IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

DAKOTA OJIBWAY CHILD AND FAMILY SERVICES	)	***M. L. Mitchell*** *for K. R. F.*
(Petitioner) Respondent	)	
	)	***No appearance***
- and -	)	*for D. Q. H. and A. R. J. K.*
	)	
K. R. F.	)	***D. R. Kropp*** *and* ***A. M. Griffin***
(Respondent) Appellant	)	*for Dakota Ojibway Child and Family Services*
- and -	)	
	)	***A. E. M. Fenske*** *and* ***J. M. Pastora Sala***
D. Q. H. and A. R. J. K.	)	*for The First Nations Family Advocate Office of the Assembly of Manitoba Chiefs*
(Respondents)	)	
- and -	)	
	)	*Appeal heard:* ***June 14, 2018***
THE FIRST NATIONS FAMILY ADVOCATE OFFICE OF THE ASSEMBLY OF MANITOBA CHIEFS	)	*Judgment delivered:* ***October 10, 2018***
Intervener	)	

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

PFUETZNER JA

[1] This is an appeal by the respondent KRF (the mother) of a permanent

order of guardianship of her five children in favour of the petitioner, Dakota Ojibway Child and Family Services (the agency).

[2] The issue at trial was not whether the children were in need of protection. The mother conceded that they were, both at the date of apprehension and at the date of the trial. In her appeal, she alleges that the trial judge erred as follows:

- by granting a permanent order of guardianship of her twin sons without service of notice of the proceedings on their father, who was known to the agency;

- by dismissing her motion for disclosure of the agency's entire file;

- by failing to place sufficient weight on the importance of the children's Indigenous identity as a factor in determining which plan would be in the best interests of the children; and

- by granting permanent guardianship of the children to the agency, rather than returning the children to her under a supervisory order.

[3] The intervener was granted leave to intervene in the appeal and made submissions on how the principle of the best interests of the child should be construed in respect of Indigenous children.

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] The agency became involved in providing supports to the mother and her children in May 2013, when it became aware that the mother, who was

residing in Winnipeg, did not have stable housing and lacked the resources necessary to care for and meet the basic needs of her four young children. At that time, the two eldest children were aged five and four years and the twins were four months old.

[6] In December 2014, the mother proposed to have the two eldest children, SAM and TKFM, live with their father, the respondent DQH, and his mother (their grandmother). The second child, TKFM, then aged five, disclosed to a staff member at her school that she had been physically and sexually abused by DQH. This disclosure resulted in an abuse investigation by Child and Family All Nations Coordinated Response Network (ANCR) and a criminal investigation by the Winnipeg Police Service (the WPS). The agency instructed the mother not to allow DQH to have access to the children. The agency also urged the mother to arrange counselling for TKFM. The mother did not believe the abuse allegations, became angry with TKFM and referred to her as a "fucking liar" in the presence of TKFM and an agency worker.

[7] Following TKFM's disclosure, the agency tried to assist the mother by arranging for an in-home support worker to attend at the mother's home and help with the care of the children. At the second visit, the mother rejected this help because she did not want the worker in her home.

[8] On July 29, 2015, one of the mother's two-year-old twins, VLM, was found, clad only in a soiled diaper, wandering unsupervised on the street by a member of the public. The mother did not notify the WPS that VLM was missing until about two and one-half hours after he was found.

[9] The four children were apprehended by the agency on July 30, 2015, at the mother's home in Winnipeg. The mother blamed TKFM, then aged six,

for not properly supervising VLM the previous day. TKFM told the agency workers that her mother physically abused her and her siblings and that she did not feel safe in the home. While the agency workers were in the process of apprehending the children, they found DQH hiding in the bathroom of the mother's home.

[10] After the four children were apprehended, the mother left Winnipeg and went to live with her father in Pine River, Manitoba. There, she met and began a relationship with the respondent ARJK.

[11] The mother agreed that the children were in need of protection and a temporary order of guardianship under *The Child and Family Services Act*, CCSM c C80 (the *Act*) in favour of the agency was granted by consent on November 27, 2015.

[12] Shortly after moving to Pine River, the mother became pregnant with ARJK's child, SSKM, who was born at the Dauphin Regional Health Centre in Dauphin, Manitoba on June 9, 2016. SSKM was apprehended from the hospital on June 10, 2016.

[13] A further temporary order of guardianship of the four oldest children and an order of temporary guardianship of the youngest in favour of the agency were granted by consent on October 25, 2016.

[14] The agency placed the children in three separate foster homes where they are doing well. The agency plans to keep the children in their current foster placements and not put them up for adoption. Although the children are Indigenous, they have been placed with non-Indigenous foster parents.

[15] The mother asked the agency for disclosure of its file in the month before the trial, beginning on June 14, 2017, and on several occasions after that. She was provided with some disclosure, but she was not given the entire file.

[16] On the first morning of the trial, the mother brought a motion, relying on section 76 of the *Act* and the decisions in *SDK v Alberta (Director of Child Welfare)*, 2002 ABQB 61; and *NCNFCS & ANCR v JG et al*, 2016 MBQB 97, for "full disclosure of all relevant agency documents on the file" and an adjournment of the trial "to allow for proper disclosure to occur". In argument, counsel for the mother asked for a one or two-day adjournment to review the disclosure.

[17] The trial judge dismissed the motion for disclosure and for an adjournment, noting that the mother's counsel had "been provided with extensive particulars since the children were apprehended", including "a pre-trial brief, an intake brief, a hearing readiness brief" as well as "additional particulars since the hearing readiness conference" that was held a month before trial. He concluded that, if the mother "was not satisfied with the particulars she had received, her remedy under Section 32(2) of the Act was to apply to the court for an order for further particulars." Importantly, the trial judge took into account the timing of the motion when he stated, "This is something that has been open to [the mother] to do since July 2015. The time to do so is not the morning the trial is scheduled to start."

[18] By the trial date, the children were nearing or had reached the end of the maximum time permitted for temporary guardianship with an agency, as set out in sections 38(1)(c)-(d) of the *Act*. At the trial, the mother put forward a plan to have the children returned to her care. She had found rented

accommodation near her father's home in Pine River. She sought to have the children returned to her in stages as their temporary order time expired. She said she would comply with any conditions imposed by the Court. The mother argued that placing the children with her would be more culturally appropriate than the agency's plan of maintaining placements in non-Indigenous foster homes.

[19] DQH did not appear at the trial. ARJK participated in the trial and supported the mother's plan. Although ARJK and the mother do not cohabit, he resides near her in Pine River and said he would support and assist the mother. ARJK has a history of alcohol addiction, illegal drug use, problems with violence and anger, and frequent involvement with the police.

[20] The father of the twins, VJM and VLM, was not identified by the agency and service of the petition and notice of hearing on him was ordered dispensed with by the Master prior to the granting of each temporary order and prior to the trial.

[21] In his reasons for decision, the trial judge found that the mother "lacks the necessary skills and ability to adequately care for the children. She has shown a pattern of behaviour that would cause the children physical, emotional and psychological harm if they were returned to her care." As for the mother's plan to involve ARJK in the children's care, the trial judge found that, "Given [ARJK]'s alcoholism and anger management issues, the children would clearly be unsafe."

[22] The trial judge concluded that, "Leaving the children in their current foster placements is in their best interests" and made permanent orders of guardianship in favour of the agency with respect to all five children.

Analysis

Did the Trial Judge Err by Granting a Permanent Order Without Service on the Twins' Father?

[23] The affidavits filed by the agency workers in support of the motions to dispense with service on the twins' father indicated that the mother had advised that she did "not know the identity of the biological father of the children as she only had contact with him on one occasion."

[24] The name of the twins' purported father, CB, was raised for the first time on the second day of the trial. This occurred during cross-examination of one of the agency workers on a developmental assessment report on VLM. The report names CB as the father of VLM under the section on "family history". The worker conceded that the name CB appeared in the agency's file in a couple of places as the possible father of the twins. However, he maintained that the mother had never confirmed that CB was the father. Consistent with this, at trial, the mother described CB as "a possible father to the children, to the twins", but that she "wasn't sure" he was the father and didn't know his whereabouts or how to contact him.

[25] The trial judge was not asked to adjourn the trial to effect proper service on CB. Instead, counsel for the mother at trial used the fact that the agency had not disclosed information about a possible father of the twins to attack the credibility and competency of the agency workers.

[26] In final argument at the trial, the mother's counsel obliquely raised the issue of unfairness to CB. The trial judge responded by indicating that it "would be [CB] that would have the complaint" and that lack of service on CB

"doesn't affect [the mother's] position."

[27] The mother argues on appeal that children and parents in child protection proceedings are owed a high level of procedural fairness because such proceedings engage their rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). She submits that the father of the twins has been unfairly deprived of his right to be made aware of the proceedings and to participate in them. Further, she says that the twins have been denied the right to have other family members considered as potential caregivers for them. Fundamentally, the mother maintains that the trial judge made a palpable and overriding error in concluding that there was effective service on all of the parties.

[28] I would dismiss this ground of appeal for two reasons.

[29] First, while the mother asserts that the trial judge erred by concluding that service was effective, this issue was not raised with the trial judge in the context of an adjournment of the trial. The test for raising a new issue on appeal is summarized in *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 26 at para 27. In the present case, there are no exceptional circumstances that would justify this Court entertaining, for the first time on appeal, the mother's argument that the trial judge erred by proceeding to hear and dispose of the matter absent service on CB. This issue could have been raised at the beginning of the trial, if not well before, because the identity of CB as the possible father of the twins was within the mother's knowledge. She was also represented by counsel, who was present when the orders dispensing with service were made.

[30] Second, as noted by the trial judge, it is not for the mother to raise a

breach of CB's right to procedural fairness. The mother does not claim that her own rights have been breached. Simply put, the mother lacks standing to argue that CB's rights have been breached (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 366-67).

Did the Trial Judge Err by Dismissing the Motion for Disclosure?

The Parties' Positions

[31] The mother argues that the trial judge erred in law by misconstruing the nature of "particulars" in a child protection proceeding and by equating a motion for further particulars under section 32(2) of the *Act* with a motion for pre-trial disclosure. The mother submits that "particulars" relate only to the issue of whether a child is in need of protection—a fact that was conceded in this case. Since the issue at trial was which order under section 38(1) of the *Act* would be in the best interests of the children, the mother maintains that the principles of fundamental justice require that she receive disclosure of all material on the agency file relevant to that issue, including how the children have been cared for in agency care, so that she can present her case effectively, including being able to examine in detail the adequacy of the agency's plan for the children.

[32] The mother notes that courts in other provinces have mandated *Stinchcombe*-type (see *R v Stinchcombe*, [1991] 3 SCR 326) disclosure for child protection proceedings and argues that this Court should adopt the same approach in order to protect the parents' rights to a fair procedure under section 7 of the *Charter*, as described in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46. In making that argument, she relies on the decisions in *G(J)*; *SDK*; *Children's Aid Society of Hamilton v*

O(E), 2009 CarswellOnt 8125 (Sup Ct J); and *Director of Child Welfare (PEI) v MO*, 2006 PESCAD 7.

[33] The agency argues that it complied with the disclosure procedures set out in the *Act*. Its position is that the mother is not entitled to receive the entire agency file because the agency has a statutory duty under Part VI of the *Act* to maintain the confidentiality of its records, subject to certain limited exceptions. It submits that, although the mother argues that a lack of disclosure led to a breach of her section 7 *Charter* rights, she has not challenged the constitutional validity of any part of the *Act* and has not served a notice of constitutional question under *The Constitutional Questions Act*, CCSM c C180. The agency says that the mother could have brought a motion for an order for disclosure pursuant to section 37(1)(a) of the *Act* well in advance of the trial, but failed to do so. Its position is that her motion brought on the first day of the trial was, in reality, an attempt to delay the trial that was properly dismissed by the trial judge.

The *Act*

[34] There are several provisions of the *Act* that are relevant to the issue of the parties' disclosure rights and obligations, being sections 27(1), 30(1), 32(2), 32(3), 36, 37(1) and Part VI, which relates to confidentiality. These sections are set out in the attached Appendix to these reasons.

[35] The first relevant section deals with the obligation of an agency to provide particulars of the grounds for a warrantless apprehension. After such an apprehension, the agency must make an application to the court for a hearing to determine if the child is in need of protection (see section 27(1) of the *Act*). The notice of that application must be served on the parents together with

"particulars of the grounds that are alleged to justify a finding that the child is in need of protection" (at section 30(1) of the *Act*).

[36] The *Act* does not define "particulars". In *NCNFCS & ANCR v KB*, 2018 MBCA 1, this Court, while not defining particulars, indicated that they need not "be excessively detailed and extensive. However, at a minimum, particulars must inform the parents of the case against them" (at para 27).

[37] The *Act* contemplates that the court can order that further particulars be provided. Section 32(2) of the *Act* states: "A person who is not satisfied with the particulars provided under subsection 30(1) may apply to court for an order that the agency provide further particulars."

[38] Second, the *Act* provides that the rules applicable to civil pre-trial discovery do not apply to child protection hearings. Section 32(3) of the *Act* states: "The rules of the Court of Queen's Bench regarding examination for discovery and examination of documents do not apply to a hearing under this Part [III]." This section, together with section 36 of the *Act*, demonstrate the Legislature's intention that child protection matters move expeditiously and without the level of formality of a traditional civil proceeding. Section 36 of the *Act* states, in part, that "[p]roceedings under this Part may be as informal as a judge or master may allow". See also *DL v Child and Family All Nations Coordinated Response Network*, 2014 MBCA 86 at paras 14, 17.

[39] Third, the *Act* allows for the court to require production of evidence. Section 37(1)(a) states: "A judge or master may for the purposes of a hearing under this Part (a) compel on his or her own motion the attendance of any person and require that person to give evidence under oath and to produce such documents and things as may be required". This Court in *DL* described section

37(1)(a) of the *Act* as providing for "judicial oversight and control of the discovery process in respect of production of documents and things to obviate concerns over possible fishing expeditions or attempts to delay proceedings under the *Act*" (at para 20).

[40] Finally, Part VI of the *Act* deals with confidentiality regarding both court proceedings and the content of agency records. Records made under the *Act* are confidential and are not to be disclosed, subject to certain exceptions, including pursuant to a court order (see section 76(3)). While an adult has the right to access his or her own record and that of any child in his or her care (see section 76(4)), that right does not apply to a record that relates to services provided under Part III of the *Act*, being child protection (see section 76(5)(b)).

Analysis

[41] The principles set out in *SDK*, *MO* and *O(E)*, on which the mother relies, are not applicable in the circumstances of this case. The decisions in *SDK* and *MO* arose in the context of applications for relief under sections 7 and 24 of the *Charter*, and all three cases dealt with statutory disclosure provisions that were significantly different from those in the *Act*. While the mother attempts to argue that the statutory disclosure provisions in the *Act* do not meet the requirements of section 7 of the *Charter*, that issue is not before us. There was no application for any *Charter* relief made to the Court, no challenge to the constitutionality of the relevant provisions of the *Act* and no notice given under section 7(2) of *The Constitutional Questions Act*. The interpretation and constitutional validity of the disclosure provisions of the *Act* raise new and complex issues that cannot be determined in this appeal (see *Samborski*; and *Guindon v Canada*, 2015 SCC 41 at paras 22-23).

[42] Having said that, there is no question that child protection proceedings engage the section 7 *Charter* rights of parents and that such proceedings must be procedurally fair as described in *G(J)*. I agree in principle that procedural fairness requires that the parents receive disclosure sufficient to allow them to effectively respond to the agency's case.

[43] In reviewing the decision of the trial judge, one cannot lose sight of the fact that child protection proceedings present unique challenges for the courts. They engage both the parents' and children's section 7 *Charter* rights. This Court has previously emphasized the urgency of these matters and the necessity that they be heard expeditiously (see *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33 at para 70; and *The Director of Child and Family Services v GMH*, 2018 MBCA 35 at para 14). Children under apprehension need to have their status determined quickly and fairly. In some cases, the parents' interests will be aligned with their children in having the proceeding move ahead expeditiously. However, this will not always be so. Delay in child protection proceedings has a direct and deleterious impact on children, particularly Indigenous children as they are overrepresented in the child welfare system (see *HH and CG* at para 88, point 7). Judges must be vigilant in preventing unneeded delay, including by dismissing unmeritorious adjournment requests (see *HH and CG* at para 88, point 1).

[44] Fundamentally, what the trial judge did in dealing with the mother's motion was to balance the need to have the proceeding heard expeditiously against the mother's request for further disclosure. A decision whether to adjourn a trial is a discretionary one that cannot be lightly interfered with on appeal, absent an error that occasions a decision that is unreasonable, clearly wrong or unjust (see *GMH* at para 12; and *The Director of Child and Family*

Services v JG and KB, 2017 MBCA 27 at para 7).

[45] On the facts of this case, I am not persuaded that the trial judge's decision to dismiss the mother's motion was unreasonable, clearly wrong or unjust. At the end of the day, the crucial finding of the trial judge was that the mother's plan for the children could not meet their need for safety and security. As a result, there is no basis to conclude that she suffered any prejudice from not having further disclosure regarding the agency's plan. In addition, the mother could have used existing statutory disclosure procedures and brought a motion for further disclosure in advance of the trial so that an adjournment would not have been necessary, but she failed to do so. While the agency argued that a disclosure motion could have been brought under section 37(1)(a) of the *Act*, I note that section 76(3)(b) of the *Act* also contemplates that the court can order disclosure of records that are confidential and subject to disclosure restrictions under the *Act*.

[46] In my view, the trial judge appropriately balanced the competing interests at play and his decision is entitled to deference.

Did the Trial Judge Err in Finding that the Agency's Plan was Adequate to Preserve the Children's Indigenous Identity?

[47] The trial judge found that it was in the children's best interests to grant the agency a permanent order of guardianship. Such a decision should not be interfered with on appeal unless there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence (see *Metis Child, Family and Community Services v AJM et al*, 2008 MBCA 30 at para 26; and *Michif Child and Family Services v VEMB et al*, 2016 MBCA 13 at para 16).

[48] In this case, the fact that the children were in need of protection was conceded. Accordingly, the issue for the trial judge was to determine which order under section 38(1) of the *Act* was in their best interests.

[49] In determining a child's best interests, the *Act* directs that "the child's safety and security shall be the primary considerations" (at section 2(1)). After that, all other relevant matters shall be considered, including:

> (a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;
>
> (b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet such needs;
>
> (c) the child's mental, emotional and physical stage of development;
>
> (d) the child's sense of continuity and need for permanency with the least possible disruption;
>
> (e) the merits and the risks of any plan proposed by the agency that would be caring for the child compared with the merits and the risks of the child returning to or remaining within the family;
>
> (f) the views and preferences of the child where they can reasonably be ascertained;
>
> (g) the effect upon the child of any delay in the final disposition of the proceedings; and
>
> (h) the child's cultural, linguistic, racial and religious heritage.

[50] The mother submits that the agency's plans for the children are not adequate to preserve their Indigenous identities and as a result, are not in their best interests. The mother points to the fact that all of the children are in non-

Indigenous foster homes and that the only evidence before the trial judge that the children would be exposed to their culture came in the form of hearsay evidence from the agency workers that the foster parents are open to doing so. The mother argues that the trial judge erred in dismissing the importance of the children's opportunity to live in an Indigenous home with the mother, supported by her father and by ARJK, both of whom are Indigenous.

[51] The intervener submits that, in respect of Indigenous children, the best interests principle must be construed with greater emphasis on culture and heritage and consistent with the principles of reconciliation as discussed in The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (2015), online: <http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf>. The intervener points out that Indigenous children are uniquely vulnerable as they are members of a historically disadvantaged group who are overrepresented in the child welfare system. The intervener says that many of the issues that bring Indigenous children into state care are the result of inter-generational trauma due to colonization and assimilation practices. The intervener argues that the placement of such children into non-Indigenous homes leads to identity confusion and negatively affects their development. It submits that a holistic view of "safety and security" (at section 2(1) of the *Act*), the primary considerations in determining best interests, would include a deep connection to one's culture and heritage.

[52] The agency notes that, in a child protection proceeding, consideration of best interests only occurs once the court determines that the child is in need of protection from the parents. The agency argues that the statutory scheme

clearly sets out that the child's safety and security is to be given primary importance, followed by the other factors which include "the child's cultural, linguistic, racial and religious heritage" (at section 2(1)(h) of the *Act*). The agency submits that the trial judge made no palpable and overriding error in granting a permanent order of guardianship to the agency based on its care plan for the children. The evidence was that there were no Indigenous foster homes available for the children, nor was there an appropriate family member who could care for them. The trial judge considered the children's cultural needs and was satisfied that the agency's plan adequately addressed them in the circumstances.

[53] As argued by the mother and the intervener, the disproportionate representation of Indigenous children in the child welfare system is disturbing, if not tragic. The preservation of Manitoba's diverse and rich Indigenous culture is vital for the health of our Indigenous communities and their children and it enriches our society as a whole. While past colonization and assimilation practices continue to have a negative effect on current generations of Indigenous Manitobans, progress toward reconciliation is being made.

[54] For example, the agency's mandate was extended as part of the devolution of the child welfare system in response to the Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Province of Manitoba, 1991). The agency provides child and family services to members of the Dakota Ojibway Tribal Council communities. The intervener noted that the agency states its intent to be the provision of service which recognizes traditional Indigenous values and customs.

[55] While it would be ideal for all children in foster care to be placed in culturally compatible homes, judges must make decisions based on the evidence before them in each individual case. In this case, the trial judge found that the children would not be safe if returned to the mother. In doing so, he gave primary consideration to the safety and security of the children, as the *Act* mandates. He considered and balanced the other important, though secondary, factors, including the Indigenous heritage of the children, stating:

> While culturally appropriate placements should be a priority in the placement of aboriginal children, I am satisfied such a placement is not feasible in this case. Unfortunately, the Agency does not have any such homes available. Fortunately, according to the Agency, the foster parents who are expected to be the children's long-term foster parents are committed to exposing the children to their aboriginal culture and facilitating contact with their siblings.

[56] The trial judge did not err in admitting hearsay evidence regarding the foster parents' willingness to facilitate exposure of the children to Indigenous cultural activities. This Court has confirmed that a judge hearing a child protection matter has the discretion to "bypass the technical rules of evidence" (*Winnipeg Child & Family Services v L(L)*, 1994 CarswellMan 132 at para 52 (CA)), including by admitting hearsay evidence without proof of necessity (see paras 50, 66).

[57] Ultimately, the trial judge balanced the factors set out in the *Act* and determined that the children's best interests would be served by a permanent order of guardianship in favour of the agency. The trial judge did not underemphasize the importance of the cultural heritage of the children. As I am not persuaded that there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence, the trial judge's decision is entitled to deference.

Did the Trial Judge Err in Granting a Permanent Order Rather than a Less Intrusive Order?

[58] The final issue in this appeal is whether the trial judge erred by granting a permanent order instead of ordering a supervised, gradual return of the children to the mother's care. This ground of appeal can be dealt with briefly.

[59] Like the previous ground of appeal, the issue here is whether the trial judge should have granted a permanent order to the agency. As stated earlier, such a decision should not be interfered with on appeal unless there has been an error in principle, a misapprehension of the evidence or a manifest failure to give due consideration to the evidence.

[60] The mother argues, as she did before the trial judge, that her plan of a supervised, gradual return of the children was in their best interests. She maintains that she has taken parenting courses and made other improvements since the children were apprehended so that she would now be an adequate parent. The mother also submits that the lack of pre-trial disclosure by the agency affected the quality of the evidence before the trial judge and prevented him from being able to fully analyze the children's best interests.

[61] The agency argues that there is no basis to intervene in the trial judge's factual findings that the mother lacks the ability to adequately care for and protect the children and that she would not comply with a supervisory order. The agency notes that, since it does not plan to place the children for adoption, the mother could return to court after one year under section 45(3) of the *Act* to seek to set aside the permanent order.

[62] In my view, the trial judge's findings were supported by the evidence. The mother's argument that the quality of the evidence prevented a proper analysis of the children's best interests is speculative at best. Deference is owed to the trial judge's decision to grant a permanent order of guardianship to the agency.

Conclusion

[63] I would dismiss the appeal.

Pfuetzner JA

I agree: Beard JA

I agree: Monnin JA

APPENDIX

Provisions – *The Child and Family Services Act*, CCSM c C80

PART III
CHILD PROTECTION

Application to court for protection hearing
27(1) The agency shall, within 4 juridical days after the day of apprehension or within such further period as a judge, master or justice of the peace on application may allow, make an application for a hearing to determine whether the child is in need of protection.

Notice of hearing
30(1) The agency shall give two clear days notice of the date the application under subsection 27(1) is returnable or is set for hearing, together with particulars of the grounds that are alleged to justify a finding that the child is in need of protection, to

(a) the parents;

(b) the guardians;

(c) the child where the child is 12 years of age or more;

(d) the person in whose home the child was living at the time of apprehension or immediately prior to placement in hospital or other place of safety; and

(e) the agency serving the appropriate Indian band if the agency making the application has reason to believe that the child is registered as an Indian under the *Indian Act* (Canada) [RSC, 1985 c I-5];

and no further notice is required to be given by the agency thereafter.

Order for further particulars
32(2) A person who is not satisfied with the particulars provided under subsection 30(1) may apply to court for an order that the agency provide further particulars.

Queen's Bench rules re: discovery not to apply
32(3) The rules of the Court of Queen's Bench regarding examination for discovery and examination of documents do not apply to a hearing under this Part.

Proceedings informal
36 Proceedings under this Part may be as informal as a judge or master may allow and no order under this Part shall be set aside because of any lack of formality at the hearing or for any other technical reason not affecting the merits of the case.

Power of court
37(1) A judge or master may for the purposes of a hearing under this Part

(a) compel on his or her own motion the attendance of any person and require that person to give evidence under oath and to produce such documents and things as may be required;

(b) accept evidence by affidavit;

(c) accept as evidence a report completed by a duly qualified medical practitioner, dentist, psychologist or registered social worker as evidence without proof of the signature or authority of the person signing it.

PART VI
CONFIDENTIALITY

Proceedings open to media
75(1) All proceedings under Parts II, III and V, other than a proceeding under *The Provincial Offences Act* [CCSM c P160], shall be closed to the general public but shall be open to representatives of the press, radio and television unless the court, on application, is satisfied that the presence of such representatives would be manifestly harmful to any person involved in the proceedings.

Proceedings open to public and media
75(1.1) With respect to a proceeding under *The Provincial Offences Act* pertaining to an offence under this Act, upon the application of a person who is involved in the proceeding or a portion of the proceeding, a court, where it is satisfied that conducting the proceeding or the portion in public would be harmful or injurious to the personal well-being of a person and that conducting the proceeding or portion in private would not be contrary to the public interest in the administration of justice, may, by order, direct

(a) that the proceeding or the portion be closed to the public and conducted in private; and

(b) that news reporters in attendance at the closed proceeding or portion not publish or broadcast evidence that is produced at or testimony that is given in the closed proceeding or portion.

Reporting not to identify persons involved
75(2) No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

Offence and penalty
75(3) A person violating subsection (2) commits an offence punishable on summary conviction and is liable, if an individual, to imprisonment for 2 years or to a fine of $5,000 or both and, if a corporation, to a fine of $50,000.

Offence by an officer, etc. of corporation
75(4) Where a corporation is guilty of an offence under this section, any officer, director or agent of the corporation who directed, authorized, participated in, or acquiesced in, the commission of the offence, is party to and is also guilty of the offence and is liable to the penalties set out in subsection (3).

Meaning of access
76(1) A person who is given access to a record or an excerpted summary of a record under this section has, subject to subsection (19), the right

(a) to examine the record or summary; or

(b) to obtain a copy of the record or summary.

Access with consent of subject
76(2) For purposes of this section, where a person is entitled to be given access to a record by virtue of the consent of another person who is the subject of the record, the agency which has custody or control of the record or the director may

(a) prior to giving access to the person, require a written acknowledgement or other evidence of informed consent from the subject of the record; and

(b) comply with the requirement to give access by giving access directly to the subject of the record rather than the person entitled to access.

Records are confidential

76(3) Subject to this section, a record made under this Act is confidential and no person shall disclose or communicate information from the record in any form to any person except

(a) where giving evidence in court; or

(b) by order of a court; or

(c) to the director or an agency; or

(d) to a person employed, retained or consulted by the director or an agency; or

(d.1) to the Advocate; or

(d.2) where the disclosure is by the Advocate under *The Advocate for Children and Youth Act* [CCSM c A6.7]; or

(e) by the director or an agency to another agency including entities out of the province which perform substantially the same functions as an agency where reasonably required by that agency or entity

(i) to provide service to the person who is the subject of the record, or

(ii) to protect a child; or

(f) to a student placed with the director or an agency by contract or agreement with an educational institution; or

(g) where a disclosure or communication is required for purposes of this Act; or

(g.1) where a disclosure is authorized under *The Protecting Children (Information Sharing) Act* [CCSM c P143.5], as long as the disclosure is not explicitly prohibited by another section of this Act; or

(h) by the director or an agency for the purpose of providing to the person who is the subject of the record, services under Part 2 of *The Vulnerable Persons Living with a Mental Disability Act* [CCSM c V90], or for the purpose of an application for the appointment of a substitute decision maker under Part 4 of that Act.

Right of access
76(4) An adult is entitled to be given access to

(a) his or her own record; and

(b) the record of a child who is in the adult's legal care.

Exceptions
76(5) Subsection (4) does not apply to

(a) any part of a record which was made prior to the day this section comes into force and which discloses information provided by another person about the subject of the record, unless the other person consents to access being given; and

(b) a record which relates to services provided under Part III;

(c) [repealed] S.M. 1997, c. 47, s. 131.

Excerpted summary
76(6) Where the director or an agency refuses to give access to part of a record under clause (5)(a), the director or agency shall, upon the written request of an adult person who would otherwise be entitled to be given access to that part of the record under subsection (4), provide the person with an excerpted summary of the information provided by the other person.

Preparation of summary
76(7) Where an excerpted summary is provided under subsection (6), it shall be prepared by the person who provided the information, if that person is available and willing to do so, but otherwise it shall be prepared as directed by the director or agency.

Restricted access
76(8) The director or an agency may refuse to give a person access to any part of a record referred to in subsection (4) where

(a) there are reasonable grounds to believe that disclosure of that part might result in physical or serious psychological harm to another person; or

(b) that part contains information which was provided by any person not employed by the director or an agency or appointed under this Act; or

(c) that part discloses the identity of a person who is not employed by the director or an agency or appointed under this Act, and who has supplied information in confidence to the director or an agency for any purpose related to the administration or enforcement of this Act or the regulations;

and the director or agency shall notify the person in writing of the reasons for refusing access to that part of the record.

Information filed by person given access
76(9) A person given access to a record under subsection (4) is entitled to submit to the director or agency

(a) a written objection respecting any error or omission of fact which the person alleges is contained in the record; and

(b) a written objection to, or explanation or interpretation of, any opinion which has been expressed by another person about any person referred to in subsection (4) and which is contained in the record.

Information becomes part of record
76(10) As of the date of its submission, any objection, explanation or interpretation submitted under subsection (9) becomes part of the record and shall not be destroyed, altered or removed therefrom.

Correction of factual error
76(11) Where the director or agency is satisfied that a record referred to in subsection (9) contains an error or omission of fact, the director or agency shall cause the record to be corrected.

Voluntary service records
76(12) Where the subject of a record is a person who has applied voluntarily to an agency for services under Part II and the agency has no reasonable grounds to believe that a child of that person, or a child who is under that person's guardianship or actual care and control, is in need of protection, the agency shall not disclose or communicate the contents of the record to any person outside the agency except

(a) by order of a court; or

(b) in accordance with subsections (4) to (8); or

(c) subject to subsection (15), with the consent of the person who is the subject of the record, but only if the subject is an adult.

Transition to mandatory services
76(13) Where the agency referred to in subsection (12) subsequently believes on reasonable grounds that a child referred to in subsection (12) is in need of protection, the agency shall immediately give notice of that fact to the person who is the subject of the voluntary service record, and all information entered in the record after the date of the notice is subject to subsection (3).

Closed records
76(14) Where a ward, or a child placed under an agreement referred to in section 14, has reached the age of majority and the record of the wardship or placement has been closed, the record shall be sealed in a separate file and stored in a safe depository, and information from the record shall not be disclosed to any person except

(a) by order of a court; or

(b) subject to subsection (8), to the subject of the record, but in the case of a record made before this section comes into force, the information shall be in the form of an excerpted summary; or

(c) subject to subsection (15), with the consent of the person who is the subject of the record; or

(d) in accordance with subsection (16); or

(e) by the director in the course of carrying out searches of the post-adoption registry under *The Adoption Act* [CCSM c A2]; or

(f) where disclosure is necessary for the safety, health or well-being of a person; or

(g) where disclosure is necessary for the purpose of allowing a person to receive a benefit.

Restricted access by other person
76(15) The right of access conferred by clauses (12)(c) and (14)(c)

(a) does not apply to a record which was made prior to the day this section comes into force; and

(b) is subject to subsection (8), with necessary modifications.

Application to disclose record
76(16) Upon application by the director or an agency, the court may order that all or part of a record referred to in subsection (14) be opened or disclosed where there are reasonable grounds to believe that a child or sibling of the adult who is the subject of the record, or a child who is under that adult's actual care and control, is likely to suffer physical or serious psychological harm if the record is not opened or disclosed.

Notice to adult
76(17) The director or an agency acting under subsection (16) shall give the adult 7 clear days notice of the hearing of the application unless a judge on application reduces the time of giving notice or dispenses with notice entirely on the grounds that a person mentioned in subsection (16) is in immediate danger.

Access for research purposes
76(18) The director, or an agency with the director's written consent, may give a person access to all or part of a record for bona fide research or statistical purposes if the director or agency obtains from the person a written undertaking not to disclose the contents of the record or part thereof in any form which could reasonably be expected to identify any other person who is identified in the record, and

(a) the other person consents to the giving of access; or

(b) the director is satisfied that the research or statistical purpose cannot reasonably be achieved unless the record or part thereof is provided in a form which identifies the other person.

Fees
76(19) A person who is given access to a record or an excerpted summary of a record under this section shall, prior to examining the record or summary or obtaining a copy thereof, pay to the agency which has custody or control of the record or to the director such fees as may be prescribed by regulation.

Request for review
76(20) A person whose request for access to a record under this section has been refused in whole or in part, or who alleges that all or part of his or her record has been disclosed in contravention of this section or that there has been a failure to comply with subsection (9), may within 30 days of the refusal, or the alleged disclosure or failure to comply, request the director to review the matter and, subject to subsection (21), the decision of the director in the matter is final.

Review from denial of access
76(21) A person who is denied access to all or part of a record by virtue of the director's decision under subsection (20) may apply for a further review or appeal of the matter in accordance with any law of general application in the province which provides a right of review or appeal to a court, or to any other person or agency outside the government and Crown agencies, on any question of access to records in the custody or under the control of government departments or Crown agencies.

Retention, storage and destruction of records
76(22) Subject to subsection (14), an agency shall retain, store and destroy records made under this Act in accordance with the regulations.