SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. C.P.*, 2016 NSSC 46

Date: 2016-02-11
Docket: *SFSNCFSA* No. 089064
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

C.P. and C.W.

Respondents

TO PUBLISHERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

Prohibition on publication
1. 94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	July 15, 16, and 23; October 27 and December 2, 2015, in Sydney, Nova Scotia
Written Release:	February 11, 2016
Counsel:	Adam Neal for the Applicant Alan Stanwick for the Respondent, C.P. Shannon Mason for the Respondent, C.W.

By the Court:

BACKGROUND:

[1] C.P. is the mother of two young children: C.T.P. born October *, 2011 and D.F.W. born December *, 2013. The Respondent C.W. is the father of the younger child. He did not present a plan for the children.

[2] The Minister's involvement on this file began in May, 2013 at which time C.P. was pregnant with D.F.W. The Minister received a referral alleging drug use, but C.P. denied this, and the child C.T.P. appeared to be well cared for when workers investigated. The file was closed, as the referral could not be substantiated.

[3] On November 27, 2013 another referral was received. It alleged that C.P., who was then eight months pregnant, along with her boyfriend, C.W., were using hydromorphone. Workers conducted a home visit on December 2, 2013 at which time they found two empty syringes in the home. C.P. admitted to snorting hydromorphone that day and three days earlier; she also admitted she had been snorting "hydros" for about a year. She told workers that C.W. was injecting hydromorphone daily. The referral was therefore substantiated and the older child C.T.P. was taken into care that day. The younger child was taken into care at birth on December *, 2013.

ISSUES:

1. Is the expert evidence reliable for purposes of this proceeding?
2. Is the plan for permanent care in the best interests of the children?

HISTORY OF PROCEEDINGS:

[4] A protection application was filed on December 4, 2013 and interim orders were issued. The parents contested the protection finding, so a hearing date was set.

[5] At the protection hearing on February 26, 2014, both C.W. and C.P. testified they last used drugs on December 2, 2013. The court found the children were in need of protective services and should remain in the Minister's care. Supervised access was ordered, along with a number of services. The order included

prohibitions on contact between C.P. and C.W. in the presence of the children, and a prohibition on non-prescription drug use.

[6] By late April, 2014 it appeared C.P. was making progress. Urine testing had been implemented and she was testing negative for drug use. She claimed C.W. had left the home. The Minister conducted a risk management conference and agreed to increase C.P.'s access, with the plan to return the children to her supervised care at the Disposition hearing. Extended access, which effectively placed the children in her supervised care, was put in place pending approval of the court.

[7] However, before the Disposition hearing was held, the Minister received a referral that C.P. and C.W. were seen together with the children in the community. This was a breach of the court order prohibiting contact between the Respondents in the presence of the children. In response to that referral, the Minister conducted a home visit, at which time C.W. was found hiding in the home. The referral was substantiated and, as a result, extended access for the children was terminated and the children were placed back in foster care. Access reverted to supervised access.

[8] At the next court appearance, the Respondents contested the decision of the Minister. A placement hearing was scheduled for September 15 and 16, 2014. After hearing the evidence, the court decided the children would remain in the temporary care of the Minister. However, C.P.'s supervised access was expanded to include one unsupervised visit on the weekends. The prohibition on contact between C.P. and C.W. in the presence of the children was continued, as C.W. had not engaged in remedial services and there were continuing concerns about his drug use.

[9] The court further directed that if all access visits went well and there was continuing compliance with the order, the children could be returned to C.P.'s care under a supervision order the following month.

[10] The Respondents cooperated with collection of a hair sample for drug testing in the meantime. The sample collected on August 28, 2014 was a 3 centimeter segment representing a period of mid-May to mid-August, 2014 (based on the research that hair grows at the average rate of 1 cm. per month). The sample was sent to the Motherisk Lab at the Toronto Hospital for Sick Children and the Minister received those results on September 24, 2014. C.W.'s test was positive for methadone (for which he had no prescription) and cocaine, as well as

cannabinoids and hydromorphone. C.P.'s test was positive for trace amounts of hydromorphone, her drug of choice before the Minister's involvement.

[11] As a result of those tests, the Minister declined to return the children under a supervision order, and instead brought the matter back to court for review. A written interpretation of the hair test results was requested, particularly with respect to the trace amounts of hydromorphone found in C.P.'s hair sample. A review hearing to determine whether the children should be placed in C.P.'s care under a supervision order was scheduled.

[12] At the hearing on January 20, 2015 Joey Gareri from the Motherisk Lab testified. He was qualified as an expert by agreement, to offer opinion evidence in the area of clinical and analytical toxicology. In his letter interpreting the test results, Mr. Gareri stated that the trace results in C.P.'s hair sample demonstrated active use of hydromorphone. At the hearing, he testified that hydromorphone metabolizes very quickly, and it only takes a small amount consumed to leave a trace present in hair.

[13] C.P. strongly denied any use of hydromorphone. When she received the initial lab results, she offered three possible explanations to workers:

- that she had been intimate with a partner who used hydromorphone and she may have been exposed in this manner;
- alternatively, she suggested that she could have been exposed to hydromorphone from using a toilet at the methadone clinic;
- as a further alternative, she suggested the trace amount of drugs found in her hair was the result of past use of hydromorphone, which she insisted she quit using on December 2, 2013.

[14] In his interpretation letter, Mr. Gareri was asked to respond to C.P.'s explanations. He rejected the first two suggestions, as he felt passive exposure did not likely explain the results. He also rejected the possibility that a 3 cm. segment of hair taken on August 28, 2014 could contain traces of drugs from use in December, 2013.

[15] The court accepted Mr. Gareri's opinion and rejected C.P.'s explanations for the trace presence of hydromorphone in her hair. The suggestion that she could have been exposed to drugs through intimate relations with a partner who uses a significant amount of hydromorphone was not credible. She acknowledged she had

been untruthful with social workers on multiple occasions in the past. Even if she'd been exposed to hydromorphone though sex, it was troubling that with her addiction history, she would pursue an intimate relationship with a partner who uses drugs.

[16] On January 28, 2015 the court ordered the children should remain in the temporary care of the Minister, with supervised access. Terms and conditions of the order included abstinence from drugs and alcohol for both respondents, and no contact between C.P. and C.W. in the presence of the children.

[17] The first Disposition order was made on May 20, 2014. The statutory deadline for completion of all reviews in this proceeding was therefore May 20, 2015. Unfortunately, a final review hearing was delayed due to problems analysing hair samples which were collected from C.P. and forwarded to the Motherisk Lab. The lab's operations were suspended by the Ontario Attorney General in March, 2015 while an investigation into its testing practices was underway. The lab was closed in April, 2015. In the circumstances, the hair sample from C.P. could not be tested, nor returned for testing by another facility. The Minister was forced to collect another hair sample from C.P. and send it to Gamma-Dynacare, a laboratory through which the Minister subsequently arranged testing services.

[18] The Minister requested an adjournment in order to obtain a report from Gamma-Dynacare. C.P. objected. After hearing submissions, the court granted the adjournment, holding it is in the best interests of the children and in the interests of justice to receive the evidence (***NS*** v ***SEL*** 2000 NSCA 62). Toxicology testing is important and relevant information in making a final determination of custody in a child protection proceeding where drug use is a concern. The decision whether the children should be returned to the care of C.P. or placed in the permanent care of the Minister is such a momentous one, that all relevant information should be available to the court.

[19] The results from Gamma-Dynacare were received by the Minister on May 25, 2015 but were negative for the presence of drugs. Despite this, the Minister maintained its plan for permanent care based on other evidence of C.P.'s alleged drug use and ongoing contact with C.W.

[20] The final review hearing was held on July 15 & 16, 2015. A deadline was set for receipt of written submissions from the Minister. Counsel for C.P. was scheduled to provide oral submissions on July 23, 2015.

[21] Before the deadline for its written submissions, the Minister filed a motion to reopen the evidence. Counsel for C.P. opposed the motion. The new evidence sought to be introduced by the Minister was a urine test report from a sample taken on June 13, 2015. The results were received a day after evidence concluded, on July 17, 2015. The urine test was positive for hydromorphone use.

[22] A hearing was held to determine the merits of the motion. After considering evidence on why the test results were not made available during the hearing and the potential relevance of the test results, as well as case law on the subject (***Doncaster v Field*** 2014 NSCA 39), the court determined it would admit the new evidence. C.P. was granted time to have independent testing completed if she wished. A further hearing date was set, but was adjourned by consent of the parties. The matter was rescheduled for completion of the evidence on October 27, 2015.

[23] When the hearing resumed, the court heard evidence from Dr. Bassam Nassar with the Q.E.II Health Sciences Program (as it was then), a lab which tests urine samples for the Minister. Dr. Nicholas Chatterton, who prepared an independent report on the hair and urine sample results, also testified. Both were qualified as experts by consent and both were cross-examined on their reports by C.P.'s counsel.

[24] Closing arguments were set over to December 2, 2015 to allow C.P.'s counsel time to prepare oral submissions. The Minister provided written submissions.

[25] After the closing arguments were concluded, the Lang report on the Motherisk Lab was released. The court invited comments from counsel on any implications that report might have on the issues at stake in this proceeding, with a deadline of January 9, 2016 for written submissions.

POSITION OF THE PARTIES ON THE PCC PLAN:

[26] The Minister filed a plan for permanent care and custody of the children on February 23, 2015. It based this plan on Mr. Gareri's interpretation letter and the hair test results which indicated ongoing drug use, as well as the history on the file. The Minister argues the children are still at substantial risk in the care of C.P. It plans to seek adoption of both boys together, if the plan is approved.

[27] C.P. opposes the plan for permanent care and custody. She seeks a return of both children to her care. She claims she stopped using drugs December 2, 2013 and is no longer in a relationship with C.W. She filed a custody application under the ***Maintenance and Custody Act*** R.S., c.160 (***MCA)***. Her application specifies no access for C.W. She takes the position the children would not be at risk in her care.

[28] C.W. did not present a plan, nor did he participate in these proceedings after the protection hearing. On the first day of the hearing, counsel asked to tender a copy of a one-way ticket to western Canada as evidence that he'd moved, but an objection by the Minister's counsel was upheld. C.W.'s sister initially indicated she would seek placement of the children with her, but she did not pursue that plan. No other family members offered a plan for the children's care.

LEGISLATION AND CASELAW:

[29] In this review, the Minister bears the burden of proof on a civil balance of probabilities. It must prove its case through clear, convincing and cogent evidence (**F.H. v. McDougall** 2008 SCC 53). The Minister must satisfy this court that it is in the children's best interests to be placed in the permanent care and custody of the Minister.

[30] The ***Children and Family Services Act*** S.N.S. 1990, c. 5 (the ***Act***) is meant to promote the integrity of the family, protect children from harm, and where parents cannot safely care for their children, to ensure their safety through alternative placements.

[31] Section 2(2) of the ***Act*** makes it clear that in any decision affecting children under the ***Act***, the overriding consideration is always the best interests of the children. Best interests is defined at section 3(2) and includes:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> …
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> …

> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
>
> …
>
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

[32] According to the preamble, the time limits established by the ***Act*** are based on a child's sense of time. The statutory time limit in this proceeding is twelve months from the date of the first Disposition order. The timelines were exceeded significantly, but in unusual circumstances. All agreed, and the court found, it was in the best interests of the children to do so.

[33] Section 42(1) of the ***Act*** leaves the court only two options when the maximum time limits have been met: permanent care and custody based on continuing risk, or return of the child to the parent or guardian.

[34] Section 42(2) of the ***Act*** states a court must not remove a child from the care of parents "unless the court is satisfied that less intrusive alternatives including services to promote the integrity of the family pursuant to Section 13, (a) have been attempted and have failed; (b) have been refused by the parent or guardian, or (c) would be inadequate to protect the child".

[35] Services offered or accessed in this case include family support, Addiction Services, Detox, Daytox, the Methadone Maintenance Program, and drug testing (both hair and urine).

[36] Under section 42(4) I am not concerned with whether circumstances are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, because the statutory time limits have expired. These children have now been involved in the child protection system for over two years, and a decision must be made to ensure their best interests going forward.

THE MINISTER'S EVIDENCE:

[37] Long-term protection social worker Rene Wilson testified. She made a number of home visits, though she had trouble reaching C.P., as she moved several times during the course of this proceeding. On April 30, 2015 the worker

questioned C.P. about suggestions she was staying with C.W. C.P. initially denied this, but then acknowledged she had slept at the home of J.W. (C.W.'s sister with whom C.W. was staying) on one or two occasions. She also told the worker that on May 12, 2015 she went to see C.W. at J.W.'s home to ask him to "sign over his rights" to the children. She said she stayed overnight because she missed the bus home. She told the worker that she was "almost 100% sure" that C.W. was doing drugs that day and that they were "done", meaning the relationship was over.

[38] After a court appearance on June 2, 2015 the worker asked C.P. to see her new apartment. C.P. agreed and the worker viewed the apartment. On noting there was no bedding, C.P. told her it was at the home of J.W. The following morning, the worker went to J.W.'s home accompanied by the family support worker. When they arrived, C.W. and C.P. were present together at J.W.'s home. C.P. explained that she was doing laundry the night before to rid her sheets of the smell of smoke after a fire in her unit, and did not want to walk home late at night.

[39] Ms. Wilson testified that C.W. left Cape Breton after the protection hearing in 2014 without participating in remedial services. He returned later that spring, and then went back out west in October, 2014. He worked through the winter and returned home again in March, 2015. She tried to contact C.W. on a number of occasions without success, and he never contacted her to ask for access when in the area.

[40] The worker was asked the Minister's response to C.P.'s application for sole custody, with no access to C.W. She noted there are serious credibility issues with information provided by C.P., who has denied contact with C.W. since the Protection hearing, yet on May 29, 2014 C.W. was found hiding in the home, in contravention of a court order. The worker therefore does not believe C.P. would follow an order prohibiting access under the ***MCA***. Nor does the Minister accept that C.P. and C.W. are truly separated, or that C.W. has moved out west permanently. The worker noted that his pattern has been to work out west over the winter, and return home in the spring of each year.

[41] The worker spoke about the plan for permanent care which was filed by the Minister. The reasons as outlined in the plan and her evidence can be distilled as follows:

- concerns with C.P.'s ongoing drug use;
- late engagement with services;

- instability in the children's lives, with C.P. moving seven times since the Minister became involved;
- concerns with C.P.'s lifestyle and partner choices, including an intimate partner who is a drug user;
- concerns with C.W.'s drug use;
- concerns with C.W.'s lack of participation in any remedial services;
- concerns about ongoing contact between C.P. and C.W.

[42] On cross-examination, Ms. Wilson conceded that she never observed C.P. under the influence of intoxicating substances on home visits, even when made unannounced. She also acknowledged that, other than one occasion when C.W. was found hiding at C.P.'s home in May, 2014, she had not found C.P. and C.W. together in the presence of the children or at C.P.'s home. However, the worker noted that she often could not get in touch with C.P., and did not gain access to C.P.'s home very often. She also points to the fact that C.P. stayed at the home of C.W.'s sister on a regular basis.

[43] The worker was asked whether she told C.P. that if she lies in court, she can be charged with a criminal offence. Ms. Wilson acknowledged this. She also acknowledged that on April 30, 2015 after she told C.P. that lying in court is a criminal offence, C.P. admitted recent contact with C.W.

[44] Ms. Wilson conceded that she misunderstood the terms of the court order, and believed she had the right to access C.P.'s home even when the children were in the Minister's temporary care. On that basis, she told C.P. she would call police if C.P. refused entry to her home. She also acknowledged that she went to the homes of C.W.'s family members on a number of occasions to check if C.P. and C.W. were there together, and that she brought police with her on one of those occasions. She denied she "ramped up" her efforts to confirm an ongoing relationship between C.P. and C.W. after the permanent care plan was filed.

[45] The worker acknowledged that C.P.'s access with the children has gone well, she takes care of their needs at visits, and there appears to be a bond between her and the children. She said the Minister refused to increase access because the plan was for permanent care. Access is currently supervised for 4 hours per week.

[46] Melissa Nearing is the children's worker. She testified about the needs of the children. The two boys were initially placed together in foster care, but one of

them had to be moved due to behavioural issues. He has shown improvements since being moved. Neither child suffers from any health or developmental concerns, and she confirmed the plan is for adoption of both boys together, should permanent care be granted.

[47] On cross-examination, she acknowledged there have been no scheduled sibling visits since the boys were separated, though they see each other at access visits with C.P. Both children are placed outside the Cape Breton Regional Municipality and travel for access with C.P.

C.P.'s EVIDENCE:

[48] C.P. testified about her plan. She wants to parent the boys herself. She says she is no longer in a relationship with C.W., nor any other partner. Though she acknowledged hydromorphone use in the past, she says she has overcome her addiction. She admitted herself to Detox the day after the Minister took the older child into care (she was 8 months pregnant) and stayed for two weeks. She followed this with daytox programming, and then contacted the methadone maintenance program for enrollment. She insists she is "clean" and has not used drugs since December 2, 2013. She says she recognizes the risk to the children from drug use, and that she wasn't in a "right state of mind" when the children were taken into care. She says she sought out services on her own, and complied with services requested by the Minister.

[49] On cross-examination, she conceded that she has lied to workers in the past. However, she was adamant that she no longer uses drugs and is not in a relationship with C.W. She said her children are not at risk if they are returned to her. She acknowledged the risk involved in continuing her relationship with C.W., because he is still using drugs. She says she would not risk her sobriety (by being around C.W.) for the children's sake.

[50] She acknowledges regular contact with C.W.'s sister and grandmother, but described them as part of her social support. However, she testified that she and J.W. are not currently speaking, due to the Minister's involvement with J.W.'s family. She acknowledged that she stayed overnight at their homes regularly in the summer of 2015, at times when C.W. was present.

[51] She clarified that she has only moved 4 times since 2013, once because her rent was increased and another time because of a fire. She has been in the same building (though a different unit because of the fire) since June, 2014.

[52] She said her new apartment has ample space, and she has readied it for the children. She has a family physician for them and has looked into daycare. She plans to pursue her education and work as a CCA. C.P. says she has lived a healthier lifestyle since 2013. She goes to the gym, for walks, to yoga and swimming. She still accesses counselling with Alanna Brown, a social worker with the Addiction Services program.

[53] C.P. says she has completed the services requested by the Minister. She says she continues to test "clean" through the Methadone maintenance program. Although the test results were not tendered, counsel for the Minister does not dispute that the Methadone Maintenance Program urine tests disclose no use of drugs other than methadone.

[54] C.P. testified that access has gone well with the children. She says she has a wonderful relationship with the boys and takes care of all their needs. She clearly loves the children, and feels a close bond with them.

[55] She was asked about the worker's home visit on June 25, 2015 when she refused entry to her home. She explained that she left that morning, went to her two hour access visit, then went home to check the mail. She said she planned to go to the gym, so she wasn't happy to find the worker on her doorstep, wanting to come inside. She told the worker C.W. was not in her apartment. After the worker threatened to phone police, she let the worker in to confirm that C.W. was not present.

[56] C.P. presented her evidence in a calm, forthright manner. She was not overly defensive. She accepted responsibility for her mistakes. She says she has learned from them, and has made positive changes in her life. She was consistent in her evidence and appeared sincere.

EXPERT EVIDENCE:

[57] Mr. Gareri from the Motherisk Lab did not testify at the final review hearing. Counsel agreed that the evidence from the Protection hearing and any hearings since can be considered by the court in this final review. Mr. Gareri's testimony from the placement hearing on January 16, 2015, as well as his interpretation letter and the Motherisk lab results were received by the court before the investigation into the Motherisk Lab was launched by the Ontario Attorney General. Neither the court or counsel was aware of any issues with respect to the reliability of Motherisk's reports in January, 2015.

[58] However, the Motherisk lab was closed in April, 2015 and the Lang Report was released on December 15, 2015. It raised serious issues into the testing practices followed by Motherisk, and concluded that reports on hair samples completed by the Motherisk lab were "inadequate and unreliable" for court purposes in child protection proceedings.

[59] In view of the situation with the Motherisk Lab, the Minister obtained a hair toxicology report from Gamma-Dynacare. The sample was collected on May 15, 2015 and the lab report was generated on May 25, 2015. According to that report, the sample tested negative for all substances, including opiates (the class of drugs to which hydromorphone belongs). Counsel agreed to tender that lab report by consent.

[60] The Minister began urine collections and testing in December, 2013. Eighty samples from C.P. were collected and tested by the Q.E.II lab up to October 27, 2015. Dr. Nassar, the Chief of Service for the Division of Clinical Chemistry at the Capital Health Authority was qualified as an expert in clinical and analytical toxicology by consent. He is a clinical toxicologist with extensive experience as a clinician. His C.V. reveals that he has taken special training in toxicology and therapeutic drug monitoring, tandem mass spectrometry, toxicology methodology, and addiction medicine, toxicology and therapeutic drug monitoring. He has no training in forensic toxicology and the Q.E.II lab is not certified as a forensic lab.

[61] Dr. Nassar prepared a report dated October 7, 2015. In it, he reviewed the Q.E.II lab results. He noted that two urine samples (June 13 and August 24, 2015) tested positive for hydromorphone above the cut off level of 100 ng/ml.

[62] In addition, Dr. Nassar was asked to review the test results for all other samples taken from C.P. He concluded there were three tests which detected drugs in her samples, but which were not initially reported, because the results fell below the cut off level of 100 ng/ml. According to Dr. Nassar, this cut off level is a widely-accepted international standard for such testing. He testified that if samples test below 100 ng/ml, but above 50 ng/ml, this could indicate waning use, accidental ingestion, or environmental exposure. He further stated that if a sample tests below 50 ng/ml, the reading would be discarded.

[63] Dr. Nassar testified that urine samples have been screened by the Q.E.II lab using liquid chromatography – mass spectrometry (commonly known as tandem mass spectrometry) since April 14, 2014. The lab did not have the capacity to screen using this method before then. His report states that tandem mass

spectrometry is used first for screening, and then again for confirmation of hydromorphone, when its presence is detected at the screening stage. He did not say whether the practice of using the same test for screening and confirmation is widely accepted or standard.

[64] Dr. Craig Chatterton also testified. He was qualified as a forensic toxicologist and his C.V. discloses that he has worked as a consulting forensic toxicologist, delivered staff training, analysis, interpretation and peer review in this area. He has also helped forensic labs to obtain and maintain their professional accreditation.

[65] He prepared a report dated October 6, 2015. He was asked by the Minister to review the testing material for C.P., including analytical data and results of both urinalysis and drug testing in hair. He was asked to comment in particular on the positive urine samples for C.P. in the context of the negative hair strand test from Gamma-Dynacare for the same period, and what those results say with respect to possible use of hydromorphone.

[66] Dr. Chatterton reviewed the Motherisk results, the Bayshore Home Health urine specimen collection notes for six dates, the Q.E.II urine test results for six dates, and the Gamma-Dynacare hair specimen results.

[67] Dr. Chatterton notes that the Q.E.II urinalysis results for the sample dated June 13, 2015, tested positive for hydromorphone. However, the Gamma-Dynacare report for a hair sample collected on July 29, 2015 was negative for drugs. In Dr. Chatterton's report, he states that this sample would capture a period from "late April/early May to mid/late July 2015 (based on an average growth rate)." The two tests overlap, hence the need for his opinion.

[68] Dr. Chatterton notes that the Gamma-Dynacare report did not state which analytical techniques were utilized, though cut off concentrations were reported. He further points out that neither Motherisk or Gamma-Dynacare provided information with respect to the procedures governing chain of custody, drug collection and analytical data management, nor was information reported on the color and/or general appearance of the hair samples, or the results of hair washings. Although he does not indicate the relevance of those steps, I infer they are the hallmarks of forensic hair testing and are meant to ensure a reliable result for court purposes.

[69] Dr. Chatterton states in his report that hair and urine results might not always appear to agree. Because hair analysis encompasses a broader time frame, it may not detect the use of a single, small dose of a drug. In his opinion, a positive hair test is not necessarily inconsistent with a negative urine test and *vice versa*.

[70] Dr. Chatterton was asked to interpret the results of the various tests completed by the Minister. He states that in the urine sample provided June 13, 2015 hydromorphone was "unequivocally" identified. In his opinion, the presence of hydromorphone in the urine sample demonstrates use/ingestion of the drug by C.P. It was his opinion that C.P. ingested hydromorphone no more than 48 – 72 hours prior to the sample being provided on June 13, 2015.

[71] Dr. Chatterton was clear that the negative hair test result from Gamma-Dynacare did not affect his opinion with respect to C.P.'s use of hydromorphone, as disclosed in the urine sample for June 13, 2015.

POSITION OF THE PARTIES ON THE EXPERT EVIDENCE:

[72] In his submissions, counsel for C.P. takes the position that the Motherisk lab report and the January, 2015 evidence from Joey Gareri should not be considered in determining whether permanent care should be granted to the Minister.

[73] He further argues that the Lang report has implications for the reliability of the urinalysis testing completed by the Q.E. II lab. He cites the following from the Lang report:

> "MDTL's hair tests were forensic in nature, and the service it offered to child protection agencies and law enforcement was a forensic one. A hair test can be forensic even if it is never tendered as evidence and even if no court proceeding is ever initiated. What distinguishes a clinical test from a forensic test is the purpose behind the test. If the test is either carried out or used for a legal purpose, it is a forensic test.
>
> To be used in child protection or criminal proceedings, forensic tests must be carried out in accordance with forensic standards. International forensic standards are articulated in several sources:
>
> - international guidelines on the science of hair testing (including the consensus statements of the Society of Hair Testing), as well as on the standards of forensic toxicology laboratories generally (including, for

> example, the guidelines of the Society of Forensic Toxicologists and the American Academy of Forensic Sciences);
>
> - the standards that are required to be met for the accreditation of forensic laboratories (including the requirements under ISO 17025:2005, General requirements for the competence of testing and calibration laboratories);
> - best practices that are commonly accepted and recognised by forensic toxicology laboratories around the world; and
> - the academic literature on the science of hair testing and the interpretation of hair test results.
>
> Although the leaders of MDTL had relevant experience as research or clinical toxicologists, none of them had any formal training or experience in forensic toxicology. Indeed, none of them considered themselves to be forensic toxicologists. Perhaps this lack of training and experience is why neither MDTL nor the Hospital for Sick children (SickKids or the Hospital) appears to have appreciated that the Laboratory was engaged in forensic work and that it was required to meet forensic standards. The result was inevitable: MDTL's testing and operations fell woefully short of internationally recognized forensic standards."

[74] Counsel for C.P. submits that as a result of the Lang report, the following questions arise in this case:

1. Is Capital Health a forensic laboratory?
2. Is Dr. Nassar a forensic toxicologist?
3. Does Dr. Nassar have any formal training or experience in forensic toxicology?
4. Does Capital Health's operations, methodology, testing and analysis of urine samples meet internationally recognized forensic standards?

[75] He argues that because those questions remain unanswered at this stage of the proceeding, the urinalysis test results should not be considered by the court. In the alternative, counsel submits that if the Minister is relying on the urinalysis lab reports, it bears the burden of adducing evidence that the testing was carried out in accordance with international forensic standards.

[76] The Minister filed submissions in response, in which it points out that if C.P. wishes to pose further questions to Dr. Nassar, she should file a motion to reopen the evidence and recall Dr. Nassar. Failing evidence (either at the hearing, or on a motion to re-open the evidence), that the urine testing methods are insufficient and therefore unreliable, the evidence should be accepted by the court.

[77] Quite surprisingly, counsel for the Minister indicates in his final submissions dated January 11, 2016 that "With respect to the issue of the Motherisk hair results analysis, we take no position and we await the court's determination on this matter."

[78] Counsel for the Minister argues that, even if the Motherisk hair test is not taken into consideration, the evidence shows a pattern of non-attendance for drug testing over the summer of 2015, while the hearing was ongoing. He argues that C.P. made herself unavailable for urine collections, knowing the Minister considers a missed test a positive test (showing drug use). The problem with this argument is that there is no evidence to support it. Other than one collection note from Bayshore Health Services for August 24, 2015, no other nurse's notes were tendered, and no nurse testified about failed attempts to collect samples from C.P.

DECISION ON EXPERT EVIDENCE:

[79] Dr. Nassar was not questioned about his lab's methodology or certification. There was no evidence adduced on collection procedures, chain of custody, the testing procedures, or peer review of results. However, Dr. Nassar stated in his evidence that the testing method used (liquid chromatography mass spectrometry) is the "super gold standard", that he follows "international standards" and that "our quality control is in place and is checked". He was not challenged on those statements or asked to clarify.

[80] The evidence on which the Minister relies is forensic in nature. It must meet a high standard of reliability because of the purpose to which it is put – as evidence in court. Although Dr. Nassar spoke in passing and general terms about his lab's processes and standards, there is insufficient evidence to conclude the QEII lab meets forensic standards. There is no evidence on who completed the testing and what processes were followed. The lab results themselves were not tendered.

[81] I also question why the urine test results which fell under the cut-off limit are now being presented as valid and reliable evidence of drug use when they were not reported at first instance. Presumably they were not reported because, as Dr. Nassar stated in his evidence, a reading under 100 ng/ml can be attributed to other causes of exposure, and does not signify active use.

[82] The fact that these readings were raised in Dr. Nassar's report and presented by the Minister as evidence of active use of hydromorphone is troubling. In submitting an expert report under ***Civil procedure Rule 55***, Dr. Nassar is required

to present impartial and objective evidence. He did so. He clearly stated in his evidence that a reading below 100 ng/ml may be attributed to several causes, including waning use, accidental ingestion and environmental exposure. The latter two situations do not demonstrate active use. The Minister's effort to use this evidence to demonstrate active use of drugs is not appropriate, given Dr. Nassar's evidence. I give no weight to those readings as a result.

[83] Dr. Chatterton reviewed and relied on six of the Q.E.II lab reports in preparing his report. He raised no issues with the lack of methodology reported by the Q.E.II lab, and accepted the lab results as generated. In comparison, he did raise issues with respect to the lack of methodology information in the Motherisk and Gamma- Dynacare reports.

[84] Further, Dr. Chatterton was not challenged on his opinion wherein he accepted that the QEII lab results "unequivocally" demonstrate hydromorphone use. Nor was he questioned about the apparent inconsistencies between his report and the Gamma-Dynacare report, which was tendered by consent. The Gamma-Dynacare report is a one page printout of test results with no information on methodology, no interpretation nor explanatory notes. It appears to contain an error in the testing period - it states "9 month testing performed", when the hair segment tested is said to be 11.7 cm long, which would (based research showing average growth of 1 cm/month) reflect a period of 11 – 12 months. Dr. Chatterton references a 4 month period in his report.

[85] Dr. Chatterton appears to accept the results outlined in the Gamma-Dynacare report, despite the lack of methodology information he cites in his report and the inconsistencies noted above.

[86] If the court is not satisfied that the Gamma-Dynacare and Motherisk reports are reliable, then any opinion based on them is of little evidentiary value. Likewise, if the QEII lab reports are not proven reliable, then any opinion based on them is worthy of little weight.

[87] The onus is on the Minister to prove, on a balance of probabilities, that the reports and expert evidence is sufficiently reliable for court purposes. I am mindful of the need for fairness in this proceeding, whilst placing the best interests of the children above all others. I have carefully considered the testimony, case law and arguments of counsel. I assign no weight to Dr. Nassar's report, Dr. Chatterton's report, the Motherisk report and the Gamma-Dynacare report. The

evidence is insufficient to prove reliability of those reports for purposes of this proceeding.

DECISION RE: PCC PLAN:

[88] Having determined that I cannot rely on the expert reports tendered in support of the argument that C.P. continues to use drugs, I must now consider whether there is other evidence of risk to the children in her care.

[89] It is useful here to review the basis on which the Minister has advanced a plan for permanent care:

- Concerns with C.P.'s ongoing drug use - there is no evidence of ongoing drug use, other than as referenced in the expert reports, to which I have assigned no weight. According to C.P. she last used drugs on December 2, 2013. If so, she has demonstrated a period of sobriety in excess of 24 months. The worker testified that she has never observed C.P. under the influence of intoxicating substances. There was no evidence from the access worker, for example, that she had observed C.P. under the influence of drugs either. Nor is there any other reliable evidence of drug use. Even if I accept that C.P. used hydromorphone on August 24, 2015 as reported by Dr. Nassar, there is no evidence of drug use past that date. Urine testing continued until at least October 27, 2015. I infer from the fact the Minister has not filed another motion to reopen the evidence since October 27, 2015 that no further test results showing drug use above the cut-off have been received.

- Lack of engagement with services – there was also concern expressed with lack of timely engagement in services. C.P initiated contact with Addiction Services in December, 2014, almost a year after being asked to do so by the Minister. However, in the meantime, C.P. engaged with other services, including detox, daytox and the Opiate Recovery (Methadone maintenance) program. Having started the Addictions program late, she continues to access counselling and speaks positively of her contact with Addictions worker Alanna Brown. I find that although she was late initiating contact with Addiction Services, she engaged in the appropriate services for drug use and continues to do so.

- Instability in the children's lives – The evidence from the Minister that C.P moved seven times since 2013 was contradicted by C.P., who stated she moved four times. On one of those occasions the rent was increased, and on another there was a fire in her unit. She has had stable housing since the summer of 2014.

- Concerns with C.P.'s lifestyle and partner choices – C.P. acknowledged having an intimate partner in 2014 who used hydromorphone. However, she says she is no longer involved in that relationship and would not risk her sobriety now by being with a partner who abuses drugs. I accept her evidence that she recognizes the risks of being in a relationship with a partner who abuses drugs.

- Concerns with C.W.'s drug use – C.P. says that on one occasion she saw C.W. in the summer of 2015, she was "100% sure" he was using drugs. C.W. did not testify, but he acknowledged drug use when the Minister first became involved. C.P.'s plan includes no access for C.W.

- Concerns with C.W.'s lack of participation in any remedial services – There is no evidence to suggest C.W. has participated in remedial services.

- Concerns about ongoing contact between C.P. and C.W. – C.W. was found in C.P.'s home with the children present on May 29, 2014 in contravention of a court order. Thereafter, the Minister made a number of home visits and visits to C.W.'s family to determine if C.P. and C.W. were having contact. Although they were found together on two occasions in 2015, the children were not present. They have not been seen together since the summer of 2015 and C.P. says she is no longer pursuing a relationship with C.W. Though the Minister does not believe that C.P. and C.W. are separated, suspicions do not equate to clear, convincing, and cogent evidence. C.P. also explained her reasons for spending time at the home of C.W.'s sister and his grandmother. She said she sought out C.W. in May, 2015 to convince him to "man up" and support her plan for the children. Her explanation for being at J.W.'s home is not unreasonable in her situation. Other than her grandmother, who has been ill, she relied on C.W.'s family for social support. Though she and J.W. no longer speak, C.P. has expanded her support network to include Alanna Brown and people she has met at the gym.

[90] The Minister's plan also cites C.P.'s failure to keep in contact with the worker as a factor in its decision to seek permanent care of the children. It is clear there is a difficult relationship between C.P. and the worker. After C.W. was found in the home in 2014, Ms. Wilson was aggressive in her attempts to confirm whether C.P. was in compliance with the court order. She misunderstood the extent of the powers granted to the Minister under the order and demanded access not only to C.P.'s home, but also the homes of relatives. She told C.P. that if she lied in court, it was a criminal offence. And she was obviously suspicious of C.P. the morning of June 2, 2015, when she asked for access to C.P.'s home and was refused. After threatening to phone police, access was granted and the worker confirmed C.W. was not present.

[91] For her part, C.P. was cooperative with the Minister, but only to the extent required. It is clear she felt workers were trying to trap her, to prove a breach of the order. She refused to speak to workers on her counsel's advice, and she refused the worker access to her home, even though C.W. was not present. Her behaviour heightened the worker's suspicions. However, C.P. attended access regularly, and was in the presence of the access facilitator during the three hour drive to and from access. Had the protection worker needed to contact C.P., she could have done so through the access worker. This was also an opportunity to observe C.P., and no evidence was adduced that she appeared intoxicated or behaved inappropriately in the presence of the access worker.

[92] The Minister did not revisit access or its plan for permanent care after January, 2015 due to its concerns that C.P. was still using drugs and continuing her relationship with C.W. The concerns about drug use were primarily based on the Motherisk hair test.

[93] There are credibility issues with C.P.'s evidence. She has lied to the Minister in the past. She now asks the court to trust that she has made significant and meaningful changes in her life, that she no longer uses drugs, and has cut C.W. out of her life. The Minister argues that her history of lying to workers and her contact with C.W. demonstrates an unwillingness to change. I accept, however, that since 2014, C.P. has made positive changes in her life and that she now understands the need to maintain those changes for the benefit of her children. She realizes that she could lose care of her children permanently. The Minister's message appears to have sunk in.

[94] I have carefully considered the evidence as a whole, and have reviewed the legislation and case law. I have considered what is best for these children in making a final decision. On the basis of the evidence before me, I find there is no substantial risk to the children which is apparent on the evidence, should they be returned to the care of C.P. There is no clear, cogent and convincing evidence of ongoing drug use by C.P., nor that she is pursuing a relationship with C.W. There is no clear, convincing and cogent evidence of current risk arising from instability in her housing, her lifestyle or relationships. The Minister has not met the onus it bears of proving that its plan for permanent care is in the best interests of the children. I find the children are no longer in need of protective services, and I therefore order the children returned to the care of C.P.

[95] There will be an order issued under the ***MCA*** which grants C.P. sole custody of both children, with no access to C.W. For purposes of any future review of his access, the risks identified at the outset of this proceeding should be addressed. At a minimum, C.W. should demonstrate:

- That he has completed an addictions assessment and complied with any and all recommendations for treatment; and
- That he is refraining from the use of alcohol and all drugs, other than prescription drugs prescribed for him in the manner and dose prescribed; and

CONCLUSION:

The Minister has not proven on a balance of probabilities on clear, convincing and cogent evidence that there is a substantial risk of harm apparent on the evidence should the children be returned to C.P.'s care. The protection proceeding is dismissed. An ***MCA*** order will be issued with respect to C.P.'s custody application.

MacLeod-Archer, J.