R.T., Re, 2004 SKQB 503

2004-12-10

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F.S.M. A.D. 1997

No. 46 J.C.P.A.

IN THE QUEEN'S BENCH

(FAMILY LAW DIVISION)

JUDICIAL CENTRE OF PRINCE ALBERT

IN THE MATTER OF *THE CHILD AND FAMILY SERVICES ACT*

AND IN THE MATTER OF

R.T., born [...], 1991("Dan")

M.T., born [...], 1992 ("Jane")

M.A.T., born [...], 1996 ("Maggie")

A.L., born [...], 2000 ("John")

K.A., born [...], 2003 ("Sally")

T. W. Klassen for Department of Community Resources and Employment

P. M. Cuelenaere and J. L. Claxton-Viczko — for the mother

H.A. (father of K.A.) — on his own behalf

V. E. Elliot-Erickson — for NASC Child & Family Services and [...] First Nation

G. G. Walen, Q.C. — for the children

R. W. MacNab — for the Attorney General of Saskatchewan

JUDGMENT — RYAN-FROSLIE J.

December 10, 2004

[1] Our greatest responsibility is to our children. How we shoulder that responsibility measures our success or failure as a society.

[2] This case involves the placement of five aboriginal children previously found to be in need of protection. The Department of Community Resources and

Employment (DCRE) has adopted a policy which provides that First Nations children will not be placed for adoption without the consent of the child's band and the First Nations agency, if any. All the children in issue here are members of, or entitled to be members of, the [...] band. That band, and its child and family service agency, have refused to consent to the adoption of any of the children. They assert it is an "aboriginal right" to speak for their children and to be involved in their placement. They do not want the children adopted by non-aboriginals because they do not want them to lose contact with their aboriginal community or their culture. Placement of the children is dependent upon the constitutional validity of the "aboriginal right" asserted and whether the policy breaches the children's *Charter* rights to equality and to liberty and security of the person.

Issues

1. What placement is in the best interests of the children?

2. Is there a constitutionally recognized aboriginal right to "speak for the children"?

3. Does the policy breach the children's *Charter* rights to "equality" and/or "liberty and security of the person"?

4. If the children's *Charter* rights are breached, what is the appropriate remedy?

Preliminary Matter

[3] As a preliminary matter, the issue of this Court's jurisdiction to deal with the constitutional questions in the course of the child protection hearing was raised by the Attorney General for Saskatchewan. OnAugust 31, 2004 this Court determined it had jurisdiction. What follows are the reasons for that decision.

[4] Two constitutional questions have been raised in this proceeding. The first constitutional question was raised by counsel for the children and may be summarized as follows: The policy or agreement not to facilitate, make available and/or allow the adoption of an Indian child, without the consent of the child's band, is invalid and of no force and effect because it violates ss. 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and is *ultra vires* the Province of Saskatchewan pursuant to s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3.

[5] The second question was raised by the Indian Child and Family Service Agency (NASC) as delegate of the Chief of the [...] First Nation. It was raised in response

to the question raised by counsel for the children. The band/agency submits that the adoption of a First Nations child by a non-First Nations family, without the consent of their band, violates s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982* and is *ultra vires* the Province of Saskatchewan pursuant to s. 91(24) of the *Constitution Act 1867*.

[6] The Attorney General for Saskatchewan, along with counsel for the Department of Community Resources and Employment, the band/agency, and the mother all argue the policy which has led to the constitutional questions is an adoption policy and should be dealt with under *The Adoption Act, 1998*, S.S. 1998, c. A-5.2. They argue a constitutional challenge at this point is premature as the policy only affects the children if this Court determines they should be placed permanently in the care of the Minister pursuant to s. 37(2) of *The Child and Family Services Act*, S.S. (1989-90), c. C-7.2. Counsel argue only if the Minister fails to place the children for adoption once a permanent order is made could there be a violation of the children's constitutional rights.

[7] Counsel for the children argues the policy affects the placement of children pursuant to *The Child and Family Services Act* and that the Department relies on the policy in fulfilling its role under that *Act* and in particular in meeting the requirements of s. 37(3). That section allows a Court to place a child in the custody of the Minister until he or she attains the age of 18 years if it is unlikely that an adoption plan would be made if the child were permanently committed to the Minister.

[8] A superior court of general jurisdiction is a court of competent jurisdiction for the purposes of s. 24(1) of the *Charter*: See: *R. v. Rahey*, 1987 52 (SCC), [1987] 1 S.C.R. 588.

[9] Section 29(1) of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 provides authority for the Queen's Bench Court to make determinations regarding constitutional issues. It empowers the Court to deal with all issues arising from a matter to avoid multiplicity of legal proceedings. Moreover, this Court's *parens patriae* jurisdiction enables it to consider a constitutional challenge dealing with the *Charter* rights of children. The Court can act on constitutional challenges dealing with children not only when injury actually occurs but also if injury is "apprehended". See: *E. v. Eve (Guardian ad litem)*, 1986 36 (SCC), [1986] 2 S.C.R. 388.

[10] The preliminary issue of jurisdiction turns on whether the policy is one which has effect under *The Child and Family Services Act* and might adversely affect the children's rights pursuant to that *Act*. The policy in issue was filed by the Department of Community Resources and Employment in this proceeding on February 27, 2004. It is

entitled "planning for permanent and long-term wards". It is a policy of the Department of Community Resources and Employment and it deals with the Department's approach to "placing" First Nations children who are in need of protection. The Department filed the policy in support of their recommendation to place the children in issue in foster care until they attain the age of 18. The first page of the policy refers to *The Child and Family Services Act.* The policy was raised by Tanya Frerichs, the children's social worker, in response to the requirements set out in s. 37(3) of *The Child and Family Services Act.* (See: Affidavit of Tanya Frerichs sworn February 20, 2004 and policies filed by the Department on February 27, 2004.) Section 37(3) of *The Child and Family Services Act* requires the Court to determine whether an adoption plan is likely for a child before making a long-term order with regard to that child. The policy in issue directly impacts that determination and its constitutional validity is therefore an issue that must be determined in this hearing. Moreover, the policy appears to have influenced the Department's recommendations for the children in issue here. The constitutional validity of the policy is intertwined with the question raised by the Agency/band. The two questions need to be dealt with together and the proper place to do so is within the protection hearing.

[11] While the constitutional question raised by counsel for the children refers to s. 12 of the *Charter* and s. 91(24) of *The Constitution Act, 1867*, no argument was presented on these sections. Accordingly the Court assumes there is no issue with regard to them.

Facts

[12] The evidence is uncontroverted. To protect the children's identities, pseudonyms are used throughout this judgment.

Dan, born [Birth date] (age 13) and Jane, born [Birth date] (age 12)

[13] Dan and Jane reside together and have been in their current foster home since the end of June, 2003. Both of them have experienced at least 13 foster placements. Their saga with the foster care system began in March of 1996 when they were just five and four years of age, respectively. Since that time they have been in care over five years. They were last apprehended on June 28, 2002.

[14] Dan is 13 years of age. He began Grade VII in September, 2003 and had difficulty adjusting to a middle year school where more was expected of him. He particularly struggles with math. His effort and attitude are good and his marks are improving. Dan was described by his foster mother as always smiling but he is not as happy as he leads everyone to believe. His smile masks his true feelings. His foster

mother testified he has a "lot of sadness" in him and described him as "a little volcano" who holds everything deep inside until he simply erupts. Dan is now in counselling.

[15] Jane is 12 and was in Grade V at the time of the hearing. She does well at school though she struggles with reading. She is determined, however, to learn. The 2003/2004 school year is the first time Dan and Jane have spent an entire school year in just one school. They have been in as many as three different schools in a single school year. Like her brother, Jane is in counselling. She is a child who needs a lot of reassurance and praise but most importantly, she needs something "to control" to help her cope. Her need "to control" has led to problems for Jane – power struggles with her teachers and conflicts with other children, but the counselling is helping.

[16] Dan and Jane's foster mother describes them as "good kids" and "very respectful". She states that 99% of the time they try their best. They are very bright and both have a good sense of humour. They have no physical limitations and their behavioural issues are improving. Neither child is "fussy" about sports and they are not involved in any extracurricular activities, though they have both attended bible camp during the summer which they love. Dan enjoys his video games and Jane has a karioke machine which she delights in using. Their foster mother testified she is not aware of any cultural concerns with regard to these children. Their school has a strong aboriginal presence, both in terms of students and curriculum. Their foster mother is Metis and involves the children in both Metis and aboriginal festivals and events. Other than their foster mother, the only significant relationships these children have are with their biological mother and siblings. Dan and Jane's contact with their mother and siblings is very important to them. In the words of their foster mother, "it is who they are and how they identify themselves." Family visits for all the children occur approximately once a month. The visits occur at the Department of Community Resources and Employment and last two hours. There is no contact between the children or the children and their mother outside these visits. As of April, 2004, the mother had not attended a visit since December, 2003, though visits between the siblings have occurred monthly.

[17] It was obvious from the foster mother's testimony that she is deeply committed to Dan and Jane. There was pride and love in her voice as she described these children and her evidence discloses a great deal of sensitivity to their needs. For example, she gave them a disposable camera so they could have pictures of their family. Pursuant to s. 29 of *The Child and Family Services Act*, I interviewed both Dan and Jane. The purpose of speaking with these children was to see if they had any special wishes or concerns. The children's expressed wish is to remain with their current foster mother.

[18] Dan and Jane's foster mother is 31 years of age and in good health. In addition to being a foster parent, she works part-time as a special care aid. She has four other foster children in her care. Her mother lives with her and assists in caring for all the children. She testified she has never given any thought to adoption or being designated as a person having sufficient interest with regard to Dan and Jane as the Department has always made it clear the children were not hers. It was obvious from her testimony that the Department had not explored with her any ways in which she could be a resource to these children other than as a foster parent. Once advised of the options, Dan and Jane's foster mother indicated she was interested in being a permanent resource but felt a designation as a person of sufficient interest would cause "differences" among the children in her care.

Maggie, born [Birth date] (age 8)

[19] Maggie was a little over a month old when she was apprehended for the first time on April 19, 1996. She has now spent more than five years of her brief life in foster care. As of April, 2004, Maggie was in Grade II and the top of her class. She reads very well and enjoys Phys. Ed and art. Maggie has no physical impairments.

[20] As of January 22, 2004, Maggie was placed in a therapeutic foster home. Maggie's current foster parents have recently been designated as "therapeutic" and Maggie is their first therapeutic placement. Maggie's case worker, Ruth Bankhead, explained that the purpose of a therapeutic home is to "stabilize" a child's challenging behaviours after which the child is reintegrated into the regular foster care system. Reintegration generally occurs after two years. Therapeutic homes are available for children with high needs and normally provide more supervision. Therapeutic parents take training to deal with a number of issues and are more skilled in managing challenging behaviours. The only other child currently in Maggie's home is her foster parents' 15-year-old son. Maggie's foster mother described her as a "good girl", "very beautiful", "kind", "helpful", "considerate" and "outgoing". She had no concerns with regard to Maggie's behaviour other than Maggie had deliberately tried to cause problems between the foster mother's adult daughters and between one of those daughters and her boyfriend. Her foster mother was unaware of any cultural concerns with regard to Maggie. While Maggie's foster parents live on a reserve, they do not practice the native culture. Maggie's foster father is a pastor and Maggie attends his church.

[21] Ruth Bankhead, Maggie's case worker with the Department, testified Maggie was designated as a special needs child because of the number of foster placements she has been in (more than 20) and behaviours which have arisen including self-harm, aggression towards younger children, manipulation, stealing and lying. Because of the number of foster care placements, there was concern that Maggie might

have an Attachment Disorder. During an adjournment in these proceedings, Maggie was assessed by a registered psychologist, Rosa Camponi, who confirmed Maggie suffers from Reactive Attachment Disorder (Disinhibited Type) ("RAD"). Ms. Camponi's report was filed with the consent of all parties as Exhibit D-3 in these proceedings.

[22] Ms. Camponi's assessment reveals that by July, 2004 Maggie's foster mother was experiencing "moderate levels of concern" with regard to Maggie's behaviour. Maggie's disobedience had gradually increased and there was evidence of her being oppositional and engaging in "sneaky behaviour". There were also indications that Maggie deliberately hurt other children, exhibited poor physical boundaries and was being indiscriminately affectionate with adult females and small children. Maggie's foster mother was having difficulty accepting Maggie's need for physical affection which seemed "sexual" in nature to her. In Maggie's personal interview with the psychologist, she disclosed that she has been sexually molested by a male relative and by a male foster child. She also acknowledged "stealing" and "smoking".

[23] Ms. Camponi found that while Maggie presented as a pleasant and engaging child, the information obtained indicates she can be angry, manipulative, impulsive and controlling with little tolerance for frustration. Ms. Camponi suspects that Maggie's anger is "related to trauma experienced in her first two to three years of life" and that Maggie is redirecting that anger to targets such as siblings, teachers, peers and adult female caregivers.

[24] Dr. Margaret McKim testified on behalf of the children. She was qualified as an expert in the early social and emotional development of children and the inter-generational transmission of relationship patterns. She was qualified as an expert in the diagnosis, causes, effects of and solutions for Reactive Attachment Disorder. Dr. McKim is eminently qualified and I found her evidence of great assistance.

[25] Dr. McKim explained that Reactive Attachment Disorder occurs when a child experiences caregiving situations that have not allowed them to form any attachments. There are two types of RAD – inhibited, where a child is withdrawn; and disinhibited, where the child acts aggressively or is inappropriately intimate to relative strangers. All human beings are born with a predisposition to form close relationships. When they are deprived of those relationships, RAD can occur. An infant forms attachments to its caregivers and those attachments affect how the child develops relationships throughout their life. Attachments affect the child's sense of self and whether they view themselves as "worthy" of "valuable" individuals. One cause of RAD is children "bouncing" from foster home to foster home. There are studies that show a direct relationship between the number of foster placements and a child's self-esteem. The more placements there are, the more negative the outcomes personally and

interpersonally in adolescence, in adulthood and in future generations. In such situations, a child has no opportunity to develop a continuous sense of self. They have no sense of what a relationship is. Life is totally unpredictable. The disruption caused by multiple placements affects different children in different ways depending on their personality and personal circumstances. A child may become indiscriminately sociable, walking off with complete strangers. Their relationships may be very superficial. They may have highly conflictual personal relationships. Because individuals with RAD have no sense of personal intimacy, they often become sexually active at an early age and are prime candidates for teenage pregnancy. Some children are aggressive. They act out, resulting in peer conflict, spousal abuse, self-mutilation, depression and suicide. Other children are withdrawn.

[26] The longer a child is bumped from one home to another, the more likely the disorder will be severe, the more negative the outcome and the harder it is to turn around. The child builds walls to prevent themselves from being hurt and intervention becomes difficult. The problem becomes an inter-generational one because they have difficulty attaching to their own children. Dr. McKim testified it is not a "hopeless picture". While there is no cure for RAD, there are "best practices". First, the child needs to be assured of living in a permanent, safe environment with a high level of routine. Secondly, the child's caregivers must be educated with regard to RAD and how to manage it. Thirdly, once the child is stabilized in a home, treatment with a therapist should occur.

[27] Dr. McKim reviewed the evidence with regard to Maggie as well as Rosa Camponi's report and testified that Maggie fits all the criteria for RAD. In her opinion, there are other things such as "sexual abuse" which may exacerbate Maggie's situation. According to both Rosa Camponi and Dr. McKim, what Maggie needs most is a stable living arrangement to help her attach positively to someone and resolve her fear of loving and being loved. The key is permanence and that permanence must be demonstrated as Maggie has no sense of what a permanent relationship is. In addition, Maggie's family will require support in the form of training, respite and counselling. A therapist is needed to work with Maggie and her family to facilitate Maggie's attachment to them and to provide encouragement and support in managing Maggie's challenging behaviours. In Dr. McKim's opinion, if Maggie's foster parents were as committed as potential adoptive parents, it would be better for her to stay in her current foster home. The issue is one of commitment.

[28] Ruth Bankhead testified that Maggie has an endearing personality, is bright, and has no behaviours extreme enough to prevent adoption. In her words, Maggie is "very adoptable". Ms. Bankhead was not aware of any relationships, other than Maggie's biological mother and siblings, that would be worth maintaining. She testified that Maggie was looking forward to seeing her mother at Easter but her mother did not attend that visit. In Ms. Bankhead's opinion, the best resolution for Maggie would be

adoption. She testified children who are in foster care are often not able to stay in one place. Sometimes this is due to changes within the foster family and sometimes it is due to the child's behavioural issues. As children enter their teenage years, difficult behaviours often arise and the foster family may not be willing to keep the child. The result is the child is moved, even though they are at a stage where stability is important. With adoption there is a greater commitment by the parent and thus a "much greater chance" that the child will be able to stay in that placement and have security. Ms. Bankhead testified the only thing preventing Maggie's adoption is the band's consent.

John, born [Birth date] (age 4)

[29] John was only nine months old when he was first apprehended on December 4, 2000. He has spent all but 15 months of his life in foster care. John is now four years old and has been in his current foster placement since May 2, 2003. There is no evidence how many foster placements he has endured. His current home is in the same community as Dan and Jane's, though no additional contact between the children has resulted from the close proximity. There are no concerns with regard to John's behaviour or his physical or cognitive development. He is described as "very intelligent for his age". He counts, knows his colours and his manners. According to his foster mother, John has no special needs "other than a stable environment". John has blended in well with his foster family and refers to his foster parents as "mum" and "dad". His foster mother testified she is only interested in caring for John as a foster child. The "bond" for a more permanent commitment is just not there. John enjoys contact with his biological mother and siblings, though according to his foster mother, John does not recognize his biological mother when she misses visits.

Sally, born [Birth date] (age 23 months)

[30] Sally was apprehended at birth and has spent her entire 23 months of life in her current foster home. That household consists of her foster parents, their 13-year-old grandson whom they are raising, and another foster child who has been in the home over two years. Sally's foster parents are not aboriginal. They were married in 1983 and have two grown sons and five grandchildren. Sally's foster mother is 52 years old, a homemaker and in good health. Her foster father is 65 and nearing retirement from his job as a truck driver. Their home is located on an acreage with lots of animals and a yard that is kid orientated with slides and play equipment.

[31] Sally's foster parents view her as "part of their family" and love her as though she was their daughter. For Sally, her current home is the only one she has ever known. She is very attached to her foster family. Sally takes a long time to build new

relationships and the impact of removing her from her current home would be significant. Sally is starting to walk and talk and is described as "cautious" around strangers. She may suffer some developmental delays and her foster mother has requested an assessment. According to Tanya Frerichs, Sally's case worker, Sally is scheduled to be assessed for Fetal Alcohol Spectrum Disorder as there are indications Sally's biological mother consumed alcohol during her pregnancy. Sally has been diagnosed with Hepatitis C which she contracted *in vitro* from her mother. Sally's foster mother views contact between Sally and her biological family as important. While she is not aware of any cultural concerns with regard to Sally, her foster mother would be willing to facilitate Sally's involvement in aboriginal culture. Sally's foster parents love her and want her to remain in their home. In that regard, they are prepared to consider any option – long-term care, a person of sufficient interest order or adoption. From the evidence, it was apparent the Department had not canvassed any of these options with them prior to the hearing.

The Department Recommendations:

[32] David Phillips testified on behalf of the Department. He has been an adoption worker for the Department for 10 years and prior to that was a family service worker. He testified that normally when a child is committed to the Minister pursuant to a permanent order under *The Child and Family Services Act*, that child is registered for adoption. According to Ms. Bankhead, the adoption process starts "almost immediately". This process is not followed for First Nations children. They are not placed for adoption without band approval and that approval is rarely given. The treatment of First Nations children in this fashion is based solely on department policy. According to Mr. Phillips, foster parents often adopt children in their care. In fact, the Department would question the long-term commitment of foster parents who were unwilling to adopt children in their care who were permanently committed to the Minister. Mr. Phillips also testified the Department favours open adoptions which allow continued contact and/or communication between a child and their biological family. In his experience adoptive parents honour such agreements. Section 9 of *The Adoption Act, 1998* also provides for assisted adoption where the Minister provides financial assistance to adoptive parents of Crown wards where a child has special needs or there are special circumstances. The assistance amounts to 90% of foster care rates.

[33] Tanya Frerichs testified for the Department. She has been a social worker with them since July, 2002. According to Ms. Frerichs, the Department can provide financial assistance of $270 per month where children are placed with persons having sufficient interest. In addition to the $270 per month, those individuals would also be entitled to receive the child tax credit. Ms. Frerichs is the case worker for all of the children except Maggie who is now in the therapeutic program. In her affidavits filed as part of these proceedings, Ms. Frerichs attested that there are no extended family or band

members willing to take these children. Ms. Frerichs testified the children are all adoptable but would not be placed for adoption if a permanent order is made because the band will not consent. In her words, "apart from the agreement between the Department and the First Nations band... there are no factors that would prevent the children from being adopted." Ms. Frerichs testified that a long-term order is in the best interests of the children because they are all in "stable placements" and such an order would ensure ongoing contact with their biological mother and their siblings.

[34] The children's maternal grandmother, who resides on the [...] reserve, would like "occasional" visits with the children at her home. The maternal grandmother has not seen the children for quite some time, though there was no evidence when the last visitation occurred. Neither the Department nor NASC recommend her as a long-term resource for these children though they do not oppose visits as approved by the Department.

[35] Dr. Katz testified on behalf of the NASC Agency and the [...] band. He is an eminently qualified and internationally-recognized psychologist who has spent many years studying indigenous people. He was qualified as an expert on the formation of self-identity from a cultural, familial and historical perspective as well as an expert in the area of attachment and building relationships, and the different notions of family that exist between First Nations and western people.

[36] Dr. Katz describes self-identity as having a sense of who you are. It encompasses an individual's sense of belonging or being connected to something. If an individual does not have a strong sense of identity, it affects their self-esteem and ability to act responsibly. In Dr. Katz's opinion, culture is the most important part of self-identity.

[37] Culture, for First Nations people is much easier to define than it is for "westerners". This does not mean western societies do not have culture, it simply means it is more "diffuse". Dr. Katz testified there can be tremendous cultural differences between First Nations people but there is a set of 15 common "values" which generally identify aboriginal culture. These values are set out in Exhibit B-2 which was prepared by a council ofSaskatchewan elders. Kinship is one of the "values" and is described as follows:

> Kinship: Our family is important to us. This includes our parents, our brothers and sisters who love us and give us roots, the roots that tie us to the lifeblood of the earth. It also includes extended family; grandparents, aunts, uncles, cousins and their in-laws and children. These are also our brothers and sisters and they give us a sense of belonging to a community.

[38] Dr. Katz testified that attachment is an emotional, psychological and spiritual bond to others. In western cultures, early attachment focuses on the nuclear family, that is the biological parents and siblings. For First Nations people, early attachment is to relatives and community. There is often a very profound attachment by aboriginal children to their grandparents, aunts, uncles and cousins. Cousins are often viewed as "siblings" and aunts as "mothers". Their homes are merely extensions of the biological parent's home. This is kinship. First Nations have custom adoptions – a vague concept that amounts to a continuation of the family. If children are unable to be cared for by their biological parents, then other family or members of the community step in.

[39] Dr. Katz testified that a child has a tremendous desire to be protected and cared for by their family. This is disrupted when a child is removed from their home. According to Dr. Katz, adopted children do not feel "special" because they were "chosen". They feel "unworthy" because they were not "good enough to be kept." Adoption in a child's early years is a "honeymoon" because identity is not an issue. While the formation of self-identity begins at birth, it is not until age three or four that children begin to have a clear sense of who they are. According to Dr. Katz, racism and negative stereotypes are a reality First Nations children must face. How they deal with this will determine whether they have positive or negative feelings of self-worth and self-identity. First Nations children need to have a relationship with their communities (reserves) so that they have contact with people who share their life experiences including racism and who can teach them to value and be proud of their heritage. If there is a strong First Nations presence, adoption with non-First Nations families can work. In Dr. Katz's opinion, if children cannot be placed with their family or extended family, then they should be placed with families where access to a child's home community, i.e. reserve, is possible. His evidence was premised on children having a connection to their reserve. In cross-examination, Dr. Katz admitted that a majority of First Nations children have never lived on reserve. He also testified he was not aware of any studies that deal with the apprehension of First Nations children or the failure of adoptions where First Nations children have been involved.

The Legislation

[40] Section 37 of *The Child and Family Services Act* governs the placement of children found in need of protection. That section reads as follows:

37(1) Subject to subsection (2), if the court determines that a child is in need of protection, the court shall make an order that the child:

> (a) remain with, be returned to or be placed in the custody of his or her parent;

(b) be placed in the custody of a person having a sufficient interest in the child; or

(c) remain in or be placed in the custody of the minister for a temporary period not exceeding six months.

(2) If, in the opinion of the court, none of the orders described in subsection (1) is appropriate, the court shall make an order permanently committing the child to the minister.

(3) Notwithstanding subsections (1) and (2), the court may, if it is of the view that:

(a) a child is in need of protection; and

(b) by reason of the age of the child or other circumstances, it is unlikely that an adoption plan would be made if the child were permanently committed to the minister;

order that the child be placed in the custody of the minister until the child attains the age of 18 years.

(4) In making an order pursuant to subsection (1), (2) or (3), the court:

(a) shall consider the best interests of the child;

(b) may consider the recommendations of the officer mentioned in subsection 36(2); and

(c) may consider the recommendations of a chief, a chief's designate or an agency that appears in court pursuant to subsection (11).

(5) In making an order pursuant to subsection (1) or (3), the court may:

(a) impose any terms and conditions that the court considers appropriate; and

(b) include in the order a provision respecting access to the child.

(6) If the court, in making an order pursuant to clause (1)(a) or (b), orders supervision of the child by the minister as a term or condition of the order, the period of supervision shall not exceed one year.

(7) In making an order pursuant to clause (1)(b), the court may direct that the order shall terminate after the expiry of a period, not exceeding one year, specified in the order.

(8) Any order made pursuant to clause (1)(a) or (b) or section 16 that is inconsistent with an existing custody order of a superior court shall be considered an interim order that is subject to a further order of a superior court.

(9) The court shall provide to each party to the proceedings a written summary of its reasons for determining that the child is in need of protection.

(10) Notwithstanding subsection 33(1), where an officer intends to apply to the court for an order pursuant to subsection (2) or (3) and the child who is the subject of the proposed hearing is a status Indian whose name is included in a Band List or who is entitled to have his or her name included in a Band List, the officer shall give 60 days' notice of the application for the protection hearing to the child's band or the agency, if any, that is providing family services to members of the child's band.

(11) Where a band or an agency has received a notice pursuant to subsection (10):

> (a) the chief of the band, the chief's designate or the agency may appear in court to make recommendations with respect to the application; and
>
> (b) where the chief, the chief's designate or the agency appears in court pursuant to clause (a), the band or the agency is a party to the proceedings.

Analysis

1. Best interests of the children

[41] Section 37 of *The Child and Family Services Act* sets out the orders that a court may make when placing children found in need of protection. That section sets out a hierarchy that the court must follow. Firstly, the court must consider the placements as set out in s. 37(1), that is, returning the child to his or her parents, placing him or her with a person having sufficient interest or placing the child with the Minister for a period not exceeding six months. Only if none of these orders are appropriate may the court permanently commit a child to the care of the Minister pursuant to s. 37(2). The court may also consider placing a child in the custody of the Minister until age 18 pursuant to s. 37(3). This is often referred to as a "long-term order". Long-term orders differ from permanent orders in a number of respects. Firstly, a long-term order is only appropriate where it is unlikely a child will be adopted. Such orders require children to be maintained in foster care until they are 18. Permanent orders, on the other hand, are made with the understanding that the child will be available for adoption. A court can attach conditions to a long-term order including provisions respecting access. It cannot do so with a permanent order (s. 37(5)). A long-term order can be varied if there is a change of circumstances and it is in the best interests of the child to do so. A permanent order can also be varied but only if the child has not been adopted or placed in a home for the purpose of adoption (s. 39(1) and (2)). In making a placement order, the court is directed, pursuant to s. 37(4) to consider the best interests of the child and may consider the recommendations of the Department and of the chief, a chief's designate or an agency. Section 4 of *The Child and Family Services Act* sets out a number of factors the court must take into account in determining a child's best interests. Those considerations are: (a) the quality of the child's relationships; (b) the child's physical, mental and emotional level of development; (c) the child's emotional, cultural, physical, psychological and spiritual needs; (d) the proposed homes; (e) plans for the child's care; (f) the child's

wishes, where practicable; (g) the importance of continuity; and (h) the effect on the child of a delay in making a decision.

[42] In this case, there is no extended family or band resources available to the children. They have no relationships worth maintaining other than those with their biological mother, their siblings, and to varying degrees, their current foster parents. These children have been in the care of the Department under s. 9 agreements and interim orders for a substantial portion of their lives, far longer than is in their best interests. As such, committing these children for a further temporary period to the care of the Minister is not appropriate. That leaves the Court with three possible options for the placement: (1) with a person having sufficient interest; (2) a long-term order which places them in the care of the Minister until age 18; or (3) a permanent order which would normally allow them to be placed for adoption. The Department and the NASC Agency/band recommend long-term orders for all of the children so that they can continue to have contact with their mother and each other and so that they can maintain ties to their aboriginal culture and community. There is no evidence these children have ever lived on their reserve or that they have any contact with it.

Dan and Jane

[43] Dan and Jane's best interests dictate that they remain in the home of their current foster mother where they have now resided for more than 17 months. These children have been provided with an exceptional home where they know love and stability. They are very attached to their foster mother and she to them. She wants to care for these children on a permanent basis but in the interests of maintaining harmony in her home where there are other foster children, she would prefer a long-term order. I am satisfied her position does not detract from her commitment to these children. Their foster mother acknowledges the importance of family in Dan and Jane's life and has involved them in cultural activities. Dan and Jane have a strong bond with one another and it is important they remain together. It is also important as they enter their teenage years that stability and continuity be established for them. It is their stated wish to remain where they are. While it is possible that Dan and Jane might be adopted, there is no guarantee that they would be placed together. Given their ages, their emotional and cultural circumstances, the bond they have formed with their foster mother and their expressed wishes, it is in their best interests that they remain in their current foster home. This placement is consistent with the recommendation of all parties.

Maggie

[44] The evidence establishes that the most compelling need for Maggie is permanence. In Dr. McKim's words, "...there needs to be a personal commitment on the part of Maggie's caregivers to be there indefinitely for her". If Maggie can be established in a permanent home, she has a chance, with treatment, to form relationships and finally learn to love. Determining the appropriate placement for Maggie is difficult because there is no room for error. The Department and the NASC Agency/band recommend a long-term order with her continuing to reside in her current therapeutic home. This is also the position of Maggie's mother. Counsel for the children was less certain of the proper placement.

[45] The Court's concern is with the "permanence" of Maggie's current placement and the "commitment" of her foster parents. When Maggie's foster mother testified, Maggie had only been in her care three months. She has no attachment to Maggie and her commitment is uncertain. It is clear she does not want to adopt Maggie or be appointed as a person having sufficient interest. While the Department argued Maggie's best interests would be served by a long-term order, that was not the recommendation of Maggie's case worker, Ruth Bankhead. She recommended Maggie be adopted. Both Ms. Bankhead and Mr. Phillips testified parents who adopt generally have a greater commitment than foster parents and that that commitment often carries them through behavioural issues. Common sense dictates this is true. There are never any guarantees in life. Just as foster care placements break down, so adoptions can fail. The very nature of adoption which makes adoptive parents the "legal parents" of the children, for all intents and purposes, means those parents have a greater commitment to make the relationship work. Adoptive parents do not "retire" from their role as caregivers. Things like illness and moves which often lead to changes in foster placements, have no effect on adoption placements. Adoption, by its very nature, gives a greater guarantee of permanence and commitment than does foster care.

[46] Maggie's current placement is with therapeutic foster parents. There was no evidence as to the training necessary to be a therapeutic foster parent but given the purpose of a therapeutic foster home, which is to provide greater supervision and more skill in managing difficult behaviours, it would appear that such training is of a general nature and not specific to Maggie's Reactive Attachment Disorder.

[47] Maggie needs to continue contact with her biological mother and siblings. Ruth Bankhead testified this contact is important because "it is all she has". This opinion was echoed by Dr. McKim who testified Maggie views her relationship with her biological mother and siblings positively and therefore that relationship "cannot" be discontinued.

[48] Maggie is First Nations and the Court recognizes the importance of her maintaining contact with the aboriginal community and her culture. Weighing all of the circumstances, I find an open assisted adoption would be in Maggie's best interests. Ordinarily, to achieve this result, only a permanent order would be required. In this case, however, the Department's reliance on the policy in issue means that even if a permanent order is made, Maggie will not be placed for adoption.

John

[49] John, who is only four years old is a prime candidate for adoption. While he has been in his current foster placement for some time, his foster mother acknowledges they do not have the bond necessary to offer him a permanent commitment. John deserves such a commitment. Because of John's age, his need for stability and permanence, his best interests would be served by an open adoption which would allow continued contact with his foster family as well as his biological mother, siblings, aboriginal community and culture. Ordinarily a permanent order would suffice, but again, because of the Department's policy, even if a permanent order is made, John would not be registered for adoption.

Sally

[50] Sally is 23 months old and her foster family is "her family" in every way that matters, except legally. These foster parents should be allowed to adopt Sally and they should be provided with financial assistance to ensure the adoption does not adversely affect them. If, however, they are unwilling to adopt, then Sally should be given the opportunity of a permanent home with someone else through adoption. Adoption is preferable to a long-term order or a person having sufficient interest order because it would give Sally security and the stability of a permanent placement. It would provide her with new resources in the form of further extended family. Should anything happen to her adoptive parents, Sally would have additional supports to step in rather than being automatically returned to the foster care system. It is important for Sally to

maintain a relationship with her biological mother and siblings as well as her aboriginal community and culture, so an open adoption would be warranted. In an ordinary case, Sally's foster family would have been offered the option of adoption and this would have occurred through a permanent order. Because of the policy, even if a permanent order were to be made, Sally's foster parents would not be allowed to adopt her.

[51] Having determined the best interests of these children, the Court must turn its attention to the constitutional issues and determine what placements are possible with reference to those issues.

2. Is there a constitutionally recognized aboriginal right to "speak for the children"?

Section 35 of the *Constitution Act, 1982* and s. 25 of the *Charter*

[52] The NASC Agency/band argue the adoption of a first Nations child by a non-First Nations family without the consent of their band, violates s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. The relevant portions of those sections read as follows:

> Section 25 of the *Charter*:
>
> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
>
> Section 35 of *Constitution Act, 1982*:
>
> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[53] Section 91(24) of the *Constitution Act, 1867* confers upon the federal Parliament the power to make laws in relation to "Indians and lands reserved for Indians". As a general rule, valid provincial legislation applies to Indians whether on or

off reserve. This is so by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5 which incorporates such laws by reference. (See: *Dan v. The Queen*, 1985 80 (SCC), [1985] 2 S.C.R. 309; *Four B Manufacturing Ltd. v. United Garment Workers of America*, 1979 11 (SCC), [1980] 1 S.C.R. 1031; *R. v. Cote*, 1996 170 (SCC), [1996] 3 S.C.R. 139 at para. 86) As Justice Binnie pointed out in *Mitchell v. Canada (Minister of National Revenue)*, 2001 SCC 33 , [2001] 1 S.C.R. 911, 2001 SCC 33 at para. 133, the notion that Indians are governed solely by federal legislation has been rejected by the courts "...which ruled that while an aboriginal person could be characterized as an Indian for some purposes including language, culture and the exercise of traditional rights, he or she does not cease thereby to be a resident of a province or territory. For other purposes, he or she must be recognized and treated as an ordinary member of Canadian society...."

[54] There are exceptions to the general rule. Section 35 of *The Constitution Act, 1982* provides constitutional protection to "existing aboriginal rights and treaty rights". Provincial laws cannot impair such rights.

[55] Aboriginal rights are rights held by aboriginal people, not by virtue of Crown grant, legislation or treaty but by reason of the fact that aboriginal peoples were once independent self-governing entities living on the lands now forming Canada. This fact distinguishes aboriginal people from other minority groups and explains why aboriginal rights have a special legal and constitutional status. (See: *R. v. Van der Peet*, 1996 216 (SCC), [1996] 2 S.C.R. 507 at para. 30)

[56] In *R. v. Van der Peet, supra*, then Chief Justice Lamer, speaking for a majority of the Supreme Court of Canada, articulated the legal test to be used in identifying an "existing aboriginal right" within the meaning of s. 35 of the *Constitution Act, 1982*. At para. 46 of that decision he stated "...in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." In order for a practice to be "integral", it must be "of central significance" to the aboriginal society – a "defining characteristic" which makes the culture of the society distinctive. Moreover, the Supreme Court in *Van der Peet, supra*, held that to qualify as an aboriginal right the practice must have developed before "contact", that is, before the arrival of Europeans in North America. (See: *Van der Peet* at paras. 60 to 62. See also: *R. v. Pamajewon*, 1996 161 (SCC), [1996] 2 S.C.R. 821)

[57] In *R. v. Pamajewon, supra*, the Supreme Court of Canada unanimously held that before applying the test set out in *R. v. Van der Peet, supra*, the Court must first identify "...the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented ... and on the facts as found ... that activity

could be said to be ... 'a defining feature of the culture in question' prior to contact with Europeans". (*R. v. Pamajewon*, *supra*, at para. 25)

[58] In this case, the NASC Agency/band argue that aboriginal "notions of community and kinship" are an integral part of aboriginal society. First Nations families and communities share responsibility for the upbringing, training, education and well-being of their children. They submit that the aboriginal right of self-government includes the legal right and moral obligation to speak for persons who are under a legal disability, such as children. As this "right" has never been extinguished, *The Child and Family Services Act* cannot impair it by placing aboriginal children for adoption without the band's consent.

[59] The provincial Attorney General and counsel for the children argue there is no evidence before this Court to establish the aboriginal right claimed.

[60] The only evidence called by the NASC Agency/band was that of Dr. Katz who testified that "kinship" is an aboriginal "value" and that "community" plays an important role in the raising of aboriginal children. There was no evidence of what happens to aboriginal children when no "kinship" or "community" resources are available to care for them. His evidence falls far short of establishing the right asserted by the NASC Agency/band. Moreover, the "right" asserted appears to be of a general nature and not a defining feature of the culture in question. Even if such a right did exist, there is no evidence that its existence was "pre-contact". The NASC Agency/band's argument must fail. (See: *MacKay v. Manitoba* 1989 26 (SCC), (1989), 61 D.L.R. (4th) 385 (S.C.C.) at 388; *R. v. Mills*, 1999 637 (SCC), [1999] 3 S.C.R. 668 at para. 38)

[61] Because this Court is unable to find the existence of the aboriginal right asserted by the Agency/band, s. 25 of the *Charter* does not apply. As pointed out by Veit J. in *Steinhauer v. R.*, 1985 1302 (AB QB), [1985] 3 C.N.L.R. 187 (Alta. Q.B.), s. 25 of the *Charter* does not add to aboriginal rights, it merely "shields" existing aboriginal rights.

3. Does the policy breach the children's *Charter* rights to "equality" and/or "liberty and security of the person"?

Section 7 of the *Charter*: Life, Liberty and Security of the Person

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[62] In applying s. 7 of the *Charter* a court uses a two-step analysis. Firstly, the court must determine if there has been an infringement of the claimant's right to life, liberty and/or security of the person. If so, then the court must go on to determine if that infringement is contrary to the principles of fundamental justice. (See: *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 , [2000] 2 S.C.R. 519, 2000 SCC 48 at para. 70;*Rodriguez v. British Columbia (Attorney General)*, 1993 75 (SCC), [1993] 3 S.C.R. 519 at page 584; *R. v. Morgentaler*, 1988 90 (SCC), [1988] 1 S.C.R. 30 at page 53; *Singh v. Minister of Employment and Immigration*1985 65 (SCC), [1985] 1 S.C.R. 177 at page 212) This analysis must be a contextual one, that is, it must take into account the purpose and effect of the impugned law. (See: *R. v. Mills*, *supra*)

[63] Section 3 of *The Child and Family Services Act* sets out the *Act's* purpose which is "to promote the well-being of children in need of protection...".

[64] Protecting children from harm is a goal which has universal acceptance. Article 3(1) of *The United Nations Convention on the Rights of the Child*, U.N. Doc. A/RES/44/25, to which Canada is a signatory, requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In this case the children are First Nations children and the policy in issue provides that because of that fact they are not to be adopted without the consent of their band and agency, if any. The purpose of the policy is to give First Nations communities "a voice" in the placement of their children. It is meant to address, at least in part, the unjustified removal of aboriginal children from their communities and their culture.

[65] The issue here is whether the children's s. 7 rights to liberty and/or security of the person are infringed by this policy which, in effect, prevents their adoption.

[66] The Supreme Court of Canada, in *Winnipeg Child and Family Services v. K.L.W.*, *supra*, at paras. 85 to 87 and *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, 1999 653 (SCC), [1999] 3 S.C.R. 46, held the apprehension of a child impairs a parent's right to security of the person. As then Chief Justice Lamer, speaking for six of the seven justices presiding in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* stated at para. 58:

> This Court has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual" ... I believe that the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings.

[67] By analogy, impairment of the right to security of the person can be extended to children apprehended pursuant to child protection legislation. Removal of a child from parental custody constitutes a serious interference, not just with the parent's psychological integrity, but with the child's as well. Children are deeply impacted by their removal from their homes. Not only is such removal a traumatic experience, but if that removal lasts for an extended period of time, it may adversely affect the child, causing behavioural issues and affecting their feelings of self-worth and their ability to cope. In very young children, it may affect their ability to form relationships and their development of self-identity.

[68] In this case, the children have been in the care of the Department for extended periods of time. Dan and Jane are in counselling to deal with issues of anger and control that no doubt have arisen as a result of their numerous placements. Maggie has been diagnosed with Reactive Attachment Disorder. John has been in care most of his life and Sally has been in care since her birth. The policy in issue has led the Department to recommend these children continue in foster care without hope of a permanent home through adoption. In *Winnipeg (Child and Family Services) v. M.A.*, 2002 MBQB 209 , 2002 MBQB 209, (2002), 165 Man. R. (2d) 279 (Man. Q.B.), Justice Beard addressed the difference between foster care and adoption. At para. 30 she stated:

> A foster family is not intended to be a permanent family. A child in a foster home is not legally a part of that family and common sense dictates that a foster child cannot have the same feeling of emotional and psychological security as an adopted child.

[69] Tanya Frerichs testified that even if this Court makes a permanent order, the children will not be registered for adoption because of the policy. If the policy is followed, the result is that these children are destined to remain in long-term foster care. The policy has been applied arbitrarily and without regard to the individual circumstances or needs of the children. There is potential for serious harm to these children if they are retained in foster care without regard to their best interests. As such, it is clear the children's s. 7 rights to security of the person have been infringed by the policy. The question is whether that infringement is contrary to the principles of fundamental justice. I find in the circumstances of this case that it is.

[70] Justice L'Heureux-Dube, speaking for a majority of the Supreme Court of Canada in *Winnipeg (Child and Family Services) v. K.L.W.*, *supra*, at para. 131, indicated

that in situations where children have been apprehended, a "...fair and prompt post-apprehension hearing is the minimum procedural protection mandated by the principles of fundamental justice...".

[71] *The Child and Family Services Act* provides for such a hearing. Children cannot be found in need of protection or "placed" except through a hearing process which culminates in a court order. There are very limited exceptions to this. The *Act* affords all interested parties an opportunity to be heard, including the parents, the children, the Department, the Agency/band and other individuals having sufficient interest. Pursuant to s. 23(1)(b) of *The Child and Family Services Act*, where a child is a status Indian whose name is included or is entitled to be included on the band list, the chief of the band or his designate may apply to be heard at the protection hearing as a person having sufficient interest. Section 37(4) of the *Act* provides that the Court may consider recommendations of a chief, a chief's designate or an agency when placing First Nations children and s. 37(10) requires a child's band or agency, if any, to be given notice of any application for permanent or long-term orders. Section 37(4) of the *Act* states that in making an order, the court must consider the best interests of the child and s. 4 of the*Act* sets out a number of factors the court shall take into account in determining those best interests. One of those factors is a child's emotional, cultural, physical, psychological and spiritual needs. The hearing process set out in *The Child and Family Services Act* complies with the principles of fundamental justice.

[72] The policy flies in the face of these provisions. It usurps the hearing process and renders it meaningless insofar as permanent orders for First Nations children are concerned. The effect of the policy is to abdicate the Minister's responsibility under the *Act* to a child's band and/or agency, if any. A hearing is necessary to protect the children's rights to liberty and security of the person. Bands and agencies have the ability to participate fully in such hearings. In this case, the NASC Agency which is also the band's designated representative, was served with notice of the Department's applications with regard to these children, even those applications for temporary placements. Service was made on the Agency by registered mail in December of 2000, July of 2002, January of 2003 and November of 2003. NASC was also served with the March 19, 2004 order which required a hearing to determine the proper placement of these children. Neither NASC nor the chief of the [...] band chose to participate in any of the proceedings until the issue of legal counsel for the children was raised. The proper forum for the band and/or the agency to be heard is in the context of the protection hearing. It is not appropriate for them to assume "veto power" through a policy that denies aboriginal children their s. 7 rights without recourse to the principles of fundamental justice. The reasons for establishing the policy are laudable ones. The desire to retain aboriginal children within the aboriginal community where they can experience their culture and promote their heritage is understandable in light of the past actions of

the state which resulted in the systematic removal of such children from their homes and "forced" assimilation of them into "western" culture.

[73] Article 30 of *The United Nations Convention on the Rights of the Child* provides that:

> In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Dr. Katz testified about the importance of aboriginal culture and community to the development of self-identity and feelings of self-worth in aboriginal children. It is clear that culture is an important consideration in determining the best interests of these children as is a continuing connection with their aboriginal roots and community. Adoption of these children by non-aboriginal families does not mean they have to be cut off from their culture or community. "Adoption" and "culture" are not mutually exclusive concepts. Section 15(2) of *The Adoption Act, 1998* allows for agreements facilitating communication and maintaining relationships. While the terms of these agreements cannot be included in an order for adoption, that does not mean they are unenforceable. The *Act* would not provide for such agreements if those agreements were meaningless. Moreover, it is now settled law that adoption does not take away a child's "status" under the *Indian Act*. First Nations children with standing under that *Act* have certain rights that are guaranteed and are not subject to erosion by provincial legislative action. (See: *Natural Parents v. British Columbia (Superintendent of Child Welfare)*, 1975 143 (SCC), [1976] 2 S.C.R. 751).

[74] This Court concludes the children's s. 7 right to security of the person has been infringed by the policy.

Section 15 of the *Charter* - equality

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[75] In *Law v. Canada (Minister of Employment and Immigration)*, 1999 675 (SCC), [1999] 1 S.C.R. 497, the Supreme Court of Canada was asked to determine a discrimination claim under s. 15(1) of the *Charter*. In a unanimous decision the Court provided "guidelines" for a s. 15(1) analysis. Firstly, the Court held any such analysis must be "purposive" and "contextual" i.e. a court must examine the purpose of the impugned law or action and the context or circumstances of the individuals who allege it breaches their equality rights. All this must be done keeping in mind the purpose of s. 15(1). (See: *Law v. Canada (Minister of Employment and Immigration, supra*, at paras. 6 and 7 and para. 88). Section 15 guarantees equal treatment of individuals by the state without discrimination. Justice Iacobucci, in the *Law* decision, described the purpose of s. 15(1) at para. 51 as follows:

> ...It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration....

He then went on at para. 53 to explain the meaning of human dignity in the following terms:

> ...Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law....

[76] There is both a subjective and objective component to a s. 15(1) analysis. Whether an individual's dignity has been demeaned must be determined from the perspective of the claimant but whether the claimant's equality rights have been infringed requires an objective analysis of the legislation in question and society's treatment of the

claimant and others with similar characteristics or in similar circumstances. (See: *Law, supra*, at para. 59).

[77] The concepts of "equality" and "discrimination" form the heart of s. 15. Because "equality" and "discrimination" are concepts, it is impossible to define them with any precision. As Justice McIntyre pointed out in*Andrews v. Law Society of British Columbia*, 1989 2 (SCC), [1989] 1 S.C.R. 143, true equality does not necessarily result from identical treatment. At page 165 of the *Andrews* decision, Justice McIntyre found that the main consideration in determining whether there is "equality" is the impact of the law upon the individuals it affects as well as those it excludes from its operation. Equality is a comparative concept and therefore in order to evaluate a s. 15(1) claim, the treatment of the individuals in issue must be "compared" to the treatment of other individuals with similar specific personal characteristics. This comparison determines whether there has in fact been differential treatment. (See: *Andrews*, *supra*, at page 164 and *Law*, *supra* at para. 56). In determining an appropriate comparitor, a variety of factors may be relevant. The most important is the claimant's view of who the appropriate comparative group is. In addition to this, the subject matter of the impugned legislation, its purpose and effect and biological, historical and sociological similarities to the comparitors may also be important. (See:*Law*, *supra*, at paras. 57 and 58).

[78] In *Andrews*, Justice McIntyre offered a definition of discrimination at pages 174 to 175. He held discrimination is a "distinction" based on personal characteristics "...which has the effect of imposing burdens, obligations, or disadvantages ... or which withholds or limits access to opportunities, benefits, and advantages available to other members of society...." It is clear discrimination is a two-edged sword. It may result from laws or actions which draw distinctions between individuals or it may result from a failure to draw distinctions which take into account substantive differences between individuals in society.

[79] Justice Iacobucci, speaking for the Supreme Court of Canada in *Law*, *supra*, set out the three broad inquiries that a court engaged in a s. 15(1) analysis must make. At para. 39 he stated:

> ...a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And

> third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

[80] Counsel for the children argue the proper comparative group for the purposes of a s. 15(1) analysis is non-First Nations children apprehended by the Department of Community Resources and Employment and who cannot be returned to their parents. The use of this group as the comparitor was not objected to by any party and appears appropriate given the purpose and effect of the policy. The policy draws a distinction between the children in issue here and the comparative group. The basis for that distinction is the fact the children are of First Nations ancestry. This is a distinction based on race which is one of the grounds listed in s. 15(1) of the *Charter*. The first two stages of the inquiry as set out by Justice Iacobucci in *Law* have been met. The real issue is whether the differential treatment amounts to discrimination.

[81] In April, 2000, the Childrens' Advocate for the Province of Saskatchewan completed a comprehensive and public review of services provided to children and youth living in foster care in Saskatchewan. With the consent of all parties, that report: *Children and Youth in Care Review: LISTEN to their Voices*, was filed as Exhibit C-2 in this proceeding. According to the report, in March of 1999 there were approximately 3,000 children in foster care in Saskatchewan and almost 70% of them were of aboriginal ancestry (First Nations or Metis). This includes children in the care of the Department of Community Resources and Employment and First Nations agencies. Most of the children were under 11 years of age.

[82] The report dealt with long-term wardship and at page 40, had this to say:

> Increased numbers of children in long-term care, and the lack of long-term permanency planning for these children is alarming. The agreement between the DSS and First Nations on the adoption of Aboriginal children is seen by some as creating more long-term wards who are overloading a system that is really designed for short-term placements. These long-term wards are seen as being "sentenced to ambiguity" without a case plan, and "warehoused" in care, until they are old enough to leave on their own.
>
> These children live "in limbo". Open adoption was sometimes cited as a desirable model that would provide stability for a child, without severing the child's connection with his or her natural family.

The report also indicated there was ample clinical evidence that "limbo" is destructive to a child's mental health.

[83] The report recommended that the Department and First Nations and Metis Nations governments review the impact that long-term care orders in conjunction with adoption policies are having on the lives of children who are long-term wards and being raised in foster care. One social worker, quoted at page 41 of the report, stated "...long-term orders are a method of appeasing everyone, but the child is forgotten...."

[84] The NASC Agency/band has refused to consent to the adoption of any of these children even though no extended family or appropriate community (band) resources are available for them. The children have already begun to suffer the effects of extended foster care. The three oldest have been in multiple placements and have behavioural issues as a result. Maggie has RAD. John is only four and the policy means he will remain in foster care and be denied that "special bond" with a parent who truly loves him. Sally will be denied the permanency of an adoption by the only family she has ever known. In these circumstances, I find there has been a breach of the children's equality rights as set out in s. 15(1) of the *Charter*.

[85] Counsel for the provincial Attorney General and the Agency/band argue that because the policy has an ameliorative purpose, s. 15(2) applies. Section 15(2) of the Charter reads as follows:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[86] The Supreme Court of Canada in *Lovelace v. Ontario,* 2000 SCC 37 , [2000] 1 S.C.R. 950 at paras. 105 to 108 touched on the purpose and effect of s. 15(2) of the *Charter*. The Court referred to it as an "interpretive aid" to s. 15(1) and concluded at para. 105:

> The plain meaning of the language in these subsections is consistent with the view that s. 15(2) is confirmatory and supplementary to s. 15(1). In this respect, it is clear that the s. 15(2) phrase "does not preclude" cannot be understood as language of defence or exemption.... In short, s. 15(2) is referenced to the s. 15(1) subsection and there is no language of exemption; on its face s. 15(2) describes the scope of the s. 15(1) equality right.

In effect, the Court held s. 15(2) was an interpretive aid to s. 15(1).

[87] It would appear s. 15(2) does not exempt laws with ameliorative purposes from the equality guarantee but those ameliorative purposes may lead to a finding that the law is not discriminatory.

[88] Does the policy here ameliorate against the taking of First Nations children from their family, communities and culture? I cannot find that it does so. The band and agency already have a right under the provisions of *The Child and Family Services Act* to participate in the decisions being made for First Nations children and to be heard as parties in protection hearings. The legislation already gives them a "voice".

[89] Adoption does not necessarily mean children will be placed in non-aboriginal homes though it is acknowledged there are many more non-aboriginal homes available for adoption than First Nation homes.

[90] Adoption no longer precludes a child's maintaining connections with their family, community and/or culture. Open adoptions allow those connections to continue.

[91] There is no evidence that the adoption of First Nations children by non-aboriginal families causes harm to the children involved.

[92] The effect of the policy is to deny these children permanent homes and stable, long-lasting relationships. These things are necessary for the children to develop relationships, form a strong sense of self-identity and positive feelings of self-worth. Self-worth is not dependent solely on culture but also on the very basic need to be loved and valued and that basic need knows no colour.

[93] As Justice Iacobucci stated at para. 53 of the *Law*, *supra*, decision: "...Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." The policy in issue here is blind to the individual needs, capacities and merits of the children to which it is applied. As such, it harms their human dignity. Implementing the policy has the potential of destroying the child's self-identity and self-worth, the very things it was established to protect.

Section 1 of the *Charter*

[94] Having found the children's s. 7 and 15(1) *Charter* rights have been infringed, the Court must turn its consideration to s. 1 of the *Charter* and determine if the policy is justified pursuant to that section. That section reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[95] Counsel for the children and the Attorney General for Saskatchewan argue the policy in issue here is not "prescribed by law" and thus cannot be justified under s. 1. They cite no case authority in support of their position. Counsel for the NASC Agency/band do not address this argument. Their stated position is that if the policy breaches the children's s. 7 or 15(1) rights, it is saved by s. 1.

[96] What constitutes a "prescribed law" within the meaning of s. 1 of the *Charter* is not clear from the case law. Professor Hogg, in his book *Constitutional Law of Canada*, 2nd. ed. (Toronto: Carswell Company Limited, 1985) at pages 684-685 puts forth two views as follows:

> ...It could be argued that the purpose of this phrase is to ensure that the Charter limit was the deliberate product of an open parliamentary process. On this basis, the phrase "prescribed by law" could be satisfied only by a statute enacted by either the federal Parliament or a provincial Legislature. Regulations or by-laws would not suffice; nor would a rule of the common law....
>
> An alternative view of the purpose of the phrase "prescribed by law" is that it is designed to ensure that citizens are plainly advised of any restrictions on their guaranteed rights, so that they can regulate their conduct accordingly. On this basis, the phrase would be satisfied by any law that fulfilled two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable the citizen to regulate his conduct by it.

Professor Hogg points out that the second view is that used by the European Court of Human Rights in interpreting the phrase "prescribed by law" in the *European Convention on Human Rights* (U.K.T.S. 1953, No. 71, 1 E.T.S. No. 5, November 4, 1950). (See: *Sunday Times v. United Kingdom* (1979) 2 European Human Rights Reports 245 (Eur. Ct. of Hum. Rts.) at pages 270-273).

[97] The Supreme Court of Canada in *Martineau v. Matsqui Institution Inmate Disciplinary Bd.* 1977 4 (SCC), [1978] 1 S.C.R. 118 was divided on the issue of whether

a departmental directive was "law" within the meaning of s. 28 of the *Federal Court Act*. Justice Pigeon, speaking for a majority of the Court stated at page 129:

> I have no doubt that the regulations are law.... I do not think the same can be said of the directives. It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity....

Chief Justice Laskin, as he then was, wrote the dissent in *Martineau*, *supra*. He held the source or authority for the directive was the *Penitentiary Act*, R.S.C. 1970, c. P-6 which provided both for the making of regulations by the Governor in Council and for the making of rules to be known as the Commissioner's directives. As such he held the directive was made pursuant to a law.

[98] Justice Le Dain of the Supreme Court of Canada, in his dissent in *R. v. Therens*, 1985 29 (SCC), [1985] 1 S.C.R. 613 dealt directly with the meaning of "prescribed law" in s. 1 of the *Charter*. He stated at para. 56 of that decision:

> ...The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule....

[99] The Federal Court of Appeal in *Weatherall v. Canada (Attorney General)*, reflex, [1989] 1 F.C. 18 seems to have adopted Justice Le Dain's approach. At para. 16 of that decision, Justice Stone, speaking for the Court stated:

> That case as I see it, did not deal with the precise point now under discussion. It is whether a further rule authorized by Parliament, rather than a decision made pursuant to a statute or regulation, may be viewed as "law" for the purposes of section 1 of the Charter. Although the point in issue has yet to be authoritatively decided, I venture to suggest that the term "by law" in section 1 does not include the Commissioner's Directive even though its adoption is provided for in the statute. That directive was not, in its adoption, required to be put through any recognized legislative process, and may be altered without reference to such process, theoretically even at the whim of its creator. In this sense,

> the statute is "law" and so too are the Regulations. Directives, on the other hand, are, as Pigeon J. described them in the *Martineau* case, mere "directions as to the manner ... duties" are to be carried out. They are not "law"....

[100] In this case I find the policy is not "prescribed by law" within the meaning of s. 1 of the *Charter*. It is an "internal" policy and is not accessible to the public as required under the test set out in the *Sunday Times*case, *supra*. The policy is not the result of any legislative process and could be altered without reference to any such process. It is not made pursuant to any statutory authority or regulation and in fact appears contrary to *The Child and Family Services Act* which contemplates a hearing process to determine the appropriate placement of children found in need of protection.

[101] Even if the policy was a "prescribed law" within the meaning of s. 1, it could not be justified by that section.

[102] Section 1 of the *Charter* has two functions. First, it guarantees the rights and freedoms set out in the *Charter* and secondly, it provides the criteria necessary to justify limitations on those rights and freedoms. The onus of proving a limitation of any *Charter* right, rests with the party seeking the limitation on a preponderance of probabilities. They must show the limitation to be reasonably and demonstrably justified in a free and democratic society. The presumption is that *Charter* rights are guaranteed. Limits to those rights are exceptions.

[103] Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. Firstly, the objective to be served must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard is high to ensure that trivial objectives or those discordant with the principles of the *Charter* do not gain protection. Secondly, the party invoking s. 1 must show the means used to limit the right are reasonable and demonstrably justified. This involves the application of a "proportionality" test with three components. The first component is that the limit be fair and not arbitrary. It must be carefully designed to achieve its objective. The second component is that the means of achieving the objective should impair the right as little as possible. The third component requires that the effects of limiting the right must be proportional to its objective. The more serious the effects, the more important the objective must be. (See: *R. v. Oakes*, 1986 46 (SCC), [1986] 1 S.C.R. 103)

[104] In accordance with para. 64 of the *Oakes* decision, a court must be guided by the values and principles essential to a free and democratic society. Some of these values were listed by Justice Dickson as:

> ...respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhances the participation of individuals and groups in society....

In this case, the limit proposed is that First Nations children be denied the opportunity of adoption unless their band and agency consent. The objective of the policy is to keep First Nations children in aboriginal homes, to prevent assimilation and to ensure the future of the First Nations culture. While this is an important objective, the limit is not necessary to ensure the objective. Adoption and the ability of children to maintain their culture are not mutually exclusive objectives. There is no reason why children cannot have a permanent, stable and loving home through adoption and still be guaranteed a connection with their community and cultural roots. This is so even if a child has no extended family or community resources and the adoption is with an non-aboriginal family. Nor is the limit one that is justifiable in a free and democratic society. This policy has severe effects on First Nations children in need of protection because it forces them to remain in the foster care system. They are in “limbo” and often subject to numerous placements. Children who have been apprehended are among the most vulnerable members of society and the effect of the policy upon them is far-reaching and devastating. Not only can the policy have the effect of causing behavioural and psychological problems for these children, but, according to Dr. McKim, the effect can be inter-generational.

4. If the children's *Charter* rights are breached, what is the remedy?

[105] Section 24(1) of the *Charter* deals with the remedies available for *Charter* breaches. It reads as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The section gives wide discretion to the Court to fashion a remedy it considers appropriate and just in the circumstances. (See: *R. v. O'Connor*, 1995 51 (SCC), [1995] 4 S.C.R. 411 at para. 69).

[106] Counsel for the children requests a declaration that the policy in issue is unconstitutional and an order that the children, whose best interests are served by adoption be placed for adoption. Counsel for the provincial Attorney General submits the appropriate order would be to direct the Department of Community Resources and Employment to deal with aboriginal children in a manner consistent with their best interests and without reference to the impugned policy.

[107] When permanent orders are made with respect to First Nations children, those children should have the same opportunity to be placed for adoption as other children. The policy prevents this. It breaches the children's s. 7 and 15 *Charter* rights and accordingly cannot stand. There shall be a declaration that the policy in issue is unconstitutional and the Department is directed to deal with First Nations children in a manner consistent with their best interests and to place them for adoption where appropriate without reference to the impugned policy. To ensure the children in issue here are placed in accordance with their best interests, this Court invokes s. 24(1) for the purpose of adding conditions to the permanent orders to ensure their *Charter* rights are upheld.

[108] There shall be an order that Dan, born [...], 1991and Jane, born [...], 1992 be committed to the custody of the Minister until they attain the age of 18 pursuant to s. 37(3) of *The Child and Family Services Act*subject to the following conditions:

1. The children shall not be removed from their current foster home without a court order.

2. The Department shall arrange and fund regular visits between Dan and Jane and their biological mother and siblings, the visits to be arranged at least once a month.

3. The children shall have visits with their maternal grandmother so long as those visits are in the best interests of the children and are approved by the Department.

4. That the Department shall fund visits by the children to their reserve for cultural events at least twice per year.

[109] There shall be an order that Maggie, born [...], 1996 be permanently committed to the care of the Minister pursuant to s. 37(2) of *The Child and Family Services Act* subject to the following conditions:

1. Maggie shall be immediately registered for adoption.

2. That Maggie's adoption should be an open one that allows continued contact with her biological mother and siblings and The [...] band.

3. That Maggie's adoption be an assisted one, that her adoptive parents receive appropriate training with regard to Reactive Attachment Disorder and that they and Maggie receive whatever reasonable counselling and/or treatment is necessary to address the disorder.

4. It is recommended that respite be provided to Maggie's adoptive parents by utilizing her current therapeutic foster home.

5. It is also recommended that the [...] band provide a mentor for Maggie and/or her adoptive family to teach her about her aboriginal ancestry and to ensure her participation in cultural events.

6. That Maggie not be removed from her current therapeutic foster home without a court order until placement for adoption occurs.

[110] There shall be an order pursuant to s. 37(2) of *The Child and Family Services Act* committing John, born [...], 2000, permanently to the care of the Minister subject to the following conditions:

1. That John be immediately registered for adoption.

2. That John's adoption be an open one to allow him ongoing contact with his current foster family, his biological mother and siblings, as well as the [...] band.

3. That John not be removed from his current foster home without a court order until placement for adoption occurs.

4. It is recommended that the [...] band provide a mentor for John and/or his adoptive family to teach him about his aboriginal ancestry and to ensure his participation in cultural events.

[111] There shall be an order pursuant to s. 37(2) of *The Child and Family Services Act* that Sally, born [...], 2003 be placed permanently with the Minister subject to the following conditions:

1. That Sally be placed for adoption with her current foster parents if they consent and if not, with another family approved by the Department.

2. Until placed for adoption, that Sally not be removed from her current foster home without a court order.

3. That prior to placement for adoption, Sally shall be assessed for developmental delays and for Fetal Alcohol Spectrum Disorder. The results of the assessment should be provided to Sally's foster parents before their consent to the adoption is finalized.

4. The adoption should be an open one so that Sally may continue contact with her biological mother and siblings as well as her current foster family (if they do not adopt) and the [...] band.

5. That if Sally's foster parents want to adopt, the adoption should be an assisted one so that the family does not suffer financial hardship as a result of the change in legal status.

6. It is recommended that the [...] band provide a mentor for Sally and/or her adoptive family to teach them about Sally's aboriginal ancestry and to involve them in cultural events.

Conclusion

[112] The future of these children depends on the willingness of all stakeholders to ensure their success. These children can have it all – permanent homes, loving relationships, stability, security, ongoing contact with their family and community and cultural involvement – but only if those with the power to do so are willing to cooperate in order to provide it. While the Court has no jurisdiction to order the band or agency to

do anything, it does implore them, for the sake of the children, to offer assistance in furthering their cultural development. These children need to remain connected with their aboriginal roots. They need mentors from the aboriginal community who will be there to address concerns the children may have with regard to their aboriginal ancestry and most importantly, to teach them about their aboriginal culture and ensure they have an opportunity to participate in cultural events. Children placed in non-aboriginal homes would benefit from a "family mentor", an aboriginal person who is willing to assume responsibility for teaching the whole family about aboriginal culture and practices. The Department, in conjunction with the children's family, their placements, the NASC Agency and the band need to ensure these children maintain regular contact with one another as well as other members of their family, including their mother and maternal grandmother. It would be of great benefit if these children could spend some extended time together, be it a day, a weekend, or longer. That contact could occur through camps, at cultural events, at recreational facilities or, if someone would open their home to these children, then in a home environment. It is very difficult to establish meaningful relationships when contact is limited to two hours once a month and the setting is the Department of Community Resources and Employment. All of the children should be provided with regular family photographs. It is hoped that with innovative thinking and open minds and hearts, these children can experience the benefits of permanent loving homes while maintaining strong ties to their aboriginal roots and family.

_____

J.