# SUPREME COURT OF NOVA SCOTIA
# (FAMILY DIVISION)

**Citation:** T.G. v. Nova Scotia (Community Services), 2011 NSSC 356

**Date:** 20110826
**Docket:** SFHCIV-076405
**Registry:** Halifax

**Between:**

T. G.

Applicant

v.

Nova Scotia (Minister of Community Services)(MCS) and R.C.

Respondents

**Editorial Notice**

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

**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 R. James Williams

**Heard:** August 26, 2011, in Halifax, Nova Scotia

**Oral Decision:** August 26, 2011

**Edited for Release:** September 29, 2011

**Counsel:** LouAnn Chiasson, counsel for T.G., Applicant
Peter C. McVey, counsel for the MCS, Respondent
Jane Lenehan, counsel for R.C., Respondent

**By the Court:**

[1] Ms. Lenehan, on behalf of R.C., is present with an application that she be granted Intervener status and joined as a party to the proceeding. I have an affidavit from T.G. which indicates that she is consenting to that. The MCS is also consenting. That order was granted.

[2] This is an appearance pursuant to Rule 7.10 of the *Civil Procedure Rules*, an appearance with respect to the request for directions for Judicial Review. Rule 7.10 provides:

> **Directions for judicial review**
> 7.10 A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:
> (a) settles what will make up the record and whether something is part of the record;
> (b) assigns responsibility to prepare, file, and deliver the record;
> (c) directs the format in which the record will be produced, and whether a party must receive a paper copy of a record that is in electronic format;
> (d) provides for the protection of information claimed to be privileged or otherwise subject to a confidentiality protected by law, delivery of the information to the judge who determines the claim, and maintenance of a record for review by the Court of Appeal, under Rule 85 - Access to Court Records;
> (e) allows an amendment to the notice for judicial review or a notice of participation;
> (f) directs whether there are interested persons who are not parties and, if necessary, adjourns the motion until an interested person is made a party or joins an interested person as a respondent;
> (g) rules on the admissibility of evidence sought to be introduced at the review hearing;
> (h) provides for the introduction of admissible evidence by affidavit or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript;
> (i) sets deadlines for filing the record, the applicant's brief, the respondent's brief, and any reply brief of the applicant;
> (j) directs further appearances before a judge, if necessary, and directs whether those appearances will be before the same judge and whether they will be in chambers, in conference, or at appearance day;
> (k) appoints the time, date, and place for the hearing of the judicial review.

*N.S. Gaz. Pt. 1, 12/10/08*

[3] The issue today relates primarily to disclosure issues.

[4] Mr. McVey's position is essentially that the Court should act under this Rule without regard to Part 5 of the *Civil Procedure Rules* related to disclosure and discovery, and without regard to material that has been filed earlier in this judicial review process, including the Affidavit of Ms. Blanchard of July 19, 2011. I disagree.

[5] Rule 3.01 provides that there are three types of civil proceedings:

> 3.01 Actions, applications, and judicial or appellate review
> A person may claim a civil remedy in the Supreme Court of Nova Scotia by starting any one of the following kinds of proceedings:
>
> (a) an action, which leads to a trial or an earlier resolution under Part 4 - Alternate Resolution or Determination;
> (b) an application, which leads to a hearing or an earlier resolution under Part 4 - Alternate Resolution or Determination;
> (c) a proceeding for judicial review, or an appeal to the court under legislation.

[6] Rule 14.08 (1) speaks to disclosure "in a proceeding":

> 14.08 - Presumption for full disclosure
> (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[7] Rule 14.12 (1) and (2) provide:

> 14.12 - Order for Production
> (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.

[8] The Rules, including Rule 7.10 and those referred to above, give the Court broad discretion in organizing and providing for disclosure in all three types of proceedings.

[9] This is a proceeding concerning a child (R.J.) who was placed in the permanent care and custody of the Minister of Community Services. T.G. (R.J.'s foster mother) asks that the decision of the Department of Community Services (the agency) to place R.J. for adoption with R.C. (who has previously had R.J.'s two older siblings placed with her) be reviewed. The discretion that the agency has in terms of determining adoption placement is a broad discretion. The role of the Court is not to review the weight of the considerations the agency made in exercising that discretion, or to create or move towards a consideration of that weight, but is rather to conduct a hearing that considers the process, not the outcome of the exercise of that discretion.

[10] Mr. McVey submits (in his Brief to this Court of August 8, 2011), in referring to the issue of evidence at judicial review hearings, that the Court may inquire into the existence of a factual or evidential foundation for the Ministerial decision but should not inquire into the sufficiency or weight to be given such evidence and relies on the *Waverley* case of the Nova Scotia Court of Appeal, paragraph 21, for that assertion. I agree with that assertion.

[11] The excerpt from *Waverley* reads as follows:

> 21 They explain:
>
> "It is not a matter of determining whether the decision is correct but whether it is authorized. Over the years the courts have employed a number of techniques to determine whether the ambit of discretion has been exceeded or not. For example, it could be asked whether the decision reflects the proper purpose for which the discretion has been granted and whether it is based on relevant considerations. As well, it could be asked whether the possessor of the discretion actually exercised it, or allowed himself to be dictated to, or refused to exercise the full range of choice available to him by fettering his discretion by way of inflexible pre-judgment... (W)hen a discretionary power is granted to a minister or some official, rather than to a more formally constituted adjudicative body such as an administrative tribunal, and, should something go wrong, it is more accurate to characterize the ministerial decision as one involving an abuse of discretion and that of the administrative tribunal as an error of law, fact or jurisdiction.

[12] In this situation there is an allegation of bias. The purpose of this appearance is to give direction pursuant to Rule 7 that moves toward the organization of the Judicial Review. Mr. McVey has referred to the Court having raised issues and questioning him and, for that matter, to some extent the other parties. The questions to Mr. McVey related to the process the Department of Community Services undertook.

[13] Case law refers to limited duties that a decision-maker may or may not have to parties interested in that decision. There is no question that the Minister's duty in her process of choosing R.J.'s adoption placement to the extent one exists to T.G. or, for that matter, to R.C., is tempered by the very broad discretion the Minister has under the legislation, the *Children and Family Services Act*. In my view there is also a significant duty that not only the Minister has but the Court has to this child. Where I see issues in the process or potential issues or have questions, I believe it is consistent with this Court's responsibilities, including the responsibility to attempt to bring this matter to a hearing and conclusion as quickly as possible. This is mandated by this child's age and the provisions of the *Children and Family Services Act* with respect to the sense of time of the child, and best interests standard.

[14] One of the questions here is whether or not the adoption file of R.C. with the Department of Community Services <u>will be disclosed</u>. The discretion exercised by the Department of Community Services here is essentially one to determine in its judgment which adoptive placement between two homes is most consistent with the mandate it, the Department of Community Services, has to make decisions in a fashion that are consistent with the best interests of the child and the mandates given it under the *Children and Family Services Act*. Mr. McVey has asserted that this decision was made by the Dartmouth District Office of the Department of Community Services. The record supplied by the Department of Community Services at this point contains scant information concerning, to quote Mr. McVey, "the existence of a factual or evidential foundation for the Ministerial decision", with respect to the adoption placement of R.J.'s siblings with R.C.. The Dartmouth Office of the Department of Community Services asserts in its June 22, 2010 Adoption Placement Minutes that placement with siblings is a primary reason for their having chosen the R.C. home for R.J.'s adoption placement. The R.C. adoption file (of R.J.'s siblings) is apparently maintained by the Department of Community Services ( * Office).

[15] Ms. Blanchard's Affidavit attaches the Department of Community Services' Minutes of the "Adoption Planning" Meeting held June 22nd, 2011, at which time the decision between the two homes was made. I do not believe that I would do this process any good at all were I to accede to Mr. McVey's assertion that the Affidavit he filed on behalf of the Minister of Community Services is technically not before me at an appearance to give direction, particularly in the face of a request for the disclosure of the file of R.C..

[16] The question before this Court ultimately when this comes to the judicial review hearing, is not, as I have said, is not whether the Court would look at the information the Minister of Community Services had and say it would or would not have made the same decision. The question is what information did it, the agency, have? What process did it follow?

[17] The Minister has presented her decision as one made primarily between two potential adoption homes - that of T.G. and that of R.C.. I am unclear from the material that I have as to the existence of information that the Dartmouth District Office had concerning R.C.'s home and the siblings of R.J. in that home. I am unclear as to the evidential foundation for the Ministerial decision. I am unclear whether they had accurate information. The Affidavit that Ms. Blanchard has filed asserts at paragraph 57:

> However, on September 10, 2010, Cindy Bailey, then the Child in Care worker, spoke with T.G. about the court proceeding. Cindy Bailey notes that she informed T.G. that R.J.'s older siblings had been by then adopted. Knowing this, T.G. stated on this date she would also like to be considered as a possible adoptive home for R.J..

[18] R.C. was joined as a party to this proceeding, by consent of all the parties, earlier in this appearance, pursuant to Rule 7.10. R.C. has filed an affidavit in support of her application to be joined, stating the adoption of R's siblings would not be complete until late September of 2011. The Minister's Minutes of its June 22nd decision makes it clear, and the statute, the *Children and Family Services Act*, makes it clear that a significant factor in the Minister's decision was the R's sibling adoption/adoption placement in the R.C. home. The material filed by the Minister - the Affidavit of Nicole Blanchard, the attached June 22nd Minutes and the R.C. Affidavit are not consistent and combine, in my view, to make it appropriate for the Court to allow disclosure of the nature or existence of information the

Department of Community Services Dartmouth District Office had concerning R.C.'s home and status of R.J.'s sibling adoption(s) when choosing (on June 22nd ) between potential adoptive homes for R.J.. Mr. McVey has acknowledged, even at the time of <u>this</u> appearance, getting instructions on this very issue.

[19] Mr. McVey indicates the R.C. adoption file (re adoption of RJ.'s siblings) is(was) maintained by the *, * office of the Department of Community Services. It is, as I understand it, the only file that would contain a record of communications from R.C. to the * office and would also, presumably, record communications from the * Department of Community Services Office to the Dartmouth Department of Community Services Office concerning the status of the adoption of R.J.'s siblings by R.C..

[20] The material from the Dartmouth files has, as I understand it, been disclosed by agreement. The * agency file concerning R.C. is the only file in dispute regarding disclosure. It is apparent that the information concerning the adoption of R.J.'s siblings in the Dartmouth file, as recited in the Affidavit of Ms. Blanchard, lacks some clarity, or appears to lack some clarity insofar as it is inconsistent with R.C.'s Affidavit.

[21] In my view, this matter should move forward. R.C. is part of the process and it is entirely possible that she would be filing further affidavit material in the process. There is reference to communication with her in the material filed by the agency, the Dartmouth agency, in Ms. Blanchard's Affidavit. Ms. Blanchard's Affidavit also refers to at least one message received (from the * Department of Community Services agency concerning R.C.'s home - the disclosure on June 15th: "received message. R.C. is in favour of adoption of R.J.". Presumably the R.J. adoption file from * would disclose the nature of that message and who it was from.

[22] The direction the Court will give is that the adoption file of R.C. with the * office of the Department of Community Services be disclosed. In my view, delaying that disclosure at this point or turning it down at this point would inevitably lead to it being raised later in the proceeding and result in delay. Delay, <u>for R.J.'s sake</u>, is to be avoided.

[23] With respect to other disclosure, I order that the Minister of Community Services make available for viewing the birth certificates of R.J.'s two siblings,

disclose the source of the information referred to in the June 22, 2011 Minutes under the heading "Discussion (October 19th, 2010)" - (the June 22 Minutes in Ms. Blanchard's Affidavit, or attached to it), it being noted that on October 19, 2010 that "R.C. reportedly doing well, interested, would consider R.J.'s sister for adoption", "if R.J. and her family are not a plan, we would need to look at a cultural match and seriously consider his attachment".

[24] The Minister of Community Services' Dartmouth District Office indicated that somebody reported to them that "RC is reportedly doing well". Who that is should be identified. (Reference: Discussion: (October 19th) in the June 22nd material.) These may well be communications from the * agency contained in the R.C. adoption file.

[25] Also on October 19, 2010, or under that date in the June 22nd note, there is reference to it being recommended (if there was an order of permanent care and custody) that the initial letter to the M'ikmaq agency reference R.J.'s sisters. I'd like that clarified as to who was making that recommendation. There is reference to June 15th: "received a message, R.C. is in favour of adoption of R.J." - again I would like an indication as to who that message was received from.

[26] Again, some of this may be clarified by the disclosure of the * file.

[27] There is reference in the June 22nd note that in one place an "Adoption Manual of Policy and Procedures", and in another place "Provincial Adoption Program Manual", which the Minister believes to be one and the same. I direct that the entire Program Manual be disclosed. Similarly that the Child Welfare League of America Standards with respect to adoption placement, that the entire document be disclosed. If it is available on the internet, give the cite to Ms. Chiasson, and I am fine with electronic disclosure. Obviously it should be provided to Ms. Lenehan. All the disclosure I have referred to should go to Ms. Lenehan and R.C. also. If the Minister only read part of it, then we should be clear on that.

[28] The page numbers of the June 22nd record are not numbered, but if I call the title page "Adoption Planning Date June 22nd, Present" and list everybody present as page 1, then on the 7th page, the first full paragraph reads: "research is telling us that....". The source of that quote should be identified and disclosed.

[29] The disclosure I am directing here is primarily aimed at attempting to make sure we do not have issues that arise later that require disclosure and an adjournment. My agenda here is to try to keep these hearing dates so this matter can be resolved in a timely way.

[30] I am going to adjourn the fixing of what the record would be and determination of introduction of admissible evidence because there is material that the parties have not had an opportunity to review at this point, particularly some of the material I have ordered disclosed and obviously I am taking it from the submissions you have made, Mr. McVey, that you have not seen the "*" file and other counsel have not.

[31] If you and Ms. Lenehan are of the view that disclosure of that file should take place through another judge, I am prepared to consider that. You can advise me of that by noon Monday, August 29th. I am prepared to make any direction that you think appropriate if the disclosure is made to counsel, including a direction that (a) the file not leave the office of any counsel; and (b) with respect to Ms. Chiasson's office and that of Ms. Lenehan's, that the file not be reproduced except for the purpose of filing with the Court, not be released from their office to their client and be returned to the Department of Community Services on completion of this proceeding and any appeal dates or hearings. I cannot think of anything beyond that in terms of protecting the file, but I am open to the suggestions of counsel. My hope may be that that may avoid the need of involving another judge and more court dates and the possibility of delay in that judge reviewing it. It seems to me counsel are able to address it, but, as I have indicated if Mr. McVey or Ms. Lenehan want it done through another process, we would in all likelihood do so. We will do what we can to respect R.C.'s privacy and that of R.J.'s siblings (see Rule 7.10(d)).

[32] I am prepared to endorse an Order for Production if that would meet the needs of the * agency in terms of their comfort level with providing that file, for the express purpose of expediting the disclosure and moving this along. It is not unusual in those forms of orders to direct that the disclosed file not be filed with the Court and it would go to counsel.

[33] With respect to disclosure of e-mail communication, where there is a reference in the agency's running notes to an e-mail, that e-mail will be provided.

[34] The matter will be set for continuation of the section 7 direction appearance on September 6 or 7, 2011 for an hour and a half, and may be double-booked. The number one imperative here is to try to get this resolved so that R.J.'s placement, wherever it will be, can either proceed or, if it comes to that, be reviewed or revisited. I have been very clear that there is no jurisdiction in this Court to direct, no matter how successful T.G. might be in this process, to direct what the Minister's decision should be. It is very clearly a process that the best T.G. can do is a direction that the Department of Community Services revisit the adoption decision using the discretion it has and in all probability, if it came to that, there may well be some difference between the parties in terms of, if the Court was going to direct that the process be revisited, what the extent or limits of the Court's discretion in giving that direction might be.

[35] The Court would like to know at the next appearance if the September 21 and 22, 2011 dates are solely to determine whether or not we get to the stage of the Court giving a direction that the matter be, the discretion be re-exercised, or whether counsel are contemplating that we would deal, if you like, both with whether we get to that stage and if we do not then that would obviously be the end of it, but that we would also attempt to receive submissions from counsel on what, if that stage was reached, on what or how the Court should do in terms of directing that. If it is the latter and this is seen as essentially three stages - the stage we have gone through, another stage and if T.G. was not successful the matter would end there, and then a third stage with the Court giving direction to the Minister, then my preference would be that we set tentative dates at least at the next appearance so that the docket does not dictate a delay. On the other hand if counsel think they are going to be ready to address both remaining issues on September 21 and 22, I suppose we could proceed that way, but frankly I have some question as to the sensibility of asking counsel for submissions on an issue that might not even be coming to the Court if T.G. is not successful.

[36] I am not asking for your response today. I am a little concerned about receiving directions on an issue that might not be before the Court.

[37] At the end of this, it appears that one of two things is going to happen - either there is going to be an adoption by R.C., or there will be an adoption by T.G.. I am going to assume for the moment that there may well be arrangements that could be made between T.G. and Ms. Lenehan through a negotiation or if need be a settlement conference that might address what might happen in terms of

contact were one of them to adopt. That might not be achievable at the end of this process if it goes all the way. I also would probably assume, at least in a tentative fashion, that if there was a discussion between your client, Ms. Lenehan, and Ms. Chiasson and T.G. that resulted in them saying "listen, we agree that person A should adopt this and person B should have this kind of contact with R.J. on a regular basis", that I would be somewhat surprised if the Department of Community Services did not look at that pretty seriously in terms of resolving the matter short of the hearing that we have scheduled in September. When I say "assume", I am not saying that it should be correct or that it inevitably would be correct, it is merely saying that if the two mothers who are potentially most devoted to R.J. of anybody, if they come to an agreement as to what works for them and R.J. and their families, then I think it would be something that, at a minimum, should be seriously considered.

[38] I would encourage that dialogue and I would indicate to you that if you wanted a date with another judge to discuss that, I would do what I could to arrange it. I would not necessarily see that the Department would need to be involved in that discussion until there was at least a tentative agreement. If the Department wanted to be involved in it and T.G. and R.C. wanted to have the discussion, that is fine, but again I am not looking to waste resources if R.C. and T.G. had a discussion and it did not go anywhere, then it would not change anything from the Department's point of view. It is very obvious, I think, Ms. Chiasson, that the upside for your client here is a revisiting of the decision, not a making of the decision.

[39] The matter is adjourned on that basis.

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

Halifax, Nova Scotia