IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: N.N.M. v. Nova Scotia (Community Services), 2008 NSSC 72

Date: 20080310
Docket: SFHMCA-056350
Registry: Halifax

Between:

N.N.M. and R.D.M.

Applicants

v.

Minister of Community Services

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."

Judge: The Honourable Justice Mona M. Lynch

Heard: January 15, 17 & 23; February 28, 2008, in Halifax, Nova Scotia

Counsel: Julia Cornish, Q.C., for the Applicants
James Leiper, for the Respondent

By the Court:

Background:

[1] There are two children in this case, a boy aged five and a girl aged three. The children were apprehended from their biological family and placed in care of the Minister of Community Services (MCS) on August 18, 2006. The children were placed in another foster home for about one month and then placed with the Applicant foster parents. The children were placed in the permanent care and custody of the MCS on September 21, 2007. The children remained with the foster parents. On the evening of September 21, 2007 the foster parents had a long discussion about adopting the children. On September 22, 2007, the foster parents informed the social worker for the MCS they wanted to adopt the children.

[2] The social worker for the MCS informed the foster parents that another prospective adoptive home had been selected for the children. The social worker for the MCS indicated that she would meet with the team who had chosen the prospective adoptive home for the children to consider the foster parents' request. The social worker for the MCS met with the foster mother in mid-October 2007 and informed her that the decision had been made for the children to be placed

with the other prospective adoptive parents. The social worker met with the foster father in November 2007.

[3] The foster parents sought review of the adoption placement decision through various persons in the hierarchy of the MCS. In November and December of 2007, during the time that the decision on the adoptive home was being reviewed, the transition of the children to the other adoptive home was taking place. The children went on visits to the other home, although there were no overnight visits. During this same period of time the MCS sought the advice of a psychologist on the transition of the children from the foster home to the adoptive home.

[4] On December 12, 2007, the foster parents learned that the decision of the Director of Child Welfare for the MCS was that the children would be placed in their chosen prospective adoptive home. This was the last stage of the review in the Department of Community Services. The next day the foster parents were informed that the children would be taken to the adoptive home on December 14, 2007 and may or may not return to the foster home.

[5] On December 14, 2007, the foster parents applied under the **Maintenance and Custody Act,** R.S.N.S. 1989, c. 160 **(MCA)** for custody of the two children. The matter came before the court on December 18, 2007. The MCS objected to an order being made under the **MCA** as the children had been placed for adoption on December 14, 2007. On December 18, 2007, the foster parents asked the court to grant relief under its *parens patriae* jurisdiction. The foster parents also requested an order that the children remain with the foster parents until the matter could be fully heard. The MCS told the court on December 18, 2007 that the permanent care and custody order in relation to the children was under appeal and scheduled to be heard at the end of January 2008. It was ordered that the children remain with the foster parents until the matter could be heard and the matter was scheduled for January 15 and 17, 2008.

[6] The foster parents were notified by letter from the MCS dated December 19, 2007, that the children would visit with the prospective adoptive parents on December 22, 2007 from 10:00 a.m. to 2:00 p.m.; December 24 - 26; December 28 from 11:00 a.m. to 3:00 p.m.; December 30 - January1 and January 6 - 8. The foster parents were also told that they would be responsible for transporting the children to the office of the MCS for the purposes of access.

[7] The foster parents filed an interim application on December 20, 2007 requesting relief under the **MCA** and the court's inherent *parens patriae* jurisdiction to clarify the allocation of the children's time. The matter came back before the court on December 24, 2007 and evidence was heard from the foster father. It was ordered that the children remain in the care of the foster parents pending the full hearing of the matter and that visits with the prospective adoptive parents could continue as outlined in the letter from the MCS with the exception that the children would remain with the foster parents from December 24 - 26, 2007. It was also ordered that the MCS arrange for the children to be picked up and dropped off at the home of the foster parents.

[8] The matter was heard on January 15, 17, and 23, 2008. After the evidence of the foster parents, the MCS applied to dismiss the application under **Rule** 30:08. The application under the **MCA** was dismissed and the proceeding continued for the relief requested pursuant to the court's *parens patriae* jurisdiction. Final submissions were scheduled for February 19, 2008 but later adjourned and heard on February 28, 2008.

Position of the Parties:

[9] The foster parents are requesting that the court exercise its *parens patriae* jurisdiction and order that the children remain with them. They ask that this be achieved by ordering an adoption of the children by the foster parents or by granting the foster parents custody. If the court does not grant either and directs that the foster parents must apply under the **Children and Family Services Act,** S.N.S. 1990, c. 5 **(CFSA)** to be added as a party and to terminate the permanent care and custody order, that the court order the children remain with the foster parents until that matter is heard. The foster parents assert that the review process and subsequent decision by the MCS to choose another adoptive home in which to place the children was unfair to them.

[10] The MCS' position is that there is no application before the court except for the application under the **MCA** which was dismissed by the court. As there was no application to amend the application, it is the position of the MCS that there is no application before the court and no order should be made. The MCS submits that as there is no new application before the court the MCS is left to guess what relief is being sought without notice which was a denial of natural justice.

[11] If the court does proceed with the application, the position of the MCS is that the court should not use its *parens patriae* jurisdiction to grant the order or orders sought by the foster parents. They assert that there is no gap in the legislation and nothing patently unreasonable, unreasonable or incorrect in the decision of the MCS to place the children in the prospective adoptive home. The MCS' position is that the foster parents simply disagree with the decision.

Issues:

(a) With the dismissal of the application under the **MCA** is there anything left for the court to decide?

(b) Does the court have *parens patriae* jurisdiction?

(c) Is there a legislative gap which would allow the court to use its inherent *parens patriae* jurisdiction? If there is a legislative gap, should the court use its inherent *parens patriae* jurisdiction to fill the legislative gap?

(d) Is there *parens patriae* jurisdiction to review the decision of the MCS to not place the children with the foster parents and to place the children in the other adoptive home?

(e) If the court invokes its *parens patriae* jurisdiction should the court order the adoption or custody of the children by the foster parents?

Analysis:

(a) With the dismissal of the application under the MCA is there anything left for the court to decide?

[12] The original application in this matter was brought under the **MCA**. At the court appearance on December 18, 2007 counsel for the foster parents explained that the matter came up very quickly and the objective was to get the matter before the court quickly to attempt to have the children remain with the foster parents until the matter could be fully heard. Counsel for the foster parents indicated that she was unsure of the appropriate jurisdiction for the application. The foster parents learned for the first time at the December 18, 2007 hearing that the MCS had placed the children for adoption. They also learned that the permanent care and custody order was under appeal. When the children were taken from their home on December 14, 2007 the foster parents were told that the children may or may not return to their home. Counsel for the foster parents indicated that she may have been wrong to proceed under the **MCA** and asked the court to use its inherent

parens patriae jurisdiction. Counsel for the foster parents mentioned both a legislative gap and judicial review as reasons for the court to use its inherent jurisdiction. The cases referred to by the foster parents dealt with both legislative gap and judicial review in using *parens patriae* jurisdiction.

[13] At the end of the hearing on December 18, 2007 the court directed that the matter be set down for a two-day hearing and gave filing directions. The brief of the foster parents was to be filed prior to the brief of the MCS.

[14] The matter was back before the court on the interim application on December 24, 2007. The interim application sought relief pursuant to the inherent *parens patriae* jurisdiction of the court. Prior to the December 24, 2007 hearing the MCS filed a brief with the court. The foster parents requested and were granted an extension of the time required to file their brief. A new date was also given for the MCS to respond to the foster parents' brief. The foster parents were clear in their brief that they were seeking relief under the court's *parens patriae* jurisdiction both because of a legislative gap and by way of judicial review.

[15] On January 15, 2008, prior to the start of the evidence, the MCS raised a concern about the relief sought. After clarification from the foster parents the MCS indicated that they were willing to proceed on that basis subject to something new coming up after the MCS' evidence or on the submissions of the foster parents.

[16] On January 17, 2008, prior to calling evidence, the MCS requested that the matter be dismissed as there was no case for the MCS to meet. The court dismissed the application pursuant to the **MCA** but did not dismiss the matter based on the *parens patriae* jurisdiction.

[17] Although there was no application to amend the December 14, 2007 application by the foster parents, there is no doubt that the MCS understood what relief was being requested by the foster parents. It cannot be said that the MCS was taken by surprise in any way or that the MCS was prejudiced in her case. While the procedure may not have been perfect, it is a unique case where the jurisdiction and procedure were not clear. The foster parents were clear from the beginning that they were seeking to have the children remain with them by way of adoption or custody. The relief sought was clear and that the jurisdiction for the

relief was under the court's *parens patriae* jurisdiction was clear. After the dismissal of the application under the **MCA** the issue of relief pursuant to *parens patriae* was still to be decided.

[18] Even if the MCS is correct in their position, there is no prejudice to the MCS. They have had an opportunity to respond to all relief sought by the foster parents. Given that a new application has been filed by the foster parents, it is highly likely that they would continue to pursue the matter. It would not be in the best interests of the children to dismiss the matter and have the foster parents bring a new application. A dismissal would cause further delay and uncertainty for the children.

(b) Does the court have *parens patriae* jurisdiction?

[19] There is certainly no doubt that the Supreme Court of Nova Scotia has *parens patriae* jurisdiction which has been preserved in the **Judicature Act,** R.S.N.S. 1989, c.240. This jurisdiction has not been ousted by the existence of legislation entrusting the care and custody of children to local authorities but it must be confined to "gaps" in the legislation and to judicial review (**B.(D) v.**

Newfoundland (Director of Child Welfare), (1982) CarswellNfld 29 (S.C.C.) at paragraph 13).

(c) Is there a legislative gap which would allow the court to use its inherent *parens patriae* jurisdiction? If there is a legislative gap, should the court use its inherent *parens patriae* jurisdiction to fill the legislative gap?

[20] In the present case the two children had been with the foster parents for over a year when the children were placed in the permanent care and custody of the MCS. The foster parents had not participated in the court proceeding involving the children. After being told that another home had been selected as the adoption home for the children, the foster parents sought review of the decision in the Department of Community Services. When they were told on December 12, 2007 that their last avenue of review had been exhausted and the children would be removed from their home, what avenues were then available to the foster parents?

[21] The MCS has suggested a number of avenues are available to the foster parents. One such avenue is for the foster parents to apply under s. 36(1)(f) of the

CFSA for leave to be added as a party. The other avenue to be a party is under s. 36(4) of the **CFSA** which allows for limited participation for foster parents in proceedings and further participation with leave of the court. If granted party status or full participation the foster parents could then apply for leave of the court to terminate permanent care and custody pursuant to s. 48(3) of the **CFSA**. If granted leave to apply to terminate, the foster parents could apply to have their application for custody of the children under the **MCA** joined with their application to terminate. The application to terminate would require notice to all parties who were part of the proceeding which placed the children in the permanent care and custody of the MCS.

[22] The MCS points to the **Children's Aid Society of Shelburne County v. I.C.,** 2001 NSCA 108 at paragraph 16 as authority that the foster parents only possible course of action was to apply to terminate the permanent care order.

[23] The facts in **I.C.** are quite different from the ones in this case. In **I.C.** the child had been originally placed with the foster parents when she was eleven hours old. The biological parents consented to permanent care of the child on the understanding that the foster parents would commit to adopt the child. When that

did not happen, the biological parents applied for leave to terminate permanent care and the foster parents applied to be added as parties. In this case, the foster parents do not know the biological parents and the biological parents are not supporting the children remaining in the care of the foster parents. The MCS may well oppose the application to terminate permanent care and custody. If the foster parents in this case are successful in terminating permanent care and custody, the biological parents and other biological relatives may oppose the foster parents' plan and put forward their own plan for custody.

[24] The foster parents in this case do not want custody of the children. They want to adopt the children. Adoption is a much more stable and permanent solution for the children. Currently the foster parents cannot adopt the children without the consent of the MCS. The MCS has chosen a different adoptive home and will currently not consent to the adoption of the children by the foster parents.

[25] If the foster parents are able to obtain custody of the children under the **MCA**, the custody order would be subject to applications to vary by the biological parents and biological relatives of the children. If the foster parents were granted

custody, an adoption application would require notice to the biological parents and the consent of the biological parents or an order dispensing with their consent.

[26] The avenue proposed by the MCS for these foster parents is a long and uncertain route which opens up the children's future to much uncertainty.

[27] At the time of the original application on December 14, 2007, s. 48(6) of the **CFSA** did not allow for an application to terminate as the order of permanent care and custody was being appealed. The appeal of permanent care has now been dismissed by the Nova Scotia Court of Appeal. The avenue suggested by the MCS would have been only available to the foster parents after the children had been taken out of their care for almost two months.

[28] The other avenue suggested by the MCS was for the foster parents to apply to be joined in the appeal. This would allow the Nova Scotia Court of Appeal to make any decision that this court can make. While the foster parents could apply to join the appeal, they were not a party to the permanent care proceeding. The foster parents did not offer any evidence at the permanent care hearing and it

would be difficult for the Nova Scotia Court of Appeal to give them relief without hearing evidence. The **CFSA** places time restrictions on appeals.

[29] If either of these two uncertain avenues could lead to the foster parents obtaining the relief they seek, then perhaps there is no gap in the legislation.

[30] It is not clear whether or not there is a gap in the legislation. I will not exercise *parens patriae* jurisdiction on the basis of a legislative gap.

(d) Is there *parens patriae* jurisdiction to review the decision of the MCS to not place the children with the foster parents and to place the children in the other adoptive home?

[31] It is clear from the **B.(D.) v. Newfoundland** case that the court can use its *parens patriae* jurisdiction to review the decision of the MCS. In **B.(D.)** the director of child welfare had removed a child who was a ward of the director from the home where the child was placed for adoption. There was an allegation of child abuse made which was later found to be unfounded. The prospective

adoptive parents instituted *habeas corpus* proceedings. At paragraph 16, Wilson J. said:

> There is no doubt that judicial review of the director's action would have been available to the appellants in the absence of any right of appeal in the statute. Moreover, an application for judicial review might well have been successful on the ground of the director's failure to treat the B.'s fairly: see Nicholson v. Haldimand-Norfolk Regional Bd. of Commrs. of Police, [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410. The Newfoundland Court of Appeal found as a fact that they had been treated unfairly. The allegations came from a completely unreliable source and no effort was made by the director to substantiate them. However, instead of proceeding by way of judicial review the appellants instituted habeas corpus proceedings and the Newfoundland courts concluded, in my view wrongly, that they were without jurisdiction to deal with the matter. I have concluded that it was open to them to proceed with judicial review in exercise of their parens patriae jurisdiction. Unlike the Liverpool case, supra, there was a basis for judicial review here and the courts were in error in treating the application as one in which they were being asked to substitute their discretion for that of the director. They were being asked to control the improper exercise of his discretion.

In **B.(D.)** the court ordered adoption of the child by the prospective adoptive parents from whom the child was taken.

[32] It is clear from the **B.(D.)** case that the court does have jurisdiction to exercise its *parens patriae* jurisdiction to review a decision of the MCS in relation to a decision pertaining to adoption of children who are in the permanent care and custody of the MCS.

[33] Finding that the court has the jurisdiction to review the decision is not the end of the matter. In all cases of judicial review the standard of review is the preliminary question.

[34] In the present case the complaint of the foster parents is that as in **B.(D.)** they were not treated fairly. They say the process of review which was undertaken by the MCS after the foster parents said that they wanted to adopt the children was not a fair process.

[35] The authorities on judicial review such as **Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police**, 1978 CarswellOnt 609 (S.C.C.) indicate that when looking at the appropriate standard of judicial review that fairness applies to all administrative decision-making when a person's rights, privileges or interests are engaged. **Cardinal v. Kent Institution,** [1985] 2 S.C.R. 643 at paragraph 23 also provides that lack of procedural fairness must always render a decision invalid:

> ...I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which

> finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Also in **Dunsmuir v. New Brunswick ,** 2008 SCC 9 at paragraph 23: "The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes". At paragraph 79:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual.

[36] The position of the foster parents is that there is a denial of fairness. They are not asking for a review of the decision of the MCS on its merits. They are asking for a review on the process. The pragmatic and functional approach is not used for review of procedural fairness (**Heritage Trust of Nova Scotia v. Halifax (Regional Municipality),** 2007 NSSC 28 at paragraph 56). If the process was unfair, the decision is invalid.

[37] The history of the matter is important when reviewing the decision of the MCS. The children were placed with the foster parents in September 2006. The

children were and remain high needs. The foster mother testified that the little girl cried “24-7". Both children were sick frequently and both children appeared to be afraid of men. It is clear from the evidence of the social worker that the children had significant developmental delays and were severely neglected prior to being apprehended by the MCS. During their time with the foster parents the children had to attend numerous medical, speech therapy and other health related appointments. The foster mother attended all but one of these appointments. The foster mother is employed in the health field and was able to help expedite appointments for the children.

[38] The children’s developmental delays have improved significantly since they have been placed with the foster parents. Their behaviours have improved. They have overcome their fear of the foster father and are quite comfortable with him. It was apparent from the evidence that the foster parents love the children very much.

[39] The foster parents have been together for twenty years. The foster parents completed the process of being approved as foster parents in 2003 and the first child was placed with them in June 2003. Other children were placed with the

foster parents, but all of the children who had been previously placed with the foster parents were returned to their families. The foster parents were not at all knowledgeable about the court process involving children apprehended by the MCS.

[40] The social worker for the MCS did not attend at the home of the foster parents. Contact between the foster mother and the social worker for the MCS was at medical appointments for the children or by telephone. The social worker for the MCS and the foster father did not meet until November 2007.

[41] The foster mother and the social worker for the MCS disagree on the number, circumstances and details of conversations between them around adopting the children. The foster mother recalls being asked on one occasion in January 2007 whether she and the foster father would be interested in adopting the children. The foster mother recalls this conversation as a casual one when the children were attending a medical appointment. The foster mother recalls telling the social worker immediately that she did not think they would be interested in adopting the children. At the time of this conversation the children's behaviour was still a concern and the foster mother felt this conversation was casual and not a

serious discussion about adoption of the children. The foster father recalls a conversation in January 2007 about adoption but in his mind this was premature as the children were not available for adoption until the permanent care and custody order was granted.

[42] The social worker for the MCS recalls the conversation in January 2007 as more than casual and that the foster mother did not give an immediate answer. The foster mother said she had to talk with the foster father and she replied by telephone about a week later that indicating that the foster parents were not seeking to adopt the children. The social worker for the MCS also recalls other times in the months of May, June and July of 2007 when the foster mother indicated that the foster parents did not want to adopt the children.

[43] The social worker for the MCS also recalls the mother indicating that the foster parents would be willing to adopt the little boy but not the little girl. The foster mother denies that she ever said they were only interested in adopting the little boy. The foster mother testified that it would be devastating for the children if they lost each other.

[44] When the foster parents were told that the children were placed in the permanent care and custody of the MCS, they had a long talk and decided that they wanted to adopt the children. In the view of the foster parents this was the logical time to tell the MCS as the children had not been available to adopt until that point. From the point of view of the MCS the planning for the children had started months before the order for permanent care and custody was made.

[45] The social worker for the MCS was concerned about expressions of frustration by the foster mother regarding the behaviour of the children and the lack of assistance by the foster father. In early April of 2007 an adoption meeting was held by members of the MCS including the social worker involved in the case, supervisors and adoption workers. During the meeting, the question of the foster parents adopting the children came up and the meeting was told that the foster parents were not interested. The meeting was also told there was concern that the placement may not last as there had been frustration expressed by the foster mother about the high needs of the children and the number of medical appointments for the children.

[46] As a result of the meeting in April of 2007 it was determined that the needs of the children required:

(a) An adoptive home with two parents, one of whom was a stay-at-home parent;

(b) A dual parenting home with both parents providing hands-on parenting of the children, sharing the responsibilities of two high needs children;

(c) The adoptive home be in a rural setting but close enough to the city core to allow access to services as the children had, prior to apprehension, been confined to their rooms for a great deal of time;

(d) Adopting parents who were sophisticated enough to access the services required for two high needs children; and

(e) Adopting parents who had a large, extended support system available to them.

Various prospective adoptive homes were reviewed and a specific adoptive home was selected. The social worker for the MCS felt that with the above criteria the foster parents, if considered, would not have been chosen.

[47] The reasons the foster parents would not have been chosen were because there was no stay-at-home parent; the foster parents did not share parenting responsibilities and they did not have an extended support system available to them. The social worker for the MCS felt that the parents did not have a support system because they needed respite for a vacation and when the children had surgery. Also, when it appeared that the little boy may have to stay in the hospital overnight the foster mother indicated that the little girl would have to stay with them as the foster father could not manage the little girl.

[48] The foster parents say that the foster mother could take a year's leave of absence if they adopted the children. The foster parents feel that the foster father participates in parenting much more than the MCS recognizes. The foster parents say that they do have a support system. The foster parents understood there were restrictions on who could look after children if the foster parents were not available and therefore they looked to the MCS for respite care twice during the sixteen months the children were in their care up to the time of the hearing.

[49] When the children were placed in permanent care in September 2007, the MCS was ready to transition the children to the prospective adoptive home. The

foster parents thought that this was the correct time to decide on whether they wanted to adopt the children. When the foster parents communicated their wish to adopt the children there was another meeting held of the adoption planning team to review the request by the foster parents. The decision was made to continue with the chosen adoptive home. The foster parents were not asked to provide input to either this meeting or the one held in April 2007.

[50] The decision that the MCS would be continuing with their choice of adoptive home was communicated to the foster mother by the social worker in a meeting at the foster parents' home in mid-October 2007. The foster mother said that she did not agree with the decision of the MCS and was quite emotional. This was the first time that the social worker visited the foster parents' home.

[51] On or about November 21, 2007 the social worker for the MCS met with the foster father to explain why the MCS had chosen the other home as the adoptive home. This was the first time that the social worker met the foster father.

[52] After the meeting between the social worker and the foster mother, the mother obtained information from a foster parents' association about requesting a

review of the decision of the MCS not to place the children with the foster parents. The social worker for the MCS did not tell the foster parents about the review process in the Department of Community Services called “when you disagree”. The foster parents did not learn of this process or policy until after they had written to a few people within the MCS. The foster parents wrote a letter to supervisors with the office of the MCS where the social worker was employed. They received a response that it was felt the decision made was proper.

[53] The foster parents then wrote to the Regional Administrator for the Central Region and received the same response. In the letter to the Regional Administrator the foster parents wrote that they did not feel that they were given a fair opportunity with regard to the adoption placement decision. The parents requested a fair chance to adopt the children. The parents wrote that a face-to-face meeting would have been a chance for the foster parents to explain themselves and give reasons in person as to how important the children’s well being and future was to them.

[54] The next level of review was with the Director of Child Welfare for the Province. The Director of Child Welfare consulted with the Manager of Adoption

Services for the MCS. The foster parents were again informed that the MCS had followed the appropriate process and arrived at a decision which will best meet the needs of the children. This response was received on December 12. The foster parents were told that a representative of the MCS would be coming to get the children on December 14, 2007 and the children may or may not return to their home.

[55] During the review process, the foster parents were never asked for further information, they were not interviewed and no one other than the social worker met with them.

[56] While the foster parents were going through the review process, the children were not placed with the prospective adoptive home chosen by the MCS. However, the transition process was underway during this time. A psychologist was hired to advise on the transition of the children from the foster home to the prospective adoptive home. The psychologist had contact with the prospective adoptive parents but did not have contact with the foster parents. Visits were taking place between the children and the prospective adoptive home. At least one

meeting was held in November in the office of the MCS to discuss transition of the children to the prospective adoptive home.

[57] Concerning to the court was that the transition process with the children was occurring during a time when the order for permanent care and custody was under appeal. The appeal was being heard at the end of January but the MCS placed the children on December 14, 2007 in what was described to the children as their "forever home". The MCS was clear that they only transition children when an appeal is pending where they feel that the appeal will not be granted. This practice seems to be full of risk to vulnerable children. The appeal process under the **CFSA** has time restrictions to ensure that children's futures are not unnecessarily delayed. The emotional harm that could be caused to children whose permanent care order is overturned after they have been taken from their biological parents, placed in a foster home and then placed in a "forever" home seems to be too great to risk. The emotional harm which could be caused to adoptive parents is also too great to risk.

[58] The social worker for the MCS was aware that the foster mother could take a year's leave of absence from her employment to stay home with the children if the

foster parents adopted the children. The social worker for the MCS testified that the children had improved both behaviourally and developmentally while in the care of the foster parents. The social worker testified that the children appeared very happy with the foster mother.

[59] The MCS expresses concern that the foster parents waited so long to indicate that they wanted to adopt the children. While this is logical from the perspective of the MCS, the foster parents' position is equally logical to persons unfamiliar with the court process. Persons who have never been involved with a permanent care process would not be aware of when the planning would begin for adoption placement of children. The foster parents thought that they did not have to decide on adoption of the children until it was decided whether the children would be placed in the permanent care of the MCS.

[60] While there is disagreement about the conversations between the foster mother and social worker regarding adoption, it is clear that no one from the MCS met with the foster parents and indicated that the foster parents needed to make a decision concerning adoption by a certain date.

[61] The MCS submits that the social worker met with both parents and were told the reasons why the other home was selected. The MCS says that the foster parents just do not agree with that position. The MCS submits that the foster parents should have requested a meeting with any of the decision-makers who were reviewing the placement decision.

[62] The foster parents feel that they were not given serious consideration as an adoptive placement as the decision had been made about placement of the children prior to the foster parents expressing their desire to adopt the children. They feel that at each stage of the review process the prior decision was justified but that there was no true review with input from them.

[63] In determining whether the foster parents were treated fairly, I must consider this specific case **(Baker v. Canada (Minister of Citizenship and Immigration),** [1999] 2. S.C.R. 817). The process of decision-making in the MCS is not close to the judicial process. It is more relaxed. Expertise and discretion are both factors to consider. The overall scheme in child welfare is guided by the principle of the best interests of children. The importance of the decision made to the foster parents is enormous. It is a decision as to whether they will be the parents of the children.

Foster parents are trusted to look after vulnerable children in the care of the MCS. The foster parents expected that their position would be considered openly and fully when they were pursuing the review process in the Department of Community Services. There is no procedure in the **CFSA** for reviewing placement decisions and no appeal process for the foster parents. The only policy is the "when you disagree" policy. In **Baker** at paragraph 28 L'Heureux-Dube says:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

It cannot be said that with the importance of this decision to the foster parents that the duty of fairness is minimal. As stated in **Baker** at paragraph 32:

> Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

In the present case the particpatory rights provided to the foster parents were the right to participate in a meeting with the social worker and to write to the decision-makers in the review process.

[64] The meeting with the social worker was not a meeting to obtain the views of the foster family to help in reconsidering the decision. It was not a meeting to take information from the foster parents back to the decision-makers in the Department of Community Services. The meeting was to inform the foster parents why they were not chosen and to tell them that the decision had been affirmed. The foster parents did not participate or have input into the original decision making process. They were not informed of the meeting in early April to plan for adoption placement of the children. When they expressed their desire to adopt the children in late September they were not invited to attend, provide information or participate in any way in the adoption planning meeting that took place in the early part of October.

[65] When it was clear that the foster parents disagreed with the placement decision, they were not provided with the policy and procedure to follow for review. The second step in the "when you disagree" policy was a meeting with the Casework Supervisor. As the foster parents were not aware of the policy they never had a meeting with any of the decision-makers after the social worker. A face-to-face meeting with the foster parents may have helped to clear up some of the inaccurate information considered by the decision-makers. The MCS submits

that the foster parents should have asked for a meeting. In the foster parents' letter of November 19, 2007 to the Regional Administrator they express the view that a face-to-face meeting would have been a chance to explain themselves. The MCS should have offered to meet with the foster parents.

[66] The foster parents were never made aware of the information that had been provided to decision-makers about them. There was information provided to the decision-makers which was inaccurate. The decision-makers were told that the little boy was not toilet trained. He was toilet trained. The decision-makers were told that the foster father worked out of the area and was only home on the weekends. The foster father changed jobs in October 2007. This cut his travel down significantly. The foster father's new position is in management which requires him to delegate persons for the job he previously did and which required extensive travel. This change in jobs for the foster father has considerably increased his time at home and his ability to share in parenting. The decision-makers were not aware of this change in relation to the foster father. The foster parents disagreed with the information given to the decision-makers about the extent to which the foster father was involved in the parenting of the children. The foster parents say that the foster father is involved in parenting the children.

The foster parents described a support network in their testimony, but the MCS expressed concern about a lack of a support system.

[67] Because the foster parents were not made aware of the information provided to the decision-makers they did not have the opportunity to correct the misinformation.

[68] The Manager of Adoption Services expressed concern that the foster parents were attached to the children and unable to separate their grief from the children's best interests. This was a concern expressed and an opinion provided without having ever met the foster parents.

[69] If the foster parents expressed doubts about adopting the children prior to the children being placed in permanent care, they certainly have been quite clear since September 2007. They were not given the opportunity to explain why they had doubts. What the foster mother thought was casual conversation has been used to cast doubt on the foster parents' commitment to the children. For a foster parent of two high needs children to express frustration does not seem unusual.

[70] The decision-makers made a decision they believed to be in the best interests of the children, however, the decision was with some misinformation and without input from the people who knew the children the best – the foster parents. The children have been living with these foster parents for a significant part of their lives. The MCS could not properly exercise their discretion without accurate information and meaningful input from the foster parents.

[71] The parents were not given a meaningful opportunity to participate in the process which rejected them as adoptive parents to the children. The foster parents' position was not fully and fairly considered. It is in the best interests of the children that the foster parents' request to adopt the children be fully and fairly considered with proper input and participation. I find that the decision-making process and the review of the decision-making process was unfair to the foster parents. The decision from this unfair process is invalid.

(e) If the court invokes its *parens patriae* jurisdiction should the court order the adoption or custody of the children by the foster parents?

[72] Unlike the Supreme Court of Canada in **B.(D.)**, I do not have all of the information. I do not have any information about the adoptive home that has been chosen by the MCS. I do not have the information that would be necessary to decide whether an order for adoption by the foster parents would be in the best interests of the children or not. I also do not have enough information to decide final custody of the children.

[73] I do have enough information to know that the decision of the MCS to exclude the foster parents as adoptive parents was made without full consideration of the foster parents' position.

[74] If I send the matter back to the MCS for reconsideration, I am concerned that there will be another request for a judicial review on the basis of bias. The decision-makers in the Department of Community Services have already made a decision. It is not in the best interests of the children for a final determination of their placement to be delayed any longer. The children need to be placed in their permanent home as soon as possible.

[75] There are child welfare agencies in the Province which are not part of the Department of Community Services. Examples, from my understanding, are Family and Children's Services of King's County or Hant's County. One of these agencies should be agreed upon to make a decision on the best adoptive home for these children. The decision will be based on accurate information. There will be input from all concerned parties. All positions should be fully and fairly considered.

[76] Until the decision is made, the children should remain in the care of the foster parents.

Conclusion:

[77] The best adoptive home for the children shall be decided by a child welfare agency in the Province of Nova Scotia which is not part of the Department of Community Services. The decision shall be made with full information and input from all concerned parties.

[78] Pending the decision, the children are to remain in the care of the foster parents.

J.