

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Children's Aid Society of Halifax v. P.M.H., 2006 NSSC 75

Date: 20060310

Docket: SFHCFSA-039527

Registry: Halifax

Between:

Children's Aid Society of Halifax

Applicant

v.

P.M.H.

Respondent

Restriction on publication: Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication. Section 94(1) provides:

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

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice R. James Williams

Heard: October 5, 6 and 7, 2005, in Halifax, Nova Scotia

Counsel: Katherine Carrigan, for the applicant
Tanya Jones, for the respondent

By the Court:

[1] This is an application by the Children’s Aid Society of Halifax to place P.M.H.’s name on the Child Abuse Register.

[2] The application is brought pursuant to s. 63(3) of the *Children and Family Services Act*, S.N.S. 1990, c.5. Section 63(3) provides:

s. 63(3) The Minister or an agency may apply to the Court, upon notice to the person whose name is intended to be entered in the Child Abuse Register, for a finding that, on the balance of probabilities, the person has abused a child.

[3] Section 62 of the Act provides, in part:

s. 62 In sections 63 to 66, “abuse” of the child by a person means that the child ...

(b) has been sexually abused by the person or by another person where the person, having the care of the child, knows or should know of the possibility of sexual abuse and fails to protect the child;

[4] Gass, J., in *CAS of Halifax v. R.G.*, F.H. C92-17, at p.4, described the standard of proof in applications to register a person under the Child Abuse Register:

The Court must determine, on a balance of probabilities, whether R.G. committed the alleged offence. It is the civil burden of proof. However, given the gravity of the application and its implications, the standard of proof is considered to be high, but not as high as the standard of proof in criminal cases, where the proof must be beyond a reasonable doubt. Thus, although the standard is still the civil standard, considering (a) the nature of the allegation and the moral culpability attached thereto and (b) the consequence of a finding; that is publication of the name in the Child Abuse Registry, then the Court must adopt the position that was adopted in *J.L. v. CAS of Halifax v. Attorney General of Nova Scotia*, 44 R.F.L. (2d) 437. Jones, J.A. discusses extensively the burden of proof at pp. 449 to 451, and specifically states that although the civil rule applies, “... a court must have regard to the gravity of the consequences of the finding.” (Page

449to 450) His Lordship goes on to quote Cartwright, J., Laskin, C.J.C., and Lord Denning. Laskin, C.J.C. in *Continental Insurance Company v. Dalton Cartage Company Limited* [1982] 1 S.C.R. 164 refers to "... proof commensurate with the gravity of the allegations ...". Laskin, J. goes on to quote Lord Denning in *Bater v. Bater* [1952] All E.R. 458, at 459 ..."

[5] Similarly, in *Nova Scotia (Minister of Community Services) v. W.W.*, [1997] N.S.J. No. 439 (Fam. Ct.), Wilson, Fam. Ct. J., stated:

The burden of proof is upon the applicant "on the balance of probabilities" under s. 63(3) to convince the court that W.W. has abused M.D. The civil burden of proof applicable to child protection proceedings has been confirmed by our Court of Appeal in *Halifax v. Lake* (1981), 45 N.S.R. (2d) 367 (N.S.C.A.). The standard must, however, have regard to the seriousness of the consequences of a decision. See *J.L. v. C.A.S. of Halifax* (1985), 44 R.F.L. (2d) 437 (N.S.C.A.).

[6] The Children's Aid Society alleges that P.M.H. sexually abused T.S., born February 2, 2001.

[7] The Agency's application relies predominantly upon out of court statements made or alleged to have been made by T.S.. The agency asserts the statements describe and disclose T.S.'s sexual abuse by P.M.H..

A. Hearsay

[8] Sopinka, J. provided the following definition of hearsay in *R. v. Evans*, [1993] 3 S.C.R. 653 at 661-2:

An out-of-court statement which is admitted for the truth of its contents is hearsay.

[9] Hearsay involves (1) an out-of-court statement or action, (2) offered to prove the truth of its contents and (3) a declarant who does not testify. The statements attributed to T.S. are hearsay.

[10] Lamer, C.J.C. in *R. v. B. (K.G.)* (1993), 1 S.C.R. 740 (SCC), at p. 764, described the traditional dangers of admitting hearsay as:

... the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent.

[11] Because of these dangers, hearsay is presumptively excluded unless the court concludes the statement can be admitted pursuant to one of the traditional exceptions to the hearsay rule, under "the principled approach", or, as here, pursuant to a statutory exception. The party who asserts that a statement fits within one of these exceptions bears the onus of demonstrating so.

B. Section 96(3)(b) *Children and Family Services Act*

[12] Section 96(3)(b) of the *Children and Family Services Act* provides:

s. 96(3)(b) Upon consent of the parties or upon application by a party, the court may, having regard to the best interest of the child and the reliability of the statements of the child make such order concerning the receipt of the child's evidence as the court feels appropriate and just, including . . .

(b) the admission into evidence of out of court statements made by the child.

[13] I outlined my view of this provision in *N.S. (Minister of Community Services) v. A.E.J. and G.C.C.C.* (1996), 152 N.S.R. (2d) 219 at paragraphs 6 - 10: This provision would appear to codify and slightly relax the common law criteria for the admissibility of children's hearsay as developed in:

D.R.H. and A.H. v. British Columbia (Superintendent of Family and Child Services) (1984), 41 R.F.L. (2d) 337 (B.C.C.A.), and **R. v. Khan (A.)**, [1990] 2 S.C.R. 531; 113 N.R. 53; 41 O.A.C. 353; 59 C.C.C.(3d) 92; 79 C.R.(3d) 1.

In **R. v. Khan** the Supreme Court of Canada considered the circumstances at common law where the children's out-of-court statements could be admissible to prove the truth of their content. Speaking for the court, Justice McLachlin identified a two-prong test for the admissibility of such evidence - the two prongs being necessity and reliability.

With respect to the question as to whether the reception of hearsay evidence is necessary, or more specifically as she stated, "Reasonably necessary." Justice McLachlin stated (at page 104 [C.C.C.] of **Khan**):

"The admissibility of the child's evidence might be one basis for a finding of necessity but sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances that would establish the requirement of necessity."

To the extent that s. 96 alters the common law, it is with respect to the first "prong" changing the concept "necessity" to the phrase "consideration of the best interest of the child". It may be that this at once relaxes and broadens the nature of considerations to be had by a court with respect to the "prong" of the test. . . .

Justice McLachlin described the second prong of the admissibility test as follows (at page 105 [C.C.C.] of **Khan**):

"The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence, for example, the evidence of children in sexual encounters, should always be regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances and are best left to the trial judge."

[14] Here all parties acknowledge that T.S. could not testify, that it would not be in his best interests to do so. The first part of the test enunciated in s. 96(3)(b) is

admitted. The issue(s) for the court arise from the second prong of the s. 96(3)(b) “test” for admissibility of T.S.’s out of court statements - reliability.

[15] Reliability in this context requires that there be “a circumstantial guarantee of trustworthiness” surrounding the statement before it may be admitted. The concept was explained by Lamer, C.J.C. in *R. v. Smith* (1992), 2 S.C.R. 915:

... the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. “Guarantee”, as the word is used in the phrase “circumstantial guarantee of trustworthiness”, does not require the reliability be established with absolute certainty. Rather it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible. (at p. 930)

[16] Reliability thus flows from the circumstances under which the statement in question was made (as stated by Lamer, C.J.C. in *Smith*):

... If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be “reliable”, i.e., a circumstantial guarantee of trustworthiness is established. (at p. 933)

C. Dr. Porter and Threshold Reliability

[17] Dr. Stephen Porter is a psychologist. He was called by the agency. He was qualified to give evidence as “a forensic psychologist with a specialty in memory and the factors involved in credibility assessments”. His testimony indicated that the study of memory and the factors involved in credibility assessment were established areas of specialized study in psychology. I concluded that the Dr.’s knowledge (as a psychologist and within these specialized areas) was outside, or beyond that of that Court.

[18] While qualified as an expert, I have reviewed his evidence cautiously. I note:

1. Dr. Porter was qualified as a Psychologist (whose opinions, evidence I consider later in this decision). As with any expert witness, I should be careful not to “over-rely” on his opinions.
2. I have qualified Dr. Porter to testify in some areas that draw perilously close to the Court’s responsibility to make findings (i.e. factors involved in credibility assessment).
3. Dr. Porter used the terms credibility and reliability in his report (Exhibit 11). He indicated:
 - ... these terms are used in the psychological or scientific literature, so I’m not sure how closely they match onto legal definitions, but I differentiate credibility assessment from reliability in the following way: If reliability ... is the degree to which a statement reflects what actually happened credibility assessment would include more than that, more than accuracy. It would also include the truthfulness or honesty of a witness ...
 - ... So I would think reliability means accuracy ...
 - Credibility means accuracy and honesty.

The distinction he makes is one with little difference. I conclude from my review of his report and evidence that for all intents he uses the words inter-changeably.

Reliability as used by Dr. Porter is akin to the phrase “ultimate reliability” (as described by Justice Elizabeth Bennett at p. 9 of “The Hearsay Rule: Hearsay and Admissibility”) - the weight to be given the statement once it is admitted. My concern, at least initially, is what Justice Bennett described as “threshold reliability” - whether there is a circumstantial guarantee of trustworthiness found in the statements and their circumstances.

[19] Dr. Porter suggested that in examining reliability (as he used the word) the court should consider:

- a. their context
- b. their content
- c. the individual characteristics of the witness
- d. any corroboration

[20] I have considered the limits and context of Dr. Porter's evidence. I have considered other cases and sources that outline factors that should be considered in determining the reliability issue as it is before me (including *C.A.S. of Cape Breton v. D.S.* (2002), N.S.J. No. 228 (NSSC Fam. Div.), *N.B Min. of Health and Social Services v. B.* (1991), 31 R.F.L.(3d) 356 (NBQB), and the article by Justice Bennett referred to).

[21] In determining whether T.S.'s statements exhibit a circumstantial guarantee of trustworthiness I am satisfied that it is appropriate that I consider:

- a. The individual characteristics of the declarant (here, T.S.).
- b. the individual characteristics of the person(s) reporting the statement (here, for the most part, E.S.).
- c. The context of each statement - the where, when, in response to what questions, by whom, who was present, its' relationship to other statements.
- d. Each statement. Its' content. What was said. Is it accurately reported? What kind of record of the statement is there?
- e. Is there corroboration of the statement - this is not required for there to be a finding that there is a circumstantial guarantee of trustworthiness - but the presence of corroboration can contribute to such a finding being made.

D. The Statements Put Forward

[22] The statements attributed to T.S. may be “grouped” as follows:

1. The Initial Disclosures to E.S.

[23] The initial “disclosures” by T.S. to E.S. took place March 4 and/or 5, 2005.

[24] E.S.’s evidence of October 5, 2005 included:

a. Re the evening of Friday, March 4, 2005

That night, I was putting my son to bed, T.S., and I asked – putting him to bed. And I said I got a secret, Momma loves you, along those lines. I could have said, I love you or Mommy loves you. And he says I have a secret too. I thought that to be unusual, but I didn’t any further til the next morning. (p. 142)

b. Re March 5, 2005

Q. And just describe your day from getting up in the morning.

A. I awoke and P.M.H. and my son were in the living room as normal. I got up. P.M.H. mentioned that he had to do a couple of things that day. After he left, I mentioned to T.S. what he had talked to me about the night before.

And I asked him what is these secret games or whatever. I think I said what are these secrets, the secret games. And then T.S. went on to tell me a little bit more. He said he couldn’t tell me too much because he would get P.M.H. in trouble for him ... or P.M.H. would go to jail.

Q. And then what did you ask him?

A. I asked him no, baby; that’s ok, you know, you can tell mommy. P.M.H. won’t go to jail; you can tell mommy. And then he

told mommy that you put – he told me that you put things in your bum and then you put things in your mouth ...

A. ... I asked him where do you play these games and he said in his room. I asked when do you play them. He said when mommy is sleeping.

Q. And when he said in his room, what did you understand that to be?

A. That to be in the room at my house. On his bed, I guess ...

Q. I asked him when does this happen. He said like I said, he said that it happened when mommy was asleep. But he said he would also wake up to it.

Q. And what do you recall happening next?

A. Shortly after that my friend, D. P., was knocking at my door and I invited her in.

Q. And then what happened?

A. She noticed that I was upset and she asked me what was wrong. And I said T.S. told me something that was very upsetting. And then T.S. proceeded to tell her what he has told me.

Q. Now, in your affidavit at paragraph 19 in Exhibit 2, you indicated that the conversation that you had with T.S. that you just spoke about took place on Saturday, March 5, 2005 in the early afternoon. Is that your recollection as to when this took place?

A. Yes, it was. (pp 142 - 144)

...

Q. ... So that you would agree that except for these affidavits, you've never written down what it is that T.S. said to you on March 4, is that correct?

A. ... so it's correct that I have not. (p. 163)

Q. Now we've already established, E.S. that you haven't made any notes of this up until the time that you've done your affidavits of September 2 and September 6. ... some 6 months after these incidents is the first time that you tried to copy down some of the questions you asked. But you have been repeating to people what it is that you say T.S. said to you, right?

A. To people that matter.

Q. ... the first person after you to hear anything that T.S. said was D.P., isn't that right?

- A. That's correct. (p. 166)
Q. Who else was at your home March the 5th?
A. That would be R.W. and D.P. (p. 168)

[25] E.S. called the police the evening of March 5. She appears to have reported that she had been assaulted by P.M.H. and that T.S. may have been sexually assaulted. Constable R. MacMullin indicated that the police arrived about 10 p.m.. E.S. was described as being very emotional - she informed Constable MacMullin that she was scared of P.M.H. and that he was taking medication that made him violent and forgetful.

[26] In reference to his notes (made that evening, Saturday, March 5 at 23:21) Constable MacMullin testified:

- Q. ... you have a quote ...” P.M.H. plays secret games with him and stated that P.M.H. puts things in his mouth and bum and that some games are fun, but he didn't like the games with his bum” Right?
A. Yes.
Q. So that's a direct quote. Is that a direct quote of what E.S. told you?
A. This is what E.S. - yes exactly. This is what she told me that her son had told her
...
Q. It's not word for word, is it, of what she said to you?
A. It may be, it may not, I don't recall.

[27] Constable MacMullin stated re: the timing of T.S.'s initial disclosure to his mother (E.S.):

From what I understood from her was on March 5. It was 8 o'clock, prior to when we arrived. So an hour and a half or two hours prior (to the police arrival).

[28] The Constable testified that E.S. told him the disclosure took place at 8 p.m.. E.S.'s oral testimony was that the disclosure took place in the early afternoon. E.S.'s affidavit of September 6, 2005 attaches as Exhibit “A” documents entitled “HRM Police General Occurrence Hardcopy” 2005-8584 and 2005-8585. She states in paragraph 3 of her affidavit:

With respect to pages 4 - 6 of ... (Exhibit A) ... the information provided therein is, to the best of my knowledge, information and belief, a true and accurate summary of my statements to the police as well as of T.S.'s to me ...

[29] Page 5 of the exhibit, a synopsis of the police report states:

Tonight at about 20:00 hrs. her son T.S. age 4 disclosed to her ...

[30] Similarly, paragraph 6 of her affidavit adopts p. 4 of GO#HP 2005-8545 (with the exception of the statement that he (P.M.H.) recently moved out).

[31] Page 4 of GO#HP 2005-8545 states, regarding E.S.'s report to them:

Tonight she was talking with her four year old son T.S. ... and T.S. disclosed.

[32] E.S. felt the police were mistaken (when she gave her oral testimony) as to the time. As noted, her affidavit adopts the time given by the police. The evidence concerning the time the March 5 disclosure took place is uncertain, contradictory.

[33] T.S.'s apparent reference to "things being put in my mouth and bum" is extremely troubling and concerning. Not being able to discern when it was said or to hear from two other people who were present when or proximate to the statement is problematic.

[34] There was no mention of D. P. or R.W. to the police on March 5 (according to Constable MacMullin). E.S. says she did mention D. P. She can't remember when D. P. was mentioned to Suzanne Brown of the Children's Aid Society. (Ms. Brown's notes suggest April 11, 2005.) Neither of these individuals were contacted by the police or the agency.

c. Re the hospital, March 6, 2005

[35] E.S. took T.S. to the IWK Children's Hospital on March 6, 2005. S.Y. went with them. The police had suggested she go to the hospital. They came to Emergency.

[36] They were seen by Marie Kavanaugh, a social worker, at 3:10 p.m. (March 6, 2005). Ms. Kavanaugh took a history from “mom and grandmother” and then called Child Protection. E.S.’s arm was bruised - she reported it occurred in an altercation with P.M.H. the previous evening when she confronted him with allegations of sexual abuse.

[37] Ms. Kavanaugh was somewhat confused as to which day events had occurred on. Ms. Kavanaugh indicated E.S. said T.S. told her he had a “secret game”. Ms. Kavanaugh’s notes and evidence lack precision as to who said what, when. E.S. reported that P.M.H. had been, on occasion, abusive and associated that with his pain killers. Ms. Kavanaugh did not interview T.S..

[38] The cross-examination of Ms. Kavanaugh included the following:

Q. Now why is that so important not to ask her about the allegations in front of T.S.?

A. The protocol with the role that I play as a crisis worker is very specified in terms of we are the front line people who gather the information from the family and represent the family. The – CAS or DCS, the child protection arm, are the ones who actually ask those questions as well as the IWK Child Protection Team.

So we specifically do not ask those questions because we do not – don’t want to contaminate the history. We don’t want to ask any leading questions. And that’s a subspecialty within our service delivery that’s done by people who are further qualified in those specific areas. And it’s basically not to ask leading questions at all.

Q. So just put simply, your concern would be talking about the allegations in front of T.S. or talking to his mother –

A. Yes. That would be –

Q. -- in front of T.S. –

A. Yeah.

Q. -- that could contaminate –

A. Absolutely.

Q. -- his memory –

A. Yes.

Q. -- in any future investigation?

A. Yes.

[39] Dr. K. Black is a pediatric emergency physician. She saw T.S., his mother and grandmother at 2:37 p.m. on Sunday, March 6. Dr. Black took a “history” with the mother, grandmother and child present. It lasted 20 minutes. It reviewed their “reason for coming” to the Emergency Department.

[40] Dr. Black’s testimony included:

...The – she reported that two nights prior to my seeing her, she was putting him to bed and he said that he had a secret game with P.M.H., who’s the mother’s boyfriend. And the next day, she asked him a little bit more about this and tried to figure out what this game was. And the boy reported that he couldn’t tell her because then P.M.H. would go to jail.

But upon a little bit further questioning, mother said that he reported that P.M.H. put things in his anus. And the boy had showed the mother what he meant by gesturing a finger in and out of his bottom, not penetrating himself but making that gesture. She also said that he reported that he put things in T.S.’s mouth, so P.M.H. put things in T.S.’s mouth. I didn’t get specifics on what “things” were. And also that he had woken up with P.M.H. doing things to him and that was – mother meant that – she felt that that meant sexual – like a touching of the genitalia.

[41] Dr. Black’s “history” is entitled “Query Sexual Assault”. In the “diagnosis box” she stated “? sexual abuse”.

[42] Part of the history taken read:

Christmas T.S. said P.M.H. touched his bum. P.M.H. said he had messed the bed and he was cleaning. Toilets by self but not wiping.

[43] It appears that Dr. Black, perhaps inadvertently, did exactly what Marie Kavanaugh felt should be avoided - asked about the allegations in front of T.S..

[44] Dr. S. Bellemare is a pediatrician with the Child Protection Team at the Children’s Hospital. He reviewed T.S.’s hospital file at Dr. Black’s request. His report and evidence referred to T.S. having used the words “sex games”. He found

this unusual. There is no reference to T.S. having used this phrase - except references to it by S.Y..

[45] Dr. Bellemare's knowledge of T.S.'s circumstances comes solely from his review of T.S.'s hospital file. It is indirect. Dr. Bellemare was clear in stating that the absence of physical evidence of sexual abuse does not mean there was no abuse. Nor, however, does it provide evidence of abuse.

2. Disclosures to A. M. and S. R.

[46] In her affidavit of September 2, 2005, E.S. stated at paragraph 25:

25. T.S. also disclosed to my friend, A.M., in my presence, and in the presence of her friend, S.R., that he "played secret games with P.M.H." I do not recall when this disclosure took place, except that it was within the first couple of months after T.S.'s initial disclosures of March, 2005.

[47] Neither Ms. M. nor Mr. R. testified. No other information concerning these events was put forward. They are imprecise as to time, place and context.

3. Statements Made to S.Y.

[48] S.Y.'s September 6, 2005 affidavit indicates at clause 9:

9. ... I advised Marie Kavanaugh that T.S. had made a passing reference to a 'sex game' prior to March 6, 2005. I was not alarmed about this comment because I thought he was probably referring to the time he and his little friend S. had been partially naked while playing together ...

[49] There was scant evidence of this incident. S.Y. also indicated that:

11. T.S. stayed with me a few weeks beginning March 2005, following his March 5 disclosures to his mother. At some point during his stay in my home T.S. said to me words to the effect "Grandma, do you want to play the sex game?" ...

[50] Qualifiers such as “at some point” and “to the effect” create uncertainty.

12. I did not want to alarm T.S. so I tried to remain calm and said to him “I’m not sure, what’s the sex game?” T.S. went on to tell me what he had previously to E.S. on March 5, 2005, namely “you put things in your mouth and things in your bum”. T.S. said that he played the game with P.M.H. ...

[51] The time, date, month of this “event” is uncertain.

4. The Interviews with Police/C.A.S. Social Worker

[52] Detective/Constable Anthony Blencow is a police officer with the Halifax Regional Police Department. He is assigned to the “sexual assault” unit. He was qualified:

... as an expert witness as a detective with a special expertise in training and experience in conducting investigative interviews relating to allegations of child sexual abuse, including the use of Step-Wise and statement validity analysis materials of Dr. John Yuille.

[53] Suzanne Brown, a social worker with the Children’s Aid Society of Halifax, was qualified:

... as a Child Protection Social Worker with an expertise in interviewing children and the use of statement validity tools of Dr. John Yuille.

[54] Detective Blencow and Ms. Brown interviewed T.S. twice - once March 10, 2005 and then April 11, 2005. (Ex. 13 A, B are videos of these interviews).

[55] The background work for the first interview appears to have been a 15 - 20 minute telephone conference between Ms. Brown and E.S. on March 8, 2005; presumably their review of the police notes from the night of March 5, and information from the hospital.

[56] The affidavit of Suzanne Brown of May 30, 2005 is replete with hearsay - much of which was not properly before the Court. I do not propose to review it paragraph by paragraph, but have not considered the hearsay statements in it (including statements attributed to H. and M.D.) for the truth of their content.

[57] Ms. Brown spoke to E.S. by telephone on March 8, 2005. Ms. Brown's May 30, 2005 affidavit states at paragraph:

16. On March 8, 2005, I also spoke with E.S. concerning the incident of March 5, 2005, and P.M.H.'s sexual assault of her child, T.S., as documented in my case recordings at Exhibit "A". E.S. informed me that T.S. had disclosed to her on Friday (March 4, 2005) that he had a "secret". T.S. proceeding to tell her about the secret game he and P.M.H. played. T.S. informed her that P.M.H. put things "in my bum". T.S. then gestured with his finger and told her that he (P.M.H.) puts things in his (T.S.'s) mouth, too.
17. E.S. went on to inform me that she miscarried recently and that when she was pregnant and P.M.H. was on his Electropam medication, he seemed to get violent. E.S. also stated that P.M.H. had kicked her in the stomach and punched her in the arm, causing a big bruise. He also pinned her down so she could not move and had his arm under her throat. E.S. stated that P.M.H. kicked her again on December 3, 2004, at which time he was taking his medication and drinking rum - which usually meant that he would get violent. She stated that she did not tell anyone about P.M.H.'s violence toward her during her pregnancy, but told her doctor that she fell. At that time, E.S. did not know she was pregnant. E.S. further informed me that most of the violence between she and P.M.H. began in November (2004).
18. With regard to her son T.S., E.S. indicated that she was suspicious around Christmas time when T.S. told her that P.M.H. had hurt his bum. On questioning, P.M.H. told her that her that T.S. had an "accident" so he had to clean him up. E.S. informed me that there were also times when she would wake up and T.S. would have no underwear on. The child's underwear would be on the floor and he would not be wet, so

E.S. was suspicious as to why this was the case. E.S. also stated that T.S. constantly “plays with his bird”. She stated that T.S. told his grandmother (S.Y.) that he wanted to “play sex”.

[58] The Children’s Aid Society file asserts that following March 8 T.S. made statements in:

- a. a March 10 videoed interview with Suzanne Brown, Constable Blencow, T.S. and E.S.;
- b. an April 11 videoed interview with Suzanne Brown, Constable Blencow, T.S. and E.S.;
- c. an April 11 “interview” with Suzanne Brown, Constable Blencow, T.S. and E.S. that was not recorded.

[59] D. P. was not identified as having been present at or near the time of the initial disclosures until April 11. R.W. appears to not have been identified as having been present. No attempt was made to contact Ms. P. during the Agency’s investigation. Ms. Brown suggested that this “was up to the police”. A. M. and S. R. were not contacted.

a. The March 10 Video-Taped Interview

[60] The March 10, 2005 interview started at 1:30 p.m.. Initially present are Ms. Brown, Detective/Constable Blencow and T.S.. E.S. then joins them.

- they ask T.S. to help them do their job;
- T.S. says P.M.H. is in jail - “he pulled Mom’s hair ... I was sleeping”;
- T.S. says he played video games, hide and seek with P.M.H.;
- asked if he ever played games with P.M.H., T.S. answered - no I don’t remember;

- asked did you do anything you didn't like with P.M.H., T.S. answered "No";
- T.S. asked for his mother, she was brought in the room;
- E.S. says "You gonna talk?";
- asked by Constable Blencow - P.M.H.'s not with you now? How come? T.S. answers "He hurts people". Asked "Did he ever hurt you?" T.S. answers "No";
- Ms. Brown talked to him about different kinds of touches;
- asked you ever touched in a place covered by a bathing suit? T.S. answers "No";
- asked if he played other games with P.M.H. he answered "No";
- asked if he told "Mom" about another game he answers "No";
- asked if he has a secret - "No";
- T.S. mumbles that he wants to leave - he is told no, not until we are finished;
- asked - anything else about games with P.M.H.? T.S. answers "No";
- asked if he plays a secret game T.S. says, Yeah, don't want to tell, bad game. Asked who plays T.S. says "Me and P.M.H.";
- T.S. says they play at my place, my room, just P.M.H. and me, and when asked what makes it bad;
- there is a lot of mumbling;
- traffic noises make the interview difficult to follow at times;

- E.S. asks T.S. to “tell us about the bad game” - are there other parts in the game? T.S. points to his “bum”;
- E.S. pleads with T.S. to “tell us about the game”;
- Ms. Brown and Constable Blencow talk to each other, it is inaudible;
- T.S. asks to leave again, he gazes out the window - refers to a big one - a bus or truck. He is not engaged;
- Ms. Brown says we have a special doll;
- T.S. is asked to show them with the doll how the game is played, he is non-responsive;
- T.S. is asked maybe the doll could say?
- a series of questions are put to T.S. while he is playing with a building toy. He is distracted;
- He is asked what time of day is the game played - he says when Mom sleeping, and mumbles;
- a series of questions receive no or a mumbled unintelligible answer;
- the body language of the adults says “loudly” - frustration;
- asked who did you tell about the game? Mom? T.S. says “yeah”. Grandmother? - his answer can’t be heard - he has literally crawled under a table. He says he “don’t want to tell no one”;
- another series of questions are ignored by T.S.;
- at 2:33 p.m. the interview ends;
- a discussion between E.S., Detective/Constable Blencow and Ms. Brown takes place. T.S. is still in the room.

[61] T.S. during this interview was often mumbling, distracted, not engaged, unintelligible. A duct creates noise on the tape. Traffic can be heard. The window and toys distract T.S..

[62] The references to “the game” are (perhaps of necessity) somewhat vague - the adults clearly mean a game involving sexual abuse - the fact is that T.S. identified other games played with “P.M.H.” - and the adults do little to separate video or other “normal” games from the “bad game” they fear was played. A number of T.S.’s responses could be seen as denials rather than disclosures.

b. The April 11 Video-Taped Interview

[63] The April 11 interview took place in the same interview room at the Children’s Aid Society of Halifax. Background noises, traffic, buses - again compromise the audio at times.

[64] T.S. is again present with Ms. Brown and Constable Blencow. His mother is in another room. He remembers the interviewers.

- asked did something happen to you? He replies a car hit me but I was not hurt;
- the adults explain truth/lie and say we only tell the truth in this room; we will talk about things that really happened;
- T.S. wants to go with his Mom, he is hard to understand, he bangs his head, wants Mommy;
- asked who plays the bad game? He answers P.M.H., bad P.M.H.;
- Ms. Brown asks “Why not tell us? It about bad P.M.H. It’s ok to talk about bad P.M.H.”;
- T.S. gets distracted again. Playing;

- T.S. says I want my Mommy. Ms. Brown says Mommy wanted you to tell us;
- the adults refer to talking to other kids about the games - say other kids told us;
- Ms. Brown asks Did someone tell you not to tell? A. No;
- play the game with anyone else? S.? A. No;
- T.S. is banging his head, distracted when asked clothes on? A. No. Asked again clothes on? A. hm, hm - (yes), bad though;
- asked did P.M.H. have his clothes on? A. Yes;
- T.S. plays, not engaged in interview;
- asked how many times did you play the game? A. Just one time;
- Ms. Brown asks when you played did P.M.H. do anything with his
 - back? A. No
 - elbow? A. No
 - foot? A. No
 - hand? A. No
 - toe? A. No
 - finger? A. No
 - ear? A. No
 - mouth? A. No

privates? A. No

- T.S. goes off camera;
- he refers to P.M.H. got a big one;
- he is asked “some people call it a penis, bird, what do you call it?”
No response;
- he is asked can’t tell it bad? have a name for it? - no;
- asked how do you know it a big one? he answers “cause”
did you see it? No
touch it? No
touch it? No
- there is reference to bad game, super nintendo, a dump truck;
- asked do you have a big long one he answers - no, tiny, P.M.H. do,
big and big like Mommy ...
- do you have a name for yours? No;
- they go and get E.S.. She comes in and says “It’s ok to tell them
about the game”. T.S. is told - no trouble for the truth, Mommy
doesn’t know the game, what did you tell Mommy? tell Mommy
what happened? T.S. retreats under a table;
- E.S. says she can’t remember, he crawls on her knee, behind a chair,
and has a sing songy almost baby talk that is unintelligible;
- T.S. is asked how do you stop bad P.M.H. from playing game?
A. can’t remember, she stops it, he stops when I say stop;

- T.S. is told to “tell him to stop”;
- T.S. says go away?
- if asked what game?
nintendo? Yes
play station? Yes
tag? Yes
hide/seek? Yes
- he refers to bad P.M.H., now on his own;
- asked to tell answers “cause, cause” then no, no, no, no - sharply;
- T.S. ignores the questions at times, looks out window, moves about, drinks, lays on floor, under table;
- asked did anyone say don’t talk about the game T.S. answers No;
- tell anyone about the game? No;
- almost noon Constable Blencow says “I’m hungry”;
- T.S. is asked anything else to say to P.M.H.? A. “Stop it”;
- tell what he did with his big, long one?
A. No, weird
- I want McDonald’s;
- E.S. hugs him. It ends at 11:58.

[65] T.S.'s statements in this interview are not, taken together, consistent. Again, a number of his statements are effectively denials. He says they "played the game just one time". He says that he did not play the game with S. (a young girl he was found unclothed with).

c. The April 11 Un-Recorded Interview

[66] Once the April 11 videotaped interview ended, another unrecorded interview took place.

[67] Ms. Brown's affidavit of May 30, 2005 states, at paragraph:

26. On April 11, 2005, E.S. advised me that T.S. had disclosed to E.S.'s friend, D. P., about playing "bad games with P.M.H.". During my conversation with E.S., T.S. was present and stated that he had told his mother about these games and also that P.M.H. put his fingers in T.S.'s bum and went "in and out". When E.S. demonstrated the movement with her fingers, T.S. agreed that he had told his mother about this. I asked T.S. what P.M.H. had put in his mouth and T.S. said, clearly, "penis".

[68] E.S.'s affidavit of September 2, 2005, states:

40. During my conversation with Ms. Brown and Constable Blencowe, I informed Ms. Brown and Constable Blencowe that T.S. had told my friend D. P., on March 5, 2005, what he had told me moments before, that is, that he had been playing "bad games" with P.M.H. Ms. Brown asked T.S. if this had happened, and he said that it had. T.S. then proceeded to volunteer that he also told me that P.M.H. put his fingers in T.S.'s bum and went in and out with his fingers. I then illustrated the motion T.S. had used with me to indicate the in and out movement of P.M.H.'s fingers. T.S. agreed that this had happened and that he had told me about it.
41. During the meeting T.S. and I had with Suzanne Brown and Constable Blencowe on April 11, 2005, I went on to say that T.S. had told me that P.M.H. had put something in T.S.'s

mouth, although T.S. did not say what that was. Suzanne Brown then asked T.S. what P.M.H. had put in his (T.S.'s) mouth, and T.S. clearly said, "penis".

42. The statement T.S. made to Suzanne Brown on April 11, 2005, in the presence of Constable Blencowe and myself, was the first time T.S. had said that the "thing" P.M.H. put in T.S.'s mouth was P.M.H.'s penis.
43. T.S. is familiar with the word "penis" as I try to use the proper word for body parts and bodily functions with him, although we sometimes refer to a "penis" as a "pee-pee". T.S. may have heard the word "sex", although would not regularly use the word around him. I believe that T.S. does not know what "sex" means, and I have never heard him use the word before he did so in the context of playing "sex games" with P.M.H..

[69] Ms. Brown had used the word "penis" in the video interview.

[70] Detective/Constable Blencow described the events that followed the videoed April 11 interview as follows:

A. After the interview was completed, the tapes were turned off. E.S. was present, myself and Suzanne Brown and T.S. and we were still in the video room – interview room at the Children's Aid office. And we had made a decision to talk to T.S. with his mother basically questioning on things that he had already said to his mother on the statement that he made to her previously. ...

...

[71] Then:

Q. And what comments would you make about the conduct of this particular interview, if I can call it that, in the context of the Step-Wise interview protocol?

A. I would say they would not follow the Step-Wise protocol. These are questions that were asked by his – by us regarding questions that his mother had asked him.

Q. Can you explain why you proceeded to conduct this particular interview then off-camera?

A. It was after that second interview. We were basically trying to determine a child safety matter. We knew a criminal investigation at this point probably was not going to happen based on what we had interview-wise, but we were still hoping that maybe T.S. would give us some insight to what happened for a child safety matter.

Q. And who was present then during that particular –

A. Myself, Suzanne Brown, E.S. and T.S..

Q. And what took place?

A. We asked – T.S. was asked about questions or answers that he had given to his mother, prior things that he had said to his mother without myself or Suzanne Brown being present, so he was questioned. When he was asked, and this – when this is – referring to E.S. when I'm saying this, she said that he had told her that P.M.H. had put things in his mouth and put things in his bottom and that it happened frequently and that he used to say, Stop it. And T.S. then told us that P.M.H. would put his penis in his mouth but only for a few seconds, that they only played the game once and –

Q. Now you're describing what took place during this interview after the camera was shut off –

A. That's right.

[72] I am uncertain what a “child safety matter” is.

[73] Ms. Brown's evidence was that after the camera was turned off April 11 the following occurred:

Q. Did you ask any questions of T.S. during that post-videotaped interview on April 11th?

A. Yes, I did. E.S. began to talk about – we asked – because T.S. had asked his mother to tell us what happened, we set it up that way. So that E.S., in front of T.S., would tell us what T.S. had said. And we checked that out with T.S. and said, Is that okay? T.S. just said, Yes, Mommy, you tell them.

When E.S. stated that T.S. had said that P.M.H. puts things in his mouth, I said to T.S., What did P.M.H. put in your mouth? And he stated, clearly, penis.

[74] I am not certain why Ms. Brown would use the phrase “we set it up that way” to describe having E.S., in front of T.S., off camera, unrecorded, “repeat what T.S. had said” to E.S.. It would seem to be totally inconsistent with the “protocols” that were referred to in qualifying Ms. Brown and Cst. Blencow as experts - off-camera, leading, involving a parent, after T.S. has asked to go to McDonald’s and the formal interview stopped, after a videotaped interview where Ms. Brown told him what a penis was and T.S. said “No” both when asked if he saw it? touched it? It is a sequence of events that speaks more of uncertainty than a circumstantial guarantee of truthfulness.

E. Ms. Brown and Detective/Constable Blencow

[75] Both Ms. Brown and Detective/Constable Blencow were qualified as having expertise in interviewing children and using the “Step Wise and statement validity analysis materials of Dr. John Yuille”.

[76] Ms. Brown’s affidavit of September 8, 2005 states at paragraph:

6. ... As part of my training, I have been instructed in the conduct of investigative interviews with children utilizing the Step Wise Interview protocol, as devised by John Yuille, and employed by the Nova Scotia Department of Community Services.
7. Attached hereto and marked as **Exhibit “A”** to this my affidavit is a true copy of Section 3.0, “Intake and Investigation”, of the Policy Guidelines utilized by the Children’s Aid Society of Halifax and the Nova Scotia Department of Community Services, in the investigation of child sexual abuse allegations, including the conduct of interviews associated with those investigations.
8. In the course of investigating the sexual abuse disclosures made by the child, T.S., and in interviewing T.S. on March 10, 2005 and April 11, 2005, I followed the Departmental Policy Guidelines at Section 3.0 and, in particular, the Step-Wise Interview protocol, as closely as possible in light of all of the circumstances.

...

11. I base my opinion that T.S. was sexually abused by P.M.H., on a consideration of the criteria outlined in the Statement Validity Analysis protocol used by the Children's Aid Society of Halifax and the Nova Scotia Department of Community Services.

[77] The policy guidelines and protocols referred to an excerpt in Ms. Brown's affidavit were filed with the court in their complete form. I refer to them as the agency "protocols".

F. T.S.

[78] Dr. Dorothy Chitty is a psychologist with Community Mental Health. She saw T.S. and E.S. on June 3, 2005. T.S. had been referred to her before the sexual abuse allegations and events of early March, 2005. The presenting concerns on the referral were temper tantrums and nightmares. The nightmares had gone on "a long time". E.S. reported that T.S. had had a temper tantrum at a grocery store that "was severe enough that other people had called the police". His tantrums include kicking, hitting, biting. He had threatened to hurt or tried to hurt the family pet. These behaviours are reported as being present prior to November 10, 2003. Then and now the tantrums could occur "unprovoked" or "for no known reason". One side of T.S.'s face suffered paralysis at birth and E.S. reported he had some hearing loss on that side.

[79] At the meeting with Dr. Chitty on June 3 E.S. was primarily concerned with her belief that T.S. had been sexually assaulted. She was seeking counselling for T.S. related to the sexual abuse issues. Dr. Chitty advised her that Community Mental Health did not provide such therapy/counselling. E.S. advised T.S. spent overnights with her mother (T.S.'s grandmother) and his father, Paul. A follow-up appointment was made for June 15, 2005. It was not kept. There is no evidence of any subsequent counselling for T.S..

[80] Dr. Chitty's notes (Ex. 17, p. 12) indicate that E.S. had explained "Good P.M.H., Bad P.M.H." to T.S. - that there are two P.M.H.'s - one good, one bad.

[81] Dr. Chitty's file contains a report, dated November 10, 2003 (concerning T.S.) by Dr. Janet Kawchuk of the IWK Health Centre Developmental Centre (Ex. 17, p. 20). The report notes E.S. reports that "T.S. is sometimes echolalic, repeating her questions or requests rather than answering" (Ex. 17, p. 20). Such a condition is obviously a concern when considering issues such as those before this Court.

[82] This behaviour was seen by Dr. Chitty (Ex. 17, p. 24) - after the March and subsequent disclosures. No evidence was led concerning the significance of such behaviour. Dr. Porter was retained by the agency to examine T.S.'s statement but, it appears, not alerted to this issue.

[83] In addition, Dr. Chitty's evidence suggests that T.S. had at the time of her contact (June 2005) difficulties with focus, attention span, speech, behaviour.

[84] T.S.'s age (4 in March of 2005) and behaviour issues undoubtedly have made the investigation of these events exceptionally challenging.

G. Circumstantial Guarantee of Trustworthiness?

[85] Is there a "circumstantial guarantee of trustworthiness" in the evidence put forward by the Children's Aid Society here?

[86] I conclude there is not - having considered the evidence and what follows:

1. Re: the initial disclosures to E.S.
 - a. The evidence as to when the initial disclosure took place is inconsistent:
 - E.S.'s oral evidence said the early afternoon of March 5;
 - Constable MacMullin reported that E.S. told him it was 8 o'clock (p.m.);

- E.S.'s affidavit of September 6, 2005 attaches and adopts the police notes that say she reported that the disclosure was made to her (E.S.) at 20:00;

Put simply, it is unclear when it occurred.

- b. Other parts of E.S.'s evidence seem inconsistent - for example, her oral evidence (re: March 5) indicated (at p. 158):

Later that evening when we coaxed P.M.H. coming back in the building, I was outside in the parking lot when he was walking in. And I said why did you do it and he said "I don't think I hurt him".

- her affidavit of September 2, 2005 reports (at paragraph 29):

29. ... I was outside my apartment building early in the morning of March 6 when P.M.H. approached the building. As he approached I asked him "why did you do it, why did you hurt him?" P.M.H. replied "I don't think I hurt him".

Perhaps the explanation is that this took place at 1 or 2 a.m. - the night of March 5, morning of March 6. I do not know.

- c. It appears that E.S. was interviewed by police the night of March 5, by Marie Kavanaugh and Dr. Black at the hospital, by telephone by Ms. Brown of the Children's Aid Society March 8 (by phone) and April 5 (at her home). The content of these interviews is, as disclosed by the notes of the various professionals involved, limited. No detailed interview of E.S. that involved her signing a statement or affidavit describing the events was done. The affidavits E.S. signed were prepared in late August/September, 2005 - some 5 months after the March 5 "incident".

- d. It appears that D. P. and R. W. were present at or proximate to the time of the initial “disclosures”. Neither was spoken to by anyone. The Children’s Aid Society is asserting that statements made by T.S. should be admitted asserting that there is a “circumstantial guarantee of their trustworthiness” in circumstances where T.S. cannot be cross-examined. D. P. and R. W. could be cross-examined, if called.

This is not a situation where there have been yeoman efforts made to contact these individuals and make them available for cross-examination. There was, it seems, no identification of Mr. W.’s having been present by the professionals involved (until August or September) and no attempt to contact either person. While I would stop short of saying that every person present when a statement was allegedly made must be called - there must, in my view, be some identifiable reason for (a party seeking to abrogate the hearsay rule) not calling as a witness, those who were present when the statement was “made”.

The agency is asserting the hearsay rule should be abrogated here. In my view there is an evidential burden on them to call evidence concerning the context and content of T.S.’s statements from the witnesses who observed the “statement”. To conclude otherwise would be saying they had no responsibility to investigate the circumstances and context in which such statements were made or that they could, effectively, “cherry pick” what part of the circumstances to explore or put forward.

This is not a matter of drawing an adverse inference - it is the failure to meet an evidential burden.

- e. The content of the disclosures is limited. Dr. Porter described it as “sparse” in terms of surrounding details. The significance of this is qualified due to T.S.’s young age and limited language skills.

- f. Other - later “disclosures” by T.S. were not investigated to any significant extent - including those reportedly made to or in the presence of S.Y., A. M. and S. R. There is no way of knowing how consistent or inconsistent they were with the original “disclosure”. There appears to have been no attempt to contact A. M. or S. R. The “disclosures” cannot be seen or examined in isolation.

The result is uncertainty in the evidence - over such fundamental issues as when the first disclosure took place, who was present and what did they hear, what precisely was said? How do later statements or disclosures compare to the first? This is not E.S.’s fault.

2. The Hospital - Ms. Kavanaugh, Dr. Black

It is not suggested that a disclosure was made at the hospital on March 6. It does appear that Dr. Black interviewed E.S. about the March 5 “disclosure” in front of T.S.. Ms. Kavanaugh’s evidence was that this risked “contaminating the history”.

Dr. Porter’s evidence is consistent with this view. He stated:
... in many cases of alleged child abuse repeated questioning by parents has “tainted” the recollections of their children to the point that their children may never recall the incident in question accurately. (p. 5, Ex. 7)
... a large body of research has indicated that the manner in which a child is interviewed by investigators can significantly influence their answers and subsequent recollections ...

3. Statements Made To S.Y.

The time, date, content and context of statements made to S.Y. were not put before the court in anything but the vaguest manner.

In consequence, it is impossible to consider whether there is a circumstantial guarantee of their trustworthiness, and just as troubling, the impact of these disclosures on later statements.

4. The March 10 and April 11 videotaped interviews are problematic in a number of ways:
 - The location was inappropriate. A window, and traffic noises both distracted T.S.. So did toys. Noise from a duct made the recording hard to make out at times. All of this appears inconsistent with the Yuille and agency protocol as filed with the court.
 - The interviews contain a number of statements or answers from T.S. that are denials (eg. Q. Ever touched in a place covered by a bathing suit? A. No; Q. When you played did P.M.H. do anything with his privates? A. No; re: P.M.H.'s penis/bird - Q. Did you see it? A. No, Q. Touch it? A. No.). Neither Ms. Brown nor Constable Blencow discuss these at any length. They are problematic when examining whether there is a circumstantial guarantee of trustworthiness. I cannot consider some of T.S.'s statements, but not others. The opinions put forward by Ms. Brown and Constable Blencow appeared "locked in" to a hypothesis of abuse - there was scant discussion or consideration of any evidence inconsistent with this view.
 - The protocols and guidelines purported to be followed suggest that you "Never assume that you know what a child means by the use of a particular word". The repeated reference to "game" in the tapes often is not specific beyond "bad game", "secret game", or even "game".
 - The protocol referred to recommends that there not be two active interviewers - noting that this can be confusing for the child. The protocol acknowledges that the interviewer and

“recorder” can switch roles if there is difficulty. My view of both tapes is that there were two active interviewers, and that it did cause confusion.

- The protocol states that a parent should not be present. In both interviews E.S. was present. The protocol suggests that “the exception to this exclusion occurs “when the child will not consent to being interviewed without the presence of a parent”. Here, both times the parent was brought in mid-interview.
- If the parent is present the protocol states “every effort must be made to impress on the adult the importance of not interfering in the interview”. Here, E.S. asked questions. She was encouraged to ask questions. (This was again done in the unrecorded “interview”)
- The protocol suggests being aware of the child’s needs - including nutritional. Near the end of the April 11 tape, near noon T.S. says he wants to go to McDonald’s. The interview then continues, after the tape is shut off.
- Dr. Porter refers to the Step-Wise Interview Protocol of Dr. Yuille. He states that this approach “recognizes that with all witnesses, but especially with young children such as T.S., the presence of suggestive or leading questioning ... can raise concerns about the reliability of the allegation.” (p. 6, Ex. 11) The interviews contained a number of leading questions. The unrecorded interview of April 11 is of particular concern in this regard.
- Regarding the March 10 videotaped interview, Dr. Porter commented:
 - ... The difficulties of obtaining relevant information from T.S. pertaining to the allegation soon became apparent during this interview. T.S. was unable to provide his age or last name to his interviewers, responded that he did not know the

difference between truth and lies (but knew that Det/Cst. Blencowe's description of T.S.'s shirt was "true"), and often answered that he did not know or recall information about the alleged abusive incident. In general, T.S. appeared to be very reluctant to participate in the interview and often refused to provide details about the initial allegation. In response to questioning by Det/Cst. Blencowe, T.S. denied that P.M.H. had ever hurt him or ever engaged him in any activities that he did not like. He also responded negatively to Suzanne Brown's question of whether he had ever been touched on his private parts. He further denied having played any "secret" games with P.M.H.. Eventually, he reported that he and P.M.H. played a "bad game", but refused to elaborate the nature of the game, stating that he had already told his mother. He seemed confused when Suzanne Brown offers him a "multiple choice" type question about what occurred during the game in question. The possible answers she offered him included "watching tv", "playing with cards", and "singing songs", to which he responded "we were singing songs." In my opinion, this response indicated that T.S. was either confused or, more likely, wishing to provide an answer to the interviewer even if he did not know the answer or want to discuss the game.

...

Because of T.S.'s reluctance to describe what occurred during the alleged incident, Det/Cst. Blencowe resorted to asking direct questions about the "game". However, T.S. still showed little interest in cooperating. When he asked T.S. whether he wanted to play the game with P.M.H., T.S. responded with "yeah" and immediately shifted his attention elsewhere in the room. T.S.

then continued to ignore direct questions about the game by both interviewers and his mother, including the highly suggestive question by Det/Cst. Blencowe: "T.S. what kind of games did you play with your bum?" (p. 8, 9, Ex. 11)

I agree with these observations.

- Regarding the April 11 videotaped interview, Dr. Porter commented:

... During this interview, T.S. initially appeared to be more willing to discuss aspects of the "game" than he was in the first interview. He reported that it was a "bad" game and goes on to distinguish "Good P.M.H." and Bad P.M.H.", stating that Bad P.M.H. plays the "game." ... However, he refused to provide any detail about the nature of the game. As the interview progressed, T.S. continues to refuse to elaborate the details of the "game." In response to direct questioning, T.S. reports that both he and P.M.H. had their clothes on during the game, and that they played the game just once. Throughout the interview, it appeared to me that T.S. was distracted, walking around the room and playing. As in the first interview, Suzanne Brown posed another "multiple choice" type question, this time regarding whether P.M.H. had used various parts of P.M.H.'s body during the game ("elbow", "back", "hand", "mouth", "private parts", etc.). T.S. responded negatively to each option. After T.S. moved out of the view of the video camera, Suzanne Brown asked him whether P.M.H. did something "down there", apparently meaning the crotch area to which T.S. responded "yeah", and "big, long one ... he's got a big one." However, he refused to say how he knows what it looked like and says "no" when asked whether he

had seen or touched it. He goes on to describe P.M.H.'s "big, long one" as "big and big and big like Mommy." T.S. then answered that P.M.H. had not seen his own (T.S.'s) "little one." After his mother entered the interview room, T.S.'s apparent reluctance to describe the alleged incident increases and he stated that "I can't remember Mommy." When Det/Cst. Tony Blencowe asks T.S. how he can stop "Bad P.M.H." from playing the game, T.S. says to tell him to "stop it" and "just go away." Det/Cst. Tony Blencowe then asked which game they are discussing, offering the possibilities of "Nintendo" and "Play Station." T.S. replied "yeah" to both. Subsequently, Det/Cst. Tony Blencowe asked T.S. what it is that he is supposed to stop P.M.H. from doing, and offered the hypothetical answer of "putting lights on the Christmas tree." T.S. responds "yeah." In my opinion, these responses indicated that T.S. was either confused or, more likely, wishing to provide an answer to the interviewer even if he did not know the answer or want to discuss the game. Finally, Suzanne Brown asks the highly leading question "Can you tell us what he did with his big long one?" to which T.S. responds "No ... it's weird" and moves to a completely different topic (he wanted to go to eat at McDonald's). (p. 9, 10, 11, Ex. 11)

Again, I agree with these observations.

5. The April 11 unrecorded statement

The protocol states "The interview should be videotaped ... an audio tape backup is very useful." Here, the video was apparently deliberately ended, and questioning deliberately continued. I cannot

identify an acceptable rationale for doing so. It is contrary to the protocols.

T.S.'s reference to "penis" here comes immediately after an interview in which he is "given" the word.

It occurs after he says he wants to go to MacDonald's, is hungry - the interview stops and he is asked things off camera. It occurs in circumstances where he is "led" in the questioning.

Also, the material filed by the agency includes (hearsay) statements suggesting that P.M.H.'s 9 year old son had observed P.M.H. and E.S. having oral sex - this was not properly put before me, nor it appears was such an observation considered in the agency's examination of what, if anything, was going on with T.S..

6. T.S.

Dr. Chitty's evidence and records disclosed a number of concerns - including behaviour problems, a somewhat dated diagnosis of echolia - that were not updated or folded into the agency's consideration or evaluation of T.S.'s alleged statements. The result is uncertainty

Dr. Porter indicated (concerning T.S.),

The main concern is T.S.'s young age ... Children under this age (5 or 6) are especially vulnerable to leading questions or suggestions from authority figures, especially parents. As such careful interviewing of children is essential to ensure that children's memories for events are preserved and their evidence is not tainted

...

Given that he has been exposed to several interviews and discussions about the allegation since the initial disclosure there is a possibility that his memories have been tainted. As such, a primary focus on the ... relatively spontaneous, untainted initial disclosure is recommended. (p. 14, Ex. 11)

This is a particular concern with the later statements, including the unrecorded statement of April 11.

Also, it is clear that the investigators here asked numerous leading and suggestive questions.

Dr. Porter also observed:

It is not possible to determine with confidence whether T.S.'s statements about or memories for the alleged incident were influenced by discussions with E.S. in the days and weeks following the initial disclosure ... the only evidence to consider is her descriptions of the interactions. (p. 7, Ex. 11)

7. Corroboration

There was no corroboration of T.S.'s statements.

8. The Step-Wise Interview Protocol of Dr. Yuille

This protocol was used here to essentially boot-strap the qualification of Suzanne Brown and Constable Blencow as expert witnesses. Dr. Porter in his testimony indicated that the protocol ... recognizes that with all witnesses, but especially with young children such as T.S., the presence of suggestive or leading questioning ... can raise concerns about the reliability of the allegation. (p. 6, Ex. 11)

As I have indicated, the protocol cannot be said to have been followed here.

[87] I conclude that there is no circumstantial guarantee of trustworthiness exhibited by the statements put forward.

- The time of the initial disclosure is uncertain.

- Persons present proximate to the initial disclosure were not contacted or called.
- Persons present at subsequent disclosures were not contacted or called.
- Dr. Black interviewed E.S. about the allegations in front of T.S..
- T.S.'s personal circumstances, background were not explored by the agency with any diligence. In consequence they are not folded into analysis of T.S.'s statements.
- The agency/police interviews of T.S. contain numerous denials by T.S.. The interviews fail in a number of respects to follow the protocols purported to be relied upon, purported to enhance validity, reliability. (Some of the divergence from protocols was as a result of T.S.'s young age.)
- The unrecorded interview of April 11 appears to purposely violate the protocol in a number of respects. In it T.S. for the first time uses a word - penis, that was "given to him" minutes before in the videotaped interview. It follows a number of interviews, interactions, "disclosures" that may have tainted T.S.'s reporting.
- There is no corroborating evidence.

[88] I do not conclude that T.S.'s statements were made under circumstances "which negate the apprehensions traditionally associated with hearsay evidence".

[89] My decision not to admit these statements is, as I have indicated, related to a number of factors, circumstances - all of them were beyond T.S.'s control, most beyond E.S.'s control. My decision not to admit evidence is not a decision that concludes that T.S. was, or was not, abused by P.M.H.. It is a decision on the admissibility of evidence.

H. Independent Evidence of Abuse

[90] The evidence (independent of T.S.'s statements) does not prove on the balance of probabilities that P.M.H. sexually abused T.S.. P.M.H. denies having done so. I have considered the evidence as a whole, including the following:

1. The assertion by E.S. that P.M.H. admitted that he (P.M.H.) was sexually abused as a youth.
2. The statement at paragraph 15 of E.S.'s September 2, 2005 affidavit:
 15. Around Christmas, 2004, P.M.H. told me that T.S. had had an "accident" during the night and had "caked poop" on his bum, when he woke up. P.M.H. indicated that he cleaned up T.S.. Later that day, T.S. made a comment to me that P.M.H. had "touched his bum" and it "hurt". I did not make any comments to T.S. about this or discuss it with him further. At the time, I did not think that T.S.'s statement to me was unusual because I thought he might have felt sore from being cleaned up by P.M.H. that morning.

If anything, this complicates the interpretation of T.S.'s disclosure.

3. The assertions that P.M.H. was violent with E.S..
4. The assertion in paragraph 39 of E.S.'s affidavit of September 2, 2005:
 39. About a week before I met with Suzanne Brown and Constable Blencowe on April 11, 2005, I found one of T.S.'s underwear in a plastic grocery bag under by kitchen counter, amongst my recyclables, all ripped apart. My recyclables are generally kept in plastic grocery bags under my kitchen counter. I have no idea how T.S.'s underwear became ripped or how it ended up in a bag under my kitchen counter. I brought the bag

with the underwear in it to the meeting on April 11, 2005 and gave it to Constable Blencowe.

P.M.H.'s response is contained in his affidavit of September 26, 2005 with regard to "the underwear":

18. ... There were many nights that T.S. would climb into bed with E.S. and I. I would usually leave and go sleep in the other bed for the rest of the night as there was not enough room. It is true that T.S. would frequently take his nightclothes off, including his underwear. For example, when E.S. and I would put T.S. to bed clothed and check on him the next hour to see if he was sleeping or not, he would frequently have taken off his pyjamas and underclothes. He was normally a handful to put to bed and if placed in bed at 8:00 p.m. it would often take him an hour to go to sleep.

...

29. ... Rags for cleaning were kept there and a lot of clothing wound up under the sink as rags. There was an assortment of clothing there that did not fit T.S. that ended up as rags including T.S.'s underwear. For example, one time E.S. and I were trying a pair of pants on T.S. and the elastic on his underwear ripped and ended up beneath the sink for rags.

5. The assertions in paragraphs 47 and 48 of E.S.'s affidavit of September 2, 2005:

47. I have observed T.S. on two occasions interacting inappropriately with my friend D. P.'s little girl, S.. The first time was a couple of months before T.S.'s March 5, 2005 disclosure. On that occasion, D. was visiting me in my home with S. and I found the children in T.S.'s room, lying on a blanket next to each other with no bottom clothes on. Neither child said anything and I told them to get dressed, which they did.

48. The second time was a month or two after T.S.'s disclosure to me of March 5, 2005. The two children

were in T.S.'s bedroom, and as I approached the room I could see T.S.'s back and observed that he was on top of S., lying face down. Once he heard me coming toward the room, T.S. quickly got up and ran toward the closet where he apparently intended to hide. I could see that T.S. was naked and I believe that T.S. was also naked (sic). I spoke with T.S. and asked him what he was doing. He said that he and S. were "playing the sex game" - or words to that effect. I did not question he or S. further about this, but told the children that this was inappropriate and that they should get dressed.

6. It was suggested that P.M.H. indicated that "I don't think I hurt him" when confronted by E.S. on March 5 (or 6). P.M.H.'s affidavit of September 26, 2005 indicated:

22. ... When I got home that Saturday March 5, 2005 E.S. was home, and R. and D. P. were there as well. R. is about 15 or 16 years old and I do not know his last name. We were sitting around having a few drinks. R. was not drinking because he is under age. In the course of the evening, E.S. told me that she wanted to discuss what was happening with T.S.. E.S. said that T.S. had said that I had hurt his bum and that was about as specific as she got. I told her that I had not done anything to hurt T.S. and I was sure that I did not hurt him ever.
23. One of the reasons that T.S. was being seen at the IWK is that he would not clean himself and was having difficulty toilet training. He would wet the bed occasionally and be incontinent during the days. He would ask E.S. or I to come and wipe his bum for him. Whoever was around, be it me or E.S., would do it. At or around Christmas 2004 T.S. had complained to me and his mother when I cleaned him up and so I had mentioned to E.S. in March 2005 that I thought T.S. may have been referring to a time I washed him up.

26. ... When I said I did not think that I had hurt him, I was referring to times when I washed T.S. up. I also told E.S. that I did not sexually abuse T.S..

I would not interpret this as inculpatory

[91] I have also considered this evidence as possible corroboration of T.S.'s statements, and concluded that it does not.

I. Disposition

[92] The application to admit statements alleged to have been made by T.S. is denied.

[93] The application to place P.M.H.'s name on the Child Abuse Registry is denied. The agency has failed to prove on the balance of probabilities that he sexually abused T.S..

J. S. C. (F. D.)

Halifax, NS