NOVA SCOTIA COURT OF APPEAL

Citation: *E.M.Y. v. Nova Scotia (Community Services)*, 2020 NSCA 46

Date: 20200610
Docket: CA 491152
Registry: Halifax

Between:

E.M.Y.

Appellant

v.

Minister of Community Services

Respondent

and

Mi'kmaw Family and Children's Services of Nova Scotia

Intervenor

Restriction on Publication: s. 94(1) of the Children and Family Services Act

Judges:	The Honourable Justice Van den Eynden The Honourable Chief Justice Michael J. Wood, concurring with separate reasons
Appeal Heard:	December 9, 2019, in Halifax, Nova Scotia
Subject:	Secure treatment proceedings – admissibility of hearsay – application of *Youth Criminal Justice Act*; best interests
Summary:	The Minister applied for an order confining the appellant, E.M.Y., to a secure treatment facility for 45 days. E.M.Y. objected to an affidavit filed in support of the Minister's application. She claimed the affidavit contained inadmissible hearsay. She also said references to her past criminal involvement violated the *Youth Criminal Justice Act*. The Family Court judge dismissed E.M.Y.'s motion, admitted the affidavit in its entirety, and granted the secure treatment order. Although that order expired some time ago, E.M.Y. appealed.

On appeal, E.M.Y. repeated her arguments concerning the admissibility of the affidavit evidence. She added that the judge was wrong to grant the order without ensuring she would receive culturally appropriate treatment during her time in confinement (E.M.Y. is a Mi'kmaw First Nation band member).

Issues: (1) Is the appeal moot and, if so, should the Court exercise its discretion to decide the issues raised by E.M.Y.?

(2) Did the judge err by admitting the hearsay evidence in the affidavit?

(3) Did the judge err by admitting evidence of E.M.Y.'s youth criminal involvement?

(4) Did the judge err in his determination that it was in E.M.Y.'s best interests to issue the secure treatment order?

Result: Appeal dismissed. Although the appeal is moot, it is appropriate for the Court to exercise its discretion to entertain all three grounds raised by E.M.Y. All three grounds fail.

The judge did not err by admitting the hearsay evidence. Affidavits based on information and belief are permissible in secure treatment proceedings.

Nor did the judge err by refusing to strike the references to E.M.Y.'s youth criminal involvement from the affidavit. These references are not subject to the *YCJA* records restrictions because they do not meet the definition of a *YCJA* "record".

The judge's determination that it was in E.M.Y.'s best interests to order secure treatment finds ample support in the record.

By concurring reasons, Wood, C.J.N.S. found that *Family Court Rule* 16.02 required affidavits in support of an application for an STO to be based upon personal knowledge unless the court ordered otherwise. Hearing judge's alternate conclusion that affidavit based on information and belief could be used upheld.

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Judges:	Wood, C.J.N.S.; Van den Eynden and Beaton, JJ.A.
Appeal Heard:	December 9, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Beaton, J.A. concurring; Wood, C.J.N.S. concurring with separate reasons
Counsel:	Paul Sheppard and Joshua Bearden, for the appellant Peter McVey, Q.C. and Spencer Dellapinna, for the respondent Minister of Community Services Paul Morris, for the intervenor Mi'kmaw Family and Children's Services of Nova Scotia

Restriction on publication pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* 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:

Introduction

[1] This is an appeal of a secure treatment order ("STO"). The STO placed the appellant (E.M.Y.), a child in care under the *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 1 ("*CFSA*"), in a treatment facility. The judge found E.M.Y. met the statutory criteria and it was in her best interests to be confined for treatment for a defined period.

[2] The STO expired long before the appeal was heard. However, E.M.Y. asked this Court to entertain the appeal and set aside the order notwithstanding the relief requested was moot.

[3] The appeal raises questions about the admissibility of evidence in STO proceedings. In particular: (1) whether it is permissible for an affidavit to contain hearsay evidence; and, (2) can the affidavit include particulars of the subject child's criminal behaviour absent prior authorization under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (*YCJA*). All parties recognized that appellate review was important given the potential for similar evidentiary issues to surface in future STO proceedings. In addition, after initial filing of the appeal, E.M.Y. also raised questions respecting cultural considerations when the lower court is determining whether a STO is in a child's best interests. The Minister and intervenor urged we not consider this issue given the incomplete record before us.

[4] I am satisfied that, notwithstanding mootness, the appeal should be heard. All issues engaged are of general concern and likely to affect future STO applications. However, finding no reviewable error, I would dismiss the appeal.

[5] Before explaining my reasons, I set out the necessary background, the specific complaints of error, and the applicable standard of review.

Background

[6] E.M.Y., a Mi'kmaw First Nation Band member, has been in the permanent care and custody of Mi'kmaw Family and Children's Services of Nova Scotia ("Mi'kmaw Agency")[1] since February 2006.

[7] The Mi'kmaw Agency uses the specialized services of Wood Street Centre Secure Treatment ("Wood Street") for children in care who have emotional or behavioural disorders that require secure treatment (confinement).

[8] S. Raymond Morse, Associate Chief Judge of the Family Court (as he then was), issued a secure treatment order under s. 56 of the *CFSA*. The order required the appellant (E.M.Y.) to be held at Wood Street.

[9] Wood Street is located in Truro, Nova Scotia. It is the only secure treatment facility for children in the province of Nova Scotia. Operated by the respondent Minister of Community Services ("Minister") under s. 54(b) of the *CFSA*, it provides treatment services to children in care. The objective of placement at Wood Street is to provide short term, intensive intervention to stabilize children.

[10] Section 55(1) permits the Minister to issue a secure-treatment certificate for a period of not more than five days, providing the Minister has reasonable and probable grounds to believe that: (a) the child is suffering from an emotional or behavioural disorder; and (b) it is necessary to confine the child in order to remedy or alleviate the disorder.

[11] If such a certificate is issued, s. 55(4) requires an appearance in court before the certificate expires to satisfy the court there was compliance with the statutory provisions and to adjudicate any request for a secure treatment order pursuant to s. 56(3). These sections provide:

> **55(4)** Where a secure-treatment certificate has been issued pursuant to this Section, the Minister or the agency shall appear before the court before the certificate expires, to satisfy the court that this Section has been complied with and, if an application is made pursuant to Section 56, for the application to be heard pursuant to that Section.

[1] The Mi'kmaw Agency provides children and family services on the territorial jurisdiction of the Mi'kmaw First Nations Bands in Nova Scotia. This is through a Tripartite Agreement between the Mi'kmaw First Nations, Government of Canada and the Mi'kmaw Agency.

> **56(3)** After a hearing, the court may make a secure-treatment order in respect of the child for a period of not more than forty-five days if the court is satisfied that (a) the child is suffering from an emotional or behavioural disorder; and (b) it is necessary to confine the child in order to remedy or alleviate the disorder.

[12] In this case, the Mi'kmaw Agency requested E.M.Y. be admitted to Wood Street as it contended her behaviours were becoming more erratic and she required the stabilizing services only available there. The Minister issued the certificate under s. 55(4) and applied for a STO requesting E.M.Y.: (1) be admitted to the facility; (2) be detained there for the purpose of diagnostic and treatment services in accordance with the plan of care determined by the Minister; and (3) be discharged during the currency of the STO or upon its expiration in accordance with the discharge plan determined by the Minister.

[13] The application was heard within the required five day time limit after the Minister issued the certificate. E.M.Y. was represented by counsel. The judge was satisfied, on a balance of probabilities, that the above provisions of s. 56(3) were met and issued a STO.

[14] E.M.Y. was 17 years old when she was placed at Wood Street. For some time prior to her placement she was presenting with some very challenging behaviours that placed her and others at risk. Her behaviours limited options as to where she could safely reside.

[15] In support of the STO application, the Minister filed the affidavit of Kelly Byrne, a clinical social worker at Wood Street assigned to E.M.Y.'s case. Ms. Byrne also provided direct testimony and was subject to cross-examination. E.M.Y. also testified.

[16] The record before the judge provided extensive details about E.M.Y.'s situation, and in summary, revealed these concerns:

- Since January 2018, E.M.Y. had undergone a number of placements, including three separate kinship placements and two other placements in group home settings. Each placement broke down simultaneous with E.M.Y. being criminally charged with various offences of violence.
- On July 8, 2019, E.M.Y. went on an extended visit with her biological mother and stepfather. However, on July 16, she was arrested for assaulting them.

- At this point, E.M.Y. had exhausted all viable and safe placements that could manage her behaviors. The record confirms her family, staff, and other youth in care were fearful of her.
- The reports concerning E.M.Y.'s psychological difficulties and other erratic behaviour from her family with whom she remained in contact, and her professional caregivers were consistent. Her emotional state was unstable and could rapidly change without warning from calm to threatening harm and serious assaultive behaviors.
- E.M.Y.'s caregivers were concerned about her abuse of drugs and alcohol; risky sexual behaviour; unapproved absences from her placements; association with individuals who increased her chance of being harmed; and, suicidal ideation. Compounding these challenges, she was unwilling to voluntarily engage in assessment and treatment initiatives in a meaningful way.

[17] At the time the Minister issued the above-noted certificate and applied for a STO, E.M.Y. had run out of placement options and was at increased risk of harming herself and others.

[18] After hearing the evidence and submissions from counsel for E.M.Y. and the Minister, Morse, A.C.J. granted the STO requested by the Minister.

[19] I now explain why the Mi'kmaw Agency applied to be an intervenor in this appeal. As noted, the Minister applied for the STO at the request of the Mi'kmaw Agency—which the *CFSA* permits. The Minister carried the application in the court below and responded to these two grounds raised on appeal by E.M.Y. which were:

1. The Court erred in law by admitting inadmissible hearsay, contained in the affidavit of Kelly Byrne; and
2. The Court erred in law by admitting youth court records, which were contained in the affidavit of Kelly Byrne, without express authorization of the *Youth Criminal Justice Act* or an authorizing order from a Youth Justice Court.

[20] The appellant later amended her Notice of Appeal, adding this third ground:

3. The court erred by finding it necessary and in the best interest of the child to confine the Indigenous appellant to a facility that could not ensure culturally appropriate services and would prohibit her from speaking her Indigenous language.

[21] This addition prompted the Mi'kmaw Agency to bring a motion to intervene on the third ground only. The Minister consented to the motion; E.M.Y. opposed. The Mi'kmaw Agency explained that it relies on the services of Wood Street, when needed, to stabilize and treat Indigenous children in its care. It was concerned that, if allowed, the third ground of appeal would effectively remove this as a possible service to stabilize Mi'kmaw youth. This Court granted the motion to intervene (2019 NSCA 86).

[22] I will later review what the record disclosed respecting cultural services available at Wood Street; for now, I provide some context respecting E.M.Y.'s complaint that she was prohibited from speaking her Indigenous language. The restriction arises from Wood Street's practice of directing residents not to speak in a language which the staff on duty do not understand. The intended purpose of this practice is to ensure the safety of all residents at the facility. As well, E.M.Y.'s evidence was that she can speak some Mi'kmaw, but her primary language is English. Furthermore, there was no evidence that E.M.Y. was actually prevented from speaking Mi'kmaw while at Wood Street.

[23] The judge's determination of the issues before him and his reasoning will be reviewed under my analysis. The decision below was rendered orally and is unreported. Thus, I quote more extensively from the transcript to demonstrate the judge's careful reasoning.

Issues

[24] I would frame the issues under appeal as follows:

1. Should this Court hear a moot appeal?
2. Did the judge err by admitting hearsay evidence contained in the affidavit of Kelly Byrne?
3. Did the judge err by admitting the evidence establishing E.M.Y.'s recent criminal charges and conditions of release?
4. Did the judge err in his determination that it was in E.M.Y.'s best interests to confine her to Wood Street?

Standard of Review

[25] The question of whether this Court should hear a moot case does not attract a standard of review. This determination is in this Court's discretion (*Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73, at paras. 56-68). The second and third issues raise questions of law attracting a correctness standard of review (*Laframboise v. Millington*, 2019 NSCA 43, at para. 14). The final issue relates to the judge's fact finding—thus the standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 10).

Analysis

Should this Court hear a moot appeal?

[26] The Minister agrees the first two issues raised by the appellant in her Notice of Appeal (pertaining to the admissibility of evidence) should be entertained on appeal. Resolution of these issues at the appellate level will provide clarity to future litigants. I agree. I am satisfied the requirements as discussed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 are met.

[27] The issue of whether this Court should entertain the final ground of appeal is more contentious. The Minster and the Mi'kmaw Agency argue we should decline to hear this issue given gaps in the evidentiary record and the manner in which the issue unfolded in the court below.

[28] This ground concerns the judge's determination that it was in E.M.Y.'s best interests to confine her to Wood Street for treatment. On appeal, E.M.Y. attempted to undermine the judge's determination by alleging it was not "necessary" nor in her best interests to confine her to Wood Street: (1) in the absence of culturally appropriate treatment; and, (2) with a prohibition against speaking the Mi'kmaw language.

[29] As I will explain later, the Minister and the Mi'kmaw Agency raise some legitimate concerns. However, the record does permit this Court to approach the issue through the broader lens of whether the judge's analysis properly considered the question of E.M.Y.'s best interests in deciding to issue a STO. I would exercise discretion and entertain this ground as it also meets the *Borowski* test.

Did the judge err by admitting hearsay evidence contained in the Affidavit of Kelly Byrne?

[30] In the court below, E.M.Y. argued the affidavit of Ms. Byrne should be rejected entirely, or, alternatively, any reference to information of which she did not have direct personal knowledge should be struck as inadmissible hearsay. As noted, the Minister relied upon Ms. Byrne's affidavit in support of the STO application. As the Minister pointed out, without this material evidence the STO application would be stripped of its factual foundation. In other words, there would be no basis upon which a STO could be granted.

[31] E.M.Y. had been at Wood Street only a few days prior to Ms. Byrne swearing her affidavit. In preparing her affidavit, Ms. Byrne relied upon documents prepared by other professionals involved in E.M.Y.'s care. Ms. Byrne confirmed in her affidavit that she believed the information to be true.

[32] The documents Ms. Byrne relied upon were appended to her affidavit and included a detailed referral form from the Mi'kmaw Agency, a behavioral summary from E.M.Y.'s most recent placement, and E.M.Y.'s discharge summary from her previous placement at the Reigh Allen Centre. E.M.Y. contended these records were also inadmissible hearsay and asked the judge to exclude them on that basis.

[33] Central to E.M.Y.'s position was her argument that a STO proceeding is a "hearing" rather than an "application" as contemplated under *Rule* 16.02 of the *Family Court Rules* (N.S. Reg. 20/93 (as amended)). This *Rule* draws an important distinction between the two with respect to affidavit evidence:

> **Contents of affidavit**
>
> **16.02 (1)** An affidavit used **on an application** may contain statements as to the belief of the deponent with the sources and grounds of those beliefs.
>
> **(2)** Unless the court otherwise orders, **an affidavit used on a hearing** must contain only those facts that the deponent is able to prove from the deponent's own knowledge.
>
> [Emphasis added]

[34] Relying on *Rule* 16.02(2), E.M.Y. said that Ms. Byrne's affidavit had to be rejected because she could only depose to facts within her own knowledge. Thus, Ms. Byrne could not rely upon the statements of others involved with E.M.Y.'s care, notwithstanding that she believed the sources to be true. However, *Rule*

16.02(2) says that is only so "unless the court otherwise orders". To avoid the application of this provision, E.M.Y. tried to persuade the judge that he should not exercise his discretion to permit facts not personally known to Ms. Byrne because, although expedient, it would not be fair given the nature of the interest at stake. Specifically, E.M.Y. could be detained in a secure treatment facility against her will.

[35] As alternate arguments, E.M.Y. claimed that: (1) if a STO proceeding is not a "hearing" but an "application" to which *Rule* 16.02(1) applies—permitting hearsay evidence—then the affidavit should have been struck because there was insufficient information respecting the sources and grounds of Ms. Byrne's beliefs; and, (2) those sources did not meet the hearsay requirements of necessity and reliability.

[36] E.M.Y. also objected to Ms. Byrne expressing her belief that: (1) E.M.Y. was a child suffering from an emotional or behavioral disorder; (2) it was necessary to confine her in order to remedy or alleviate the disorder; and (3) it was in her best interest to be detained at Wood Street for the purpose of diagnostic and treatment services. E.M.Y. asserted this was inadmissible opinion evidence and wanted it struck from the affidavit.

[37] In rejecting each of E.M.Y.'s arguments, the judge noted he had recently heard and rejected identical submissions. The judge reviewed his prior ruling that STO proceedings are applications for the purposes of *Rule* 16.02 and thus hearsay evidence in an affidavit is permissible providing the deponent identifies the sources and grounds of their beliefs. While recognizing the possibility of appellate review, the judge expressed concern about what appeared to be a lack of respect for his clear prior ruling. These repetitious arguments occupied much of the court's and counsels' time in this contested STO application, which by its very nature had compressed timelines. In the record before us, this was an obvious point of frustration. The judge said:

> In the context of secure-treatment applications, I would ask that counsel of both parties [...] respect the judgements of the Family Court, and not repeatedly raise issues that have previously been considered and determined by the Court in the absence of appropriate circumstances.
>
> [...] counsel and their clients are free to exercise their right to appeal any decision of the Court if they feel that the decision contains an appealable error. But in the absence of a successful appeal [...] I would respectfully request that counsel not

> seek to relitigate issues that have previously been heard and determined by this Court.

[38] Notwithstanding the judge's understandable frustration, his patience, restraint and respect for the important advocacy role of youth counsel is apparent from the hearing transcript.

[39] I return to the judge's reasons for rejecting E.M.Y.'s motion to exclude the affidavit evidence of Ms. Byrne. As noted, the core of E.M.Y.'s argument was the contention that STO proceedings should be conducted as if they were a formal hearing (trial) with all the attendant formalities. The judge found that a STO proceeding is an application. He said:

> To be perfectly clear, […] the Court […] rejects the respondent counsel's submission that a secure-treatment hearing falls within the meaning of "hearing" as contemplated by Family Court Rule 16.02(2). It is, in fact, an application.

[40] As a matter of statutory interpretation, the judge found the language of s. 55(4) of the *CFSA* intends for a STO application to involve completion of an application as opposed to a trial. This section provides:

> s. 55(4) Where a secure-treatment certificate has been issued pursuant to this Section, the Minister or the agency shall appear before the court before the certificate expires, to satisfy the court that this Section has been complied with and, **if an application is made pursuant to Section 56, for the application to be heard pursuant to that Section**.
>
> [Emphasis added]

[41] The Minister's position below and on appeal is that to adopt the position urged by E.M.Y. would grind STO proceedings to a halt. This would defeat the objective of speedy access to treatment for children in crisis.

[42] Returning to how the judge reasoned *Rule* 16.02 applied, he said:

> Because a certificate is only valid for five days, pursuant to Section 55(4), the Minister is required to appear before the Family Court in Truro before the certificate expires to satisfy the Court that Section 55 has been complied with. And in any instance where the Minister is proceeding with an application for a secure-treatment order pursuant to Section 56, that application must be heard within that five-day period.
>
> [...] *Family Court Rule* 24.22(1) confirms that a secure-treatment proceeding ... or application is commenced by the applicant filing a secure-treatment application

supported by an affidavit setting out the evidence relied on by the secure-treatment applicant for a determination that [...] (a) the child is suffering from [*sic*] emotional or behavioural disorder and (b) it is necessary to confine the child in order to remedy or alleviate the disorder. The rule does not provide any further guidance other than what I've just indicated.

[...] the Family Court for the Province of Nova Scotia is bound by the legislation. The Family Court is a statutory court. The only jurisdiction we can exercise is the jurisdiction conferred on the Court by relevant provincial legislation. And the sections of the *CFSA* relevant to secure-treatment applications do not confer upon this Court any power to adjourn the hearing of a secure-treatment application beyond the five-day period required by the legislation.

[...] and therefore, it is necessary that every application be heard and determined on the date assigned for hearing. [...]

So clearly in the mind of the Court, the legislation imposes a timeline that requires secure-treatment applications to be dealt with on an expedited or summary basis. [...]

So the Family Court is not in a position, in the context of secure-treatment matters and in determining secure-treatment matters, to reserve decision because of the timelines required for determination. [...]

And it is necessary and usual for the Family Court Judge presiding to provide an oral decision at the conclusion of an application for a secure-treatment order or a renewal application or a review.

[…] the language of Section 55(4) is clear in indicating and confirming that an application for secure-treatment order involves hearing of an application as opposed to a trial, because that's exactly what the provision states. Again, the distinction is important and reflects the realities associated with the time limited procedures prescribed by the legislation as applicable to issuance of secure-treatment certificates and determination of applications for secure-treatment orders.

The timeline imposed by the legislation simply does not permit or allow for pretrial disclosure processes or motions as provided for under the *Family Court Rules* applicable to hearings/trials. So when I'm saying "hearings" in that sentence, I'm really talking about a trial. The abbreviated timeline necessitates that the proceeding be dealt with as an application and that *Rule* 16.02(1) applies. And that is obviously stated as a conclusion for purposes of this decision.

[…]

Now Mr. Sheppard, […] basically asserts that secure-treatment applications should be viewed or considered as equivalent to a trial or seen as a trial and subject to all the evidentiary rules and procedures that would occur prior to or during a trial.

> Unfortunately, respondent's counsel have not been able to identify any Nova Scotia case authority that supports that position.

[43] As an additional attempt to persuade the judge that a trial-like process with the attendant higher threshold for the admissibility of evidence should be adopted in Nova Scotia, E.M.Y. pointed to the Ontario secure treatment framework (s. 164 of the *Child, Youth and Family Services Act*, S.O. 2017, c. 14, schedule 1). This argument was properly rejected by the judge. The same argument is repeated on appeal and can be summarily rejected for the reasons explained by the judge. The judge said:

> […] I have concluded that the Ontario legislation and associated case decisions [*McMaster Children's Hospital and L.R.*,[2019] O.J. No. 3628] confirm procedures and a process in relation to secure-treatment applications that is radically and drastically different than that confirmed by the relevant provisions of the *Children and Family Services Act*. In particular, the type of adversarial trial process required in accordance with the Ontario legislation is not required under the Nova Scotia legislation, the *Children and Family Services Act*, nor would it be feasible under the existing provisions of the *CFSA* relating to secure-treatment applications. The stringent timelines of our legislation do not allow for secure-treatment applications to be determined by way of the trial process mandated and required by the Ontario legislation.

[44] Even counsel for E.M.Y. acknowledged the Ontario and Nova Scotia legislation was not comparable as this exchange confirms:

> **THE COURT:** Do you see the process as set forth in the relevant provisions of the *Children and Family Services Act* relating to secure-treatment applications as being equivalent or analogous to the provisions in the Ontario legislation as referred to in the case authority that you've referred the Court to?
>
> **MR. SHEPPARD:** I do not. [...] Those other jurisdictions seem to take a medical type approach to this. And I know ... I believe it's at least Ontario that once the young person is taken into a secure facility, there's an obligation to have an independent psychiatrist or psychologist come in and provide ...
>
> **THE COURT:** The Ontario legislation is radically different than our legislation.
>
> **MR. SHEPPARD:** Absolutely.
>
> **THE COURT:** For example, the child who is the subject of the application doesn't even have to be ... it's not even a child in care.
>
> **MR. SHEPPARD:** That's right.

> **THE COURT:** It could be a child who's in the hospital being attended to by a psychiatrist and the psychiatrist is the applicant requesting admission to a secure-treatment facility. It's just totally, totally different.
>
> **MR. SHEPPARD:** That's right. I agree. I agree.

[45] The judge made clear that until these recent admissibility challenges, the longstanding practice was to permit hearsay evidence in affidavits providing the requirements of *Rule* 16.02(1) were met—the deponent identifies sources and grounds for beliefs. Based on his considerable past experience in adjudicating STO applications, he was in a position to speak to the nature of these proceedings and how the *Rules* should interact with the statutory mandate he was to carry out.

[46] Having determined this was an application to which *Rule* 16.02(1) applied, the judge then found the evidence in Ms. Byrne's affidavit complied with the *Rule*. He said:

> The Court is satisfied that in the case of Ms. Byrne's affidavit as filed on behalf of the Minister in relation to this application, that the affidavit is prepared in accordance with Rule 16.02(1). Paragraph one of the affidavit confirms that Ms. Byrne has personal knowledge of the matters herein deposed to except where otherwise stated to be based upon information and belief.
>
> Paragraph eight clearly identifies the source of the information as set forth in paragraph eight as coming from the referral submitted by the responsible social worker. And a copy of that referral is attached as Exhibit B to the affidavit.
>
> Similarly, paragraph nine identifies the information comes from the behavioural summaries from the young person's current placement. And the behavioural summaries are attached as Exhibit C.
>
> And paragraph ten identifies that the information comes from a discharge summary from the Reigh Allen Centre. And the discharge summary is attached as Exhibit D, and the author of the discharge summary is also identified.

[47] These determinations were open to the judge. I see no error. The judge went on to point out:

> The respondent has the right to challenge the accuracy [*sic*] reliability of information contained within paragraphs eight, nine, and ten of Ms. Byrne's affidavit. This can be effected through cross-examination of Ms. Byrne and of course also, in addition, the young person has the opportunity to provide evidence in opposition to the Minister's application if they wish to. In particular, the young person has the right to provide evidence challenging the accuracy or reliability of the information contained in the clinical social worker's affidavit.

> However, this Court also acknowledges and confirms that there is, of course, no obligation on the part of the young person to offer evidence in response to the application and, as indicated earlier, the Minister bears the burden of proof throughout.

[48] The judge was aware of the liberty interests at stake and the evidence required to satisfy the statutory requirements. He explained:

> This Court recognizes the importance of the liberty interests of the young person are at stake in the context of a secure-treatment application and the Court does not take consideration of the liberty interests lightly. In each and every case, the Court must be satisfied that the Minister has adequately discharged the burden of proof that falls upon the Minister even when the young person is not contesting or may be consenting to the application. The Court is still required to be satisfied and to make findings confirming that the Court is satisfied that the Minister has adequately discharged the burden of proof.
>
> The Minister must adduce sufficient reliable and cogent evidence in support of the application in accordance with Rule 16.02(1). The Rule does not mean that the evidentiary rules are jettisoned or to be ignored. The Court must be satisfied in each and every case that the evidence provided on behalf of the Minister meets the applicable criteria on balance of probability. And, in addition, the Court must also be satisfied that the granting of a secure-treatment order is consistent with the best interests of the child, given that this is the paramount consideration in all proceedings under the *Children and Family Services Act*.

[49] The judge also rejected E.M.Y.'s assertion that Ms. Byrne ventured into rendering inadmissible opinion evidence.

> […] I'm satisfied that the opinions expressed by Ms. Byrne in paragraph 12 of her affidavit are appropriate and admissible. And I'm also satisfied that the fact that Ms. Byrne expresses her belief with respect to the applicable statutory criteria in the best interests of the child is not intended to supplant or usurp the role of the Court or the Court's ultimate responsibility to determining each and every application, whether or not the Minister has adequately discharged the burden of proof.
>
> And I think that the situation can be argued to be analogous to the existing practice in the Family Court in the context of child protection proceedings where the responsible child protection worker's affidavit in almost each and every instance contains an expression of the worker's belief with respect to the best interests of the child, whether or not the child is in need of protective services [...]

[50] Furthermore, the judge properly recognized that before the Minister had issued the secure-treatment certificate she had to be satisfied that: (1) there were

reasonable and probable grounds to believe E.M.Y. was suffering from an emotional or behavioural disorder; and, (2) confinement was necessary to remedy or alleviate the disorder. These are the criteria expressed in para. 12 of Ms. Byrne's affidavit. The challenged evidence (opinions) simply stated the Minister's beliefs—which is not only proper, but expected. The judge said:

> […] I am also satisfied in this instance that paragraph 12 of Ms. Byrne's affidavit should not be struck. The Court has some familiarity based upon the applications that the Court has heard and determined over a significant period of time as to the role and duties of the clinical social worker.
>
> The responsibilities of the clinical social worker include, potentially, the involvement in the assessment of the initial referral package as received from the Agency and the associated determination in any given case as to whether or not there are reasonable and probable grounds to issue a certificate. In addition, the clinical social worker's role includes ongoing responsibility for assessment of the child's progress while at Wood Street and participation in case conferences such as the decision to renew case conference.
>
> And, indeed, I would note my reference to Section 55 that the Minister has an obligation to satisfy that the certificate was issued in accordance with the relevant provisions of Section 55, which would include, in particular, that the Minister be satisfied as to reasonable and probable grounds with respect to the two applicable statutory criteria in making the decision as to whether or not to issue a certificate.

[51] Similarly, I find no fault with this determination.

[52] Although he was not required to do so, the judge found in the alternative that if a STO proceeding was a hearing and not an application for the purposes of *Rule* 16, he would have exercised his discretion under *Rule* 16.02(2) and admitted Ms. Byrne's affidavit without striking any of its content on the basis of impermissible hearsay. In my view, had that been the applicable *Rule* (the judge properly found it was not) this would have been a reasonable exercise of the judge's discretion.

[53] I return to E.M.Y.'s principal argument under this ground of appeal: that a STO proceeding is a "hearing" and not an "application" for the purposes of *Rule* 16—mirroring the arguments made in the court below. E.M.Y. says the judge's interpretation of the governing framework was wrong. This submission must be rejected.

[54] Contrary to E.M.Y.'s submission, there is clear ambiguity in the text of the *Rules* as to the use of the terms "hearing" and "application". Noticeably absent in

the court below and on appeal is any purposive analysis of the *CFSA* or the applicable *Rules* by E.M.Y. When one undertakes that analysis, as the judge did, the inescapable conclusion is that STO proceedings are heard by "application". To suggest otherwise leads to an absurd result. Let me explain.

Where does the ambiguity arise?

[55] Starting with the *CFSA*, the procedural route to a secure treatment order is clear—it is an application. For example:

> **56 (1)** The Minister or an agency with the consent of the Minister may **make an application to the court** for a secure-treatment order in respect of a child in care.
>
> [Emphasis added]

[56] However, other *CFSA* provisions imply that a "hearing" must take place:

> **56** … **(3) After a hearing**, the court may make a secure-treatment order in respect of the child for a period of not more than forty-five days if the court is satisfied that …
>
> [Emphasis added]

[57] When read in isolation, this language is not problematic. Applications are the subject of court hearings. An "application" is the request for relief and a "hearing" is the process by which the court deals with that request. Applying common sense, the use of the word "hearing" in s. 56(3) would likely not be understood as transforming the secure treatment proceeding into something other than an application. Because the *CFSA* does not define either term or otherwise recognize a distinction between the two, this common-sense interpretation prevails when s. 56(3) is read in isolation.

[58] But, when we examine the applicable *Family Court Rules*, ambiguity arises. *Rule* 16.01 sets forth the required formalities for preparing and executing affidavits used in a "proceeding". *Rule* 16.02 speaks to the nature of the proceeding and the permissible contents of affidavits. Importantly, *Rule* 16.02 recognizes a distinction between an "application" and a "hearing". Read in this context, the interchangeable use of "hearing" and "application" in ss. 55-60 of the *CFSA* is unclear. If a request for a STO involves an "application", *Rule* 16.02(1) applies; if it involves a hearing, *Rule* 16.02(2) applies.

[59] For convenience, I restate *Rule* 16.02:

> **Contents of affidavit**
>
> **16.02 (1)** An affidavit **used on an application** may contain statements as to the belief of the deponent with the sources and grounds of those beliefs.
>
> **(2)** Unless the court otherwise orders, an affidavit **used on a hearing** must contain only those facts that the deponent is able to prove from the deponent's own knowledge
>
> [Emphasis added]

[60] On its face, *Rule* 16.02 indicates that a "hearing" is distinguishable from an "application". However, there is confusing use of terminology elsewhere in the *Family Court Rules*. For example, *Rule* 1.05 states that "hearing" means "the hearing of an application or a trial", suggesting an application and a hearing can be one and the same. *Rule* 1.04(1) provides that "application" has the same meaning as "motion" in the *Civil Procedure Rules*, again subject to the caveat unless the context otherwise requires. STO proceedings are not interlocutory steps in a wider proceeding; they are original proceedings.

[61] Then *Rule* 24.01(2) states a "secure-treatment application" means "an application under Section 56 of the Act for a secure-treatment order or renewal of a secure-treatment order". *Rule* 24.21(1) reads: "For the purposes of any hearing regarding a secure-treatment application, [...]". *Rule* 24.22 provides that "a secure-treatment proceeding is commenced by the secure-treatment applicant filing a secure-treatment application supported by an affidavit setting out the evidence relied on by the secure-treatment applicant […]", but otherwise offers no guidance on the content of the affidavit.

[62] With respect, the *Family Court Rules* are not a model of clarity. To summarize, the interchangeable use of "hearing" and "application" in the *CFSA* and the overlapping definitions and inconsistent use of "application", "motion", "hearing" and "trial" in the *Rules* creates significant ambiguity. *Rule* 1.02 (3) does provide that the *Rules* do not apply to any proceeding in which they are, or appear to be, contradictory to any enactment under which an application is before the court. That is not a complete answer because the *Rules* do contain necessary provisions for STO proceedings (24.22 to 24.55); however, as noted, no guidance is provided on the contents of permissible affidavit evidence in those proceedings and the remaining *Rules* are ambiguous.

[63] In summary, it is impossible to discern, based on the text alone, whether *Rule* 16.02(1) or 16.02(2) applies in secure treatment matters.

How should the ambiguity be resolved?

[64] The ambiguity must be resolved by using principles of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, the Supreme Court set out the modern approach to statutory interpretation as follows:

> [21] Although much has been written about the interpretation of legislation [...]Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[65] Courts are to take a pragmatic approach to statutory interpretation that is both purposive and contextual.

[66] Reference to Ruth Sullivan's *Statutory Interpretation* is instructive (3rd ed (Toronto: Irwin Law, 2016) at p. 53). If the text of a statute is ambiguous, courts must look to its "larger context" to resolve that ambiguity. When examining a statute's larger context, courts are entitled to a conduct a consequential analysis. As Sullivan explains:

> In resolving problems in statutory interpretation, courts appropriately take into account the consequences of applying legislation to particular facts … **As much as possible, interpretations that lead to unacceptable consequences are avoided**.
>
> [...]
>
> [A] commonly invoked absurdity is **defeating the purpose of an enactment** […]
>
> Other forms of absurdity include internal conflict or inconsistency, **incoherence in the legislative scheme**, a lack of fit between conduct and consequences, **interference with the efficient administration or enforcement of the law, pointless hardship or inconvenience, and generally speaking any result that is inconsistent with our basic assumption that the legislature is a competent institution acting in the public interest**.
>
> [pp. 212-215; Emphasis added]

[67] There are also the provisions of s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

[68] The appellant's proposed interpretation (that secure treatment matters involve a "hearing (trial)" rather than an "application" for the purposes of *Rule* 16 and the admissibility of affidavit evidence thereunder) results in several clear absurdities. That cannot be what the governing legislation and *Rules* intended. This is evident upon a proper purposive and consequential analysis. I will explain.

[69] It is important to note that the *CFSA* is a child welfare statute. The best interests of children are paramount. The objective of a STO order is to provide short-term intensive treatment to children in care. At the point the Minister issues a certificate and applies for a STO, typically a child is in crisis and unmanageable in a family or other residential (non-secure) placement. Wood Street is not a long-term care facility. The goal is to stabilize through treatment and return children to their home as quickly as possible. Interpretations which erode these overarching objectives must be guarded against.

[70] The task at hand is to determine what the legislature intended by way of procedure in s. 56 of the *CFSA*. The *Rules* are established by regulation and have their origin in the *Family Court Act*, R.S.N.S. 1989, c. 159. Sections 11(2) and (3) of this *Act* provide:

> **(2)** The Family Court Rules Committee may make rules
>
> (a) regulating the pleadings, practice and procedure of the Family Court;
>
> [...]
>
> (e) regulating the form and execution of any process of the Court;
>
> (f) prescribing and regulating the proceedings under any enactment that confers jurisdiction upon the Family Court or a judge thereof.
>
> **(3)** Where provisions in respect of practice or procedure are contained in any Act, rules may be made adding to or modifying such provisions to an extent that is considered necessary for the equitable dispatch of the business of the Family Court unless that power is expressly excluded.

[71] The principles of statutory interpretation apply equally to the interpretation of regulations (see *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82 at paras. 24-28). This Court said in *Sparks*:

> [24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. [...]

> [26] This approach also applies when, like here, the subject provision is a regulation. Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) makes this point:
>
> > **§13.18 *Interpretation of regulations*.** It is well-established that delegated legislation, like Acts of the legislature, must be interpreted in accordance with Driedger's modern principle. Generally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations. There are some differences, however. As explained by Binnie J. and Bastarache J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, **regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions. Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read.** [Citations omitted]
> >
> > [Emphasis added]

[72] The interpretation of the *Rules* advocated by E.M.Y. is not in keeping with a result that is harmonious, coherent and consistent between the STO provisions contained in both the *CFSA* and *Rules*.

[73] The *CFSA* mandates secure treatment applications be dealt with within a five day window (five working days by Regulation). The secure-treatment court (a statutory court) has no choice but to conduct a hearing within five days or the Minister's Certificate expires. If E.M.Y.'s urged interpretation of *Rule* 16.02 were adopted, the resulting process would be fundamentally incompatible with the five-day window. This undermines the basic assumption that the legislature is a competent institution. It also creates incoherence in the broader legislative scheme (being the *CFSA* and the *Family Court Rules*).

[74] In this case, a clinical social worker affiant reviewed and relied upon documents prepared by other professionals involved in E.M.Y.'s care. If Ms. Byrne could not rely upon such relevant information, which she confirms under oath to be true to the best of her knowledge, the number of witnesses required to file affidavits and potentially be compelled to present for cross-examination could easily derail the ability to complete a STO application within the mandated timeline.

[75] To demonstrate, in this case the number of potential affiants needed to explain how E.M.Y. got to her crisis point where the Minister issued a STO certificate and applied for a STO would have topped twenty. If the Minister had to obtain individual affidavits (with deponents spread out over the province), that would likely amount to a near impossible task given a five-day timeline from start to finish. If cross-examination were requested, subpoenas would need to be issued and served, all within the timelines set out in the *Rules*. All highly unlikely to be achieved within the stringent *CFSA* timelines.

[76] In my view, the judge conducted a purposive and consequential analysis of the governing STO provisions of the *CFSA* and how they interact with the applicable *Rules*. He was correct in concluding that STO proceedings are properly heard by "application" and the provisions of *Rule* 16.02(1) apply with respect to the admissibility of hearsay evidence in affidavits. The judge made no error in rejecting E.M.Y.'s motion to strike evidence on any of the fronts advanced. I would dismiss this ground.

[77] This determination is limited in scope to STO proceedings. No broader pronouncements are made respecting what other types of proceedings may or may not fall within the definition of "application" or "hearing" under *Rule* 16.02.

[78] Recognizing my colleague the Honourable Chief Justice Michael Wood has written concurring reasons, I note that he concludes *Rule* 16.02(1) (which permits hearsay in affidavits) is to be restricted to interlocutory applications. E.M.Y. hinted at this argument. The Minister did not address it. There is an absence of meaningful submissions on this point.

[79] Limiting my comments to the Family Court's mandate under the *CFSA* to adjudicate STO applications, there is considerable potential for unmanageable consequences in my colleague's reliance on the discretion of a judge to admit hearsay. It does not necessarily relieve the Minister of the daunting, if not impossible, administrative burden discussed in paras. 73 to 75 herein. Furthermore, none of the parties to an STO matter can be guaranteed if or how a judge might exercise the discretion.

Did the judge err by admitting the evidence establishing E.M.Y.'s recent criminal charges and conditions of release?

[80] As a second prong of attack to have evidence excluded, E.M.Y. relied on provisions of the *YCJA*. E.M.Y. said the details contained in the affidavit of Ms.

Byrne referencing criminal charges should be struck from the record. E.M.Y.'s counsel filed a written brief in the court below and reiterated those arguments during oral submissions to the judge. The same position was essentially repeated on appeal, and, with respect, it is equally unpersuasive here as it was below.

[81] E.M.Y.'s argument under the *YCJA* hinges primarily on her contention that: (1) the evidence she wanted excluded falls within the definition of "record" under s. 2(1) of the *YCJA*; and, (2) the Minister is prohibited from disclosing or providing access to such "records" without authorization under the *YCJA* or an order from a Youth Court judge.

[82] The following are examples of the evidence E.M.Y. sought to exclude. The underlining is E.M.Y.'s and pinpoints the evidence she found objectionable in these paragraphs in Ms. Byrne's affidavit:

> 8.c. [E.M.Y.] was placed at the Reigh Allen Centre on March 12, 2019. [E.M.Y.] was discharged from the Reigh Allen Centre on April 28, 2019, due to charges for uttering threats, mischief, resisting arrest and assaulting a police officer;
>
> 8.e. [E.M.Y.] was placed at Comhla Cruinn on May 16, 2019. [E.M.Y.] remains placed here, but assaulted two staff members on July 8, 2019, and is on conditions to have no contact with them;
>
> 8.f. [E.M.Y.] was on an extended access visit with her biological mother and stepfather from July 8 until July 16, 2019, but this broke down as she was arrested and charged for assaulting both her mother and stepfather;
>
> 8.r. On July 16, 2019, [E.M.Y.] chased her mother in the home with a knife, causing her mother to lock herself in a bedroom and scream for the neighbours to call 911. [E.M.Y.'s] stepfather entered the home and she began to yell at him and threw the knife towards him. [E.M.Y.] picked up a shovel and broke the window of a car parked in the driveway with a shovel. [E.M.Y.] also swung the shovel at her mother, hitting her in the arm.
>
> 9.e. On June 14, 2019, [E.M.Y.] began making comments toward a Comhla Cruinn staff member, stating "you're fucking ugly" and "you are lucky I don't punch you in the face". [E.M.Y.] then stated "I am just kidding about punching you, I want to punch her in the face" motioning towards another staff member with her fists clenched. [E.M.Y.] began threatening to punch a third staff member, and swung at him. [E.M.Y.] was placed in a team control hold and continued to kick, bite and scratch at staff until police arrived. When [E.M.Y.] was placed in the police car, she began kicking the inside of the vehicle, attempting to break the windows;

> 9.i. On July 8, 2019, [E.M.Y.] struck a staff member multiple times with her hands and broke the skin on two staff members with her fingernails while being restrained. [E.M.Y.] struck two staff members with a hair straightener and broke one staff member's glasses. [E.M.Y.] kicked and kneed both staff members in the back, side and head during a physical restrained [*sic*]. [E.M.Y.] also spit on another staff member a police officer;
>
> 9.j. [E.M.Y.] was charged for two counts of assault, one count of mischief and one count of assault with a weapon following the incident on July 8, 2019; and
>
> 10.c. [E.M.Y.] was discharged from the Reigh Allen Centre on April 28, 2019, as she became escalated when staff attempted to discuss her threats toward staff from April 27, 2019. [E.M.Y.] threated to harm staff again and began kicking and punching the office door and window. [E.M.Y.] was charged with uttering threats following this incident and was unable to return to the Reigh Allen Centre due to no contact provisions being put in place.

[83] As explained in paras. 30 and 31 herein, Ms. Byrne relied upon various documents prepared by other professionals involved in E.M.Y.'s care when preparing her affidavit and appended these documents to her affidavit. E.M.Y. also objected to the content of the appended documents.

[84] Section 2 of the *YCJA* defines a record as follows:

> …
>
> record includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, **that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act**.
>
> [Emphasis added]

[85] E.M.Y. referred the judge to various sections of the *YCJA* that limit access to and disclosure of youth records as defined in the *Act*. Counsel for E.M.Y. summed up her position this way:

> 34. It is the Respondent's view that the identified passages meet the definition in *s. 2* of the *YCJA*. These passages may also be categorized as government records as described above and lawfully kept by the Agency. However, in the absence of express authorization by the *YCJA* or otherwise an authorizing order from the Youth Court, this material must be excluded from this proceeding.

[86] Noting that this too was not a novel argument, the judge said:

> I mean I'm certainly satisfied that again the motion that is made on behalf of the young person this afternoon in reference to the *YCJA Act* is again substantially similar if not almost identical I mean to the previous motion that I heard and determined on March 11, 2019.
>
> […] Consistency counts. And consistency, as I've indicated earlier, is from my perspective important when it comes to the decisions of the Family Court. And in the absence of a successful appeal of an earlier decision or some new and relevant circumstance or new compelling case authority that was not available for consideration at the time of the original decision, I believe it is important for both Court as well as counsel to recognize that the issue that has been raised was previously the subject of Court decision and determination and again, subject to certain exceptions, should be respected. And, clearly, if the respondent in the earlier decision felt that there was an appealable error made by the presiding judge, there would have been a right to appeal. And at this point in time, I certainly have no understanding that my March 11, 2019 was subject to appeal.
>
> So, accordingly, I propose to follow and rely upon my earlier decision for purposes of this motion [...]

[87] Again, I acknowledge the undercurrent of frustration expressed by the Minister and the judge in the face of a clear recent ruling of the lower court which was not subject to appeal. Counsel below were or should have been aware of that ruling, yet repeated the same arguments to the judge. Although it was open to the judge not to consider the duplicitous motions, the record demonstrates he handled the repetitious arguments with patience and respect and delivered a thorough and thoughtful oral decision, notwithstanding the time constraints.

[88] I turn to the judge's reasons for rejecting E.M.Y.'s argument to exclude this evidence. He said:

> […] Mr. Sheppard, on behalf of the young person, objects to the admission of information or material that he asserts can be characterized as youth criminal justice records as referred to in Ms. Byrne's affidavit or the exhibits attached to the affidavit. And Mr. Sheppard maintains that the *YCJA* records may not be accessed by any person or disclosed in any legal proceeding outside of a Youth Justice Court unless it is done so in accordance with the *Youth Criminal Justice Act* or pursuant to an authorization order as issued by the Youth Justice Court.
>
> […]
>
> And I would note, firstly, that Ms. Byrne's affidavit does not contain or have attached to it any *YCJA* documentation or records as defined in the definition section of the *YCJA*. Her affidavit does contain information with respect to incidents that the evidence in her affidavit suggest have resulted in various charges that would be dealt with under the *YCJA*.

> […] after listening to submissions of counsel this afternoon and after having reviewed the brief and the case authorities, my ultimate conclusion would be that […] in the context of this application, the information that is at issue and is objected to really cannot be considered to be a *YCJA* record as defined in the *YCJA* legislation.
>
> Now the young person who is the subject of this application for a secure-treatment order is currently the subject of an order for permanent care and custody and that order was issued February 20, 2006. And pursuant to Section 47(1) of the *Children and Family Services Act* where the Court makes an order for permanent care and custody, 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.
>
> So I'm satisfied that the Agency or, alternatively, the Minister would be entitled to request and have access to *YCJA* records pursuant to Section 119(1)(e) as the parent of the young person. And I believe the fact that the Minister stands in the position of a parent is of some critical importance to determination of this motion.
>
> The *YCJA* provisions recognize that the person standing in the position of a parent or guardian should have access to the *YCJA* records relating to their child. Mr. Sheppard argues that the reference to the charges as contained within the affidavit are inappropriate and not admissible. And, in my mind, my conclusion is that to suggest a parent cannot refer to or rely upon information within their knowledge when making parental decisions based upon the best interests of the child is somewhat nonsensical.
>
> The provisions of the *Children and Family Services Act* confirm that the paramount consideration in all proceedings under the *Children and Family Services Act* is the best interest of the child. This Court is obligated to consider all relevant or pertinent information when making a best interest determination. If the Minister were not permitted to rely upon and refer to *YCJA* information, which the Minister is lawfully entitled to access as a parent of the child for purposes of a secure-treatment application, it could very well result in the Court not being able to consider information or evidence that the Court should obviously have regard to in determining the best interests of the child. And, clearly, Section 2 of the *Children and Family Services Act* is applicable to determination of secure-treatment applications made pursuant to Section 56.

[89] E.M.Y. raised privacy concerns as another basis for the exclusion of the highly relevant evidence. The judge was mindful of E.M.Y.'s privacy concerns and explained how these could and would be addressed—by exercising his discretion under ss. 93 and 94(1) of the *CFSA*. Section 93 authorizes the judge to order the public be excluded from the STO proceeding. Section 94 permits a publication ban.

[90] Although not required, the judge provided alternative relief in the event he was incorrect in concluding the challenged evidence did not qualify as a protected *YCJA* record. The judge reasoned:

> And so as an alternative to my decision that the information that has been challenged in this case, does not qualify as a *YCJA* record and therefore is not subject to the *YCJA* records restrictions, in the alternative I am making an order that I believe addresses one of the primary concerns foundational to the *YCJA* Act, that is ensuring the privacy of the young person by making sure that this proceeding ... by ordering that this hearing today is not going to be public and there shall be no publication or public information ... no person shall publish or make public information that has the effect of identifying the child who is the subject of the proceeding.
>
> […] I acknowledge that Part 6 of the *YCJA* protects the privacy of young persons dealt with under the Act and I also acknowledge that under Part 6, publication of information that would identify a young person having been dealt with under the Act, and access to records created or kept for purposes of the Act, are strictly limited. And Sections 119 to 123 of the *YCJA* set forth the rules or parameters governing access to *YCJA* records.
>
> […] Family Court is normally a closed court and, indeed, the provisions of the *Family Court Act* impose a statutory obligation under the Family Court to guard against publicity.
>
> […] But not in the context of *CFSA* proceedings, because Section 93 of the *CFSA* confirms that except where the Act otherwise provides, a proceeding pursuant to this *Act* shall be held in public. […]
>
> However, the *CFSA* does create an ability on the part of the Court to make an appropriate order to guard against publicity and publication. And I would confirm that I am making the following order for purposes of this proceeding. I'm confirming that the hearing of this application is not to be held in public because I'm satisfied that it would be in the interests of the proper administration of justice to exclude all members of the public from the hearing in accordance with Section 93 of the *Children and Family Services Act*.
>
> I also make a further order pursuant to Section 94(1) confirming that no person shall publish or make public information that has the effect of identifying the child who is the subject of this proceeding. And I'm also ordering a prohibition against the publication of any report of the hearing or proceeding or any part thereof.
>
> […] I believe the orders that I've made are adequate to ensure that hearing of this matter will not result in any inappropriate disclosure or publication, given the orders that I've made under Sections 93 and 94.
>
> […]

> And I'm also satisfied that access to the information that is contained in the affidavit, that denial of access to that information in the circumstances of this case by granting of this motion would potentially bring the administration of justice into disrepute. Denial of such evidence or exclusion of such evidence would preclude the Family Court from the opportunity to consider evidence relevant to the determination of a child's best interest in the context of an application for a secure-treatment order. And that is, of course, the paramount consideration in any proceeding under the *Children and Family Services Act* including proceedings under the secure-treatment provisions.
>
> And, finally, I would just note that Mr. Sheppard certainly has the right to challenge the accuracy of the information as set forth in the affidavit of Ms. Byrne, and the young person also has the right to give evidence, if they choose, to correct any information in the affidavit which they feel to be inaccurate or incorrect. And the Minister continues to bear the burden of proof throughout with respect to this matter.
>
> So the motion is denied and the matter will now move forward to a hearing of the Minister's application for a secure-treatment order.

[91] As an aside, the judge also noted his dual appointment—he was both a judge of the Family Court and Youth Justice Courts (*Youth Criminal Justice Act*/Youth Criminal Justice Act Regulations, NS Reg. 92/2003) Although he was not sitting in the latter capacity, he said:

> I am a dual appointee […] of [...] the Youth Court. [...] And I'm not sitting in that capacity today. […] But if I was, I would be satisfied that access to the records in the context of this application is desirable and in the interest of the proper administration of justice.

[92] Turning to the Minister's submissions to this Court, she says the challenged evidence is not a "record" as defined in s. 2 of the *YCJA*. To repeat, s. 2 provides:

> ***record*** includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.

[93] In her factum, the Minister argues:

> 214. The Minister says Parliament did not say "anything"; they said, "any thing". As a matter of interpretation, a "record" can only be a "thing", and it must also be a "thing" of like nature (*ejusdem generis*) to a microform, sound recording, videotape, or machine-readable record.

> 215. If this is contrary to the *Youth Criminal Justice Act*, presumably when a peace officer brings a child to the IWK Health Centre under Section 14 of the *Involuntary Psychiatric Treatment Act*, [SNS 2005, c. 42, s. 14] he or she cannot tell the attending physician why the officer believes the child "is seriously harming or is threatening serious harm towards another person or has recently done so".
>
> [...]
>
> 222. That children may go back and forth between Secure-Treatment and a Youth Justice Facility, as is well known to the Minister and Appellant's legal counsel. A Youth Court may refer a child to a child welfare authority and a child protection agency may be the child's parent before the Youth Court. A Youth Justice Court may grant a "pickup order" for transport to and from the WSC, despite a Secure-Treatment Order confining the young person. Clearly, both Parliament and the Legislature did not intend to create child protection and youth justice court silos.
>
> See, for example, *R. v. Munroe*, 2013 NSPC 45, para. 36-38
> *Youth Criminal Justice Act*, SC 2002, c. 1, s. 35
> *Children and Family Services Act*, SNS 1990, c. 5, as am. s. 60A

[94] At the appellate level, it appears the question of whether the type of information that E.M.Y. seeks to exclude constitutes a *YCJA* record has not been addressed. However, the Ontario Court of Justice dealt with the same issue in *Native Child and Family Services of Toronto v. K.G.*, 2019 ONCJ 457. The ONCJ determined that references to youth criminal involvement in a child protection worker's affidavit do not fall within the definition of a "record" in the *YCJA*. Neither party referenced this case, but the reasoning is helpful.

[95] As with the present case, *K.G.* was a child protection proceeding. The subject of the proceeding was a 15-year-old Aboriginal youth, I.G. The respondent, Native Child and Family Services ("NCFS"), had a lengthy history with I.G. and his family. I.G. was first apprehended as an infant and was periodically returned to the care and custody of NCFS throughout his childhood. As a teenager, I.G. had extensive involvement with the criminal justice system. Around the time of the criminal proceedings, NCFS applied for a permanent care order. NCFS filed affidavits of two social workers in support of the application, both of which referenced I.G.'s youth criminal involvement.

[96] Counsel for I.G. claimed portions of the affidavits referring to I.G.'s criminal history violated the *YCJA*. Counsel asked the court to strike those portions of the affidavits. The motion was denied on the ground that the disputed

information was not a "record" within the meaning of the *YCJA*. The court reasoned:

> [52] **Further, NCFS is not *seeking* access to I.G.'s youth records kept or created under the statutory scheme established in Part 6 of the *YCJA*. NCFS already has this information in its own records, based on the personal knowledge and involvement of its child protection workers with I.G, as part of their child protection investigation**.
>
> [53] As noted earlier, section 2 of the *YCJA* defines "record" as "anything [*sic*] containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, **that is created or kept *for the purposes of this Act* or for the investigation of an offence that is or could be prosecuted under this Act**."
>
> [54] **The information regarding I.G.'s youth criminal involvement in the society worker's affidavits was created for the purpose of the child protection proceeding** and was largely within the workers' personal knowledge as either one or both child protection workers attended the numerous youth court justice appearances with I.G. as his legal guardian, to act as a support and resource for I.G. and to assist the youth criminal justice in understanding I.G.'s experience of trauma and risk as a child in need of protection. **The child protection records are not youth criminal justice records**.
>
> […]
>
> [58] In conclusion, this court does not need to constitute itself as a youth criminal justice court **as the information contained in the affidavits of the child protection workers in this proceeding are not "youth records" as defined by section 2 of the *YCJA***. [...]
>
> [Italics and underlining in original; bold emphasis added]

[97] While *K.G.* is not binding on this Court, its reasoning is applicable to the issue raised by E.M.Y. in this appeal. The information recorded in Ms. Byrne's affidavit and the attached exhibits was not generated for the purposes of the *YCJA*. It was compiled for reasons all having to do with E.M.Y.'s involvement in the child protection system and treatment objectives. It was based on the knowledge of the affiant and other child protection workers who dealt with E.M.Y. around the time of relevant events.

[98] *Reodica v. Ontario (Attorney General)*, 2006 ONCJ 36 also undercuts E.M.Y.'s position. In *Reodica*, a police officer fatally shot the applicants' teenage son during his arrest. The Special Investigation Unit (the "SIU"), an arms-length agency of the Ministry of the Attorney General, investigated the incident,

ultimately concluding the police officer who fired the shot should not be criminally charged. The parents of the deceased youth applied for disclosure of the SIU records pursuant to the *YCJA*. The judge denied the motion on the ground that SIU investigation records were not "records" within the meaning of the *YCJA*. The court concluded:

> [22] Investigations conducted by the Special Investigation Unit pertain to the conduct of police officers to allow for consideration whether the officers ought to be prosecuted under the *Criminal Code* of Canada. Any such records are not created or kept for the purposes of the *Youth Criminal Justice Act* or for the investigation of an offence that is or could be prosecuted under the *Act*.

[99] The judge reached this conclusion notwithstanding the fact that the SIU records almost certainly would have referred to the deceased's arrest and alleged criminal conduct. That decision undermines E.M.Y.'s argument that any reference to the events of a young person's criminal involvement constitutes improper use of a *YCJA* "record".

[100] In my view, Morse, A.C.J. was correct in concluding the challenged evidence did not equate to "records" under the *YCJA* and therefore was not subject to the *YCJA* records restrictions. He made no error in dismissing the motion to exclude. The information regarding E.M.Y.'s criminal involvement contained in Ms. Byrne's affidavit and the records appended thereto were created for the purpose of the related STO child protection proceeding. To exclude this information would create absurd results and not serve the best interests of children, as the judge below was aware.

[101] I would dismiss this ground of appeal.

Did the judge err in his determination that it was in E.M.Y.'s best interests to confine her to Wood Street?

[102] After E.M.Y.'s two unsuccessful motions to exclude evidence, the judge proceeded to hear the STO application on its merits. After carefully reviewing the evidence and submissions on the governing legislative framework and guiding legal principles, the judge determined the Minister had discharged her burden of proving it was in E.M.Y.'s best interests to issue a STO for a period of 45 days. He concluded:

> But when I look at the evidence on balance, the conclusion that I reach is that the evidence before me, on balance, justifies and supports the conclusion that,

> [E.M.Y.], at this point in time, is a young person suffering from an emotional or behavioural disorder.
>
> So then the second issue that I have to determine is whether or not it is necessary to confine the young person in order to remedy or alleviate the disorder.
>
> […] I'm satisfied that it is necessary to confine the young person in order to remedy or alleviate the disorder and, therefore, I find that the Minister has adequately discharged the burden of proof with respect to both criteria.
>
> And then there is the need to consider the overall best interests of the young person. [...]
>
> And the Court also acknowledges the provisions of Section 3(2) which identifies criteria, which the Court is directed to consider when determining the best interests of the child. […] that certainly [E.M.Y.]'s relationship with relatives is certainly an important consideration for the Court and the ... subparagraph (g) for sure, the child's cultural, racial, and linguistic heritage is something the Court should consider.
>
> […] I've also certainly taken into account [E.M.Y.]'s views. She made it clear that she doesn't really think she needs to be at Wood Street […] and [...] talked about wanting to go home. And the Court understands her and appreciates her perspective on that issue. But the purpose of the *Act* is also to protect ... as per Section 2(1) is to protect children from harm and assure the best interests of children. And certainly, again, I acknowledge that best interests is the paramount consideration.
>
> And at this particular point in time, my conclusion, based upon the evidence, is that it would be in [E.M.Y.]'s best interest to have the opportunity to participate in an appropriate treatment program within the safety and security afforded by the Wood Street Centre.

[103] The central complaints E.M.Y. makes under this ground of appeal are that it was neither necessary nor in her best interests that she be confined to Wood Street for treatment because there was no evidence the facility offered culturally appropriate treatment and there was a prohibition against speaking the Mi'kmaw language.

[104] On appeal, E.M.Y. broadens the arguments advanced below and uses unnecessarily harsh language in her assessment of what she views as the judge's failures. I will expand on this later. For now, it is enough to say she sees the judge as having failed to recognize the importance of her culture and language, and treatment that is sensitive to the needs of an Indigenous child. She says:

> 7. [...] and that an overriding and palpable error was made by deciding that it was necessary and in the best interests of the Appellant to confine her in a locked

> facility that is not equipped with culturally appropriate treatment methods and adheres to internal policy that is constructively hostile to Mi'kmaq peoples by prohibiting them from communicating in their native language.
>
> [...]
>
> 126. [...] gives rise to a question of whether the Court adequately accounted for the best interests of the child, the paramount concern of all child welfare decisions. No error can be more palpable or overriding.

[105] In advancing this ground of appeal, the appellant indirectly asks this Court to mandate culturally-appropriate services because, without such services, children such as E.M.Y. should not be subject to STOs. Whether that is even our role is one matter. On this record, we cannot go further than to address whether, on the evidence before him, the judge made a palpable and overriding error by concluding it was necessary in E.M.Y.'s best interests to confine her to Wood Street for treatment.

[106] On this issue, the Mi'kmaw Agency as intervenor advanced these arguments:

- Wood Street's policy of preventing residents from speaking in a language not understood by staff on duty appropriately balances language rights with the need to monitor interactions between residents. It was open to E.M.Y. to pursue her language in other ways (e.g. by writing or conversing in Mi'kmaw with her social workers and mentors). The Mi'kmaw Agency would fully support her in these endeavours.
- Wood Street is the only facility in Nova Scotia that provides these particular services to children in care, including Mi'kmaw children. To grant the appellant's third ground of appeal would effectively deny Mi'kmaw children access to Wood Street, creating a gap in services and placing Mi'kmaw youth at a disadvantage as compared to other children in care.
- To grant the third ground of appeal would also create a dangerous precedent, which could potentially impede Mi'kmaw children's access to other services they require.
- The appellant failed to lead evidence as to how her behaviours could have been addressed in a more culturally appropriate manner. The judge fully considered the evidence that was before him and did not

> err in granting the STO. Given the severity of the appellant's previous situation, and the risks she faced due to her increasingly destructive behaviour, confinement to Wood Street was in her best interests, particularly since culturally appropriate services could have been arranged upon her request.

[107] Respecting culturally-appropriate services, the record reveals:

- During E.M.Y.'s time in care, the Mi'kmaw Agency ensured that E.M.Y. maintained ongoing contact with both her direct and extended family.
- Ms. Byrne gave evidence of the types of Mi'kmaw cultural competencies at Wood Street. For example, she testified that there are staff at Wood Street who are of First Nations heritage and staff receive cultural competency training. Respecting services, she explained that: a) part of the educational program includes schoolwork related to indigenous communities; b) Wood Street invites members from the First Nations community to assist youth in cultural activities such as storytelling and drumming; c) First Nations mentors visit with youth while they are in treatment; and, d) Wood Street consults with the Mi'kmaw Agency to develop culturally-sensitive treatment plans.
- The restriction on the use of language, arose as a result of Wood Street's need to monitor conversations between resident youth for safety reasons. Unless there is a staff member on shift who can speak the alternate language (whatever that might be) youth are expected to speak English. E.M.Y. would be permitted to speak with her agency social worker in Mi'kmaw and with those providing services and support to her during her stay at Wood Street. Furthermore, as noted, E.M.Y. identifies her primary language as "English". Her evidence was that she can speak some Mi'kmaw and wanted to learn more. She provided no evidence that she was actually prevented from speaking Mi'kmaw while at Wood Street.

[108] It is clear from the record that the judge was cognizant of E.M.Y.'s need for culturally-appropriate services. The judge explained that s. 3(2)(g) of the *CFSA* directed him to consider a child's cultural, racial and linguistic heritage in his best

interests ruling. In fact, the judge clearly stated he expected Wood Street to develop a culturally-sensitive and appropriate treatment plan for E.M.Y., saying:

> And I also want to comment upon the treatment plan. And Mr. Sheppard referred to the Truth and Reconciliation Commission Report. The Court certainly has some familiarity with respect to that report. And the recommendations of that report are broad, extensive and far reaching, and apply to really not only child welfare agencies but to lawyers, educators, and judges. In fact, those groups are specifically referred to in the context of that report.
>
> So when it comes to the development of an appropriate treatment program, I'm going to request that the Minister specifically involve Ms. Aboud in the development of the treatment plan and I'm going to specifically request that [E.M.Y.]. ... and I know she is. I know that usually the young person is involved. **But I think when it comes to this treatment plan, I'm going to ask the Wood Street staff to see that an appropriate and culturally-sensitive treatment plan is developed for this young person. And that would require input from Mi'kmaw Family and Children Services and input from [E.M.Y.]**.
>
> And Wood Street Centre needs to be, you know, proactive in these situations. So, you know, **the expectation of the Court is that there will be a culturally-sensitive and appropriate treatment plan developed for [E.M.Y.] during her period of time at Wood Street**.
>
> [Emphasis added]

[109] The foregoing excerpts from the judge's oral decision are by no means an exhaustive review of his considerations respecting E.M.Y.'s cultural, racial and linguistic heritage and how they related to his determination of her best interests.

[110] To repeat what I said earlier—E.M.Y. uses unnecessarily harsh language in her critique of the judge's decision. What the record reveals is a judge who listened carefully, respectfully and patiently to E.M.Y.'s important cultural concerns. His analysis is hardly demonstrative of a judge who, as E.M.Y. alleged, was just making a "toothless plea" about appropriate services and whose silence about her language concerns was "deafening". Also unwarranted is E.M.Y.'s suggestion that a "well-informed" judge on such important matters would not have made such mistakes.

[111] To recap, the judge found: (1) E.M.Y. was suffering from an emotional or behavioural disorder. Section 56(3)(a) does not require a formal diagnosis and can be satisfied by a concerning pattern of behaviour; (2) it was necessary to confine her in order to remedy or alleviate the disorder; and (3) confinement for treatment was in her best interests, which is the paramount consideration in all proceedings

under the *CFSA* (see s. 2(2)). There was ample evidence in the record to support these findings.

[112] The judge made no extricable error of principle or palpable and overriding error of fact. Considering the evidence and submissions before the judge, his decision to issue the STO was unquestionably in E.M.Y.'s best interests. I would dismiss this ground of appeal.

[113] I return to my comments in para. 29 respecting the scope of this outcome and, as noted in para. 104, on appeal E.M.Y. broadened the arguments advanced below and asked this Court to make pronouncements on culturally-appropriate services. Specifically, she sought a pronouncement that her First Nations status, culture, heritage or language must be considered with reference to the second criterium for a STO—it being "necessary" to confine her in order to remedy or alleviate the disorder. In this case, the judge took these factors into consideration under his over-arching "best interests" analysis.

[114] On appeal, the Minister, supported by the Mi'kmaw Agency, encouraged this Court to decline to address the broader argument advanced by E.M.Y. saying:

> 120. Critically, the Appellant did **not** argue her First Nations' status, culture, heritage or language must be considered with reference to the second criterium for a Secure-Treatment Order.
>
> 121. This is a new legal idea pleaded for the first time on October 21, 2019; it was not argued below.
>
> […]
>
> 167. In short, the Appellant is asking this Honourable Court to make pronouncements on legal issues raised for the first time on appeal, citing authorities provided for the first time on appeal, assuming a factual record that counsel wishes was created in the court below rather than the actual record, all build around a hypothetical scenario that never in fact arose in this case.
>
> […]
>
> 225. In the court below, counsel for the Appellant structured his submissions by arguing the first criterium for a Secure-Treatment Order, the second criterium for a Secure-Treatment Order, and the child's best interests, which included her First Nations' culture, heritage, language and needs.
>
> 226. The Appellant did not blend the "necessity" and "best interests" criteria as she now wishes to do with the recently added 3rd ground of appeal. The judge also ruled on the issue as it was presented to him, which did not tie "necessity" to First Nations' culture, heritage, language or needs.

> 227. [...] If the Court considers the third ground of appeal, the Minister submits it should be considered as it was presented in the Court below, not as the Appellant wishes to argue it in this moot appeal.
>
> [Original emphasis]

[115] I agree with the Minister. This aspect of the challenge to the judge's determination is not properly before this Court, and I decline to address it.

Conclusion

[116] I would dismiss the appeal. Neither the Minister nor intervenor sought costs. None are ordered.

Van den Eynden, J.A.

Concurred in:

Beaton, J.A.

Concurring reasons for judgment: (Wood, C.J.N.S.)

[117] I have had the opportunity to review a draft of the decision of Van den Eynden, J.A., and I agree with her careful reasons that dispose of the second and third grounds of appeal and that the appeal should be dismissed.

[118] I would also dismiss the first ground of appeal but for different reasons. In my opinion, the hearing judge erred in his interpretation of *Rule* 16.02 but not in exercising his discretion to accept the affidavit of Ms. Byrne tendered by the Minister. I will explain how my interpretation differs from that of the hearing judge and Van den Eynden J.A..

[119] *Rule* 16.02 applies to all proceedings in the Family Court. For this reason, my analysis will start with wording of the *Rule* itself and its context in the *Family Court Rules* as a whole. After this, I will apply the *Rule* as I interpret it to the proceeding before Morse, A.C.J. which was an application for a secure treatment order ("STO") pursuant to s. 56 of the *Children and Family Services Act* ("*CFSA*").

Interpretation of *Rule* 16.02

[120] *Rule* 16.02 is of general application, its meaning does not change depending upon the subject matter of the proceeding. For ease of reference, I will set it out:

> **Contents of affidavit**
>
> 16.02 (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds of those beliefs.
>
> (2) Unless the court otherwise orders, an affidavit used on a hearing must contain only those facts that the deponent is able to prove from the deponent's own knowledge.

[121] This *Rule* describes the information which can be included in an affidavit. 16.02(1) permits the deponent, in an affidavit used on an "application", to state their belief provided they identify the source and grounds of that belief. 16.02(2) deals with affidavits used on a "hearing", which must be limited to facts within the knowledge of the deponent unless the court otherwise orders. The issue raised by the parties before the hearing judge and on appeal is the meaning to be given to the words "application" and "hearing" in this *Rule*.

[122] Application is defined in *Rule* 1.04(2):

> 1.04 (2) in these *Rules*, "application" has the same meaning as "motion" in the *Civil Procedure Rules* unless the context otherwise requires.

[123] *Civil Procedure Rule* 22.01(1) defines a motion as an interlocutory step in a proceeding and not an original proceeding. As a result, in the *Family Court Rules*, application refers to an interlocutory step in a proceeding unless the context otherwise requires.

[124] *Rule* 1.05 also includes a definition of application. It reads:

> 1.05 in these *Rules*, unless the context otherwise requires,
>
> …
>
> "application" means a proceeding started by filing a notice of application or notice of variation application.

[125] This *Rule* also defines hearing:

> "hearing" means the hearing of an application or a trial.

[126] The combined effect of *Rules* 1.04(2) and 1.05 is that "application" is used to describe two different things. The first is an interlocutory step in a proceeding and the second is the type of proceeding itself. Which of these definitions is used in any particular provision will depend upon the context.

[127] According to *Rule* 6.05(1)(a), a person wishing to start a proceeding in Family Court must file a notice of application or a notice of variation application. Such proceedings are, by definition, "applications" (*Rule* 1.05). In addition, parties to a proceeding in the Family Court are referred to in the *Rules* as applicants and respondents.

[128] As indicated by *Rule* 1.04(2), there are some instances where the use of "application" in the *Rules* describes an interlocutory step in the proceeding. For example, a party may seek disclosure of documentation from another person by making an application (*Rule* 6.13(6)). In addition, the transfer of a proceeding to another court in a different district may take place on the application of a party (*Rule* 7.01(3)). Also, an *ex parte* application may be made during the course of a hearing (*Rule* 7.06(2)(d)).

[129] When *Rule* 16.02(1) is considered the question arises as to whether "application" is used to describe the overall proceeding or an interlocutory step within that proceeding. If it is the proceeding itself (as found by the hearing judge) then affidavits based upon belief may be used throughout. However, since applications are the only type of proceeding described in the *Family Court Rules* this would permit such affidavits in all matters. In my view, this could not have been the intent of the drafters of the *Rules*. This becomes apparent upon an examination of *Rule* 16.02(2).

[130] 16.02(2) applies to a hearing, which is the court appearance at the conclusion of a proceeding. *Rule* 14 sets out the procedures for a hearing including witnesses, subpoenas, production of documents, etc. In the Family Court all proceedings which are commenced as applications conclude with hearings. According to *Rule* 16.02(2), affidavits used on those hearings must be based upon the first hand knowledge of the deponent unless the court otherwise orders.

[131] If "application" in *Rule* 16.02(1) refers to the proceeding rather than an interlocutory step, an affidavit based upon belief would be permissible at the concluding court appearance. In other words, at the hearing. This contradicts the provisions of *Rule* 16.02(2) which limit affidavits at hearings to personal knowledge.

[132] In my view, the proper interpretation of 16.02, when assessed in the context the entire *Family Court Rules,* is that affidavits used on interlocutory applications may be based upon belief; but at the final hearing they are to be limited to the deponent's own knowledge unless the court orders otherwise. When interpreted in this fashion there is no contradiction between the subsections of 16.02.

[133] Having determined the appropriate interpretation of *Rule* 16.02, I will now consider its application to the proceeding before the hearing judge.

Secure Treatment Order Proceeding

[134] The proceeding whereby the Minister obtains an STO is an application which results in a hearing. This is clear from section 56 of the *CFSA* which authorizes the issuance of such an order. That section provides, in part:

> **Secure-treatment order**
>
> 56 (1) The Minister or an agency with the consent of the Minister may make an **application** to the court for a secure-treatment order in respect of a child in care.
>
> (2) The Minister shall serve the **application** upon the child and upon the nearest legal-aid office.
>
> …
>
> (3) After a **hearing**, the court may make a secure-treatment order in respect of the child for a period of not more than forty-five days if the court is satisfied that
>
> (a) the child is suffering from an emotional or behavioural disorder; and
>
> (b) it is necessary to confine the child in order to remedy or alleviate the disorder.
>
> [emphasis added]

[135] In addition, *Rules* 24.18 to 24.25 deal specifically with applications for STO's in the Family Court. There are multiple references to the proceeding being an application that concludes with a hearing. By way of illustration, I simply note *Rule* 24.22 which provides:

> **Hearing of application for secure-treatment order**
>
> 24.22 (1) A secure-treatment proceeding is commenced by the secure-treatment applicant filing a secure-treatment **application** in Form 24.22A,

> supported by an affidavit setting out the evidence relied on by the secure-treatment applicant for a determination that
>
> (a) The child is suffering from an emotional or behavioural disorder; and
>
> (b) It is necessary to confine the child in order to remedy or alleviate the disorder.
>
> (2) Service of the application for a secure-treatment order and supporting affidavit must be effected by personal service at least 2 days before the **hearing**, unless service is waived, before or at the **hearing**, by the child, the legal aid office or the court.
>
> [emphasis added]

[136] It is clear from both the *CFSA* and the *Rules* that an application for an STO is dealt with at a hearing which means that *Rule* 16.02 (2) applies. Affidavits used are to be based upon the deponent's personal knowledge unless the court orders otherwise.

Analysis and Disposition

[137] The hearing judge's decision was that the matter before him was an application within the meaning of *Rule* 16.02(1). His reasoning was as follows:

> As I noted, on July 18, I have indeed referred approvingly to Judge Levy's decision in some instances when dealing with a pretrial motion to strike various provisions in an affidavit in accordance with the Family Court Rules. However, as I believe I made clear on July 18, it is extremely important to recognize that Judge Levy's decision was clearly rendered in the context of a case that had proceeded to contested trial and not an application.
>
> I believe this distinction is critical and supported by the definition section of the Family Court Rules which clearly indicates is per Rule 1.05, that hearing has…the word "hearing" has dual meaning. Under the Family Court definition, it means the hearing of an application or a trial. And both Rule 1.05 and 16.02 recognize and confirm, therefore, a distinction between an application as opposed to trial.
>
> And what I'm doing at this point is I'm trying to paraphrase but in a much more summary way, Mr. Sheppard, the reasoning and … that I used for purposes of my decision on July 18. So…
>
> MR. SHEPPARD: Of Course.
>
> THE COURT: …do not, for a moment, think that I am able to give it word for word in an identical manner because it's just simply not possible. I have

> had the opportunity to review my notes, but I've had to obviously do a redraft for purposes of this case.
>
> In addition, I would suggest that the language of Section 55(4) is clear in indicating and confirming that an application for secure-treatment order involves hearing of an application as opposed to a trial, because that's exactly what the provision states. Again, the distinction is important and reflects the realities associated with the time limited procedures prescribed by the legislation as applicable to issuance of secure-treatment certificates and determination of applications for secure-treatment orders.
>
> The timeline imposed by the legislation simply does not permit or allow for pretrial disclosure processes or motions as provided for under the Family Court Rules applicable to hearings/trials. So when I'm saying "hearings" in that sentence, I'm really talking about a trial. The abbreviated timeline necessitates that the proceeding be dealt with as an application and that Rule 16.02(1) applies. And that is obviously stated as a conclusion for purposes of this decision.
>
> To be perfectly clear, the respondent … the Court, sorry rejects the respondent counsel's submission that a secure-treatment hearing falls within the meaning of "hearing" as contemplated by Family Court Rule 16.02(02). It is, in fact, and application.
>
> Now if I am wrong, as I did on July 18th, I would confirm that, in the alternative, I would choose to exercise my discretion as referred to or as conferred by … confirmed by 16.02(2) in favour of the Minister and allow the matter to proceed to trial …sorry, proceed to hearing on the basis of Ms. Byrne's affidavit as filed on behalf of the Minister.

[138] As this passage indicates, the judge made a distinction between trials and applications and concluded that hearings only relate to trials. With respect, that is not what the *Rules* say. According to these, all applications end up in hearings. In addition, the hearing judge never explained why the appearance before him, which is referred to as a hearing in both the *Rules* and the *CFSA*, was not also a hearing for purposes of *Rule* 16.02(2).

[139] In his analysis the hearing judge never attempted to harmonize the interpretation of the subsections of *Rule* 16.02. Had he done so he should have concluded that 16.02(1) was referring to interlocutory matters and 16.02(2) to final hearings. Instead he erred in adopting an interpretation of the *Rule* which leads to an internally inconsistent result.

[140] Despite erring in his interpretation of *Rule* 16.02, the hearing judge went on to make the alternative finding that if the matter was governed by 16.02(2) he would exercise his discretion and permit the affidavit of Ms. Byrne to be filed

based upon her information and belief. Such a conclusion was available to him in the circumstances, taking into account the nature of the proceeding, the short timelines and the contents of the affidavit. His discretionary decision to accept the affidavit in the form submitted is entitled to considerable deference and I would not interfere with it. For this reason, I would join with my colleagues and dismiss this ground of appeal.

Wood, C.J.N.S.