CANADA **SFSNCFSA13685**
PROVINCE OF NOVA SCOTIA
2002

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***Children's Aid Society of Cape Breton-Inverness v. D.S.,***
2002 NSSF 27

BETWEEN:
THE CHILDREN'S AID SOCIETY OF CAPE BRETON-INVERNESS

APPLICANT

- and –

D.S.

RESPONDENT

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on April 30, 2008.

DECISION

HEARD: Before the Honourable **Justice M. Clare MacLellan**, at Sydney, Nova Scotia, on March 14, 2002 & March 18, 2002

DECISION (ORAL): March 28, 2002

PRESENT IN COURT: Robert Crosby, Q.C., Counsel on behalf of the Applicant
Charles Broderick, Counsel on behalf of the Respondent

M.C. MacLellan, J:

[1] The matter before the Court is a Section 40 Protection Hearing in the matter of D.S. and the Children's Aid Society. The matter was adjourned for Decision and for an opportunity to review the taped interview and consider the effect, if any, of

the different disclosure versions. As well, it was essential for the Court to review the child's, I.S.'s, comments to A.B. and the manner of extracting comments made by the child, I.S., to Mrs. Donna Dalrymple of the Children's Aid Society.

[2] Section 22(1) of the *Children and Family Services Act* sets out the standard for a Section 40 Protection Hearing. It reads as follows:

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

[3] The Protection Application alleges sexual abuse and risk of sexual abuse under Section 22(2)(c) and (d):

> Child is in need of protective services(2) A child is in need of protective services where(c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;(d) there is a substantial risk that the child will be sexually abused as described in clause (c);

[4] The finding in this matter is sought only against the father, who will be referred to hereafter as, D.S.

[5] I.S. was born [in 1996]. The allegations were first disclosed by her on April 19, 2001. At that time, I.S. was [approximately four (4) years old]. Evidence was given by A.B., daycare worker - her proper title may be Director. For the purposes of this evidence, she was I.S.'s daycare worker. A.B. gave evidence, as did Doug Thorn of the Children's Aid Society's Intake and Donna Dalrymple, a Protection Worker, whose primary involvement was video-taping I.S.'s discussion concerning the allegations against her father.

[6] C.C. (I.S.'s mother and D.S.'s partner) gave evidence in support of the father. The chronology of events is as follows:

[7] On April 19, 2001, I.S., the child, was colouring a picture of vegetables when she disclosed to her daycare worker, A.B., (in French), the English translation is, “I touched daddy’s penis. I can’t touch D.’s, only daddy’s. You have to touch it softly (or gently - A.B. believes it was softly) not to hurt daddy.” I.S. showed the teacher a motion of two hands cupped together as if there was some object in the middle. The hands are moving upward and downward and the fingers are not touching.

[8] The other child colouring with A.B. and I.S. left the table and I.S. continued to discuss this allegation with A.B.. I.S. went on to say, “Daddy has two balls and D. has two balls and D.’s are small.” I.S. shows a hand gesture to show two small balls. I.S. continued as follows, “I touch daddy. It makes him happy and makes me a good girl.” A.B. described the day as a normal day at daycare and that these comments were made out of the blue. A.B. described I.S. as appearing comfortable at first but later she began to fidget and bite her nails. The comments were made without lead-up or solicitation by anyone.

[9] The next day, although it could be some days later, (according to A.B. it was the next day - according to the father it was some days later before I.S. returned to the daycare), when I.S. returned to colour the picture she was colouring at the time of disclosure, she refused to colour a cucumber which she stated was a penis. She advised A.B. that if she were to colour the cucumber, she would not colour it green, and she selected a reddish-purple crayon.

[10] After the initial disclosure on April 19th, A.B. made notes in English and French on the evening of April 19th. She indicates that as to the best of her recall, which she indicates is not one hundred percent (100%), the disclosures were made late in the p.m. on April 19th at approximately 5:15. Once the class was dismissed

and A.B. went home, which was approximately 5:30 p.m., she made notes of the events and contacted her superior. Where A.B. indicated on cross-examination that her memory is faulty, it is in relation to the hand movement of I.S. and not to other comments made by the child. A.B. went on to advise her supervisor, C.G., the French School Director.

[11] The Court heard from Doug Thorn, Intake Worker, who received a referral from C.G.. The police were notified by Mr. Thorn. D.S., the father, was removed from the house by police. Mr. Thorn gave C.C., the mother, a vague version of the allegations. The interview with I.S. was set up as a joint interview with the Children's Aid Society and the police for the next day.

[12] The next day I.S. was interviewed by Donna Dalrymple, on April 20th. The interview was part of a joint Police/Children's Aid Society investigation. The interview took approximately one hour. The child was fidgety and reluctant to speak of her father from the onset. As the questioning became more intense or more leading, some disclosures consistent with the disclosures made to A.B. were made. The disclosures were less spontaneous and less complete in nature. The father, D.S., signed an agreement not to attend the family house. This was done so that it would not be necessary to remove the child, I.S., from the home. This agreement was subsequently breached by D.S.

[13] D.S. and C.C. provided the Children's Aid Society's workers and police with various explanations as to what may have happened to make I.S. disclose these types of comments to the daycare worker and to Mrs. Dalrymple. The main explanation involved I.S. entering the bathroom by jiggling the lock on the locked bathroom door and seeing her father put Vaseline on the tip of his penis to relieve discomfort arising from sexual activity with his partner. He covered his genital

area with a towel and refused I.S.'s request to put Vaseline on him. She cried and went to her room. She expressed to her father that he could put Vaseline on her vagina when she was uncomfortable, and she should be able to do the same to him. He explained the difference to her and she was upset. Her upset was described by one of the parents as a "temper tantrum". Her father believed she was upset because it would be very rare for him to be short in his manner to her.

[14] On July 12, 2002, D.S. was charged with "invitation to sexual touching" under Section 152 and "sexual exploitation" under Section 153(b). He was placed under an Undertaking to have no contact with the child, I.S., and pleaded not guilty to both counts. On December 6th the Undertaking was varied to allow D.S.'s father to live in the home as supervisor until this matter was resolved. On that basis, D.S. was entitled to return to his home. He was, at that time, and at present, to have no unsupervised contact with his daughter, I.S.

[15] A Section 32 *Children and Family Services* application was filed by the Applicant on December 19, 2001. The Protection Hearing scheduled for one day was set for March 14th and consumed the better part of March 14th and March 18th. The evidence is basically as follows:

[16] The Respondents do not dispute necessity, reliability or spontaneity in relation to the comments made to Mrs. Dalrymple and A.B.. The Respondents maintain there is a reasonable explanation of innocent conduct which explains the child's disclosures.

[17] The disclosure to Mrs. Dalrymple was piecemeal and disjointed. The questioning at times became noticeably more leading. The mode of questioning is viewed by Mr. Broderick, as inappropriate in certain circumstances. There was a progression in questioning on the videotape from non-leading to leading. Mrs.

Dalrymple advised the progression was made knowingly, as there was a window of opportunity for the child to disclose and the opportunity was fading. She advised that she conferred with the police constable, and they agreed it was necessary to change the mode of questioning. Mrs. Dalrymple viewed the change in format as necessary if she was to complete her mandate to assess risk.

[18] Mrs. Dalrymple describes the interview process as three segments - rapport building, investigative, and termination. She indicated that she had interviewed hundreds of children and has taken many courses in the area. She trains protection workers in Nova Scotia on sexual abuse disclosure techniques.

[19] At the onset of her evidence, it was agreed by Counsel for the Respondent that the onus required in Section 96(3) of the *Children and Family Services Act* had been met. The onus is:

> Child's evidence
>
> (3) Upon consent of the parties or upon application by a party, the court may, having regard to the best interests of the child and the reliability of the statements of the child, make such order concerning the receipt of the child's evidence as the court considers appropriate and just, including
>
> b) the admission into evidence of out-of-court statements made by the child. 1990, c. 5, s. 96.

[20] The videotaped transcript, (Exhibit #1), was introduced by Mrs. Dalrymple, who outlined what questions were asked, in what form, and why. The transcript had certain questions missing as the audiotape was changed, however, all parties were able to view the videotape which provided a complete audio record of the interview. It was agreed by all parties that the missing section in the typed transcript was not essential to the determination of issues.

[21] The transcript is not a certified transcript and there is the occasional variation. I have watched the videotape three times so I have not seen, with the exception noted, any significant variation except in verb tense or where something was actually audible on the videotape but is described as "inaudible" in the transcript.

[22] The relevant portions of the transcript appear first on page 15:

> Q. O.K. So when mom goes out and you and dad have a bath, so who washes you?
> A. My mom.
> Q. Oh, but when mom's not there, who washes you?
> A. My dad.
> Q. Oh, o.k. Does he do a good job? Yeah? And who washes dad?
> A. Me.

[23] At page 16, the following is noted:

> Q. Who is taking the bath in the bathtub?
> A. It's a new one.
> Q. Oh, is it a new one?
> A. Yes.
> Q. And who takes a bath in there?
> A. He's mad. How he's mad.
> Q. O.K. So, when you take a bath, who's in the tub with you?
> A. My dad.

[24] At page 24 of Exhibit #1:

> Q. Do you remember that? Remember you were telling A.B. about that...that you have to do something. It would help me if I...if you would tell me about that.
> A. What?
> Q. About you and daddy and daddy's penis.
> A. My daddy don't got penis.
> Q. He doesn't have a penis?
> A. No.
> Q. Oh. What does he have?
> A. He has nothing.

Q. He has nothing.
A. But he's got a penesse.
Q. A penesse. Oh, where's that?
A. Its...it's down there (according to the video she points down to the area between her own legs)

[25] The rest of the next two pages is much the same. I believe there is a misspelling when I.S. describes her father putting powder ("puit" - transcript, "poudre' - french) on himself. I.S. changes the topic on her own. She says:

A. But my dad don't got a vagee. (Which I take to be French for vagina)
Q. No, he doesn't have a vagee.
A. No, he's got a penesse.
Q. A penesse.
A. Yes.

[26] At this point the question begins but I.S. over-speaks Ms. Dalrymple, so the question is not finished. They are speaking at the same time. Mrs. Dalrymple begins, at the bottom of page 25 to say:

Q. And do you have to do... (and before she can finish even that part of the sentence, I.S. says the following)
A. I rub that penesse.
Q. Do you? Oh.
Q. It's not hurting you.
Q. It's not hurting you. Can you show me how you rub it?
A. You do like this. (At this point I.S. makes a one hand motion of rubbing up and down as if there is something contained within her hand.)

[27] I have considered all of these portions, but I don't intend to read all of Exhibit #1 into the record. I do not read the transcript out of context. I read the sections relevant to the determination:

Q. O.K. Let's say if this is...if this is daddy's penesse, show me what you do.
A. I don't know.
Q. You were just...(and as the interviewer said this, I.S. answers again at the same time)
A. I rub it.

Q. Oh, you rub it.
A. Yeah.
Q. O.K. And show me again how you rub it ‘cause you were showing me really good. You were doing this or something.
A. Uh hum. (And the child again loses interest)

[28] On the next page, page 27, the following is noted:

A. (I.S. said) We gotta talk.
Q: You’re helping me ‘cause we’re talking...’cause you’re helping me a whole lot.
A. A lot...a lot, a lot, a lot.
Q: Yeah. A lot, a lot, a lot. So you have to rub it sometimes?
A. Uh hum.
Q: O.K.
A. It makes you feel good.
Q: Does it?
A. Uh hum.
Q: O.K. And do you have to rub it like...I’m trying to understand. Can you show me again how you rub it? O.K., then. And what happens then when you rub it? (And I.S. again shows the one-hand motion)

[29] On page 28, middle of the page:

Q: So tell me what happens to daddy’s penesse when you rub it? Huh? What happens to...
A. Don’t talk about this.

[30] Bottom of page 28, top of page 29:

Q: Yeah. I need you to tell me more about...
A. I’m not talking to you like this penesse.

[31] Farther down on page 29 and top of page 30:

Q: Is it...are you allowed to rub D.’s (brother) penesse?
A. (The child shakes her head.)
Q: No. How come?
A. We don’t do this with D. (brother).
Q: Oh.
A. We do this with my dad.
Q. Oh, o.k. Who does it with dad? Do other people do it with dad?
A. No.

Q. Who does it with dad?
A. Me.

[32] On page 30:

Q: Oh, o.k. So, when you rub daddy's penesse...
A. Don't talk about it.
Q: ...do you do that in the basement?
A. No.
Q: In the yard?
A. No.
Q: In the bedroom?
A. (There is an inaudible answer, but the child nods.)
Q: No? In the bathroom?
A. Uh hum.
Q: Uh hum? In the, um, kitchen? No?
A. No, my mom won't see my daddy's penesse.
Q. What's that?
A. My mom.
Q. Yeah? What about your mom.
A. Her a girl.
Q. She's a girl. So when you rub daddy's penesse, where's your mother?
A. Her go at...at gym. And my mom see my school.
Q. Does she? So when you rub your daddy's penesse, your mommy is at the gym?
A. No.
Q. Is that what you said? No? Where's mommy when that...when that happens?
A. But her was at going at, at, at my school.

[33] On page 33:

Q: Can you tell me any more me...can you tell me any more about rubbing daddy's penesse?
A. No. No. Colour...let's talk about pussycats now.

[34] Mrs. Dalrymple advised at page 22 she left the room to speak to the police officer. At this stage a decision was made to become more direct in the questioning of the child, I.S. Mrs. Dalrymple viewed, as she calls it "go leading", to provide less valuable information to her risk assessment. She advises that if a child answers simply "yes" to a leading question, little is added to the assessment information.

However, if the child adds new information to leading questions, there could be value to that response in the risk assessment. Mrs. Dalrymple puts weight on the exchange at page 25. She is bringing the child around to discussing the penis and she began to ask leading questions. She asked, "Do you have to do..", when the child over-speaks her and said, 'I rub that penesse." The question is not finished.

[35] The videotape, unlike the transcripts, shows that on at least two occasions the child volunteered information to what started out as a leading question but instead used language not in the question of the speaker and added information not in the question. For example, page 26, I.S. volunteers "hurting" into the answer and that "it makes you feel good". Pages 26 & 27 she shows hand movements using one hand in an up and down motion.

[36] On cross-examination it was brought to the Court's attention that a number of times I.S. asked to leave the room as well as the possibility that there is some confusion in the terms between French and English. I.S. speaks French. The statements, or at least certain words, from time to time, were in French. I.S.'s initial disclosure to A.B. was in French. As well, emphasis was put on the fact that I.S's birth date is not Valentine's Day. I.S. stated someone called George lived in her home but her parents advise this is not so.

[37] C.C., I.S.'s mother, advised that she has a Degree in Business and now works at [name of employer changed], but is currently on maternity leave. Her son, D., has A.D.H.D. He has to be reminded repeatedly not to proceed around the house undressed. She advised that her daughter, I.S., has suffered allergic reactions to soap and bubble bath since age two (2), necessitating putting Vaseline on her vaginal area. She indicates that it is C.C.'s practice to have I.S. put the Vaseline on her fingers and have her apply it herself.

[38] C.C. advised that when she returned home on April 18, 2001, the day before the daycare disclosure, her husband had disclosed that I.S. came upon him in the bathroom. He had the door locked but she was able to jiggle the lock and saw him put Vaseline on his penis. I.S. had a temper tantrum when she was not allowed to help him.

[39] C.C. advised that D.B. came to her house the next evening and she told him of the one occasion when she was present and I.S. saw her father's penis when the bedroom door was ajar. C.C. indicated she had not forgotten the conversation she had with her husband the night before, about what happened on April 18, 2001, but did not speak to that matter to anyone in authority until May 5, 2001, during her interview with Cst. Hutchison.

[40] C.C. indicated that she met with Children's Aid staff on May 20, 2001, but did not disclose the possibility of the April 18th Vaseline incident. She advised her previous lawyer knew of the April 18th Vaseline incident and she did not know what to do. She believed that the first agreement with Children's Aid required D.S. not to be in the home for the two-week period it was necessary for her to take a course. C.C. advised her previous lawyer gave her this impression.

[41] C.C. endorsed paragraph 15 of Ms. MacLeod's affidavit which outlines the sexual information shared with her children. This information was given by C.C. on April 24th to C.A.S. personnel, but did not include any mention of the April 18th Vaseline incident. C.C. explained the failure to advise the Children's Aid of the April 18th incident was due to her belief that once she went to Court, things got twisted and her lawyer was working on the issue.

[42] C.C. advised that her husband came home on May 24, 2001, as the C.A.S. investigation was, in their opinion, at a standstill. D.S. returned home without

permission from the Children's Aid Society on July 8th because three months had passed and C.C. was ill due to her pregnancy. As well, C.C. was attempting to work and had the responsibility for the other children. C.C. clearly did not believe anything sexually inappropriate occurred between I.S. and D.S.

[43] D.S. gave evidence. He advised that he has a Business Degree from [name of college changed] in [name of place changed]. He advised that I.S. saw him applying Vaseline to the tip of his penis because he experienced post-relations discomfort. The bathroom door was locked but I.S. knew how to jiggle the lock opened. She looked at him through the door. He was applying Vaseline and stopped as soon as I.S. opened the door and he covered himself. She asked him to allow her to put Vaseline on and he said "no". She cried and went to the bedroom because she's not used to him using a stern voice. She indicated to him that "if he can put it on her, she should be able to put it on him". D.S. told his wife that night. They agreed to discuss the incident with the children on the weekend when neither were working and there would be more time for discussion.

[44] D.S. could not recall when he told the police of the April 18th Vaseline incident, but he did relate other events to the police to explain I.S.'s disclosure. He advised, contrary to A.B.'s recollection, that I.S. did not return to daycare the next day. She returned a number of days after the April 19th disclosure.

[45] On the night of April 20th, D.S. was taken from the home. He eventually returned contrary to his agreement with Children's Aid. He advised he returned to help his wife because she was ill, pregnant, and the investigation was not moving forward.

[46] He explained to the Court that on one occasion I.S. touched his penis when he was in the tub and he pushed her hand away. He indicated on another occasion

he, his wife and I.S. were in the bed and she may have touched his penis when he was asleep, but he is not really sure. He was trying to find answers why she would say what she said to A.B. and Mrs. Dalrymple.

[47] The onus of proof is on a balance of probabilities that there is a real chance of danger of sexual abuse, will or has occurred. The Applicant advises A.B.'s recollection of I.S.'s comments are admissible as exception to hearsay because they were made spontaneously. This is not opposed by the Respondent's Counsel. According to the views expressed by Madam Justice MacLachlin, as she then was, there is an issue of timing between the event and the statement, and this is critical. In *R. v. Khan (1998), 42 C.C.C. 197,* the time period was 1.5 hours and the child was 3.5 years old. The test appears to be whether the chain of occurrence has been broken or whether it continued up to the disclosure.

[48] In this case, spontaneity is not disputed. The events complained of are of an on-going nature. The evidence points to the child's recollection seeing a cucumber in her vegetable picture, which evoked her comments in relation to her father and events the night before. Although reliability and necessity are not the test in Nova Scotia, the test is set out in Section 96 of the *Children and Family Services Act*, as best interests and reliability. The Court has examined these elements in examining A.B.'s recollections. A.B.'s recollections would be procedurally better received if the issues had been canvassed separately, but at the end of the day I find that the elements of reliability and necessity and reliability and best interests exist. These statements were made to A.B. clearly and without any solicitation.

[49] If it is not sufficient on the ongoing nature of the sexual intrusion to satisfy the spontaneous exception then I am satisfied that the reliability and necessity, and/or the reliability and best interests have been made out.

[50] As well, the Court has considered the area, or subcategory, of spontaneous disclosure under the heading "excited utterance". In ***Ratton v. R. (1972), A.C. 378 [P.C.] as*** interpreted by Professor Delisle in his text evidence *Principles and Problems, 1999, at 563*, the Judge has the authority to examine an utterance that comes out without provocation, although the caution is placed on the Judge's examination of the conduct "before" and "during" the utterance.

[51] While the statements made to A.B. were twenty-four hours later, they were made in the circumstances of spontaneity. I find that the likelihood of concoction is remote. Secondly, given I.S.'s age and manner the statements came to be made, I find the elements of reliability and necessity and/or reliability and best interests are proven on a balance of probabilities.

[52] I understand that the Defense had received copies of A.B.'s notes in French and English prior to Court and there was no objection to the manner of her evidence. For the reasons given, I find that the statements made to A.B. can be considered either on the basis of spontaneity or the utterance issue or on the reliability and best interests test. All three exceptions are met and are considered disjunctively.

[53] In relation to Ms. Dalrymple's video interview, the analysis of this interview is more complex. Ms. Dalrymple did not know the child. I.S. was not in a familiar room. She had a continuous need to see her mother and she had a wish not to talk about her father, almost from the onset of an hour long interview.

[54] The Defense has indicated that the onus is made out for the admission of the videotape, but again, they maintain that the version of I.S. walking in on her father will show innocent conduct necessary to rebut the sexual version put forward by I.S. It is important to note that in the assessment of the onus, it is not the parents'

obligation to rebut from the onset, it is only their obligation to rebut once the Agency's case is made out on clear evidence on a balance of probabilities. While Respondents do not have to give evidence, if the Agency's evidence is left unmodified, a finding may be made.

[55] Ms. Dalrymple's questions became (to use her word) more forceful, although her tone did not change. She tried to keep the interview comfortable, I believe was her word, or relaxed, and it was; although I.S. wished to run out of the room fairly often and wished only to colour. Her attention span was short and, with a couple of exceptions, her wish to discuss anything sexual was markedly changed from her wish to discuss sexual events with her teacher the day before.

[56] In relation to the law on leading questions, the text of Professor Delisle, *Evidence, Principles and Problems, 5th Edition, 1999, Carswell,* provides at pgs. 313 and 314:

> The third reason suggested by Justice Beck for prohibiting leading questions in chief highlights a different kind of leading question from that which directly suggests an answer: a question may be so phrased as to assume within it the truth of some fact which remains controverted between the parties and a witness, not attuned to that fact, may inadvertently agree to its existence. The classic example, of course, is "when did you stop beating your wife?" Another example, "what was the deceased doing when the accused shot her?", in a prosecution where the issue is the identity of the assailant, is equally objectionable as "leading, or "misleading,' as the witness may unwittingly testify to a fact concerning which he has no knowledge or which he has no wish to concede.
>
> The common law, then, prohibits leading questions but provides exceptions to the general rule. A list of exceptions would include:
>
> a) for introductory, formal or undisputed matters;
> b) for the purpose of identifying persons or things;
> c) to allow one witness to contradict another regarding statements made by that other;
> (a) where the witness is either hostile to the questioner or unwilling to give evidence;

(b) where it is seen, in the trial judge's discretion, to be necessary to refresh the witness's memory;
(c) where the witness is defective in some respect arising from age, education, language or mental capacity;
(d) where the matter is of a complicated nature and, in the opinion of the trial judge, the witness deserves some assistance to determine what subject the questioner is asking about.

> In exercising his discretion to allow leading questions the trial judge should, however, keep in mind the reasons for the rule canvassed above, and rule not according to a grocery list of exceptions but in accord with the underlying philosophy. The evidence we seek is that of the witness and not that of the questioner. Stating the rule in this open way is preferable, as one could never close the list of exceptions and the matter must be left to the trial judge's discretion. In determining whether a question suggests an answer, much will depend on the character, mood and bias of the witness, and the manner and inflection of the questioner, all matters to be determined in the particular case.

[57] The Court has placed particular emphasis on items (d) and (f), particularly (f) as it relates to age.

[58] While I note the change of manner of Ms. Dalrymple's questions, her questions became more pointed from page 22 onward. I place weight on the exchange at page 25 when Ms. Dalrymple did not finish the question. She and the child were speaking at the same time. Ms. Dalrymple did not say, 'Did you rub....", and as she was speaking I.S. speaks over and says, "I rub that penesse". We have the same comment in mid-section on paragraph 25 with the same speaking over. These are clearly not leading questions. The fact that Ms. Dalrymple had to direct I.S. to the topic is an incident of I.S.'s age.

[59] It is well-known that if one asks a four year old to tell all about her day in school, the child will focus on either the best or worst part of the day. They will talk about the high-point with a friend or the low-point as a time-out in the corner. They will simply not be able to give a chronology of the full day. They do not have

the mental capacity, but a question to a four year old such as, "What did you write when you went to the blackboard?", is an appropriate question.

[60] I am influenced by I.S.'s hand gestures made to A.B. and Ms. Dalrymple as well as her disclosure. I find both are consistent. I draw no negative inference from the fact that Ms. Dalrymple was giving a single-handed illustration and A.B. was giving a double-handed illustration. I saw the videotape on the three occasions and the child clearly made an up and down motion with her hand cupped.

[61] In weighing the evidence in this particular type of case, I found a helpful checklist in the recent decision of *J.A.G. v. R.J.R.*, [1998] O.J. No. 1415 (Ontario Court of Justice, General Division), paragraph 17, Judge Robertson held:

> While there is no formula to determine probability, the process must be more than intuitive. In evaluation the evidence and determining best interest, the court must filter the circumstances, facts, expert opinion and assess the credibility of witnesses before reaching a conclusion. In weighing the evidence, I considered the following:
>
> (a) What were the circumstances of disclosure - to whom and where?
> (b) Did the disclosure or evidence of alleged abuse come from any disinterested witnesses?
> (c) Were the statements made by the child spontaneous?
> (d) Did the questions asked of the child suggest an answer?
> (e) Did the child's statement provide context such as a time frame or positioning of the parties?
> (f) Was there progression in the story about events?
> (g) How did the child behave before or after disclosure?
> (h) Is there physical evidence that would be available by medical examination? If so, and no medical report has been filed, is there a sufficient explanation for its lack?
> (i) Was there opportunity?
> (j) What investigative or court action was taken by the parent alleging abuse?
> ...
> (12) Was there other evidence supporting the allegations of sexual abuse?
> ...
> (16) Did the child use wording in statements which appeared to be

prompted, rehearsed or memorized?
...
(18) Was the information given by the child beyond age-appropriate knowledge?
...
(22) Was a treatment plan put forth by either party?
(23) Was the child coached or prompted?

[62] When I went through the information I find that the statement made to A.B. certainly seems to be open and unprompted. I find as well that I.S's knowledge of the male genitalia is well beyond age-appropriate knowledge.

[63] The parents' tardiness to disclosure of the events of the April 18th Vaseline incident by both parents to the police and to the Children's Aid raises concerns in the evidence assessment. D.S. discusses trying to look for answers but he has no recollection when he told the police of the April 18th incident, which should have been foremost on his mind. It was alleged to have occurred the night before the disclosure.

[64] I have noted, but I cannot weigh in my assessment, I.S.'s free exchange of information to A.B. And her reluctance to talk about her father to Ms. Dalrymple, although she is comfortable colouring with her and talking about Ms. Dalrymple's son and even to the point of telling Mrs. Dalrymple that she (Mrs. Dalrymple) is "a bad colourer". She seems to be very comfortable with the interviewer but she does not want to talk about a subject she wished to speak about the day before. As I have indicated, I cannot analyze I.S.'s reticence with Ms. Dalrymple - there are too many variables and too little evidence to conclude whether or not I.S. was tired of the subject, didn't know Mrs. Dalrymple well enough, or whether or not she had been coached not to discuss her father in any way with anyone else or some other reason.

[65] I have considered I.S.'s description of how to rub a penis, as told by A.B.

and on two occasions on the videotape with the activity that D.S. said I.S. saw for the moment the door was opened on April 18, 2001. He used the microphone in the courtroom to demonstrate spreading his hand over the tip of the microphone as if it was a penis. I find these two activities described by I.S. are not consistent with the one illustrated by D.S. in court.

[66] I.S.'s knowledge of male private areas is not age-appropriate. I accept that she has seen her dad in the tub, may have been in the tub with him, has seen her father naked getting out of the shower, has seen her father and brother's genitalia and is able to distinguish between the size difference of a young boy and a man.

[67] I accept, and find on a balance of probabilities, that I.S. knew how to stimulate her father's penis and that she had done so. I accept she was able to describe the action of stimulating a penis. I accept that I.S. believed for her to perform this act made her a good girl.

[68] I do not accept there is any higher standard for sexual abuse cases in protection cases. Rather, the evidence provided is more difficult to analyze. This fact is discussed in *J.A.G. v. R.J.R.* at page 6, paragraph 10*:*

> On the other end of the scale is a suggestion that the possibility of abuse is enough to tip the balance. In custody disputes, the court is often met with vague allegations based on suspicion or fear. Sexual abuse rarely has a witness and the consequences to a child are severe.
> The standard of proof is not changed. The test remains the balance of probability and it has neither been eroded nor promoted to a balance of possibility. There is a need for counsel and ultimately for the court to closely monitor the evidence and ensure that the rules of procedure and evidence are followed when determining the best interests of a child.

[69] I attach no significance to I.S. for getting her birth date wrong or her view that someone called George lives in her house, nor to her use of French and English in the same sentence. I find that her disclosure to A.B. were very clear and

I find her reluctance with Ms. Dalrymple is mitigated to a large degree by the two occasions she spoke over Ms. Dalrymple to answer a question not put to her. I find on a balance of probabilities that the grounds under Section 22(c) and (d) are made out against D.S.

[70] I have not been asked, but having heard from C.C., the mother, her automatic dismissal of the allegations, her reticence to disclose explanations and to follow court orders I am left to wonder if she is best able to protect I.S. I will give Counsel the opportunity to talk about this Decision and Counsel can advise me regarding remedial measures, if any, are to be proposed.

M.C. MacLellan, J.