SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. F.B., 2013 NSSC 100

Date: 20130312
Docket: SFHCFSA-076632
Registry: Halifax

Between:

Minister of Community Services

Petitioner

v.

F. B.

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 14, 15, 16, 17, 18, 28, 29 & 30, 2013
February 19, 20 & 26, 2013, in Halifax, Nova Scotia

Counsel: May Knox, for the Applicant

By the Court:

Background:

[1] The mother in this case has three children. Only the disposition in relation to the youngest girl, A, is being considered in this decision. The parenting of the two other children, the oldest girl and the boy was decided by consent orders under the **Maintenance and Custody Act,** R.S.N.S. 1989, c.160, s. 37 (**MCA**) which placed each of the children in the care of parental relatives.

[2] There was child protection involvement in the mother's family when she was a child. Concerns at that time were domestic violence and substance abuse. After the birth of the oldest girl there were child protection referrals about the mother alleging domestic disputes and domestic violence between the mother and the fathers of her two older children.

[3] In December 2010, the Minister of Community Services (MCS) received a referral from a doctor who had seen the mother with her two older children when he was consulted about the boy's ear and chest infection. The doctor described the mother as very angry, screaming and swearing, and indicating that she could

not afford the medication that the doctor prescribed and refusing to take the child to the children's hospital. The doctor indicated that he had not seen anything like this in 40 years of practice. This report was investigated. The children had received the necessary medication, social workers visited the mother and no further action was taken by the MCS. At that time it was learned that the mother was pregnant with A.

[4] A further referral was received in April 2011 from a probation officer indicating that the biological father of the boy had been convicted of sexual interference with a 13 year old girl. The MCS requested that the contact between the boy's father and the children be supervised.

[5] In May 2011 a further referral was received from the Halifax Regional Police (HRP) regarding the mother threatening her unborn child. The police arrested the mother for making threats to her unborn child. That charge was not pursued but she was charged with assaulting the biological father of A. Police officers noted concerns about the mother's mental health and behaviour in the presence of the children. The mother and the biological father of A ended their relationship.

[6] In May 2011 the MCS received a further referral from HRP that the mother was in violation of a provision in an order which required her to have no contact with the father of the boy. The police went to the mother's home and indicated that they would be charging her for breaching the no contact order and she became hysterical. The police officers remarked that the children appeared to be unfazed by their mother's hysterics.

[7] The MCS had concerns with the mother and the father of the boy being together even after the no contact provisions were removed. Concerns of the MCS included the history of domestic violence between the two and the father's conviction for sexual interference. The MCS asked that the mother and father of the boy not live together and that contact between the boy's father and the children be supervised. The MCS asked the mother and the boy's father to participate in services voluntarily rather than have the matter proceed to court under the **Children and Family Services Act,** S.N.S.1990, c. 5 (**CFSA)**. Neither would agree to cooperate. The MCS took the children into care on July 27, 2011 as it was felt that a supervision order would not be effective to gain cooperation.

[8] The couple disrupted the office of the MCS to such an extent by their behaviour on July 28, 2011 that sheriffs were called to remove them from the building. The mother was also escorted from the building at the time of the first access visit on August 2, 2011 after reports that she was screaming and crying and was on her hands and knees. The mother indicated that she was having an anxiety attack. The mother was eight months pregnant with A at that time.

[9] The mother of the children is a member of Canada's First Nations and notice was provided on August 4, 2011 to Mi'kmaq Family and Children Services pursuant to s. 36(3) of the **CFSA.** The mother is very involved in programs and services that are offered in the Mi'kmaq community. The mother's grandmother is a survivor of the Indian Residential Schools.

[10] On August 5, 2011, the matter was before the court on the five-day hearing and a finding of reasonable and probable grounds to believe the children were in need of protective services was made by the court. The father of the oldest girl had counsel, the father of the boy had counsel but the mother did not have counsel. The matter was adjourned to the next week for a hearing on the father of the oldest girl's request for standing and a two-day interim hearing to determine if the

children should be returned to the mother. A settlement conference on August 9, 2011 resulted in an agreement that the children remain in the interim care and custody of the MCS. The parties agreed that the mother would have access with the children three times a week. The mother agreed to participate in services and that the father of the oldest girl was a party to the proceeding. The mother did not have counsel for the settlement conference.

[11] The child A was born at the end August 2011 and she was taken into the care of the MCS at the hospital. The matter involving A was before the court for the five-day hearing on September 4, 2011. The mother had counsel. The court found reasonable and probable grounds to believe the child was in need of protective services and that the biological father of A did not meet the definition of a parent under the **CFSA** and was not a party to the proceeding. The court could not determine whether there was substantial risk to the child and returned A to the mother under a supervision order.

[12] Both matters proceeded separately before the court. All three children were found to be in need of protective services pursuant to the **CFSA.** The two older children remained in the care of the MCS and A remained in the care of the

mother pursuant to a supervision order. In November/December 2011 counsel for the mother was permitted to withdraw as counsel of record for both matters.

[13] The father of the oldest girl requested that she be placed with him and objected to access between the oldest girl and the boy's father. A day and a half hearing was set in mid-February 2012 to determine placement and access. On the first day of that hearing, counsel for the MCS informed the court that a case conference had been held, progress had been made by the mother and all parties were in agreement that the two oldest children would be gradually returned to the mother with the father of the oldest girl having increased access, including overnight and weekend access. The mother continued to be unrepresented and when asked if she was in agreement with the proposal she indicated that she did not agree to the extent of the access for the father of the oldest girl. The matter was adjourned for the mother to obtain counsel.

[14] At the end of February 2012 the mother had obtained counsel and was in agreement with the plan of the gradual return of the children to her and the access proposed for the father of the oldest girl. At this point, the father of the oldest girl

was no longer in agreement and the matter was scheduled for a settlement conference and a five-day hearing on the placement of the children.

[15] In February and March 2012 there were two significant incidents which caused concern to the MCS. The first was an unannounced home visit to the mother. The mother was present with six month old A and a worker from the Native Council. When the social worker for the MCS began a discussion with the mother about her case, the mother became very upset and began yelling, screaming and swearing. The mother went to the upstairs of her home but continued to yell and scream. The child was present for this outburst and both the social worker for the MCS and the person present from the Native Council indicated that there was no reaction from the child. The social worker left the mother's home after fifteen to twenty minutes but the mother continued to yell, scream, swear and throw things for up to two hours according to the person from the Native Council.

[16] On March 12, 2012 the mother was scheduled for a supervised visit with her two older children. The visit did not go well, the children were acting up and the mother was upset. Representatives of the MCS ended the visit early. The access supervisor was concerned about the mother's state of mind because she had care of

A. The mother left with A in the stroller. Two social workers for the MCS and the access supervisor went to the parking lot to see how the mother was doing. They tried to talk to the mother but she escalated and was yelling and screaming. Other representatives of the MCS were present in the parking lot and one social worker called a supervisor with the MCS and then 911. The mother would calm a bit and then become upset again. The representatives of the MCS decided to take A into the care of the MCS. A brief struggle ensued and the child was taken into care. The mother went up to the office of the MCS and continued to yell and scream in the elevator. The mother was charged with assaulting one of the social workers for the MCS as a result of this incident.

[17] The MCS sought an order placing A in the temporary care and custody of the MCS. A hearing was held for three days in March and April 2012 and by written decision, **Minister of Community Services v. F. B. And W.G.,** 2012 NSSC 181 dated May 9, 2012, A was returned to the care of the mother under a supervision order.

[18] The mother was not represented by counsel at the hearing in March and April 2012. The second lawyer for the mother had been heard on a motion to be removed as solicitor of record and was allowed to withdraw on both matters.

[19] A review hearing was held on April 23, 2012 and the mother was still without counsel. The mother indicated that Nova Scotia Legal Aid would not provide her with another lawyer. The court ordered that the Attorney General provide counsel to the mother.

[20] A settlement conference was held on April 30, 2012 and the mother appeared without counsel. It was agreed that the five-day placement hearing scheduled for June would be adjourned, a parental capacity assessment of all of the parties would be prepared and access between the oldest girl and her father would increase. The five days for the placement hearing were removed from the docket.

[21] At a conference on May 29, 2012, it was apparent again that the mother's understanding of the agreement reached at the settlement conference was different from that of the other parties. The Attorney General had not provided counsel to

the mother. The matter was adjourned to hear from the Attorney General and for a five-day hearing as soon as possible. The date to hear from the Attorney General was set for July 26, 2012 and the five-day hearing was scheduled for the end of November 2012. The court was concerned about the delay in the matter and scheduled it to return on June 27, 2012 to hear from the Attorney General. Counsel was arranged for the mother and the placement hearing remained adjourned for five days at the end of November as there were no sooner dates when counsel were available.

[22] There were two further significant incidents, one in July and one in September 2012, of the mother yelling, screaming and being unable to control her emotions in the presence of the children.

[23] In October 2012, the MCS indicated that they were seeking permanent care and custody of all three children. The parental capacity assessment had been completed and the psychologist who prepared the report recommended permanent care and custody. A psychiatric assessment report also recommended placement of A not be with her mother. The two proceedings were consolidated and scheduled for a permanent care and custody hearing using the days at the end of

November and other days in December. A settlement conference was held in November and there was agreement that the two older children would be placed with parental family members under the **MCA**. The matter under the **CFSA**, the permanent care and custody hearing for A, was adjourned to January 2013.

[24] There was a further settlement conference in early January 2013 at which time the mother was represented by counsel. Between the date of the settlement conference and the first day of trial the mother filed a "Notice of Intention to Act on One's Own" which indicated that she had discharged her lawyer and had decided to act on her own.

[25] Evidence at the final disposition hearing for A was heard on January 14, 15, 16, 17, 18, 28, 29, 30, February 19, 20 and 26, 2013.

[26] The biological father of A appeared on January 14, 2013 and consented to A being placed in the permanent care and custody of the MCS. He had no involvement with A from the time of her birth.

[27] The outside date for all dispositions under the **CFSA** was January 18, 2013. The court implicitly extended the timelines on January 18, 2013 and explicitly extended them on January 28, 2013. It was found to be in the best interests of the child to hear all of the evidence before making a decision as to whether the child should be returned to her mother or placed in the permanent care and custody of the MCS.

Position of the Parties:

A **Minister of Community Services:**

[28] The MCS's position is that there is substantial risk that A will suffer emotional harm if left in the care of her mother and that the mother is unable to alleviate the risk. They are asking that A be placed in the permanent care and custody of the MCS. Incidents of the mother's inability to regulate her behaviour with police officers, a doctor, representatives from her landlord and the representatives of the MCS are relied on by the MCS to show that the mother's behaviour is volatile, aggressive, erratic and violent. The MCS submits that the mother lacks insight into her behaviour and the effect that it has on the children. The MCS relies on the recommendations of the psychologist in the Parental

Capacity Assessment and the assessment of the mother's mental health by the psychiatrist. They point to the emotional problems of the other two children, particularly the oldest girl, that A was withdrawn when taken into care in March 2012 and that A did not seem to react to her mother's emotional outbursts. The MCS has concerns about the mother's emotional instability. The mother has participated in services according to the MCS but has made minimal improvements or gains. The MCS plans to find an adoptive home for A which is culturally appropriate to her aboriginal heritage.

[29] The MCS is not alleging that A is in need of protective services on any other ground. They acknowledge that A's physical care in the mother's care is good and the child's physical surroundings in the mother's care are good. They are not alleging a risk of sexual abuse.

B **The Mother's Position:**

[30] The mother's position is that A is 18 months old and has always been in her care except for the two short periods of time when she was taken into care by the MCS and that the MCS has not established it is in the best interests of the child to

be taken from her mother with whom A has a strong bond. The mother asserts, and there is no evidence to the contrary, that she provides A with a safe, clean environment and healthy food; that A's medical needs are looked after and all vaccinations are up to date and that A is meeting the appropriate milestones for her age and in some cases is ahead for her age.

[31] The mother submits that she participated in all of the services that she was asked to participate in. She cooperated and participated in services through the STOP program, Project New Start, a mental health assessment, family skills, a parental capacity assessment, a neuropsychological assessment, a psychiatric assessment and an assessment of the oldest girl. She has also participated in more services than requested by the MCS, through the Native Council and the Mi'kmaq Child Development Centre. She found the access visits with the children very stressful and while she missed some access visits, she did attend most of the visits. At the visits she always brought appropriate activities and snacks for the children.

[32] Leaving A with her mother is the only way that A will continue to know her siblings. The mother submits that A is part of an extended family that supports both the mother and A. The family consists of grandparents, aunts and cousins

who all get together on a regular basis. The mother submits that in her home the child is being immersed in her aboriginal culture. The mother and A also participate in the church and attend bible study and church services regularly. The mother points to the incredible stress that she has been placed under in the last two years to explain some of her behaviour. She also accepts that her behaviour, at times, was inappropriate.

[33] The mother explains the incidents where she had outbursts and poor behaviour as occasions when she was under extreme stress and that the other people involved did not understand her point of view and were not listening to her. She indicates that she now has a counsellor that she has connected with and that she has made gains since September 2012 in her anger management and anxiety.

[34] The mother is asking that the child remain in her care.

Issues:

Is it in the best interests of the child A to be returned to her mother or placed in the permanent care and custody of the MCS?

Legislation:

The legislation governing this matter is the **Children and Family Services Act.**

Section 2 of the **CFSA** provides the purpose of the legislation and paramount consideration:

> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

Section 3(2) provides the considerations for determining best interests of a child:

> 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;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

(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;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(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;

(n) any other relevant circumstances.

The MCS is asserting that A is in need of protection services pursuant to s. 22(2)(g) of the **CFSA:**

(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

Section 22(2)(f) reads:

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

Substantial risk is defined in s. 22(1):

> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.

Section 42(1) of the **CFSA** provides options for disposition. In the present case, the timelines under s. 45 of the **CFSA** have been reached and exceeded for all dispositions, therefore the only options available to the court are dismissing the matter and A will remain with the mother (s.42(1)(a)) or placing A in the permanent care and custody of the MCS (s.42(1)(f)).

Sections 42(2) - (4) provide guidance and considerations for the court in deciding on the appropriate order:

> (2) The court shall not make an order removing the child from the care of a parent or guardian 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.
>
> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

Section 47(1) states the effect of an order for permanent care and custody:

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

Section 47(2) provides considerations for making an access order after a permanent care and custody order:

> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> > (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
> >
> > (b) the child is at least twelve years of age and wishes to maintain contact with that person;
> >
> > (c) the child has been or will be placed with a person who does not wish to adopt the child; or
> >
> > (d) some other special circumstance justifies making an order for access.

Counsel:

[35] For much of the proceeding before the court regarding all three children the mother was self-represented. Two lawyers were permitted to withdraw as her counsel. The third lawyer was provided by the Attorney General as a result of the court's order to provide counsel to the mother. At that point the mother was requesting the assistance of counsel but had exhausted all possible avenues for receiving legal aid. The court found, pursuant to **New Brunswick (Minister of Health and Community Services) v. G. (J.),** [1999] 3 S.C.R. 46 that the mother's section 7 rights under the **Canadian Charter of Rights and Freedoms** would be infringed if she was required to proceed without counsel as she would be unable to have a fair hearing.

[36] On the eve of the final disposition hearing, the mother filed a "Notice of Intention to Act on One's Own" which indicated that she had discharged her third lawyer, had not retained new counsel and decided to act on her own in the proceeding. On the first day of the proceeding the mother requested an adjournment to further prepare but she did not seek an adjournment to obtain counsel. The adjournment was not granted as it was found not to be in the best

interests of A to adjourn the matter. The outside date for final disposition was less than a week away. The mother was not seeking the assistance of counsel which was a decision she is entitled to make pursuant to paragraph 103 of **G. (J.)**, supra.

[37] The mother did a very good job of representing herself at the final disposition hearing. That being said, she clearly would have benefitted from counsel experienced in child welfare matters, both at the final disposition hearing and throughout the proceeding. On two occasions the mother misunderstood agreements reached and gave up hearing dates which would have determined whether the children would be returned to her. In February 2012, based on the progress that the mother had made, the MCS was willing to return the two oldest children to her care. At the court appearance to implement that agreement, the mother would not agree to the increased access for the oldest girl's father. If the mother had counsel at that time, the misunderstanding may not have occurred and the children would have been returned to her care. If all had gone well, the MCS likely would not have sought permanent care and custody of any of the children.

[38] Things did not go well after that date, partially due to the fact that the children were not returned to the mother. Prior to the court date, access with the

two oldest children was occurring in the mother's home and was unsupervised. Things were going well and the mother was very happy not having to go to the office of MCS and have supervised access. After the court date, access returned to being supervised in the office of the MCS. This caused extreme frustration, anxiety, upset and stress to the mother which led to the events of February 23, 2012. Then the events of March 12, 2012 occurred. It was after that time that the parental capacity assessment and the psychiatric assessment were completed.

[39] Counsel experienced in child welfare matters would have ensured that the mother maximized the time limits in the legislation and would have been of great assistance for cross-examining the expert witnesses.

The Role of MCS in Child Protection Proceedings:

[40] In Ontario the role of the Minister of Community Services or the Agency has been characterized in **Children's Aid Society of Algoma v. M.(R.),** 2001 Carswell Ont 2204 (O.N.C.J.) at paragraph 64 as:

> Courts cannot make decisions without evidence. The scheme of the *Child and Family Services Act* gives, in section 40, discretion to a society to seek a judicial

> determination of whether a child is in need of protection. Once it does so, it has **a statutory duty to present evidence that will enable the court to make both a finding and a disposition** (emphasis in original). That evidence will come almost invariably as a result of investigation by the society. For the court to make the right decision, it must have as much relevant evidence before it as possible which means the society investigation should be full and comprehensive and, I suggest, impartial. The society has been likened to an arm of the state and, as such, has a duty to present all the relevant evidence, including that which may not support its claim in the proceeding.

While the legislation in Ontario is not the same as the legislation in Nova Scotia, I believe that the duty on the MCS is the same. The MCS's role before the court is to present as much relevant evidence as possible so that the court can decide what is in the best interests of children. It must be impartial. The MCS must present relevant evidence that supports their case and relevant evidence that does not support their case. The court was disturbed by some of the evidence that was presented and some of the testimony in this proceeding.

[41] The mother did a very good job of pointing out the negativity of the evidence presented by the MCS. This included evidence in recordings, affidavits and access facilitators' notes. The mother was not always compliant with the MCS and she questioned the reason for things continually. If something she was told by one access worker was contradicted by another, she pointed that out. She did not like being interrupted in her access visits and she told the social workers

that. She did not want to talk about Agency concerns in front of her children and she said that. She was disruptive in the office where her access with her children took place. There is no doubt that the mother was a difficult client to deal with, however, a parent's failure to cooperate with the MCS does not equate to their child being in need of protective services.

[42] While recognizing the concerns of the Agency, the court was troubled that there was not more empathy from the witnesses who are employed by the MCS. There was little recognition of the stress that was placed on the mother. As she said in her testimony, they drove a truck through her life. How difficult it would be to have the MCS come into your life and take over complete control of your children and your life. What a helpless feeling that would be.

[43] The mother submits that on several occasions she raised concerns about the children and the access but her concerns were not addressed by the MCS. The mother's concerns were varied: the children not getting proper medical care and nutrition; the children referring to foster parents as Nanny and Grampa and to her by her first name; the lack of cleanliness and lack of supplies in the access area as well as the haircuts the children received in care.

[44] Prior to the involvement of the MCS in 2011, she was attending school and doing very well in her program. She was caring for two children and was pregnant with A. She received funding for her school from the Aboriginal Peoples Training and Education Commission and she received the Child Tax Benefit. The mother was saving some money and she was sponsoring needy children. She was attending church and she was attending parenting programs offered through the Native Council and the Mi'kmaq Child Development Centre. She was not receiving Income Assistance.

[45] In July 2011, the MCS took two of her children into care and in late August they took A into care at her birth. When the children were taken into care the Child Tax Benefit ceased. Her focus had to change from school to the return of her children and she stopped attending school after making arrangements to continue at a later date. Leaving school meant that the funding she was receiving stopped. She was able to have A returned to her at the 5-day hearing but the two oldest children remained in care. She had no income to support herself and Income Assistance turned her down. She received some money from her

grandmother who received a settlement as a result of being a survivor of the Residential Schools. The mother's world fell apart.

[46] Many of the workers with the MCS quickly labeled her as difficult and everything was seen through that lens. It was very concerning to the court that much of the evidence in the affidavits was negative. When an access visit between the mother and the children was being described, only the negative aspects of the visit were placed in the affidavits. If the visit was completely positive, it was not mentioned in the affidavit. Some witnesses seemed unable or unwilling to answer questions without adding something negative about the mother. When asked why only negative facts were placed in the affidavit one witness answered that "it is just an overview" which fails to recognize the problem. One witness indicated that there was both positive and negative in her affidavit but when asked found it very hard to find positive statements and even suggested negative statements were positive. This witness did have positive statements in her access facilitator's notes but they were not placed in the affidavit.

[47] The court expects workers for the MCS who testify to describe events from their employment in a matter of fact and unbiased fashion. Witnesses for the MCS should not be personally invested in the outcome of a proceeding. The proceeding is about the best interests of children, not who wins or loses. Unlike witnesses in private family matters, who are usually supporting one side or another, the court expects workers with the MCS to be impartial. The court expects balance. The court expects that the witnesses from the MCS provide evidence of both the good and the bad that they have witnessed. The court expects that they will just relay the facts without attempting to colour the evidence in a negative light. Sadly in this case, with few exceptions, the witnesses who work for the MCS were not impartial or unbiased. They appeared to be so invested in the outcome of the case that it has affected the weight the court can give their evidence. They appeared unable to say something positive about the mother even when there were positive things to say. The evidence of many of the access facilitators can be given little weight. This is unfortunate because the access facilitators spent the most time with the mother and the children of all of the witnesses.

[48] I can only imagine how disheartening it must be for the mother to only receive negative feedback. The court sees many positives in the mother.

[49] The court also had concerns about the inconsistent messages that the mother was given by the access facilitators. In one case the access facilitator expected the mother to meet the children in the parking lot while another wanted the mother to meet the children in the office. One access facilitator told the mother that balloons were not allowed in the access area, but after the mother found balloons left over from another family's visit another access facilitator told her that balloons were allowed. One access facilitator indicated that the role of the access facilitator was to observe and record and not intervene with the visit between the children and parents and another access facilitator indicated the role was to provide support and direction to the parents. One access facilitator indicated it was the parent's responsibility to provide supplies such as diapers for the children during access and another said it was the responsibility of the MCS. One access facilitator would remind the mother when there was fifteen minutes left in an access visit so that the children could be prepared and the room tidied up but another access facilitator indicated that it was the responsibility of the parent to watch the time.

These inconsistent messages and practices add to the frustration and stress of an already stressful situation.

Analysis:

[50] There has already been a hearing in this matter which resulted in the return of A to the mother. The MCS took A into care on March 12, 2012 and applied to vary the order which placed A in the care of her mother subject to the supervision of the MCS to an order placing A in the temporary care and custody of the MCS. In the hearing and the decision, **Minister of Community Services v. F.B. and W.G.,** 2012 NSSC 181, the court considered the evidence presented from 2011 up to and including the incident of March 12, 2012, when A was taken into care by the MCS and the mother was charged with assaulting a social worker for the MCS. The court found that there had been a change in circumstances since the last disposition order based on the incidents that occurred on February 23 and March 12 and concluded, "Each incident was a complete loss of emotional control by Ms. B." (Paragraph 46). The court found that there was greater disadvantage in removing A from her mother's care than remaining in her mother's care. (Paragraph 56). It was found that the least intrusive option that was in A's best

interest was to return her to her mother and the MCS's application for temporary care and custody was dismissed.

[51] In the prior hearing, the court considered the totality of the evidence up to March 12, 2012 and decided that it was not in the best interests of A to place her in the temporary care and custody of the MCS. I cannot go behind the order made as a result of that hearing and I accept the decision made at that time on the totality of the evidence at that time. In **Nova Scotia (Community Services) v. A.S.**, 2007 NSCA 82 at paragraph 17, Cromwell, J. said:

> The second critical part of the context relates to the effect of the findings earlier in the process that the child was in need of protective services. At the final disposition hearing, it is not the judge's function to reconsider these earlier determinations: those previous findings must be accepted at face value. They are assumed to have been properly made at the time they were...

I accept that in the prior decision Jollimore, J. made the correct decision based on the totality of the evidence as of that date. I must determine what is in the best interests of A based on the totality of the evidence at this time.

[52] In **S.R. v. Nova Scotia (Community Services)**, 2012 NSCA 46 the obligation of a judge considering a permanent care and custody application is set out in paragraph 33:

> Cromwell J.A. described the trial judge's obligations at a disposition hearing in *Nova Scotia (Community Services) v. A.S.*, 2007 NSCA 82:
>
> > [11] Under appeal is a permanent care order made at a final disposition hearing. There is no dispute about the judge's role at that disposition hearing: he had to determine whether the child continued to be in need of protective services and, if so, to make an order in the child's best interests: see, for example, **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, [1994] 2 S.C.R. 165; **Children's Aid Society of Halifax v. T.B.**, 2001 NSCA 99, 194 N.S.R. (2d) 149 (C.A.) at para. 26; **Nova Scotia (Minister of Community Services) v. D.W.S.**, [1996] N.S.J. No. 349 (Q.L.), 168 N.S.R. (2d) 27 (F.C.) at paras. 320 - 324; **Nova Scotia (Minister of Community Services) v. F.A.**, [1996] N.S.J. No. 447 (Q.L.) (F.C.) at paras. 21 - 22.
> >
> > . . .
> >
> > [17] The second critical part of the context relates to the effect of the findings earlier in the process that the child was in need of protective services. At the final disposition hearing, it is not the judge's function to reconsider these earlier determinations: those previous findings must be accepted at face value. They are assumed to have been properly made at the time they were: **G.S. v. Nova Scotia (Minister of Community Services)**, 2006 NSCA 20, 241 N.S.R. (2d) 148 (C.A.) at para. 19. At the final disposition hearing, the judge is to consider whether the need for protective services continues at that time. As Chipman, J.A. put it in **Nova Scotia (Minster of Community Services) v. S.E.L. and L.M.L.**, 2005 NSCA 55, 184 N.S.R. (2d) 165 (C.A.) at para. 20: "... Once a finding of the need for protection has originally been made, there is still the requirement ... to consider whether the child is or is no longer in need of future protection. Children's needs and circumstances are continually evolving and these ever changing circumstances must be taken into account."

> [18] In summary, ***two of the key issues at the final disposition hearing are to determine whether the child remains in need of protective services and what order is required in the child's best interests.*** The issue of the ongoing need for protective services is not to be considered in a vacuum, but in light of the previous findings of the court which must be taken as having been right at the time they were made. The nature of the order required in the child's best interests must take into account the time limitations in the statute. [Emphasis added in original]

[53] The onus is on the MCS on a balance of probabilities (**F.H. v. McDougall**, 2008 SCC 53 at paragraph 49).

[54] The MCS alleges that there is a substantial risk that A will suffer emotional harm in the care of her mother. A substantial risk is set out in the **CFSA** as, "a real chance of danger that is apparent on the evidence" (s. 22(1)). The MCS asks me to consider the mother's emotional outbursts and her inability to regulate her emotions when dealing with a doctor, her landlord, the police and the representatives of the MCS. The mother indicates that each time there was an outburst, there was a valid reason. She indicates the doctor was questioning her about using medication for herself rather than her children and she got angry. She indicates that she was very upset in dealing with her landlord when her basement flooded and her belongings were damaged but the yelling and swearing were

directed at the situation and not the representatives of the landlord. With the police she indicates that they would not listen to her and they did not arrest her former partner when he assaulted her but arrested her for assault of him. She indicates that on the occasion when the police arrested her for "uttering threats to her unborn baby", as a result of a call from her former partner, they would not listen to her concerns that she found drugs belonging to her former partner and his mother in her home. She was very upset that these drugs were in her home with her children present. The offence of uttering threats to an unborn baby for which she was arrested does not exist in Canada.

[55] In relation to the Agency, she indicates that she had reason to be upset at access, at unannounced home visits and on March 12, 2012 when A was taken from her. She indicates that she suffers from anxiety attacks and had an anxiety attack while on an early access visit. She indicates that the MCS unfairly described and characterized her behaviour and did not recognize an anxiety attack. In February and March 2012 she was extremely frustrated and angry when the two oldest children were to be returned to her care and then were not.

[56] The mother has participated in services. She participated in access although she did miss some visits. The MCS indicates that she did not make a good effort at counselling with community mental health and with the IWK Hospital as she would not acknowledge problems.

[57] The mother indicated that she was looking for a counsellor that she was comfortable with and did not find one until September 2012. At the point when the counsellor for the mother testified, she had seven sessions with the mother. The counsellor indicated that she was working with the mother on managing her emotions, anger management, understanding why she gets angry and taking responsibility. The mother, the counsellor testified, is learning to redirect her anger. The counsellor testified that the mother was making great progress.

[58] The mother's reactions, to a certain extent, were understandable. Being very upset when you have lost your children, when someone is accusing you of something you did not do and when someone is not listening to your side of a situation are all understandable reactions. Not getting along with the representatives of the MCS is understandable. However, the problem for the court is the seeming inability of the mother to calm herself. In her testimony the

mother blamed others for causing her anger and upset by "pushing her buttons". She did not seem to understand her responsibility to manage her own emotions.

[59] The psychologist who wrote the October 1, 2012 Parental Capacity Assessment (PCA) was very clear in her evidence that there was substantial risk to A in her mother's care because of the mother's emotional instability. The author of the PCA recommended that A be placed in the permanent care and custody of the MCS. Her opinion was that the older children, particularly the oldest girl, showed emotional harm in withdrawn and parentified behaviour. The author was concerned that the mother appeared to use the children for her emotional support rather than the other way around. Both older children showed aggression which concerned the author of the PCA. The PCA author testified to the importance of the first three years of a child's life for their development. There were concerns in the PCA about the mother's behaviour in the presence of the children, both in relation to major outbursts and things such as calling the social workers "mean". The author felt that the mother showed little insight into her problems and there was substantial risk of emotional harm over the long term. She said therapy could be beneficial along with the development of insight but there was not a positive prognosis that risk could be alleviated in the time remaining in the **CFSA**

proceeding. The author testified that it would be a long process to alleviate the harm and the first step was for the mother to accept and have insight into the issues to be addressed.

[60] The mother cross-examined the author of the PCA on two occasions. The mother was able to establish that there are limits on assessments and no approach to such assessments can be demonstrated to be perfectly valid or reliable. The mother was able to establish that the author of the PCA had a lot of negative material provided by the MCS and relatively little information from the mother.

[61] While I accept the mother's assertions that the process for the PCA does not seem fair and balanced, I accept the author's findings.

[62] Even if I did not accept the findings of the PCA regarding the risk of emotional harm to A, there is also the evidence of the psychiatrist, Dr. Kronfli. The court found his evidence to be very balanced and fair even though much of his background information in his report was from the MCS. Dr. Kronfli's report is dated October 26, 2012, although he interviewed the mother in May 2012. Dr. Kronfli could not reconcile the mother's version of events with those of the

Agency or the police. It did not appear to him that the mother was lying. He was concerned that there was a neurological problem and sent the mother for a neuropsychological assessment, which showed normal results. Dr. Kronfli had concerns regarding the mother's inability to perceive how she comes across to others and her inability to see the impact of her behaviour on others or on her children.

[63] While Dr. Kronfli did not provide a clear diagnosis of the mother's mental health, his concerns were regarding her impulsivity and lack of insight. The mother was not amenable to taking medication. He was very clear that the mother loves her children and there was no evidence she would be violent with the children. He contrasted the desire to parent with the ability to parent. He felt the prognosis for the mother to start to change her behavioural responses or to develop impulse control is very dark. Dr. Kronfli also indicated that the first step would be for the mother to have insight into her problems.

[64] Dr. Kronfli testified that children can survive a bad environment with one good model but with unpredictability and inconsistency children cannot develop coping skills. Unpredictability is very traumatic to children over the long run and

they withdraw. He was concerned that the mother had been prescribed medication in the past and had not taken it as she was not convinced that something was wrong. He said that in the care of the mother A was at risk of emotional harm. While Dr. Kronfli recognized that the mother was reacting to unpredictable things, he indicated that unpredictable things will always happen and the mother needs to learn to cope and have a predictable response.

[65] Dr. Kronfli testified that a child will withdraw from unpredictability. He indicated that in some cases children no longer react to loud noises or a person yelling; they functionally withdraw. A child cannot process that a person who is hugging them one minute is screaming the next, and the child cannot reconcile the two situations in the same person. He testified that the time up to 18 months of age is crucial for a child.

[66] Dr. Kronfli recommended permanent care and custody with the MCS in the absence of a family placement. He recommended a trial of medication for the mother and cognitive or behavioural psychotherapy.

[67] The mother submits that the older children were fine in her care and it has been the six foster homes in which the children have been placed and the unpredictability of the events in their lives since they were taken into the care of the MCS that has caused the behavioural problems that they exhibit. The evidence before the court shows that the children, particularly the oldest girl, showed troubling behaviour as early as September 2011, a month after they were taken into care. The court does not accept that all of the emotional problems with the older children were caused after they were taken into care.

[68] While there is little evidence that A has actually suffered emotional harm, on the evidence particularly from the psychologist who prepared the PCA and Dr. Kronfli, I find that there is a substantial risk that A will suffer emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour. It is noted that A did not react to her mother yelling and screaming in February 2012. It is noted that the oldest girl is withdrawn and police reports indicate that the two older children did not react to their mother's yelling and screaming. There is a substantial risk of emotional harm, particularly withdrawal.

[69] The next part of s. 22(2)(g) requires me to find that the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm. The mother has participated in many services including the STOP program for dealing with risk of sexual abuse; the CHIP program and Parenting Journey program offered through the Native Council; programs with the Mi'kmaq Child Development Centre; counselling with Project New Start; the assessment of the oldest girl; the PCA; the neuropsychological assessment and the mental health assessment, etc. She has participated in services or treatments to remedy or alleviate the harm, however, the substantial risk of harm still exists and due to the time limitations in the **CFSA,** I do find that she is unable to consent to services or treatment that will alleviate the harm in the time allowed. The time limitations in the **CFSA** have been exhausted.

In **M. (B.) v. Children's Aid Society of Cape Breton** (1998), 170 N.S.R. (2d) 65 (N.S.C.A.) at paragraph 37, Chipman J. says:

> The strict time limits for proceedings to be taken under the Act are undoubtedly designed to respect the child's sense of time and to avoid protracted litigation becoming a dominant or central event in a child's upbringing.

[70] The next step is to consider the order that is in the best interest of A. The court is left with two options, either dismiss the application or place A in the permanent care and custody of the MCS.

[71] The relevant provisions of s. 3(2) of the **CFSA** must be considered. The mother has had A in her care for most of A's 18 months. By all accounts, A is doing well in her mother's care. The mother provides very well for A's physical well being, physical health, physical environment, healthy food and stimulating activities. The mother includes A in parenting programing with the Mi'kmaq Child Development Centre, her church and frequent family gatherings. A is part of an extended family with grandparents, aunts, cousins, etc. If A remained in her mother's care she would have the opportunity to continue to know her older sister and brother. A would be very disrupted by a change in care from her mother to a foster home, however, when asked about this the experts indicated that it was more harmful to leave A in her mother's care than it was to take her from her mother because of the risk of emotional harm. I accept that A and her mother have a bond.

[72] The mother provides very well for A's physical needs. The concern is A's emotional needs and care. By all accounts, A is meeting all of the appropriate levels of development for her age. The mother and A are participating in appropriate First Nations programs so that A will be familiar with her cultural, racial and linguisitic heritage. The MCS indicates that they will find a culturally appropriate adoptive home for A. The mother takes A to church and they participate in programs at the church. The mother placed in evidence letters of support from people in the community and service providers which provided support for the mother including information about the mother's dedication to A; her parenting strengths; her home environment and A's development.

[73] The merits of the mother's plan include all of the factors above. A is being exposed to her heritage, religion, family and her physical needs are being more than adequately met. The plan from the Agency is to place A in a culturally appropriate adoptive home and that A will be adopted. Little more is known of the MCS's plan. The mother's plan would have A remain in her care with support from her family, programs and church. If the only consideration was A's physical well-being and her cultural education, the mother's plan would be clearly superior. The risk of emotional harm to A is the concern. A delay in the disposition of the

case is not possible as the time limits have been exceeded and Dr. Kronfli has indicated that it is a crucial time for A's emotional health.

[74] The risk of harm in a foster home is the risk of the unknown. The risk in the mother's home is a substantial risk of emotional harm.

[75] Under 42(2) of the **CFSA** there are no less intrusive alternatives, including services to promote the integrity of the family, that would be adequate to protect the child from the substantial risk of emotional harm. The mother has not refused any services and she has participated in the services requested by the MCS.

[76] There are no other plans put forward by relatives, neighbours, members of A's community or extended family for the court to consider.

[77] Because we are at the end of the time limits in the **CFSA,** it is clear that the circumstances cannot change within a reasonably foreseeable time not exceeding the maximum time limits.

Conclusion:

[78] As the Supreme Court of Canada said in **New Brunswick (Minister of Health and Community Services) v. G. (J.)**, [1999] 3 S.C.R. 46 at paragraph 76:

> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and children.

[79] This is a case where the court would like to be able to extend the time limits for six to twelve months for the mother to receive more treatment. The mother's counsellor describes the mother's progress as "great". The court accepts that the mother has developed some insight into her unstable, unpredictable and unregulated emotions and the effect on A and her other children. The court also accepts that the mother has now found a counsellor that she feels comfortable with. She is benefitting from the counselling and is learning to manage her anger and her emotions. The mother was before the court for an eleven-day permanent care hearing while representing herself. She heard an abundance of negative evidence about herself, and she was able to manage her anger and her emotions.

[80] The mother has much to offer a child. She is a very resourceful, intelligent, articulate, motivated and confident young woman. The mother has admirable goals for her future. After her experience with the MCS, the mother would like to become a lawyer to help others in similar circumstances. The court has confidence that the mother will succeed in whatever career she chooses.

[81] The process has not always been fair to the mother. If the mother had sound legal advice at certain points in this proceeding, the result may have been different. The mother accessed services, attended access and tried very hard to keep her children in her care. However, the **CFSA** does not allow the court to act on sympathy or to remedy wrongs or unfairness.

[82] The paramount and only consideration is what is in the best interests of A. The court must base the decision on the evidence before the court at this time and cannot speculate on what the future will hold. The time limits have been exhausted. The court finds that it is in the best interests of A to be placed in the permanent care and custody of the MCS.

[83] I am not satisfied there are any exceptions that would allow access after permanent care in s. 47(2) of the **CFSA** which would apply in this case. Therefore, there is no order for access.

J.