NOVA SCOTIA COURT OF APPEAL

Citation: *A.B. v. Nova Scotia (Community Services)*, 2022 NSCA 24

Date: 20220324
Docket: CA 510434
Registry: Halifax

Between:

A.B.

Appellant

v.

The Minister of Community Services

Respondent

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

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	February 16, 2022, in Halifax, Nova Scotia
Cases Considered:	*S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46; *Nova Scotia (Minister of Community Services) v. A.S.* (1995), 144 N.S.R. (2d) 71; *Nova Scotia (Community Services) v. J.E.*, 2010 NSSC 422; *Slawter v. Bellefontaine*, 2012 NSCA 48; *H.A.N. v. Nova Scotia (Community Services)*, 2013 NSCA 44; *Nova Scotia (Community Services) v. T.L.*, 2019 NSSC 182; *Nova Scotia (Community Services) v. C.K.Z.*, 2016 NSCA 61; *Yar v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 1017; *R. v. Abbey*, [1982] 2 S.C.R. 24; *Nova Scotia (Community Services) v. S.E.L.*, 2005 NSCA 55; *Nova Scotia (Community Services) v. V.A.H.*, 2019 NSCA 72; *Roué v. Nova Scotia*, 2013 NSSC 45;
Subject:	Child Protection – Permanent Care Order – Child in Need of Protection – Expert Evidence

Summary: Appeal from Permanent Care and Custody Order with respect to a young high-needs child, G.B. G.B.'s mother, A.B., had a history of involvement with Community Services relating to neglect of her children. In November 2019, three of her children were taken into care. A.B. accepted services and by agreement between the parties, had made substantial improvements. One child was returned to her. Another went to live with relatives. Relying on a social worker who had not done a parental assessment nor seen any interaction between A.B. and G.B., the judge decided that G.B. was in need of protective services owing to "substantial risk of physical and emotion harm and neglect" and granted the Minister's requested order.

Issues:

(1) Did the judge unfairly make findings on matters not pleaded or argued?

(2) Did the judge err in finding the Minister proved that G.B. had suffered or was at substantial risk of suffering physical harm, emotional abuse or neglect caused by A.B.?

(3) Did the judge err in finding A.B.'s improvements were not durable?

Result: Appeal allowed. A.B.'s complaint about unfairness is moot because the evidence did not support the findings complained of. Although G.B. had high needs, the Minister did not prove that G.B. remained in need of protective services. There was no evidence since G.B. was taken into care and A.B. had engaged in services that G.B. was at risk of harm or neglect from A.B. The judge speculated that because A.B.'s improvements were "untested" she could not care for G.B. No contemporary evidence supported this conclusion.

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Judges:	Farrar, Bryson and Derrick JJ.A.
Appeal Heard:	February 16, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson J.A.; Farrar and Derrick JJ.A. concurring
Counsel:	Seamus Murphy, for the appellant Sarah Lennerton, for the respondent

Prohibition on publication

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] A judge of the Supreme Court (Family Division) ordered an eight-year-old boy into the permanent care and custody of the Minister of Community Services, despite the young boy's mother successfully completing all services required and provided by the Minister. The mother, A.B., says the Honourable Justice Jean Dewolfe erred in fact and in law in finding that her son, G.B., was in need of protective services, adding the judge failed to make an order in the child's best interests.

[2] In order to permanently remove a child from a parent's custody it must be apparent both that the child is being harmed or is at risk of harm and the harm has been caused by the parent's act or omission. In practice this means considering the needs of the child and the ability of the parent to meet those needs.

[3] In this case, the judge was aware of G.B.'s high needs. Unfortunately, as these reasons will disclose, the judge disregarded the evidence of A.B.'s parenting progress and assumed that A.B. could not care for her son.

[4] A.B. says the judge erred:

1. By unfairly making findings on issues not pleaded or argued;
2. By confusing "emotional abuse" with "emotional harm";
3. By finding that G.B.'s brother, L., emotionally or physically abused G.B.;
4. By finding the changes made by A.B. were not durable;
5. In her treatment of the evidence of expert witness, Shannon Hartlen.

[5] These grounds directly and indirectly attack the finding that G.B. was in need of protective services. A permanent care order may only issue if a child is in

need of protective services. That need may be established if a child has suffered some form of harm or is at substantial risk of suffering harm, as defined in s. 22 of the *Children and Family Services Act*, S.N.S. 1990, c. 5. So the issue on appeal is whether the judge erred in finding G.B. had suffered or was at substantial risk of suffering physical harm, emotional abuse or neglect owing to acts or omissions of A.B.

[6] The Order signed by the judge was less broad, citing only ss. 22(2)(b) and (j) of the *Act*, which describe "substantial risk" of physical harm and experiencing neglect by a parent, respectively.

[7] For convenience, the issues should be restated:

1. Did the judge unfairly make findings on matters not pleaded or argued?
2. Did the judge err in finding the Minister proved that G.B. had suffered or was at substantial risk of suffering physical harm, emotional abuse or neglect caused by A.B.?
3. Did the judge err in finding A.B.'s improvements were not durable?

[8] A.B.'s fifth issue dealing with the evidence of Shannon Hartlen will be addressed in the context of issues 2 and 3.

[9] Before addressing each issue the facts will be summarized and the duty of the court at a permanent care hearing will be reviewed.

Factual Summary

[10] A.B. is a 29-year-old mother of four children, three of whom, G.B., C. and L., were taken into care on November 22, 2019, when the present proceeding began. The fourth child was never taken into care as she has been living with A.B.'s stepmother and father.

[11] G.B. is a child with high needs. He has a mild intellectual disability and significant learning challenges. He is being assessed for autism. He has epilepsy and regularly sees a pediatric neurologist. He attends speech and occupational therapy. He has an individualized learning programme at school and a full-time teaching assistant.

[12] Proceedings regarding the two other children were terminated by consent in April of 2021. One child was returned to A.B.'s care and the other placed in the care of A.B.'s stepmother and father.

[13] At the time the children were taken into care, A.B. acknowledges she had relapsed into drug use and was partnered with someone who had physically assaulted her children. The children's living conditions were described as "appalling".

[14] Fortunately for all concerned, A.B. made a successful effort to improve as the judge recognized:

> Ms. [A.B.'s] evidence, supported by her stepmom and her current partner, is that she has made significant improvements in her life since April 2020. This is supported by the Minister.

[15] A.B. had taken responsibility for her past behaviour, made significant changes that improved her ability to care for her children, escaped from an abusive relationship and entered into a new relationship which was described as "healthy". She moved to more suitable accommodation, obtained a job, and became more financially secure. More recently, concerns were raised about the past behaviour of A.B.'s new partner relating to a minor, two years ago. The new partner has been charged with sexual assault and sexual interference. As a result, he was moved out of A.B.'s home and has no contact with her children.

[16] A.B. accepted services offered by the Minister. She worked on and greatly improved her parenting skills. She enjoys a much healthier support network which now includes her father and stepmother and siblings who before she had kept at a distance. A.B. followed through with all services offered by the Minister and developed a positive relationship with her counsellor, Yvonne Lombard.

[17] A.B.'s improvements are described in an Agreed Statement of Facts filed with the court, designed to narrow the issues at the hearing:

> 2. The Respondent, [A.B.] has made significant improvements following the completion of the Parental Capacity Assessment. In particular, [A.B.] has obtained full-time employment in the service department of [T.F.] (although currently laid off due to shortage of work), entered into a long-term relationship with [T.R.], which relationship has been in existence now for more than one year. [A.B.] has also been able to purchase a vehicle, has fully participated with her counsellor, Yvonne Lombard, and has co-operated fully with the Minister and in

> particular with the Family Support Program, conducted by Leslie Cranley-Blades. [A.B.] has also participated in all of the access visits with her children that have been offered to her.
>
> 3. [A.B.'s] visits with her son, [G.B.], have been positive in terms of bonding and affection in both directions.
>
> 4. That [G.B.] had advised Social Worker, Nicole Muise, on May 3rd, 2021, that he likes to visit with his mom, that he likes to see [L.], [C.] and [A.] and that he feels safe at his mom's house and in the company of [L.]. ([A.] is his older sibling and she lives with the maternal grandparents).

[18] Notwithstanding all A.B.'s successful improvements, the judge found that the G.B. was in need of protective services because he was "at substantial risk of physical and emotional harm and neglect as defined by section 22(2) of the *Act*". The judge never explained what she meant by this finding. The *Act* refers to emotional abuse, not harm. The Minister had not argued a risk of emotional abuse or harm. As previously mentioned, this finding does not accord with the Order, which says nothing of emotional abuse. Moreover, the s. 22(2)(j) definition of "neglect" is expressed in the present tense and the child's experience of neglect must be caused by a parent or guardian. There was no such contemporary evidence of neglect caused by A.B. and, apart from the judge's quoted cryptic language, no such finding.

[19] Before addressing the specific grounds of appeal, it will be useful to review the court's obligations at a permanent care hearing.

Duty of the Court at Permanent Care Hearing

[20] In *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46, the Court quoted often-cited jurisprudence describing the duty of the court at a permanent care hearing:

> [33] Cromwell J.A. described the trial judge's obligations at a disposition hearing in *Nova Scotia (Community Services) v. A.S.*, 2007 NSCA 82:
>
> > [11] Under appeal is a permanent care order made at a final disposition hearing. There is no dispute about the judge's role at that disposition hearing: he had to determine whether the child continued to be in need of protective services and, if so, to make an order in the child's best interests: see, for example, *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, [1994] 2 S.C.R. 165; *Children's Aid Society of Halifax v. T.B.*, 2001 NSCA 99, 194 N.S.R. (2d) 149 (C.A.) at para. 26; *Nova Scotia (Minister of Community Services) v. D.W.S.*, [1996] N.S.J. No. 349 (Q.L.),

> 168 N.S.R. (2d) 27 (F.C.) at paras. 320 - 324; *Nova Scotia (Minister of Community Services) v. F.A.*, [1996] N.S.J. No. 447 (Q.L.) (F.C.) at paras. 21 - 22.
>
> . . .
>
> [17] The second critical part of the context relates to the effect of the findings earlier in the process that the child was in need of protective services. At the final disposition hearing, it is not the judge's function to reconsider these earlier determinations: those previous findings must be accepted at face value. They are assumed to have been properly made at the time they were: *G.S. v. Nova Scotia (Minister of Community Services)*, 2006 NSCA 20, 241 N.S.R. (2d) 148 (C.A.) at para. 19. At the final disposition hearing, the judge is to consider whether the need for protective services continues at that time. As Chipman, J.A. put it in *Nova Scotia (Minster of Community Services) v. S.E.L. and L.M.L.*, 2005 NSCA 55, 184 N.S.R. (2d) 165 (C.A.) at para. 20: "... Once a finding of the need for protection has originally been made, there is still the requirement ... to consider whether the child is or is no longer in need of future protection. Children's needs and circumstances are continually evolving and these ever changing circumstances must be taken into account."
>
> [18] In summary, ***two of the key issues at the final disposition hearing are to determine whether the child remains in need of protective services and what order is required in the child's best interests***. The issue of the ongoing need for protective services is not to be considered in a vacuum, but in light of the previous findings of the court which must be taken as having been right at the time they were made. The nature of the order required in the child's best interests must take into account the time limitations in the statute.

[34] Although the onus of establishing that a child remains in need of protective services is always on the Agency, this must take into account previous findings of the court. In *A.S.*, Justice Cromwell explains:

> [52] The judge was clearly alive to the requirement for him to determine whether the child remained in need of protective services. He made a clear finding in this regard at paragraph 7 of his reasons where he indicates that the agency had met its burden to show "throughout the proceeding" that the child remained in need of protective services under s. 22(2) of the *CFSA*. [Justice Cromwell's emphasis]
>
> [53] ***The judge's reasons reflect that he essentially was looking for positive change in the appellant's ability to parent the child. This was the right approach given the number and the recency of the findings that the child continued to be in need of protective services.*** As noted, there had been several such findings, all with the appellant's consent and none challenged in any way. The appellant was represented by counsel

> throughout. In addition, the transition orders specified, with the appellant's consent, that her non-compliance with the orders would be grounds for the agency to take the child back into care. After the second attempted transition failed, the child was again taken into care and a further temporary care and custody order was made. At that time, the appellant consented to the order, including a provision that the Court found there to be reasonable and probable grounds to believe that the child was at substantial risk of harm pursuant to s. 22(2) of the *CFSA*. As discussed earlier, the judge was not only entitled, but obliged, to consider that these orders were correct at the time they had been made.
>
> [Emphasis in original]

[21] The emphasized language of Cromwell J.A. (as he then was) in *A.S.* is apposite here. G.B. is a child with many needs. Central to this case is whether A.B. had sufficiently improved her parenting skills to be able to meet G.B.'s needs so that he would not require protective services. Unlike *S.R.* and other cases with similar concerns, there is no expert or firsthand evidence in this case of A.B.'s inability to adequately parent G.B., but there is unanimous agreement that she successfully implemented all support services offered her.

[22] Keeping in mind the emphasized passages in *A.S.*, above, the Minister never established that after G.B. was taken into care in 2019, A.B. caused or contributed to any harm, neglect, abuse or substantial risk of harm or abuse to G.B.

Did the judge unfairly make findings?

[23] A.B. is correct that the judge based her decision on some issues not pleaded or argued by the Minister. Emotional harm (abuse) was not alleged or argued. A.B.'s progress and development as a parent was not in issue. The judge's concern about possible physical or emotional abuse by G.B.'s brother was not argued. Nevertheless, a judge is entitled to consider all protection grounds even though not pleaded (*Nova Scotia (Minister of Community Services) v. A.S.* (1995), 144 N.S.R. (2d) 71 at ¶9). The Minister may argue any grounds for the continuing need of protective services, supported by the evidence (*Nova Scotia (Community Services) v. J.E.*, 2010 NSSC 422 at ¶8).

[24] On the other hand, it may be an error of law for a judge to decide a case on issues the parties had no opportunity to argue (*Slawter v. Bellefontaine*, 2012 NSCA 48 at ¶18). In this case, these objections are moot because the evidence did not support the findings made. For similar reasons, A.B.'s objections regarding the

alleged confusion between emotional abuse and harm can be addressed in relation to the evidence which did not sustain any finding of emotional abuse.

Physical Harm, Emotional Abuse, Neglect

Physical Harm

[25] Section 22(2) says a child is in need of protection services when:

> (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;
>
> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

[26] The *Act* defines "substantial risk" as a "real chance of danger that is apparent on the evidence". In *H.A.N. v. Nova Scotia (Community Services)*, 2013 NSCA 44, the Court expanded on the meaning of substantial risk as follows:

> [39] […] Section 22(1) says that "substantial risk" means "a real chance of danger that is apparent on the evidence". The standard does not require that the judge be satisfied the future risk will materialize. But the judge must be satisfied, on the balance of probabilities from the evidence, that there exists a real possibility the risk will materialize: *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64, para 77. *G.M. v. Children's Aid Society of Cape Breton-Victoria*, 2008 NSCA 114, para 37. Expert evidence, though often helpful, is not essential to satisfy the standard: *Nova Scotia (Minister of Community Services) v. B.M.*, [1998] N.S.J. No. 186 (C.A.), para 80; *J.G.B. v. Nova Scotia (Community Services)*, 2002 NSCA 86. […]

Emotional Abuse

[27] Section 22(2)(g) provides that a child is in need of protective services for emotional abuse where:

> (g) there is substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;

[28] Section 3(1)(la) defines emotional abuse:

> (la) "emotional abuse" means acts that seriously interfere with a child's healthy development, emotional functioning and attachment to others such as
>
> (i) rejection,
>
> (ii) isolation, including depriving the child from normal social interactions,
>
> (iii) deprivation of affection or cognitive stimulation,
>
> (iv) inappropriate criticism, humiliation or expectations of or threats or accusations toward the child, or
>
> (v) any other similar acts;

[29] Justice Forgeron noted the challenge of making such a finding in *Nova Scotia (Community Services) v. T.L.*, 2019 NSSC 182:

> [22] A finding of a substantial risk of emotional abuse is not one that will be entered lightly. It involves both objective and subjective elements. The parental conduct must be viewed objectively to prove actions that seriously interfere with a child. The parental conduct must also be viewed subjectively based on the impact that the conduct has or will likely have on the specific child.

Neglect

[30] Section 22(2) of the *Act* says a finding of protective services can be based on neglect when:

> (j) the child is experiencing neglect by a parent or guardian of the child;
>
> (k) there is a substantial risk that the child will experience neglect by a parent or guardian of the child, and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the harm;

[31] The acts of harm complained of must be "clearly linked to the actions, failure to act, or inability to act of the adults responsible for the child's care" (*Nova Scotia (Community Services) v. C.K.Z.*, 2016 NSCA 61 at ¶47).

[32] So what is the physical harm, emotional abuse or neglect that G.B. has suffered or the substantial risk of suffering for which A.B. would be responsible? The judge did not say. Her concerns focused on apparent "trauma" which she seems to equate primarily with emotional abuse. At no point in her decision does the judge link any of what she generically describes as "emotional" abuse or harm to any act or omission of A.B. This is an error of law.

[33] There was no finding and no basis for a finding of neglect of G.B. by A.B.

[34] The judge initially acknowledged G.B.'s favourable experiences with his mother:

> The Agreed Statement of Facts notes that while [G.B.] was in a place of safety prior to April of 2020, his behaviours did not escalate on return from visits with his mom. Workers did note an escalation when transitioning [G.B.] to the foster parent's home after April 2020. The Agreed Statement of Facts also notes [G.B.]'s comments to worker Ms. Muise on May 3rd, 2021 in which he said he likes to see his mom and siblings and feel safe at his mom's house and in [L.'s] company.

[35] But then the judge adverted to what she considered contrary evidence from Ms. Hartlen:

> These facts on the surface appear to be at odds of Ms. Hartlen's opinion. However, the Court notes that Ms. Hartlen's work with [G.B.] did not commence until seven months after he had begun residing in the foster home. The Court also notes that given [G.B.'s] level of functioning and young age, a single comment cannot be given much weight. No one argues, in fact, that [G.B.] does love his mom and his siblings and that access with her overall has been very positive.
>
> However, the Court finds that Ms. Hartlen's evidence is ... to be professional and objective. No one disputes the trauma [G.B.] endured due to Ms. [A.B.'s] inadequate parenting. Ms. Hartlen considered the report she received from both the foster mother and the school, as well as her own observations. She reviewed this evidence from a trauma-informed perspective. She is well qualified to do so. I accept her opinion that [G.B.] is triggered by seeing his mother and [L.] and that this is harmful to him.
>
> […]
>
> In addition, the Court has concerns with the relationship between [G.B.] and [L.] and Ms. [A.B.'s] insight into the risk that [L.] poses to [G.B.]. Not necessarily from sexual abuse but of emotional and physical abuse as well. No doubt [G.B.] loves his brother, but I echo Ms. Hartlen's concerns as to [G.B.]'s ability to navigate his relationship with [L.] and Ms. [A.B.'s] ability to protect [G.B.] even with only daytime contact or with locks and alarms on the doors.

[36] First, it must be noted that the "trauma" the judge describes predates these proceedings and ignores A.B.'s improvements to which the parties agreed and which the judge had conceded.

[37] Second, most of Ms. Hartlen's evidence relied on stale information from others. She drew inferences from older case notes and what G.B.'s foster mother told her about G.B.'s "dysregulated" behaviour. But she had very little direct experience of G.B. and virtually no experience with G.B.'s mother, A.B. Ms. Hartlen was not retained to do a parental assessment of A.B. Initially, she provided counselling to G.B. Later she was asked to prepare a "report outlining my impressions of how [G.B.] is being impacted by visits with his mother, an outline of his needs, and the nature of his placement with current foster parents".

[38] The judge had earlier noted that Ms. Hartlen's testimony was central to the Minister's case. It was also central to the judge's decision. But the evidence of an expert must accord with her expertise and be based on established facts. Ms. Hartlen was not asked and did not have any factual foundation to offer any opinion on A.B.'s parenting skills.

[39] Ms. Hartlen relied on hearsay in dated case notes not placed in evidence and of which A.B. was unaware. While hearsay can be referred to by an expert as context for an opinion, that hearsay cannot generally be received for its truth (*Yar v. College of Physicians and Surgeons of Ontario*, [2009] O.J. No. 1017 at ¶50; *R. v. Abbey*, [1982] 2 S.C.R. 24 at ¶52). In this case, the authors of the notes were not called and no motion was otherwise made for their admissibility.

[40] In fact, it may not have been easy to have all the notes admitted. During the relatively brief period when G.B. was in the Minister's care, numerous people were involved in the case.

[41] Social worker Nicole Muise noted:

> […] because the file went through four different social workers and three different supervisors things were missed and it is before the court that we'd be offering [A.B.] more access.

[42] Ms. Muise admitted under cross-examination that children's interviews were sometimes not documented. Notes were missing from the file.

[43] Notwithstanding the problems with Ms. Hartlen's evidence the judge relied heavily on it when she identified what appears to be two possible sources of concern: A.B.'s visits with G.B. and the relationship between G.B. and his brother, L. Each will be considered.

A.B.'s Visits With G.B.

[44] The judge ascribed to Ms. Hartlen the opinion that "G.B. is triggered by seeing his mother and [L.] and that this is harmful to him". Ms. Hartlen noted that G.B.'s foster mother said G.B. could become "dysregulated" after visits with A.B. But this was never attributed to poor parenting by A.B. In her May 3, 2021 Report, she imputed the opinion of "triggering" to others. "It was suggested that visits with brothers were most triggering and [G.B.'s] individual visits with Ms. [A.B.] were 'fine'". Ms. Hartlen did not adopt this opinion.

[45] In cross-examination, social worker Nicole Muise agreed that G.B.'s behaviour after visiting A.B. "didn't seem to have anything to do with the visits". Shannon Hartlen also acknowledged in cross-examination:

> **Q.** Thank you. Okay, and in terms of your impressions of how [G.B.] is being impacted by visits with his mother. So was it part of your task to determine whether the behaviours in question were, in fact, caused by visits with his mother or more to explain why they might be happening? What do you consider your task to be in that respect?
>
> **A.** My understanding was why they might be happening.
>
> **Q.** Okay, so you wouldn't have necessarily been looking to question whether they were, in fact, caused by the visits or not. Is that fair?
>
> **A.** I would ... I guess that's fair, yes

[46] Ms. Hartlen never said that visits between A.B. and G.B. were harmful to G.B. In fact, she favoured giving A.B. "more consistent opportunity to prove or disprove her ability to care for [G.B.]" provided that appropriate supports were in place. But, as discussed further below, the Minister did not facilitate that opportunity.

[47] Moreover, the judge's finding that A.B.'s visits with G.B. were harmful to G.B. is inconsistent with the Agreed Statement of Facts entered into between the parties which, to repeat, provided, amongst other things:

> 3. [A.B.'s] visits with her son, [G.B.], have been positive in terms of bonding and affection in both directions.
>
> 4. That [G.B.] had advised Social Worker, Nicole Muise, on May 3rd, 2021, that he likes to visit with his mom, that he likes to see [L.], [C.] and [A.] and that he feels safe at his mom's house and in the company of [L.]. ([A.] is his older sibling and she lives with the maternal grandparents).

[48] The judge's conclusion of harm is a clear and material error of fact.

Relationship Between G.B. and L.

[49] During cross-examination, Ms. Hartlen said the main reason for not recommending return of G.B. to A.B. related to some reports of sexual touching of G.B. by his brother, L., and the mother's "siding" with L.

[50] She described a "superficial" meeting with A.B. about the sexual touching, but acknowledged that A.B. took the initiative to arrange the meeting. Although she thought the meeting was "superficial", she did not think it was her role to offer any insight to A.B. She was just there "to answer questions".

[51] Ms. Hartlen was unaware of the steps A.B. had proposed to take to mitigate any risk to G.B. from L., by arranging for L. to live with A.B.'s father and step-mother and to supervise G.B. and L. when they were together. When told, Ms. Hartlen conceded those steps alleviated her concerns, although she felt that A.B. needed support if she were to care for G.B.

[52] Though the judge worried about the relationship between G.B. and his 11-year-old brother, L., "[n]ot necessarily from sexual abuse but of emotional and physical abuse as well", she does not say what that would be. The best the judge could do was observe:

> Ms. Hartlen also noted [G.B.'s] comments about [L.] being mean to him and she expressed concern that [G.B.] may experience aggression from [L.].

[53] The Minister made no submissions to the judge alleging risk of physical or emotional abuse from L. Concern about possible aggression from L. is not emotional or physical abuse. There was no evidentiary foundation for a finding of a substantial risk of either.

[54] G.B.'s comments about L. were hearsay and the alleged behaviour of L. was not noted by any of the aide workers who could have witnessed it. Unless related to acts or omissions of A.B., such conduct does not meet any definition of physical or emotional abuse for which A.B. can be held responsible. Nor does it accord with the Agreed Statement of Facts (¶17 above).

[55] When the judge concluded that G. was at "substantial risk of physical and emotional harm and neglect as defined by section 22(2) of the *Act*", neglect appeared for the first time. The judge made no finding that A.B. failed to provide services or alleviate harm to G.B. There is no evidence in the record showing any neglect of G.B. by A.B. once she successfully engaged with the services offered

her. Two instances of inappropriate sexual contact from L. were mitigated by A.B. which the judge seemed to accept when she observed "[n]ot necessarily from sexual abuse but of emotional and physical abuse as well". She made no finding of substantial risk of sexual abuse (s. 22(2)(c) and (d)).

[56] At no point in her decision does the judge link any of what she generically describes as "emotional" abuse or harm to any act or omission of A.B. This was an error of law.

A.B.'s Improvements Not Durable?

[57] The judge challenged A.B.'s capacity to meet G.B.'s needs:

> The question before this court is whether the Minister has proven on a balance of probabilities that a return of [G.B.] to Ms. [A.B.'s] care continues to pose a substantial risk to [G.B.] as defined by the Act; that is, a real chance of physical or emotional harm or neglect as indicated on the evidence. The past parenting history is relevant but not determinative to the present circumstances.
>
> The Court is required to make a disposition that is in the child's best interest as defined by the Act. [G.B.] is a young boy with significant delays and high needs due in large part to his chaotic and neglectful upbringing. Ms. [A.B.] asks for another chance to parent [G.B.]. Ms. [A.B.] has had child protection involvement for over 13 years. She was a child herself when she became a mom. Her judgment and insight has been severely lacking, and the conditions in which her children lived have been very damaging.
>
> [G.B.] is very vulnerable. I accept Ms. Hartlen's evidence that [G.B.] loves his mom, but his behaviours reflect his knowledge at some level that she has not met his needs in the past. [G.B.] has made progress while in foster care but he is still experiencing three- to four-year delays in all areas of functioning. He requires many resources and an actively engaged caregiver. Ms. [A.B.] still needs to focus on herself and her development. The Court has significant concerns as to her ability to put [G.B.] first.
>
> […]
>
> [G.B.] needs consistent high-quality care. I find that given Ms. [A.B.'s] history and the relative newness and untested nature of her improvements, she cannot adequately parent a child with [G.B.]'s high needs.

[58] Here again, the judge reverted to a history which the Agreed Statement of Facts acknowledged A.B. had overcome. History can preface a current finding of a need for protective services. But it is not a substitute for a current finding of such a need (*Nova Scotia (Community Services) v. S.E.L.*, 2005 NSCA 55 at ¶20).

[59] The judge's reliance on Ms. Hartlen's evidence was misplaced. Because Ms. Hartlen never observed G.B. together with his mother, she had no firsthand basis on which to express any opinion concerning A.B.'s parenting skills regarding G.B. Nor was that her retainer. She never saw the visits or spoke to anyone who did. She never asked A.B. about the visits. She did not speak to G.B.'s teacher. G.B. never told her anything about the visits. She did not even see the evidence before the court.

[60] It is difficult to know exactly why the judge determined that G.B. continued to be in need of protective services. The judge diminished the progress acknowledged by the Minister in the Agreed Statement of Facts stating that A.B. "needs to focus on herself and her development". She did not say how A.B. failed to meet the requirements of the Minister or how her development remained deficient.

[61] There was no evidentiary basis for the judge to question the enduring character of A.B.'s improvements. A.B.'s affidavit of April 30, 2021 detailed her improvements and was supported by affidavits from her stepmother, her partner, and her counsellor, Yvonne Lombard. None were cross-examined. During cross-examination, social worker Nicole Muise agreed that no inappropriate interactions were observed between A.B. and G.B. during visits. As discussed further below, A.B. was not given any reasonable opportunity to parent G.B. It is simply wrong to assume she could not do so.

[62] A.B. can hardly be faulted for a lack of insight into physical or emotional risk when no such risk has been identified in the evidence by the judge.

[63] No examples of inconsistency or unsustained improvement were noted since A.B. had accepted the services of the Minister. A.B. had an older negative history that the parties had effectively agreed to discard, including a negative parental assessment report which was acknowledged to be dated and could not be relied upon.

[64] The parties had already agreed:

> 1. Robert Wright and James Dube, of Halifax, were retained by the Applicant to conduct a Parental Capacity Assessment with respect to the Respondent, [A.B.]. The assessment was completed and is before this Honourable Court. At the present time the Applicant and Respondent agree that Mr. Wright's Report is dated and the Minister is not relying upon the Report at this time with respect to the child, [G.B.].

[65] And to repeat:

> 2. The Respondent, [A.B.], has made significant improvements following the completion of the Parental Capacity Assessment. In particular, [A.B.] has obtained full-time employment in the service department of [T.F.] (although currently laid off due to shortage of work), entered into a long-term relationship with [T.R.], which relationship has been in existence now for more than one year. [A.B.] has also been able to purchase a vehicle, has fully participated with her counsellor, Yvonne Lombard, and has co-operated fully with the Minister and in particular with the Family Support Program, conducted by Leslie Cranley-Blades. [A.B.] has also participated in all of the access visits with her children that have been offered to her.

[66] The judge's scepticism about A.B.'s progress and need to focus on her own development was contradicted not only by the Agreed Statement of Facts but by counsellor, Yvonne Lombard, who testified:

> Ms. [A.B.] made a strong commitment to improving her lifestyle. I am confident she realizes where things went wrong. She presents a very good response to counselling by showing much progress in addressing the initial set goals.

[67] Although case aide workers were present for meetings between G.B. and A.B., the Minister led no evidence of adverse interactions between A.B. and G.B.

[68] The Minister's failure to give A.B. regular and reasonable opportunity to parent G.B. should not prejudice A.B. Put otherwise, the Minister did not prove that A.B. could not care for G.B.

[69] In her evidence, Ms. Hartlen implicitly criticized the Minister's failure to provide G.B. a chance for supervised parenting of G.B. in her letter of May 3, 2021 to the Department of Community Services:

> […] G. has also not had consistent opportunity to be with his mother in a caregiving role for more than approximately 90 minutes at a time and this has been tremendously inconsistent and unpredictable in nature for various reasons including COVID-19, missed appointments, decisions by the agency to suspend visits and high turn-over rates in social workers.

[70] Ms. Hartlen also noted the lack of opportunity to parent G.B. Initially, video-calls were not permitted to accord with the foster mother's privacy concerns. Once visits were restarted in June 2020 they were brief and fully supervised. The Minister agreed to partially supported visits at a court appearance on September 29, 2020, but they never happened until January 17, 2021.

[71] A.B. testified that during this period, the visits were frequently cancelled and not rescheduled. A.B. had to apply for an Order permitting reasonable and regular access. Ignoring the court Order, the Minister eliminated visits after February 28, 2021, only resuming them on April 18, 2021. COVID restrictions disrupted further visits in May 2021 when A.B. only had phone calls with G.B., conceded to be a "waste of time" by Nicole Muise and not "meaningful" by Ms. Hartlen due to G.B.'s cognitive limitations. Moreover, the evidence was that A.B.'s relationship with her other children improved markedly during the spring of 2021. L. was returned to her care and another child, C., expressed a desire to return to A.B.'s care.

[72] Ms. Hartlen's reservations about A.B.'s ability to care for G.B. were not based on evidence, but on a lack of evidence because A.B. was given little opportunity to parent G.B. after having successfully implemented the services afforded her. During her cross-examination, Ms. Hartlen repeatedly explained her ignorance of A.B.'s parenting because assessing that was not her "role". But her opinion that G.B. should not return home to A.B.'s care was key to the judge's permanent care decision that A.B. could not parent G.B. The judge made a clear and material error of fact by adopting Ms. Hartlen's concern in the absence of supporting evidence.

Disposition

[73] Although I would allow the appeal and set aside the Permanent Care and Custody Order, both parties expressed concern about G.B.'s sudden return to A.B.'s care after having been kept from his mother for so long.

[74] The Minister suggests the matter be remitted to the trial court for reassessment of the facts. Even A.B. requests some "transition" arrangements using s. 46(5)(b) of the *Act*. That option is not available.

[75] The Court of Appeal can make any order that the trial court could have made (s. 49(6)(c) of the *Act*). Unfortunately, in this case the statutory timeline was exhausted and the judge either had to dismiss the application or grant the Care and Custody Order (*Nova Scotia (Community Services) v. V.A.H.*, 2019 NSCA 72 at ¶5).

[76] *Rule* 90.48 of the *Civil Procedure Rules* is broader than s. 49(6) of the *Act* and provides in part:

(1) Without restricting the generality of the jurisdiction. Powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:

[…]

(b) draw inferences of fact and give any judgment, allow any amendment, ***or make any order that might have been made by the court appealed from or that the appeal may require***;

[…]

> (e) ***make any order or give any judgment that the Court of Appeal considers necessary***.
>
> [Emphasis added]

[77] The *Rules* have the force of law, equivalent to provincial legislation (*Roué v. Nova Scotia*, 2013 NSSC 45). *Rule* 90.48 may provide a basis for the Court granting some type of transitional order. Alternatively, the Minister may choose to provide services to A.B. to assist with transition of G.B. into A.B.'s care.

[78] I would invite the submissions of the parties on an appropriate form of order.

Bryson J.A.

Concurred in:

Farrar J.A.

Derrick J.A.