 2001) to prepare an assessment regarding access between R.L.F. and the children. His report is dated May 14, 2001. In it he states:

> The primary limitation of this report stems from the brevity of time that has been provided. None the less I believe that sufficient observations, consultations, interviews as well as

review of documentations has been conducted so as to validate the legitimacy of the report..

..

Based on information from the access supervisors, the visits between R.L.F. and her daughters have improved over the past 12 months; there appear to be somewhat fewer conflicts between R.L.F. and the children and R.L.F. handles their behaviour some what better than she had at the onset of the access supervisions. However, what was noted in the past in part w as also noted during several of my observations:

1. The children are happy and pleased to see their mother and are often quite physical in hugging and climbing on her in their display of affection. R.L.F. returned their affection but tended to operate from one position in the room, necessitating the children coming more to her.

2. S.N.F. was clearly far more consistently energetic and enthused with her interaction with her mother than is K.J.F. K.J.F. was perceived as being a bit more distant and peripheral than S.N.F. more often.

3. R.L.F. seemed to try to be balanced and fair in her interactions with her children; however she seemed to find it generally easier to relate to S.N.F. than with K.J.F. Perhaps it is because she is the baby. K.J.F. seemed aware of this treatment between herself and S.N.F. and appeared at times to resent the treatment, her mother, and S.N.F.

4. R.L.F. appeared during the sessions to want to be good to and with her children; however she seemed to become impatient with them easily and frustrated by the agency supervision. The children did not always respond in the way she seemed to feel they should and she therefore questioned them regarding certain point or issues that may be too much for them to understand.

5. Consequently R.L.F.'s expectations of her children may exceed their developmental levels and may also reveal R.L.F. frustration with being supervised and observed when she is with the children. Whatever the reason however, R.L.F.'s frustration and expression of that frustration is very likely perceived by the children.

6. It has been recorded during many of the access visits as well as observed by myself, that R.L.F. often seemed to find something to complain about or question regarding the children's clothing, hair, or other issues relating to the children; she has questioned them on several occasions regarding why they weren't wearing certain clothing that she had provided for them, or what had happened to certain items of jewelry that had been given to them; she had also instructed them as a result of their answers to inform either the supervisor or the foster parents that they are to wear or be provided with the items that she (R.L.F.) had given them. Again this places undue responsibility on extremely young children. This questioning and criticizing on the part of R.L.F. seems a clear reflection of what may be her resentment of the foster home just for being there and for her not having control over her children and rather feeling that others have control over both her children as well as herself.

7. Based on documents received as well as discussions with R.L.F., R.L.F. seems to have a lot of unresolved emotional needs and issues that greatly block her emotional ability to be a "mom" the way she intellectually is a "mom". There is resultantly an inconsistency in her interaction, in her patience, even her permissiveness. A comment made by R.L.F. during a discussion I had with her suggests that she is aware that she needs parenting skill training: she stated that the agency should have given her

parenting training which she knows she could have used.

..

The foster parents have indicated that they are prepared to make and would welcome a long-term commitment to these children, if it's required.

..

Everyone has stated and I believe that it is true from my observations that R.L.F. does in fact love her children; however, it is clear that love is not always enough. **The adult must parent the children with confidence and not seek to have the child in them parented**.

..

R.L.F. has been involved in her present relationship with P. for about a year now. Unfortunately she has had a history of brief relationships which may not bode well for the permanency of this particular relationship. It is therefore uncertain in general how stable her life is relative to her past. Even her most recent desire to have her children placed in the care of her new found family in Saskatchewan, further alludes to a history and a tendency towards shifting of plans of impulsivity.

While it seems evident that the access visits at present are not necessarily destructive, it may be argued that they are not advancing either, but rather continuing to hold the children in a limbo state. The high frequency of the contacts may only lead to greater false expectations on the part of the children as well as greater frequency of exposure to negativity, disappointment, and frustration on their party. Though total lack of contact between mom and the children is unwarranted, other alternatives may be necessary. If K.J.F. and S.N.F. are to be placed in permanent care, they need a stable, permanent home with what I would describe as intermittent contact with their mother. This would take the

> form of access, direct or indirect face to face or by phone, once a month. At present the children want and need some contact with their mother on a somewhat regular basis; however they do not want nor need the possible side effects as indicated in some of the sessions reported above. In point of the fact, conflictual visits are neither good for them nor for R.L.F. since this sets up a barrier between herself and her children and a certain nervousness or apprehension on their part as observed during some of their visits.
>
> This present recommendation suggests that the children must get on with their lives. Hopefully, R.L.F. can also take some actions to enhance her parenting skills through parent training, and counselling and hopefully eventually come to a better understanding and relationship between herself and her children.

C. THE PARTY/LEAVE ISSUE GENERALLY

There are two proceedings before the Court - a proceeding under the Children and Family Services Act, and one(s) under the Family Maintenance Act. The proceedings have been heard together.

1. With respect to standing under the Children and Family Services Act, the relevant statutory provisions and Rules include:

   S. 36(1) Children and Family Services Act:

> The parties to a proceeding pursuant to Section 32 to 49 are
> a. the agency
> b. the child's parent or guardian
> ..
> f. any other person added as a party at any stage in the proceeding pursuant to the Family Court Rules.

The Judicature Act, R. S. N. S., 1989, c. 240 provides transitional provisions with respect to the Family Court Rules and their applicability to the Nova Scotia Supreme Court (Family Division) Transitional Provision II (which follows s. 321 of the Judicature Act, provides:

> Rules made by the Family Court Rules Committee pursuant to s. 11(2) of the Family Court Act concerning the practice and procedure in the Family Court continue and apply to the practice and procedure of the Family Division of the Supreme Court until amended, varied, cancelled, suspended or repealed pursuant to the Judicature Act.

Family Court Rule 5.09 provides:

> **5.09** Any person may, with leave of the Court and subject to enactments respecting confidentiality, intervene in a proceeding and become a party thereto where such person
> (a) claims, and to the satisfaction of the Court..can show a direct interest in the subject matter of the proceeding..

It is appropriate, in my view, to also consider other portions of the Children and Family Services Act when examining the standing issue, including:

(a) The Preamble,
(b) Sections 2(1) and (2),
(c) Section 3(2).

Finally it is appropriate to consider the stage of the proceeding - we are beyond the statutory (s. 45(1)(a)) time limit for the Children and Family Services Act proceeding.

Case law dealing with applications for intervener status under the Children and Family Services Act has been cautious, and mindful of the danger or risk of rendering disposition hearings unmanageable if leave is granted indiscriminately (see Family and Children's Services of Kings County v. D. R. (1992) 118 N. S. R. (2d) 1 (N. S. C. A.). Other case law has spoken of a two-stage approach, considering the nature of the connection, or direct interest and, the possibility of placement (considering s. 42(3) of the Act) as an alternative to removal from parents.

2. With respect to applications for standing, the relevant provisions of the Family Maintenance Act include:

S. 18(2)(a) and (b):

(2) *Custody and access*. The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

S. 18(4):

(4) *Father and mother are joint guardians.* Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the *Guardianship Act;* or

(b) ordered by a court of competent jurisdiction.

S. 18(5):

(5) *Welfare of child is paramount*. In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to sa child, the court shall apply the principle that the welfare of the child is the paramount consideration.

The case law discusses several principles and approaches for consideration where there are applications for leave pursuant to s. 18(2) of the Family Maintenance Act. They are thoroughly

discussed by Wilson, J. in L. M. M. et al v. T. J. P . (1992) 119 N. S. R. (2d) 149, at p. 152:

> The Family Maintenance Act clearly states in s. 18(4) that the father and mother are joint guardians of the children and equally entitled to care and custody unless otherwise provided. Similarly, s. 18(2) as amended, clearly provides for persons other than a parent or guardian to seek leave of the Court to apply for custody and/or access.
>
> It is suggested there might be at least four approaches to a leave application.. Each of these approaches has its strengths and weaknesses..
>
> Best Interest
>
> While the idea of collapsing a leave application into a consideration of the issue on its merits focuses directly on the child's needs, it effectively denies any significance to the leave application. It also has the potential of dragging good or adequate parents into needless litigation. If there is a presumption in favour of parents having custody of their children (s. 18(4) Family Maintenance Act) then the Court should exercise great caution in not opening up custody/access proceedings to any party who feels they can offer a child a superior plan..
>
> Frivolous or Vexatious Application
>
> This test would require the Court to exercise some minimum discretion to weed out applications. It is a very low standard but at least attaches some significance to the leave application and avoids wide open litigation possible under a simple best interest test.
>
> Sufficient Interest
>
> This test obliges the application to meet a nominal burden by establishing some interest or tie with the child. Relatives or persons having a meaningful relationship with the child would be included. This category might include individuals specially qualified to meet the special needs of a particular child.
>
> Quasi Parental or Specified Existing Relationships
>
> This is perhaps the highest standard that the court might require to grant standing.. This approach perhaps

> best represents a past or existing relationship and may not adequately deal with future needs of the child..
> ..
> In the court's opinion it is incumbent on an applicant seeking leave to establish some special interest or sufficient tie to the child. The court would not attempt to define an exhaustive list of such sufficient interests but would encourage a broad approach. Blood relationships, past experience and the needs of the child are all factors to be considered in granting leave. Such an approach..is necessary to fairly preserve the natural parent-child relationship while at the same time not compromising the best interests of the child..

D. THE POSITIONS TAKEN AT THE CLOSE OF TRIAL

1. The Agency

The Department of Community Services submits B.B. should be added as a party to the proceeding concerning S.N.F. and granted leave to apply for her custody. They suggest that S.W.J.'s application should be assessed in accordance with the considerations outlined in L. M. M.

2. R.L.F.

R.L.F.'s counsel requests that the child protection proceeding be dismissed, S.W.J. be granted leave to apply for custody of the

children under the Family Maintenance Act and that B.B. not be granted leave with respect to S.N.F.

It is suggested that a contract or agreement might thereafter be entered into between "the parties to the FMA application and [...] Human Services Corp. setting out the terms of their involvement to provide services.." The contract, it is suggested, might then be registered with the court pursuant to s. 52 of the Family Maintenance Act. The evidence indicates [...] Human Services Corp. is willing to be flexible in arranging some involvement or services. This submission contemplates the children being in Saskatchewan. The efficacy of registering an agreement in Nova Scotia in that circumstance may be questionable.

Alternatively counsel for R.L.F. suggests that the Court might "extend the time limits for disposition for a further period of time in the children's best interest." This would allow the Minister to place the children with S.W.J. pursuant to s. 42(1)(c) of the Children and Family Services Act and to monitor the access through the [...] Human Services Corp.

3. B.B.

B.B.'s position is that leave should be granted to him under both Acts, and denied S.W.J.

4. D.D.

D.D. supports S.W.J. and presumably her leave application. He states he wants access to both children but has made no formal leave application respecting K.J.F. In his written submission, he referred to possibly maintaining the children in their current foster home.

5. S.W.J.

S.W.J.'s counsel focuses his submission on arguments for granting her standing, while observing there are arguments against B.B.'s standing application(s).

This is, in my view, an extraordinarily unique situation. The two children have been in care for over a year. Their mother has not put forward a plan for their care (with her). K.J.F. 's father, who for all intents has had no contact with her (or with S.N.F.) has put forward a plan for both children. S.N.F.'s father has not put forward a plan. The children are Native. Their second cousin, S.W.J., a Native person residing on their

reservation of origin, and who has never met them is also putting forward a plan for their care. Both of the plans being put forward can be criticized.

E. SHOULD THE CHILD PROTECTION PROCEEDING BE CONTINUED (BEYOND THIS DECISION)?

I have considered the suggestion by R.L.F.'s counsel that the disposition time limits might be extended to allow a placement (she submits with S.W.J.), pursuant to s. 42(1)(c) of the Children and Family Services Act ("placed in the care and custody of a person other than a parent or guardian, with the consent of that person, subject to the supervision of the agency..."). I have concluded that a placement using this provision, whether considered for S.W.J. or B.B. is inconsistent with the children's best interests. The supervision that the Court or that the Nova Scotia Agency might provide to such a placement - whether it be in Quebec or Saskatchewan, would be limited. Having the matter further reviewed by this Court would subject both B.B. and S.W.J. to the further and ongoing expense of litigating the matter far from their home. Such an order would be temporary and subject to further review(s) and hearing(s). These children have been in "limbo" for more than a year. They are entitled, in my view, to an order that is, at least on its face, more than temporary.

I have considered the possibility of long term placement with the existing foster family. I do not, however, have direct evidence from them, nor sufficient evidence to allow me to make such an order.

The Department of Community Services has by Review Application dated May 11, 2001, sought an order terminating the child protection proceeding. They state in their Agency Plan of May 11, 2001:

> Given that there appears to be a viable plan for placement with a biological parent, the Applicant, the Minister of Community Services, is mandated pursuant to the Children and Family Services Act to support the less intrusive option of placing the children in the care and custody under the Family Maintenance Act with B.B. and R.B. The focus of the agency plan remains to provide these two young children with long term security and stability.

The agency's position seems to effectively be "K.J.F.'s father has put forward a viable plan. K.J.F. and S.N.F. should not be separated. The agency should step aside".

I conclude that it is appropriate to dismiss/terminate the proceeding under the Children and Family Services Act. The applications for leave and/or standing under that legislation become, then, moot. That said, the provisions of the Children and Family Services Act remain relevant in the context of this unique situation.

F. LEAVE UNDER THE FAMILY MAINTENANCE ACT

It is appropriate that I have the ability to consider fully the two alternative plans being put forward. While each leave application might be more critically examined were it made individually in the face of a long established custodial arrangement, there are reasons to allow each leave application.

B.B. is K.J.F.'s father. The evidence is totally consistent in indicating that K.J.F. and S.N.F. should not be separated. It is in the children's best interest that the plan consider both.

S.W.J. is a blood relative of both children. She and the children are Native. She offers a placement that is uniquely sensitive to the Native status and heritage of the children.

I agree with the concerns expressed by Wilson, J. in L. M. M. suggesting that a mere "best interest" approach to leave applications risks a diminishment of the importance of a leave application. Here, however, there is no parent (of S.N.F.) putting forward a plan or in danger of being "dragged into" needless litigation. Given that, it is appropriate for the Court to focus on the child(ren)'s needs when considering the leave applications. Neither application is frivolous or vexatious. Both parties have reasonably put forward arguments of "sufficient interest" - B.B. in S.N.F. through

K.J.F., S.W.J. as extended family with a specific racial and cultural interest. Neither has had a relationship with either girl. Both focus on the future interests of the girls.

Both leave applications under the Family Maintenance Act are granted - B.B. to apply for custody of S.N.F. (as K.J.F.'s father he is entitled to apply for her custody as of right); S.W.J. to apply for custody of K.J.F. and S.N.F..

G. CUSTODY AND ACCESS

The Children and Family Services Act and Family Maintenance Act proceedings having been consolidated, it is appropriate that the court consider the relevant legislation from both when examining the custody and access issues.

The relevant portions of the Family Maintenance Act are:

1. Sections 18(2)(a) and (b):

> (2) *Custody and access*. The court may, on the application of a parent or guardian or other person with leave of the court, make an order
> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

2. Section 18(4):

(4) *Father and mother are joint guardians.* Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
(a) provided by the *Guardianship Act;* or
(b) ordered by a court of competent jurisdiction.

3. Section 18(5):

(5) *Welfare of child is paramount*. In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to sa child, the court shall apply the principle that the welfare of the child is the paramount consideration.

The relevant portions of the Children and Family Services Act are:

1. The Preamble:

WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;

AND WHEREAS children are entitled to protection from abuse and neglect;

AND WHEREAS the rights of children are enjoyed either personally or with their family;

AND WHEREAS children have basic rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;..

AND WHEREAS the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and society's interest in protecting children from abuse and neglect;

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

AND WHEREAS when it is necessary to remove children from the care and supervision of their parents or guardians, they should be provided for, as nearly as possible as if they were under the care and protection of wise and conscientious parents;

AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;

AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child;

2. Sections 2(1) and (2):

Purpose
Sec. 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
Paramount consideration
Sec. 2 (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

3. Section 3(2):

Best interests of child
Sec. 3 (2) [*Order or determination in best interests of child].* - Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an Order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
(b) the child's relationships with relatives;
(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
(d) the bonding that exists between the child and the child's parent or guardian;
(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
(f) the child's physical, mental and emotional level of development;
(g) the child's cultural, racial and linguistic heritage;
(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
(j) the child's views and wishes, if they can be reasonably ascertained;
(k) the effect on the child of delay in the disposition of the care;
(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
(n) any other relevant circumstances.

Also relevant is s. 36(3) of the Children and Family Services Act:

s. 36(3) *[Re Indian children]* Where the child who is the subject of a proceeding is known to be Indian or may be Indian, the Mi'kmaq Family and Children 's Services of Nova Scotia shall receive notice in the same manner as a party to the proceedings and may, with its consent, be substituted for the agency that commenced the proceeding. (1996, c. 10, s. 5)

I have considered these factors as well as those outlined by Justice Goodfellow in Foley v. Foley (1993) 124 N. S. R. (2d) 198 (S. C.) and Ffrench v. Ffrench (1994) 134 N. S. R. (2d) 241 (S. C.) in coming to my decision.

H. THE B.B. PLAN

The B.B. plan has been criticized, chiefly by R.L.F.'s counsel. The concerns include:

- lack of interest in K.J.F. until this proceeding;
- lack of response and participation in this proceeding from the time he received notice (May 2000) until January 2001;
- limited payment of child support;
- he was prepared at one point to allow Mr. R. adopt K.J.F;
- limited current income;
- plans to shift jobs, and possibly move;
- degree to which he would cooperate with access of D.D. and R.L.F.;
- limited ability to expose the children to Native culture.

The lack of contact is disturbing, though R.L.F. does acknowledge in her evidence that she did "move around a lot". Also it does not seem that the paternity issue respecting K.J.F. was put to rest until 1999. The B.s state that their participation in this proceeding was initially limited by distance, finances and R.B.'s health and pregnancy. Even accepting this it is hard to understand their lack of contact with the agency from July 2000 to January 2001.

I have less difficulty with the assertion concerning child support. B.B. appears to have responded responsibly to every application - travelling,

retaining counsel, going to expense and inconvenience - only, on more than one occasion, to have seen the proceeding effectively or formally abandoned as a result of R.L.F. moving.

The discussion with respect to a possible adoption by Mr. R. was some years ago.

I have referred to B.B.'s evidence concerning his family's current financial situation. He is prepared to move, and shift jobs, to improve the family financial situation. The family appears to have sound financial management.

B.B. says he will follow Mr. Manning's recommendation(s) regarding access. R.L.F.'s evidence suggests she believes access can be worked out with B.B. B.B. says that he would like paternity testing done with respect to S.N.F. and D.D. Around the time of the commencement of this proceeding, D.D. himself questioned (his) paternity of S.N.F. It would be in S.N.F.'s interest to deal with this issue, to make it a non-issue before she left the care of the Department of Community Services.

The B.s cannot offer the girls an opportunity to live and breathe Native culture, the culture of the [...] Band, on a day to day basis. They have said clearly that they would do whatever they could, whatever was

suggested or recommended to facilitate the girls' education and experience of this portion of their heritage. The girls are now registered status Indians.

There is some suggestion that B.B. has a temper that mitigates negatively. The suggestion is that this is seen in two incidents - one his reactions at the time he and R.L.F. broke up in 1995 - in putting her things out when she went out for a good part of the night and reacting to a threat from her with a statement that he'd have a friend come over and "bring a knife", and second in getting verbally angry with Kandi Swinehammer, the Department of Community Services Social Worker in January 2001 when she advised him of the O. adoption plan. The first incident occurred years ago at the time of their break-up. The evidence indicates it was isolated. R.L.F. was unequivocal in stating there was no violence in their relationship. His getting angry at Ms. Swinehammer reflected, it appears, his then expectation that he would be kept appraised of significant developments in the proceeding.

B.B. is Francophone. He has moved back to Quebec in part to be closer to his family and culture. The girls can attend English school, R.B. having been educated in English. B.B. states his language and culture is important to him. K.J.F. is his child.

The B.s present as a young couple who are hard-working committed parents. Their relationship appears stable. They are united in making the

application for custody. They have extended family and friends in Quebec. R.B. is prepared to be “at home” with the children.

I. THE S.W.J. PLAN

The plan put forward by S.W.J. has a number of positives:

- the family lives in a very comfortable home;
- the older children in the home are prepared to support a “placement”’
- the household income is the equivalent of at least $60,000.00 to $75,000.00 per year;
- there is extended family;
- the home is stable - no relocation is planned or anticipated;
- day care and school arrangements are available, concrete and identified. They appear positive.
- there are numerous activities available to the children;
- the school offers Cree language instruction;
- S.W.J. has parented for a number of years;
- there is community and institutional support;
- the children can experience, learn and live nature culture.

This plan, like the B.s’, can be (and has been) criticized (by B.B.’s counsel and that of the Agency).

R.I., S.W.J.'s common-law husband, has put nothing before this court. He has been "too busy" to facilitate completion of the homestudy report - through completion of the criminal record check and medical. He does not appear to have even spoken to E.S. or any other representative of [...] Human Services Corp. S.W.J. says the family supports her application. Chief M.A.S. speaks well of him. It is difficult to understand (even given the short timeline from the commencement of S.W.J.'s application) the total absence of participation by R.I..

It is difficult to see S.W.J.'s application as being independently made. She has known of this proceeding since January and came forward on Friday, April 27th under pressure, I would conclude, from R.L.F. She is a sincere, well-meaning, capable woman. She is confused, however, as to the role she would take with these children - and the role [...] Human Services Corp. would take. Her evidence reflects that. So does the evidence of D.P.. The confusion gives rise to concerns - about what would happen if R.L.F. visited, moved to Saskatchewan or wanted the children back.

S.W.J. and those who supported her plan emphasized the importance of heritage and custody for K.J.F. and S.N.F. They did so, in large part, singularly - referring to Native culture, heritage and tradition as if

this was all that these girls had in their background. There was little or no mention of other heritage unless/until specific questions were put.

J. PARENTAL RIGHTS

I do not consider that B.B., as a natural parent, has a "parental right" to custody (see Re: B. C. Birth Registration No. 99-00733 (2000) 4 R. L. F. L. (5th) 17 (B. C. C. A.)). Custody (and access) here, as with all cases, must be decided in accordance with the best interests of the child and statutory guidance.

In King v. Low (1985) 44 R. L. F. L. (2d) 113, the Supreme Court of Canada made it clear that parental rights are subordinate to the welfare of the child:

> Parental claims must not be lightly set aside, and they are entitled to serious consideration.. Where it is clear that the welfare of the child requires it, however, they must be set aside. (per MacIntyre, at p. 126).

As parents, the views and plans of R. L. F., B. B. (re K. J. F.) and D. D. (re S. N. F.) are all entitled to "serious consideration".

Section 18(4) of the Family Maintenance Act creates an equal entitlement to care of children between parents subject to order of a court of competent jurisdiction. This proceeding is not between parents per se.

The reference to children being removed from supervision or care of parents only when all other measures are inappropriate (in the Preamble to the Children and Family Services Act) must be read in the context of an Act that deals with child protection, permanent care and adoption, not private custody proceedings.

The references to 'family" in the Preamble to the Children and Family Services Act must be similarly read in context and, as well, considered broadly.

K. SEPARATION OF SIBLINGS

Courts in custody proceedings have traditionally been reluctant to separate siblings. Here no one suggests that K.J.F. and S.N.F. should be separated. All agree that it is in the best interests of the children that they remain together. I have considered their interests separately It is not in S.N.F.'s interest (nor K.J.F.'s) that her (S.N.F.'s) interests be distinguished to the degree that they be separated. That said, the children's paternity is different.

L. RACE, HERITAGE AND CULTURE

The Children and Family Services Act acknowledges in its Preamble (and s. 3(2)) that 'the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child."

Both plans present arguments based on these principles. Where relevant these issues are or should be part of any custody decision.

K.J.F. has Native and Francophone heritage. Her mother, R.L.F., has not embraced her Native heritage in an experiential sense. She has known of her Native heritage, I would conclude, for a lengthy period of time. She feels it is important that her child(ren) experience the culture of her origin. K.J.F.'s father if Francophone. He has grown up in, left, and returned to Quebec. He asserts his heritage as being important to K.J.F. (and S.N.F.).

S.N.F. has Native heritage, through her mother. Her father is of Irish and French descent.

Dr. Emily Carasco has observed (at p. 29, Race and Child Custody in Canada: Its Relevance and Role (1999) 16 Cdn. J. Fam. Law, 11):

> Race is an immutable part of a person in a race conscious society; it is part and parcel of a child's identity and self acceptance. To ignore the issue of "race" in custody decisions where it may be relevant is to deny the child in question his or her identity and/or related needs. It has been

> said that a sense of identity includes the elements of emotional security, knowledge of one's background and the experience of being perceived by others as worthwhile. Congruence between individual and communal identities contribute to a healthy personality. There are and will continue to be situations where one or both parties seeking custody of a child will have a racial background (skin color) from that of a child. In assessing the child's needs - current or future, that relate to the child's identity as determined by skin color, a decision maker may have to decide how and by whom these needs are best met. The issue of these race-related needs may be raised by either of the parties or the decision maker in a best interests determination.

I have limited evidence concerning the physical appearance of the children. D.D. describes neither as appearing Native, "..they don't look Native, they look predominantly Caucasian". The assessment report, however, suggests that S.N.F., at least when she was younger, appeared Native. It has not been argued that either child has a distinct racial appearance that of itself creates needs that can be better met by a person with the same racial identity. It would be inappropriate for the Court to inject appearance as an issue where there is insufficient evidentiary foundation to do so, where the parties have chosen not to.

Racial, cultural and linguistic heritage is (are) an issue(s), however, that must be considered when examining the "plans" before the Court.

The evidence of R.L.F., the mother of the children, is that it is important that the children know "both sides" of their heritage. Similarly

S.W.J. said this was “not winner take all” but that what was important was that the children connect to their culture.

The evidence of D.P., Chief M.A.S. and Mr. Allbright came from a tribal or band perspective that was informed by the historical treatment of Native children by child welfare agencies - particularly that that occurred in Western Canada in the “Sixties Scoop” years. Their evidence emphasized the need to repatriate children, to have Native children live and learn Native language, culture and heritage experientially. Their evidence is important, informative and powerful.

That said, I cannot consider it here without considering the non-Native heritage of K.J.F. and S.N.F. I make this point not to criticize their evidence but to recognize its limits. Those limits include the haste with which their evidence came to trial. Chief M.A.S. and Mr. Allbright simply did not have much time to fully examine or consider the background of this proceeding and the children. D.P. and his agency while “involved” since January, in reality operated under similar constraints. I do, however, feel he and his agency might reasonably have been expected to seek to become informed of the children and this process through sources other than R.L.F.’s counsel - particularly the Department of Community Services and Mi’kmaq Family and Children’s Services Agency. Each of these witnesses acknowledged their respective limited knowledge regarding the heritage of the children through their fathers and of the proceeding

generally. I do recognize and believe that the Tribe does have an interest, perhaps akin to a *parens patriae* interest in all its children. I see the evidence of D.P., Chief M.A.S. and Mr. Allbright as being given at least in part from this perspective (see Fraser, C.; Protecting Native Americans: The Tribe as *Parens Patriae* (2000) 5 Michigan Journal of Race and Law, 665).

Both children are of mixed heritage - K.J.F. of Native and French heritage, S.N.F. of Native, French and Irish heritage.

B.B. is Francophone and lives in Quebec. D.D. has French roots that apparently never took. B.B. asserts that his heritage is important as that of R.L.F. when their child is considered.

Ms. Litke, on behalf of R.L.F., submitted in her closing brief:

> It is expected that counsel for B.B. will assert that the preservation of K.J.F.'s French-Canadian heritage is equally as important a factor to consider in determining custody. It is submitted that B.B. can play a significant role in developing K.J.F.'s understanding of this aspect of her heritage through access contact and by sending her materials. Just as the [...] Nation has information on the Internet, so too is there information about the Province of Quebec. It is also important to note that K.J.F. will have the opportunity to learn the French language and French-Canadian history in school.

There is very limited evidence, however, to support the notion that recognition of B.B.'s heritage would be actively fostered and facilitated by the S.W.J. plan. B.B. and R.B. have been much more assertive in expressing their commitment to recognizing that the heritage of the children is not singular. There is no denying, however, the fact that learning or experiencing heritage, culture and language from a distance is inevitably inferior to living it.

Ms. Litke also suggested:

> D.D. indicated that his family background was French and Irish. There was no evidence to suggest that D.D. or his family members are Francophone or immersed in French-Canadian culture. For S.N.F., the importance of French-Canadian culture in determining a custodial arrangement for her is minimal.

The consideration for S.N.F. <u>is</u> different, but I would not say it is a "minimal" consideration. To take Ms. Litke's argument a step further - R.L.F. is Native and has known that for, it would appear, most of her life. She has never chosen to inform herself of or become involved in Native culture as, for example, S.W.J. and Mr. Allbright have. I do not believe R.L.F.'s failure to embrace her Native heritage and culture should in any way diminish or make "minimal" its importance to K.J.F. and S.N.F. Dormancy of cultural education should not, in my view, be treated in <u>totally</u>

opposite ways for different sides of a child's heritage - being important for one line of heritage, "minimal" for the other.

Different heritage may, because of its history, the child's appearance, or other factors, require different consideration. Here neither of S.N.F.'s parents are putting forward a plan to personally care or provide for her - on a day to day basis - or in terms of education and experience of her cultural heritage.

This is not a situation where either child has, or has been given, a personal sense of racial, cultural, or linguistic identity by their parents or extended family. Consideration of their heritage and possible future experience of it, in all its contexts, should, however, be a factor in the Court's consideration of "best interests".

In Sawatzky v. Campbell, 2001, Carswell Sask. 380 (Sask. Q. B.), Krueger, J. considered a custody dispute between an aboriginal father and non-aboriginal mother. He stated, at p. 4:

> The *Children's Law Act*, 1997, S. S. 1997, c. C-8.2, requires the Court to do what is in the best interest of the child. The Act makes no specific reference to race, ethnicity or culture. Heritage is an important factor to be considered where the child is born into two different cultures, but it is only one of the factors to be considered.

The Family Maintenance Act makes no reference to race, ethnicity or culture. The Children and Family Services Act, in its Preamble and Adefinition" of best interests (s. 3(2)) does refer to cultural, racial and linguistic heritage, and emphasizes their importance. It does so in an Act considering processes that potentially terminate parental rights - through permanent care or adoption orders. It provides little guidance to a court considering a custody case between children of mixed heritage.

The sentiment that the Court should be reluctant to value one stream of heritage over another is reinforced by s. 18(4) of the Family Maintenance Act:

Section 18(4):

> (4) *Father and mother are joint guardians.* Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
> (a) provided by the *Guardianship Act;* or
> (b) ordered by a court of competent jurisdiction.

Clearly "mixed racial backgrounds" are a factor in "the central inquiry..of best interests" (Anderson v. Williams (1988) B. C. J. No. 428 per Cohen, S. C. J. at p. 4). More than one court when considering the "best interests" of mixed racial children has considered the degree to which a parent or applicant recognizes, supports and encourages the mixed racial

and cultural background and heritage of the child(ren). (See Camba v. Sparks (1993) 124 N. S. R. (2d) 321 per Daley, F. C. J. at p. 330; Ffrench v. Ffrench (1994) 134 N. S. R. (3d) 241, per Goodfellow, J. S. C. at p. 247; D. H. v. H. M. (1997) B. C. J. No. 2144 per Bauman, J. S. C. at p. 12 and 13, affirmed at (1988) 1 S. C. R. 328 (S. C. C.).)

Courts are reluctant to shut cultural doors for children. These cases suggest that children of mixed heritage should, subject to other considerations, be provided with sufficient cultural information and experience to allow them to make their own choices as they get older.

In D. H. v. H. M., Bauman observed (at p. 11):

> The submission that..aboriginal heritage is virtually a determining factor here, oversimplifies a very complex case..

While not argued in this fashion, some of the evidence before me was presented in a manner that was singular in analysis. The evidence of R.L.F. (and to a degree S.W.J.) did recognize the children's need for connection to both lines of heritage.

Racial, cultural and linguistic heritage are important. I am satisfied that K.J.F. and S.N.F. are more likely to be meaningfully exposed to their maternal and paternal heritage in the care of the B.s.

I do, however, have concerns about their ability on their own to optimally facilitate “identity and connection” to Native culture. I will address this further.

M. CUSTODY AND ACCESS

I have considered the statutory provisions outlined, and the evidence and arguments before me.

1. Custody

I am satisfied that the decision most consistent with the best interests and needs of both of these children is to place them in the care and custody of B.B.

I am concerned that the plan of S.W.J. is born in part from the pressure of others. I am uncertain of the views and role of her husband, R.I.. I have no evidence directly from him. The evidence in support of this plan approached heritage to a large degree in a

singular fashion. The evidence of S.W.J. and those who supported her is (even considering the fact that her application was brought both under the Children and Family Services Act and Family Maintenance Act) confused as to her role with the children, and at different points and times contemplated R.L.F. taking the children back in the future. It is not in the interest of these children to consider this without dramatic changes in R.L.F. - personally and in lifestyle. Neither S.W.J. nor the [...] agency have taken any significant steps to independently inform themselves of R.L.F.'s and the children's backgrounds, even as disclosed by the full documentary history of this proceeding. I am uncertain whether they would approach R.L.F.'s future involvement in an independent and critical fashion - and believe that the children's interests demand such an approach.

B.B. has the support of his wife, R.B. Both testified. They appear stable, though limited, financially. They are caring and responsible. They have two other children. They are ready to commit to providing K.J.F. and S.N.F. a long term stable home. They are prepared to provide access to R.L.F. and D.D. That access should be limited for the reasons outlined by John Manning. The B.s recognize that the two children are Native and have Native heritage. They are prepared to work on/at ensuring that the children are informed of and experience this heritage.

2. Access

S.W.J. has not sought access.

R.L.F. shall have, once the children are transferred to B.B.'s care, access by telephone (at her expense) once each month with additional calls Christmas Day, the girls' birthdays and Mother's Day. Should she travel to Quebec she will have access supervised by B.B. or his designate. This access is, I believe, consistent with the recommendations of Mr. Manning and evidence as a whole.

D.D. will have access by telephone (at his expense) to S.N.F. once each month with additional calls being made at Christmas, S.N.F.'s birthday and Father's Day. Should he travel to Quebec he shall have access (including overnight) as arranged between he and B.B. The access need not be limited to Quebec. This access need not be supervised. There being no application for leave concerning K.J.F., I will make no order. There would appear to me no reason why K.F.J. should not accompany S.N.F. for access to D.D., however. Finally, D.D.'s access shall have two conditions - that he not use or be under the influence of alcohol during it, and that he cooperate with paternity testing with respect to S.N.F. on the request of the Department of Community Services. In the event the paternity

testing discloses that he is not the natural father of S.N.F., the access will continue as ordered, subject to further order of a court of competent jurisdiction or agreement by both D.D. and B.B.

B.B. will provide D.D. and R.L.F. with his (and the children's) residential address and phone number at all times.

D.D. and R.L.F. shall provide B.B. with their residential address and phone number at all times.

B.B. will provide R.L.F. and D.D. with a summary of the children's activities, including copies of report cards and an outline of any medical or other professional consultations prior to January 15, 2002, July 15, 2002; January 15, 2003 and each six months thereafter.

3. Additional "Conditions" re Custody

The B.s have expressed a willingness to inform, educate and facilitate K.J.F.'s and S.N.F.'s experience of their Native culture.

They will need assistance. S.W.J. has not asked for access nor suggested that she has an ongoing formal role in this regard. I have no doubt that she would/will assist the B.s in any way that she can.

R.L.F. is not experienced nor informed with respect to her and the children's Native heritage.

Most often where parents of children have different heritage, each parent takes some individual responsibility for imparting their heritage to the child(ren). This is perhaps particularly so where parents are separated. This will not occur for K.J.F. and S.N.F. with respect to their maternal heritage. R.L.F. is not able to fulfill this role.

The [...] Band has an interest in those who are members of its band - particularly its children. In this proceeding the Band did not ask for standing nor to be heard apart from the testimony of witnesses supporting S.W.J. The Band clearly, however, has interests apart from those it has in common with S.W.J. It has an interest in ensuring its members, its children learn and experience to as great a degree as is possible the benefit of their Native heritage and culture. The majority of the Band's members live off its reserve. Chief M.A.S. is recognized as an authority on cultural education.

As a condition of the custody order, B.B. shall provide his (and the children's) residential address and telephone number to Chief M.A.S. or her designate. He shall also make a formal written inquiry/request to Chief M.A.S. for advice and assistance with respect

to informing K.J.F. and S.N.F. of Native culture and, as they get older, experiencing it. I use the word “informing” in its broadest sense.

This request will be done within two months and be copied to the Court and parties. My hope would be that within a period of one year the Band would assist B.B. through the provision of, or recommendation of, resources and activities (in short, a plan) to assist the B.s in ensuring the children’s exposure to and experience of their Cree heritage. This plan will also be copied to the Court and the parties. Presumably the advice would continue to be available in the future - and not be a one time event. I have chosen a period of one year, recognizing that the children face a period of adjustment in going to the care of the B.s and the fact that my direction may be seen as “new ground” to the Band. They should have ample time to respond should they choose to.

A condition of the custody order will be that B.B. attempt to, as great a degree as possible, comply with the reasonable written recommendations of the Band in this regard. Where financial limitations impact their ability to follow through with such recommendations, the B.s will advise the Band. The evidence before me indicates that the Band and [...] Human Services Corp. each have some “discretionary” funding. Whether they provide such funding would, of course, be up to the Band. The Band might also be

expected to provide the B.s with a specific person with whom they might consult on these issues.

In his post-trial submission, Eldon Lindgren, Q. C., counsel for S.W.J., indicated:

> One last issue is the connection to the Court proceedings of [...] First Nation and [...] Human Services Corp. Both have suggested their willingness to participate in assisting any of the parties in providing support in the care of K.J.F. and S.N.F. While the Court cannot order them to do anything, the Court could make an order providing that certain events would only happen if arrangements were reached with the Band and the [...] Human Services Corp. to do certain things and assist in the children's movements. Both the Band and [...]..would then as they have indicated consider such conditions and could agree to do them on a voluntary agreed upon basis..

If the Band chooses not to assist B.B. in the fashion I have recommended, that will be their choice. Such a decision would obviously impact upon the children's future experience of their Native heritage.

Until he receives recommendations from the [...] Band, B.B. will consult with Kevin MacDougall (or his designate) of Mi'kmaq Family and Children's Services and follow his (their) reasonable recommendations respecting the Native heritage of the children.

Mr. MacDougall's evidence indicates his agency is experienced in the provision of such support.

N. ORDER

The order(s) in this matter will provide:

1. that as a cost of apprehension, paternity testing be conducted involving S.N.F., D.D. and R.L.F.;

2. that the Children and Family Services Act proceeding herein be terminated;

3. that pursuant to s. 18(2)(a) of the Family Maintenance Act, leave to apply for custody:

    (a) of S.N.F. (b. [in 1998]) be granted to B.B.;

    (b) of K.J.F. (b. [in 1996]) and S.N.F. (b. [in 1998]) be granted to S.W.J.

4. that B.B. have the care and custody of K.J.F. and S.N.F.

5. that B.B.:

(a) provide R.F.L., D.D. and Chief M.A.S. (or her designate) with his and the children's residential address at all times;

(b) within two months make a written request to Chief M.A.S. for advice and assistance with respect to informing K.J.F. and S.N.F. of their Native heritage;

(c) follow such reasonable written recommendations as Chief M.A.S. (or her designate) may make;

(d) consult with Kevin McDougall (or his designate) of Mi'kmaq Family and Children's Services respecting the Native heritage of the children and follow his reasonable directions;

(e) provide R.L.F. and D.D. (with respect to S.N.F.) with a written summary of the children's activities and an outline of any medical or other professional consultations, including copies of report cards prior to January 15, 2002, July 15, 2002, January 15, 2003 and each six-month interval thereafter.

6. that R.L.F.:

(a) have telephone access (at her expense) to K.J.F. and S.N.F. once each month; and Christmas Day, the girls' birthdays and Mother's Day;

(b) have access in the Province of Quebec as agreed to and supervised by B.B. or his designate;

(c) have such other access as agreed to between herself and B.B.;

(d) provide B.B. with her residential address and phone number at all times;

(e) advise B.B. prior to any application concerning access of what services of those recommended by the Assessment Services Report of July 6, 2000 or the John Manning *report* of May 2001 she has undertaken or completed.

7. that D.D.:

(a) cooperate with paternity testing with respect to S.N.F;

(b) have telephone access (at his expense) to S.N.F. once each month, and on Christmas Day, the girl's' birthday and Father's Day;

(c) have access in Quebec to S.N.F. as arranged and agreed to with B.B.;

(d) not use or be under the influence of alcohol during periods of access;

(e) have such other access, including access to K.J.F., as may be agreed to by B.B.;

(f) provide B.B. with his residential address and phone number at all times.

There will be no order of costs.

J. S. C. (F. D.)

Halifax, Nova Scotia