IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***CD v. PB et al.,*** 2006 BCSC 1515

Date: 20061012
Docket: 14238
Registry: Smithers

Between:

CD

Plaintiff

And

PB, NE and BM

Defendants

- and -

Docket: 14087
Registry: Smithers

In the Matter of the Adoption Act

In the Matter of a Male Child
Birth Registration Number 2005-59-039747

As Amended Pursuant to Rule 24(1)

Between:

NE, BM and PB

Petitioners

And

CD

Respondent

Before: The Honourable Mr. Justice E. R. A. Edwards

Reasons for Judgment

Counsel for the birth father: B. D. Solem

Counsel for the birth mother and prospective adoptive parents:	T. E. Hudson
Dates and Place of Trial/Hearing:	August 14-17, 2006 August 21-24, 2006 Smithers, B.C.
Written submissions filed:	September 21, 22, 27 and 29, 2006

BACKGROUND

[1] These two proceedings, heard together by consent, concern the adoption of a boy, MM, conceived during a one night liaison between the boy's mother PB, then age 16, and father CD, then age 18. MM was born December 20, 2005.

[2] CD has another son, MD, born in February, 2006. CD and SB, age 17, the mother of MD, are unmarried. They lived together as a couple at the time MD was conceived and at the time of the hearing of this case. Both testified they intend to marry.

[3] The prospective adoptive mother NE, age 37, and prospective adoptive father BM, age 41, have lived together for 13 years and been married 10 years. Two foster children, ages 15 and 7, have each resided with them for most of those children's lives. NE and BM have acted as foster parents to other children as well.

[4] NE's son, age 18, no longer resides with NE and BM, but remains close to them. BM's three children by a previous marriage, ages 18 though 22, all reside in Fort St. John. BM sees them infrequently.

[5] NE and CD are both "status" Indians (under the ***Indian Act***, R.S.C. 1985, c. I-5) of Tahltan First Nation origin and are distantly related. SB is a "status" Indian of Wet'suwet'en First Nation origin. PB is related to neither adoptive parent and is not of First Nations origin.

[6] Before MM was born, PB determined that neither she, as a high school student nor CD who had just completed high school and was headed for university, were sufficiently mature to care for a baby as parents and arranged for MM to be adopted by NE and BM with the understanding that CD would consent to the adoption.

[7] The preponderance of the evidence in this rather lengthy trial dealt with the circumstances under which PB decided prior to MM's birth that he should be adopted by a stable couple and what ensued from her decision.

[8] CD's mother, JA, approached NE and BM about adopting the baby and recommended them to PB as a suitable couple to adopt the baby. JA persuaded CD to consent to the adoption.

[9] PB concluded NE and BM would be ideal adoptive parents and following CD's signing of a form of consent, also consented to the adoption and placed MM in the care of NE and BM ten days after his birth, pending formalization of the adoption.

[10] More than two months later, CD, with JA's support, decided to revoke his consent when he learned the consent form he signed had been rejected by the court registry.

[11] The unfortunate effect of these developments is that all of these persons, who undertook the adoption with the best interests of MM in mind, have divided into two camps: CD and JA versus PB, NE and BM, in what amounts to a custody dispute over MM. All of them acknowledge that MM should know and have continuing contact with his birth parents PB and CD regardless of the outcome of this case.

[12] Just prior to MM's birth, NE and BM engaged a solicitor (who was not their counsel for these actions) to act for them to apply to the court for an adoption order pursuant to the ***Adoption Act***, R.S.B.C. 1996, c. 5 ("the ***Act***").

[13] Pursuant to their instructions, the solicitor met with both birth parents the day after MM's birth to address the issue of their consents.

[14] On that day, the solicitor met in his office with CD and his mother JA. He had drafted a form of consent for signature by CD, which he showed them. The form of consent did not include the birth registration number which had yet to be issued, the name of the child which had not yet been determined or registered by PB, or CD's occupation. It erroneously set out MM's date of birth as December 20, 2006.

[15] According to the solicitor, he explained the consequences of the consent and adoption and the consequences of not consenting, as well as the possibility of revocation of consent.

[16] Under cross-examination at the trial, the solicitor acknowledged that he was unaware of the requirement that the child reside for six months with the adoptive parents before an adoption order can be made under s. 35 of the ***Act***, so the solicitor was unable to tell CD how long he had to apply to revoke his consent, although he advised CD it would be "expensive and time consuming" to do so.

[17] The solicitor also acknowledged he advised CD he was legal guardian of MM by virtue of his paternity, erroneously in light of s. 27(5) of the ***Family Relations Act***, R.S.B.C. 1996, c. 128 ("the ***FRA***").

[18] The solicitor testified that he told CD that PB was opposed to CD and SB raising the child and that if CD did not consent to the adoption there would be litigation with PB if he attempted to obtain custody.

[19] The solicitor also testified that he told CD that NE and BM would treat the adoption as an open one in which CD could be involved in the life of MM.

[20] The solicitor further testified that CD's mother, JA, made clear to CD she was opposed to him seeking custody of MM.

[21] The solicitor could not recall JA stating to CD that he would have a better chance of contact with MM if he consented to the adoption than if he did not consent and contested custody with PB. However, this is consistent with JA's testimony that she pressed CD to consent to the adoption by NE and BM on the basis of her belief CD had no chance of obtaining custody in a dispute with PB.

[22] The solicitor testified he told CD he was not obliged to sign and that his consent had to be voluntary, informed and without doubt. The solicitor testified he told CD he could get his own lawyer but did not suggest or urge that he do so.

[23] This meeting on December 21, 2005, lasted about one hour. When it ended CD said he wanted time to consider whether he would consent.

[24] The solicitor met with PB that day and explained consent and adoption to her.

[25] When CD met PB the night of MM's birth, he was equivocal about whether he would consent. This surprised PB who had assumed, since it was JA's suggestion that NE and BM would be suitable adoptive parents, CD would consent to their adoption of the baby. PB told the solicitor she would not consent until CD did. PB began to plan for the eventuality that she would retain custody and care for the baby if CD did not consent.

[26] PB told NE that CD had not consented. NE called JA for an explanation. JA told NE she would speak to CD. She persuaded CD to consent.

[27] On December 23, 2005, the solicitor was advised CD would sign the consent form and went to CD's home to obtain his signature.

[28] The solicitor's impression was that CD was clear about his intent to consent and so eager to sign that the solicitor had to "slow him down" in order to explain again the consequences of consent and non-consent. CD signed an incomplete form of consent to adoption by NE and BM. It was incomplete because the baby had not been named nor had the birth been registered when he signed.

[29] PB signed her consent to adoption by NE and BM on December 30, 2006, at the earliest

opportunity under s. 14 of the ***Act*** and the next day placed MM, whose name she had chosen in conjunction with NE before registering the birth, with NE and BM.

[30] MM had been in the care of PB from December 25, 2005, when they left hospital, until December 31, 2005, when her consent to adoption took effect. NE and BM took up parental responsibility for MM on that day and he has been in their care and custody since then.

[31] The solicitor filed the adoption application on January 13, 2006. It was rejected by the registry on January 31, 2006, because the consent form signed by CD did not include the name of MM or the birth registration number and set out the wrong birth date for MM, and because the application did not include material to support an order to dispense with the requirement under s. 35 the ***Act*** that the child reside with the prospective adoptive parents for six months before adoption.

[32] On March 8, 2006, CD signed a purported revocation of consent which he delivered to the solicitor for NE and BM.

[33] In March 2006 CD applied, without counsel, to the Provincial Court for access to MM and specified access was ordered by consent.

[34] Since April 2006, CD has had several short access visits with MM, some at CD's home and some at the home of NE and BM, pursuant to two consent orders of the Provincial Court.

[35] PB resides nearby NE and BM. PB has become a close friend of NE and has had frequent contact with MM since birth and more or less daily contact with MM for several weeks prior to the trial of these actions.

PLEADINGS

[36] The Provincial Court custody proceedings commenced by CD were transferred to this court under Action Number 14238 Smithers Registry so they could be heard in conjunction with the adoption petition brought by NE, BM and PB, Action Number 14087 Smithers Registry.

[37] In Action Number 14087, the petitioners NE, BM and PB seek the following orders:

1. An Order recognizing the Custom Adoption of MM by NE and BM pursuant to the customs and traditions of the Tahltan Nation;
2. An Order for the Adoption of MM by NE and BM;
3. An Order for costs; and
4. Such further and other relief as this Honourable Court may consider appropriate and just in the circumstances.

[38] The Response filed on behalf of CD does not seek any specific relief, including dismissal of the petitioners' claims. In the context of the agreement of counsel that the two actions be heard together, and the manner in which the cases were presented and argued, I take the respondent's claim for relief to be that the petition for adoption be dismissed. Pursuant to Rules 2(2) and 24(1) and (5) I allow the respondent to amend his Response to that effect.

[39] CD, the plaintiff in Action Number 14238 seeks the following relief: "sole custody and sole guardianship" of MM. In the same action the three defendants NE, BM and PB seek an order granting NE and BM "sole custody and guardianship of their son" (which I take to mean they seek an order granting NE and BM joint custody and guardianship). In the alternative, the three defendants seek an order granting PB sole custody and guardianship.

[40] It is noteworthy that neither the plaintiff nor the defendants seek access in the alterative to the orders for custody they seek in Action Number 14238.

CUSTOMARY ADOPTION

[41] If the petition for adoption is granted then the parties' competing claims for custody and guardianship become moot. I therefore consider the petition for adoption first.

[42] In that regard I deal first with the claim for an order recognizing the arrangement to have NE and BM raise MM as an adoption "pursuant to the customs and traditions of the Tahltan Nation".

[43] Patrick Carlick, a 64-year old elder of the Telegraph Creek Tahltan First Nation was called by counsel for PB, NE and BM to testify as to the Tahltan tradition respecting adoption. Counsel for CD objected on the basis she had insufficient notice of what he would say, since she had not received an outline of his evidence until the day before he testified, although she had received "will say" statements from other elders who did not testify. I heard Mr. Carlicks's evidence and reserved decision on its admissibility.

[44] Mr. Carlick testified from his own family experience respecting his near relatives that where a natural parent died or was unable to act as a parent because of illness, that parent's child would be "given" to a near relative such as a grandparent, aunt or uncle. If no near relative could care for the child, then the child would be placed in the care of some other resident of the reserve. If the natural parents were too young to care for the child the same applied. Once the natural parents had agreed to the adoption they could not claim the child back, but could visit the child.

[45] As I understood Mr. Carlick's evidence, such arrangements were made with the consent of the natural parents and the near relatives of the child. His evidence did not specifically address the circumstances of this case, where the natural mother agreed to the adoption and the natural father, after initially agreeing, purported to revoke his consent.

[46] There is no evidence that CD, PB, NE, BM or JA had any significant understanding of Tahltan traditional or customary adoption practice, or that either the natural or prospective adoptive parents gave any consideration to that practice when the arrangements were made for NE and BM to adopt MM pursuant to the ***Act*** or when CD and PB signed their consents to the adoption. All these persons assumed they were dealing with an adoption governed by the generally applicable law under the ***Act***, not one according to Tahltan custom. I find there was no adoption under Tahltan customary practice.

[47] I find Mr. Carlick's evidence of Tahltan traditional adoption practice is inadmissible. Since it did not provide a comprehensive description of Tahltan customary adoption nor address the specific circumstances of this case, and since I have found this was not treated by the parties as a customary adoption, I find it is not relevant to or determinative of any issues which arise in this case.

CONSENT OF CD

[48] I now consider the effect, if any, of CD's consent to the adoption on December 23, 2005, and his purported revocation of consent on March 8, 2006, before addressing the key issue of whether adoption of MM by NE and BM or transferring custody of MM to CD, to be raised by CD and SB, as CD now proposes, is in the best interests of MM.

[49] I find PB's placement of MM with NE and BM for adoption was not a "direct placement" under s. 4(c) of the ***Act***, in light of the definition of that term in s. 1 of the ***Act***, which is as follows:

> **"direct placement"** means the action of a birth parent or other guardian of a child placing the child for adoption with one or 2 adults, <u>none of whom is a relative of the child</u>. [emphasis added]

[50] One of the reasons JA recommended NE as a prospective adoptive parent to PB was that NE was a blood relation of CD, albeit a distant one.

[51] Because CD and NE shared Tahltan origin and because of their relationship and acquaintance with other members of that First Nation, JA persuaded CD that NE would raise MM with a connection to and awareness of his Tahltan origins, including members of CD's family. PB recognized this as a significant factor in her decision to place MM with NE and BM.

[52] I find both PB and CD consented to NE as a suitable adoptive parent in part because she was a relative of CD who would maintain MM's connection with CD and his extended family. NE, through her distant blood relationship with CD, is a "relative" of MM as defined by s. 1 of the ***Act***, as follows:

> **"relative"** means a person related to another by birth or adoption.

[53] I find PB, a "birth parent", placed MM with NE, "a relative of the child", pursuant to s. 4(d) of the ***Act***.

[54] Because this was by definition not a "direct placement", sections 8, 9, and 31 of the ***Act*** are not engaged. Under s. 12(2) of the ***Act***, if a child is placed for adoption with a relative, that prospective adoptive parent is not obliged to notify either "a director or an adoption agency" of the placement.

[55] That being so, there will be no "post-placement report" prepared for consideration of the court under s. 35 of the ***Act***, which provides:

> **Adoption order**
>
> **35** (1) After considering the post-placement report and other evidence filed under section 32, 33 or 34, the court may make an adoption order if it is satisfied that
>
> > (a) the child has resided with the applicant for at least 6 months immediately before the date of the adoption hearing, and
> >
> > (b) it is in the child's best interests to be adopted by the applicant.
>
> …

[56] In the absence of a "post-placement report" the court, on considering the adoption petition under s. 35, is bound to consider only "other evidence filed under section 32, 33 or 34."

[57] In this case sections 33 and 34 have no application. The relevant portions of s. 32 are the following:

> **Required documents**
>
> **32** Before an adoption order is made, the following documents must be filed with the court:
>
> > (a) all the required consents to the adoption, or the orders dispensing with consent or an application to dispense with consent;
> >
> > (b) the child's birth registration or, if it cannot be obtained, satisfactory evidence of the facts relating to the child's birth;
> >
> > …

[58] The consent form signed by the father does not meet the requirements of s. 16 of the ***Act*** and s. 9 of the ***Adoption Regulation***, B.C. Reg. 291/1996, which prescribes the form of consent.

[59] As noted above, the form of consent signed by CD was deficient in a number of respects. It does not comply with the prescribed form.

[60] CD's consent is either required under paragraphs 13(1)(c) and 13(2)(f) of the ***Act***, or it must be dispensed with by the court under s. 17.

[61] The evidence before the court in the present actions makes it abundantly clear that CD acknowledged paternity, had seen the child after its birth before signing the form of consent and knew the date of birth. There is no doubt CD intended to consent to the adoption of his newly born son by NE and BM when he signed the form.

[62] I find on the basis of the evidence of the solicitor and CD that at the time CD signed that CD was aware of the legal consequences of consenting to the adoption. I make that finding even though the solicitor was unable to answer some of the questions CD and JA asked, did not recommend to

them that CD see his own lawyer and misinformed CD that he had the status of legal guardian of the child at birth. CD's consent was irregularly obtained in that it did not conform to the form prescribed by regulation, but it was not improperly obtained since CD was not misinformed about the consequences of his consent. CD acknowledged at trial that at the time he signed the consent form he considered adoption by NE and BM in the best interests of MM.

[63] CD later changed his mind. CD wrote to the solicitor on March 8, 2006, purporting to revoke his consent. I find this attempt to revoke his consent was a tacit acknowledgment by CD that at the time he signed the consent form his consent was informed, voluntary and valid in substance if not in form.

[64] The form of consent CD signed does not conform to the form prescribed by s. 16 of the ***Act*** and s. 9 of the ***Adoption Regulation***. However, the fact of his signing the form of consent with the understanding it would permit NE and BM to adopt MM, with the consequential loss by CD of his parental rights and obligations, is evidence of CD's intention to consent. CD effectively consented even if the form of consent he signed did not meet the requirements of the ***Act***. CD's letter purporting to revoke his consent has no legal effect in light of s. 22 of the ***Act***, which requires an application to the court to revoke consent.

[65] NE, BM and PB have no formal application before the court to dispense with CD's consent. CD has no formal application before the court to revoke his consent.

[66] Again in light of the evidence before the court and the way these cases were presented and argued, I grant the respective parties leave to amend their pleadings to include those applications pursuant to Rules 2(2)(c) and 24 (1) and (5), in order that there may be an orderly and timely resolution of these actions.

[67] Subsections 22(1) and (4) of the ***Act*** provide that after placement of a child for adoption the court may revoke a consent if "satisfied it would be in the child's best interests to do so."

[68] Subsection 17(1) of the ***Act*** similarly provides that the court may dispense with the consent of CD, the father, whose consent is required under paragraphs 13(1)(c) and 13(2)(f) of the ***Act***, if the court is "satisfied that it is in the child's best interest to do so".

[69] The test in these sections corresponds to the test the court must apply under paragraph 35(1)(b) to determine if "it is in the child's best interests to be adopted by the applicant". The applicants in this case are NE and BM. So the issues of the validity of CD's consent and revocation of CD's consent are effectively subsumed in the larger question of whether it is in the best interests of MM that the adoption order be granted.

[70] I have concluded that it is in the best interest of MM that the adoption order be granted and I accordingly grant that order and dispense with the requirement of CD's consent for the following reasons.

OPINION OF DR. MOISEY

[71] Dr. C. D. Moisey, a paediatrician who had treated CD and SB and was familiar with NE and BM because he is the physician for their two foster children, was called as a witness for PB, NE and BM.

[72] Dr. Moisey had also treated PB's sister and half brother for mental health problems reflected by difficulty remembering, learning and coping with new experiences. These symptoms are labelled "bi-polar type 2" disorder.

[73] Dr. Moisey was aware of PB's family history, including that of her father and mother, both of whom, according to what he had learned in his practice, have been diagnosed with mental health problems.

[74] Dr. Moisey testified that on the basis of interviewing PB, she disclosed no personal mental health history or apparent problems. Dr. Moisey was unable to predict the probability PB might later in life develop type 2 bi-polar symptoms as her siblings have as children.

[75] Dr. Moisey further testified that although medical literature indicated an 80% probability that the child of a parent with type 2 bi-polar disorder would inherit the disorder, the inheritance rate through "skipped generations" had not been established.

[76] Since type 2 bi-polar disorder has skipped PB and there is no basis for predicting the probability she will inherit it, I find that logically there is no reliable basis for predicting the probability that MM will inherit the disorder from PB.

[77] In his written report Dr. Moisey expressed his belief "that there is enough statistical evidence" from PB's side of MM's gene pool that "there is a strong probability of (MM) developing focussing and learning difficulties in the future."

[78] For the reason just stated I am unable to accept that opinion. Dr. Moisey acknowledged in his written opinion it was "tenuous to make these assumptions (that MM may exhibit type 2 bi-polar disorder) at this time and they are made more on the irritability and the settling of this child and the maternal family history." [emphasis added]

[79] His report is signed with the notation "dictated but not read". The preceding quotation makes more grammatical sense if the underlined word "and" is replaced by "than" and this is more consistent with Dr. Moisey's testimony at the trial.

[80] Dr. Moisey's opinion is predicated on the risk that MM will develop symptoms of type 2 bi-polar disorder and that if he does, this can best be dealt with if MM is provided with consistent, repetitive, routine parenting of the type NE and BM have provided for their two foster children, one of whom has been diagnosed with fetal alcohol syndrome and the other the equivalent condition resulting from his birth mother's heroin addiction.

[81] I have not based my decision on Dr. Moisey's opinion.

BEST INTERESTS OF THE CHILD

[82] MM has been in the continuous care of the prospective adoptive parents since ten days after his birth. MM has had some contact with CD and SB as well as his half brother MD under consent access orders. MM has also had a good deal more contact with his birth mother PB under an arrangement between her and the prospective adoptive parents NE and BM.

[83] While there has no doubt been some familial bonding during MM's short visits with CD, SB and MD, the main bond that MM has developed must be with NE, BM and their foster children C and T with whom MM has resided, and with his birth mother PB who lives nearby and visits MM frequently.

[84] In ***King v. Low***, [1985] 1 S.C.R. 87, the Supreme Court of Canada noted the importance of a child bonding early in life with its caregivers and dismissed an appeal from a birth mother who sought to revoke her consent to adoption three months after placing the child with adoptive parents shortly after birth. The Court (per McIntyre J.) noted at para. 34:

> In my view, which I find supported in modern authority in this country and in the United Kingdom: see *Re Moores and Feldstein; Beson; Racine;* and *J. v. C.*, [1970] A.C. 668 (H.L.), and particularly where the governing statute preserves and dictates the application of the rules of equity, the court in questions of contested custody, including contests between a natural parent and adoptive parents, must consider the welfare of the child the predominant factor and give it effect in reaching its determination. This was done by the trial judge and the majority of the Court of Appeal. They reached, in my view, the right result, and I would dismiss the appeal. The respondents are entitled to their costs.
>
> *Appeal dismissed.*

[85] The trial judgment of de Weerdt J., [1983] N.W.T.R. 97, which the Supreme Court of Canada

upheld, placed particular emphasis at pages 103-104 on the fact the child had bonded with the adoptive parents as a basis for determining that the "welfare of the child", which is synonymous with the "best interests of the child", was best served by the adoption.

> On the evidence before me, the child has by now established a strong bond instead with the adoptive parents, who are as a result in relation to the child as if they were its natural parents. This goes beyond the fact that they love and care for the child and have done so almost since the day of its birth. It goes to the very roots of the child's experience of its world since that time. It would be extremely traumatic for the child now to be uprooted from its present parental home and to be returned to a stranger to it, even if that stranger is its natural mother. Though lawful, such an uprooting would do serious and perhaps permanent psychological damage to the child, for it would be destructive of the truly close human bonds which it now has and would impair its prospects of functioning as a healthy human being as it grows older.
>
> The law gives rights to the natural parents of a child in order that such very important and natural bonding may be protected and fostered, in the best interests of the child. The court recognizes those rights on that basis and for that purpose. But where, as in the present case, such bonding does not exist between the natural parent and child, having instead developed between the child and other parent figures, the court must perforce give recognition to the facts of the case accordingly. To do otherwise would be to substitute an empty formula for the substance which the law must embody and express.
>
> On the facts of the present case, as the evidence plainly reveals, the child has been brought up by the adoptive parents almost since the day of its birth. The mother was able to see it and care for it during the five days they both stayed in the hospital, but (in spite of her growing misgivings) she gave up the child as a planned and deliberate choice. She later signed and delivered a formal consent to adoption of the child, in the usual written form, and she does not deny that she did so freely and knowing fully what she was doing. The adoptive parents were also with the child during its days in the hospital and they have had the child ever since, awaiting the day when the court would grant them its adoption. The adoptive parents have been the sole support of the child during the 7 1/2 months of its life. These facts go a long way to establish the position of the adoptive parents in the present application, ….

[86] If custody of MM were transferred to CD at this point, and MM were to reside with CD, SB and MD, the early and substantial bonds MM has developed with the prospective adoptive parents NE and BM, their children and PB would be inevitably and significantly disrupted at a critical early stage of MM's development. This would necessarily occur despite CD's avowed interest in maintaining and fostering bonds between MM and NE and BM, who have been his primary caregivers essentially from birth, and between MM and his birth mother PB.

[87] While I have no reason to doubt the sincerity of CD's expressed intentions in this regard, the disaffection between the parties in this case, as manifested at the trial, does not bode well for cooperation between them. Further, I doubt the existing close relationship which PB has developed with MM, encouraged by NE and BM, could be maintained if CD was granted custody of MM. PB's alternative claim for relief if the adoption is not granted, which is a transfer of custody to her, reflects PB's understandable desire to maintain the close relationship she has developed with MM.

[88] The blood relationship of MM to his father CD and half brother MD is the most compelling consideration in favour of a transfer of custody to CD. Does this important consideration outweigh the bond between MM and NE, BM and their children?

[89] I have concluded the blood tie between CD and MM, though important, is not sufficiently important to justify the change of custody of MM proposed by CD.

[90] In order to change the custodial *status quo* of MM, to which CD agreed in substance if not in form when he signed the form of consent, CD must make a strong case that such a change would

clearly be in MM's best interests.

[91] An order granting CD custody would cause inevitable disruption of the important bonding of MM with the prospective adoptive parents NE and BM and their children, with whom MM has now resided for eight formative and important months. Such a disruption would not be in MM's best interests.

[92] Further, in CD and SB's household, MM would at least to some degree be competing with his near contemporary half brother MD for the attention and affection of CD and SB.

[93] For CD and SB parenthood is a new experience and no doubt a significant challenge for two teenagers recently out of high school. If CD had custody of MM and the relationship between CD and SB deteriorated or ended, there would be potential for a second potentially traumatic disruption in MM's life.

[94] While I was impressed with the apparent maturity and commitment to their relationship and parental responsibilities of both CD and SB, maintaining that relationship and meeting those responsibilities would be all the more difficult with a second young child to care for.

[95] NE and BM, on the other hand, have a long-established, stable relationship and household routine and a comfortable well-established family income as well as a good deal of experience raising their own children and foster children ranging in age from newborn infants to teenagers. In their capacity as foster parents they have received special training in dealing with children with special needs and their home has been periodically assessed by the authorities responsible for foster children, with favourable results.

[96] Counsel for CD cited ***A.L. & J.L. v. D.K. & M.W.*** (2000), 190 D.L.R. (4th) 108, 2000 BCCA 455 ("***A.L.***") for the proposition (cited from ***Hardcastle v. Muculak*** (1987), 11 R.F.L. (3d) 363) that "all things being comparatively equal" in terms of the parties' ability to care for a child "the welfare of the child is best served in the custody of one or both of his natural parents."

[97] The present case is distinguishable from ***A.L.*** in a number of important respects such that in the present case "all things" are not "comparatively equal." In ***A.L.*** there was no *de facto* or *de jure* consent to adoption but merely an agreement to transfer custody of a four-year old child. Unlike the present case, in ***A.L.*** the parties who took custody under the agreement were not prospective adoptive parents, nor had they acted as the primary caregivers of the child from the date of the child's birth for nearly eight months. They had been important but only intermittent caregivers over the four years of the child's life. Also, in ***A.L.*** both birth parents sought to set aside the agreement and obtain custody of the child, whereas here PB supports the adoption by NE and BM.

[98] The present case is much more similar to ***King v. Low*** than it is to ***A.L.*** in that the early bonds MM has developed with NE, BM and their children represent the key familial relationship in his life.

[99] The purpose of the ***Act***, as set out in s. 2, is "to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests."

[100] I have not been persuaded that transfer of custody to CD has been shown to be clearly in MM's best interests. Nor am I satisfied such a transfer would provide for "permanent family ties" because it would immediately engage PB's competing application for sole custody.

[101] I therefore find that granting custody of MM to CD would not be in MM's best interests. Accordingly I dismiss CD's application for an order granting him permanent custody of MM.

[102] I find that the establishment of permanent family ties for MM with NE and BM, who have been his primary caregivers since birth, would be in MM's best interests.

[103] Accordingly I order that MM be adopted by NE and BM. It follows that I also find it would be in the best interests of MM that the required formal consent of CD to the adoption be dispensed with and I so order.

[104] All parties agreed that MM should remain in contact with his birth parents in what is called an "open adoption".

[105] CD has access to MM under the terms of a May 11, 2006, consent order of the Provincial Court. Pursuant to s. 38(2) of the ***Act*** I order that this order does not terminate with the granting of the adoption order but continues on its present terms, subject to the parties' right to apply to this court to modify its terms on the basis of the usual criterion of a material change of circumstances.

[106] PB has concluded an "openness agreement" with NE, which BM accepted was binding on him as well. I order that the access and other provisions of that agreement do not terminate with the granting of the adoption order. The parties are free to modify that agreement, as it contemplates, by their mutual agreement.

[107] NE, BM and PB have been largely successful in these two actions. I award them costs on Scale 3 as if the two actions were one.

"E.R.A. Edwards, J."
The Honourable Mr. Justice E.R.A. Edwards