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— Franks & Zalev - This Week in Family Law

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Contents

Breaking News

Section 3(1)(b) of the *Citizenship Act* defines a citizen as including a person who "was born outside Canada after February 14, 1977, and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen[.]"

Until very recently, Immigration, Refugees and Citizenship Canada ("IRCC") interpreted the word "parent" in s. 3(1)(b) as including only genetic parents. This interpretation had serious consequences for some parents, as it meant that a child who was born outside of Canada and who did not have a genetic link to his/her Canadian parent could not automatically qualify for Canadian citizenship.

Fortunately, IRCC recently announced that it is going to fix this problem. According to the IRCC's July 9, 2020 press release:

> This new interpretation helps Canadian parents who have relied on assisted human reproduction to start a family, including members of the LGBTQ2+ community and couples with fertility issues. Until now, a child born abroad was automatically recognized as a citizen at birth only if the child shared a genetic link to the Canadian parent or if the child was born to a Canadian parent in the first generation.
>
> This change is the result of the advocacy of the Caron / van der Ven family, who sought a durable solution through the court system to address situations where some children of parents using assisted human reproduction did not acquire citizenship automatically at birth. The Superior Court of Québec affirmed that Immigration, Refugees and Citizenship Canada's (IRCC) new interpretation of "parent" recognizes equally biological parents and legal parents at birth, and the Charter of Rights and Freedoms protects this interpretation under the law.

Congratulations to the Caron / van der Ven family, and to all of the other Canadian families who will now be able to obtain Canadian citizenship for their children as of right.

A "Beneficial and Meaningful" Decision on Beneficial and Meaningful Relationships

Children's Aid Society of Toronto v. J.G., 2020 CarswellOnt 8820 (C.A.) - Doherty, Hourigan, and Benotto JJ.A.

. . . And a Different Approach to Access After Guardianship

J.C. v. Minister of Families and Children, 2020 CarswellNB 162 (C.A.) - Baird, French, and LeBlond, JJ.A., additional reasons at 2020 CarswellNB 252 (C.A.)

The question of access after Society Wardship/Permanent Guardianship continues to be one of the most difficult issues in child protection law. With recent statutory amendments, the regime in Ontario has changed, and the cases discussed below offer a good comparison of two of the main regimes that now operate in Canada.

Historically, in Ontario, there was a legislative presumption ***against*** access after a grant of Crown Wardship. The *previous* legislation, the *Child and Family Services Act*, R.S.O. 1990, c. C.11 (the "*CFSA*"), required that, after a finding of Crown Wardship, an applicant for access had to establish that the relationship "is beneficial and meaningful" to the child, and that the access would not impair the child's opportunities for adoption. However, in 2018, the *CFSA* was repealed and replaced with the *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*"). While the *CYFSA* does still require the court to consider whether the relationship is "beneficial and meaningful" to the child, that is just one of several considerations for determining whether access would be in the child's best interests.

In *Children's Aid Society of Toronto v. J.G.*, the trial judge applied the new approach to the determination of access, and ordered access at the discretion of the Children's Aid Society. The appeal judge applied the older and more restrictive test (albeit with the same wording), allowed the appeal, and overturned the decision.

The appellant (the "mother") was the mother of a two-year-old child, A.G. A.G. was the mother's fifth child, and her other four children were in care. There was little doubt that the mother was not able to care for A.G., and it was not disputed that the child was in need of protection. Rather, the mother only sought to continue her supervised once-a-week access at the offices of the Children's Aid Society of Toronto. The father took no part in the proceedings.

The initial hearing took place before Justice Sherr of the Ontario Court of Justice. At the hearing, the mother ultimately consented to an extended society care order, and the only issue before the Court was the mother's access to the child. As noted above, to get access after an order for extended society care, the parent claiming access must show that the relationship "is beneficial and meaningful" to the child.

The question then became the interpretation of the words "beneficial and meaningful". Were those words to attract the strict interpretation as under the *CFSA*? Or did the generally more expansive and liberal provisions of the *CYFSA* demand a new interpretation of "beneficial and meaningful"?

The Society urged the Court to follow the cases under the *CFSA* that narrowly interpreted the words "beneficial and meaningful". Justice Sherr rejected that approach and decided that a more expansive inquiry was required given the new statute, and recent appellate authority. And based on that more expansive inquiry, his Honour concluded that the benefits of the mother's relationship with the child outweighed any detriments, and that the relationship was beneficial and meaningful for the child. He found that it was, presently and prospectively, in the child's best interests to have continued access with the mother at the discretion of the Society.

Justice Sherr's order was appealed by the Society to a single judge of the Ontario Superior Court of Justice.

The appeal judge concluded that the trial judge had erred in assigning a "new definition" to the "same words" - "beneficial and meaningful" under the *CYFSA*. She reviewed the case law on the interpretation of "beneficial and meaningful", and concluded that the more restrictive approach still applied. She also found that the trial judge had erred by considering the potential for a *future* relationship because the court is called upon to consider whether the relationship "is" beneficial and meaningful, not whether it may become so in the future.

The mother then further appealed to the Court of Appeal, where the main issues were:

i. Has the test for access under the *CYFSA* changed the meaning of a "beneficial and meaningful" relationship?

ii. Can the benefits of a future relationship be considered in the "beneficial and meaningful" analysis.

The Court of Appeal first delved into legislative history.

Prior to the *CYFSA* (back to **2004**), the statute dealing with children in need of protection was the *CFSA*. Access to "Crown wards" was governed by s. 59, which stated:

> **Access: Crown ward**
>
> 59 (2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that
>
> (a) the relationship between the person and the child is **beneficial and meaningful** to the child; and
>
> (b) the ordered access will not impair the child's future opportunities for adoption.

The legislation also prevented a child from being adopted if there was an outstanding access order. Therefore, the decision to grant access was a critical one. When a child was about to be placed for adoption, the Court was prevented from granting an access order except in extraordinary circumstances. As noted by Justice Benotto, writing for the Court, "[s]ince courts had to choose between an access order or permanency for a child, the common law interpretation of the test for access to a Crown ward under the former *CFSA* was extremely, and intentionally, restrictive."

In 2011, the *CFSA* was amended to provide that a child could be placed for adoption even if there was an outstanding access order. The amendments established a process for a Society to administratively terminate an access order by serving a notice of intention to place a child for adoption on persons named in the access order. The amendments broadened the ability for children to continue to have some form of contact with people who are important to them through "openness" after adoption. However, the actual *test* for access to a Crown ward did not change, and courts continued to apply the same strict approach and interpretation.

On April 30, 2018, the *CFSA* was repealed and replaced with the *CYFSA*. The new legislation aimed to reduce the stigma of children in care (for example the idea of a "Crown ward" was replaced by children "in extended Society care"), and to import a broad best interests analysis into the determination of access. And, of particular interest for this appeal, the two-part test for access in s. 59 was replaced by a holistic consideration of the child's best interests, now set out in ss. 105(5) and (6) of the *CYFSA*:

> **When court may order access to child in extended society care**
>
> 105 (5) A court shall not make or vary an access order under section 104 with respect to a child who is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c) **unless the court is satisfied that the order or variation would be in the child's best interests**.
>
> **Additional considerations for best interests test**
>
> 106 (6) The court shall consider, **as part of its determination** of whether an order or variation would be in **the child's best interests** under subsection (5),
>
> (a) whether the relationship between the person and the child is **beneficial and meaningful** to the child; and
>
> (b) if the court considers it relevant, whether the ordered access will impair the child's future opportunities for adoption. [emphasis added]

In turn, the definition of "best interests" in s. 74(3), was amended to encompass an *extremely* broad range of considerations - including an "any other circumstances" clause.

Upon the enactment of the *CYFSA*, two lines of cases developed with respect to access for a child in extended care: one line following the old test from the *CFSA*; and the other taking a more expansive approach.

Justice Benotto turned first to the case law under the *CFSA*. Her Honour noted that the most often cited case propounding the restrictive approach was *Children's Aid Society of Niagara Region v. J. (M.)* (2004), 4 R.F.L. (6th) 245 (Ont. S.C.J.) at paras. 45 and 46. In that case, Justice Quinn considered the dictionary definition of the words "beneficial and meaningful" under the *CFSA* and the relevance of a *future* relationship:

> [45] What is a "beneficial and meaningful" relationship in s. 59(2)(a)? Using standard dictionary sources, a "beneficial" relationship is one that is "advantageous." A "meaningful" relationship is one that is "significant." Consequently, even if there are some positive aspects to the relationship between parent and child, that is not enough - **it must be significantly advantageous to the child**.
>
> [46] I read s. 59(2)(a) as speaking of an **existing relationship between the person seeking access and the child, and not a future relationship**. This is important, for it precludes the court from considering whether a parent might cure his or her parental shortcomings so as to create, in time, a relationship that is beneficial and meaningful to the child. This accords with common sense, for the child is not expected to wait and suffer while his or her mother or father learns how to be a responsible parent. [emphasis added]

As noted by Justice Benotto, the phrase "significantly advantageous" became the touchstone of the "beneficial and meaningful" test. This, and it's progeny, was the first line of cases. Even after the *CYFSA* came into force, the "significantly advantageous" test continued to be applied in many cases, and most cases using this more restrictive interpretation also concluded that only the existing relationship be considered - not a possible future one.

One can certainly understand why courts might apply the same interpretation to "beneficial and meaningful" as had been applied under the *CFSA* - after all, the same words are used, and there must be at least a rudimentary assumption that the legislature acts with knowledge of the law. Legislatures are presumed to know what they are doing when they specifically choose to use one word over another: *Bates v. Welcher* (2001), 17 R.F.L. (5th) 255 (Man. C.A.); *O.G. v. R.G.* (2017), 97 R.F.L. (7th) 295 (Ont. S.C.J.); *Dundas v. Schafer* (2014), 50 R.F.L. (7th) 37 (Man. C.A.); and *Foster v. Foster* (2007), 41 R.F.L. (6th) 241 (Man. C.A.). When a statute uses the same word in different provisions, consistency favours applying the same meaning throughout: *St. Jean (Litigation Guardian of) v. Cheung*, 2008 CarswellOnt 7209 (C.A.); *Duchesne v. St-Denis*, 2012 CarswellOnt 13064 (C.A.).

Other courts, however, took a different approach, preferring an updated and more flexible interpretation of the test. That approach was summarized by Justice Sager in *Jewish Family and Child Service of Greater Toronto v. K.B.* (2018), 15 R.F.L. (8th) 166 (Ont. C.J.), at paras. 141-43, aff'd *Jewish Family and Child Service Of Greater Toronto v. E.K.B.* (2019), 34 R.F.L. (8th) 180 (Ont. S.C.J.):

> The introduction of the best interests test in the *CYFSA* brings a less rigid and more flexible approach to deciding whether to order access to a child placed in the extended care of the society, **as a court is now permitted to give consideration to any factor it considers relevant**, one can assume, on the well accepted principle in cases involving children that one size does not fit all.
>
> As the best interest analysis involves a consideration of what could be numerous factors, **there cannot be a hard and fast rule as to how much weight a court must give any one factor** including whether the relationship between the party seeking access and the child is beneficial and meaningful to the child. That must be determined on a case by case basis, by weighing all the relevant factors against the particular needs of the child before the court. This is a significant departure from the rigid test in the predecessor legislation.
>
> For some children who are the subject of an order of extended society care, a relationship with a parent may be in their best interests for a myriad of reasons. Some of those reasons would not have been sufficient to demonstrate a beneficial and meaningful relationship under the predecessor legislation to the *CYFSA*. The court ought not be confined to a one-dimensional definition of beneficial and meaningful under the *CYFSA*, as to do so would be to potentially ignore the variety of needs children have as a result of being removed from their parents' care, both at the date of the order and in the future. For this reason, the test was altered in a significant way to one of best interests. [emphasis added]

This updated test was also followed in several cases, as cited by Justice Benotto. It was also used by Justice Horkins in *V.R. v. Catholic Children's Aid Society of Toronto*, 2020 CarswellOnt 8165 (S.C.J.).

So - which interpretation of "beneficial and meaningful" was to govern?

Justice Benotto quite properly started with the proposition that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament. That is a trite principle of statutory interpretation: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 CarswellBC 851 (S.C.C.) at para. 26.

To meet that objective, her Honour then moved on to consider the object and scheme of the *CYFSA*. And, as the Court of Appeal said in *Kawartha-Haliburton Children's Aid Society v. M.W.* (2019), 24 R.F.L. (8th) 32 (Ont. C.A.), and in *L.M. v. Peel Children's Aid Society* (2019), 33 R.F.L. (8th) 288 (Ont. C.A.), the new *Act* reflected a significant change for children in care, including replacing some outdated and stigmatizing terms "Crown ward" with "extended society care", as well as:

> • Making services more culturally appropriate for all children and youth in the child welfare system, including First Nations, Inuit, Métis, to ensure that they receive the best possible supports;
>
> • Focusing on early intervention, to assist in preventing children, youth and families from reaching crisis situations in the home; and
>
> • Improving review of service providers to ensure that children and youth receive consistent, high-quality services across Ontario.

While the paramount purpose of the *CYFSA* in s. 1(1) remained as it had been - "to promote the best interests, protection and well-being of children" - new secondary purposes in s. 1(2) now emphasized the best interests of children.

In the context of access for children in extended care, the *CYFSA* changed the criteria for access by removing the presumption against access, and making the child's "best interests" paramount. As the Court of Appeal noted in *Kawartha* and *Peel*, the change was not "just semantics", but represented "a significant shift in the approach to access for children in extended care." As noted by Justice Benotto, some of the changes to the test for access include [at paragraph 37]:

> > • The burden is no longer on the person requesting access to demonstrate that their relationship to the child is beneficial and meaningful and in no way will impair the child's future adoption opportunities.
> >
> > • When the court undertakes a best interests analysis, it assesses whether the relationship is beneficial and meaningful to the child, and considers the potential impairment to future adoption opportunities, but only as part of this assessment and only where relevant;
> >
> > • There is no longer a "presumption against access" and it is no longer the case that a parent who puts forward no evidence will not gain access. and
> >
> > • While any evidence of possible impairment to adoption opportunities would have thwarted previous requests for access, under the new Act, access is to be ordered for a child with otherwise excellent adoptive prospects if it is in her overall best interests.
>
> . . . . .
>
> > • Highlighting in the first statement of the Preamble that children are "individuals with rights to be respected and voices to be heard" and ensuring that children's wishes are considered and given due respect when any decision is made that affects their lives;

• Confirming that the aim of the CYFSA is to be consistent with, and build upon, the principles expressed in the United Nations Convention on the Rights of the Child;

• Expanding the protections and unique considerations for all First Nations, Inuit and Métis children;

• Expanding the age of "protection" to include 16 and 17 year olds; and

• Specifically referencing siblings in the non-exhaustive list of persons who may seek access. This inclusion was made to specifically "promote the consideration of [sibling] access application[s], and as part of efforts to promote the rights and voice of children throughout the Act."

Considering these expansive changes and the previous statements of the Court of Appeal in *Kawartha* and *Peel*, Justice Benotto determined that the test for access under the *CYFSA* changed the meaning of a "beneficial and meaningful" relationship.

Given the changes to the *CYFSA*, it was no longer appropriate to apply older cases that simply applied a dictionary definition to important words, "untethered from the context of the *Act*." As remedial legislation enacted for the protection of society's most vulnerable children, the *CYFSA* must be liberally construed to the benefit of the child. The new access test is no longer a "beneficial and meaningful" test. Rather, it is now a best interests test with a statutory requirement to consider whether the relationship is beneficial and meaningful for the child as but *one aspect of that analysis*. And when a court considers a child's best interests, it should consider all relevant factors - past, present ***and future***. The new test for access to a child in extended care now calls for a holistic and comprehensive analysis of what is best for a child. Therefore, the Court of Appeal also found that the learned appeal judge erred in concluding that the trial judge had erred in law when he said that a child's best interests include "all relevant factors, 'whether they be past, present or future considerations'" (at para. 81). Again, the "beneficial and meaningful" test is no longer a separate pre-condition as it was under the *CFSA*. Now, it is just one consideration in the best interests analysis.

Of course, the best interests of a child are not static. This is confirmed by the wording of s. 74(3), which requires the court to consider "any other circumstance of the case." According to Justice Benotto, "[t]here is simply nothing in the plain wording of the current *Act* to suggest that access should be decided without reference to the future."

Finally, Justice Benotto clarified the issues of presumptions and onus.

With respect to presumptions, contrary to the submissions of the Society, there is no longer any presumption against access (*Kawartha* at para. 31 and *Peel* at para. 70).

The issue of onus, however, according to Justice Benotto, is more nuanced. Her Honour did not find it helpful to import the concept of "onus" when the court is required to consider and balance the various factors that affect the life of a child in protection. Notably, the court is not being called upon to determine past events and to make findings. Instead, the court must consider and weigh a number of factors, past, present, *and future*.

Nor did Justice Benotto think it useful to consider the issue of access in these situations in terms of a specific burden of proof as those concepts are typically concerned with establishing whether something took place in the past. It is less helpful - and perhaps less meaningful - to ask whether there should be access "on a balance of probabilities". One is not talking about something which is "probable" or "improbable" when one balances the factors and considerations set out in the *CYFSA*. Rather, the question is whether one is satisfied, after weighing and balancing all the relevant considerations, that access should take place. It is not a fact-finding mission and the exercise is not assisted by determining what the onus is or where it lies.

While Justice Benotto's comments regarding onus are certainly forward thinking, those comments do raise questions as to the concept of "onus" when dealing with custody and access issues in the *Divorce Act* and provincial custody/parenting legislation. It is hard to understand why "onus" would matter in one and not the other. Interesting. Food for thought.

In the end, Justice Benotto wholly adopted the words of Justice Sager, relied on by Justice Sherr (the trial judge), as set out in *Jewish Family and Child Service of Greater Toronto v. K.B.*:

> [65] The introduction of the best interests test in the CYFSA brings a less rigid and more flexible approach to deciding whether to order access to a child placed in the extended care of the society, as a court is now permitted to give consideration to any factor it considers relevant, one can assume, on the well accepted principle in cases involving children that one size does not fit all.

The trial judge in this case endorsed this approach and added (as adopted by Justice Benotto):

> **When a court considers a child's best interests it should consider all relevant factors, whether they be past, present or future considerations**. That is what courts do in making custody and access decisions - there is a predictive element in all of these decisions. There is no need for a court to confine itself to past or present circumstances in conducting its analysis. **The new access test now permits the court to conduct a more holistic and comprehensive analysis of what is best for a child**. The more expansive analysis will permit courts to make the best possible decisions for children. [emphasis added]

In contrast, some jurisdictions, such as New Brunswick, for example, continue a statutory and common law presumption *against* access after a grant of Society Guardianship. This presumption was recently affirmed by the New Brunswick Court of Appeal in *J.C. v. Minister of Families and Children*, 2020 CarswellNB 162 (C.A.), additional reasons at 2020 CarswellNB 252 (C.A.).

In *J.C.*, the Society sought a guardianship order for two children, aged two and three, on the basis that the security or development of the children may be in danger (the statutory test in New Brunswick).

The Minister alleged that the mother was unable to improve her parenting skills, recover from her drug addiction, or stabilize her mental health. At the same time, the Minister was concerned that the father remained homeless and could not obtain appropriate housing. The father also had sobriety issues. As a result, the Minister argued a Guardianship Order was in the best interests of the children.

The children had been in Society care since October 2015.

After a 12-day trial, the Court granted a Guardianship Order with no right of access, in a 198-paragraph decision.

With respect to the father, the trial judge found:

> As for the father, he also suffers from drug addiction and lacks insight into the impact of this disease on his parenting. If the father has some ability to parent, he has not demonstrated that he can fully meet the needs of the children. The father's coping mechanism, when difficult situations arise, is to turn to drugs. The fact that he has been clean for eight months and has a home does not satisfy the Court that he now has developed proper abilities to deal with life's challenges. The father had plenty of time to get his life together. He knew this was imperative to get his children back. He made other choices. [para. 191]

Only the father appealed, and on the ground that the trial judge erred by determining that preservation of the children's right of access to their father was not in their best interests.

The Court of Appeal first reiterated that the standard of review in child protection cases is very narrow. As the New Brunswick Court of Appeal stated in *New Brunswick (Minister of Family & Community Services) v. B. (S.)*, 2006 CarswellNB 209 (C.A.) (per Richard J.A. (as he then was)):

> It is common ground that the scope of appellate review in child protection matters, including guardianship cases, is very narrow. Considering the numerous decisions of the Supreme Court of Canada and of this Court on point, it would have been futile for any of the parties not to acknowledge the limited circumstances where appellate intervention may be justified [citations omitted].

. . . . .

> These cases stand for the proposition, succinctly stated by Drapeau C.J.N.B. in A.N. at para. 11, that an appellate court will not intervene in child protection cases "unless the trial judge's decision has no factual merit or was based on an error in principle, a failure to consider all relevant factors or the consideration of an irrelevant factor." [para. 3]

The Court of Appeal then noted the extensive involvement of the Minister with the family, and moved on to a consideration of the best interests the child and the preservation of access, noting that "[a]ccess to parents following the issuance of guardianship order," must be "considered in context." Such access is the right of the child - not that of the parents - "and it is **exceptional** (emphasis added)."

The Court of Appeal then continued:

> [12] . . . Severing a child's right to have access with his or her parent has significant consequences, and is not undertaken lightly. In this case, there was evidence that both children had frequent access to their father, they knew him, and he was bonded with them. There is no doubt the father loves these children; **however, that alone will not determine the issue of access and visitation**. [emphasis added]

The father argued that the trial judge placed too much emphasis on the potential impediment an access order would have on the potential for adoption, and that the judge "supplanted" the best interests of the child analysis with minimal evidence that an access order "could hamper" and "could limit" adoption. Although in *New Brunswick (Minister of Family & Community Services) v. M. (T.L.) (Litigation Guardian of)*, 2009 CarswellNB 29 (C.A.), the New Brunswick Court of Appeal concluded that adoption "would likely be hampered" by the preservation of access, here the father argued there was no evidence that an access order in this case would "hamper" the adoption process, and that the judge's use of the word "could" imported impermissible speculation.

While it appears that the Court of Appeal was somewhat concerned with reasons that could be seen as "conclusory", it also noted that appellate intervention is not warranted solely because a judge did a poor job expressing themselves.

Importantly, Justice Baird, for a unanimous Court of Appeal stated that,

> [16] . . . the preservation of access following a guardianship order does not hinge exclusively, **nor should it ever**, on whether, or not, the adoption process would be hampered. The child's best interests, in consideration of the evidence as a whole are the primary considerations, above all else. If it is found that the preservation of access following the issuance of a guardianship order is in a child's best interests, an order is appropriate. [emphasis added]

That said, in *Nouveau-Brunswick (Ministre de la santé & des services communautaires) c. L. (M.)* (1998), 41 R.F.L. (4th) 339 (S.C.C.), Justice Gonthier noted that, when considering whether to preserve a right of access, a judge must not ignore the fact that he or she has first found it necessary to remove the child permanently from the parent's care (at para. 38). Justice Gonthier then concluded:

> [. . .] First, there is no inconsistency in principle between a permanent guardianship order and an access order. **Second, access is the exception and not the rule**. Third, the principle of preserving family ties cannot come into play in respect of granting access unless it is in the best interests of the child to do so, having regard to all the other relevant factors. Fourth, **an adoption, which is in the best interests of the child, must not be hampered by the existence of a right of access**. Fifth, access should not be granted if its exercise would have negative effects on the physical or psychological health of the child. [para. 39]

These principles are regularly repeated in New Brunswick's jurisprudence: *Nouveau-Brunswick (Ministre du Développement social) v. B. (G.)*, 2012 CarswellNB 425 (C.A.); *P. (N.J.) v. New Brunswick (Minister of Social Development)* (2012), 18 R.F.L. (7th) 304 (N.B. C.A.); *C.A. v. Minister of Families and Children* (2018), 17 R.F.L. (8th) 297 (N.B. C.A.).

In this case, the Court of Appeal found the judge's reasons to be thorough and comprehensive. And with respect to the idea of access to the father, the trial judge found:

> [. . .] I am aware that it might be difficult for the children to sever their ties with their father. I do not doubt the love the father has for his children, but love is not the determinative factor. The children have been in the care of the Minister for 39 months. Their caretaker is the foster family. Their home is that of the foster family. Access is the exception not the norm. Family ties are not the determinative factor. The access order must demonstrate the benefit for the children to have access to the father. I am not convinced, on the balance of probabilities, that the children's attachment to their father is sufficient to be qualified as an exceptional circumstance. [para. 196]

Here, the trial judge considered all of the relevant factors, and properly considered the Minister's evidence that a preservation of access to these children "could hamper" the adoption process. She found there were no exceptional circumstances and that the children had spent most of their lives in foster care. Therefore, determined the Court of Appeal, the decision below was not exclusively anchored to the adoption issue; it was just one consideration in the overall best interests analysis.

And there you have it: two Courts of Appeal, two different statutory regimes; and two ways of considering the difficult issue of access after permanent Society care.

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