SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. F.C. ,* 2019 NSSC 403

Date: 2019-12-18
Docket: 114681
Registry: Sydney, NS

Between:

Minister of Community Services

Applicant

v.

F.C. and R.C.

Respondents

LIBRARY HEADING

Restriction on Publication

Section 94(1) of the *Children and Family Services Act* applies to this decision and provides as follows:

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

Information that would identify the children, parents or foster parents in this proceeding has been anonymized so that this decision can be published.

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	November and December 2019, in Sydney, Nova Scotia
Final Submissions:	December 12, 2019
Written Decision:	December 18, 2019
Summary:	K.C. (age 15) provided two statements to the police alleging sexual abuse by her step father, R.C.; The Court held a *voir dire* to determine the admissibility of the statements without the necessity of calling the Declarant

as a witness;
Although it was in the best interests of K.C. not to testify, the Court, nonetheless, ruled the Minister failed to prove, on a balance of probabilities, that the statements met the threshold reliability test;
The statements do not exhibit sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement;
There are insufficient safeguards to establish the inherent trustworthiness of the statements.

Issue: Is Statement of KC admissible at trial?

Result: Statement ruled not admissible.

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Counsel:	Tara MacSween for the Applicant Robert Crosby, QC for the Respondent, F.C. Jill Perry, QC for the Respondent R.C. Lisa Fraser-Hill for the Litigation Guardian

By the Court:

BACKGROUND

[1] This matter came to the Court's attention on June 12, 2019, at which time the Minister alleged there were reasonable and probable grounds for a finding that the children of the Respondents, K.C. and O.C., were in need of protective services.

[2] An allegation of sexual assault was made by the child, K.C., against her father, R.C.. Given the circumstances, R.C. was removed from the family home and denied access to the children. The children were placed in the supervised care of their mother, F.C., at this time.

[3] The matter returned to Court on July 18, 2019, at which time a continuation order was granted, with a return date on July 23, 2019.

[4] Dates for a contested Protection Hearing were scheduled, but due to disclosure issues and availability of counsel, the matter was ultimately set for Hearing on November 18, 19, 20, 27 and 28, 2019; which later included December 11 and 12, 2019.

[5] The first matter of business was for the Court to conduct a *voir dire* into the admissibility of the statements provided by the child, K.C., to Cst. Curtis MacDonald on April 24, 2019, and Cst. David Browner and Social Worker, Renee Wilson, on April 25, 2019.

[6] The Minister called the following *voir dire* witnesses, namely:

1. Cst. Curtis MacDonald;
2. Cst. Keith Power;
3. Cst. David Browner (interviewer);
4. Renee Wilson (interviewer); and
5. Mary Annette Marzek.

[7] The following exhibits were filed, namely:

a) VD-1: General Occurrence Report dated April 24, 2019, prepared by Cst. Curtis MacDonald, filed by the Applicant;

b) VD-2: Notes of Cst. Keith Power, who observed K.C. interview, filed by the Applicant;

c) VD-3: DVD of Interview of K.C., commencing 10:23:57 a.m. and completed 2:11:08 p.m., filed by the Applicant;

d) VD-4: Transcript of K.C. Interview, filed by the Applicant;

e) VD-5: Handwritten Letter prepared by K.C. during interview, filed by the Applicant;

f) VD-6: Minister's Book of Pleadings/Renee Wilson's Affidavit at Tab #2, filed by the Applicant;

g) VD-7: Affidavit of D.M., filed by the Respondent, R.C.;

h) VD-8: Recognizance of R.C., filed by the Respondent, R.C.;

i) VD-9: R.C. Witness Statement Notes, filed by the Litigation Guardian;

j) VD-10: Statement of R.C., filed by the Litigation Guardian; and

k) VD-11: Statement of F.C., filed by the Respondent, F.C..

[8] Counsel for the Respondent, R.C., called the following *voir dire* witnesses, namely:

6. D.M., mother of Respondent, R.C.; and

7. R.C..

[9] Counsel for the Respondent, F.C., called the following *voir dire* witnesses, namely:

8. F.C.

[10] On December 12, 2019, the Court received submissions on the *voir dire* and the matter was adjourned for decision to December 19, 2019.

[11] I have reviewed and considered all of the evidence along with both written and oral submissions of counsel. This is my decision.

VOIR DIRE ADMISSIBILITY

[12] The basic principle of access to evidence is well recognized. In **R. v. Jarvis**, [2002] 3 S.C.R. 757, it was elevated to a Constitutional level in criminal cases, referring to the principle of fundamental justice that all relevant evidence should be available to the trier of fact in the search for the truth.

[13] The rules of evidence frequently impede access to information. For example, the hearsay rule is an example of a rule of restricted admissibility. It does not prohibit the admissibility of everything that has been said prior to Court. It simply holds that Courts must not treat what has been said out-of-court as though it is the equivalent of in-court testimony. The Court should not use out-of-court statements as a narrative account of what happened. As proof of its contents, on the other hand, if those out-of-court statements are relevant for other purposes they can be admitted and used for those limited purposes.

[14] In the conduct of a hearing, it often becomes necessary to settle collateral legal disputes as to whether particular evidence is admissible. Hearings of this kind are "trials within a trial" conducted to settle collateral legal issues and are called *voir dires*.

[15] The *voir dire* is a separate hearing. Evidence heard during the *voir dire* is not admissible at the trial itself until ruled otherwise by the Court, or by agreement of the parties.

[16] Hearsay evidence is presumptively inadmissible, unless it falls within one of the approved exceptions. The Supreme Court of Canada has ruled that the essential features of hearsay are: (1) the fact an out-of-court statement is addressed to prove the truth of its contents; and, (2) the absence of a contemporaneous opportunity to cross examine the Declarant (**R. v. Khelawon** (2006), 215 C.C.C. (3d) 161, at para. 35 (S.C.C.))

[17] Fish, J. in **R. v. Baldree**, [2013] 2. S.C.R. 520, at para. 32, summarizes hearsay concern as follows:

> [32] First, the Declarant may have misperceived the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have

> been wrongly remembered; third, the Declarant may have narrated the relevant facts in an unintentionally misleading manner; and finally, the Declarant may have knowingly made a false assertion. The opportunity to fully probe these potential sources of error arises only if the Declarant is present in court and subject to cross-examination.

[18] The adversary system places a premium on the calling of witnesses, who give their evidence under oath and are subject to cross-examination. These trial safeguards assist in the weighing and testing of the witness's testimony. Statements made out of Court may not be so tested.

[19] Hearsay evidence may be admissible under an existing hearsay exception or may be admitted on a case by case basis according to the principles of "necessity and reliability". The "necessity" requirement is satisfied where it is reasonably necessary to present the hearsay evidence in order to obtain the Declarant's version of events. "Reliability" refers to "threshold reliability" which is for the trial judge to determine. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, "ultimate reliability" which is the weight or value that the trier of fact gives to the admitted evidence.

[20] *The Law of Evidence*, Paciocco and Stuesser, 2015, 7th Edition, states, at page 128:

> We need to be reminded that hearsay evidence often presupposes that the declarant is unavailable or cannot be effectively cross examined.

[21] And at page 129:

> Before admitting hearsay statements under the principled approach, the trial judge must determine on a "voir dire" that necessity and reliability have been established on a balance of probabilities.

[22] Paciocco and Stuesser identify the difference between criminal and civil cases, however, point out at page 130:

> A general across-the-board relaxing of the hearsay rules in civil cases is too blunt an approach. Admitting hearsay without due scrutiny would impair the fact-finding process. The search for truth remains important in civil cases where much can be at stake. What is recommended is a case-by-case consideration of the

> hearsay evidence in the context of the issues in the case and the potential impact of receiving the evidence in hearing form…
>
> … in terms of assessing the reliability of the hearsay statements, the indicia of reliability do not change whether it is a civil or criminal case.

[23] In **G.A. v. Children's Aid Society of Cape Breton-Victoria**, [2004] N.S.J. No. 134, Hamilton, J.A. noted the important distinction between criminal and child protection proceedings. Hamilton, J.A. held that the application of rigid formulas was not appropriate in the child protection context. At para. 15:

> 15 Bearing in mind the context and purpose of the trial judge's exercise of discretion to admit child hearsay pursuant to s. 96(3)(b) of the Act, I am not persuaded it is appropriate to impose any rigid formula for the receipt of such evidence. These are not criminal proceedings where the protections and concerns described in the governing jurisprudence such as R. v. Khan, (1990), 79 C.R. (3d) 1 (SCC), R. v. Smith, [1992] 2 S.C.R. 915 (SCC), and R. v. Starr, [2000] 2 S.C.R. 144 (SCC) necessarily arise. Here in the context of child protection proceedings, the discretion granted a trial judge to admit such evidence, whether or not the child in fact ever actually testifies in court, is found in s. 96(3)(b) which provides:
>
> > Childs evidence
> >
> > 96 (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.

[24] At the *voir dire* of the proceeding, the Court must assess necessity and threshold reliability. "Reasonable necessity" requires that reasonable efforts be made to obtain the direct evidence of the witness. The requirement of necessity protects the integrity of the trial process. Without a requirement of necessity, the introduction of out-of-court statements could replace the calling of witnesses, which would deprive the opposing party of the opportunity to test the evidence through cross-examination, even where effective cross-examination is entirely possible (Paciocco and Stuesser, page 131).

[25] As a general proposition, where a witness is physically available, and there is no evidence that he or she would suffer trauma in testifying, then the witness should be called. It is not enough that a witness is unwilling to testify. Fear or

disinclination without more, do not constitute necessity (Paciocco and Stuesser, page 132).

[26] R.J. Williams, J., in **Children's Aid Society of Halifax v. P.M.H.**, [2006] N.S.J. No. 165, reviewed necessity in the context of s. 96(3)(b) of the Children and Family Services Act, S.N.S. 1990, c. 5, at para. 12-13:

> [12] Section 96(3)(b) of the *Children and Family Services Act* provides:
>
> s.96(3)(b) Upon consent of the parties or upon application by a party, the court may, having regard to the best interest 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 feels appropriate and just, including ...
>
> (b) the admission into evidence of out of court statements made by the child.
>
> [13] I outlined my view of this provision in N.S. (*Minister of Community Services) v. A.E.J. and G.C.C.C.* (1996), 152 N.S.R. (2d) 219 at paragraphs 6-10:
>
> This provision would appear to codify and slightly relax the common law criteria for the admissibility of children's hearsay as developed in:
>
> *D.R.H. and A.H. v. British Columbia (Superintendent of Family and Child Services*) (1984), 41 R.F.L. (2d) 337 (B.C.C.A.), and *R. v. Khan (A.)*, [1990] 2 S.C.R. 531; 113 N.R. 53; 41 O.A.C. 353; 59 C.C.C. (3d) 92; 79 C.R. (3d) 1.
>
> In R. v. Khan the Supreme Court of Canada considered the circumstances at common law where the children's out-of-court statements could be admissible to prove the truth of their content. Speaking for the court, Justice McLachlin identified a two-prong test for the admissibility of such evidence -- the two prongs being necessity and reliability.
>
> With respect to the question as to whether the reception of hearsay evidence is necessary, or more specifically as she stated, "Reasonably necessary." Justice McLachlin stated (at page 104 [C.C.C.] of *Khan*):
>
> > "The admissibility of the child's evidence might be one basis for a finding of necessity but sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances that would establish the requirement of necessity."
>
> To the extent that s. 96 alters the common law, it is with respect to the first "prong" changing the concept "necessity" to the phrase "consideration of the best interest of the child". It may be that this at once relaxes and broadens the nature of considerations to be had by a court with respect to the "prong" of the test. ...

[27] In considering "reliability" a distinction is made between "threshold" and "ultimate reliability". This distinction reflects the important difference between

admission and reliance. Threshold reliability is for the trial judge who acts as a gate keeper and whose function is limited to determining whether the particular hearsay statement has sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

[28] The trial judge, in determining the threshold reliability and admission statements is to use a functional approach.

[29] A functional approach by its nature is case-specific. The most important point of reference is that trial judges need to be mindful "that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*" (Paciocco/Stuesser, p. 135; **R. v. Khelawon**, supra., at page 93).

[30] In **Khelawon, *supra***., the Court observed that the reliability requirement will generally be met if: (1) the statement is inherently trustworthy; and, (2) the accuracy can be adequately tested by the trial judge and assess its true worth.

[31] At page 136, Paciocco/Stuesser outlined factors that go to inherent trustworthiness, where one should consider whether the statement was made:

- Spontaneously;
- Naturally;
- Reasonably contemporaneously with the events;
- By a person who had no motive to fabricate;
- By a person with sound mental state;
- Against the person's interest in whole or in part;
- By a young person who would not likely have knowledge of the acts alleged; and
- Whether there is corroborating evidence.

[32] In addition, the Court should consider whether there are any safeguards in place surrounding the making of the statement that would go to expose any inaccuracies or fabrication. For example:

- Was the person under a duty to record the statement?;
- Was the statement made to public officials?;

- Was the statement recorded?; and
- Did the person know the statement would be publicized?

[33] Motive is an important factor in determining reliability. Relationship evidence is another factor… evidence of malice in the relationship may taint reliability. Judges need to consider whether the Declarant would have any reason to lie. There is need for sceptical caution. (R. v. **Khelowon, *supra***. At para. 62). In **R. v. Couture** (2007), 220 C.C.C. (3d) 289 (S.C.C.), at para. 100, the Court explained that "what must be shown is a certain cogency about the statement that removes any real concern about its truth and accuracy."

[34] The benefits of the evidence in question should not be lost when there are adequate substitutes for testing the evidence. The optimal way of testing the evidence is to have the Declarant state the evidence in Court, under oath and subject to contemporaneous cross-examination (Paciocco/Stuesser, p. 138). They include:

- Was the person under oath when making the statement?;
- Was the statement audio or video taped?;
- At the time of making the statement, was the person cross-examined?; and
- Is the person now available to be cross-examined in Court on making the out of Court statement?

[35] In terms of testing the evidence, the availability of cross-examination is a critical factor. It was noted in **R. v. Couture**, **supra**, at paragraph 92, that, "In the usual case, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes".

[36] Circumstances that support threshold reliability include the training of the interviewer and the use of "Step Wise" procedure during the interview. This includes evidence of the child's appreciation of the difference between the truth and a lie, and the child being told to promise to tell the truth early in the interview; the use of open-ended questions and the absence of leading questions; the use of simple and age appropriate language; the establishment of a rapport; and, the apparent comfort between the interviewer and interviewee; the child's presentation as cooperative and not evasive; nervous or anxious; consistencies and inconsistencies within and among the statements; motivation to lie and collusion

among child witnesses (See page 379, *Annotated Children and Family Services Act*, 2nd Ed. Peter C. McVey).

INTERVIEW #1 - APRIL 24, 2019 - CST. CURTIS MACDONALD

[37] Cst. MacDonald is assigned to patrol with the Cape Breton Regional Police Service. His training regarding interviews was limited to his police academy training in 2008. He had no training regarding the interviewing of children.

[38] When K.C. arrived at the police station, she was crying and upset. Cst. MacDonald took K.C. to an interview room and tried to calm her down. Cst. MacDonald testified he used "open ended" questions when taking K.C.'s statement, but the interview was not recorded. Cst. MacDonald testified that he "figured" the file would be referred to GIS and it was "very common not to record".

[39] Cst. MacDonald made handwritten notes as referenced in Exhibit# VD-1. Cst. MacDonald did not discuss the difference between the truth and a lie with K.C. He testified, "That is not a typical practice done by a patrolman."

[40] Cst. MacDonald reported the matter to his sergeant and called Child Welfare. He thereafter attended the Respondents' residence with Renee Wilson.

INTERVIEW #2 - APRIL 25, 2019 - VIDEO INTERVIEW

[41] Cst. David Browner, an eight year veteran of the Cape Breton Regional Police Service, was the lead interviewer regarding the allegation of K.C. against her father, R.C..

[42] Cst. Browner testified on the *voir dire* that he has been assigned to the General Investigation unit since May 2018 and has conducted child interviews on a regular basis since that time. He had "Step Wise" training in October 2018.

[43] A joint protocol interview was conducted with the assistance of Child Welfare Worker, Renee Wilson. Cst. Browner testified, "We only talk about the truth and that the interviewers attempt to build rapport with the Declarant with whom they discuss the difference between the truth and a lie." Cst. Browner testified open-ended questions only are used, not leading questions.

[44] In terms of rapport building, Cst. Browner testified, "I asked general questions to get her (K.C.) to interact with me and be more comfortable with me."

[45] Cst. Browner testified K.C. "seemed fine" throughout the 3-4-hour interview, which he confirmed was a "more lengthy interview than normal." Cst. Browner felt it was a "good interview", although K.C. "shut down" and resorted to writing her statement in letter form.

[46] Cst. Browner testified K.C. was not comfortable in having him read the letter back to her aloud, which the Cst. accepted. Ideally, the practice is to read the statement back to the Declarant to confirm its contents.

[47] In cross-examination, Cst. Browner acknowledged he did not spend much time discussing the difference between the truth and a lie because K.C. was 15 years old and he did not want to embarrass her.

[48] Cst. Browner testified he never directed K.C. to only tell the truth. He testified that is not a pre-requisite and is done on a case by case basis. He acknowledged he did not tell K.C. it was important for her to tell the truth.

[49] Cst. Browner concluded K.C. would not vocalize what had allegedly happened to her and he hence resorted to the letter approach. This was signed and dated by K.C., but not under oath. (See Exhibit # VD-5).

[50] Renee Wilson has been a protection worker since 2011. She responded to the police station on April 24, 2019, and prepared a "safety plan" for K.C. K.C. was "upset and tearful". Ms. Wilson participated in the joint protocol interview on April 25, 2019. She completed "Step Wise" training in 2013.

[51] Ms. Wilson testified the "Step Wise" training taught her how to illicit a child's recall in a non-leading way. They establish a natural/comfortable setting for the interview. It is audio/video recorded. They discuss the difference between the truth and a lie. They only discuss truth. Ms. Wilson guesstimates she has conducted this type of interview on an average of 12 per year since 2011.

[52] Ms. Wilson testified a lot of rapport building was required with K.C. "She would shut down." Ms. Wilson acknowledged the interview was lengthy but, "there are no set times for interviews."

COURT OBSERVATION OF INTERVIEW

- K.C. sat on the sofa with arms crossed and legs crossed;
- Discussed truth/lie - page 3: "A. One's true and one's not."

- Discussed school/favourite courses;
- K.C. seems relaxed and engaging;
- Discussed family - brother and sister;
- Discussed watching TV shows;
- Discussed K.C.'s friend, Allison;
- K.C.'s mother does not like Allison;
- K.C. gets emotional when asked what she told police the day before.

[53] At page 35/line 7:

> Q. … What did you say to the police officers yesterday when you spoke to them?
>
> A. Just told them everything that happened, that's all.
>
> Q. … So what did, what did you tell those officers yesterday?
>
> A. What my dad did.
>
> Q. … So what did your dad do?
>
> A. I don't know why it matters…

[54] At page 36/line 13:

> Q. … You said you told him (Cst. MacDonald) everything your dad did. So what is that? Let's go through it.
>
> A. No.

- Some leading questions were asked about K.C.'s position in the room and her dad's position in the room;
- Interviewer leaves room for a break;
- K.C. not providing any details;
- K.C. appears emotional/weeping;
- K.C. refuses to talk about it.

[55] At page 41/line 19:

> Q. So what happened after that? What happened next?
>
> (Page 42/line 01)
>
> A. He started rubbing my back and my shoulders and then I stepped away from him.
>
> Q. … And then what happened?
>
> A. I just went back to trying to cleaning my room.

[56] Page 44/line 01:

> Q. … We appreciate you comin in here and talkin to us today, cause like I said everything you have to say is important, right. So…
>
> A. I didn't have a choice did I?

- K.C. is sitting; looking away and not engaging with the interviewers;
- K.C. says her dad hates her; that he is mad at her all the time.

[57] At page 50/line 08:

> Q. … Let's go back and talk kind of about… you said you were cleaning your room?
>
> A. Can we not talk about it.

[58] At page 51/line 03:

> Q. … But part of my job is interviewing youth and kids and talking about stuff that's going on in their life, and I have to get that information directly from you. There's no one else I can get it from, right.

[59] At page 51/line 11:

> Q. … It's really important for us to know what, what you're thinking and what you have to say and what you talk to your friend about, cause we can't just assume things right. ... But first we have to get your information.

A. You're kinda pissing me off so just leave me alone.

- The interview then moved into more rapport building;
- K.C. does not want to talk about the allegation;
- Discussion about dogs/cats/car license;
- K.C. is more engaging/appears relaxed;
- K.C. is very well spoken;
- There is lots of loud laughter;
- K.C. declines drink or bathroom break;
- K.C. talks about having a migraine.

[60] At page 79/line 10 & line 12:

A. I feel like I have a migraine.

…

A. I'm going to throw up, that's what I feel like …

[61] At page 83/line 15:

Q. … We've been talking to you for a little while now, you seem pretty cranky?

A. Yeah, I am.

Q.… Well, you didn't snap at me yet, so.

A. Hmm. Really try not to.

- Continues to discuss movies; cheerleading; favourite food;
- K.C. laughing;
- K.C. appears relaxed;
- K.C. is quite conversational;
- K.C. discusses anxiety; Superbowl/ Commercials.

[62] At page 104/line 5:

A. I'm tired, I want to go to bed.

…

Q. Kick your feet up on the couch there then ,and talk to us. You just want to stay home from school and have another nap.

…

(Line 11)

Q. Maybe we'll continue on. …

- Back to discussing teachers, math, yoga, trails, 4-wheelers, and traffic tickets;
- Discusses friend, Allison;
- K.C.'s mother thinks Allison is a bad influence;
- K.C. says she gets along "fine" with her mother;
- K.C. discusses dad's work;
- K.C. states her mother is a nurse.

[63] At page 118/line 17:

A. … I have a migraine I keep seeing things that aren't actually there.

…

A. … Cute little stars and yellow spots.

- The interviewers adjust the lights in the room;
- Discuss the room colour; pictures on the walls;
- Discuss K.C.'s sister, O.C.;
- Discusses K.C. being grounded for a week because she got mad at her mother/ no phone/ no hanging with friends.

[64] At page 125/line 14:

Q. That's a long time to go without a phone if you're 15?

A. Yeah. I'll survive. I don't care.

- Discusses friend, Zoe/Zoe not to be trusted;
- K.C. is not allowed to hang out with Allison;
- K.C. laughing
- Discusses elevator/stairs in police station;
- Discusses pineapples; porcelain dolls;
- Discusses weekend plans/ still grounded;
- Discusses school courses/French;
- Discusses grandparents/great grandparents;
- Discusses D.M., K.C.'s dad's mother;
- K.C. not really close with family members - no sign of concern for O.C.;
- K.C. says she has no plans to speak with her father.

[65] At page 147/line 5:

A. I don't want to talk to him ever again, but I mean that's probably very unrealistic. So…

…

(Line 9)

Q. … Like is there a role for me there… to help?

A. If you, if you want you can do whatever you like. I… it doesn't matter to me.

Q. … What can I do for your dad?...

A. Keep him ten feet away from me at all times.

Q. … Is there something I can do… is there something else that he needs help with?

A. He needs a whole lot of something.

- Discusses general issue about K.C.'s dad;

[66] At page 152/line 6:

- K.C. says her dad makes her feel "rude and ungrateful";
- K.C. is looking very fidgety, not composed;
- K.C. says she was anxious coming to the police station;
- K.C. says Cst. Browner "kind of freaks her out.";

[67] At page 158/line 17:

- K.C. says she was considering going to the police station for a while;
- Interviewers maintain attempts to get K.C. to talk about incident.

[68] At page 161/line 12:

> Q. Did anything different happen in the last couple of days that would make you change like that?
>
> A. No.

- K.C. still not cooperating with the interviewers;
- Discusses bipolar/depression;
- Interviewers still attempting to get a disclosure from K.C..

[69] At page 166/line 2:

> Q. … And I'm being very sincere when I say that and it is not a joke, there's nothing you could say that would make me think any less of you or make… should make you feel embarrassed or that, that would surprise me. Absolutely nothing. Absolutely nothing. And the same with Renee.
>
> …
>
> (Line 16)
>
> Q. … Like I said, everything you're saying is important to me.

[70] At page 167/line 6:

A. Stop right there. The more you talk, the more I think about it, the more upset I get, and the more upset I get I want to break things. So just don't.

…

(Line 11)

A. Because I can't. I can't handle… I'll have a breakdown right now, like I can't.

Q. And I respect that.

…

(Line 14)

Q. Is there anything you want to chat about with us that won't make you so upset or do you want to have a chat with us today or…

A. Not really.

- Interviewers shift topic and talk about her dad's mystery sisters;
- K.C. appears to have some issue with Cst. Browner;

[71] At page 169/line 11:

Q. And listen, I don't want to make you uncomfortable and if you ever want me to leave, I can step out.

…

(Line 15)

A. … I don't know you and you kinda scare me.

Q. Really?

A. You're kind of scary.

Q. Am I really?

[72] At page 170/line 01:

A. You actually are. You seem like a very nice person and that stuff's great, but you do scare me.

[73] At page 171/line 18:

Q. I can't believe I'm the creepy one.

A. You scare me a lot.

[74] At page 176/line 14:

A. No, you're just terrifying. You're not scary, you're terrifying.

Q. Terrifying?

A. … I might have nightmares now.

…

A. It's scary. I'm serious.

- The interviewers continue on;
- Decision made to provide K.C. with pen and paper so she can write it down.

[75] At page 178/line 01:

Q. … If I gave you a piece of paper and you write some of things out and then we talk about it or, is that possible.

A. The writing part would be easy, the speaking afterwards would not.

[76] At page 179/line 12:

A. I don't want to talk to you anything. Like I don't really have a choice so that's that.

- Cst. Browner discusses choices;
- K.C. declines pop/juice.

[77] At page 182/line 01 :

Q. Well if you want anything you let me know. Can you take this and if there's anything that you want to get off your chest and you can't actually voice and talk about today, I'll give you some time to put it, put it on paper and then I'll come back in and… so you don't have to talk, you don't have to actually voice it or anything like that. I'll read it and we'll go from there. …

- K.C. begins writing/hugs a pillow/has feet up on couch;
- K.C. appears to be at ease while writing;
- Interviewers return and discuss K.C.'s cover sheet;
- The Interviewers wish to review what K.C. has written.

[78] At page 190/line 01

Q. … If you want to talk about it, we can talk about it, if not…

A. No talking.

Q. No? Alright.

A. You can take your paper and go read it somewhere else.

Q. Okay. Well I'll just read it in quiet then…

A. Or you can take it, go read it somewhere else.

Q. Well, I don't really want to take it out of the room, cause…

A. Then can I go out of the room?

Q. Okay, what I'll do then is I'll, I'll, I'll just take the papers and I'll hold them up to the camera to say that there's nothing else on the papers, because I don't want anybody to think that I wrote something on the paper there for you, or anything like that. I just want it to say that it's it's your righting and not mine. That's why I didn't want to leave the room. I wanted it to be on camera. So I'll just… I'm just gonna hold it up to the camera and say that it's your writing and then I'll leave the room and read it. Okay?

A. Fine.

Q. Perfect.

A. If you lie to me though, I will hurt you.

- The Interviewer leaves the room to read the letter;
- K.C. appears to be emotional/out of sorts;
- K.C. will not allow the letter to be read back to her;
- Interviewers attempt to discuss other incident referred to in letter;
- K.C. refuses/cries/appears to be upset.

DECISION

[79] In addressing the issue of necessity, I find that s. 96(3) has essentially codified the common law. As stated by R.J. Williams, J.:

> [13] … It is with respect to the first "prong" changing the concept "necessity" to the phrase "consideration of the best interest of the child". It may be that this at once relaxes and broadens the nature of considerations to be had by a court with respect to the "prong" of the test. ...

[80] I find that the Minister has established, on a balance of probabilities, that it would be in the best interests of K.C. not to testify. I am satisfied the rule has been relaxed and broadened with respect to necessity being replaced with best interests considerations pursuant to s. 96(3). As stated by Ms. MacSween in her submissions to the Court, "… Essentially one way to think about it is that if it is not in the child's best interests to testify, necessity is met."

[81] The Court notes that the Minister has not called any expert evidence to support the argument that K.C. would be "possibly traumatized" if required to testify.

[82] That said, the Court heard evidence that K.C. was acting out in the home, exhibiting behavioural issues, had been cutting herself and was previously suicidal. The Court accepts this evidence as being relevant to "trauma", which assists the Court in finding it is not in K.C.'s best interest to testify against her father. The relaxing and broadening of the rule of necessity allows the Court to make such a determination.

[83] That does not end the analysis, however. The Minister must still establish "threshold reliability" on a balance of probabilities. Upon review of the video taped statement (Exhibit# VD-3), I do not agree with Cst. Browner that this was a

"good interview". K.C. was continuously pressed by the interviewers to make a disclosure. It is apparent to the Court that K.C. was not comfortable in the interview setting; she expressed being ill; having a migraine; and, being tired. The interview yet continued on and lasted almost four hours. It appeared K.C. believed that she had no choice other than to remain in the room against her wishes. I reject the Minister's submissions to the contrary.

[84] The length of the interview is of concern to the Court, given the signals that K.C. gave that she did not want to talk. The continued attempts at "rapport building" drifted into nonsensical banter. It may have kept the conversation going, but it did not build a good rapport with K.C. and the interviewers. This result negatively impacts the threshold reliability of the statement.

[85] K.C. had expressed she was afraid of Cst. Browner. Cst. Browner seemed to take exception to that and attempted to persuade K.C. otherwise. I do not accept that K.C. was "joking"/"teasing" as submitted by the Minister. K.C. said she was serious yet the interview continued. With the greatest of respect, the interview should have been stopped at that point, if not earlier, when K.C. complained of not feeling well, and apparently fearing Cst. Browner.

[86] I find it was inappropriate for the interview to press on in spite of the obvious fact K.C. did not want to talk or cooperate. Her complaints were essentially ignored and were not acted upon by the interviewers in a proactive way.

[87] I find it is very possible that K.C. ultimately provided the letter to simply end this lengthy interview so she could go home. It was obvious to the Court, K.C. did not want to remain in that interview room and felt she had no ability to leave on her own terms.

[88] I further find the acceptance of K.C.'s letter with no attempt to confirm its contents as true or have it sworn under oath negatively impacts reliability. These failures undermine trustworthiness. The statement was not tested and simply went unchallenged by the interviewers, which, in the Court's view, affects the circumstantial guarantee of trustworthiness.

[89] Cst. Browner should not have removed the letter from the interview room, I doubt that its removal impacted the reliability of same but it is clearly bad practice, which Cst. Brown acknowledged on the video.

[90] Based upon the evidence, one could attribute a motive to lie to K.C., given the breakdown in the family relationships according to R.C., F.C. and D.M. This evidence negatively impacts reliability.

[91] I find that motive to lie or fabricate by K.C. is a legitimate consideration for the Court to assess. It can be concluded from the evidence that K.C. may have had reason to fabricate the allegations against her father. The evidence of D.M. supports the Court's concern in this regard, wherein she testified two years ago, K.C. made the following comment to someone at a gathering in R.C.'s household, noting that R.C. was not present at the time, "I would just call the police and say you did something to me." D.M. could not recall any other specifics but did recall the comment and resulted in her "lashing out at K.C.".

[92] R.C. and F.C. testified they are unable to explain K.C.'s allegations about her father, suffice to say the relationship is stressed at this time.

[93] K.C. is not a child of tender years and could easily have knowledge of the acts alleged. As stated in **Khelowon**, ***supra***, there is a need for sceptical caution. The Court requires that safeguards are in place to remove any real concern about the statement, truth, and accuracy. I find these safeguards have been compromised. As stated in **Couture**, ***supra***, "…the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes."

[94] The Court has considered the "Step Wise" training which both Cst. Browner and Renee Wilson completed. In the Court's view, the interviewers failed to adequately address the issue of K.C.'s appreciation of the difference between the truth and a lie. Surely, with a response from K.C., "A. One's true and one's not", that does not satisfactorily end the inquiry. But that is the extent of the questioning on this topic according to the evidence.

[95] The evidence discloses that K.C. was not told to promise to tell the truth during any point of the interview. The discussion regarding the difference between the truth and a lie was minimal. Ms. Perry submitted to the court as follows:

> No one is suggesting that the police officer and Renee Wilson should have been drilling her about whether she was telling the truth. That was not the purpose of their interview. The purpose of their interview was to make her comfortable in disclosing some difficult allegations. But what that means for testability is that it wasn't very testable at all. Not only did they… it's fine that they didn't dwell on her capacity to tell the difference between truth and fiction. Clearly, she had that.

> But at no point did anyone even ask her to confirm she was telling the truth. At no point did anyone say, "It is really important that you only tell us the truth in here, okay?" At no point after the statements were made did someone say, "and that was the truth." There was zero confirmation of truth telling.

[96] The omission not to talk about the importance of telling the truth is contrary to the "Step Wise" training both Cst. Browner and Renee Wilson received. In their respective testimony, they both commented upon the importance of telling the truth, but it was not followed through in their interview. The "Step Wise" program includes assessing the child's appreciation of the difference between the truth and a lie. This was not adequately done in the Court's view, but counsel for R.C. appears to take no issue.

[97] R.C.'s counsel did take issue with the "zero confirmation of the truth" and lack of same is at odds with what the interviewers were trained to do in the "Step Wise" program. This adversely affects the threshold reliability of K.C.'s statement.

[98] Morse, Fam. Ct. J, stated in **Nova Scotia (Minister of Community Services) v. D.B.**, [2016] N.S.J. No. 59, at para. 230:

> [230] In my oral decision on threshold reliability I excluded portions of the video and associated transcript based upon use of leading questions which negated the reliability of the child's responses. In doing so I acknowledged the challenges associated with interviewing children, especially younger children such as GB. While acknowledging that it may be appropriate to use some leading questions during such an interview, I also emphasized the importance of limiting the use of leading or closed questions as much as possible.

[99] I agree with the above comment. In the present case, some leading questions were asked. I disagree with the Minister's submission that the interviewer "might be close to a leading question." That said, nothing came of it as K.C. refused to talk. But still at odds with their "Step Wise" training.

[100] In addition, the interviewers did not develop a proper rapport with K.C. She was clearly not cooperative and sometimes evasive.

[101] The "Step Wise" program would suggest the lack of establishing a rapport with the child and the child being uncooperative and evasive would impact negatively on threshold reliability.

[102] Similarly, Cst. Curtis MacDonald took no steps to satisfy the Court that the standard required to establish threshold reliability had been met when he interviewed K.C. on April 24, 2019.

[103] Cst. MacDonald has a lack of experience when dealing with child sexual assault. He was not compliant with the "Step Wise" procedure, and there is no recording of the interview. Consequently, threshold reliability has been compromised.

[104] In consideration of the above, I find that the Minister has failed to prove on a balance of probabilities that the statements meet the threshold reliability test. Threshold reliability is established when the hearsay is sufficiently reliable to the overcome the dangers arising from the difficulty of testing it. This has not been achieved in this instance. Hearsay dangers still persist. I am mindful of the distinction with ultimate reliability which the Court need not consider at this time. The issue before the Court at this time is one of admissibility only. The statements are, therefore, ruled to be inadmissible.

[105] K.C. is a young, bright, articulate and well-spoken young woman. She has made a serious allegation against her father. That allegation, nonetheless, cannot be presented to the trier of fact in statement form. There are insufficient safeguards to establish its inherent trustworthiness. The statements do not exhibit sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. I am exercising my discretion under s. 96(3) not to admit the police statements. I find this decision is appropriate and just in the circumstances.

[106] With the *voir dire* now completed, further dates are required to complete the protection hearing in this matter. I suggest counsel contact Scheduling, so protection hearing dates can be assigned.

[107] Reference is made to the Protection Decision published as **Nova Scotia (Community Services) v. F.C. and R.C.** 2020 NSSC 142

Order accordingly

Haley, J.