FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. M.B.,* 2020 NSFC 4

Date: 2020-03-04
Docket: FAMCFSA No. 108757
Registry: Amherst

Between:

Minister of Community Services

Applicant

v.

M.B., R.S., and J.B.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services act*, S.N.S. 1190, c.5.

Judge:	The Honourable Associate Chief Judge S. Raymond Morse
Heard	December 17, 2019, January 7, 10 and 22, 2020, in Amherst, Nova Scotia
Counsel:	Sanaz Gerami, for the Applicant Anastacia Merrigan, for the Respondent, M.B.

By the Court:

Introduction

[1] M.B. (also known as M.M.) is the mother of three children, C.M., date of birth February **, 20**, J.B., date of birth November **, 20**, and C.B., date of birth June **, 20**.

[2] J.B. is the father of the children J.B. and C.B. The Respondent R.S. is the father of the oldest child, C.M. R.S. was not an active participant during the protection proceeding and was not represented by legal counsel at any point in time.

[3] The three children were the subject of a protection proceeding commenced pursuant to Protection Application and Notice of Hearing dated February 14, 2018.

[4] Pursuant to Review Application and Notice of Hearing dated January 10, 2020, the Minister requested termination orders in relation to the children C.M. and J.B in favor of *Parenting and Support Act* (hereinafter referred to as the *PSA*) orders confirming custody on the part of extended family. The application also confirmed the Minister's request for an order for permanent care and custody in relation to the child, C.B.

[5] The Respondent mother opposes the Minister's request for permanent care and custody and requests that the Minister's application be dismissed and that C.B. be returned to her care.

[6] J.B. had attended the Court hearing held December 17, 2019. At the outset of the proceeding on December 17, 2019, the Court allowed a motion by J.B.'s counsel seeking leave to withdraw as J.B.'s counsel. J.B. did not oppose the motion. The Court explained to J.B. that, as a Respondent, he had the right to participate in the proceeding as a self-represented litigant. J.B. indicated that he did not wish to remain for the hearing but advised the Court that he was supportive of the mother's request for dismissal of the Minister's application for permanent care and custody and believed it would be best if the child were returned to the Respondent mother's care. The Court made it clear to J.B. that the proceeding would move forward in his absence.

[7] The Respondent father, J.B., passed away suddenly on December 26, 2019.

Proceedings

[8] Pursuant to Protection Application and Notice of Hearing dated February 14, 2018, the Minister maintained the children who are the subject of the proceeding were in need of protective services pursuant to subparagraphs (b), (g), and (i) of Section 22(2) of the *Children and Family Services Act* (hereinafter referred to as the "*CFSA*").

[9] The initial interim hearing was held February 21, 2018 before His Honour Judge Moreau (as he then was). At the conclusion of that hearing Judge Moreau made the necessary findings and granted the Minister's request for a Supervisory Order in favor of the Respondent mother. The matter was adjourned for completion of interim hearing on March 14, 2018.

[10] Following the initial hearing the Agency received information that the terms and conditions of the initial supervisory order had been breached, which resulted in a taking into care.

[11] Pursuant to Amended Protection Application and Notice of Hearing dated February 27, 2018, the Minister requested an Order for Temporary Care and Custody. On February 28, 2018 the Court granted the variation as requested by the Minister. The matter remained scheduled for completion of interim hearing on March 14, 2018.

[12] At the conclusion of the March 14 hearing the Court made the necessary findings and granted a Non-Party Supervisory Order in relation to the child J.B. and a further Order for Temporary Care and Custody in relation to the other two children.

[13] A combined pre-hearing and protection hearing was held May 9, 2018. The Court confirmed a protection finding pursuant to Section 22(2)(g) of the *CFSA*, subject to a reservation of rights in favor of the Minister. The Court granted Non-Party Supervisory Orders in relation to the two older children and confirmed a further Order for Temporary Care and Custody in relation to the youngest child, C.B.

[14] A combined pre-hearing and disposition hearing was held on July 25, 2018. Counsel for J.B. and M.B. confirmed that their respective clients were not contesting the Minister's disposition application, subject to a reservation of rights.

The Court granted the Minister's disposition application and confirmed extension of the existing orders for the purposes of initial disposition.

[15] A review hearing was held October 3, 2018. That hearing proceeded on an uncontested basis. The Court granted the Minister's request to maintain the existing orders subject to a reservation of rights in favor of the Respondents.

[16] Pursuant to Review Application and Notice of Hearing dated December 6, 2018, the Minister requested a variation to a supervisory order in relation to all three children in favor of the Respondent mother.

[17] At the review hearing held December 19, 2018, counsel for the Minister advised that the Minister no longer wished to proceed with the variation application and requested that the existing Non-Party Supervisory Orders in relation to the two older children, and the Order for Temporary Care and Custody in relation to C.B. be maintained. Counsel for M.B. advised that M.B. was opposed to the Minister's application and the matter was therefore scheduled for early review on January 23, 2019.

[18] Pursuant to Review Application and Notice of Hearing dated January 10, 2019, the Minister requested termination orders in relation to the two older children in favor of *PSA* orders premised upon placements with extended family, and an order for permanent care and custody in relation to C.B. The Minister's application was supported by supplementary plans of care.

[19] At the review hearing held January 23, 2019, Respondent's counsel suggested that the matter be scheduled for settlement conference. With the agreement of all parties, the Court scheduled the matter for settlement conference on May 24, 2019. In the interim, the Court confirmed that the current orders with respect to the children would remain in force and effect.

[20] At the conclusion of the review hearing held April 17, 2019, the Court granted the Minister's request to maintain the status quo and extended the existing orders.

[21] Subsequently, counsel advised the Court that they felt that a settlement conference would not be useful or productive and, accordingly, the May 24 settlement conference date was vacated.

[22] A pre-trial conference was held May 29, 2019. Counsel for the Minister identified July 25, 2019 as the outside limit for the protection proceeding. The matter was scheduled for review and *pro forma* commencement of final review hearing on July 24, 2019. The matter was scheduled for continuation of contested final review commencing December 17, 2019.

[23] As a result of the appointment of Judge Moreau to Supreme Court Family Division, the July 24, 2019 review hearing was held before His Honour Judge Wilson.

[24] The Review Application and Notice of Hearing, dated January 10, 2019, with attached plans of care was marked and entered as Exhibit 1. Judge Wilson acknowledged that this constituted commencement of the final review hearing on a *pro forma* basis and confirmed that in the interim, pending completion of the final review, the existing orders would remain in force and effect.

[25] A pre-trial was held on October 9, 2019 before Judge Wilson. Judge Wilson approved Interim Orders under the *PSA* in relation to the two older children. In relation to the youngest child, C.B., Judge Wilson confirmed that the existing Order for Temporary Care and Custody would remain in force and effect. The Minister's application for an order for permanent care and custody remained scheduled for continuation on December 17, 2019.

[26] Counsel were subsequently advised of a further telephone pre-trial conference on December 2, 2019, and that the contested final review would proceed on December 17, 2019 at 1:30 pm and continue on January 7, 10 and 22, 2020.

[27] On November 28, 2019, Mr. Muir, counsel for the Respondent father, J.B., advised the Court that he wished to be removed as counsel of record for J.B.

[28] A telephone pre-hearing was held December 2, 2019. The Court deferred decision on Mr. Muir's request for leave to withdraw, indicating that the motion would be determined at the outset of the hearing on December 17, 2019.

[29] On December 17, prior to commencement of the hearing, the Court dealt with Mr. Muir's application for leave to withdraw. The Respondent, J.B., was in attendance and did not oppose the motion.

[30] The hearing proceeded with presentation of evidence on behalf of the Minister.

[31] The final review hearing continued on January 7, 2020. After completion of the Minister's case on direct, the Respondent mother proceeded with her case. The only witness to testify on behalf of the Respondent mother was the Respondent herself.

[32] Following completion of cross-examination of the Respondent mother on January 7, 2020, the Court confirmed that the matter would be adjourned for closing oral argument on January 10, 2020.

[33] Pursuant to Application dated January 9, 2020, the Minister sought permission of the Court to introduce new evidence.

[34] On January 10, the date originally set for closing argument, the Court acknowledged the motion as filed on behalf of the Minister. Counsel for the Respondent mother confirmed that the motion was contested. The Court scheduled the motion for hearing and determination on January 22, 2020.

[35] On January 22, following submissions by counsel, the Court proceeded to render an oral decision on the Minister's motion. The Court confirmed that the Minister would be permitted to adduce additional evidence subject to the directions and conditions specified by the Court.

[36] Additional evidence was then presented on behalf of the Minister in accordance with the Court's decision. Following presentation of this evidence, the Court granted an adjournment so that Respondent's counsel could determine whether or not any evidence in response would be presented on behalf of the Respondent, M.B. When the hearing resumed, Ms. Merrigan, counsel for the Respondent mother, advised that no evidence would be presented on behalf of her client.

[37] Following the noon hour break, counsel proceed with closing oral submissions.

[38] After submissions the Court reserved judgement pending the filing of a written decision. In the interim, the Court confirmed that the existing Order for Temporary Care and Custody would remain in force and effect.

Review of Evidence

[39] The final review hearing commenced on a *pro forma* basis on July 24, 2019 with the introduction of the initial exhibit tendered on behalf of the Minister. Exhibit 1 consisted of the Review Application and Notice of Hearing dated January 10, 2019 with attached plans of care. The hearing continued on December 17, 2019, January 7, 10 and 22, 2020.

[40] A total of 15 exhibits were entered during the course of the hearing. Nine witnesses were called on behalf of the Minister during the presentation of the Minister's case on direct.

[41] The Respondent M.B. testified on her own behalf.

[42] After the Court granted the Minister's motion to present additional evidence, counsel for the Minister called one additional witness and re-called the responsible long-term protection worker.

[43] Exhibit 2, as tendered on behalf of the Minister, consisted of an exhibit booklet containing copies of *curricula vitae* ("CVs") and reports as submitted by the two therapists who had provided therapeutic services for the Respondent mother at the request of the Minister.

[44] Exhibit 3 was a large exhibit brochure containing copies of various pleadings, affidavits and orders filed during the protection proceeding.

[45] The paragraphs that follow contain a summary of the evidence and will include references to affidavit evidence in some instances. I would emphasize that the paragraphs that follow contain a summary of the evidence and, as such, is not intended to be comprehensive. I have, however, carefully considered all of the testimony and documentary evidence for purposes of this decision.

[46] The first witness to testify on behalf of the Minister was Mr. Reginald Noiles, a Probation Officer with Probation Services in Moncton, New Brunswick.

[47] Mr. Noiles identified and confirmed his "Can-Say" Statement, dated December 6, 2019, entered as Exhibit 4. Exhibit 4 contained information primarily related to the children's father, J.B. Mr. Noiles was J.B.'s Probation Officer from September 2018 until November 2019.

[48] Exhibit 4 confirmed that the Respondent mother contacted Mr. Noiles on four different occasions regarding the no contact provision included within J.B.'s probation order. On one occasion in 2018, she requested contact with J.B. and then

subsequently on March 16, 2019, sent a letter to Mr. Noiles asking to have the condition of no contact reinstated. On June 1, 2019 M.B. asked to have contact with J.B. and then on July 29, 2019 she again requested the no contact provision be reinstated.

[49] Mr. Noiles identified Exhibit 5 as a copy of an Addendum to a Pre-Sentence Report he had prepared in relation to J.B., dated May 20, 2019.

[50] Mr. Noiles identified Exhibit 7 as J.B.'s two-year Probation Order, dated November 4, 2019, which followed the entry of guilty pleas to various charges on November 4, 2019, including charges of breach of probation.

[51] Exhibit 8 was identified as a Probation Order granted in relation to J.B. on December 6, 2017 following his conviction for various charges, including assault with a weapon, breach of probation and failure to comply with an undertaking. This Probation Order was for a period of three years.

[52] Exhibit 9 was an Amended Probation Order dated February 20, 2018, for a period of 12 months, following J.B.'s conviction for several charges including assault, assault of a peace officer, breaches of probation, and uttering threats to cause death. The conditions of probation included a condition confirming that J.B. was to have no direct or indirect contact or communication whatsoever with M.B., except with her express consent received in writing in advance, which might be revoked at any time.

[53] The second witness to testify was Staff Sergeant Brian Gairns of the Amherst Police Department.

[54] Staff Sgt. Gairns identified Exhibit 10 as his "Can-Say" Statement dated December 6, 2019. Subject to corrections to paragraph 10 and paragraph 13, he confirmed that the contents of the statement were true.

[55] When referred to paragraph 8 of his "Can-Say" Statement, Staff Sgt. Gairns confirmed that M.B. had failed to appear in Provincial Court in Moncton, New Brunswick on December 11, 2019 in relation to the theft charges referred to in paragraph 8.

[56] During cross-examination, Staff Sgt. Gairns testified that he was not aware of any other charges currently against M.B. other than those referred to in paragraph 7 and 8 of his "Can-Say" Statement. He also acknowledged that the

information contained in paragraph 13 was based upon observations made by officers who attended at M.B.'s home. In relation to paragraph 13, he testified that there was nothing connecting M.B. to the reports of gunshots having been heard other than the fact that the incident had occurred in a neighborhood where she was then resident.

[57] In response to a question from the Court, Staff Sgt. Gairns confirmed that he had no personal knowledge of any convictions for M.B. as a result of any of the complaints or charges referred to in his statement.

[58] The next witness to testify for the Minister was France Daigle, a counsellor in private practice in Dieppe, New Brunswick. Ms. Daigle confirmed that M.B. was referred to her by her social worker in March 2019. She identified her reports as contained within Exhibit 2 at tabs 2(b) and 2(c).

[59] Ms. Daigle testified that the goal of therapy was to help M.B. understand the impact of some of her decisions on the children and her choices respecting unhealthy relationships. Counselling commenced in April 2019 and the last session with M.B. was in July 2019. She noted that M.B. did not attend the last three scheduled sessions. Her last contact with the Respondent mother was in August 2019 and the counselling was terminated in August 2019 as a result of the missed sessions.

[60] Ms. Daigle testified that she did have discussions with M.B. about J.B. and that M.B. mentioned that she was having contact with J.B. and acknowledged that there was a no contact order in place. Accordingly, Ms. Daigle advised M.B. not to have contact with J.B. Ms. Daigle also testified that M.B. explained that she had had contact with J.B. in an effort to arrange for co-parenting.

[61] Ms. Daigle testified that the goals for therapy were not met.

[62] During cross examination, Ms. Daigle indicated that M.B. had acknowledged during counselling that some of her decisions were unhealthy and had had some emotional impact on her children. Ms. Daigle also acknowledged that M.B. had taken courses respecting domestic abuse. She said that she told M.B. that it was not a good idea that she contact J.B. because of the no contact order and the potential effect on the children. She did not provide counselling to assist M.B. in coming to terms with the Minister's application for permanent care and custody.

[63] After a brief adjournment, the Court was informed that counsel had agreed that the reports of Janet Tomlinson, therapist, as contained in Exhibit 2 would be entered by consent.

[64] Ms. Tomlinson's report dated November 12, 2018, contained within tab 1 of Exhibit 2, confirms contact between Ms. Tomlinson and M.B. from August 2018 through to and including November 2018. Her initial report confirms that M.B. attended all sessions. The treatment plan was to assist M.B. in recognizing consequences of choices made around relationships and the effect on her children.

[65] In her second report dated November 12, 2019, Ms. Tomlinson indicates that she continued to provide counselling services for M.B. from November 20, 2018 to December 14, 2018. When Ms. Tomlinson and M.B. last spoke on December 14, 2018, M.B. reported that all the children were home at that point and that things were going well, and that she was in a good place. The report indicates that Ms. Tomlinson did not hear from either M.B. or her caseworker subsequent to the telephone conversation on December 14, and therefore Ms. Tomlinson closed her file.

[66] Shelley McBurnie, Family Support Worker, testified on behalf of the Minister. She identified and confirmed her affidavit sworn November 14, 2019 (tab 39, Exhibit 3).

[67] During cross examination, Ms. McBurnie confirmed that she had observed progress on the part of the Respondent mother during her participation in family support services. She also acknowledged observing the utilization or application of family skills on the part of M.B. Ms. McBurnie agreed that as of December 2018 the plan was to transition the children into M.B.'s care. She also acknowledged that the condition of M.B.'s home was appropriate and the only safety concern identified was in relation to a baby gate. She confirmed that she made no other observations with respect to the home suggesting or indicating any risk of harm.

[68] In response to a question from the Court, Ms. McBurnie confirmed that she observed progress on the part of the Respondent mother as a result of her participation in family skills sessions and that the Respondent mother also displayed insight. She confirmed that M.B. had successfully completed the family skills program she had offered.

[69] The next witness to testify was Emily Pipes, Child in Care Social Worker.

[70] Ms. Pipes identified and confirmed her affidavit sworn November 15, 2019 (tab 36, Exhibit 3). She testified that the prospects for adoption of C.B. would be high given the child's age and the fact that there were no health issues or special needs to be considered.

[71] On cross-examination Ms. Pipes acknowledged that she had not had any opportunity to observe interaction between the child and the Respondent mother.

[72] Holly Martin, Case Aide, was the initial witness to testify on behalf of the Minister on January 7, 2020. She identified her affidavit sworn November 15, 2019 (tab 40, Exhibit 3). She confirmed a correction at paragraph 13 of her affidavit indicating that M.B. had not said that she was planning to meet with J.B., rather that it was J.B.'s mother, S.B., who had made that statement.

[73] During cross-examination, Ms. Martin confirmed that the role of the case aide has changed and that case aides are now not as interactive as they had previously been. A case aide's primary obligation or duty when attending an access visit is to ensure the safety of the child or children. Case aides are no longer required to keep notes with respect to access visits.

[74] Ms. Martin acknowledged during cross-examination that she had had no opportunity to observe any access visits involving only the Respondent mother and the child C.B. and therefore could not comment on M.B.'s ability to parent C.B. alone.

[75] Bonnie Mullin, Case Aide, testified for the Minister. She identified her affidavit (tab 38, Exhibit 3).

[76] During cross-examination Ms. Mullin confirmed that she had been involved with M.B.'s access since January 2019. She indicated that she has been present for visits between only M.B. and the child C.B. She testified that she observed no negative incidents during those visits. She acknowledged that the child C.B. goes to M.B. for attention. She testified that the visits have gone well and that she has not observed any roughhousing when the visits involve only C.B.

[77] Ms. Mullin also agreed that M.B. would sometimes bring snacks to access visits. She acknowledged that, in discussing the issue of healthy snacks, M.B. explained that she was on a limited budget. Ms. Mullin also confirmed that she had observed positive praise being used by M.B. during visits, but not consistently.

[78] The next witness to testify was Kristina Murphy, Social Worker with the Colchester District Child Welfare office.

[79] Ms. Murphy confirms that she had acted as the long-term caseworker from February 2018 until the end of October 2018. She confirmed her affidavit, sworn February 27, 2018 (tab 5, Exhibit 3). She identified tab 9 of Exhibit 3 as her affidavit sworn May 7, 2018. She identified tab 12 as including an Application for Disposition Order as well as a Plan of Care dated July 5, 2018. She confirmed that she had prepared the Plan of Care. She indicated that the plan was premised upon the goal of returning all three children to M.B.'s care.

[80] Ms. Murphy testified that she felt she had a good relationship with M.B. She was impressed by M.B., noting that M.B. sought out services on her own. She also acknowledged that service providers were saying positive things about M.B. However, Ms. Murphy did suggest that she was not sure that M.B. was being truthful. She decided to refer M.B. to counselling with Janet Tomlinson in the hope that counselling could assist M.B. in understanding the importance of positive choices.

[81] During cross-examination Ms. Murphy agreed that M.B. was willing to do whatever was required from the outset of her involvement as the responsible worker. She acknowledged that M.B. had engaged in services at Maggie's Place and Autumn House.

[82] Ms. Murphy testified that in June 2018 she told M.B. to avoid contact with a specific individual and that she believed the Respondent complied that that request.

[83] Ms. Murphy also indicated that she had no concerns regarding M.B.'s hands-on parenting. She explained that the Agency's concerns were with respect to her lifestyle. Ms. Murphy testified that those concerns were based upon M.B.'s association with people with criminal records, as well as M.B.'s credibility.

[84] Ms. Murphy stated that the protection concerns related to family violence in the relationship between M.B. and J.B., as well as criminal lifestyle. She explained that criminal lifestyle meant the people that M.B. was associating with as well as her involvement in theft charges.

[85] In referring to the Plan of Care at tab 12 of Exhibit 3, Ms. Murphy acknowledged that it identified three concerns and confirmed that no other issues had arisen. With respect to the first concern relating to family violence, she

testified that M.B. had participated in ongoing services through Autumn House which, while not fully mitigating the risk, appeared to put her on the right track.

[86] With respect to the second concern relating to inadequate parenting skills, Ms. Murphy testified that that concern related to more than hands-on parenting and encompassed M.B.'s choices, and had not been fully mitigated.

[87] With respect to the third concern relating to emotional mental health, Ms. Murphy acknowledged that there were no mental health concerns during her involvement, but that there were continuing concerns with respect to the Respondent mother's lifestyle choices.

[88] In response to questions from the Court, Ms. Murphy acknowledged the unfortunate death of J.B. and indicated that J.B.'s death would lessen the risk of family violence. Ms. Murphy noted that the issue of family violence was definitely connected to the relationship between J. B. and M.B.

[89] The final witness to testify for the Minister was Jennifer Cormier, Long Term Protection Social Worker with the Cumberland District Child Welfare Office.

[90] Ms. Cormier testified that she was assigned responsibility for the file in October 2018.

[91] Ms. Cormier identified the Review Application with attached Plan of Care dated December 5, 2018 (tab 20, Exhibit 3). She confirmed that she had prepared the Plan of Care. The Plan of Care was premised upon return of the children to the care and custody of M.B. She observed that, at that point in time, the Respondent mother had engaged in numerous services including Autumn House, Maggie's Place, as well as therapy with Janet Tomlinson. Ms. Cormier testified that at that point in time the Agency believed that M.B. was doing well.

[92] The Agency had no knowledge of her association with any individuals or persons of concern.

[93] She identified tab 23 of Exhibit 3 as a Review Application dated January 10, 2019, with attached plans of care. The first plan related to the two older children and was prepared in support of the Minister's request for termination of the existing *CFSA* orders relating to those children. The second plan of care related to

the child C.B. and was based upon a request for an order for permanent care and custody.

[94] Ms. Cormier indicated that the Agency had planned to return the children to M.B. in December 2018. Just prior to proceeding with reunification of the children, a referral was received that was concerning and which triggered an investigation. She noted that the referral alleged that M.B. and J.B. had attended a party where alcohol was consumed, that J.B. had assaulted the homeowner and later M.B. had returned to the home and stolen firearms. The referral had indicated that M.B. had refused to return the firearms and had to be pressured into returning them. She indicated that M.B. had used her vehicle to return the weapons and had parked the vehicle in the parking lot of the Agency office with the trunk open and the firearms located within the trunk.

[95] Ms. Cormier testified that the Agency had substantiated the referral. She referred to the existence of photographs of M.B.'s vehicle showing the trunk open and the weapons in cases within the trunk. She also referred to text messages between M.B., and an individual she identified as S.B., regarding the weapons. Ms. Cormier expressed her belief that the photographs and text messages supported the truth of the allegations made by the referral source.

[96] Ms. Cormier also indicated that the owner of the firearms had been alleged to be an individual involved with organized crime.

[97] As a result of this referral the Agency's plan changed. Due to the open investigation, a decision was made not to return the children to the care of M.B.

[98] Ms. Cormier discussed the referral with M.B. At this point during her direct examination she started to suggest an admission on the part of M.B., but quickly changed her answer to acknowledge that M.B.'s version of events was that she was doing S.B. a favor in hiding the firearms from the owner due to his drinking. Ms. Cormier testified that she did not feel the Respondent mother's explanation made sense based upon the text messages.

[99] Ms. Cormier also testified that M.B. suggested to her that everyone was entitled to at least one mistake, however Ms. Cormier felt that what had happened was part of a pattern of concerning behavior on the part of M.B.

[100] Ms. Cormier identified her affidavits as contained in Exhibit 3 during her testimony. In relation to her affidavit dated July 10, 2019 (tab 30, Exhibit 3), she

confirmed a correction at paragraph 40 indicating that the reference in that paragraph should be S.B. and not M.B. She identified tab 37 as her affidavit of November 13, 2019 and confirmed the contents of the affidavit subject to a correction in paragraph 40 relating to the identity of the individual who asserted M.B. had been lying for 30 years.

[101] When asked if there were any additional updates to be provided, Ms. Cormier explained she had found out on December 26 that J.B. had passed away.

[102] Ms. Cormier indicated that the Agency is not familiar with M.B.'s current partner. When she found out about the relationship, she asked M.B. if this individual was part of her plan and explained that, if he was, the Agency would want him to complete appropriate background checks. She testified that M.B. had responded by indicating that the relationship was new and might not progress to a long-term relationship.

[103] Ms. Cormier explained that, in light of J.B.'s death, the Agency had held a further risk conference. She testified that the risk conference determined that there was still substantial risk.

[104] When asked to comment further on the issue of substantial risk, Ms. Cormier testified that even though J.B. had passed, it was important to note that M.B. had continued her relationship with J.B. in December 2018 and that the police had reported another domestic incident. Ms. Cormier also referred to the fact that the no contact order had been off and on at the request of M.B.

[105] Ms. Cormier testified that the Agency does not have any knowledge of any family violence involving M.B.'s current partner.

[106] Ms. Cormier further testified that the concern is that there has been no change on the ground, or alternatively, only superficial change. She stated that the pattern of behavior on the part of M.B. has not changed.

[107] Ms. Cormier referred to an access visit where she had been required to intervene to protect C.B. from her older brother. Ms. Cormier explained that M.B., from her perspective, takes a hands-off approach to roughhousing during access visits such that others are required to intervene.

[108] During cross-examination, Ms. Cormier acknowledged that the RCMP advised they did not receive a complaint in relation to the referral respecting the

firearms and, as a result, the RCMP did not undertake any investigation and no charges were laid.

[109] Ms. Cormier confirmed that the referral respecting the firearms came from S.B., who she identified as J.B.'s mother, and the referral was also supported by J.B.'s grandmother.

[110] Ms. Cormier indicated that she did not recall showing M.B. any photographs relating to the referral, but that she had provided copies of the photographs to Agency counsel. She also acknowledged that she had never shown M.B. any text messages relating to the referral. She could not recall what information she had shared with the RCMP relating to the referral.

[111] Ms. Cormier acknowledged during cross-examination that M.B. had admitted to doing S.B. a favor by holding the firearms and then returning them in her car to the parking lot. Ms. Cormier stated that this explanation didn't make sense to her. She indicated that it did not align with the information in the text messages. Again, she referred to the fact that the Agency had photographs and text messages. Ms. Cormier testified that, from her perspective, M.B. took the rifles from the owner without his knowledge or consent and then suggested, "so, in a sense, she stole them". Again, Ms. Cormier conceded that the Respondent mother told her that she had hid the weapons in the woods at the request of S.B.

[112] When asked about the decision to apply for permanent care and custody, Ms. Cormier noted that the Agency had been involved with the Respondents for almost a year and that M.B. had engaged in extensive services but continued to associate with J.B., which meant that the concerns respecting to family violence had not been mitigated. She testified that she felt that it seemed as though services had not been effective in changing the Respondent mother's choices or her behaviors.

[113] When referred to her assertion that M.B. and J.B. had resumed their relationship in December 2018, Ms. Cormier indicated that M.B. had admitted that she and J.B. had been at the party together and that they left together. However, Ms. Cormier agreed that there was no evidence that M.B. and J.B. were involved romantically at that point. Ms. Cormier acknowledged that M.B. had never said that she intended to continue her relationship with J.B.

[114] Ms. Cormier testified that in December 2018 she had told M.B. that the Agency would return the children if there were no new referrals regarding any

criminal activity or association with J.B. She then added that the Agency had received a domestic violence referral from police in February 2019.

[115] In relation to the incident she had observed during an access visit, she testified that C.M. was close to hitting C.B.'s head on the floor and that she had to ask him to stop. She testified that she thought she was the first to say something. She could not recall if the case aide reacted to what was happening but indicated that M.B. did not react.

[116] At the conclusion of her cross-examination, Ms. Cormier was referred to paragraph 12 of her affidavit at tab 37 of Exhibit 3, in which she stated that counselling with Ms. Tomlinson was not concluded because M.B. had stopped attending. Ms. Cormier confirmed her understanding that M.B. cancelled visits with Ms. Tomlinson on December 12 and 14, 2018 because the children were being returned to her care. She acknowledged that the contract with Ms. Tomlinson was not renewed when the decision was made to maintain temporary care and custody in December 2018. Ms. Cormier could not explain why further sessions were not booked with Ms. Tomlinson.

[117] The Respondent M.B. testified on her own behalf.

[118] She identified tab 10 of Exhibit 3 as her affidavit sworn May 7, 2018. She identified Exhibit 11 as her affidavit dated December 10, 2019.

[119] During her direct examination, she testified that she has a charge pending and a past conviction for theft. She testified that, as far as the December 2018 referral was concerned, no charges had ever been laid in relation to that incident. She stated that she has never been convicted for any violent crimes.

[120] During cross-examination, M.B. acknowledged that she is currently in a relationship with J.S. She testified that the relationship has been off and on since June 2019. After the relationship started they decided to split up because she felt she had to focus on her case and that she didn't need distractions associated with the relationship. She testified that she and J.S. had recently decided to resume the relationship and that they were presently living together and had moved to a new address. She indicated that J.S. was part of her parenting plan and that she would expect him to help her parent C.B. if the child is returned to her care.

[121] M.B. acknowledged being asked by the Agency to obtain information with respect to J.S., but testified that at the time the request was made she was not sure

that J.S. was going to be a part of her plan. She also referred to difficulties in her communication with Ms. Cormier and, as a result, it had been decided that any communications should go through her legal counsel.

[122] M.B. acknowledged that the child C.B. has never met J.S. and that he would be a stranger to her. She then testified that her plan was for J.S. to reside with his parents and have periodic contact with C.B. as a way of introducing him to the child. She explained that this was because she did not want C.B. to be introduced to a stranger, noting that it was going to be an adjustment for C.B. just to be with her, in the event the child is returned to her care.

[123] When asked if J.S. had any police involvement, she indicated that in his early twenties he had had a *Motor Vehicle Act* conviction. She testified that J.S. was not a drug user. She indicated that her knowledge of his *Motor Vehicle Act* conviction was a direct result of her asking him because she felt she needed to know if he had a record.

[124] She also noted that J.S. has a nephew and two nieces and that she has observed him to be very caring and loving with these children, and noted their ages to be eight, seven and five.

[125] In discussing her involvement with Ms. Tomlinson, M.B. indicated that the session for December 14, 2018 had to be rescheduled due to a snowstorm. She also testified that when she spoke with Ms. Tomlinson on December 14, the children were coming back to her care and that Ms. Tomlinson indicated that she didn't need to continue counselling and that the goals that had been set by the Agency have been met. She testified that based upon that conversation she understood that the requirements of counselling had been completed.

[126] In discussing her counselling with Ms. Daigle, M.B. testified that she attended eight sessions. She also indicated that it was her understanding that Ms. Daigle had been asked to provide her with grief counselling as a result of the Agency's request for C.B. to be placed in permanent care and custody. M.B. testified that she didn't want to go to grief counselling because she was still having visits with the children.

[127] At one point during her cross-examination, M.B. indicated her understanding that C.B. was taken into care due to her life choices, domestic violence in her relationship with J.B. and poor choices.

[128] M.B. acknowledged and agreed that Ms. Daigle had advised her not to have contact with J.B., and yet she had had contact. She noted that her last contact with J.B. was June 4, 2019 when he was incarcerated. She also indicated that the no contact order had been changed to allow that contact to occur.

[129] M.B. testified that her contact with J.B. was an attempt to figure out how they were going to make the situation work in a healthy way if the children were returned to her care.

[130] M.B. testified that she and J.B. never lived together in 2019. She also testified that there had been no domestic incident between them in February 2019. She confirmed that at that point she and J.B. had not lived together since November 2017.

[131] M.B. testified that she was not asked to do any other services after counselling sessions with Ms. Daigle stopped. She testified that she had recently attended at Mental Health Services in Moncton, New Brunswick and had been advised that she didn't need to see a therapist and to follow up with her family doctor regarding her medication, as appropriate. She confirmed her current medications.

[132] M.B. indicated that she feels she no longer presents as a risk to the child, C.B. She agreed that there would have been risk when she was having contact with J.B. and commented that her life had taken a tumble when J.B. was involved.

[133] M.B. stated that she couldn't blame her conviction for theft on J.B., indicating that she "owns that". She testified that she had received a Probation Order in connection with her conviction for theft, which she successfully completed and she had also paid restitution. She had been on probation for one year and testified that her Probation Order was completed in 2019. The Probation Order arose from two theft charges involving theft from an Esso service station.

[134] M.B. acknowledged that there are outstanding charges and that she did not attend a court appearance in Moncton, New Brunswick on December 19, 2019. She confirmed her intention to deal with the outstanding charges, and commented that everything had spiraled with J.B.'s sudden passing.

[135] When referred to paragraph 4 of her affidavit, Exhibit 11, and asked what mistakes she was admitting to, M.B. testified that it was "everything leading up to here", the domestic, the theft, her involvement with J.B. and her poor choices

respecting associates and not making good decisions. She admitted that her decision to keep having contact with J.B. was a mistake and contrary to the Agency's direction.

[136] M.B. went on to describe in some detail an incident between herself and J.B. indicating that this was the only physical altercation between herself and J.B., but also acknowledging it was a huge incident. She confirmed that this incident occurred prior to the children coming into care.

[137] M.B. testified that the older children do engage in some roughhousing, noting that they are excited to see each other and that they want to play and physically interact. She knows some roughhousing is not acceptable, indicating that she has on occasion spoken up if it gets to the point where someone is going to get hurt. She stated that she disagreed with the suggestion in the affidavit of the case aide, Bonnie Mullin, that she never intervenes.

[138] M.B. readily acknowledged to Agency counsel that she would want to apply to vary the existing *PSA* orders relating to the two older children if she had custody of C.B.

[139] Following completion of M.B.'s cross-examination, her counsel confirmed that there was no additional evidence to be presented on behalf of M.B.

[140] Counsel for the Minister confirmed that there would be no rebuttal evidence adduced.

[141] The Court confirmed that the hearing would be adjourned to January 10, 2020 for closing oral submissions.

[142] Subsequently, the Minister sought permission of the Court to introduce new evidence pursuant to Application dated January 9, 2020.

[143] At the outset of the January 10 hearing, the Court acknowledged the Minister's motion and scheduled the motion for hearing on January 22, 2020.

[144] Following oral submissions from counsel on January 22, the Court rendered an oral decision granting the Minister's motion to re-open the Minister's care and present additional evidence, subject to specific terms and conditions.

[145] A Pre-Sentence Report for J.S. was entered as Exhibit 12 and a Probation Order for J.S. was entered as Exhibit 13 by consent of counsel.

[146] J.S. was called as a witness by counsel for the Minister.

[147] J.S. identified Exhibit 12 as his Pre-Sentence Report dated July 2, 2019. He identified Exhibit 13 as the Probation Order associated with his sentence.

[148] J.S. acknowledged that the probation order was dated September 3, 2019. He explained that the sentence was in connection with a conviction entered in 2015. J.S. is presently serving an intermittent jail term in accordance with the outcome of the September 3, 2019 sentencing hearing.

[149] J.S. testified that he became involved in a relationship with M.B. in approximately September 2019 and that they were not living together at first. He testified that he would stay with the Respondent mother off and on.

[150] When referred to his Pre-Sentence Report, J.S. acknowledged that he had been incarcerated when he was younger. He also acknowledged that he uses marijuana daily, explaining that he has been diagnosed with stage IV cancer and that he uses marijuana for medical purposes.

[151] J.S. acknowledged that he and M.B. have maintained a relationship but indicated that they are not presently living together. He acknowledged that they had lived together a couple months back but that when he heard she was getting her children back, he decided that he would give her space and accordingly, they stopped living together. He estimated that this had happened in November 2019.

[152] The Minister recalled Jennifer Cormier to provide additional evidence.

[153] Ms. Cormier identified Exhibit 14 as the Minister's application to introduce fresh evidence, including her supplemental affidavit sworn January 9, 2020.

[154] Ms. Cormier identified Exhibit 15 as her additional affidavit sworn January 15, 2020 and acknowledged that paragraphs five through to and including eight of that affidavit had been redacted by the Court.

[155] The Pre-Sentence Report dated July 12, 2019, Exhibit 12, confirms that at time of preparation of the Pre-Sentence Report, J.S. was 28 years old. The report also notes that J.S.'s father was recently diagnosed with prostate cancer. It indicates that J.S. enjoys a positive relationship with his family and confirms that he was, in fact, as of the date of preparation of that report, residing with his parents in the family home. The report notes that J.S. was diagnosed with cancer at the age of 17 and that following treatment, the cancer had been in remission until two

years ago. As of the date of preparation of the Pre-Sentence Report, he had received further treatment by way of surgery and chemotherapy and was once again in remission, but being followed regularly by his family doctor. The Pre-Sentence Report acknowledged that J.S. had reported that he had been diagnosed with anxiety following the return of his cancer and was taking medication as prescribed by his family doctor.

[156] The Pre-Sentence Report confirms that J.S. took responsibility for driving while under the influence at age 22 and admitted that he had made a very poor choice.

[157] The report also notes that he began using marijuana after being diagnosed with cancer for the second time and uses marijuana pursuant to a medical prescription to alleviate anxiety. J.S. reported being regularly employed and considers himself to be a hard worker. He pays room and board to his parents.

[158] The Probation Order entered as Exhibit 13 confirms that on October 19, 2015, J.S. pled guilty to a charge of operating a motor vehicle while disqualified, contrary to Section 259(4) of the *Criminal Code*. The Probation Order is dated September 3, 2019 and confirms that J.S. received a sentence of two months custody, to be served intermittently on weekends and subject to 12 months probation, with the only conditions being to keep the peace and be of good behavior, appear before the Court when required to do so, notify the Court 48 hours in advance of any change in his name, address, employment or occupation and that when presenting himself at jail, he do so in a sober condition.

[159] Following the presentation of the additional evidence on behalf of the Minister, the Court granted a brief adjournment.

[160] Following the adjournment, Ms. Merrigan advised the Court that there would be no additional evidence presented on behalf of the Respondent.

[161] Counsel proceeded with oral submissions on January 22, 2020.

Closing Submissions

[162] In her submissions on behalf of the Respondent, Ms. Merrigan argued that the Minister had not discharged the burden of proof resting upon the Minister in relation to the Minister’s request for permanent care and custody, and requested dismissal of the Minister’s application.

[163] Ms. Merrigan submitted that M.B.'s involvement with J.S. does not justify or warrant the Minister's continuing concerns respecting poor lifestyle choices on the part of M.B. She noted that J.S.'s criminal record does not contain convictions for offences that would justify such concerns and that it was important to note that the convictions relate to offences that occurred several years ago and therefore should be considered historic. Ms. Merrigan asserted that J.S.'s evidence corroborated the testimony as given by M.B. and therefore supported M.B.'s credibility.

[164] Ms. Merrigan maintained that M.B. had taken appropriate steps to separate herself from association with individuals with violence criminal records or history.

[165] Ms. Merrigan submitted that the evidence did not establish a sufficient risk to the child C.B. to justify permanent care and custody.

[166] In her submissions on behalf of the Minister, Ms. Gerami argued that the child C.B. continue to be a child in need of protective services.

[167] Ms. Gerami emphasized a lack of change in circumstance on the part of the Respondent mother due to poor lifestyle choices and decisions, despite the opportunity to participate in services.

[168] She submitted that an illustration of the Respondent mother's poor decisions would be her failure to provide information to the Minister and suggested that the failure to do so was self-serving and only served to highlight the Minister's continuing concerns respecting poor decision-making on the part of M.B.

[169] Ms. Gerami maintained that there was a continuing pattern of behavior on the part of the Respondent mother that justified the Minister's application. She argued that no changes in lifestyle had been demonstrated by M.B., despite the need to demonstrate such changes.

[170] Ms. Gerami referred to the importance of the Court assessing M.B.'s credibility.

[171] Ms. Gerami emphasized that M.B. had been afforded time and opportunity to address the Minister's protection concerns but had not done so because of her inability to break her pattern of poor choices. Ms. Gerami maintained that any changes made on the part of the Respondent mother were superficial. She

suggested that the Respondent mother had not demonstrated insight or genuine acceptance of responsibility for past parenting mistakes.

[172] Counsel for the Minister concluded her submissions by maintaining that, on balance of probability, the Minister had established that the child C.B. was still at risk due to the pattern of poor decision-making on the part of M.B. Ms. Gerami argued that the risk of domestic violence was still existent given the fact that M.B. had been involved in domestic violence during her relationship with J.B. Ms. Gerami maintained that it was too late for the Respondent mother to now assert positive change regarding the risk of poor choices.

Issues

1. Is the child C.B. in need of protective services?
2. In the event the Court determines that C.B. is still in need of protective services, is an order for permanent care and custody in the best interests of the child?

Legal Analysis

[173] In *Mi'kmaw Family and Children Services v. KDo*, 2012 NSSC 379, Justice Forgeron considered an application for permanent care and custody. Justice Forgeron identified the following principles commencing at paragraph 19:

> [19] In making my decision, I must be mindful of the legislative purpose. The threefold purpose is to promote the integrity of the family, protect children from harm, and ensure the best interests of children. The overriding consideration is, however, the best interests of children as stated in sec. 2(2) of the *Act*.
>
> [20] The *Act* must be interpreted according to a child centred approach, in keeping with the best interests principle as defined in sec. 3(2). This definition is multifaceted. It directs the Court to consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, and social development needs, and those associated with risk of harm.
>
> [21] In addition, sec. 42(2) of the *Act* states that the Court is not to remove children from the care of their parents, unless less intrusive alternatives have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children.
>
> [22] When a Court conducts a disposition review, the Court assumes that the orders previously made were correct, based upon the circumstances existing at the time. At a review hearing, the Court must determine whether the circumstances which resulted in the original order, still exist, or whether there have been

> changes such that the children are no longer children in need of protective services: sec. 46 of the Act; *and Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* [1994] 2 S.C.R. 165.
>
> [23] Past parenting history is also relevant as it may be used in assessing present circumstances. An examination of past circumstances helps the Court determine the probability of the event reoccurring. The Court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane, and relevant: *Nova Scotia (Minister of Community Services) v. Z.S.* 1999 NSCA 155 at para. 13; *Nova Scotia (Minister of Community Services) v. G.R.*, 2011 NSSC 88, para. 22, as affirmed at *Nova Scotia (Minister of Community Services) v. G.R,*. 2011 NSCA 61.

[174] The Minister is requesting an order for permanent care and custody with respect to the child C.B. pursuant to Section 47 of the *CFSA*.

[175] The Minister bears the burden of proof with respect to the application. The burden of proof is the civil burden based upon balance of probabilities (See *C.R. v. McDougall*, 2008 SCC 53).

[176] In determining whether the Minister has adequately discharged the burden of proof in any given case, it is the responsibility of the trial judge to carefully consider and review all the evidence.

[177] In determining this application, I have considered the preamble to the legislation which confirms the objectives and philosophy of the *CFSA*.

[178] The legislation clearly emphasizes that children are only to be removed from the care of their parent when all other measures are inappropriate.

[179] The purpose of the *CFSA*, as set forth in Section 2(1), namely, to protect children from harm, to promote the integrity of the family and assure the best interests of the children, must be kept in mind throughout.

[180] In all proceedings under the *CFSA*, the paramount consideration is the best interests of the child as per Section 2(2). That provision underscores the need for a child-focused or centric approach to the determination of child protection proceedings.

[181] I have taken note of the relevant provisions of Section 22(2) of the *CFSA* in determining whether C.B. continues to be in need of protective services.

[182] A finding that the child continues to be in need of protective services requires the Court to consider additional applicable provisions of the *Children and Family Services Act*, including Sections 42, 45, 46 and 47.

Outside Limit

[183] The outside limit for disposition orders in this proceeding was July 25, 2019.

[184] Case authorities clearly establish that, if a child is still in need of protective service when the outside limit is reached, the matter cannot be dismissed and the Court has no jurisdiction to order either supervision or temporary care and custody.

[185] In *Nova Scotia (Community Services) v. R.F.*, 2012 NSSC 125, Justice Jollimore indicated as follows commencing at paragraph 165:

> [165] According to Justice Saunders in *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99 at paragraph 19, I'm to consider each of the possible dispositions in section 46(5) and, by virtue of section 46(5)(c), section 42(1). His Lordship's reasons limit my considerations. At paragraph 23, he explained:
>
> > As the proceeding nears a conclusion, the opportunity to grant disposition orders under s. 42(1) (c) diminishes until the maximum time is reached at which point the Court is left with only two choices: one or the other of the two "terminal orders". That is to say, either a dismissal order pursuant to s. 42(1) (a) or an order for permanent care and custody pursuant to s. 42(1) (f).

[186] Given the outside limit applicable to this proceeding has now been reached, the Court must determine whether to dismiss the Minister's application or place the child in permanent care and custody.

Protection Finding

[187] Pursuant to Protection Application and Notice of Hearing dated February 14, 2018, the Minister maintained that the child was in need of protective services pursuant to subparagraphs (b), (g) and (i) of Section 22(2) of the *Children and Family Services Act*. Those provisions read as follows:

> 22 (2) A child is in need of protective services where

> (a) a 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)
>
> …
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> …
>
> (i) the child has been exposed to, or has been made aware of, violence by or towards
>
> (i) a parent or guardian, or
>
> (ii) another person residing with the child,
>
> and the parent or guardian fails or refuses the obtain services or treatment, or to take other measures, to remedy or alleviate the violence;

[188] The protection finding made May 9, 2018 was made pursuant to Section 22(g) of the *CFSA*.

[189] Unfortunately, the Protection Order dated May 9, 2018, as included within tab 11 of Exhibit Book 3, does not reflect the Court's decision in so far as the order confirms a finding pursuant to subparagraphs (b), (g) and (i).

[190] The initial Disposition Order made July 25, 2018, and as contained at tab 14 of Exhibit 3, specifically confirms in the first prefacing paragraph that the protection finding was made pursuant to subparagraph (g) on May 9, 2018.

[191] In addition, the affidavit of Kristina Murphy, sworn July 23, 2018, as found at tab 13 of Exhibit 3, at paragraph 4(f), confirms the protection finding pursuant to subparagraph (g) only. All subsequent affidavits of the responsible long-term protection worker contain similar paragraphs when reviewing the history of the proceeding.

[192] In the pre-hearing brief as filed on behalf of the Minister, as well as closing submissions, counsel for the Minister maintained that the child remains in need of protective services pursuant to Section 22(2) on the basis of substantial risk without making reference to any specific subparagraph of Section 22(2).

[193] Subparagraphs (b) and (g) are based upon substantial risk.

[194] Subparagraph (i) is not based upon substantial risk and is a protection ground based upon a child's exposure to, or awareness of, family violence and requires proof of such exposure on balance of probability, as well as proof that the parent fails or refuses to obtain services or treatment, or take other measures to remedy or alleviate the violence.

[195] The Minister's current position seemed best summarized by Ms. Gerami when, at conclusion of her oral submissions, she submitted that lack of positive change and continued poor decision-making on the part of the Respondent mother continues to place the child at substantial risk of harm.

[196] Section 22(1) indicates that "substantial risk" means "a real chance of danger that is apparent on the evidence".

[197] In *Nova Scotia (Minister of Community Services) v. S.C.*, 2017 NSSC 336, Justice Jollimore commented upon the meaning of "substantial risk", indicating as follows at paragraph 35 of her decision;

> [35] "Substantial risk" is a real chance of danger that is apparent on the evidence: subsection 22(1) of the *Children and Family Services Act*. It is the real chance of physical or emotional harm or neglect that must be proved to the civil standard. That future physical or emotional harm or neglect will actually occur need not be established on a balance of probabilities: *MJB v. Family and Children Services of Kings County*, 2008 NSCA 64 at paragraph 77, adopting *B.S. v. British Columbia (Director of Child, Family and Community Services)*, 1998 CanLII 5958 (BC CA), at paragraphs 26 to 30.0
>
> [36] If the Minister establishes that there is a real chance of harm, the question is purely one of D's best interests, as between permanent care and a return to the parents. If the Minister does not establish this that there is a real chance of harm, then D must be returned to her parents.

[198] In *C.R. v. Nova Scotia (Community Services)*, 2019 NSCA 89, Justice Hamilton indicated the following with respect to the test to be applied in determining substantial risk under Section 22;

> …the test is as set out previously by this Court in *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64:
>
> > [77] The Act defines "substantial risk" to mean a real chance of danger that is apparent on the evidence (s.22(1)). In the context here, it is the real chance of sexual abuse that must be proved to the civil standard. That

> future sexual abuse will actually occur need not be established on a balance of probabilities. (*B.S. v. British Columbia (Director of Child, Family and Community Services*) (1998), 160 D.L.R. (4th) 264, [1998] B.C.J. No. 1085 (Q.L.)(C.A.) at paras. 26 to 30)
>
> (Emphasis in original)
>
> When deciding whether there is "substantial risk", a judge must only be satisfied that the "chance of danger" is real, rather than speculative or illusory, "substantial", in that there is a "risk of serious harm or serious risk of harm" *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, paras. 104, 106 and 117), and it is more likely than not (a balance of probabilities) that this "risk" or "chance of danger" exists on the evidence presented.
>
> (Emphasis added)

[199] In determining whether or not the child remains in need of protective services I propose to deal firstly with the issue of whether or not the child is in need of protective services pursuant to subparagraph (i) and then consider whether or not the child is in need of protective services pursuant to subparagraphs (b) and (g).

Is the child in need of protective services pursuant to Section 22(2)(i)?

[200] The affidavit of Katelyn Walsh, Social Worker, sworn February 13, 2018 (tab 2, Exhibit 3) refers to an incident of family violence between M.B. and the child's father, J.B., in January 2018, commencing at paragraph 25.

[201] The incident involved a physical altercation between the parents while driving with the child C.B in the vehicle and then a further verbal altercation later in the evening in the presence of the child, J.B. This incident occurred at a point in time when the parents were attempting to resolve custody issues relating to the children following the father's release from custody in December 2017. This incident of family violence played a significant part in the Agency's decision to commence a protection proceeding in February 2018.

[202] M.B. herself referred to and described the incident in some detail during her cross-examination. While she may have mistakenly referred to the date of the incident during her testimony, she did correctly identify that it occurred prior to the children being taken into care.

[203] Ms. Walsh's affidavit of February 13, 2018 also confirms that the Agency initially determined that a supervisory order in favor of M.B. in relation to the children would be consistent with the children's best interests.

[204] The Minister filed an Amended Protection Application requesting an order for temporary care and custody based upon information indicating that M.B. had failed to comply with the terms and conditions of the initial supervisory order. That application was subsequently granted by the Court and the child C.B. was placed in the temporary care and custody of the Minister. C.B. has remained in temporary care and custody throughout the proceeding.

[205] The affidavit of the initial long-term protection worker, Kristina Murphy, sworn May 7, 2018 (tab 9, Exhibit 3) confirms that the Respondent mother was referred for family skills sessions and was asked to self-refer for counselling and services through Autumn House, as well as Mental Health and Addiction Services.

[206] The affidavit of M.B., sworn May 7, 2018 (tab 10, Exhibit 3), confirms that the Respondent self-referred to Autumn House to gain insight into family violence and commenced weekly group sessions and one-on-one counselling. The affidavit indicates that the Respondent mother also self-referred to Mental Health and Addiction Services. M.B. also attended programming at Maggie's Place. She also continued to work with the assigned family skills worker. The affidavit acknowledges M.B.'s commitment to applying the skills she has learned to her daily life and parenting.

[207] The affidavit of Ms. Murphy sworn July 23, 2018 (tab 13, Exhibit 3) confirmed M.B.'s continued engagement in services and noted that, overall, M.B. had presented as engaged and was positive about services.

[208] In her affidavit sworn September 26, 2018 (tab 17, Exhibit 3), Ms. Murphy indicates at paragraph 31 that the Agency, as of that date, did not have concerns with the hands-on parenting skills of M.B. or J.B. She states at paragraph 32 that the Agency's primary outstanding concerns relate to lifestyle concerns on the part of the parents, concerns respecting the individuals they associate with, and conflict between the parents.

[209] The affidavit of Jennifer Cormier, sworn December 14, 2018 (tab 20, Exhibit 3), confirms at paragraph 16 that M.B, at that point in time, had cooperated with the Agency's plan of care to sufficiently mitigate protection concerns through engagement in remedial services. It notes that:

> (M.B.) has demonstrated positive change through lifestyle choices, appropriate discipline of the children and follow through with services

[210] The affidavit also confirms the successful completion of family support services. Ms. Cormier's affidavit, at paragraph 28, confirms the Agency's conclusion that M.B. had made sufficient progress in addressing the Agency's lifestyle and parenting concerns that the children could be returned to her care and custody subject to supervision.

[211] The only evidence indicating or suggesting any continuing concern relating to family violence is a referral received from Amherst police on March 20, 2019, as referred to in Ms. Cormier's affidavit of April 10, 2019 (tab 27, Exhibit 3) at paragraph 40. That paragraph confirms a referral from Staff Sgt. Gairns on March 20, 2019 confirming that RCMP had attended at M.B.'s home on February 14, 2019 following a complaint. The officers who attended at M.B.'s home during the investigation of the complaint did not testify. Exhibit 10, at paragraph 9(a), refers to information obtained by officers who investigated the February 14, 2019 complaint, indicating that the Respondent parents said they had had an argument and yelled at each other. During her testimony, M.B. denied that the incident involved any family violence between herself and J.B.

[212] While there was evidence indicating continuing contact between M.B. and J.B. in 2019, there was no evidence presented at trial indicating or confirming any incidents of family violence between the parents in connection with that contact. M.B. testified that her last contact with J.B. was June 4, 2019, when J.B. was apparently incarcerated. She stated that she and J.B. have not resided together since November 2017.

[213] During cross-examination, the long-term protection worker, Ms. Murphy, was asked about the Plan of Care as set forth at tab 12, Exhibit 3, and the concern relating to family violence as referred to in the plan. Ms. Murphy testified that M.B. had ongoing services through Autumn House which, while not fully mitigating the risk, appeared to put her on the right track.

[214] In response to a question from the Court, Ms. Murphy testified that the unfortunate death of J.B. had lessened the risk associated with family violence and also acknowledged the issue of family violence was connected with the relationship between J.B. and M.B. The Court agrees that J.B.'s death is material to assessment of future risk of family violence as well as assessment of whether or not the child, C.B., is in need of protection pursuant to Section 22(2)(i).

[215] The current long-term protection worker, Ms. Cormier, testified that, at present, the Agency does not have any knowledge of any family violence involving M.B.'s current partner.

[216] The evidence supports the testimony of the initial long-term protection worker, Ms. Murphy, that the family violence issues were connected with the relationship between M.B. and J.B. That relationship, and the associated risk of family violence, no longer exists due to J.B.'s passing.

[217] The evidence confirms that the Respondent, M.B., did not refuse or fail to participate in services intended to address the protection concerns relating to family violence, nor did she fail to seek out additional services over and above those she was requested to participate in by the Minister.

[218] The services she participated in at the request of the Minister included individual and group counselling at Autumn House dealing with domestic or family violence, as well as participation in individual counselling/therapy. She also complied with the Minister's request to make a self-referral to Mental Health and Addiction Services.

[219] On her own initiative she arranged to participate in parenting programs at Maggie's Place. She also successfully participated in family skills programming as requested by the Agency. The Court acknowledges that these services were specifically intended to benefit and enhance M.B.'s parenting. It is not unreasonable to suggest that improved parenting skills on the part of a parent may in some instances be of some assistance in reducing risk of family violence.

[220] The evidence does not support and justify the conclusion that M.B. inappropriately terminated counselling services with Ms. Tomlinson. As Ms. Tomlinson herself noted in one of her reports, she was never requested to resume counselling services by the Agency after December 2018. In the absence of such a request, she closed her file.

[221] The evidence does indicate that the goals of counselling with the second counsellor, Ms. Daigle, were not achieved.

[222] M.B.'s explanation for why she decided not to continue the counselling is certainly inconsistent with Ms. Daigle's evidence. However, it is also important to note that M.B.'s decision to forgo participation in further counselling with Ms. Daigle occurred proximate to the *pro forma* commencement of the Minister's

application for permanent care and custody in July 2019. M.B.'s decision not to continue with counselling with Ms. Daigle should be considered in the context of her understanding the Minister's application for permanent care and custody was proceeding. The evidence confirms that her last contact with Ms. Daigle occurred in August 2019. There was no evidence indicating that, had M.B. successfully completed counselling with Ms. Daigle, the Minister would have been willing to reconsider the Minister's plan of care for C.B. and abandon the application for permanent care.

[223] Based upon careful consideration of the evidence, I find that the Minister has not established on balance of probability that C.B. is in need of protective services pursuant to Section 22(2)(i) of the *CFSA.*

Is the child in need of protective services pursuant to Section 22(2)(b) and (g)?

[224] The Minister believes that lack of positive change and continued poor decision-making on the part of the Respondent mother gives rise to a substantial risk of physical harm and/or a substantial risk of emotional harm pursuant to subparagraphs (b) and (g).

[225] I would acknowledge the definition of "emotional abuse" as set forth in Section 3(la) of the *Children and Family Services Act*. The Court infers from the Minister's submission that the Minister believes the mother's continued poor decision-making and inability to effect positive change gives rise to a substantial risk of emotional abuse in so far as the poor choices on the part of the mother may seriously interfere with the child's healthy development and emotional functioning. The Court acknowledges that the list of "acts" set forth within the definition section are indicated to be examples and therefore the list is not intended to be exhaustive.

[226] In determining whether or not the child C.B. continues to be in need of protective services under subparagraphs (g) or (b), I am mindful that the Minister is not required to establish that future physical or emotional harm will actually occur on balance of probability. Rather, the burden on the Minister is to establish a real chance of physical or emotional harm. (see *M.J.B v. Family and Children Services of Kings County*, 2008 NSCA 64 at paragraph 77)

i) <u>Continued contact between M.B. and J.B.</u>

[227] The Court acknowledges that the Minister has argued or maintained that there are continuing concerns with respect to risk of family violence based upon M.B.'s continued contact with J.B. While counsel for the Minister did not articulate this position in concise terms, it would appear that the Minister believes that there is a substantial risk of physical or emotional harm associated with the potential for future family violence based upon the Minister's concern that the continuing contact demonstrated lack of insight on the part of the Respondent mother with respect to domestic violence.

[228] M.B. herself conceded that she should not have maintained contact with J.B. when such contact was contrary to the Agency's directions. However, the evidence also indicates that M.B., on two occasions, made an appropriate request to J.B.'s probation officer to suspend the no contact provisions of the applicable order in order to allow contact. On two successive occasions she requested that the no contact order be reinstituted. At trial M.B. testified that her reason for communication with J.B. related to the need to sort out issues relating to custody of their children.

[229] The Court does not accept that the evidence relating to continued contact between M.B. and J.B. is sufficient to justify a finding of substantial risk as defined in Section 22(2)(b) and (g) of the *CFSA.* The evidence does not establish a real chance of danger in relation to family violence at this point in time.

[230] In reaching this conclusion the Court certainly finds that the untimely death of J.B. represents a material change in circumstance relevant to the assessment of risk.

[231] The history of the relationship between M.B. and J.B. is troublesome. Had the evidence established a likelihood of future contact between J.B. and M.B, the Court would certainly have had to properly assess and consider the risk of further or future harm associated with domestic violence based upon the past history of their relationship.

[232] I find that the passing of J.B. has significantly alleviated the risk associated with the child's exposure to further family violence.

[233] There is no evidence indicating any domestic or family violence concerns in relation to the mother's relationship with her new partner, J.S.

[234] There is a lack of evidence indicating or confirming a pattern of family violence in other intimate relationships on the part of M.B.

[235] Based upon the evidence presented, I find that the Minister has not established on balance of probability substantial risk pursuant to subparagraphs (b) or (g) in relation to family violence.

[236] The evidence does not support or justify a finding of a real chance of danger or serious risk of harm associated with family violence.

ii) The December 17, 2018 Referral

[237] The Minister's decision to proceed with a request for permanent care and custody was triggered by a referral received in December 2018. The Agency decided not to proceed with the request for a supervisory order in favor of M.B. pending further investigation of the referral. Subsequently, the Minister filed a Review Application dated January 10, 2019 confirming a request for permanent care and custody of the child based upon a supplementary Plan of Care, also dated January 10, 2019.

[238] Section 4(a) of the Plan of Care dated January 10, 2019 explains the basis for the Agency's conclusion that the circumstances justifying permanent care and custody are unlikely to change prior to the expiration of the outside limit. It refers to the referral information received December 17, 2018. It specifically refers to photographs received from the referral source as "supporting the referral information". The plan refers to an admission by M.B. in connection with the referral. The plan refers to M.B. and J.B. being "still involved with each other" as "what lead to current Agency involvement, and subsequent removal of the children". It confirms Agency concerns with respect to lack of real change and insight on the part of both parents. The referral information is identified as indicating "continued high risk behavior" on the part of M.B. which casts doubt upon her ability or willingness to make necessary changes.

[239] It is clear that the referral information was critical to the Agency's decision to proceed with an application for permanent care and custody.

[240] Jennifer Cormier testified that the Agency had planned to return the children to M.B. in December 2018, but just prior to family reunification, a referral was received that was concerning and triggered an investigation. Ms. Cormier stated that the allegations as made by the referral were substantiated.

[241] Ms. Cormier also referred to the existence of photographs, as well as text messages, which she believed supported the reliability of the referral. Neither the photographs nor the text messages were ever introduced into evidence on behalf of the Minister. The Court was not afforded the opportunity to assess whether Ms. Cormier's conclusion respecting the photographs and test messages was, or was not, appropriate.

[242] Ms. Cormier confirmed that she discussed the referral with M.B. She indicated that the Respondent mother's version of events was that she was doing the referral source a favor in hiding firearms from the owner of the firearms due to concerns about his drinking. Ms. Cormier testified that she didn't feel that M.B.'s explanation made sense based upon the text messages.

[243] I have reviewed the affidavit evidence of Ms. Cormier in relation to the December 2018 referral. The history of the referral is set forth in Ms. Cormier's affidavit sworn January 14, 2019 (tab 24, Exhibit 3).

[244] The referral sources, although obviously known to the Agency, were not called as witnesses at trial. The Court was not provided with any explanation as to why these individuals were not called to give evidence at trial. The Court acknowledges that the Minister was not under any obligation to call the referral sources as witnesses or to provide an explanation as to why they were not called.

[245] Similarly, the Court was not provided with any understanding as to why the photographs and text messages as referred to, and obviously relied upon by Ms. Cormier and the Agency, were never entered into evidence.

[246] Paragraph 17 of Ms. Cormier's affidavit of January 14, 2019 notes that M.B. reported that J.B. was upset over the plan to return the child J.B. to her care. He was upset that J.B. was not going to remain in his existing placement with his paternal grandfather, K.C. The affidavit indicates that this conversation with M.B. occurred December 17, 2018.

[247] Paragraph 18 of the affidavit refers to an initial referral received on December 17, 2018. The initial referral source is not identified. The information contained and set forth in that paragraph is hearsay attributable to an anonymous source.

[248] Paragraph 19 of the affidavit confirms contact, also on December 17, 2018, with D.C. by telephone. The paragraph identifies D.C. as J.B.'s mother. This may

be an error as Ms. Cormier referred to D.C. as J.B.'s grandmother during her testimony.

[249] J.B.'s biological mother, S.B., joined the conversation. She proceeded to provide information to the effect that J.B. and M.B. had been attending a party in November 2018 and related what had happened during the party and afterwards.

[250] There is nothing in paragraph 19 indicating or confirming that S.B. was also present during the party or personally made the observations as referred to and set forth in paragraph 19. S.B., at one point during the conversation, admitted to threatening M.B. The affidavit does not indicate the nature of the threat.

[251] Paragraph 20 of the affidavit confirms that Ms. Cormier attended the home of D.C. the next day, December 18, 2018. S.B. was present at the time of the visit. The affidavit refers to S.B. showing Ms. Cormier text messages and photographs to verify her story. S.B. expressed some concern that the owner of the firearms allegedly stolen by M.B. had threatened D.C. S.B. was concerned about retaliation on the part of the owner.

[252] Paragraph 22 of Ms. Cormier's affidavit confirms that S.B. was unwilling to make a statement to police regarding the incident.

[253] Paragraph 23 confirms that a risk management conference was held December 18, 2018 and that the Agency decided the children could not be returned to M.B.'s care under a supervisory order until the investigation of the referral was complete.

[254] Paragraph 27 confirms that on December 19, 2018, Ms. Cormier received a call from M.B. who was upset and queried why she had not been advised that the child C.B. was going to be removed from her care. M.B. also pointed out that Ms. Cormier had not asked her side of the story.

[255] Paragraph 29 confirms a conversation between M.B. and Ms. Cormier on December 19, 2018, at which point in time M.B. advised that the child C.B. was not present in the vehicle when she transported the firearms. M.B. informed Ms. Cormier that it was S.B. who had asked her to pick the firearms up from the owner, S.M., and bring them to her because of S.B.'s concerns about drinking on the part of S.M. M.B. advised that she left the firearms in the bushes until S.B. asked for them back. M.B. stated that it was S.B. who took the firearms from S.M. and she did not steal them. M.B. also reported that the owner of the firearms, S.M., was

S.B.'s boyfriend. During the conversation, M.B. indicated acceptance of responsibility for her part in what had happened, indicating that she had made a "stupid" choice.

[256] Paragraph 35 of the affidavit is noteworthy. On December 28, 2018 Ms. Cormier met with the paternal grandfather and his partner at the Agency office to discuss long-term care of the child J.B. The paternal grandfather, K.C., advised that the referral source, S.B., was not trustworthy.

[257] Paragraph 39 of the affidavit contains a summary of the risk management conference held January 4, 2019 which resulted in the decision to proceed with an application for permanent care and custody of J.B.

[258] Subparagraph (a) contains the following statement:

> …the referral pertaining to M.B. transporting stolen firearms was substantiated. M.B. admitted to having them and dropping them off in the parking lot.

[259] Subparagraph (b) contains the following statement:

> M.B. has engaged in a significant number of services and still made the decision to steal weapons from an individual with a known criminal history. M.B. is demonstrating a lack of insight and it is unclear whether she is willing or able to make necessary changes.

[260] Subparagraph (j) confirms the decision to proceed with a plan for the child C.B. based upon permanent care and custody.

[261] Ms. Cormier's affidavit of April 10, 2019, (tab 27, Exhibit 3), at paragraph 21, contains a reference to a conversation wherein Ms. Cormier was specifically advised that M.B. had been set up.

[262] During her cross-examination, Ms. Cormier testified that the RCMP did not undertake an investigation in relation to the information that had been received by the Agency on December 17, 2018. Ms. Cormier understood that the RCMP never received a complaint in relation to the incident and thus had never undertaken an investigation and no charges had ever been laid.

[263] Ms. Cormier acknowledged that M.B. admitted to doing S.B. a favor by holding the firearms and then returning them in her car to the Agency parking lot. Ms. Cormier said that this didn't make sense to her because it did not align with the information in the text messages that had been shown to her. She indicated that the Agency had the photographs and text messages.

[264] At one point, Ms. Cormier went so far as to suggest that, from her perspective, M.B. took the rifles from the owner without his knowledge or consent "so, in a sense, she stole them". Ms. Cormier acknowledged that M.B. had told her that she had hid the weapons in the woods at the request of S.B.

[265] During cross-examination when explaining the decision to apply for permanent care and custody, she commented that it seemed as though services had not been effective in changing M.B.'s choices or her behaviors.

[266] When questioned about her assumption that M.B. and J.B had resumed their relationship in December 2018, Ms. Cormier testified that M.B. had admitted that she and J.B. had both been at the party and had left together. Ms. Cormier agreed that there was no evidence that M.B. and J.B. were romantically involved at the time and that M.B. never said she intended to continue her relationship with J.B.

[267] The Respondent mother was not asked any questions about the December 17, 2018 referral information during cross-examination by counsel for the Minister.

[268] In *Nova Scotia (Community Services) v. T.S.*, 2015 NSSC 65, Justice Forgeron concluded that there were no reasonable and probable grounds upon which to find the child in need of protective services based upon the evidence presented and confirmed dismissal of the Minister's application. In the analysis portion of her decision, Justice Forgeron indicated as follows at paragraph 12:

> [12] The rules of evidence do apply in child protection cases, including the rules regarding hearsay, unless the hearsay evidence falls under an exception or there is a provision in the CFSA which allows such evidence. Section 39(11) allows a Court to admit and act on evidence that the Court considers credible and trustworthy in the circumstances at the interim hearing stage. Section 96 allows the Court to consider evidence from prior child protection proceedings and under certain circumstances to consider out of Court statements of children.

[269] In *R v. Keats*, 2016 NSCA 94, Justice Beveridge, in confirming the judgement of the Court, offered the following comments with respect to hearsay evidence at paragraph 93:

> The underlying rationale for the rule presumptively excluding hearsay is the concern that unreliable evidence could skew the fact-finding process. Without a means to test the reliability and veracity of out-of-court statements, not made under oath, a danger exists that a trier of fact may go astray.

> The traditional exceptions, or the so-called pigeonholed approach, included an exception for business records. The exception for business records, and the modern principled approach of requiring reliability necessity, are closely aligned. Both rely on the circumstantial markers of trustworthiness to demonstrate reliability and, hence, admission.
>
> As noted above, hearsay is presumptively inadmissible because of the inability to be assured of the reliability of the proffered evidence. Without an opportunity to cross-examine the author of the information, there is no avenue to test the reliability and veracity of the evidence (*Khelawon*, 2006 SCC 57 at para. 2).

[270] Justice Beveridge also confirmed the obligation of the trial judge, even in the absence of an objection from defence counsel, to deal with hearsay evidentiary issues in order to ensure a fair trial. Justice Beveridge stated as follows at paragraph 102:

> [102] It is counsel's plain duty to raise evidentiary issues at trial, with the caveat that the judge retains responsibility to ensure the trial is conducted according to law (see *R. v. T.(S.G.)*, 2010 SCC 20 at para. 36; *R. v. Lomage*, [1991] 2 O.R. (3d) 621 at pp. 138-9; *R. v. Baxter*, 2013 SKCA 52; *R. v. Ambrose* (1975), 11 N.B.R. (2d) 376 at para. 6, aff'd [1977] 2 S.C.R. 717).

[271] In *C.K. v. C.S.*, (1996), 157 NSR (2d) 387 (NSFC), His Honour Judge Levy determined a custody application. Judge Levy offered the following comments with respect to admissibility of hearsay evidence during a contested family Court hearing commencing at paragraph 7:

> However, when every reasonable and available effort at resolution short of trial has been tried and failed, and a determination of the issues is to be left to a judge to decide, that determination must be made only on the basis of admissible evidence. Far from dictating the relaxation of the rules of evidence, the "best interests" of children is of such importance as to dictate that the Court make those determinations with scrupulous attention to the fairness and reliability of the evidence.

[272] The Family Court Rules also recognize a distinction between affidavits utilized for purposes of an application or motion, as opposed to for purposes of a hearing or trial. Rule 16.02 provides as follows:

> 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.

[273] I acknowledge that Exhibit 3 was tendered without objection from defence counsel. However, the fact that the exhibit was entered without objection does not relieve the Court of its obligation, especially in the context of determining an application for permanent care and custody, to ensure that the Court's assessment of the evidence includes recognition and adherence to the rules relating to admissibility of hearsay evidence. Subject to the specific exceptions as per Section 96 of the *Children and Family Services Act*, exceptions regarding admissibility of business records per the *Evidence Act* and other applicable common law exceptions, hearsay evidence is to be viewed as presumptively inadmissible for the purposes of a final review application.

[274] As previously noted, no explanation was offered to the Court as to why the December 17 referral sources as identified in Ms. Cormier's affidavit were not called as witnesses. Since they were not called, they were not subject to cross-examination.

[275] Similarly, the photographs and text messages as referred to by Ms. Cormier, and which she maintained supported the reliability of the referral information, were not entered into evidence.

[276] The circumstances immediately preceding the receipt of the referral information should have caused the worker to seriously question the reliability of the referral information and the possible motive on the part of the referral sources.

[277] The referral sources are both related to the father, J.B. On the same day the referral was received Ms. Cormier was advised by M.B. that J.B. was upset with her decision to resume custody of their child, J.B. There was nothing in Ms. Cormier's affidavit indicating that she asked either D.C. or S.B. whether or not they were supportive of M.B.'s decision to resume custody of J.B.'s son, or aware of J.B.'s upset respecting her decision to do so.

[278] There is no explanation in Ms. Cormier's evidence for S.B.'s delay in providing the referral on December 17, given the incidents referred to allegedly happened in November 2018. There is nothing indicating or suggesting that Ms. Cormier was concerned about the timing of the referral given the delay or her conversation earlier that day with M.B.

[279] There is nothing to indicate any concern on the part of Ms. Cormier with respect to the reliability of S.B. as a referral source, even though S.B. admitted to threatening M.B.

[280] There is nothing in paragraph 19 of Ms. Cormier's affidavit of January 14, 2019 indicating any awareness or understanding of the fact that the owner of the weapons, S.M., was S.B.'s boyfriend.

[281] There is nothing to indicate or suggest that Ms. Cormier, in attempting to assess the reliability of the referral source information, adequately considered the significance of the RCMP's information that S.B. was unwilling to make a statement to police. There is no evidence indicating that Ms. Cormier questioned S.B. as to the reasons why she did not provide a statement to the police.

[282] There is no evidence indicating Ms. Cormier asked when the photographs were taken or why the photographs were taken.

[283] Ms. Cormier's affidavit confirms that when she spoke with M.B. on December 19, M.B. pointed out to her that she had not asked for her side of the story. M.B.'s version of the events was very different from that of S.B. M.B. denied stealing the firearms and advised Ms. Cormier that S.B. herself had taken them from her boyfriend, S.M. There is no evidence indicating any inclination on the part of Ms. Cormier to reconsider the reliability of the referral source information based upon the information obtained from M.B. Aside from her stated reliance upon the texts and photographs, Ms. Cormier did not offer any explanation for not accepting M.B.'s version of events.

[284] Even after being advised by the child J.B.'s paternal grandfather that S.B. was not trustworthy, there was no evidence indicating any reconsideration of the reliability of the referral.

[285] During the course of his decision in *R. v. Keats*, supra, Justice Beveridge also referred to an earlier decision of the Nova Scotia Court of Appeal, *R. v. Wilcox*, 2001 NSCA 45, in which Justice Cromwell, as he then was, recognized and noted that, after the admissibility of the evidence at issue has first been assessed having regard to the traditional rules relating to admissibility of hearsay evidence, a principled approach to determining admissibility of hearsay evidence involving consideration of necessity and reliability should then be undertaken. (see also, *R. v. Khan*, [1990] 2 SCR 531).

[286] I do not believe the referral information as set forth and referred to in Ms. Cormier's affidavit is admissible under any of the traditional exceptions to the hearsay rule.

[287] I would confirm a lack or absence of evidence supporting or justifying a finding of necessity respecting the admissibility of the referral evidence. The referral sources were not called as witnesses, despite the obvious significance the Agency attached to the information provided by the referral sources, in particular, S.B.

[288] I have significant concern with respect to the reliability of the information. I am unable to conclude that proper consideration of the circumstances relating to the receipt of the referral information, as set forth and referred to in the worker's affidavit, justifies or supports a finding of reliability. The evidence does not establish or indicate a circumstantial guarantee of trustworthiness.

[289] Given the father J.B.'s upset with the decision on the part of M.B. to resume care and custody of the child J.B. as of December 17, the timing of the referrals should have triggered alarm bells. The familial connection between J.B. and the referral sources should have been considered when evaluating the reliability of the referral information and possible motivation on the part of the referral sources. The personal connection between S.B. and S.M., the owner of the weapons, should have been taken into consideration. Information indicating that S.B. had declined to give a statement to the police and suggesting that S.B. should not be seen as a reliable referral source should also have been considered. There was no evidence presented indicating or confirming that these issues or circumstances were considered by the Agency prior to reaching the conclusion that the referral information had been substantiated and to proceed with an application for permanent care and custody.

[290] A principled approach to consideration of the hearsay evidence therefore supports and justifies the exclusion of the referral evidence as non-admissible hearsay.

[291] Having concluded that the referral information as contained and set forth in Ms. Cormier's affidavit, and as referred to in her *viva voce* evidence, is non-admissible hearsay, I must then consider whether or not the admissible evidence relating to the referral, namely the information obtained from the Respondent, M.B., supports and justifies a finding of substantial risk.

[292] M.B. was not cross-examined about the December 17, 2018 referral information by counsel for the Minister.

[293] Paragraph 29 of Ms. Cormier's affidavit of January 17, 2019 outlines the conversation Ms. Cormier had with M.B. on December 19 relating to the referral.

[294] During that conversation, M.B. indicated to Ms. Cormier that she did not steal the firearms. She reported that it was S.B. who took the firearms from her boyfriend, S.M. due to S.B.'s concerns about his drinking. She acknowledged that her decision to transport the weapons in the trunk of her vehicle at the request of S.B. was a "stupid" choice.

[295] The Court is unable to conclude that the admissible evidence relating to the December 17 referral establishes substantial risk or likelihood of future harm. While the evidence does indeed establish a significant error in judgement on the part of M.B. in regard to the favor requested of her by S.B., the Court is unable to conclude based upon the evidence that the Minister has adequately established, on balance of probability, a substantial risk of harm in connection with the incident or series of incidents upon which the referral was based.

[296] In the alternative, if I am wrong in concluding that the referral information should be excluded as inadmissible hearsay, based upon careful review of the affidavit evidence, as well as the *viva voce* testimony, the Court is unable to accept Ms. Cormier's assertion that the referral information as received on December 17 was substantiated.

[297] While the Court accepts that M.B.'s involvement in the incident relating to the weapons is concerning and demonstrates poor judgement on her part, the Court is unable to view the evidence as having as much significance as the Minister would like the Court to attribute to it. Again, the absence of opportunity for the Court to assess the reliability and credibility of the referral sources has played a significant part in this conclusion.

[298] The fact that photographs and text messages were relied upon by the responsible worker for purposes of her assessment of the reliability of the referral information and yet not attempted to be tendered as exhibits is problematic. In the absence of the Court having the opportunity to review the photographs and text messages, the Court is unable to determine whether or not Ms. Cormier's belief that they supported and substantiated the referral information is reasonable.

[299] The Court finds that the risk conference determination as referred to at paragraph 39(b) of Ms. Cormier's affidavit of January 14, 2019, that M.B. "made the decision to steal weapons" is inaccurate based upon Ms. Cormier's *viva voce*

testimony. Ms. Cormier acknowledged in her testimony that the Respondent mother did not admit to stealing the weapons and only admitted to transporting them in her vehicle. The fact that Ms. Cormier confirmed in her testimony her opinion that M.B. "in a sense stole them" does not support or justify the conclusion as set forth in her affidavit.

[300] The Court notes that the Agency's plan for the child's care premised upon permanent care and custody, dated January 10, 2019, indicates that M.B. did not report that she and J.B. had reunited and resumed their relationship. The inaccuracy of this statement was also acknowledged by Ms. Cormier during her testimony when she agreed that there was no evidence indicating that M.B. and J.B. had resumed a romantic relationship, or that M.B. intended to resume her relationship with J.B. The fact that M.B. and J.B. were observed together at a party and may have left the party together does not support and justify the conclusion that they had reunited and resumed their relationship. The statement, to that effect, in the plan of care is inaccurate.

[301] Again, it is important to note that in explaining why the circumstances justifying permanent care and custody are unlikely to change, the Plan of Care refers specifically to the December 17, 2018 referral information. The plan obviously accepts and relies upon the referral allegation in support of the conclusion that M.B. had demonstrated "continued high risk behavior" which calls into question her ability or willingness to make necessary changes and exposes the child C.B. to substantial risk of harm.

[302] Based upon careful consideration of all the relevant evidence, the Court is unable to view the referral information as reliable. To the extent the Agency's Plan of Care accepts and relies upon the referral information for the purposes of the decision to make application for permanent care and custody of the child C.B, the plan cannot be viewed as reasonable or reliable.

[303] The Court therefore finds that the referral information as received by the Agency in December 2018, and subsequent investigation, does not support and justify a finding of substantial risk of harm under subparagraphs 22(2)(b) or (g) of the *CFSA*.

[304] The evidence certainly does indicate and confirm a specific incident where the Respondent mother failed to exercise appropriate judgement. However, based upon careful consideration of the evidence, the Court is unable to conclude that the Minister has adequately established a real chance of danger sufficient to justify a

finding of substantial risk of future harm as per subparagraph (b) or (g) as a result of the December 17 referrals or as a result of the mother's poor choice in deciding to grant the favor as requested by S.B.

iii) Evidence of Criminality

[305] The Minister also maintains that there is additional evidence confirming "criminality" on the part of M.B. and that based upon consideration of such evidence, the Court should find substantial risk of harm under subparagraphs 22(2)(b) and/or (g).

[306] This concern is premised upon M.B.'s history of associating with individuals who have criminal records or a propensity for criminal behavior. The concern is also founded upon J.B.'s lengthy criminal record, M.B.'s criminal record and the criminal record of her current partner, J.S. The Minister sees this concern as premised upon a track record of poor choices or poor decision-making on the part of the Respondent mother giving rise to a substantial risk of harm. Counsel for the Minister referred to it as part of a pattern of concerning behavior in closing submissions.

[307] Mr. Noiles' "Can-Say" Statement, Exhibit 4, provides a summary of the history of probation orders and convictions for J.B. Only paragraphs 17 through 20 make reference to the Respondent mother. These paragraphs contain reference to the "no contact" condition contained within the Probation Order dated February 16, 2018 pursuant to which J.B. was not to have any contact or communication with M.B., except with her express consent received in advance in writing, which might be revoked at any time. Exhibit 4 confirms that on two occasions M.B. requested contact with J.B. and on two occasions she asked to have the no contact provision reinstated.

[308] Staff Sgt. Brian Gairns' "Can-Say" Statement was entered as Exhibit 10. Exhibit 10 contains information relating to both J.B. and M.B. It refers to M.B. being charged with theft under or equal to $5000 in Moncton, New Brunswick on September 13, 2019. It notes that on August 16, 2019 M.B. was arrested and charged with theft under or equal to $5000. Exhibit 10 refers to M.B. being the subject of various complaints to police from 2016 through to and including 2019. The statement confirms that in addition to complaints of theft, there were 27 additional complaints involving M.B. in 2018 in which M.B. was either a

complainant or the subject of a complaint. The statement also confirms various motor vehicle related charges laid against M.B. in 2018.

[309] Staff Sgt. Gairns testified that he was not aware of any other charges currently against M.B. other than those referred to in paragraphs 7 and 8 of Exhibit 10.

[310] In relation to paragraph 13(r) of the statement, he testified that there was nothing connecting M.B. to reports of gunshots having been heard, other than the incident occurred in the neighborhood where she was residing.

[311] In response to a question from the Court, Staff Sgt. Gairns confirmed that he had no knowledge of any convictions for M.B. as a result of any complaints or charges referred to in his "Can-Say" Statement.

[312] Kristina Murphy testified during her cross-examination that she had no concerns about M.B.'s hands-on parenting and that the Agency's continuing concerns related to M.B.'s lifestyle. When asked to explain the lifestyle concerns, she indicated that it was based upon the Respondent mother's association with people with criminal records as well as M.B.'s credibility. Later in her evidence she indicated that criminal lifestyle meant the people that M.B. was associating with as well as her involvement in theft charges.

[313] I have carefully considered the affidavit evidence of both Ms. Murphy and Ms. Cormier in considering the concerns relating to continued criminality on the part the of the Respondent mother.

[314] During her cross-examination, the Respondent mother agreed with the suggestion that there would have been a risk for the child C.B. when she was having contact with J.B. and commented that her life had taken a tumble when J.B. was involved. She also testified that she couldn't blame her conviction for theft on J.B., acknowledging that she owns that.

[315] M.B. testified that she successfully completed her probation in connection with the theft conviction and had also paid restitution. She confirmed that the Probation Order arose from two incidents involving theft charges involving an Esso service station. She acknowledged that there were outstanding charges before the Provincial Court in Moncton, New Brunswick, which she was going to deal with.

[316] When referred to her affidavit, Exhibit 11, M.B. testified that she admitted to the concerns relating to domestic violence in her relationship with J.B., the theft, her involvement with J.B. and her poor choices respecting associates, and not making good decisions. M.B. testified that she was not going to make these mistakes on a go forward basis.

[317] M.B.'s current partner, J.S., testified after the Court granted the Minister's motion to re-open the Minister's case and present additional evidence. J.S. identified Exhibit 12 as his Pre-Sentence Report dated July 2, 2019. He identified Exhibit 13 as the Probation Order associated with his sentence. J.S. acknowledged that the date of Exhibit 13 of September 3, 2019. He explained that the sentence was in connection with the conviction entered in 2015. He confirmed that he was presently serving an intermittent jail sentence as a result of the sentencing hearing held in September 2019.

[318] The Probation Order entered as Exhibit 13 confirmed that on October 19, 2015, J.S. pled guilty to a charge of operating a motor vehicle while disqualified contrary to Section 259(4)(k) of the *Criminal Code*. The Probation Order confirms that J.S. received a sentence of two months custody to be served intermittently on weekends, subject to 12 months probation.

[319] In *Nova Scotia (Community Services) v E.P.B.*, 2007 NSSC 265, Justice McDonald determined an application for permanent care and custody where the Minister maintained that the children continue to be in need of protective services based upon substantial risk of physical or emotional harm. The Minister maintained that the Respondent mother's involvement in criminal activity supported a finding of substantial risk.

[320] Justice McDonald commented as follows at paragraph 83 of her decision:

> [83] Unfortunately E. P. B. has once again engaged in criminal activity. She was charged with fraud under $ 5,000.00 for using a master card on April 11, 2007. On June 13, 2007 she entered a guilty plea to this offence and she received nine months probation. She has also been charged with an offence that occurred on April 17. She along with J. M. is charged with theft under $5,000, possession of stolen property under $5,000, damage to property under $5,000, theft of a credit card and fraudulent use of a credit card. She is to appear and enter a plea on August 9, 2007. Her information is that she does intend to plead guilty to the use of a fraudulently obtained credit card. She denies she stole this card but she did know it was stolen. She does not expect to be incarcerated as a result of that proceeding. Certainly it is regrettable that she engaged in criminal activity.

> Society however does not prevent parents who have been convicted of crimes from caring for their children unless there is an identifiable, real, probable risk of harm to those children related to the criminal activity. The suggestions of risk of harm put forth by the Agency do not meet this standard. They are at best speculative, at worst alarmist.
>
> (Emphasis added)

[321] I agree with Justice McDonald's comments that individuals who have been convicted of crimes are not precluded from parenting of their children in the absence of reliable evidence, establishing a probable risk of harm associated with their criminal activity, requiring state intervention in order to ensure the safety and welfare of the children, in other words, a real chance of danger apparent on evidence.

[322] In this case, the evidence establishes that the Respondent mother has a criminal record for theft. However, the evidence also indicates that she successfully completed the terms of the Probation Order imposed as a result of her conviction.

[323] The evidence also establishes that she has some new theft charges which are being dealt with in Provincial Court in Moncton, New Brunswick. Again, the evidence indicates that these are outstanding charges, but there was no evidence as to the entry of any plea at this point, or how M.B. intends to plead to those charges. M.B. simply testified as to her intention to deal with the charges after acknowledging that she had missed the most recent Court dates in Moncton and being informed that a warrant had been issued as a result of her non-appearance.

[324] Evidence that an individual is the subject of a complaint does not support or justify the conclusion that the complaint was justified or has merit. A complaint is basically an allegation which remains subject to proof or verification depending upon the result of a police investigation. There was no evidence offered by any police officer responsible for the investigation of any of the complaints involving M.B. Accordingly, the court is not able to make any finding respecting the reliability of any of the complaints as referred to by Staff Sgt. Gairns. Nor does the Court have the ability to assess the significance of the complaints in the absence of evidence from the investigating officers or other evidence allowing the Court to undertake such an assessment.

[325] The evidence indicating the Respondent mother's involvement in a multitude of complaints over several years, while concerning, does not support or

justify a finding of substantial risk of harm based upon criminality or poor judgement, nor does it establish a continuing pattern of negative behavior sufficient to justify a finding of substantial or serious risk of harm.

[326] There was a lack of evidence indicating any basis for continuing concerns relating to M.B.'s association with individuals involved in criminal activity or having criminal records, except J.S.

[327] Based upon the evidence, I have concluded that M.B. was quite accurate in suggesting that her life took a tumble when she was involved with J.B. The evidence supports and justifies the conclusion that many, if not most, of the concerns respecting "criminality" arose when M.B. was involved with J.B. While the evidence does indicate some continuing concerns, again, the Court believes that J.B.'s death also constitutes a material change in circumstance relating to evaluation of future risk association with the "criminality" on the part of the Respondent mother.

[328] The evidence with respect to J.S. confirms that his recent sentence arises from a conviction that was entered in 2015 and an incident that occurred in 2014. The charge under the Criminal Code is for the criminal offence of operating a motor vehicle while disqualified. J.S. also has a prior motor vehicle related conviction.

[329] J.S.'s Pre-Sentence Report, Exhibit 12, is a positive report confirming that J.S. accepted responsibility for the offence. The report provides background information with respect to J.S. and confirms that he has a positive relationship with family members.

[330] The Court does not see M.B.'s current or future relationship with J.S. as a significant risk factor based upon the evidence presented. Indeed, the evidence suggests that J.S. could potentially play a supportive role in M.B.'s life if M.B. and J.S. continue their relationship.

[331] Based upon careful consideration of the evidence, I find that the Minister has not adequately established a substantial risk of harm associated with "criminality" on the part of the Respondent mother.

[332] The evidence presented does not support or justify a finding of a real chance of danger based upon the Minister's continuing concerns with respect to the Respondent mother's past or current associations or her current relationship.

[333] I am satisfied that the evidence with respect to M.B.'s criminal record and existing charges also do not support a finding of substantial risk under either subparagraphs (b) or (g) of Section 22(2).

iv) Failure to Disclose Information

[334] The Minister has also argued that the Respondent mother's failure to disclose information to the Agency is relevant to the determination of substantial risk.

[335] This concern seems to arise primarily from the Respondent mother's reluctance to provide information with respect to her new relationship with J.S. and to cooperate with the Agency's request for the opportunity to complete background checks in relation to J.S.

[336] Firstly, it is important to recognize that M.B. was not under any continuing legal obligation to provide ongoing disclosure to the Minister. She was no longer subject to the terms and conditions of a supervisory order requiring her to cooperate and comply with all reasonable requests, inquiries, directions and recommendations of any representative of the Agency following the taking into care of the three children on February 23, 2018. There is no provision of the *CFSA* that would require or obligate M.B. to provide ongoing disclosure.

[337] Respondent's counsel referred the Court to the decision of Justice Jesudason in *Nova Scotia (Minister of Community Services) v. A.R.*, 2019 NSSC 1, involving determination of an application for permanent care and custody. In considering the issue of the Respondent mother's credibility, His Lordship indicated as follows commencing at paragraph 79:

> [79] I agree with the Minister that Ms. R hasn't always been forthright with the Agency on the state of her relationship with Mr. B. I also agree that, like many parents who have had their children taken away from their care, Ms. R has been somewhat antagonistic toward the Agency and hasn't always been open with CB. This doesn't mean, however, that Ms. R was "less than credible" when she testified in this proceeding.
>
> [80] Furthermore, my paramount consideration isn't whether Ms. R has always been completely honest with the Agency. Rather, it's D's best interests and whether the Minister has established he continues to be in need of protective services. Indeed, there may be parents who appear before this Court who have been less than honest about things occurring in their lives. Those parents aren't

> deprived permanently of their children simply because they have been less than honest about those events.
>
> [81] I also urge the Agency to be cautious about simplistically painting Ms. R's credibility with a broad brush and suggesting that she's a person unworthy of being believed because she may not have always been forthright in the past about the state of her relationship with Mr. B.

[338] I believe that M.B.'s reluctance to be as forthcoming or cooperative as the Agency might have liked is certainly understandable and not surprising. The Minister had made it clear that she was requesting an order for permanent care and custody in relation to C.B. M.B. was opposed to the Minister's application. The final review hearing had been commenced on a *pro forma* basis on July 24, 2019. Given these circumstances, M.B.'s reluctance to cooperate with or respond to the Agency's inquiries respecting J.S. and to be less than forthcoming with respect to her relationship with J.S. is understandable. I agree with Justice Jesudason's conclusions in *A.R.*, supra, parents are not deprived of their children simply because they have been less than forthright in their communications with the Agency.

[339] The evidence does not support or justify a finding of substantial risk due to the Respondent mother's failure to be forthright.

v) Roughhousing

[340] The Minister maintains that the mother's failure to intervene during access visits when the older children were engaging or interacting in what was described as "roughhousing" behavior represents a failure on the part of the Respondent mother to exercise appropriate judgement by not intervening on a timely basis to prevent risk of harm or injury to the children. The Minister argues that this concern also justifies a finding of substantial risk.

[341] The evidence with respect to "roughhousing" is based upon the observations of the case aides, as well as Ms. Cormier.

[342] In her affidavit of November 15, 2019, tab 40, Exhibit 3, case aide Holly Martin confirms that she has reported concerns respecting roughhousing between the children during visits, and that the case aides have to point out what is happening until M.B. intervenes. At paragraph 19 of her affidavit, Ms. Martin

confirms that she observed the child C.M. “often be rough and hurt the two younger children”.

[343] During her cross-examination, Ms. Martin acknowledged that she had no opportunity to observe any access visit involving on M.B. and C.B. and therefore could not comment on M.B.’s ability to parent C.B. alone.

[344] Case aide Bonnie Mullin also testified. Her affidavit sworn November 14, 2019, tab 38 of Exhibit 2, at paragraph 30 indicates that regularly during access visits, M.B. gets on the floor and lets all three children get on top of her, which then results in roughhousing/wrestling. Her affidavit indicates that this activity leads to the two younger children ending up crying because they have gotten hurt and she notes that M.B. will hug and console the children appropriately, but that the pattern of rough behavior continues and that M.B. has not been observed to take preventative measures. Ms. Mullin confirms that she consistently cues and prompts the children not to be rough.

[345] During her testimony, Jennifer Cormier testified about being present during an access visit where she had to intervene to protect the child C.B. from her brother, C.M. She indicated that from her perspective, M.B. takes a hands-off approach to the boys roughhousing such that others have to intervene. During cross-examination Ms. Cormier testified that during the incident between C.M. and C.B., she observed that the older child was close to hitting C.B.’s head on the floor and she had to ask that he stop. She could not recall if the case aide reacted to what was happening but testified that M.B. did not react.

[346] M.B. testified that the incident as referred to by Ms. Cormier had occurred when three adults were present and that only Ms. Cormier observed what was happening between the older child, C.M. and C.B. She testified that neither she nor the case aide saw what Ms. Cormier had seen. She indicated her belief that C.M. is not rough with C.B. She conceded that the boys do engage in some roughhousing but indicated that they are very excited to see each other and that they want to play and physically interact during the access visits. She testified that she knows that some roughhousing is not acceptable. She has on occasion spoken up if it gets to the point where someone is going to get hurt. She disputed the suggestion that she never intervenes during the access visits.

[347] I am unable to conclude that the evidence with respect to roughhousing supports and justifies a finding of substantial risk. The Respondent mother’s explanation of why the two older children engage in roughhousing makes sense to

the Court. Given their ages, it would be natural for C.M. and J.B. to want to physically interact with each other when they see each other during access visits. The Court accepts that, from the perspective of the case aides, M.B. does not intervene on a timely and appropriate basis at all times when the children are physically interacting. However, in the context of an hour-long access visit, occurring in limited physical space, with three healthy and active children of different ages, the Court is not surprised at the need for invention by the responsible case aide.

[348] There was no evidence of any instance where any of the children sustained a serious injury or an injury requiring medical treatment as a result of interaction during an access visit. Although the case aides may have played an appropriate role during the visits, the Court accepts the Respondent mother's evidence that on occasion she has also intervened when she felt the roughhousing was becoming excessive.

[349] It is also important to bear in mind that the Minister's application for permanent care and custody relates only to the youngest child, C.B. M.B. is requesting that C.B. be returned to her care. While M.B. did candidly acknowledge that if she is successful in opposing the Minister's application she will at some future point in time make application to have the two older children returned to her care, the outcome of such application is uncertain. The Court is unable to conclude that the Minister's concerns relating to roughhousing give rise to a substantial risk of harm given that dismissal of the Minister's application will result in only the child C.B. being returned to the care of M.B.

[350] Accordingly, I am not prepared to make a finding of substantial risk in association with the Minister's concern respecting roughhousing. The evidence does not adequately support and justify the conclusion, on balance of probability, that failure on the part of the Respondent mother to intervene to prevent, or minimize, risk of injury or harm as a result of roughhousing during access visits gives rise to a real chance of danger apparent on the evidence so as to justify or support a finding of substantial risk of harm.

[351] In reaching this conclusion I do, of course, acknowledge that the ability of a parent to provide adequate parenting does of course require the parent to take reasonable steps to ensure the safety and welfare of the child as necessary and appropriate. The evidence in this case simply does not establish that the

Respondent mother is incapable of providing such adequate parenting for C.B. or that there is a substantial risk that she will not do so.

Assessment of Credibility

[352] In *G.L.T. v. Nova Scotia (Community Services)*, 2017 NSCA 68 the Nova Scotia Court of Appeal referred approvingly to the trial decision of Justice Forgeron, wherein Justice Forgeron identified various case authorities identifying legal principles and guidelines applicable to the assessment of credibility including, *C.R. v. McDougall*, 2008 SCC 53 (S.C.C.), *Baker-Warren v. Denault*, 2000 9 NSSC 59, and *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.).

[353] I have attempted to undertake the credibility assessment required in this case in accordance with the principles and case authorities as referred to by Justice Forgeron and approved by the Nova Scotia Court of Appeal in *G.L.T.*, supra.

[354] I was impressed by M.B.'s calm demeanor during her testimony. She did not present as argumentative when responding to questions on cross-examination. She was, for the most part, responsive to the questions posed during cross-examination. She was seldom evasive or argumentative but rather, in most instances, frank and direct when responding to questions.

[355] On more than one occasion during her cross-examination she made admissions against her own interests. In one instance she acknowledged that C.B. was taken into care due to her life choices, domestic violence in her relationship with J.B., and the poor choices that she had made at the time. When referred to her affidavit, Exhibit 11, paragraph 4, and asked what mistakes she was admitting to, she responded by indicating everything that has led up to here, the domestic, the theft, her involvement with J.B. and her poor choices respecting associates and not making good decisions. M.B.'s responses demonstrated insight into the Minister's protection concerns.

[356] M.B. responded frankly to questions about her criminal record, indicating at one point during her testimony that she "owned" her conviction for theft and did not try to deflect responsibility by placing blame or responsibility on J.B.

[357] Based upon the opportunity to observe M.B. during her testimony, and considering her *viva voce* and affidavit evidence, the Court does not have any significant concerns respecting the credibility of M.B.

[358] The Court also has no significant reservations with respect to the credibility of J.S. He was responsive to the questions asked during his examination. While J.S. was concerned by the focus or emphasis placed on his past criminal history during direct examination, he was neither evasive nor argumentative in his responses.

[359] While there were some inconsistencies between the testimony of J.S. and M.B., the Court does not feel that the inconsistencies were of such significance or importance as to justify an adverse credibility finding on the part of either J.S. or M.B.

[360] The Court does have some concerns with respect to the reliability of the evidence of the current long-term protection worker, Jennifer Cormier. In reaching this conclusion, I want to make it clear that I certainly have not rejected Ms. Cormier's evidence in its entirety. I believe that she did her best to provide her evidence in an honest and forthright manner. However, as noted earlier in this decision, I do have significant concerns with respect to reliability of parts of her testimony, and in particular, the conclusions reached by Ms. Cormier in connection with the referral information received December 17, 2018.

[361] In her affidavit sworn January 15, 2020, Exhibit 15, Ms. Cormier states at paragraph 9 that at trial on January 7, 2020, M.B. testified that she and J.S. would fill out any paperwork necessary for the Agency. She indicates that M.B. testified that they would attend the Agency on January 8, 2020 to do so. This statement was inconsistent with my evidence notes and, as a result, I reviewed the audio recording of M.B.'s testimony on January 7. At no time during her testimony did M.B. testify that she and J.S. would attend the Agency on January 8, 2020 to compete necessary paperwork as stated in Ms. Cormier's affidavit.

[362] Earlier in this decision I also noted concerns regarding the reliability of some of the statements set forth in the plan of care prepared by Ms. Cormier in support of the Minister's request for permanent care and custody based upon my review of the evidence.

[363] I would reiterate that my reservations with respect to Ms. Cormier's testimony relate primarily to reliability as opposed to truthfulness.

Conclusion

[364] A finding that the child who is the subject of a protection proceeding continues to be in need of protection as of the date of a final review hearing is a prerequisite to an order for permanent care and custody.

[365] The Minister bears the burden of proof and must establish on balance of probability that the child C.B. continues to be in need of protective services.

[366] Having regard to the totality of the evidence presented, and after careful consideration of the pre-hearing and post-hearing submissions on behalf of the parties, I have concluded that the Minister has not discharged the burden of proof in this case.

[367] The evidence does not support and justify the conclusion on balance of probability that the child C.B. is in need of protective services pursuant to subparagraphs (b), (g), or (i) of Section 22(2) of the *CFSA*.

[368] After careful consideration of all the evidence adduced at trial I have concluded that the evidence does not establish a real chance of danger so as to justify and support a finding of substantial risk of physical harm as per subparagraph (b), nor a substantial risk of emotional abuse pursuant to subparagraph (g).

[369] Based upon all the evidence presented I am unable to conclude that the chance of danger is real. Instead, the concerns of the Minister appeared to be primarily based upon speculation. The evidence does not establish a serious risk of future harm. The Minister did not establish on balance that substantial risk or real chance of danger exists on the evidence presented.

[370] In support of this conclusion I can do no better than to refer to another excerpt from Justice McDonald's decision in *Nova Scotia (Community Services) v. E.P.B.*, supra, at paragraph 85:

> [85] There are risks for J. B. in his mother's care, but living is full of risk and no one raises children free of risk. Some view certain childhood activities as risky, others view the same activities, for example, climbing a chair, as appropriate for gross motor skill development. In child protection only those risks that can be shown to be substantial are sufficient to justify the permanent removal of a child from the care of his or her parent. The risks to J. B. are not substantial. He is to be returned to his mother's care.

[371] The Minster's application for permanent care and custody be and hereby is dismissed and the child C.B. is to be returned to her mother's care.

[372] I thank counsel for their cooperation and assistance.

S. Raymond Morse, ACJFC