NOVA SCOTIA COURT OF APPEAL

Citation: ***Nova Scotia (Community Services) v. T.G.***, 2012 NSCA 43

Date: 20120502
Dockets: CA 355869 and 375447
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

T.G. and R.C.

Respondents

Restriction on publication: **Pursuant to s. 94(1) *Children and Family Services Act.***

Judges: Saunders, Fichaud and Farrar, JJ.A.

Appeal Heard: January 30 and March 22, 2012 in Halifax, Nova Scotia

Held: Appeal allowed and the Order on Judicial Review overturned, without costs, and the appeal from the Production and Disclosure Orders dismissed as moot per reasons of Fichaud, J.A.; Saunders and Farrar, JJ.A., concurring.

Counsel: Peter C. McVey, for the appellant
C. LouAnn Chiasson, Q.C., and Jean Beeler, Q.C.,for the respondent T.G.
M. Jane Lenehan, for the respondent R.C.

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 94(1) OF THE <u>CHILDREN AND FAMILY SERVICES ACT</u> APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] R. turns two years old tomorrow. He is forsaken by his birth parents. But his foster mother, T.G., and his sisters' adoptive mother, R.C., each want to adopt him. The Minister of Community Services accepts that both would be excellent parents, but prefers R.C. because R.C. shares R.'s racial and cultural background and R.'s siblings live with R.C.. The matter never reached the stage of a court application to approve an adoption under ss. 77-78 of the *Children and Family Services Act*. Instead, by a peremptory motion T.G. challenged the adoption process as a violation of her right to procedural fairness. The judge of the Supreme Court (Family Division) (1) issued an interim injunction against R.'s removal from T.G.'s foster care, (2) ordered the Minister to produce the Department of Community Services' complete file respecting R.C., and (3) ultimately quashed the Minister's decision to place R. for adoption with R.C., as biased and a violation of the Minister's duty of procedural fairness to T.G.. The Minister appeals and submits that the judge had no legal justification to so intrude into the adoption process.

[2] The submissions touched several issues, but they orbit around one question - What standards of procedural fairness to T.G. governed the Minister's choice of an adoptive parent?

1. Background

[3] R.'s mother used narcotics through her pregnancy. On May 3, 2010, R. was born positive for cocaine. His father was in prison. At birth, the Minister apprehended R. for protection. His biological parents have no apparent interest in him, and are not a factor in this proceeding.

[4] Fortunately R. has two strong and capable individuals, T.G. and R.C., who each want to adopt him.

[5] T.G. has been R.'s foster mother since May 5, 2010, two days after his birth. She has Masters Degrees in Special Education and Educational Psychology, and is a special needs teacher in the elementary school system. She has fostered over twenty children in her home, and already has adopted a boy, A.. According to

T.G.'s affidavit, in April, 2010 she told her foster care worker that she wished to be considered for infant foster placements only if the foster child was an adoptive prospect. This was because it was traumatic for her son A. to deal with the departure of foster child companions from their home.

[6] On May 1, 2010 an intake worker with the Department of Community Services asked T.G. about fostering a newborn, scheduled for a caesarian section on May 3, 2010. According to T.G.'s affidavit:

> 16 I reminded the intake worker of my request only to accept placements if the infant was a long term/ adoptive prospect. I was assured this was the case. ...
>
> 17 I was advised that the baby had two siblings currently in care with a foster mother in Jeddore and that there was a prospective adoptive mother for the siblings in Cape Breton. I inquired as to why the child was not placed with his siblings and was advised that this foster placement was not being considered for him.
>
> 18 I further inquired into whether the adoptive mother for the siblings was interested in the baby. I was advised that she was not and that she only wished to consider adopting the two older siblings.

[7] T.G.'s affidavit describes R.'s arrival:

> 21 A beautiful newborn baby boy, [R.], was born on May 3, 2010. Upon his release from the hospital at two days old, [A.] and I took him to our home.
>
> 22 From the first time I saw [R.], I instantly bonded with him. [A.] instantly bonded with him as well. [R.] is a beautiful child that has added much to our family. [R.] is always pleasant with an infectious laugh which we hear often. He is always on the go but willingly stops to cuddle. He is a delight.

[8] The prospective adoptive parent for R.'s siblings, mentioned in paras 17 and 18 of T.G.'s affidavit, was R.C.. R.'s biological parents had two older children, girls, born in January, 2008 and April, 2009. Their initials also are "R.". To avoid confusion while maintaining anonymity, I will refer to them as the "elder" and "younger" sisters. Due to their parents' ongoing drug use and domestic violence, in January of 2010 R.'s sisters were taken into the Minister's permanent care and custody by a court order. In August, 2010, the sisters were placed for adoption

with R.C.. According to R.C.'s affidavit of September 15, 2011, the scheduled date for the final court approval of those adoptions was to be September 28, 2011.

[9] R.C. is a registered social worker, and her affidavit says she has "considerable experience in working with individuals with disabilities, mental health issues and addictions". R.C.'s affidavit discusses her interest in adopting R.:

> 14. ... I received a telephone call in either February or March of 2010 from Murdoch MacLean. Murdoch MacLean told me that there were two sisters available for adoption and asked if I would consider taking both.
>
> 15. I told him I didn't even have to think about it and that I would definitely take both children. ...
>
> 16. I am fairly certain that during that telephone conversation Murdoch MacLean also told me that the biological mother of the sisters was pregnant again. However Murdoch MacLean did not ask me if I was interested in adopting that unborn child nor did I say that I was not interested in adopting that unborn child. The child had not yet been born and, unlike the child's sisters, he or she was not available for adoption at that time.
>
> ...
>
> 20. ... As soon as I knew that [R.] had been born and taken at birth into temporary care by Community Services (which I learned during the telephone call from Murdoch MacLean in May, 2010 to the best of my recollection) I indicated my interest in keeping up to date on [R.] in case I was in a position to adopt him should he become available for adoption in the future.
>
> 21. Certainly at my August 9, 2010 pre-placement meeting for [the sisters] I made it very clear to everyone at the meeting that if [R.] was placed in permanent care I wanted to be advised immediately so that I could make a decision as to whether or not I was in a position to adopt him and raise the three siblings together.

[10] R.C.'s affidavit, para 21, refers to R. being "placed in permanent care". On May 30, 2011, the Supreme Court of Nova Scotia issued an order placing R. in the permanent care and custody of the Minister (or Agency) under s. 47 of the *Children and Family Services Act*, S.N.S. 1990, c. 5, as amended (*CFSA*). Only then, was the Minister in a legal position to place R. for adoption. In the remainder

of these reasons, “Agency” refers to the Minister and Department of Community Services and the Department’s employees.

[11] R.C.’s affidavit describes the prospect of R.’s advent in her household:

> 25. We had always kept [R.] in our minds and knew a decision would have to be made if he was put in permanent care. I am fully confident in my abilities and with my support network behind me I know that I can provide a loving, caring, nurturing and safe home for [R.] where he can grow up with his sisters.
>
> ...
>
> 34. Based on this information I started the transition with my daughters. We talked about [R.] coming to live with us. [The daughters] have seen pictures of [R.] and are very excited about him coming to live with us.
>
> 35. Both girls were amazed to see how much he looks like [the younger daughter]. [The younger daughter] initially thought that the pictures were of her and not [R.]. Both girls helped to get [R.]’s room ready. They bought him a gift. And now they continue to ask when “brother” is coming to live with us, and I cannot give them an answer.

[12] The chronology of representations by the Agency to T.G. was central to the judge’s conclusion that T.G. was denied her legitimate expectation to procedural fairness because of the Agency’s bias or predetermination. I will quote the critical evidence.

[13] T.G. learned that the prospective adoptive parent of R.’s sisters was interested in adopting R.. T.G.’s affidavit discusses the point:

> 35 In August or September, 2010, I was advised by a worker at the Dartmouth office that the adoptive mother of R.’s siblings may have changed her mind and may also be interested in adopting the baby. ...
>
> 36 Despite this initial contact, nothing further was communicated to me in relation to the proposed adoptive mother. On numerous occasions I questioned Kathy Lawrence [of the Department of Community Services] and [R.]’s workers as to whether the adoptive mother was interested in caring for [R.]. It was not until April 2011, that one of the workers involved confirmed

> that the adoptive mother in Cape Breton was definitely interested in adopting [R.].
>
> ...
>
> 43 In April 2011 I was advised by Kathy Lawrence that Community Services was seriously considering removing [R.] from my care and placing him for adoption with the proposed adoptive mother in Cape Breton.

[14] R. is racially mixed. One of his birth parents is Caucasian and the other is African-Canadian and Caucasian. R.C. also is racially mixed, as stated in her affidavit:

> ... I am an African Nova Scotian with Caucasian heritage. My mother is bi-racial. My grandmother was Caucasian.

T.G. is Caucasian. This is pertinent to R.'s adoption chronology because s. 47(5) of the *CFSA* says:

> Where practicable, a child, who is the subject of an order for permanent care and custody, shall be placed with a family of the child's own culture, race or language but, if such placement is not available within a reasonable time, the child may be placed in the most suitable home available with the approval of the Minister.

[15] T.G. was told by the Agency that both this racial preference and the potential for placement with R.'s birth siblings were factors that favoured R.C.'s application for adoption. T.G.'s testimony confirmed this repeatedly:

> A. In my conversations with the agency after - after [R.] was four months old and it became known to me that Ms. [C.] was possibly interested in adopting, and I was continually asking, is she continued to be interested, whatever, and I was told again and again, there are two prospective adoptive families and you need to know that we may - the focus of Community Services was to look at sibling contact and cultural heritage.
>
> ...
>
> Q. So it would be fair to say, knowing that - because you've always known, that the mandate of Community Services is if at all possible to place with siblings, correct?

A. Yes

...

Q. Now, you spoke just now about your understandings and your beliefs. What you were describing was what you knew at the time. You knew back before Christmas of 2010 those things that you just said, is that correct?

A. That policy, part of the policy was sibling placement and cultural heritage. Yes, I knew that was part of the policy.

...

Q. All right. And it says here - I'm going to ask you if you think that's true or not, it says here that on March 21st, 2011, Ms. Lawrence has written down:

> "Ms. [G.] stated that she was familiar with the departmental policy on trying to keep siblings together."

Is that probably something you said around that time?

A. I have said to people I am aware that part of the policy is to keep siblings contact, yes.

...

Q. You knew on May the 5th [of 2011] that it was possible the department would decide to place [R.] with [R.C.] or the mother caring for his siblings, did you not?

A. I knew that if they went by sibling placement and cultural heritage alone, that was a possibility.

[16] From the Agency's perspective, on December 21, 2010, Ms. Kathy Lawrence, a foster care worker with the Agency discussed R.'s adoption options with T.G.. Ms. Lawrence's recorded note says:

> [T.G.] indicated to me that she is very interested in adopting the CIC [child in care] should he become available. She is aware that this child's siblings have been adopted together and the adoptive mom has indicated to the agency that she might be interested as well should he become available. [T.G.] too acknowledged that

> she too understands the provincial policy of placing siblings together and should the adoptive mom want to proceed that the CIC would most likely be placed with her. [T.G.] said that she is prepared to take the risk. She too is aware that since the CIC has been in her home for over 6 months that she would have some standing in family court due to the bonding issues. She is contemplating seeking legal advise [*sic*] on this.

Ms. Lawrence's recorded note of a discussion with T.G. on March 21, 2011 says:

> [T.G.] contacted me by phone this afternoon. ... [T.G.] indicated that she plans to be sending a letter to the agency indicating that she would like to make a plan for this child and to make a strong argument for this child remaining with her. There are other adopted siblings living in Sydney and the adoptive parent wanted to be notified if this child came into permanent care and custody. [T.G.] stated that she is familiar with the departmental policy of trying to keep siblings together.

[17] T.G. wrote a letter, dated April 14, 2011, to Ms. Mary Craig, the Agency's Adoption Program Supervisor, and to Ms. Jill Wilson, Manager of the Agency's Dartmouth District Office. The letter recites T.G.'s understanding that the adoptive mother of R.'s siblings is interested in adopting R., and states the reasons that, in T.G.'s view, R. should be placed for adoption with T.G. instead.

[18] Ms. Lawrence's note of a home visit to T.G. on May 5, 2011 says:

> We talked about long-term planning for the child in care. [T.G.] would very much like to adopt this child, if he becomes available, but realizes that this may not be a possibility. [T.G.] would like to have an attachment assessment completed on this child. She said that her son and the child in care are just like brothers.

[19] As mentioned, on May 30, 2011 the Court ordered that R.'s permanent care and custody be with the Agency, enabling the Agency to initiate adoption placement. Under the Agency's Manual of Policy and Procedures - Adoption Manual, Standard 5.15(a), "the selection of an adopting family for a child(ren) in permanent care and custody by court order or under a Section 68 agreement must take place at an adoption placement conference". This conference sometimes was termed an Adoption Planning Meeting by the witnesses in this case. The Agency scheduled R.'s Adoption Placement Conference for June 22, 2011.

[20] On June 1, 2011, the Agency's Mr. Murdoch MacLean telephoned R.C. and informed her of the order for R.'s Permanent Care and Custody, issued two days

earlier. According to Mr. MacLean's note of the conversation, "RC has always been interested; but understandably, wants to have all the information on the child before making a final decision". R.C. was out of the Province, so they agreed to meet on her return. They met on June 8 and, according to Mr. MacLean's note, R.C. "wanted some time to consider this very carefully". On June 15, 2011, R.C. confirmed to Mr. MacLean that R.C. wished to adopt R.. These facts appear in the affidavit of Ms. Craig, paras 78-80, and in Mr. MacLean's recorded notes attached as exhibits.

[21] Section 36(3) of the *CFSA* says:

> Where the child who is the subject of a proceeding is known to be Indian or may be Indian, the Mi'kmaq Family and Children's Services of Nova Scotia shall receive notice in the same manner as a party to the proceedings and may, with its consent, be substituted for the agency that commenced the proceeding.

Further to s. 36(3), the *Department of Community Services Family and Children's Services Division Manual of Standards, Policies, and Procedures for Children in Care and Custody*, Standard 4.4.1(a), requires that custody of aboriginal children, placed into the Minister's care by the Court, be transferred to the custody of Mi'kmaw Family & Children's Services of Nova Scotia. The only exception is when Mi'kmaw Family & Children's Services gives a waiver.

[22] Section 36(3) is relevant because, early on, R.'s birth mother had told the Agency verbally that R. and his sisters had aboriginal heritage. When R.'s sisters were placed into Agency care, the Agency had written to Mi'kmaw Family & Children's Services to request, and then receive, a waiver of custody for the sisters.

[23] For R., the Agency again requested a waiver from Mi'kmaw Family & Children's Services.

[24] Ms. Jill Wilson, District Manager of the Agency's Dartmouth Office deposed:

> 12. As a result, on September 23, 2010, I wrote to the Executive Director of Mi'kmaw Family and Children's Services of Nova Scotia, reminding her that her Agency has already waived transfer of custody of two siblings of [R.], and providing additional information regarding [R.] and his family, and

> further informing her that both [R.]'s current foster mother and the prospective adoptive mother of [R.]'s siblings desire to adopt [R.].

Ms. Wilson's letter of September 23, 2010 said:

> Our Agency is currently in a court proceeding with the above named child's parents. We have put forward a plan for Permanent Care and Custody, and anticipate trial dates sometime in the new year.
>
> We have recently signed notices of proposed adoption with respect to [R.]'s older siblings, [R.] and [R.J.]. Your Agency was notified of the girls' Permanent Care and Custody status and in turn we were notified that you would not be seeking the transfer of their files to your Agency. I understand that this process may be time consuming and as such I wanted to notify you in advance that we may be in the same situation with [R.] in the near future.
>
> [R.]'s mother is bi-racial (African and Caucasian) and claims that her grandmother was part Aboriginal, but did not have status or identify with this culture. [R.]'s father is Caucasian.
>
> [R.'s sisters]' adoptive mother has expressed an interest in being considered as an adoptive home for [R.], should he become available for adoption. [R.]'s current foster mother has also expressed an interest, in putting forward a plan for adoption for [R.] should the Agency be successful in obtaining Permanent Care and Custody.
>
> If an Order for Permanent Care and Custody is granted, with respect to [R.], you will be advised at that time to determine if your Agency would be more suitable to secure a permanent adoptive home for him. If you require further information or clarification on this child please do not hesitate to contact us.

[25] On June 6, 2011, a week after R.'s Order for Permanent Care and Custody, Ms. Wilson again wrote to Mi'kmaw Family & Children's Services. The full text of the letter is:

> The above named child has been was [*sic*] ordered into Permanent Care and Custody (PCC) on May 30, 2011. He is the full sibling to two children; [R.J.] (DOB: April 7, 2009), and [R.J.] (DOB: January 12, 2008), who have African Nova Scotian and Aboriginal heritage. The two children, [R.] and [R.J.], were placed for adoption with an African Nova Scotian family in August 2010. **The agency is pursuing adoption placement for [R.] in the same adoption home with his siblings.**

> Correspondence was forwarded from Raymond Morse legal counsel for Mi'kmaw Family and Children's Services on September 8, 2010 advising that the Mi'kmaw Family & Children Services did not wish to assume responsibility for the Child Protection proceeding regarding [R.]. However, there was a request to advise the Agency of the outcome of the proceeding.
>
> Similar to his siblings, the Dartmouth District Office has not been able to confirm the native status for [R.]. The only information that we have is a verbal comment from the birth mother indicating that [R.] had aboriginal heritage. Further discussion with the birth mother has not provided us with any specific information including any indication of band identification nor membership. The reference was vague and details could not be provided.
>
> In correspondence from Joan Glode, Executive Director, Mi'kmaw Family and Children Services dated July 7, 2010 the Mi'kmaw Agency advised that they would not be seeking a transfer of [R.]'s two siblings and we proceeded to place for adoption.
>
> The baby, [R.J.], is a full sibling and as you have released his two sisters, I am therefore requesting that the same consideration be available for [R.] so that we may proceed to place him for adoption.
>
> As the planning process for [R.] is immediate, I am requesting that a response be provided by June 22, 2011. If we have not heard from your agency in that time, we will assume that this agency can proceed with the planning for [R.].
>
> Thank you.
>
> [emphasis added]

[26] On June 9, 2011, Ms. Arlene Johnson, Acting Executive Director of Mi'kmaw Family & Children's Services of Nova Scotia, wrote to Ms. Wilson:

> In response to your letter dated June 6, 2011 in regard to the above-named child Mi'kmaw Family & Children's Services will not be seeking legal transfer of the child [R.J.] to our Agency. As you have indicated the planning process for [R.] is immediate therefore **we wish you all the best in making the appropriate plan by placing [R.] with his two siblings for the purpose of adoption.**
>
> [emphasis added]

[27] I have bolded the wording in Ms. Wilson's letter of June 6 and Ms. Johnson's letter of June 9 that, in the subsequent litigation, pertained to the allegation of the Agency's bias.

[28] T.G's Affidavit, paras 49-54, recites the events from the Permanent Care and Custody Order of May 30, 2011 to the Adoption Placement Conference on June 22, 2011.

[29] On May 31, 2011, Agency adoption workers notified T.G. of the status of R.'s adoption process. T.G.'s affidavit says, of this discussion:

> 49 On May 31, 2011, Maria Hernandez confirmed that my plan to adopt [R.] would be put forward at the Adoption Committee Planning Meeting. This is confirmed in the Affidavit sworn by Nicole Blanchard and dated July 19, 2011, at paragraph 75.

Ms. Blanchard's affidavit, para 74 and para 75, cited by T.G.'s affidavit, says:

> 74. On May 31, 2011, Maria Hernandez and Kristen Cockerill, adoption workers with the Agency, met with [T.G.]. According to the recordings of Maria Hernandez, which I believe to be true, during this meeting the following occured [*sic*]:
>
> a. The adoption workers discussed with [T.G.] her desire to adopt [R.];
>
> b. [T.G.] stated that she was aware that another family was being considered for adoption of [R.], "but would like her assessment to be considered as well";
>
> c. Maria Hernandez explained to [T.G.] that the Agency must consider adoption placement adoptions in the following order of preference:
>
> i. First, a kinship family and sibling match should be sought;
>
> ii. Secondly, a cultural match should be sought;
>
> iii. Thirdly, other adoptive placements that are culturally competent should be considered.

> 75. As a result, on May 31, 2011, [T.G.] was informed of the priorities in which options would be considered. However, Maria Hernandez did agree to present [T.G.]'s plan for [R.] at an Adoption Planning Meeting, and invited [T.G.] to attend that meeting to speak to the child's needs.

[30] According to T.G.'s affidavit (para 50), on June 16, 2011 T.G. "was advised by Kathy Lawrence [of the Agency] that the adoptive mother in Cape Breton (of [R.]'s biological siblings) was definitely interested in adopting [R.]", to which T.G. "indicated that I was very interested in adopting [R.] as well".

[31] T.G.'s affidavit then says that, still on June 16, she spoke to the Agency's Ms. Wilson:

> 51. On or about June 16, 2011, I spoke with Jill Wilson and asked what I could do to ensure the adoption planning team had all my information (specifically my letter of April 14, 2011) to take to the meeting. Jill Wilson informed me that usually Foster parents are present at the meeting but because I was a prospective adoptive parent that it would be a conflict for me to be at the meeting.
>
> 52. Jill Wilson then advised me and I do verily believe that she was going to check with the other participants at the meeting to see if all agreed to have me come and present my case for adopting [R.]. She asked me what time would be convenient and I advised her I would make myself available any time.

[32] T.G.'s testimony elaborated on the concern about a conflict of interest, from T.G.'s attendance at an Adoption Placement Conference, as Ms. Wilson had explained it to T.G.:

> Q. So a meeting - when a foster parent - would you agree with me from your own experience, when a foster parent has an input into that process, what they give the department is information about the child, is that - would you agree with that?
>
> A. In other cases, yes. In this case I was told that the conflict arose because my name was being put forth and, therefore, for me to come to the meeting and speak when [R.C.] did not have that opportunity would be a conflict - (a) a conflict of interest because I had an invested interest in what took place.

[33] T.G.'s affidavit then recites her communications with the Agency between her June 16, 2011 phone call with Ms. Wilson and the Adoption Planning Meeting of June 22, 2011:

> 53 I was then advised by Nicole Blanchard in a telephone call on approximately June 20th that I was being permitted to attend the meeting.
>
> 54 I was advised by Nicole Blanchard on various occasions (and as late as June 16, 2011) that a final adoption decision had not been made and that the final decision would be made at the meeting scheduled for June 22, 2011. This is confirmed in the Affidavit of Nicole Blanchard dated July 19, 2011, at paragraphs 82, 110 and 111.

[34] Ms. Blanchard's affidavit, para 82, cited by para 54 of T.G.'s affidavit, says:

> 82. Further on June 16, 2011, I spoke with [T.G.] informing her of the date and time of the Adoption Planning Meeting, and explaining to her the purpose of the meeting. In particular, I explained to her that a final adoption decision would be made on that date with respect to [R.], and she was invited to participate.

[35] Next we come to the Adoption Placement Conference of June 22, 2011. The minutes show that those in attendance included numerous Agency employees, T.G. and another individual I.G., T.G.'s brother who attended to give her support. R.C. was not there.

[36] T.G.'s affidavit discusses the Adoption Placement Conference of June 22, 2011:

> 55 On June 22, 2011, I met with the Adoption Planning Team to discuss the adoption placement for [R.]. Attached hereto as Exhibit "D" is a copy of my letter I provided to the Adoption Planning Team. I attended this meeting with my brother, [I.G.].
>
> 56 I was advised by the Adoption Planning Team that they had two concerns related to the placement of [R.] for the purposes of adoption: 1) contact with siblings and 2) cultural heritage.
>
> 57 I advised the team that I have every intention of ensuring [R.] knows his biological family and that I will foster relationships with his siblings and other family members.

[37] The letter cited in para 55 of T.G.'s affidavit, dated June 22, 2011, is three and a half pages and expresses T.G.'s heartfelt view that R.'s interests would be better served with T.G. than with the adoptive mother of R.'s siblings.

[38] T.G.'s testimony explained how she presented her submissions to the Adoption Placement Conference at the meeting of June 22:

> Q. ... So you came - you came in with a prepared written statement that is dated June 22, 2011, is that correct?
>
> A. I came in with a statement, yes.
>
> Q. It was written?
>
> A. By me.
>
> Q. Yeah. And you handed it out. You had made - brought lots of copies and you handed it out to participants.
>
> A. Yes.
>
> Q. And just to be clear, I'm going to ask you just to flip for a moment to tab 7 of the same document. It is three pages plus a bit. It's dated Wednesday, June 22nd, 2011. On the last page appears to have your signature, is that correct?
>
> A. Yes.
>
> Q. Okay. So this is probably the document that you came, you brought, and you handed out to the adoption placement meeting on June the 22nd, would you agree?
>
> A. It is.
>
> Q. Okay. Now, has just been - I've just read from the minutes, you had a prepared document but you also gave verbal information, is that right?
>
> A. Not a lot, no. I knew I had to follow this because of my - I am - I knew I was so strongly invested and emotionally behind this meeting that I felt it prudent to read from a document so that I wouldn't get sidetracked in my own thoughts. I started with basically a salutation of, you know, hello, how are you, and I

> apologized for reading from a document, but I felt that was the best way to present myself. I - from beginning to end there was very little moving away from my letter. There were interjections by Therese Henman-Phillips and Mary Craig, at which time I would respond to whatever was said, but, for the most part, I read from this.

[39] The minutes of the June 22 meeting recite T.G.'s submissions. They include T.G.'s comments concerning the Agency's preference for a placement with siblings:

> "It would be difficult for one person to look at the high needs of the 3 children according to [T.]"
>
> "Goes beyond genetic connections. Why are you considering this - adoptive parent is now interested and can manage the 3."
>
> "This wiill [*sic*] result in a loss for [A.] and [R.] just so [R.] can go with siblings that he does not know."
>
> "Ms.[G.] stated that she is asking that we look beyond policy and procedures."
>
> "[T.] said that the adoptive mother was not interested."
>
> "We differ in our definition of siblings according to [T.]."
>
> "[T.] asked if the adoptive parent for [R.'s sisters] is she aware that she is attached to [R.] and want to make a permanent plan for him. [T.] said 'I can't help but think that perhaps the adoptive mother might think differently once she has all of the facts'."

[40] The minutes of the June 22 meeting state that the Agency representatives explained the Department of Community Services' rationale for the preferences for sibling placement and common culture and heritage:

> Mary Craig provided information to [T.G.] and the Adoption Planning team the reason we look at placements with siblings. Mary Craig stated that we are required by policy to consider the placement of children with siblings. This policy is based on research. Mary explained that children who are now older are expressing concerns about their lives in care and adoption and are asking "why wasn't I placed with my brothers and sisters, why was this not considered, why did I not know that I had siblings..." Mary explained that children get a lot of

> comfort from their biological connection because their birth parent connection has been severed and children get comfort and reduced anxiety when they know they have birth connections.
>
> ...
>
> Therese Henman-Phillips talked about the cultural piece for [R.] and Mary Craig reviewed the policy in relation to culture and heritage.

[41] The minutes of the June 22 meeting recite that, after T.G. and her brother left the meeting, the Agency personnel pondered the substance of T.G.'s submissions. According to the minutes: (1) they discussed T.G.'s comments about R.C.'s supposed lack of interest; (2) they discussed "at length", according to the minutes, T.G.'s request for an attachment study; (3) they considered "[w]hy did we not provide visits with the siblings"; (4) they discussed the effects of R.'s placement on T.G.'s son A. (5) The minutes recite that T.G.

> did come in with the 'foster with a view to adopt' when she started fostering. This is written in her file.

[42] After the Committee discussed T.G.'s submissions, the Committee made its final decision, according to the minutes:

> We discussed the request for an attachment assessment. The majority of the Adoption Planning team agreed that this is not warranted. We discussed the request for the attachment assessment. We all agree that there is a healthy attachment for [R.] with [T.] and with [A.]. We do not need an assessment to tell us that.
>
> ...
>
> The Adoption Planning team is in agreement that [R.] be placed for adoption with his birth siblings based on being able to be placed with his siblings and the cultural connection for [R.]. This is pending the approval of the adoptive parent being approved to adopt a 3rd child with [R.]'s needs. Policy and best practice guides us in this decision. Sibling connections and the ability to grow up in a culturally same home is possible for this child. We are required to consider these options for children in our placement decisions and we have determined that we are able to achieve these critical elements for [R.] which is placement with his full biological sisters and a cultural match with his adoptive parent and sisters.

> [T.'s] expressions are real for her and attachment is important - [T.] is right from her point of her view and with no other options however the other priorities of siblings and culture are more critical to give to this child.

[43] Later on June 22, the Agency's Ms. Blanchard informed T.G. of the Committee's decision.

[44] Over the next few weeks the Agency took some transitional steps for R.'s placement with R.C..

2. The Litigation in the Supreme Court

[45] On July 13, 2011 T.G. filed with the Supreme Court of Nova Scotia a Notice for Judicial Review. Her Notice described the "Order proposed" as

> The applicant requests an order quashing the Minister's decision to remove the child from the applicant's care and to place the child with another party and requiring the Minister to consent to the applicant's application to adopt the child.

The Notice described the "Grounds for review" as:

> 1. The Minister's decision to remove the child from the applicant's care and place the child with another party is not in [R.]'s best interest as mandated by s. 2(2) of the *Children and Family Services Act* and is therefore unreasonable.
>
> 2. The Minister's decision to remove the child from the applicant's care and place the child with another party was not made within a "reasonable time" pursuant to s. 47(5) of the *Children and Family Services Act* and is therefore unreasonable.

Section 47(5), cited in the second Ground, is quoted above (para 14).

[46] Also on July 13, 2011, T.G. filed a Notice of Motion that was scheduled to be heard in chambers of the Supreme Court (Family Division) on July 22, 2011. On July 14, 2011, T.G. filed an Amended Notice of Motion. The Amended Notice described the Motion as:

> **Motion**

> [T.G.], the applicant in this proceeding, moves for an order enjoining the Minister from removing [R.] from her care, for an attachment study to be conducted, and excluding members of the public from the proceeding, prohibiting the publication of the identity and names of the parties, the child, and witnesses, and sealing the court file with respect to this matter. [underlining in original document]

The brief for the Motion, filed by T.G.'s counsel, elaborated on T.G.'s submission:

> The applicant respectfully submits that the decision of the Minister did not conform with the duty of procedural fairness. Unlike the *M(N.N.)* Case [*Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69], the applicant submits that the procedural difficulties relate to the lack of information surrounding the removal of the child from the only home he has ever known. The Department of Community Services has repeatedly denied the Applicant's request for an attachment study. It is respectfully submitted that this is a necessary consideration in determining the best interest of the child.
>
> ...
>
> ... The applicant is not advocating procedural fairness with respect to hearing from her - she is pleading with the court to acknowledge that a duty is owed to the child to consider all his circumstances including the circumstances which would be canvassed in an attachment study.
>
> ...
>
> Firstly, the applicant submits that there is an arguable issue to be reviewed. Although the Minister of Community Service's [*sic*] decisions are only quashed by a reviewing court in exceptional circumstances, the applicant suggests that the facts of this matter are exceptional. The child was placed with the applicant for the purposes of adoption. She was in fact approved to adopt a second child. The decision to place the child with another caretaker and remove him from her care was made without an attachment study and without consideration of the effects the removal would have on [R.].

[47] T.G.'s Notice for Judicial Review, Motion for the stay or interim injunction and brief did not plead bias by the Agency.

[48] Justice Williams of the Supreme Court (Family Division) heard T.G.'s motion on July 22, 2011. Later that day the judge gave an oral decision that granted an interim injunction based on the Agency's bias. The judge's oral reasons

referred to the letter of June 9, 2011, from Ms. Johnson of Mi'kmaw Family & Children Services to the Agency's Ms. Wilson (quoted above, para 26), where Ms. Johnson stated:

> ...we wish you all the best in making the appropriate plan by placing [R.] with his two siblings for the purpose of adoption.

The text of the June 9 letter was in the material filed by the Agency in response to T.G.'s motion. Ms. Wilson's letter of June 6, 2011 (above para 25), to which Ms. Johnson replied, was not in the record before the judge. The judge said:

> Here the correspondence with the Mi'kmaq Family and Children Services agency - or from the Mi'kmaq Family and Children Services agency and the absence of the correspondence that triggered it and the narrowness of the adoption plan referred to in the letter from Ms. Johnson, who could only be getting her information, based on what is before me, from the Department of Community Services, leads me to conclude that the application for judicial review is of sufficient strength that it could result in the application for judicial review being successful and the remedy sought, the quashing of the decision, being granted. I emphasize could be, could result.
>
> ...
>
> They said a decision would be made on June 22nd. They said [T.G.] would have an opportunity to present her views and to have them be considered, and they have correspondence that is available to me that suggests and indicates to me that the decision had been made prior to that date.
>
> In my view those circumstances create a circumstance where the duty of fairness the Department of Community has in the process they chose appears, on the evidence available to me at this time, to have fallen short of what it should be, in its worst light to have been predetermined and biassed in the sense that the decision was made prior to the meeting or hearing that the agency said it would have on June 22nd.
>
> ...
>
> The injunctive relief will be granted. The order will be that [R.R.J.] not be removed from the care of [T.G.] and that [R.R.J.] not be subjected to the implementation of transition placement or visits for the purpose of preparing him for placement in an adoption home.

[49] On August 4, 2011, the judge issued an "Order (Family Proceeding) Stay Pending Judicial Review", that stated:

> NOW ON MOTION of C. LouAnn Chiasson, the following is ordered until further order:
>
> 1. The Nova Scotia Minister of Community Services shall not remove [R.R.J.] from the care of [T.G.] pending further order of the court or agreement of the parties.
>
> 2. [R.R.J.] shall not be subjected to the implementation of transition placements or visits for the purpose of preparing him for placement in an adoptive home, it being acknowledged this does not mean there could not be sibling visitation.

The "Stay" Order is more accurately described as an interim injunction, which is the term I will use.

[50] Since that Order, R. has remained with T.G. while this litigation has proceeded through to the Court of Appeal. The injunction has frozen his adoption process.

[51] On August 23, 2011, R.C., through her counsel, filed a motion to intervene in the proceeding for judicial review that T.G. had initiated on July 13, 2011. On August 31, 2011, Justice Williams granted the intervention by consent.

[52] On August 26, 2011, T.G. amended her Notice for Judicial Review to add the ground of bias upon which the judge had relied in his ruling of July 22 for the interim injunction. The amended Notice deleted the former Ground number 2 (alleging that the Minister had misapplied s. 47(5) of the *CFSA*) [see above para 14] and added the Ground:

> 3. The Minister's decision did not comply with the rules of procedural fairness which resulted in a denial of natural justice which grounds include but are not limited to the following:
>
> a. The Minister did not follow her own plan of action which required an updated assessment of R.C. and approval to adopt the child in question;

> b. The Minister was not impartial in reaching her decision on June 22, 2011 because the Minister had predetermined [R.]'s placement with R.C. The Minister was biased or, in the alternative, created a reasonable apprehension of bias.

The Amendment deleted the request that the Court order the Minister to consent to the adoption by T.G., and added the following to the "Order proposed":

> The applicant requests that the decision be declared void *ab initio* and that the matter be remitted for consideration to a newly constituted impartial panel. As the matter would be reconsidered on a *de novo* basis, the applicant requests that the process of reconsideration include evidence by way of an attachment study.

[53] On August 26, 2011, Justice Williams heard a motion for directions for judicial review further to *Civil Procedure Rule* 7.10. Rule 7.10 provides that a judge "may give any directions that are necessary to organize the judicial review", including settling the record and evidence for the judicial review hearing. He also heard T.G.'s motion, filed on August 26, that the Minister produce certain information. The Agency had disclosed the material in the files of its Dartmouth District Office, which was handling R.'s adoption. But the Agency had not disclosed R.C.'s file material from its Cape Breton Office. On August 26, 2011 the judge issued an oral decision that directed the Minister to produce the Department's complete file on R.C., and to answer questions respecting some comments in the record that indicated the Agency supported R.C.'s adoption application.

[54] The judge's oral decision of August 26, 2011 later was embodied in a written decision (2011 NSSC 356). Further to the August 26 ruling, the judge issued an Order for Production and an Order for Disclosure, both dated September 1, 2011.

[55] The Order for Production included:

> It is ordered:
>
> 1. The complete adoption file of the Cape Breton-Victoria District Office of the Department of Community Services in relation to the Respondent, [R.C.], shall forthwith be reproduced and the original file shall be provided to the solicitor for

> the Minister of Community Services, Peter C. McVey at the Nova Scotia Department of Justice, 5151 Terminal Road, 4th floor, Halifax, Nova Scotia, B3J 2I6, phone: (902) 424-5332, fax: (902) 424-7158.
>
> 2. Counsel for the Minister of Community Services shall make three (3) true copies of the original file produced pursuant to this Order, the complete adoption file of the Cape Breton-Victoria District Office of the Department of Community Services in relation to the Respondent, [R.C.], and one such true copy of the file shall be provided forthwith to legal counsel for each of the other parties.

[56] The Order for Disclosure directed the Minister to "forthwith disclose to the Applicant" [T.G.], the answers to a number of questions involving: the Agency's communications with R.C. and the Mi'kmaw Agency, Adoption Manuals and Standards, the "articles on siblings attachment referenced in the Adoption Planning Minutes dated June 22, 2011", "the source of the quotation in the paragraph beginning, 'Research is telling us that ...', found in Adoption Planning Minutes dated June 22, 2011, at page 7", and the birth certificates of R.'s two sisters.

[57] On December 5, 2011, Justice Williams rendered an oral decision on T.G.'s motion for judicial review. This was followed by a written decision January 20, 2012 and a "corrected" decision on February 15, 2012 (2011 NSSC 497). Later in the Analysis (paras. 95-107) I will discuss the judge's reasons. The judge's Order was dated December 21, 2011. The judge held that the Agency's selection of R.C. was biased and predetermined, which violated the Minister's duty of procedural fairness to T.G.. The judge quashed the Minister's decision. The Order directed that the Minister convene a new panel to determine R.'s adoption placement, gave detailed directions on how that panel should proceed:

> It is further ordered that:
>
> 2. The Minister of Community Services shall forthwith convene a fresh panel of three experienced social workers. This panel shall be composed of two adoption workers and one foster care worker or child in care worker.
>
> 3. The three social workers composing the panel shall be from outside of Central Region and Eastern Region of the Department of Community Services and may, at the discretion of the Minister, be retired social workers.

4. Every attempt shall be made by the Minister of Community Services to identify to the parties the three social workers composing the panel by not later than Monday, December 19, 2011.

5. These three social workers shall each sign an affidavit confirming that they each have no prior involvement with or knowledge of the child, [R.R.J.], born May 3, 2010, and/or with or of [T.G.], born October 20, 1963, or [R.C.], born July 24, 1965.

6. [T.G.] and [R.C.] shall be treated by this fresh panel as a two-person, short-list of prospective adoptive parents for the child, [R.R.J.], and no other prospective adoptive parent(s) shall be considered.

7. The mandate of this panel shall be to make a fresh adoption placement decision in relation to the child, [R.R.J.]. This decision shall be made on its merits; that is, it shall be a decision consistent with Section 3(2) of the *Children and Family Services Act*. This decision shall be made without input or advice from any social workers who are or have worked for the Central Region of the Department of Community Services since January 1, 2010.

8. Upon being convened, this panel shall be informed that they have the option to retain the services of a psychologist to prepare a Report concerning the needs of the child, [R.R.J.], and the ability of each of [T.G.] and [R.C.] to provide for those needs, including addressing issues of openness in adoption.

9. The discretion to retain or not retain a psychologist shall be exercised independently by the panel, and the panel shall control its own process regarding the commissioning of any such report. However, the commissioning of any such Report by the panel shall be subject to the following terms and conditions:

    (i) [T.G.] and [R.C.] shall each be entitled to write to the panel on or before Wednesday, December 14, 2011, stating their reasons why a Report should or should not be commissioned by the panel. Such submissions shall not exceed four (4) pages in length;

    (ii) The psychologist may be Dr. Carolyn Humphreys or any other psychologist chosen by the panel;

    (iii) The Report must be completed and received by the panel by not later than Tuesday, January 31, 2012;

(iv) The Report may inform the panel, but the conclusions of the psychologist shall not bind the panel;

(v) The Report shall be shared by the panel forthwith upon its receipt with legal counsel for each of the Minister of Community Services, [T.G.] and [R.C.]; and

(vi) The costs associated with the Report shall be born by the Minister of Community Services.

10. This panel shall otherwise only be provided with the following documents for its review and consideration:

(i) the SAFE Assessment(s) and SAFE Update(s) for each of [T.G.] and [R.C.];

(ii) the Social History of the child, [R.R.J.];

(iii) A copy of Section 3(2) of the *Children and Family Services Act*;

(iv) A copy of the entire *Children and Family Services Act*;

(v) A copy of the *Adoption Manual of Policy and Procedures*, Department of Community Services; and

(vi) Such written submissions as may be provided by each of [T.G.] and [R.C.] by not later than Saturday, January 14, 2012.

11. Upon convening, receiving and reviewing all of the documents provided for herein, the panel shall make a decision regarding adoption placement of [R.R.J.] on or before Tuesday, February 28, 2012. This decision shall be reduced to writing by the panel and shall be provided forthwith to each of the following:

(i) Legal counsel for each of [T.G.], [R.C.] and the Minister of Community Services; and

(ii) Each of the Cape Breton-Victoria and Dartmouth District (1) Offices of the Department of Community Services.

12. While the fresh panel is in the process of making its decision and for fourteen (14) days after delivery of the panel's decision to the persons stated

> above, the Minister of Community Services shall continue to be enjoined as follows:
>
> (i) [R.R.J.] shall not be removed from the care of [T.G.]; and
>
> (ii) [R.R.J.] shall not be subjected to the implementation of transition visits for the purpose of preparing him for adoption placement with [R.C.], it being acknowledged that this does not mean there could not be sibling contact.
>
> The injunction shall, however, vacate upon the filing and issuance of an order to that effect, which Order may be filed by any of the parties to this proceeding.

The parameters and criteria for the new panel, written in this Order, are silent on R.'s racial and cultural heritage. The information to be provided under the Order omits significant material that was in the Agency's case history file for R.. The newly appointed panelists would not have and, as it later turned out, did not have any direct knowledge of R. except what could be gleaned from documentary review.

3. The Appeals

[58] The Minister appealed the Orders for Production and Disclosure of September 1, 2011, and the judge's accompanying reasons of August 26, 2011 (oral) and September 28, 2011 (written). I will term that proceeding the Disclosure Appeal. The Court of Appeal heard the Disclosure Appeal on January 30, 2012, and reserved its decision.

[59] The Appeal Books for the Disclosure Appeal did not include a transcript of Justice Williams' oral decision of December 5, 2011, or his written decision of January 20, 2012 or the Order of December 21, 2011 on the judicial review. But T.G.'s factum, filed December 16, 2011 for the Disclosure Appeal, said:

> 20 The judicial review hearing was held on September 21st and 22nd, 2011. An oral decision was rendered on December 5th,2011, which quashed the decision made by the Appellant on June 22, 2011, on the basis of bias and ordered that the matter of the adoption placement decision be revisited by the Appellant.

[60] At the January 30, 2012 hearing on the Disclosure Appeal, the Court of Appeal was informed that the Minister was appealing Justice Williams' judicial review ruling of December 5, 2011 and Order of December 21, 2011. I will term that the Judicial Review Appeal. At the conclusion of the hearing on January 30, the Court suggested to counsel that, given the child's interest in a speedy disposition, the Minister's Judicial Review Appeal should be heard by the same panel at an expedited hearing date. Counsel agreed. The earliest available hearing date that could accommodate the preparation of a transcript was March 22, 2012.

[61] Shortly before the March 22 hearing, T.G. tendered as fresh evidence the material generated by the reconstituted adoption placement panel that had been directed by Justice Williams' Order of December 21, 2011 (above para 57). The Minister and R.C. opposed the admission of fresh evidence.

[62] On March 22, 2011, the same panel of this Court who heard the Disclosure Appeal heard the Judicial Review Appeal. The Court also heard the submissions of the parties respecting the admission and use of the fresh evidence that had been tendered by T.G.. The Court reserved its decisions on the admission and use of the fresh evidence and on the merits of the appeal.

[63] These reasons address both appeals.

4. Issues on Appeal

[64] On the Disclosure Appeal, the Minister submitted that the information ordered to be produced under the Production and Disclosure Orders was privileged, and was subject to the Crown's prerogative to decline pre-trial disclosure. The Minister says that the judge erred by issuing those Orders.

[65] On the Disclosure Appeal, and reiterated as a ground on the Judicial Review Appeal, the Minister said that the judge's actions showed a reasonable apprehension of bias.

[66] On the Judicial Review Appeal, a preliminary issue is whether the Court should admit the fresh evidence.

[67] On the merits of the Judicial Review Appeal, I will consider the Minister's several submissions together under the umbrella topic - whether the judge erred by ruling the Minister or Agency violated a duty of procedural fairness to T.G..

[68] As to the sequence, before discussing the grounds of appeal, as a preliminary issue I will consider the request to adduce fresh evidence. Among the grounds of appeal I will first address the foundational issue from the Judicial Review Appeal - whether the judge committed an appealable error in his ruling that the Minister violated a duty of procedural fairness. Secondly, I will discuss whether the judge exhibited a reasonable apprehension of bias, argued in both appeals. Thirdly, I will come to the Minister's objections to the Orders for Production and Disclosure, from the Disclosure Appeal.

[69] Section 78(1) of the *CFSA* says that when the court is satisfied of several matters, including that the adoption "is proper and in the best interests of the person to be adopted", then "the court shall make an order granting the application to adopt". By s. 106, that court is the Supreme Court of Nova Scotia. One future day, there will be an application under s. 78(1), and a judge will be asked to determine whether the proposed adoption is in R.'s best interests. The proceeding under appeal was not an application under s. 78(1). These reasons mention the

"best interests of the child" and interpret the *CFSA* to address the issues that have arisen in the argument of this appeal. Nothing in these reasons should be taken as a pre-determination of the ultimate issue that will arise under s. 78(1).

5. Fresh Evidence

[70] On March 8, 2012, T.G. filed a Notice of Motion with the Court of Appeal for an order permitting the admission of fresh evidence. The fresh evidence was an affidavit of T.G. that attached as exhibits: (1) a report dated February 27, 2012 from the Panel that had been reconstituted further to Justice Williams' Order of December 21, 2011 (above para 57), (2) a report from Dr. Carolyn Humphreys that Justice Williams' Order, item # 9, had directed be prepared, and (3) copies of documents that the reconstituted panel had received or mentioned in its Report.

[71] R.C. and the Minister oppose the introduction of fresh evidence as irrelevant to the issues in the Court of Appeal. The Minister provisionally submitted a Reply Affidavit of Mary Craig, the Agency's Adoption Program Supervisor. Ms. Craig's affidavit disputes some of the assertions in T.G.'s affidavit and adds commentary pertinent to the reports of Dr. Humphreys and the Panel.

(a) Preliminary Issue

[72] Before discussing the fresh evidence motion, I will address a preliminary submission. R.C.'s counsel contended that the Court of Appeal should not have viewed the tendered fresh evidence, even for the purpose of determining whether to admit it. By reading it, according to the submission, the Court of Appeal became tainted by a reasonable apprehension of bias. When asked if R.C. was requesting the panel of the Court of Appeal to recuse because of reasonable apprehension of bias, counsel for R.C. said No.

[73] I disagree that a judge becomes tainted by a reasonable apprehension of bias merely by viewing evidence, that is subject to an objection, for the purpose of determining the admissibility of that evidence.

[74] It has long been this Court's practice on fresh evidence motions to: (1) receive, meaning read or hear, the evidence provisionally, which enables the Court to assess whether the evidence satisfies the criteria for the admission of fresh

evidence, (2) hear counsel on the motion to admit the fresh evidence, then (3) decide whether to admit the fresh evidence. Usually the decision whether to admit is reserved and included in the Court's decision on the merits. That is because the relevance of the fresh evidence, a criterion for its admission, often is better assessed in tandem with the assessment of the submissions on the merits of the appeal. This has been the practice approved by this Court and other appellate courts on fresh evidence motions in cases too numerous to cite. It is the practice that this Court followed on this appeal.

[75] It is normal that a judge examine evidence that is tendered, and is subject to objection, beside the existing evidence, to determine whether the tendered evidence is relevant and satisfies the criteria for admission. The issue of relevance and the criteria for admissibility need context, and can't be distilled under hermetic seal. In *R. v. Hurley*, [2010] 1 S.C.R. 637, at para 17, Justices Rothstein and Cromwell, for the Court, said "the fourth *Palmer* factor requires an assessment of the new evidence in the context of the other evidence adduced at trial". If the judge rules the evidence is inadmissible, the trial proceeds before that judge who disregards the excluded evidence. Judges are accustomed to the dispassionate relegation of inadmissible evidence. A judge hears a confession on a *voir dire* in a prosecution, excludes the confession as involuntary or under s. 24(2) of the *Charter*, proceeds with the trial and gives a verdict, sometimes an acquittal, based only on the admissible evidence. An equivalent process to deal with tendered evidence that is subject to objection happens in criminal and civil courts every day.

[76] I reject the suggestion that the panel of this Court is tainted by reasonable apprehension of bias because we viewed the tendered fresh evidence in order to rule upon its admissibility.

(b) Merits of Fresh Evidence Motion

[77] Moving to the fresh evidence motion itself, the test stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Admission is governed by four factors: (1) whether there was due diligence in the effort to adduce the evidence at trial; (2) relevance to the issue at trial; (3) credibility of the new evidence; (4) whether the evidence could reasonably have affected the result. The test applies to civil as well as criminal cases: *Public School Boards' Assn. of Alberta v. Alberta (Attorney*

General), [2000] 1 S.C.R. 44, para 8; *United States of America v. Shulman,* [2001] 1 S.C.R. 616, para 44; *May v. Ferndale Institution,* [2005] 3 S.C.R. 809, para 107.

[78] The evidence must be in admissible form. If it is inadmissible, obviously it could not affect the result under *Palmer*'s fourth criterion. *R. v. O'Brien*, [1978] 1 S.C.R. 591, per Dickson, J. at page 602; *R. v. Dell*, [2005] O.J. 863 (C.A.), per Sharpe, J.A., at para 85; *R. v. Kelly*, [1999] N.B.J. No. 98 (C.A.), at para 71; *R. v. Assoun*, 2006 NSCA 47, para 302. A motion to admit fresh evidence isn't just a generic preview of the type of evidence that would be offered, in admissible form, at a future new trial.

[79] The four-branched *Palmer* test applies to issues that were *decided* at the trial that is under appeal. When the fresh evidence relates to the *process* of the tribunal whose decision is appealed, *Palmer*'s criteria recede and are replaced by a test that asks whether the evidence is "credible and sufficient, if uncontradicted, to justify the appellate court making the order sought": *R. v. Wolkins*, 2005 NSCA 2, at para 61, per Cromwell, J.A.. See also *R. v. Assoun*, paras 297, 316, and cases there cited.

[80] In this case the fresh evidence is tendered respecting an issue decided by the judge in the judgment and reasons under appeal, and *Palmer*'s test applies.

[81] Due diligence is not an issue, as the fresh evidence did not come into existence until after the decision under appeal. Neither is credibility an issue. The tendered evidence is in the admissible form of sworn affidavits by T.G. and Ms. Craig. The questions are whether the evidence is relevant and could affect the result. I will consider those overlapping points together.

[82] In a child welfare matter, relevance may be viewed through a wide angled lens. This Court has exercised a broad discretion to admit fresh evidence of the child's circumstances: *e.g. Children's Aid Society of Halifax v. C.M. et al.* (1995), 145 N.S.R. (2d) 161 (C.A.), at p. 167, per Bateman, J.A.; *Children's Aid Society of Cape Breton v. L.M. and B.M.*, (1998), 169 N.S.R. (2d) 1 (C.A.), at para 43, per Cromwell, J.A.. A child's welfare is ongoing and fluid, an undammed stream, and usually it is better that the Court have the full context.

[83] Whether T.G. or R.C. should be the adoptive parent is not an issue before the Court of Appeal. The issue is procedural - whether the Minister violated a duty of procedural fairness to T.G. in the events leading to and culminating in the Adoption Placement Conference of June 22, 2011.

[84] I agree with the Minister and R.C. that the fresh evidence should not be received for an issue that is not before this Court - *ie.* to show who should be the adoptive parent. But the fresh evidence may be relevant to the determination of the procedural issues that are appealed. I will discuss that point later (paras 153-54).

[85] Accordingly, I would admit the tendered fresh evidence - T.G.'s affidavit of March 8, 2012 with exhibits and Ms. Craig's Reply Affidavit of March 19, 2012 - but for the limited purpose of assisting the Court to determine the procedural issues on this appeal.

6. Standard of Review

[86] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para 43, the Chief Justice discussed the Court of Appeal's role on appeal from a court that conducted a judicial review:

> At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housed, supra*, apply.

[87] These normal rules of appellate review are that the judge must be correct on issues of law and not commit a palpable and overriding error on issues of either fact or mixed fact and law with no extractable legal error: *Housed v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras 8, 10, 19-25 and 31-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at paras 4, 65, 69 and 72-74.

[88] The content of the duty of procedural fairness is a legal issue, for which the Court of Appeal applies correctness to the analysis of the reviewing judge: *Communications, Energy and Paperworkers Union of Canada, Local 141* v. *Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, para 28; *Kelly v. Nova Scotia Police Commission,* 2006 NSCA 27, paras 21-33; *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69, para 40.

7. First Issue - Procedural Fairness

[89] Before examining the judge's approach, I will outline the principles.

[90] A court that considers whether a decision maker violated its duty of procedural fairness does not apply a standard of review to the tribunal. The judge is not reviewing the substance of the tribunal's decision. Rather the judge, at first instance, assesses the tribunal's process, a topic that lies outside standard of review analysis: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para 74, per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103, per Binnie, J.; *Creager v. Nova Scotia (Provincial Dental Board)*, 2005 NSCA 9, paras 24-25; *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, para 19; *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para 11; *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, paras 30-31.

[91] The judge must define the content, or standards of procedural fairness that apply to the particular case. In *Kelly*, Justice Cromwell said:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> [21] The first step - determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step - assessing whether the Board lived up to its duty - assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's

> perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for review.

[92] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Justice L'Heureux-Dubé set out what have become the guiding principles to define the standards of the duty:

> (1) Factors Affecting the Content of the Duty of Fairness
>
> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". ...
>
> 22 ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> 23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. ...
>
> 24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is

provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted ....

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. ...

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: ... As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: ... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: ... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: ....

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[93] Recently in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, at para 42, Justice Binnie for the Court reiterated *Baker*'s list of non-exclusive factors.

[94] I will turn to the judge's decision in this case.

[95] The judge found:

> [13] ... Both homes [of R.C. and T.G.] appear exceptional.

[96] The judge framed the issue as turning purely on procedural fairness, not the merits:

> [14] The first ground of Judicial Review pleaded by [T.G.] asserts that the decision of the Minister is "not in [R.]'s best interests ...".
>
> [15] This Court does not have jurisdiction in this proceeding to re-evaluate the merits of the decision made, to re-visit, to re-do, to re-balance the best-interest analysis done by the Minister. I do not have the jurisdiction to say "yes" the right choice was made or "no" the wrong choice was made. The first ground of judicial review cannot be said to be unreasonable on its face. The first ground pleaded thus fails insofar as it is a merit-based concern.
>
> [16] The assertion in the Notice of Judicial Review at 3(a) - that "the Minister did not follow her own plan of action ..." also fails. As I will later discuss, the process for making the decision lies fundamentally within the discretion of the Minister, subject to a duty of fairness. [judge's underlining]

[97] The judge referred to *Baker*'s five factors. But his reasoning relied almost entirely on *Baker*'s fourth factor - T.G.'s legitimate expectations.

[98] The judge said that T.G. had a "legitimate expectation" from R.'s initial placement with her in May, 2010. The Agency's Plan of Care for R., an internal document within the Agency, dated August 27th, 2010 read:

> The baby [R.] is in a foster home with a view to adopt. There is also an interest expressed by the adoptive parents of [R's sisters] that, pending his availability for adoption, they would very much like to be considered for adoption placement.

The judge said:

> [97] The evidence before me indicates, and I conclude, that discussions concerning potential adoption were had with [T.G.] when [R.] was placed. At the time, the Dartmouth office of the Community Services believed - perhaps inaccurately given [R.C.]'s evidence - that there was no foster or adoptive placement for all three siblings. This was communicated to [T.G.]. The possible adoption of [R.] was discussed by a representative of the Agency with [T.G.]. I accept [T.G.]'s evidence in this regard.

He concluded:

> [84] I conclude that the placement of [R.] with [T.G.] as a "foster with a view to adopt placement" created a legitimate expectation that she, [T.G.], would be looked at as a serious option or choice should [R.] become available for adoption.

[99] The judge reached this conclusion despite having made the following finding:

> [82] That said, it is clear, very clear that there could be and were no promises to [T.G.] at the time of [R.]'s foster placement. There was no guarantee that [R.] would be placed in the permanent care and custody of the Community Services and thus become "available" for adoption. There was no guarantee that [R.] would be placed for adoption with [T.G.] (despite her affidavit's reference being limited to the question of placement with her unless there was a placement with parents). Other placements were always possible and available, and I am satisfied that she knew and understood that.

[100] The judge moved forward chronologically. He referred to T.G.'s affidavit evidence of the phone calls from June 16, 2011 to the June 22, 2011 Adoption Placement Conference (quoted above paras 28-37), and concluded:

> [125] I conclude that [T.G.] had the same expectation that Ms. Henman-Phillips had - that she would have an opportunity to present her position, her plan at this June 22, 2010 [*sic* - 2011] meeting. As or more importantly, [T.G.] had the expectation and impression that the decision between the two plans had <u>not</u> been made, and that the decision between the two plans would be made at the meeting. I conclude that these expectations were induced in [T.G.] by the actions of representatives of the Minister. [judge's underlining]

[101] The judge then referred to the following evidence that, before the Adoption Placement Conference of June 22, 2011, Agency employees had expressed a preference for R.C.. In chronological order:

(1) The letter of June 6, 2011 from the Agency's Ms. Wilson to the Mi'kmaw Family and Children's Services stated that "[t]he agency is pursuing adoption placement for [R.] in the same adoption home with his siblings." (quoted above, para 25).

(2) On June 15, 2011, the Agency's Ms. Henman-Phillips emailed others in the Agency saying that R.C. "is in favor of adoption of [R.] fully" and "[w]e should book adoption planning to confirm/formalize as well and I guess ensure the foster mother will co operatively work with us on this placement ...".

(3) The Agency's Ms. Henman-Phillips emailed the Agency's Sydney office on June 21, 2011:

> We are having adoption planning on Wed to specify [R.C.] as the identified placement for baby R. The foster mother will be attending so we will hear more on her position/interest which she has expressed and brought forward to management and more history on baby R. Once [R.C.] has been identified/specified, I will arrange for the adoption planning notes to be forwarded to you so that we can move forward with [R.C.]'s update.

(4) The Cape Breton Agency replied on June 22, saying: "Good to know that you are you are having a meeting to confirm [R.C.] as the identified placement."

(5) At the June 22, 2011 Adoption Placement Conference, the Agency's Ms. Craig gave T.G. a package of materials described by the judge (para 138) as related to "the importance of siblings being placed together, excerpts from articles, internet sources, et cetera". The judge said "this was delivered to rationalize the decision to place [R.] with [R.C.]".

[102] Ms. Craig, the Agency's Adoption Supervisor, testified clearly about the Agency's approach, in a passage also noted by the judge (para 135):

> Q. Would it be fair to say that the only option for consideration at the June 22nd meeting was placement with [R.C.], and only if it fell through were other options going to be examined?

> A. That's correct. Although we did have ... we knew of [T.G.]'s interest. We knew that she had a written interest. We also considered the attachment and continuity of care for the child. In this particular circumstance, we knew there was somebody else that was interested in putting forth a plan for [R.], but on June 22nd, our first plan was [R.C].
>
> Q. The second plan was not up for consideration unless the first plan failed, correct?
>
> A. That's correct.

[103] The judge concluded:

> [152] I conclude that [T.G.] had a legitimate expectation that the June 22nd meeting would choose between the two potential adoption placements.
>
> ...
>
> [155] Representatives of the Department did, prior to the meeting, point out policies relating to sibling placement and culture, but did not - in my view could not - assert to [T.G.] that these policies trumped the best-interest considerations such as continuity of care, and the possible disruption on [R.] of disruption in that continuity of care.

[104] Despite having confined his jurisdiction to procedure, not the merits (above, para 96), the judge stated conclusions on the Agency's interpretation and weighing of criteria.

[105] As to sibling placement and racial compatibility, the judge said:

> [156] There is absolutely no question that the sibling considerations, the racial considerations are critically important. But they are not so important that the attachment issues, the possibility of disruption of care, the broad application indeed of the best-interest test do not even reach the table of the meeting unless those first considerations are found wanting. I note this is a situation where there has been, to the Court's knowledge, no contact between [R.] and his siblings.

[106] The judge referred to s. 47(5) of the *CFSA* (quoted above para 14), that governs racial compatibility, and said:

> [166] The section is qualified, as I have indicated before, by what is practicable. The reference to "within a reasonable time", in my view, is reasonably taken as a reference to the attachment issues which are in the best-interest test - and the impact that the passage of time has on those factors. The longer a child is in a home, the more attachment issues should be considered.
>
> ...
>
> [168] "Practicable' has been defined as meaning feasible, fair, and convenient. An act is practicable if circumstances permit its performance. Practicable here must be seen from the child's perspective through the prism of the best-interest standards. An approach (as it appears to be have been [*sic*] taken here) that elevates a plan that is said to match sibling and race considerations (the Section 47(5) considerations) to the point that only if that plan is rejected will an alternate plan involving continuity of care be considered excludes continuity of care from consideration. This is in my view an error.

[107] The judge concluded:

> [170] I conclude here that:
>
> (1) the Department of Community Services failed to apply Section 3(2) of the *Children and Family Services Act* to their decision process and made an error of law;
>
> (2) that it pre-judged the decision that was to be made on June 22nd, 2011, having represented that they were undertaking a process of choice, considering two alternative adoption plans. ...

The judge said (para 171) that the result "violated the principles of fairness and natural justice" and "[t]he decision of June 22nd is set aside, voided, quashed". The judge's reasons then prescribed detailed provisions for the appointment, procedure, mandate and evidence to be considered by a fresh panel (Order quoted above, para 57).

[108] In my respectful view, the judge erred (a) by dealing with the merits, that were not before him, and by his conclusions on the merits, (b) when he determined the standards of procedural fairness, by misapplying those components of *Baker*'s tests that prescribe respect for the Legislature's chosen procedure, and (c) by misapplying the principle of legitimate expectations. I will discuss these in turn.

(a) The Judge's Comments on the Merits

[109] The judge concluded (para 170) that the Department "failed to apply Section 3(2)" [best interests of the child] and therefore "made an error of law". That error, according to the judge, involved the Minister's interpretation of s. 47(5) and the Minister's weighing of racial compatibility and sibling placement, favouring R.C., over attachment and continuity, favouring T.G.. Section 47(5) says:

> Where practicable, a child, who is the subject of an order for permanent care and custody, shall be placed with a family of the child's own culture, race or language but, if such placement is not available within a reasonable time, the child may be placed in the most suitable home available with the approval of the Minister."

The judge said (para 166) that "reasonable time" in s. 47(5) is "a reference to the attachment issues" and "[t]he longer a child is in a home, the more attachment issues should be considered". The judge said (para 168) that an approach that "elevates ... sibling and race considerations" as a determining factor against "continuity of care" is "an error".

[110] The Agency's weighing of factors and interpretation of the *CFSA*'s provisions governing racial preference, sibling placement, attachment and continuity were not issues before the judge. T.G.'s Notice for Judicial Review included a ground that the Minister's decision was "not in R.'s best interest" and was "unreasonable" (above, paras 45, 52). The judge dismissed that ground summarily (Decision, paras 14-16, above para 96). The only remaining issue before the judge was procedural fairness.

[111] In *Baker*, para 26 (above, para 92), Justice L'Heureux-Dubé said that procedural fairness and the principle of legitimate expectations do not authorize a court to substantively review the merits of a tribunal's decision. To similar effect - the authorities cited above, para 90, and *Mavi*, para 68 (quoted below para 164). In the decision under appeal, the judge said, correctly in my view:

> [15] This Court does not have jurisdiction in this proceeding to re-evaluate the merits of the decision made, to re-visit, to re-do, to re-balance the best-interest analysis done by the Minister.

The judge then did what he said he had no jurisdiction to do.

[112] A standard of review analysis is a prerequisite to any judicial review of a merits ruling by an administrative decision maker, such as the Minister or Agency exercising statutory discretion under the *CFSA*: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. The judge performed no standard of review analysis. Yet he reviewed and found error with the Minister's weighing of factors and interpretation of the *CFSA*'s criteria for the merits of the Minister's decision.

[113] The judge analysed these points on a correctness basis. This Court has said repeatedly that the Minister's discretion to place a child in care for adoption is entitled to substantial deference from the courts (authorities quoted below, paras 132-41). Even T.G.'s ground for review (that the judge dismissed) suggested reasonableness, not correctness.

[114] Given the judge's foray into the merits, he also erred in four respects, with his interpretation of the *CFSA*.

[115] **First:** Citing no authority, the judge said that "reasonable time" for placement in s. 47(5) refers simply to the child's attachment to his pre-adoptive home. That is not the meaning of the provision. Section 47(5) intends that the placement in the home (which is compatible culturally, racially, linguistically) should be done within a reasonable time from when that placement decision is to be made. For an adoption, that is usually the date of the permanent care order, or after any appeals from that order are concluded. The point of the provision is so the child does not have to wait unreasonably for that compatible placement. What is an "unreasonable" wait may involve various factors, to be weighed by the Agency. But here, R. could have been so placed in short order after the permanent care order of May 30, 2011. As I discuss below [paras 141, 155(8), 155(9)], the *CFSA* addresses the Court's assessment of attachment at a later stage in the adoption process.

[116] **Second:** Section 47(5) says the compatible placement "shall" be made if "practicable". Citing no authority, the judge said that to use cultural/racial/linguistic compatibility placement as a decisive factor over continuity of care is "an error". I disagree with that absolute statement. The weighing of "practicality" is in the Agency's discretion, depends on many factors, and is not for the Court to overturn on an error based correctness standard.

[117] **Third:** The judge (para 52) quoted s. 47(5) - which the text of the decision wrongly cites as "47(4)" - and said (para 53) "I note the use of the disjunctive 'or'". The judge did not explain why the word "or" was notable. It appears the judge may hold the view that the provision directs the Minister to emphasize only one of "culture, race or language". So, if the child and a prospective adoptive parent each speak English, the provision is spent, and the Minister is to ignore race and culture. If that was the judge's interpretation, then the judge erred. Section 47(5), including the word "or", means that each of culture, race and language is a prioritized factor. It does not mean that the Minister is to pick one and disregard the other two.

[118] **Fourth:** In my view, the judge also misinterpreted the Legislature's prescription of the "best interests" test.

[119] The judge said the Minister erred because the Minister "failed to apply Section 3(2)" of the *CFSA*. Sections 3(2) and (3), with s. 2(2), prescribe the factors that a judge is to consider in a "determination in the best interests of a child". The Minister allowed the racial preference in s. 47(5) and the preference in various other provisions for family or sibling cohesion to tip the Minister's determination that R. should be with R.C. and with R.'s birth sisters. The judge was of the opinion that the Minister's preference for racial compatibility and sibling placement was a "failure" to apply the *CFSA*'s best interest test.

[120] I respectfully disagree.

[121] First, the child's "relationships with relatives" and "cultural, racial and linguistic heritage" are listed as "best interests" factors in ss. 3(2)(b) and (g).

[122] More importantly, in s. 47(5) the Legislature has explicitly designated racial compatibility as a super-weighted factor. Section 47(5) embodies the recital in the *CFSA*'s preamble that "the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child". According to the Legislature, this factor promotes the child's best interest, to the degree that the factor merits special weight in s. 47(5). The Minister felt this factor was pertinent because R.C. and R.'s sisters are all racially compatible with R.. Similarly, various provisions in the *CFSA* promote family integrity, that would follow a sibling placement, as in the child's best interest.

[123] In *Nova Scotia (Community Services) v. T.H.*, 2010 NSCA 63, Leave to Appeal refused [2011] 1 S.C.R. xi, a Family Court judge ordered that two children be in the Minister's permanent care, but with the conditions that foster care continue indefinitely and that adoption was "ruled out". The judge's reason for the conditions was that, in his view, continued placement with the foster parent was in the child's better interests than an adoption. The Court of Appeal overturned those conditions. This Court said:

> 55 ... The *CFSA*'s processes and standards specifically channel the Legislature's intentions for promotion of the child's best interests respecting adoption. They are not just an alter ego to the child's best interests under s. 2(2), leaving a judge on the disposition hearing with an option to choose one or the other. Rather they flesh out "best interests' in s. 2(2) and, together with s. 2(2), embody the Legislature's prescription to satisfy the child's best interests respecting adoption.
>
> ...
>
> 57 Section 2(2) is not abrogative, like s. 52(1) of the *Constitution Act, 1982*. It does not invalidate other sections in the *CFSA*. Rather s. 2(2) is to be construed consistently with other provisions in the *CFSA*.

As the judge's conditions to the permanent care order were inconsistent with the *CFSA*'s pre-adoption process, that channelled the Legislature's view of best interests, the Court of Appeal allowed the appeal and deleted those conditions.

[124] In *Children and Family Services of Colchester County v. K.T.*, 2010 NSCA 72, a companion case to *T.H.*, Chief Justice MacDonald (paras 2, 32, 46, 54) reiterated the points made in *T.H.,* and added:

> [34] In summary, while a consideration of a child's best interests is fundamental and important to a judge's role, specific statutory prerequisites cannot be sacrificed in attainment of this goal. It is, after all, within the province of the Legislature, if it so chooses, to prescribe how a child's best interests will be met. This is not the exclusive bailiwick of the judiciary.

[125] The Legislature is entitled to incorporate, in its view of the child's best interests, an overriding or prioritized criterion, such as s. 47(5)'s directive that a child "shall" be placed when the stated conditions are met. Unless there is a successful constitutional challenge to that provision, the Agency does not contravene

the general “best interests” test of ss. 2(2), 3(2) and (3), merely by following the Legislature’s directive.

(b) Procedural Fairness - The Statutory Scheme and the Minister’s Functions

[126] Several *Baker* factors establish that standards of procedural fairness must respect the regulatory context, statutory process and the role that the Legislature intended the tribunal to perform. A synopsis from *Baker* (above, para 92):

(1) The “content is to be decided in the specific context of each case” (*Baker*, para 21). The procedure is to be appropriate to “its statutory, institutional, and social context” (paras 22 and 28). To similar effect: *Dunsmuir*, at para 79, per Bastarache and LeBel, JJ., for the plurality; *Canada v. Mavi*, at para 38.

(2) Under *Baker*’s first factor “[t]he more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness” (para 23). To similar effect *Moreau-Bérubé*, at para 75.

(3) Under *Baker*’s second factor, the role of the decision “within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed” (para 24).

(4) *Baker*’s fifth factor assesses “the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances” (para 27).

[127] In *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 and *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, the Court elaborated on the relationship between standards of procedural fairness and the tribunal’s expected functions under the legislation.

[128] In *Bell Canada* the Chief Justice and Justice Bastarache for the Court said:

> 21 The requirements of procedural fairness - which include requirements of independence and impartiality - vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p, 636, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" [further citations omitted]. As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum; their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence [citations omitted].
>
> 22 To say that tribunals span the divide between the executive and the judicial branches of government is <u>not</u> to imply that there are only two types of tribunals - those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to <u>all</u> of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal - such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law - as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are

> appropriate for a body that has these particular functions. [Supreme Courts' underlining]

[129] Similarly, in *Imperial Oil*, Justice LeBel for the Court said:

> 31 The appellant's reasoning thus treats the Minister, for all intents and purposes, like a member of the judiciary, whose personal interest in a case would make him apparently biased in the eyes of an objective and properly informed third party. This line of argument overlooks the contextual nature of the content of the duty of impartiality which, like that of all the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions [citations omitted]. These variations in the actual content of the principles of natural justice acknowledge the great diversity in the situations of administrative decision-makers and in the roles they play, as intended by legislatures [citation omitted]. The categories of administrative bodies involved range from administrative tribunals whose adjudicative functions are very similar to those of the courts, such as grievance arbitrators in labour law, to bodies that perform multiple tasks and whose adjudicative functions are merely one aspect of broad duties and powers that sometimes include regulation-making power. The notion of administrative decision-maker also includes administrative managers such as ministers or officials who perform policy-making discretionary functions within the apparatus of government. The extent of the duties imposed on the administrative decision-maker will then depend on the nature of the functions to be performed and on the legislature's intention. In each case, the entire body of legislation that defines the functions of an administrative decision-maker, and the framework within which his or her activities are carried on, will have to be carefully examined. The determination of the actual content of the duties of procedural fairness that apply requires such an analysis.

[130] In *Communications Workers v. Bowater*, para 32, this Court summarized *Baker*'s criteria, supplemented by these comments from *Bell Canada* and *Imperial Oil*, as "including the tribunal's delegated room to manoeuvre that is contemplated by its governing statute", among *Baker*'s other factors.

[131] A series of decisions by this Court has discussed the Minister's discretion, or room to manoeuvre, that is contemplated by the *CFSA* respecting the adoption of children in care.

[132] In *Re D.T.* (1992), 113 N.S.R. (2d) 74 (C.A.), a father, with no knowledge of his child's placement for adoption, challenged the Agency's adoption process and sought custody. The Court of Appeal dismissed the father's request. Justice Chipman reviewed the *CFSA* and said:

> [19] ... I find it inconceivable that the Legislature which is taken to know the law "simply forgot" about fathers in the position of D.T. - those who never took a step to recognize interest in or responsibility for their children.
>
> ...
>
> [21] In my opinion, Mr. Justice Hall erred in relying on the case of **Beson** ... as supporting his conclusion that there was a gap in the legislative scheme for adoption so as to permit the exercise of the court's *parens patriae* jurisdiction.
>
> ...
>
> [26] It is clear that Wilson, J., recognized that there is no room for the *parens patriae* jurisdiction where the Legislature has exercised its discretion [referring to p. 723 of *Beson* and to Lord Wilberforce's reasons in *A. v. Liverpool*].
>
> ...
>
> [27] The following case law recognizes that legislation such as the **Act** constitutes a complete code for dealing with issues of child protection, support and adoption. [citations omitted]
>
> ...
>
> [30] ... Strong policy considerations demand that we recognize the adoption legislation as a complete code and that collateral proceedings taken to interfere with the process of adoption be discouraged. Adoptive parents must have confidence in the system, which confidence includes freedom from fear of such attacks. A consideration of the entire scheme of the legislation, as well as its predecessor legislation leads to the conclusion that the adoption provisions in the **Act** constitute a complete and comprehensive code respecting adoption matters.

[133] In *Family and Children's Services of Kings County v. D.R. et al.*, (1992), 118 N.S.R. (2d) 1 (C.A.) , Justice Chipman said:

> [60] ... With respect, the selection of the most suitable adoptive parents is the function of the agency under the [***CFSA***] and not that of the court.

[134] In *Children's Aid Society of Cape Breton v. L.M. and B.M.* (1999), 177 N.S.R. (2d) 25 (C.A.), the child's natural parents applied to vary the permanent care and

custody order, and obtain access. After that application was filed the child's prospective adoptive parents gave notice of adoption. The Court of Appeal upheld the ruling of Chief Judge Ferguson that dismissed the parents' application. Justice Flinn said:

> [44] With respect to the obligation on the Agency, Chief Judge Ferguson said the following in his decision:
>
> > "The agency, after the granting of a permanent care and custody order, has a legal obligation to make long-term plans for the child. In **Re Tanner** (1974), 24 A.P.R. 444, Justice Morrison stated at page 446:
> >
> > > 'It is within the authority of the defendant society and, as a matter of fact, may well be its duty, to encourage the adoption of children who have been made wards of the society.' "

Justice Flinn referred to the procedures prescribed by the *CFSA* for the period between the order for permanent care and custody, and concluded that those procedures were not to be circumvented by a court application that was not contemplated by the statute.

[135] In *Children's Aid Society of Shelburne County v. I.C.*, 2001 NSCA 108, a judge refused to add foster parents as parties in a motion to terminate a permanent care order under the *CFSA*. The Court of Appeal allowed the foster parents' appeal and gave them leave to apply to terminate the Agency's permanent care. Justice Bateman (paras 28-34) distinguished the status of foster parents before and after an order for permanent care. Before permanent care, the *CFSA* contemplates a primary effort to reunite the child with the natural parents, an objective that would be thwarted if foster parents could seek permanent care on their own behalf. But, after permanent care, the prospect of family reconciliation has been abandoned and the statute prefers a permanent placement outside the home of the birth parents. Depending on the child's best interests, permanent placement may include adoption by the foster parent. Justice Bateman said (para 36) that "[g]enerally, once a permanent care order is made, all decisions affecting the child are within the discretion of the Agency". This conclusion followed from s. 47(1) of the *CFSA*, giving the Minister "all the rights, powers and responsibilities of a parent or guardian" upon permanent care. But s. 36(4) of the *CFSA* entitles "a foster parent, who has cared for the child continuously during the six months immediately before the hearing or application" to notice and participation during an application to

terminate permanent care. Further, s. 36(1)(f) says that a "party" for a proceeding to terminate permanent care may include "any other person" further to the Family Court Rules, and the Family Court Rules allowed the addition of a party who "can show a direct interest". So Justice Bateman allowed the foster parents to apply for termination of the Agency's permanent care.

[136] In *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69, a judge ruled that the Agency breached its duty of fairness to the foster parents by selecting another family as the adoptive parents of the child in care. The reason was that the Agency had not provided certain information to, or met with the foster parents on the matter, before deciding the adoptive placement. The Court of Appeal overturned that ruling and held that the Agency did not breach any duty of fairness. Justice Hamilton (para 42) noted that the Minister conceded there was a duty of fairness and said that "[i]n light of this position, I have assumed without deciding that a duty of fairness existed in the circumstances of this case".

[137] The judge in this case (para 22) described *N.N.M.* as having "circumstances that are broadly speaking similar to those before this Court". In *N.N.M.*, Justice Hamilton (para 44) referred to the *Baker* factors, respecting the content of the duty, and said:

> [47] I agree with the judge's statement that the process to be followed by the MCS [the Minister of Community Services] in selecting the adoptive parents is not close to a judicial process and that the paramount consideration throughout is the best interests of the children. With respect, I do not agree that the effect of the MCS's decision on the foster parents or their subjective expectations required the MCS to do more than she did; that they required her to disclose additional information to them or to meet with them so that they could have meaningful input into the selection process.
>
> ...
>
> [62] The nature of the decision being made by the MCS in this appeal suggests minimal participatory rights for the foster parents given the large number of people interested in the decision and the need to make it relatively quickly in the best interests of the children.
>
> [63] ... Here the **CFSA** gives the MCS broad discretion to select the adoptive parents, to determine the process she will follow in doing so and to review her decision if necessary.

> [64] Other than requiring her to make her selection in the best interests of the children, the **CFSA** does not prescribe a procedure for her to follow in making her selection or in reviewing it, leaving the process for her to determine. There is no requirement that she disclose information to foster parents or meet with them to provide them with a meaningful opportunity to participate in the selection process.

Justice Hamilton referred to ss. 74(7) and (8) of the *CFSA*, - that the Minister's written consent is required for an adoption of a child in care - and said:

> [68] The effect of this is that persons who are not approved by the MCS cannot adopt a child in her permanent care.

Justice Hamilton (para 71) adopted this Court's statement in *D.R.* (above para 133) that "the selection of the most suitable adoptive parents is the function of the agency under the **Act** and not that of the court".

[138] In *N.N.M.*, Justice Hamilton considered the impact on the child's sense of time of expanding a foster parent's right to challenge the adoption process in court:

> [73] The same statute that leaves the process for selecting the adoptive home and reviewing it if necessary to the MCS, subject only to the best interests of the children, and that gives the MCS discretion equivalent to that of a parent in selecting adoptive parents creates only limited rights for foster parents despite their crucial role in providing temporary care for children in need of protection. The legislature has to a large extent left it to the MCS to determine the relationship between her, foster parents and children contractually.
>
> ...
>
> [80] In addition to the broad discretion given to the MCS and the limited rights given to foster parents, the **CFSA** focusses on timeliness....
>
> [81] The ninth paragraph of the preamble to the **CFSA** directs respect for a child's sense of time in proceedings under the **CFSA** ...
>
> [82] Timeliness is one of the factors s. 3(2)(k) requires the MCS to consider when determining the best interests of the children in the adoption context ....
>
> [83] Other sections of the **CFSA** enforce this theme by mandating short, strict time frames for court proceedings.

...

> [85] As set out above s. 3(2)(k) indicates timeliness is a consideration when determining the best interests of children. The foster parents' challenge to the MCS's decision in this appeal has caused a delay of almost one year in the adoption of the young children despite the best efforts of the judge and this Court to expedite the process. There is nothing in the **CFSA** to suggest that in the circumstances of this case such a delay is in the children's best interests.
>
> [86] The scheme of the **CFSA** providing a broad discretion to the MCS, equivalent to that of a parent, limited rights to foster parents and strict time limits for dealing with children, indicates minimal procedural rights for foster parents.

[139] Respecting *Baker*'s third factor - importance of the decision to the parties - in *N.N.M.* Justice Hamilton said:

> [87] With respect to the third factor referred to in **Baker**, supra, the judge appears to have focussed only on the importance of the MCS's decision on the foster parents to the exclusion of others, notably the children. ...
>
> ...
>
> [89] Given the nature of the decision being made and the paramount consideration that the process followed and the selection made be in the best interests of the children, it is the importance of the decision to the children not to the foster parents that should be the focus of attention. ...
>
> [90] The decision is also important to the approved adoptive parents ...

[140] Respecting *Baker*'s fourth and fifth factors, in *N.N.M.* Justice Hamilton said:

> [92] The judge also focussed on the subjective expectations of the foster parents, the fourth consideration in **Baker**, supra, in deciding they were entitled to disclosure and a meeting. It is only the legitimate expectations of the affected persons that **Baker**, supra, indicates are to be considered.
>
> [93] To the extent the judge found that the foster parents had legitimate expectations to meet with the MCS and to receive disclosure prior to the review process, with respect, I am satisfied she was wrong. ...

...

> [96] There was no suggestion that the MCS did not follow her ususal process in selecting the best adoptive home for the children in both June and September. ...

[141] Finally, in *Nova Scotia (C.S.) v. T.H.*, as I have discussed earlier, the Family Court Judge placed two children in the Minister's permanent care, with the conditions that adoption be "ruled out" and that the children continue to reside with their foster parent. This Court overturned the conditions. This Court noted (paras 51-53) that (1) ss. 76-77 prescribe "prerequisites to adoption" which include a child's residence for at least six months with the proposed adoptive parents immediately before the court application to approve the adoption; and (2) s. 78(1)(c) says that, on that court application, the court "shall make an order granting the application to adopt" if the court "is satisfied ... that the adoption is proper and in the best interests of the person to be adopted". The Court said:

> [54] In s. 78(1)(c), the Legislature expressed its intent that the adoption court ... consider whether adoption is "in the best interests of the person to be adopted" .... If that answer is yes, and the other prerequisites exist, that court "shall make an order granting the application to adopt". The Legislature intended that, before that court makes this determination, the applicable consents in s. 74 be given and the applicable prerequisites in ss. 76 and 77 occur. The Legislature considered that the court would be better able to assess the child's best interests with the benefit of both the Minister's recommendation for a child in care under s. 77(2), and evidence of actual residence with the proposed adoptive family under s. 76(1)(c).

[142] What can we deduce to define the standards of any duty of procedural fairness owed by the Agency to T.G.?

[143] Section 47(1) of the *CFSA* says that, upon permanent care the Agency, "is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody". The preamble says that, after children are removed from their parents' care, they "should be provided for, as nearly as possible, as if they were under the care and protection of wise and conscientious parents". The Legislature expects the Agency to exercise those powers and responsibilities from that perspective.

[144] Before permanent care, the *CFSA* seeks an avenue to return the child safely to the birth parents. But after permanent care, the statute shifts its aim to other

permanent placement, usually adoption. The Legislature expects that to be the Agency's objective, pursued with the attitude of a wise and conscientious parent.

[145] The preamble says that "children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time". The Legislature expects the Agency to pursue its objective of adoption with some dispatch.

[146] What does this mean for the Agency's role at an Adoption Placement Conference for a child in care?

[147] The Agency's role at the Adoption Placement Conference is decidedly not that of a classic judicial tribunal. A judicial tribunal waits passively for the parties to bring the case forward, keeps a solemn reserve until all the evidence and argument is in, then allows or dismisses the petitioner's claim with a ruling that, for the first time, breaches the tribunal's objective demeanour and expresses an opinion on the merits.

[148] The Agency, on the other hand, is expected to be proactive before the Adoption Placement Conference to: (1) find a suitable adoptive placement, not with haste, but with some urgency after the permanent care order; (2) once a suitable match is found, finish the legwork, obtain the consents and waivers and satisfy the administrative prerequisites - for instance the communications with Mi'kmaw Family and Children Services in this case; and (3) gather the relevant material and assemble the staff with knowledge of the child's circumstances at an Adoption Placement Conference. The Meeting's attendees make a final decision, and the Agency moves forward to implement the decision. The Adoption Placement Conference is supposed to culminate, not initiate the placement choice.

[149] As a culminating event, the Adoption Placement Conference is not expected to convene with the blank slate and placid mind of a jury on opening day of a criminal trial. The Adoption Placement Conference is not tainted because some of its participants have prior inclinations. A conscientious parent is entitled to an opinion. The Adoption Placement Conference likely will open with a prior recommendation for a preferred adoptive parent. That preference likely would have been discussed and endorsed, before the Adoption Placement Conference, by individuals who then attend that Conference. That preference may well be streamed by the criteria,

including prioritized criteria, that the Legislature has channelled to define “best interests of the child”. The Adoption Placement Conference is not tasked to hear submissions from competing parties, then award the child as a *res* to the winning litigant. It is a problem-solving Conference about the child, not a forum for the argument between adoption applicants. The role of the Adoption Placement Conference is to undertake a culminating assessment, that may adopt a prior recommendation, or may include an appreciation that some second thought is in order, and make a final decision. This fairly describes what happened on June 22, 2011.

[150] I will pause to consider the consequences if the scenario that occurred here since July 2011, became the norm.

[151] The Agency’s files, as they existed immediately before the Adoption Placement Conference, would be produced and scoured by legal talent for “pre-determination”. It is highly likely - if the Agency is doing its job - that those files would disclose an email or a note from some Agency employee that expresses a preference, perhaps a strong one, for the proposed adoptive parent. The Agency is supposed to lead the fray to find a suitable adoptive placement. It’s a cognitive challenge to imagine how the Agency could do that without such a document materializing in a file.

[152] Continuing with the scenario, that note would be produced by court order, then used to support a ruling of “bias” or “pre-determination”. The bias would be cleansed by an interim injunction that suspends the process, followed by a court order on judicial review that vitiates all the Agency’s adoptive placement efforts, and remits the matter to a new “independent” panel designated by the judge. The court Order would prohibit that new panel from receiving any “input or advice” from Agency personnel who have knowledge and experience with the child since the child entered the Agency’s care (in this case at R.’s birth). The Order would prescribe the information that the new panel could review and hint at the name of the expert to advise the panel. That information would exclude any reference to the child’s racial or cultural background and would omit substantial material from the Agency’s case file, accumulated since the placement in care. The new panelists would have no personal knowledge of the child, their source information being limited to the documents listed in the Order.

[153] R.'s interim injunction has suspended his adoption for over ten months and kept R. with T.G.. The judge's decision on Judicial Review emphasizes that, in his view, attachment is the critical factor for a child's best interests, and says (para 166): "The longer a child is in a home, the more attachment issues should be considered". So, to the judge, the interim injunction's effect would inexorably strengthen the merits of the injunction applicant's ultimate case. That injunctive bootstrapping may have left its imprint in this case. The February 2012 report of the new panel that appears in the fresh evidence tendered by T.G. (above para 70) says that R.'s placement with R.C. was "the correct decision" in June of 2011, but that R.'s continuing attachment to T.G. since that time, might now tip the scale to T.G.. I reiterate what I said earlier (paras 69, 83-85), that these reasons address only the procedural issues, and should not be taken as a comment on the merits that one day will be presented to a judge under s. 78(1).

[154] The incentives instilled by this scenario would confound the Legislature's intended adoption process. The supposed "pre-determination" begets an injunction, that solidifies the attachment which, according to the judge, is pivotal to best interests for the adoption. The self-fulfilling outcome is teased out by legal strategy.

[155] In my view, that scenario could not be farther from the adoption process that the Legislature contemplated for a child in Agency care, namely:

(1) The *CFSA* intends that, upon permanent care, the Agency be the deemed parent, who wisely and conscientiously, and with some alacrity, seeks a permanent placement - usually, though not always an adoptive home.

(2) To the extent that the *CFSA* expressly allows the foster parent to participate legally, then that avenue is open. For instance, s. 36(4) permits a foster parent with six months' care to participate in an application to terminate permanent care (*C.A.S. v. I.C.*). No such provision applies to the proceedings under appeal.

(3) Otherwise, the *CFSA* intends that the Agency select the prospective adoptive home. That is done after proactive investigation and recruitment, if necessary, by the Agency. This will involve preferences or opinions, weak or strong, by individual Agency personnel before the Adoption Placement Conference.

(4) The Agency staff gathers the material, obtains the consents and waivers, and satisfies the administrative prerequisites.

` (5) The Agency stakeholders, including those with prior opinions, gather at an Adoption Placement Conference. That Conference has a culminating look, considers any outstanding issues, then makes a final decision. The placement may be with the foster parent, or it may not.

(6) Then the child is placed with the adoptive family selected by the Agency.

(7) Unless there is an application to terminate permanent care, the *CFSA* contemplates no legal proceedings that would abort the process to this point. The Agency is the deemed parent under s. 47(1). Section 74(7) says that "[n]o order for the adoption of a child in care of the Minister shall be made without the written consent of the Minster". Section 74(8) says that, for a child under twelve years of age, "the written consent of the agency or the Minister is the only consent required". The *CFSA* requires the Minister to act in the child's best interests. Best interests sometimes are in the eye of the beholder. The *CFSA* favours the Minister's eye at this point, and the Court's aspect later in the process.

(8) Sections 76 and 77 prescribe the "Prerequisites to adoption". Sections 76(1)(c) and (d) require that the child "has for a period of not less than six months immediately prior to the application, lived with the applicant" unless the Minister, by certificate, has shortened that period. That provision is noteworthy in this case. The Legislature has addressed the process to assess pre-adoption attachment. The Minister is to select the prospective adoptive parent, and the child is to live with that person for at least six months in a probationary placement. Then the child has a track record of attachment, or lack of it, with the prospective adoptive parent.

(9) Finally, after the above processes have run their course, under ss. 77 and 78 the Court hears an application for adoption brought by the individual who comes to court with the Minister's consent, for a child in care. By s. 106, that court is the Supreme Court of Nova Scotia. Section 78(1)(c) says;

> "Where the court is satisfied ... that the adoption is proper and in the best interests of the person to be adopted, the court shall make an order granting the application to adopt."

It is on this application that the Legislature intended the judge of the Supreme Court to rule on the child's best interests in the proposed adoption. The Legislature intended that, before the Court makes that ruling, the child have six months residence with the proposed adoptive parents - *ie,* those who have the consent of the Minister to adopt a child in care. The evidence of the child's experience with the proposed adoptive applicant would assist the Court to assess how issues of attachment affect the child's best interests.

[156] In *Nova Scotia v. T.H.*, paras 51-57, this Court approved the general principles that underlie what I have just outlined, though the specifics were not before the Court in that case. In *C.F.S. v. K.T.*, paras 2, 32, 34, 46, 54, the Court reiterated its comments from *T.H.*.

[157] The above, in my respectful view, is how the Legislature intended adoption of a child in care to operate under the *CFSA*. The statute's architecture makes no allowance that I can detect, between the Adoption Placement Conference and the start of the probationary adoptive placement, for the litigation vortex that has swallowed the progress of R.'s adoption during one third of his lifetime. Under *Baker*'s factors, to determine the content or standards of any duty of procedural fairness, the judge was required to give due consideration to the Agency's role, and room to manoeuvre, that was intended by the Legislature. The judge paid virtually no heed to that matter, and instead relied almost entirely on legitimate expectations. In my respectful view, this was an error of law.

[158] Before turning to legitimate expectations. I will add another point. The judge emphasized that on June 22, 2011, the Agency entered the Adoption Placement Conference with a mind set to prefer the factors of racial compatibility and sibling placement. The judge saw this as bias. In *Bell Canada*, the Chief Justice and Justice Bastarache for the Court said:

> 38 The objection that the guideline power unduly fetters the Tribunal overlooks the fact that guidelines are a form of law. It also mistakenly conflates impartiality with complete freedom to decide a case in any manner that one wishes. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the

> absence of all constraints or influences. Rather, it consists of being influenced only by relevant considerations, such as the evidence before the Tribunal and the applicable laws. As Scalia J. pointed out in *Liteky v. United States*, 510 U.S. 540 (1994), at p. 550, the words "bias" and "partiality" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess" (emphasis in original). Similarly, as Cory J. emphasized in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 119, not all predispositions amount to "bias". Predispositions that simply reflect applicable law do not undermine impartiality. On the contrary, they help to preserve it. Hence, the fact that the Tribunal must apply all relevant law, including guidelines formulated by the Commission, does not on its own raise a reasonable apprehension of bias. [Supreme Court's underlining]

[159] The Agency's preferential criteria for racial compatibility and sibling cohesion were sourced in the *CFSA*, as I have discussed, and in the Agency's Policies that were authorized under the *Children and Family Services Regulations*, N.S. Reg. 183/91 as amended, Regs. 8(2) and 8(3), which in turn were enacted further to s. 99 of the *CFSA*. I refer to the Department of Community Services - Family and Community Supports Manual of Policy and Procedures - Adoption Manual, ("Adoption Policies Manual") in particular Section 5 ("Planning - Agency Adoption") and the Department of Community Services - Family and Children's Services Division Manual of Standards, Policies, and Procedures for Children in Care and Custody ("Children in Care Manual"), Section 4 ("Religion, Language, Race, and Culture"). Standard 5.11(a) of the Adoption Policies Manual says:

> In consideration of an adoption placement for a child, the agency must review the following options:
>
> - Placement with a relative (see s. 4(3) of the *Regulations* for definition)
> - Placement with siblings
> - Placement with a family of the same racial, cultural or linguistic heritage
> - Placement with a family sensitive to the child's racial, cultural or linguistic heritage with approval of the Minister or his designate.

Policy 4.2(a) of the Children in Care Manual says:

> Under the *Act*, a child must be placed with a family of the child's own religion, language, race, or culture where possible. Where this placement is not available within a reasonable period of time, prior approval of the executive director or district manager is required to place the child in the most suitable home available.

[160] For the reasons stated in *Bell Canada*, the Agency's preference for those criteria does not manifest bias.

(c) Legitimate Expectations

[161] The judge rested his procedural ruling squarely on *Baker*'s fourth factor - T.G.'s legitimate expectations. In *Baker*, Justice L'Heureux-Dubé (para 26) said "it will generally be unfair for [administrative decision-makers] to act in contravention of representations as to procedure".

[162] Since *Baker*, the Supreme Court has commented on "legitimate expectations" in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 and recently in *Canada v. Mavi*.

[163] In *C.U.P.E. v. Ontario*, Justice Binnie for the majority said:

> 131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices,

> conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. [citations omitted] Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate"expectation.
>
> ...
>
> 133 In my view, with respect, the conditions precedent to the application of the doctrine are not established in this case. The evidence of past practice is equivocal, and as a result the evidence of a promise to "return to" past practice is also equivocal.

[164] In *Canada v. Mavi*, Justice Binnie for the Court said:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. [citations omitted] It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: [citation omitted].
>
> ...
>
> [75] In this process there is a limited but real opportunity for the sponsor to make representations to the government regarding the particular circumstances surrounding a default. There is no hearing and no appeal procedure but there is a legitimate expectation that the government will consider relevant circumstances in making its enforcement decision and a duty of procedural fairness to do so. However, the wording of the government's representations in the undertaking are sufficiently vague to leave the government's choice of procedure very broad. Clearly no promises are made of a positive outcome from the sponsors' point of view.
>
> ...

> [78] ... In my respectful view the policies adopted by Ontario would, if respected in its collection efforts, satisfy the legitimate procedural expectations of the sponsors, and meet the basic requirements of procedural fairness.

[165] *C.U.P.E.* and *Mavi* require "representations that can be characterized as clear, unambiguous and unqualified". *Mavi* adds "the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty".

[166] The judge's decision does not cite either *C.U.P.E.* or *Mavi*.

[167] T.G.'s affidavit (above paras. 29, 33) sets out the Agency's representations:

> 49 On May 31, 2011, Maria Hernandez confirmed that my plan to adopt [R.] would be put forward at the Adoption Committee Planning Meeting.
>
> 53 I was then advised by Nicole Blanchard in a telephone call on approximately June 20th that I was being permitted to attend the meeting.
>
> 54 I was advised by Nicole Blanchard on various occasions (and as late as June 16, 2011) that a final adoption decision had not been made and that the final decision would be made at the meeting scheduled for June 22, 2011.

[168] T.G.'s affidavit and testimony about the Adoption Placement Conference are quoted above (paras 36-38). The minutes of the meeting are quoted above (paras 40-42). At the Conference:

(1) T.G. attended, presented a three and a half page latter, and gave an oral presentation. Included were her submissions that R.C. should not be permitted to adopt the child. R.C. was not in attendance to hear, or reply to these comments that contradicted her interest.

(2) After T.G. left the Conference, the minutes show that the remaining attendees discussed her presentation, and assessed "at length" her request for an attachment study, but "a majority" felt that an attachment study was not warranted. After considering T.G.'s submissions, the Adoption Placement Conference decided to approve R.C..

[169] In *N.N.M.*, this Court determined that a foster parent generally has no right in procedural fairness to attend and make submissions for an adoption placement under the *CFSA*. Yet T.G. attended, made all the written and oral submissions she wished to advance, and the Conference considered her submissions. After that was done, the final decision was made at that Adoption Placement Conference of June 22, 2011.

[170] The judge felt that the Agency's criteria - racial preference and sibling placement - were weighted against T.G. before June 22. So there was no even playing field when the Adoption Placement Conference convened. Given s. 47(5), no doubt this is correct. But the Agency gave no representation to T.G. that she would have an even playing field. T.G.'s evidence is quoted above (para 15). She testified:

- ... I was told again and again, there are two prospective adoptive families and you need to know that we may - the focus of Community Services was to look at sibling contact and cultural heritage.

- That policy, part of the policy was sibling placement and cultural heritage. Yes, I knew that was part of the policy.

- I have said to people I am aware that part of the policy is to keep sibling contact, yes.

- I knew that if they went by sibling placement and cultural heritage alone, that was a possibility.

The Agency's preferences for sibling placement and cultural heritage were explained to T.G. once more on May 31, 2011 (above para 29).

[171] T.G.'s affidavit states that, at the Adoption Placement Conference of June 22, the Agency's preference was explained to her yet again (above para 36):

> 55 On June 22, 2011, I met with the Adoption Planning Team to discuss the adoption placement for [R.] ...
>
> 56 I was advised by the Adoption Planning Team that they had two concerns related to the placement of [R.] for the purposes for adoption: 1) contact with siblings and 2) cultural heritage.

[172] The Agency made it clear to T.G. that cultural/racial heritage and sibling placement were preferred criteria. There was no representation - certainly no "clear, unambiguous and unqualified" representation - by the Agency to T.G. that the Agency would withdraw those preferences. The Agency's actual representations - that T.G. could appear and present her plan and that the Adoption Placement Conference would make the "final" decision after T.G.'s presentation - were performed.

[173] Further, as noted in *Mavi*, para 68, the representation that may establish a legitimate expectation must be "procedural in nature". The judge (para 155) said that the Agency "could not - assert to [T.G.]" that sibling placement and cultural compatibility "trumped the best-interest considerations such as continuity of care". Earlier (paras 118-25) I discussed my view that the Legislature is entitled to prioritize and channel factors into the *CFSA*'s best interests test. The judge would not accept this statutory prioritization, and he infused his substantive view of "best interests" into what should be the procedural doctrine of legitimate expectations. In doing so, he erred. It is not "legitimate" to "expect" the statutory tribunal to resile from the Legislature's properly enacted prioritized criteria.

[174] In my view the judge erred by ruling that the Agency failed to perform a representation that gave rise to a legitimate expectation.

(d) Conclusion - Procedural Fairness

[175] For those reasons, in my opinion the judge's decision on the judicial review erred in law, the Minister's appeal should be allowed, the Order following the judicial review should be overturned, and T.G.'s motion for judicial review should be dismissed.

8. Second Issue - Reasonable Apprehension of Bias

[176] The Minister's factum says "the Chambers Justice appeared to be directing the applicant's litigation from the Bench". The Minister submits that the judge's conduct established a reasonable apprehension of bias and, as a result, the judge's orders are void.

[177] Before coming to the evidence, I will set out the legal principles.

(a) The Legal Principles

[178] In *Miglin v. Miglin*, [2003] 1 S.C.R. 303, Justices Bastarache and Arbour for the majority said:

> 26. The appropriate test for reasonable apprehension of bias is well established. The test, as cited by Abella J.A., is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 111, *per* Cory J.; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-95, *per* de Grandpré J. A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence (*S. (R.D.)*, at para. 114). As stated by Abella J.A., the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties.

[179] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, Justice Cory's decision, cited in *Miglin*, included:

> 99. If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh* [*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537], supra, at para 5.
>
> ...
>
> 104. In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' ... connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described - perhaps somewhat inexactly - as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.
>
> 105. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. ...

106. A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

...

109. ... It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone* [*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623], supra, at p. 636.

...

111. The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ....[The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude ..."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. [citations omitted] Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold" [citations omitted]. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

...

> 113. Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. ... Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.
>
> 114. The onus of demonstrating bias lies with the person who is alleging its existence: ...
>
> ...
>
> 117. Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. ... However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. [Justice Cory's underlining]

[180] In *S. (R.D.)*, Justice Iacobucci concurred with Justice Cory. Justice Major, with whom Chief Justice Lamer and Justice Sopinka concurred, agreed (para 23) with Justice Cory's approach, but dissented on the application of the test.

[181] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2001 NSCA 112, paras 30-37, Justice Hallett for the Court adopted Justice Cory's statements as the settled approach to determine whether there is reasonable apprehension of judicial bias.

[182] In *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, para 7, Justices La Forest and Cory for the majority said that generally a decision made as a result of bias is "void and unenforceable".

(b) Examination of the Proceeding

[183] I will turn to the careful and thorough examination of the proceeding that is directed by *Miglin*.

[184] T.G.'s Amended Notice of Judicial Review of July 13, 2011, and Notice of Motion for the interim injunction, as amended on July 14, 2011, and brief for the hearing of the interim injunction motion are quoted above (paras 45-46). T.G.'s position was that the Minister's assessment of R.'s best interests by preferring sibling attachment and racial heritage over R.'s attachment to his foster family was "unreasonable". T.G. did not submit that the Minister was biased.

[185] The transcript of the hearing on July 22, 2011, T.G.'s motion for the interim injunction, includes the following. The page numbers refer to the transcript in the Appeal Books of the Judicial Review Appeal:

(1) Counsel for the Minister opened with seven preliminary issues. They were discussed by counsel and the judge. (Transcript, pp. 8-18)

(2) Then the judge explained his perspective to counsel. He said that the Associate Chief Justice directed Justice Williams to hear the matter "on an emergency basis" (p. 8) and "obviously this is an unusual proceeding" (p. 18). The judge said that it appeared to him the matter was governed by the principles of procedural fairness, and was "not a process that allows the court, at least on my read of the case law, to engage in a best interests task but rather a review of the decision making process the Minister has undertaken". The judge said that, if the interim injunction motion failed "that would end the process", but "[i]f it is successful, then we move to the issue of motion for directions and setting the matter down for a hearing on the more formal judicial review". The judge said "finally, if a judicial review, which would take place at - concluded that the process embarked upon by the Minister was flawed, then the court would have the ability to give directions to the Minister as to what process to engage in at that point in time." (pp. 18-19)

The judge asked counsel for their comments. Counsel for T.G. agreed. Counsel for the Minister said "I agree 100 percent" except he added that if there was no merit to T.G.'s position on fair process, then the matter ends. The judge replied "That's what I said" (pp. 19-20). The judge said he would only have jurisdiction to order "an assessment of some kind ... if on the judicial review there was a conclusion that the process was flawed". (pp. 20-21)

(3) The proceeding moved to counsel's submissions on the interim injunction motion. The submissions of counsel for T.G. generally followed those in her brief that I quoted earlier (para 46). I will quote Ms. Chiasson's oral submission, for T.G.:

> "My Lord, in the information filed, in the brief filed, the applicant takes no objection to the fact that she was not provided with the opportunity to be heard in the context of the hearing. That is not one of her submissions. Her submission is, in effect, that the Minister, in reaching the decision that she did with respect to the placement of this child for the purpose of adoption, overlooked a material fact.
>
> The material fact that the applicant asserts was overlooked is that from the Minister's perspective it appears as though they've done a mathematical weighing. We have the label here of a bi-racial, tri-racial child, and there is some discrepancy in the records as to whether or not he's bi-racial or tri-racial, so we have that label; and then we have a label of he's a sibling. And on the other side we have another label, which is continuity of care and attachment.
>
> The difficulty here, My Lord, is that this is more than simply labels. This is an analysis, a fact specific analysis on the facts of this case. Would anyone looking at this case and the facts of this case reach the same determination as the Minister? And that's the reason and the request for the judicial review." (pp. 76-77)

T.G.'s submission was that the Minister had simplistically and unreasonably weighed the factors that govern R.'s best interests. There was no submission by T.G. of bias by the Minister or Agency.

(4) After T.G.'s counsel concluded her submissions, the Court introduced the issue of bias:

> "**THE COURT:** All right. All right. Before - just have a seat, Ms. Chiasson. Before we proceed any further, I do want to bring something that my review of the material causes me pause, and give counsel an opportunity to comment on it. Mr. McVey, the communications from the department to [T.G.] concerning the June 22nd meeting referred to June 22nd being the date that this matter would be decided, the date that there

> would be a final decision and invited her to participate in that decision. That's what I glean from the affidavit that I have.
>
> **MR. MCVEY:** That's accurate.
>
> **THE COURT:** The material filed, if one goes to the minutes of the adoption planning meeting, includes the letter from the Mi'kmaq Family and Children Services dated June 9th states, and I quote:
>
> > 'As you have indicated, the planning process for [R.] is immediate, therefore, we wish you all the best in making the appropriate plan by placing [R.] with his two siblings for the purpose of adoption.'
>
> That makes it sound pretty much like the decision had been made and communicated to another agency." (pp. 84-85)

After some discussion between the judge and counsel for the Minister, the judge asked T.G.'s counsel for comment:

> "**THE COURT:** Ms. Chiasson?
>
> **MS. CHIASSON:** My Lord, I don't know how you can cure a deficiency. If the decision is made, there's absolutely nothing to indicate that there was openness, rather than paying lip service to [T.G.] at the point of the meeting of June 22nd. The decision was clearly made prior to that time." (pp. 89-90)

(5) Later that afternoon on July 22, the judge gave his ruling on T.G.'s motion for an interim injunction. I have quoted the ruling earlier (para 48). Based on the letter of June 9 from Mi'kmaw Family and Children's Services, the judge said that the Agency's decision appears "in its worst light to have been predetermined and biassed".

(6) Still on July 22, the judge and counsel then discussed disclosure for the judicial review hearing. The Minister said that record for judicial review should include the material that was considered by the decision maker, the decision was made at the Department's Dartmouth Office, and therefore the record should comprise that material. The judge and the Minister's counsel said:

"**THE COURT:** I think it would have to include the R.C. adoption file too, Mr. ...

MR. MCVEY: That is in the possession of the Cape Breton agency. She's their home. They share the home studies. Dartmouth has the home studies, the safe assessment that you've seen from [T.G.], Dartmouth has that for R.C., and I'm told today they now have the update. So, in that sense, they have information, but disclosing that would only be important if we were going to get into a battle of best, and I don't think we should try to get into a battle of best homes. That's not - with respect, that's not an appropriate way to proceed with this case, but I'm open ...

THE COURT: I don't think it's only limited to a battle of best, I think it's also relevant to what R.C. was told and when she was told it. If she was told in March or May or June 9th that she was it, then we're right on the ..." (p. 130)

After discussion, the judge and counsel for the Minister had the following exchanges:

(a) "**THE COURT:** Let's make it simple then. Ms. Chiasson ...

MR. MCVEY: Well ...

THE COURT: ... Mr. McVey will give you the name of the agency. You have the name of R.C., and you will subpoena the files and ...

MR. MCVEY: Subpoena it, but you're raising questions, My Lord, in the context of judicial review, and I'll have to take instructions on ...

THE COURT: Well, Mr. McVey, the very - the very point that my decision today - or the primary point certainly that my decision today rests on is intimately related to that file. And if, you know, you're ...

MR. MCVEY: I'm asking that we take stock for a week, My Lord, before you give a direction of that nature." (p. 132)

(b) "**THE COURT:** Well, perhaps help me understand, because what I'm trying to do is just cut through that. My suggestion was going to be that the file be subpoenaed, it then be made available to you and Ms. Chiasson, and that it would move from there." (p. 133)

(c) "**THE COURT:** Can I be specific too, that if you're going back on [T.G.]'s file, you do exactly the same on anything that you have on R.C. from the agency here and with respect to the agency there too. And let me just indicate to you why I say that. I have some doubts whether some of that is terribly relevant to the judicial review part of it, but if, and I think it's a large if at this point and I'm not - by large if I say, no, it's not going to happen, but it's a large if, because I don't have a lot of information here. And, as Mr. McVey has indicated, there's case law that pertains to the issues that I've identified. If we got to the point of giving directions as to how the review should take place, I don't want that to be slowed down because there's information we don't have. So...

MR. MCVEY: I'm not trying to be difficult, My Lord, but I am trying to meet my legal obligation to my client. Section 85 of the Act has whole detail provisions on the adoption process and the privacy of adoption records. I will not disclose information about R.C. regardless of who - in whose possession it is without a clear order of the court that's carefully heard submissions, including binding provisions of the Act relating to adoption privacy.

I can't commit to break the law on behalf of my client, but I - so I can't consent to it, and I would prefer that an order in relation to R.C. not be made until more consideration and more time had passed. We could do it next week, but there are issues here that go beyond this litigation and there's obligations on me to assert them. For example, there's a procedure to get adoption records in the Act. You have to follow that procedure. I can't consent not to." (pp. 138-39)

(d) "**THE COURT:** ... The - I don't think that the department can hold up R.C.'s privacy issue as a shield against disclosure of its communications with R.C.". (p. 140)

(e) "**THE COURT:** Anyway. But that - but none of that really matters. Really what I'm concerned about is that there be disclosure of the communications between the department and R.C. as it concerns [R.] or the potential placement of [R.] as either a foster or adoptive child." (p. 142)

At this point, counsel for T.G. had not moved for disclosure of R.C.'s file from the Department's Cape Breton Office. R.C. was not a party and had not been served with a Motion for anything. R.C. was not in attendance on July 22 and had no

inkling that a judge, a few hundred miles away, was urging the disclosure of her confidential adoption file.

[186] On August 8, 2011, the Minister disclosed extensive file material, but did not disclose what the Minister considered to be the privileged adoption file of R.C..

[187] The proceeding resumed on August 9, 2011. By then, R.C. had received notice. R.C. attended in person and told the judge that she was seeking legal counsel. The following was said:

> (1) "**THE COURT:** So is the file from the Cape Breton agency concerning [R.C.] and the child in question disclosed?
>
> **MR. MCVEY:** Of course not. Everything that the Dartmouth office have that relates to [R.C.] and this child has been disclosed. That was the direction. There's no order from the court, but we can go back and listen to it. I made it clear that a motion from the front of the court, that was never asked for by Ms. Chiasson, was something I had to respond to on my feet at the end of the hearing. I've complied with it. If Ms. Chiasson thinks otherwise, she should inform the court. ..." (pp. 157-8)
>
> (2) "**THE COURT:** Well, I mean, the obvious question is whether or not Ms. Chiasson wants the Cape Breton file and its - what it contains in terms of saying its communication with the Dartmouth file - with the Dartmouth agency." (p. 163)
>
> (3) "**THE COURT:** All right. Ms. Chiasson, if you want further disclosure, we'll set the matter down next week. You bring can [*sic*] your motion for it and we'll deal with it at that point." (p. 166)

The matter was adjourned to August 18, 2011 for submissions respecting the extent of the Minister's required disclosure.

[188] On August 16, 2011, T.G. filed a Notice of Motion that requested an order for production of (1) the Agency Plans of care for R.'s siblings, (2) the Agency Plans of care for R., (3) emails from R.'s adoption worker, (4) a letter of June 1, 2011, from the Agency's Dartmouth Office with enclosed photos of R. and his biological parent, and (5) the "complete adoption file of R.C. as it pertains to [R.]".

[189] On August 18, 2011, R.C. did not attend in person or by counsel. The judge and counsel for the Minister were walking different pathways, splaying further as the conversation proceeded, on the scope of the Minister's required disclosure. Clearly the judge was frustrated that the disclosure was not moving smoothly. I will quote passages that suggest the judge's frame of mind:

(1) "**THE COURT:** Mr. - McVey and Ms. Chiasson, let me make one simple point here. I don't - I don't - we don't do judicial reviews in this court every day. I'm perfectly capable of making a mistake around this. The question, as I understand it at the time of judicial review, is related to the decision making process."(p. 201)

(2) "**THE COURT:** ... And, Mr. McVey, the kind of thing - the kind of argument - I paid particular attention to your arguments because, quite frankly, I've assumed that as counsel for the Minister that you're more familiar with some of the administrative law aspects of this than perhaps anybody else in the room or that your learning curve, while it might be steep, might not be as steep as mine or perhaps even Ms. Chiasson's. ..." (p. 203)

(3) "**THE COURT:** Well, you know, one of the other norms is that judicial review isn't done as quickly as it's being done here, and there's - no, hear me. You know, I have no idea, but I'm going to guess that if there's a judicial review of an administrative body, if it's just a routine judicial review matter, that there's nothing like the time constraints we're imposing here. And, with respect, the Minister, as much as everybody else when we're trying to do this, has some responsibility to try to make those timeframes work." (p. 220)

(4) "**THE COURT:** And if you're guided by what happened in that case, so be it, I can't change that. You make your decisions. But I'll be very clear with this, if my view is that the Minister is putting [T.G.] in a position where it's stop, stop, stop and preventing her from putting forward the best case she can and is not prepared to - well, is basically saying, 'I, the Minister, should be deciding what the court sees, not the court. I, the Minister, should be deciding what's relevant to this, not the court. I, the Minister, don't trust the court to be able to sort out evidence that's relevant from evidence that's not relevant at the hearing,' if that's your position, then we're going to end up with one big - one of two things. Either you'll wear [T.G.] out and she'll withdraw, or you'll have, to use your phrase, a haemorrhage." (pp. 226-7)

(5) "**THE COURT:** Well, Mr. McVey, you and I have an entirely different view of your role. You roll over in a case that's purely adversarial. You roll over in a case that's between IBM and Microsoft. You roll over in a case that - even

in a divorce case maybe. In a child protect - in a child welfare case and, at the end of the day, this is a child welfare case - now, it is - and perhaps even more than in a conventional child welfare case, in a situation where the Minister is dealing with one of its own foster parents, there's I think a responsibility to just say, 'Okay, you say this was unfair. Here's what we did. Here's what - how we communicated to the other principal in this. Here's what was communicated to them. You have that. Now, you can tell us what you think is wrong with that,' and get it done. But, you know, as - you know, fighting over the production of all of this material is, you know, very ...

MR. MCVEY: I'm stuck - I'm stuck with the pleadings, My Lord. The pleadings are very clear. You're being asked to make a best interests decision. That's what's still before the court. You're being asked to order an attachment assessment and to say it's unreasonable not to ..." (pp. 230-1)

(6) "**THE COURT:** And you need to step it back and you need to look at what the issue is for the court. And the issue for the court is the process. The issue from the court is the process from the point of view of judicial review. It is not a best interest. If it was a best interest, then there would be things alive with this like race, and what is race, and who is what race. Those things aren't - you know - or culture, which seems to be just interchangeably used. This is about the process the department used and whether they considered valid considerations. Race and culture in the statute. They have to consider them. They're not bound by them There's a couple of catch phrases at each end of that section." (pp. 234-5)

(7) "**THE COURT: ...** And I'll repeat what I said before. I don't see this as, you know - were I to get to that - to that point in this process, I wouldn't see it as, well, we need an adoption assessment here and a race and cultural assessment here, and a - you know, research on sibling contact from here and here. What - if the process is independent and fair and considers all of the factors that are in the statute, including obviously the factor in section 47(5) that, for lack of a better way of putting it, is an attachment or bonding consideration, then that's - that's what it is. Mr. McVey, anything you want to add?" (p. 243)

At the time of this discussion, T.G.'s Notice of Judicial Review still pleaded the grounds that the Minister's decision was "unreasonable" and contrary to s. 47(5) of the *CFSA* (above para 45), and did not mention bias. The proceeding adjourned to August 26, 2011.

[190] On August 26, 2011 T.G. filed an Amended Notice for Judicial Review to (1) add the ground that the Minister "was biased or, in the alternative, created a

reasonable apprehension of bias", (2) delete the former Ground that the Minister failed to comply with s. 47(5) of the *CFSA*, (3) add an "Order proposed" that a "newly constituted impartial panel" consider the adoption placement, and (4) delete the earlier proposed remedy that the Minister be ordered to consent to the adoption by T.G. (above paras 45 and 52).

[191] At the hearing on August 26, 2011, R.C.'s counsel attended. The judge issued an order, by consent, that R.C. be added as a party. The judge heard the submissions of counsel on the Minister's disclosure. R.C.'s counsel took issue with the disclosure of her file, based on *Wigmore*'s test for confidentiality privilege:

> "**THE COURT:** All right. Ms. Lenehan, one of the focuses here is your client's adoption record with the agency in Cape Breton. Do you take a position on whether it should be disclosed, and at this point the issue is disclosure to Ms. Chiasson's client and, for that matter, to your client, I guess, not necessarily the filing of it with the court at this point.
>
> **MS. LENEHAN:** Yes, My Lord. My client does take issue with the disclosure of that record, both to me and to Ms. Chiasson, based on the fourth prong of the *Wigmore*. I could go on and on, but I think my friend has done a good job with that, so I'll just echo his comments." (pp. 258-9)

R.C.'s counsel was referring to the test for confidentiality privilege stated in *Wigmore on Evidence*, as discussed by (then) Justice McLachlin for the majority in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, paras 20 ff. and to the submissions on that topic that had been made to the judge by counsel for the Minister.

[192] Next at the hearing of August 26, the judge raised another concern about an affidavit from an Agency witness, to which counsel for the Minister said:

> "**MR. MCVEY:** I'm going to note for the record that again we're focussing at the hearing today on an issue raised by the court and not by the applicant, and I will respond to it. ..." (p. 263)

After a testy exchange the judge said:

> "**THE COURT:** Wait a minute. I think I have a duty to the child to make those inquiries, and, quite frankly, I have a duty to [R.C.] also, because the - this process obviously affects her a great deal, and that's what it is. ... (p. 273)

[193] Finally at the hearing of August 26, 2011, the judge gave his ruling on production and disclosure that I have discussed earlier (paras 53-56). The judge ordered the production of the Agency's complete adoption file respecting R.C.. The judge's decision said (para 12): "In this situation there is an allegation of bias." His view was that the information to be produced was relevant to that allegation. The judge's decision said nothing about the claim for privilege, based on the *Wigmore* test and *Ryan*, that had been asserted by both counsel for the Minister and R.C.. T.G.'s Notice of Motion for disclosure, dated August 16, 2011 had requested: the Agency Plans of Care respecting R. and his siblings, copies of emails from R.'s adoption worker, a letter of June 1, 2011 from the Agency's Dartmouth Office to its Cape Breton Office, with enclosed photos of R. and his biological parent, and R.C.'s complete adoption file (above para 188). The judge's Order for Disclosure required the Minister to produce further information, such as the birth certificates of R.'s sisters, and answer questions, worded like interrogatories, respecting seven items. Most of these further items were at the judge's initiative, and had not been requested by T.G.. It is unclear how the birth certificates of R.'s sisters pertained to procedural fairness.

[194] The hearing resumed on September 7, 2011. The parties and judge attempted to finalize the record for judicial review and discussed the schedule for filings and submissions on the judicial review hearing.

[195] On September 21-22, and October 7, the judicial review proceeded, with *viva voce* evidence and submissions of counsel. The judge issued his oral decision on December 5, 2011. His decision (paras 15-16) quickly rejected T.G.'s Grounds for Review that the Minister was "unreasonable" and "did not follow [the Minister's] own plan of action". The only remaining Ground was bias, added by T.G.'s Amendment to the Notice of Judicial Review on August 26, 2011 (above, para 52). The decision granted T.G.'s motion for judicial review, based on the Agency's bias.

(c) Is There a Reasonable Apprehension of Bias?

[196] Based on this review and the principles in *Miglin* and Justice Cory's exposition in *S. (R.D.)*, did the judge's conduct evoke a reasonable apprehension of bias?

[197] Earlier I concluded that the judge had erred in his analysis of procedural fairness. Those errors do not affect my analysis whether the judge's conduct evoked a reasonable apprehension of bias. Error is not bias. Conversely, a determination that the judge was unbiased does not diminish those errors.

[198] Judges have a responsibility to promote opportunities for all litigants to meaningfully present their case. It is not bias for a judge to identify a point that springs from the theory that a party brings to court. After identifying the point to the parties, the judge should permit meaningful input by evidence, if appropriate, and submissions. This type of flexibility inheres in the organic texture of a court proceeding.

[199] T.G. was represented throughout by very capable counsel. The issue of the Minister's alleged bias was not an outgrowth from T.G.'s theory. Rather the judge crafted a new theory for T.G.'s case, without any stimulus from T.G. up to that point, then within hours issued an injunction premised on that new theory. That injunction has stilled R.'s adoption process for over nine months now. That passage of time, in turn, may have solidified R.'s attachment to T.G., upon which T.G. relies for the merits of her request to adopt. Ultimately the judge summarily dismissed T.G.'s initial theory as unmeritorious, but issued reasons and an Order following Judicial Review that emphasized the significance of R.'s attachment to T.G.. From the first day of hearing, on July 22, the judge pressed for the disclosure of R.C.'s file material as relevant to the bias theory. The judge introduced and endorsed the view that R.C.'s file should be disclosed, by a mere subpoena if necessary, before that information had been requested by T.G. and before R.C. was even notified that her confidential material was in play. After R.C. appeared by counsel and asserted confidentiality privilege, the judge ordered production of R.C.'s complete file without any comment on R.C.'s express assertion of privilege. The judge also ordered disclosure of information and answers to interrogatory-type questions that had not been requested by T.G..

[200] A judge should assist parties to access justice and should control the efficient process of the trial. But this does not mandate the judge to commandeer one party's theory of the case.

[201] There is, however, a special factor here. This matter involved the interests of an infant, in mid-adoption process under the *CFSA*. The *CFSA*'s preamble directs

that "proceedings taken pursuant to [the *CFSA*] must respect the child's sense of time". I have read and re-read the transcript, to try and understand the judge's perspective. The judge felt this was an unusual and urgent case. He was concerned that the normal process of judicial review would delay the adoption, to R.'s prejudice given the child's compressed sense of time. The child's sense of time is a statutory driver in proceedings under the *CFSA*. Because of this, the judge felt that he should take proactive control to move matters forward at every turn. Various comments by the judge throughout the transcript lead me to this view. Exemplifying the judge's approach is the extract from his written reasons of September 28, 2011 (2011 NSSC 356), that explains why he ordered the production of R.C.'s adoption file:

> [22] The direction the Court will give is that the adoption file of [R.C.] with the Sydney office of the Department of Community Services be disclosed. In my view, delaying that disclosure at this point or turning it down at this point would inevitably lead to it being raised later in the proceeding and result in delay. Delay, for R.'s sake, is to be avoided. [Justice Williams' underlining]

Similarly, from the same decision, the judge explains his Order for Disclosure of items that T.G. had not requested:

> [29] The disclosure I am directing here is primarily aimed at attempting to make sure we do not have issues that arise later that require disclosure and an adjournment. My agenda here is to try to keep these hearing dates so this matter can be resolved in a timely way.

[202] The judge's relentless propulsion for the child had the unfortunate side effect that, to the Minister and R.C., the judge of the Supreme Court at times seemed to act like a protagonist. But the judge's objective was to compress the process for R., not to favour T.G. with the result. Given this factor, I cannot say the judge's conduct showed bias for the outcome, or surpassed the margin of what *S. (R.D.)* described as the high threshold for its reasonable apprehension. Whether the judge erred is better assessed substantively, as I have discussed earlier.

[203] I would dismiss this ground of the Minister's appeal.

9. Third Issue - Other Objections to Disclosure

[204] The Minister makes two submissions - that R.C.'s adoption file was subject to confidentiality privilege, and that the Crown has a prerogative right to refuse production by way of discovery.

(a) Privilege

[205] The Minister says that the judge's Order for production of R.C.'s file material should be set aside, as a denial of confidentiality privilege that was asserted by the Minister and by R.C. at the hearing on August 26, 2011 (above para 191). The submission is based on the test approved in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, where (then) Justice McLachlin for the majority said:

> 20 ... it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: [citations omitted]. The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), s. 2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[206] The judge did not mention R.C.'s explicit assertion of privilege before he ordered the production of R.C.'s adoption file. That, in my view, was an error of law. It was the judge's responsibility to address the issue. But this does not mean the file would have been privileged.

[207] The first three criteria from the *Wigmore*/*Ryan* test would appear to be satisfied. Privilege likely turns on the fourth point - whether R.C.'s privacy interest outweighs the interest in accessing the facts to properly dispose of the motion for judicial review.

[208] It is unnecessary to perform that balancing exercise on this appeal. The information was produced. The judicial review proceeded to a ruling by the judge. As I have discussed, the judge's ruling on judicial review should be overturned and T.G.'s motion for judicial review should be dismissed. That result would obtain, regardless of whether or not the Orders for Production and Disclosure were rightly issued. I would dismiss this ground of appeal as being moot.

(b) Crown Prerogative

[209] Alternatively, the Minister says that the Crown enjoys a prerogative from compelled discovery and disclosure, that the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 14 provides that no enactment binds the Crown "unless it is expressly stated therein that Her Majesty is bound thereby", and that the Crown is not expressly bound by statute to the *Civil Procedure Rules* which govern disclosure and discovery.

[210] There is case law on the application of the Crown's prerogative to refuse discovery and the overlapping principle of public interest immunity with its judicially determined balancing test. There is authority that situates the line between a decision-making tribunal's deliberative secrecy and its responsibility to disclose the record that is relevant for a judicial review. There is case law that distinguishes the degree of the Crown's responsibility to disclose on a hearing, especially one for judicial review of a decision by a Crown tribunal, from its responsibility to assist with pre-hearing discovery in a civil claim. There is a body of precedent on the extent of the Crown's immunity from the application of statutes, because of provisions like s. 14 of Nova Scotia's *Interpretation Act*, and the exceptions to that immunity. Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed., (Toronto, ON: Thomson Reuters Canada Limited, 2007), in the chapter "The Crown", para 10.8(c), cites six exceptions that, according to Professor Hogg, "make substantial inroads into the rule". Several of those exceptions arguably may apply to a case like this one. Further, we are dealing with the *CFSA* which (1) expressly acknowledges in s. 38 that disclosure is to follow the *Civil Procedure Rules*, though the Minister may contend that s. 38 is in a different context, and (2) acknowledges elsewhere the jurisdiction of the "court", which may necessarily implicate the *Civil Procedure Rules* under which that court must function.

[211] That network of issues is for another day. I repeat what I said earlier for confidentiality privilege. The evidence covered by the Orders for Production and Disclosure was disclosed for the sole purpose of the judicial review. The judge's ruling on the judicial review should be overturned, whether or not the Orders for Production and Disclosure were properly issued beforehand. The Minister's ground of appeal that challenges the Orders for Production and Disclosure has been overtaken by the later appeal.

(c) Summary

[212] I would grant leave to appeal, but dismiss the Minister's appeal against the Orders for Production and Disclosure, as being moot.

10. Conclusion

[213] I would admit as fresh evidence T.G.'s affidavit of March 8, 2012 with exhibits, and Ms. Craig's reply affidavit of March 19, 2012, both for the limited purpose of assisting the Court to determine the procedural issues on this appeal.

[214] I would dismiss the Minister's ground of appeal that the judge's behaviour evoked a reasonable apprehension of bias.

[215] I would grant leave to appeal, but dismiss, as being moot, the Minister's appeal against the Orders for Production and Disclosure both dated September 1, 2011.

[216] I would allow the Minister's appeal against the Order for Judicial Review dated December 21, 2011, set aside that Order, and dismiss T.G.'s Notice for Judicial Review as amended.

[217] The interim injunction, described as an "Order (Family Proceeding) Stay Pending Judicial Review" of August 4, 2011, granted orally on July 22, 2011, was premised on the ongoing judicial review. The dismissal of T.G.'s Notice of Judicial Review terminates the interim injunction, or stay, effective as of the date of the Court of Appeal's Order that accompanies these reasons.

[218] This will enable the Agency to proceed with R.'s adoption according to the *CFSA*'s process that I have summarized above (para 155). To be clear, that means: (1) R. would be placed with the Minister's preferred adoptive parent; (2) unless there is a Ministerial certificate to abridge the time under s. 76(2), R. would have at least six months residence with that individual further s. 76(1)(c); then (3) the Supreme Court would hear any application to adopt by that individual under ss. 77, 78 and 106; and (4) the judge of the Supreme Court would then determine whether R.'s adoption by that applicant is in R.'s best interests under s. 78(1)(c).

[219] Everybody in this matter only wanted to promote the child's best interests, but from different perspectives. All the parties should bear their own costs.

Fichaud, J.A.

Concurred: Saunders, J.A.

Farrar, J.A.