IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Children's Aid Society of Cape-Breton-Victoria v. M*.
2007 NSSC 119

Date: April 20, 2007
Docket: 44071
Registry: Sydney, Nova Scotia

Between:

The Children's Aid Society of Cape Breton -Victoria

Applicant

v.

L.M. and T.B.

Respondent

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

Judge: The Honourable Justice Theresa M. Forgeron

Heard: In Sydney, Nova Scotia on November 10, 2006, December 7, 8,12, and 14, 2006, January 23, 2007, and February 2, 2007.

Oral Decision: March 7, 2007

Written Decision: April 20, 2007

Counsel: Robert Crosby, Q.C., Counsel for the Applicant
Ann Marie MacInnes, Counsel for L.M.
Lisa Fraser-Hill, Counsel for the children, K.B. and C.B.

Restriction on Publication: S. 94 (1) of the Children and Family Services Act applies and this judgement or its heading may require editing 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 a relative of the child, 1990 c. 5.

The original text of this decision has been corrected according to the erratum dated September 26, 2023.

BY THE COURT:

I. INTRODUCTION

[1] The matter before me for determination concerns the disposition review involving the respondents' children, K.B. born [in 1990] and C.B. born [in 1993]. At the outset of this hearing, the Children's Aid Society of Cape Breton Victoria (the "Agency") sought to have its involvement terminated, while L.M. requested the continued intervention of the Agency. During summations, the Agency consented to its continued involvement with the child C.B., but sought the termination of its involvement with the child K.B.. The respondent, T.B. did not participate at this disposition review, although he had participated in previous hearings.

II. ISSUES

[2] I must resolve two issues:

(a) Did the Agency fail to disclose relevant information to the respondent, L.M. and to the court?

(b) What is the proper disposition order in respect of the children, C.B. and K.B.?

III. BACKGROUND INFORMATION

[3] The respondents were involved in a rocky common law relationship between 1985 and 1995. They lived in Alberta and then Nova Scotia. At the conclusion of the relationship, L.M. became the custodial parent. T.B. returned to Alberta. He had little involvement with the children except for two summer visits. The first occurred in 1998 in Cape Breton; the second occurred in 2004 when the children travelled to Alberta. T.B. also exercised sporadic telephone access to the children.

[4] In the summer of 2005, K.B. ran from her mother's home and stayed with her paternal uncle in [...]. Upon L.M.'s application, an ex parte order issued pursuant to the provisions of the *Maintenance and Custody Act* which order prevented K.B. from leaving Cape Breton Island until further court hearing. K.B. eventually reunited with her mother. However, the conflict within the M. household continued and this reached a crisis point in December 2005.

[5] The Agency filed a protection application and notice of hearing on January 24, 2006. This was not L.M.'s first involvement with the Agency as she had a child protection history which began in approximately 1995.

[6] The s. 39, s. 40, and the disposition hearings were resolved by consent, and with court approval. The children were placed in the supervised care of T.B. who was given permission to return to Alberta with the children. In addition to the Agency's supervision, arrangements had also been made to have out-of-province courtesy

supervision by the [...] and Area Child and Family Services Authority (the "[...] Agency"). Further, the parties had agreed that should things not work out in Alberta, the Agency would return the children to Cape Breton.

[7] T.B. and the children moved to [...] on February 13, 2006 where they lived with T.B.'s common law partner, B.R.W. and her four children in rental accommodations.

[8] Difficulties arose and L.M. sought to have the children returned to Cape Breton. The Agency sought to have its involvement terminated. A review was therefore scheduled. The contested disposition review spanned seven days: November 10, 2006, December 7, 8, 12, 14, 2006, January 23, 2007, and February 2, 2007. Lack of disclosure by the Agency was identified as an issue on November 10. The court directed full and complete disclosure. The Agency produced much of its file on December 4 - only three days prior to the scheduled hearing. An adjournment was necessitated on December 14 to allow the respondent, L.M. time to review further documentation which the Agency had failed to disclose notwithstanding the court's direction of November 10.

[9] At the conclusion of this disposition review, the parties agreed that the child C.B. should be returned to Nova Scotia. L.M. consented to C.B.'s placement with the Agency to expedite his return. This agreement was given court approval and the Order of February 7, 2007 issued.

IV. EVIDENCE

[10] The following people testified at the disposition review hearing: Ms. Noelle Holloway, Mr. John Janega, Ms. Jane Gillespie, Ms. Marilyn MacNiel and L.M.. Ms. Lisa Fraser-Hill, the children's representative, advised the court of the children's wishes.

Noelle Holloway

[11] Noelle Holloway stated that Marilyn MacNeil was the original protection worker assigned to the file. Ms. Holloway assumed carriage of the file as of July 4, 2006 when Ms. MacNeil took another position within the agency. Ms. Holloway advised that it took her approximately eight weeks to review and become comfortable with the file.

[12] Ms. Holloway reviewed the children's status for the court. She advised that K.B. had actually been living with T.B.'s niece, C.R.B. since approximately April 2006 despite the court order which required K.B. to live in the supervised care of her father, T.B.. Ms. Holloway stated that K.B. wished to continue to reside with C.R.B.. Ms. Holloway indicated that she spoke with K.B. approximately twice per month.

[13] Ms. Holloway stated that C.B. did live in the supervised care of T.B. until September 13, 2006, with sporadic absences at various times during the summer. On September 13, T.B. and C.B. became embroiled in an altercation and the police were called. T.B. left the home and made arrangements for C.B. to live temporarily with his common-law partner's sister, S.W.. Ms. Holloway indicated that she and C.B. communicated approximately once a month.

[14] Ms. Holloway advised that on October 18, 2006, the children were apprehended by the [...] Agency. K.B. was placed in the supervised care of C.R.B., who became an approved foster parent for K.B.. C.B. was placed in an approved foster home. Services were put into place for T.B.. The Order was granted on a six-month temporary care and custody basis.

[15] Ms. Holloway advised that C.B. initially stated that he wanted to live in [...], but by January 2007 was adamant that he wanted to return to Cape Breton to live with his mother. If C.B. was to return, Ms. Holloway stated that the Agency would stay involved to facilitate access between C.B. and K.B.; to offer services to L.M. in the management of adolescent behaviours; and to advise of community services and recreational services available for C.B..

[16] Ms. Holloway confirmed that communication was difficult with the [...] Agency, T.B., and the children. She stated this difficulty resulted from time differences, Ms. Holloway's case load, Ms. Gillespie's case load, vacation times and court appearances.

[17] Ms. Holloway indicated that the [...] Agency wanted the supervision order from Nova Scotia dismissed as the [...] Agency wanted to assume sole responsibility for K.B. and C.B.. Ms. Holloway indicated that the Agency was in agreement and as a result was seeking an order dismissing the Nova Scotia proceedings.

[18] Ms. Holloway reviewed the various concerns that L.M. had articulated about the plan to have T.B. parent the children in Alberta.

[19] Ms. Holloway discussed the role of the Agency. She stated that it was the Agency's responsibility to receive and collect information, to investigate concerns, and to be proactive in the management of the file given the Nova Scotia supervision order.

[20] Ms. Holloway was questioned about a document entitled "Information Consolidation" which the Agency had received from the [...] Agency. This document detailed the [...] Agency's involvement with C.B. and K.B. from February to October 2006 and also referenced B.R.W.'s child welfare history. This document contained the first notice to the court and L.M. of the [...] Agency's concerns.

[21] The Information Consolidation contained the following paragraph:

> The initial referral to [...], through the Interprovincial Coordinator, was for a parental home assessment to be completed, but before that happened the matter appeared in court in Nova Scotia and the children were placed with their father, T.B. and his common law partner B.R.W. despite the concerns about her extensive child welfare history in [...]. The original request was made by phone on January 12, 2006 and then followed up by a letter on January 23, 2006 by the Children's Aid Society of Cape Breton Victoria. Apparently the courts in Nova Scotia were made aware of this and yet the order was granted on an interim basis. The outcome resulted in an out of province courtesy Supervision Order from Cape Breton-Victoria. K.B. and C.B. were subjects of the Supervision Order.

[22] During Ms. Holloway's cross examination, it became apparent that the Agency had been aware of the extensive child protection history involving T.B.'s partner prior to November 2006. Ms. Holloway was not able to identify when the Agency became aware of the protection history, but confirmed that this information had been known prior to Ms. Holloway coming on board on July 4, 2006. Ms. Holloway identified a letter dated February 7, 2006 which summarized some of B.R.W.'s child protection history.

[23] Ms. Holloway could not explain why B.R.W.'s child protection history had not been disclosed to the court nor to L.M.. Ms. Holloway confirmed that she would have disclosed the information. Ms. Holloway stated that B.R.W.'s child protection history was sizable, spanning from 1992 to 2004. Ms. Holloway confirmed that the information received from the [...] Agency indicated that T.B.'s partner had been the subject of many interventions, although none had resulted in an apprehension. Allegations indicated chronic and severe difficulties involving domestic violence; anger management difficulties; sexual abuse between children; an inability to parent four special-needs children; neglect and filth within the home; inappropriate supervision which on one occasion resulted in one child starting a fire which burned down the home killing another child; struggles with stress, depression, agoraphobia, new relationships, pregnancies and the difficult behaviours of the children; financial difficulties; and patterns of several moves each year.

[24] Given these significant concerns, Ms. Holloway stated that she would have requested immediate and intense supervision by the [...] Agency. Unfortunately, the first investigation carried out by the [...] Agency through Ms. Jamie Adams took place on March 27, 2006 - approximately six weeks after the children had moved to Alberta.

[25] Ms. Holloway also reviewed the two reports prepared by Ms. Jamie Adams of the [...] Agency. The first report dated March 27, 2006, was a positive one. Although noting some struggles, the report nonetheless depicted a healthy family which was coping appropriately with life's challenges. T.B., B.R.W. and the children had been interviewed for this report.

[26] The second report was written four days later on March 31, 2006. This report was completed as part of an investigative tool to determine how K.B. had received a black eye. L.M. discovered that K.B. had a black eye from a picture she saw on the internet. L.M. presented this picture to the court and the Agency who in turn requested an investigation by the [...] Agency. The second report, although dated March 31, 2006 was not received by the Cape Breton Agency until May 17, 2006. It was not provided to L.M.'s counsel or to the court until after the current disposition review commenced in November.

[27] The second report provided a different perspective of the B.W.s' household than the one concluded four days earlier. The household was dysfunctional. B.R.W. had lost control, threw an ornament and struck K.B. in the eye. The report confirms the significant stressors

and conflict within the B./W. household. Issues included the small size of the home, the unsafe neighbourhood, financial difficulties, neglect, constant fighting within the home, and drug use by T.B..

[28] Ms. Holloway also confirmed that the Agency was aware that by March 6, K.B. was not attending school in Alberta. She further confirmed that the Agency was aware of C.B.'s sporadic school attendance until the October 2006 foster placement was made.

[29] Ms. Holloway put forth the Agency's position that C.B. and K.B. were old enough to self-protect. She stated that given their ages, C.B. and K.B. would be able to call the police or child protection authorities if they were injured or if they had safety concerns. Ms. Holloway acknowledged that the children did not self-protect in regards to the incident which resulted in K.B.'s black eye, nor in regards to other protection concerns within the B./W. household. In fact, to the contrary, Ms. Holloway confirmed that both K.B. and C.B. lied to Ms. Jamie Adams when she completed her first report and to Ms. Fraser - Hill, the children's representative.

[30] Ms. Holloway indicated that in early July she requested an assessment of C.R.B.'s home as K.B. had moved there. The [...] Agency did not respond until August 25. They advised that C.R.B. had a prior child protection history and that the [...] Agency did not approve of K.B.'s placement with C.R.B.. Ms. Holloway stated the [...] Agency later changed its position as to the suitability of C.R.B.'s residence and, in fact, actively supported C.R.B. with her kinship application.

[31] Ms. Holloway discussed the Agency's Plan which contained the July 19 risk conference minutes. She agreed that the plan did not state K.B.'s new residence, nor the fact that the Supervision Order was not being followed. Further, she confirmed that the Plan was not as accurate as it might have been and agreed that the Plan was a little bit thin on the details of what was happening with the children in [...].

John Janega

[32] John Janega stated that he was employed with the Agency as the Unit Director in the Sydney office and that he was the supervisor of the file.

[33] Mr. Janega reviewed the February 8, 2006 risk conference minutes. He confirmed the position of the Agency - that once the children were placed in the care of their father, they would no longer be children in need of protective services.

[34] Mr. Janega reviewed the letter from Ms. Gail Iler, Interprovincial/Appeals Coordinator dated February 7, 2006 and received by the Agency on February 9, 2006. He also reviewed the Alberta Children's Services Investigation respecting their involvement with T.B.'s common law partner. The February 7 letter states in part:

> Further to our conversation and my message, here is the information on the H. family from 1992 to 2003/4. There seems to be ongoing issues regarding neglect, physical abuse and lack of supervision all the way along. These seemed to have continued despite supportive intervention. It would appear that B.R.W. could not sustain whatever gains she made over time.

[35] Mr. Janega stated that the information contained in these documents had very little impact on the decision made by the Agency as the documents contained historical references only and related, not to T.B., but rather to his common law partner.

[36] Mr. Janega initially stated that he was aware of B.R.W.'s background at the time of the February 8 risk conference. He later retracted that comment and said that he was not sure when he became aware of B.R.W.'s history. Later still, Mr. Janega stated that he didn't remember if the B.R.W.'s child protection history was ever discussed at the risk conference of February 8.

[37] In any event, Mr. Janega determined that the information concerning B.R.W. was simply not germane to the decision which the Agency made. Mr. Janega stated that he did not harbour any fears about T.B.'s ability to parent notwithstanding the fact that T.B. had little past involvement with his children; the fact that C.B. and K.B. had challenging behaviours; and the fact that B.R.W. had a past history with the [...] Agency. Mr. Janega found solace in the fact that the children wanted to live with their father in [...]; in the fact that the children did not want to live with their mother; in the fact that the legislation supported the principle of family; and in the fact that the Agency did not have another placement for the children.

[38] Mr. Janega stated that the February 8 risk conference notes did not mention B.R.W. history because it was not a relevant point to the person who wrote the minutes. Mr. Janega could not offer any

explanation as to why B.R.W. child protection history was not disclosed until after the November 8 hearing commenced.

[39] Mr. Janega was unable to recall, and was unable to offer any explanation for the many lapses in the information being presented to the court prior to November 2006 despite the fact that he was a “hands on” supervisor. Mr. Janega experienced great difficulty remembering details.

Jane Gillespie

[40] Jane Gillespie testified via a telephone conference. She stated that she graduated in June 2004 and had been employed with the [...] Agency as of April 2005. Ms. Gillespie was assigned to this file as of May 2005. Ms. Gillespie stated that the [...] Agency referred to the file as ‘the Nova Scotia dump job.”

[41] Ms. Gillespie testified as to her involvement with K.B. and C.B.. She indicated that she was informed by K.B. and T.B. that K.B. had moved in with C.R.B. by the summer of 2006. She stated that initially plans had been made to transition K.B. back to her father’s care before school commenced in September. On August 22, 2006, T.B. advised Ms. Gillespie that K.B. would not be returning to live with T.B. and that he [T.B.] had “signed K.B. over to C.R.B..”

[42] Ms. Gillespie stated that C.R.B. became an approved placement for K.B. even though C.R.B. had a prior history with the [...] Agency. Ms. Gillespie stated that the child protection concerns were “more of a

concern for small children," and K.B. was not a small child. However, she did note that C.R.B. had four children all under the age of ten. Ms. Gillespie confirmed that the police had advised protection workers not to attend C.R.B.'s residence alone based on a January 2005 investigation at a previous residence.

[43] Ms. Gillespie indicated that K.B. could not return to school because of her violent outbursts and extreme abuse to staff.

[44] Ms. Gillespie stated that she visited with K.B. at C.R.B.'s residence on two occasions. The first visit was on October 16 and that visit lasted approximately one hour. The second visit was two days later on October 18 and that visit was approximately thirty minutes. Ms. Gillespie was uncertain if an assessment/investigation had been completed of C.R.B..

[45] Ms. Gillespie stated that she was advised by C.B.'s assistant school principal that T.B. had made arrangements for C.B. to be cared for by B.R.W.'s sister, S.W.. S.W. had two children and her mother living with her in a small residence. S.W. also had a child protection history. When confronted by Ms. Gillespie that this action amounted to abandonment, T.B. stated that he was planning to enter a residential treatment center for substance abuse, although T.B. denied that he had a substance abuse problem. Ms. Gillespie also acknowledged that the [...] Agency "lost track" of C.B. for a period of time.

[46] Ms. Gillespie agreed that the Nova Scotia supervision order required the children to be in the care of T.B.. She was unable to explain why she did not immediately notify the Agency of the children's residential changes given the order. She stated that the [...] Agency actively supported the C.R.B. placement in defiance of the Nova Scotia supervision order because of K.B.'s wishes.

[47] Ms. Gillespie said that she informed both Ms. MacNeil and Ms. Holloway of the children's circumstances in [...]:

> ... like there was never a time where I felt that things were really great in [...] and I think I made that pretty clear to Nova Scotia. Um, I had conversations on the telephone with Marilyn MacNeil and with Noelle Holloway and we were talking very openly about you know that things weren't great here, that T.B. wasn't in control of K.B. and C.B. at all, um, ...

[48] Ms. Gillespie indicated that the children and T.B. refused to attend counselling, and the children, and K.B. in particular flatly refused to talk to her or the in-home support worker, Ms. Holland. She stated that the children refused to attend school and the B./W. home was problematic. Ms. Gillespie was also unable to state how K.B. spent her days at C.R.B.'s home given that she was not attending school.

[49] Ms. Gillespie advised that in October 2006, the children were placed in the temporary care and custody of the [...] Agency with C.B. being placed in a foster home and K.B. being placed with C.R.B..

[50] Ms. Gillespie stated that she was informed that the courts in Nova Scotia were aware of B.R.W. extensive child welfare history as well as

the concerns harboured by the [...] Agency. She presumed this to be correct based upon a faxed letter which she had received from Ms. Gail Iler. This fax states:

> Please find attached a referral for courtesy supervision from Children's Aid Society Cape Breton Victoria. This request originally came to us from a home assessment on the father's home to see if it was suitable for the children. I referred that onto Pat Mosher for a parental home assessment. Before that happened the matter appeared in court in Nova Scotia and the children were placed with the father and his common law spouse despite our concerns about the common law extensive child welfare history. They knew all of that and still the order was granted on an interim basis.

[51] Ms. Gillespie stated that K.B. absolutely refused to return to T.B.'s home or to Nova Scotia, and threatened to run away if she was forced to do so. Ms. Gillespie stated that C.B. initially refused to return to Nova Scotia and threatened to run away if he was forced to do so. Ms. Gillespie acknowledged that C.B. now wants to return to live with his mother in Nova Scotia.

L.M.

[52] L.M., 38 years of age, reviewed her Affidavit dated February 7, 2006. She discussed the history of her relationship with T.B. and T.B.'s sporadic access with K.B. and C.B.. She spoke about her concerns regarding the children's placement with T.B. in [...]. L.M. stated that if she knew about B.R.W.'s child protection history she would never have consented to the children moving to Alberta with their father.

[53] L.M. reviewed her relationship with the children. She indicated that K.B. was a difficult, defiant child who did not like to follow reasonable house rules. She discussed the issues surrounding the conflict in her home and explained the incident which led to the intervention of the Agency in December 2005. She denied any physical or sexual abuse of the children, and noted that there was no physical evidence to support the allegations of abuse.

[54] L.M. advised of interventions which she had put into place for the children over the years including an anger management program for C.B., and counselling for the children with Child and Adolescent Services. She also stated that she had taken counselling in the past and was currently participating in individual counselling upon the Agency's recommendation. L.M. discussed the educational needs of the children and reviewed how she attempted to address those needs.

[55] L.M. detailed the efforts she made to care for the children while they were in Alberta including phone calls to the children, to their schools, and to the child protection workers in Nova Scotia and Alberta. L.M. became increasingly frustrated following the children's move to [...] because the children were not accepting services and were not attending school. She felt that neither agency was responding appropriately. L.M. stated that she ultimately was the person who located C.B. during the time that he was missing while living in [...].

[56] L.M. detailed the negative events which occurred in the lives of the children since their move to [...]. She reported viewing K.B.'s website

and seeing sexually provocative and inappropriate photographs which K.B. had posted of herself. Other photographs showed K.B. drinking in a bar, despite being under aged. She also viewed C.R.B.'s "racy" website.

[57] L.M. stated that she wants K.B. to be returned to Nova Scotia as she fears for her safety and well being in [...]. She wants C.B. to be returned to her care.

Marilyn MacNeil

[58] Marilyn MacNeil stated that although she had been employed with the Agency for twenty years, she had only assumed the role of a protection worker in December 2005. She advised that the M./B. file was her first child protection file. She said that she met extensively with her supervisor, Mr. Janega as she "was trying to make sure [she] didn't do anything wrong" and that she "wanted to do a very good job."

[59] Ms. MacNeil advised that she was not that familiar with the provisions of the *Children and Family Services Act*. Ms. MacNeil stated that she did not know what the words "paramount consideration" meant until Ms. MacInnes clarified the definition during cross examination.

[60] Ms. MacNeil reviewed the file history for the court. She stated that when T.B. indicated his interest in parenting the children after the protection application had been filed, Ms. MacNeil contacted the [...] Agency to request an in-depth home assessment at Mr. Janega's suggestion.

[61] Ms. MacNeil advised that she was contacted by Ms. Gail Iler on January 23, 2006 in response to the Agency's request for information about T.B. and T.B.'s common law partner, B.R.W.. In a lengthy conversation, Ms. Iler advised that B.R.W. had an extensive and serious child welfare history in [...]. In her diary, Ms. MacNeil noted that Ms. Iler used the following words to describe B.R.W. history: "looks awful," "neglect all over the place," "young baby died in fire," and "what a mess."

[62] Ms. MacNeil confirmed that the letter from Ms. Iler and the document entitled "Investigation of the Alberta Children Services Child Protection Services" concerning B.R.W. arrived at the Agency as one package on February 9, 2006. Ms. MacNeil stated that everything in the written reports had been discussed with Ms. Iler by telephone.

[63] Ms. MacNeil indicated that she discussed the contents of the documents and the contents of her earlier telephone conversation with Mr. Janega. Mr. Janega told Ms. MacNeil that "[i]t wasn't B.R.W. that we were looking at. It was T.B. that needed to protect his children. It was his responsibility to protect his children." Mr. Janega told Ms. MacNeil to file the material that she had received from [...].

[64] Ms. MacNeil stated that she sent an e-mail to Ms. Iler confirming that a supervision order had been granted in favour of T.B.. In her reply, Ms. Iler expressed shock that the children had been placed in the care of their father given B.R.W. child protection history. Further, Ms. MacNeil indicated that she cancelled the request for a home assessment from the [...] Agency upon Mr. Janega's instruction. She

sought biweekly supervision visits from the [...] Agency. Ms. MacNeil did not assume a proactive role in the management of the case.

[65] Ms. MacNeil confirmed that the wishes of the children were a significant factor in the Agency's decision to place the children with their father. Ms. MacNeil stated that the Agency did not really pursue any placement other than that of T.B.. Ms. MacNeil said that the resource issue did not play a factor in the Agency's decision making.

[66] Ms. MacNeil agreed that it was the policy of the Agency to have its employees transcribe all hand written notes onto the computer in a running file fashion. She acknowledged that it was usual practice to disclose the Agency's running file to opposing counsel.

[67] Ms. MacNeil agreed that despite the policy, she did not transcribe the notes of her January 23 conversation with Ms. Iler onto the computer running file. Ms. MacNeil agreed that the information provided by Ms. Iler was "important", "serious" and "explosive". Ms. MacNeil wasn't sure why she didn't transcribe the information. She gave three possibilities for her failure: [I] she was learning the system; [ii] she wasn't sure in which section she should place the information; and [iii] the information was confidential to B.R.W.. Ms. MacNeil confirmed that she spoke to Mr. Jonega about her concerns, but she didn't "remember exactly what he said there..."

[68] Ms. MacNeil confirmed that she did not mention B.R.W. child protection history in the two affidavits which she filed with the court

following her conversation with Ms. Iler. She likewise confirmed that she did not mention B.R.W. child protection history in the February 8, 2006 risk conference minutes despite being “absolutely positively sure” that this history had been discussed.

[69] Initially Ms. MacNeil was unsure who typed the minutes from the risk conference, but later recalled that she did. Ms. MacNeil confirmed that she sought help in the preparation of the minutes from either Mr. Jonega or Ms. Aylward. Ms. MacNeil was unable to recall the advice that she was given.

[70] Ms. MacNeil confirmed that she was aware that T.B. had limited parenting experience with K.B. and C.B.; that T.B. had a history of addictions; and that K.B. and C.B. exhibited many behavioural and educational challenges. Ms. MacNeil also confirmed that she spoke with T.B.’s brother who lived in [...] who opined that the allegations made against L.M. were ridiculous and that he could not see the placement of C.B. and K.B. with T.B. lasting three months.

[71] Ms. MacNeil agreed that she had concerns about T.B.’s ability to parent C.B. and K.B. even before they left for [...]. She noted that T.B. did not know that certain issues were nonnegotiable with children; that T.B. had failed to ensure the children attended school on one occasion while in [...]; and that T.B. failed to take K.B. to a doctor when the circumstances required. Further T.B. was unable to control some of the wilful and defiant behaviour of the children. Ms. MacNeil confirmed that she did not provide any of these facts to the

court in the affidavits which she filed. Ms. MacNeil was unable to provide an explanation for her failure to do so. Ms. MacNeil did acknowledge however that on February 15, she sent an e-mail to Ms. Iler which stated in the last line: “In the time that I did spend with T.B. and his children I do believe that problems with parenting his adolescent children will arise.”

[72] Ms. MacNeil was questioned about the meaning of some of her hand written notes from a February 7 entry which stated in part: “What we have to do, put it down how she is likely going to go along with, that’s how you get out of it quickly.” Ms. MacNeil was unable to recall to what these words referred. They were written around the time of the February 8 risk conference meeting. Included in what appears to be comments from the risk conference meetings are the words “Cut girl loose. Whatever the boy wants we will support.”

[73] Ms. MacNeil denied that the failure to disclose was related to a concerted effort on behalf of the Agency to keep the negative information about the [...] placement from the court and L.M.. Ms. MacNeil recognized that the information would be important to the court and to L.M.. Ms. MacNeil could not explain why the information was not disclosed and indicated that she “never really thought about it.”

[74] Ms. MacNeil stated several times in her evidence that it was her understanding “that everything, you know, was there;” and that she understood that “everything was in the risk;” and “that everyone had

the information." Ms. MacNeil was unable to state why she had come to these conclusions given the absence of disclosure in the computer running file, the affidavits, and the risk minutes.

[75] Ms. MacNeil reviewed her hand written notes which referenced a telephone call which she had received from Ms. Iler on March 8, 2006. This entry states: "Call from Gail Iler, wants additional information, can't believe the judge would send the kids..." Ms. MacNeil confirmed that Ms. Iler requested an explanation as to why the Nova Scotia court would send K.B. and C.B. to Alberta with their father in the face of the extensive child welfare history of B.R.W.. Ms. MacNeil stated in response: " I basically stated that I couldn't explain how the whole thing happened, like ..." and then " I don't know how to explain it to you but, she had questions and things that I couldn't explain or answer, um...." Ms. MacNeil then suggested that Ms. Iler contact her supervisor Mr. Jonega. Ms. MacNeil did not follow up with Mr. Janega.

[76] Ms. MacNeil confirmed that it was clear to the Agency that things had unravelled in [...] by the beginning of June 2006, yet no plans were put into place to return the children to Cape Breton in keeping with the agreement reached in February 2006.

[77] Ms. MacNeil, like Ms. Holloway found communication with the [...] Agency, T.B., K.B. and C.B. to be problematic at times. She confirmed that Ms. Jamie Adams was not cooperative and at one point stated in reference to a report "you'll get it when you get it."

Lisa Fraser-Hill

[78] Lisa Fraser-Hill put forth the position of K.B. and C.B.. She confirmed that C.B. wished to return to Cape Breton to live with his mother. She confirmed that K.B. had not been returning her calls, but had advised in December that she wished to remain with C.R.B. in [...] and was adamantly opposed to returning to Nova Scotia.

V. ANALYSIS

[79] Did the Agency fail to disclose relevant information to the respondent, L.M., and to the court?

[80] Section 38(1) of the *Children and Family Services Act* provides for mandatory disclosure by the Agency subject to a privilege claim:

> **Disclosure or discovery**
> 38 (1) Subject to any claims of privilege, an agency shall make full, adequate and timely disclosure, to a parent or guardian and to any other party, of the allegations, intended evidence and orders sought in a proceeding.

[81] During the course of the hearing, various Agency employees admitted that they made an error in failing to disclose relevant information in the Agency's possession to L.M. and to the court. Given the breath and extent of the "error", it is necessary to review this issue in further detail.

[82] In *Canadian Child Welfare Law,* 2nd ed, 2004, Vogl and Bala discussed the duty upon protection agencies to disclose. After

reviewing ***R. v. Stinchcombe,*** 1991 CanLii 45 (SCC), [1991] 3 S.C.R. 326, the authors state at pp 53 and 54:

> Since *Stinchcombe*, however, the obligation on Crown prosectors is clear. Further there have been growing expectations that child protection agencies will also provide disclosure of all information that they have gained in the course of an investigation and involvement with a family. Since the Supreme Court has also held that child protection proceedings must be conducted "in accordance with the principles of fundamental justice," child protection agencies must provide disclosure of information that they have collected to ensure that parents can prepare adequately for trial. Disclosure of information to parents can impose a burden on agencies, but it is necessary in order that fair trials can fully explore the needs and interests of the children involved.
>
> In a 2002 decision of the Alberta Court of the Queen's Bench, *S.D.K v. Alberta,* Justice Bielby ruled that s. 7 of the *Charter* requires a child protection agency to provide full disclosure of "all relevant information in [its] possession." The only material that can be withheld is information relating to the identity of persons who have made an initial confidential report of abuse, and information which in the opinion of the agency "may potentially harm a child's physical, mental or emotional health to a degree that such harm outweighs the entitlement of his or her parents to disclosure." Any material that the agency decides to withhold is to be specifically listed by the agency and a court may be asked by parents' counsel to rule upon whether or not the agency is justified in withholding it. The courts's decision also required the agency to seek out information and documents that are not in its files, but to which it is entitled (in this case, the notes of a psychologist who conducted tests on the child), and share it with the parents.
>
> While it may be argued that the decision is not strictly binding outside of Alberta, the principles enuciated in the *S.D.K. v. Alberta* decision are increasingly reflected in rules and practice

directions governing child protection matters throughout Canada.

[83] In ***Children's Aid Society of Kingston (City) & Frontenac (County) v. S.(J.M.),*** 2004 CarswellOnt 883 (Ont.Ct.J), Robertson J. reviewed the Society's obligation to provide "prompt, even handed disclosure" to ensure justice prevails at paras 7 and 9:

> ¶ 7 The initial post-apprehension hearing and pleadings did not disclose the society's in-house disagreement of opinion concerning C. There was no internal follow-up within the agency to review the apprehension crisis and new plan. The power to remove a child especially without a warrant is a grave remedy and must be carefully monitored. In *Winnipeg Child and Family Services v. K.L.W.,* supra, at paragraph [122], the Supreme Court described how procedural fairness through full and fair disclosure is meant to counter-balance the power of the society to apprehend children in an emergency situation:
>
> > ... the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing. In order to be fair, the hearing must involve reasonable notice with particulars to the parents, as well as an opportunity for them to participate meaningfully in the proceedings ...
>
> ...
>
> ¶ 9 Full and frank society disclosure is a necessity in child protection matters for justice to prevail. Fair disclosure is not a new concept. [See Note 2 below] This includes evidence helpful to a parent defending a protection application. The court should not read between the lines or fill gaps in the chronology. The agency should clarify whether it initially made a mistake or changed plan on a whim. The mother concluded that the

> society betrayed her. The society's U-turn was unfair to the mother and the child. Although child protection matters wear a shroud of confidentiality, this privacy is to protect the child, not to protect the society from scrutiny. The society owes the mother an explanation.

[84] I have also reviewed ***M.O. v. The Director of Child Welfare for the Province of Prince Edward Island*** 2006 PESCAD 7 (CanLii),764 A.P.R. 147 (C.A)**, *S.D.K. v. Director of Child Welfare (Alta) et al.,*** supra, and ***C.F.S. v. E.I.*** (2005), 2005 YKCA 3 (CanLII), 213 B.C.A.C. 78 (Yuk.CA).

[85] The Agency breached its obligation to the court, to K.B. and C.B., and to L.M. in failing to provide prompt and balanced disclosure which would enable the court to act in the children's best interests and which would provide L.M. with a fair hearing and an evidentiary base upon which to make informed decisions. The failure to provide prompt and balanced disclosure was evident when the Agency:

> [a] omitted to make any entry in the computer generated running file of the [...] Agency's child protection concerns involving B.R.W., which concerns spanned twelve years and involved chronic neglect issues, including the death of a child, and sexual abuse issues. The Agency was aware of this information as of January 23, 2006. Disclosure was not forthcoming until November 2006;

[b] omitted to make any reference to the extensive child protection concerns involving B.R.W. in any Agency affidavit s filed after January 23, 2006 including the February 9 supplemental affidavit purportedly filed by Ms. MacNeil to provide the court with relevant information which she had inadvertently omitted to record in her first affidavit;

[c] omitted to make any reference to the extensive child protection concerns involving B.R.W. in the February 8, 2006 risk conference minutes despite the fact that these concerns were addressed during the conference;

[d] omitted to make any reference to the extensive child protection concerns involving B.R.W. in the Agency's Plans;

[e] omitted to make any reference to the extensive child protection concerns involving B.R.W. during any of the court appearances prior to November 2006;

[f] omitted to make any reference to the child protection concerns involving T.B. and the children which were observed by Ms. MacNeil prior to the children leaving for Alberta in any affidavit, risk conference minutes, Agency plan, or at any court appearance prior to November 2006;

[g] omitted to make any reference, in the Agency Plan of August 2006 that K.B. had stopped residing with T.B. as of April 2006 and that C.B. had been living with people other than T.B. prior to leaving T.B.'s residence for a final time in September

2006. In fact the Plan furnished erroneous information by proposing that the children " remain in the care and custody of the Respondent, T.B.,.." when in fact K.B. was not residing there;

[h] omitted to disclose, to any significant degree, the serious problems which quickly developed once the children arrived in [...] as detailed by Ms. Gillespie to both Ms. MacNeil and Ms. Holloway which problems included: constant fighting and conflict within the B./W. home, lack of supervision and neglect, an inability to manage anger, substance abuse, the over crowded home and the dangerous neighbourhood where the home was situate; and

[i] omitted to disclose the second home assessment completed by the [...] Agency prior to November 2006.

[86] L.M. forcibly argued that by their failure to disclose, the Agency "actively misled the Court and engineered that the children would be removed from Nova Scotia" and that this failure to disclose was "both inexplicable and inexcusable." In response, the Agency denied any bad faith, and stated that the failure to disclose was unintentional and coincidental.

[87] L.M. has levelled a strong accusation against the Agency. She therefore bears the burden of proof, which although based upon a civil standard is nonetheless a heavy onus given the nature of the

allegation. I find that L.M. has succeeded in her argument for five reasons:

[a] First, the Agency did not provide any plausible explanation for its failure to disclose. Ms. MacNeil's responses of "I don't know" and "I can't explain" and "I thought everyone knew" are incredulous. Mr. Janega's lapses in memory and recollection changes are likewise unconvincing.

[b] Second, I find that the Agency was aware that B.R.W.'s child protection history should have been disclosed. If the Agency did not believe that B.R.W. history was relevant, it would not have sought the information in the first place. Further if the Agency really believed that the information was not relevant, Ms. MacNeil would not have had difficulty responding to Ms. Iler's email and telephone demands to explain why the court would allow the children to be placed in the supervised care of their father in Alberta given B.R.W. history. Instead of answering this question directly, Ms. MacNeil stated that the situation was complicated and that Ms. Iler would have to speak to her supervisor, Mr. Janega. At no time did Ms. MacNeil or the Agency advise Ms. Iler that B.R.W. child protection history had not been disclosed to the courts.

[c] Third, the Agency's failure to disclose spanned an approximate nine month period commencing January 23, 2006. During this time frame, the Agency was presented with many

opportunities to disclose with court appearances held on February 9, March 31, April 20, April 26, and August 3. L.M. consistently raised child welfare concerns which have, for the most part, been proven accurate. The Agency should have, and easily could have, advised the court and L.M. on these occasions. Instead the Agency was silent. The Agency mislead the court and L.M. by its silence and by documentation which was not complete, nor balanced.

[d] Fourth, the Agency went to great lengths to ensure negative information concerning the B. plan did not reach the court or L.M.. I do not accept that it was coincidental that the only written documentation of B.R.W. child protection history was found in Ms. MacNeil's hand written notes in her diary, which diaries are typically not subject to disclosure. The information was not placed in documents which are subject to disclosure, including the running file, the minutes of the risk conferences, and affidavits. The Agency's Plan did not even mention that K.B. was no longer living with T.B. in defiance of the court order. The Plan further did not mention the second report of Jamie Adams dated March 31 which the Agency had in its possession as of May 2006. The Agency was also aware of K.B.'s inappropriate web site. Yet the serious nature of these problems was not reported for many months. I do not accept that this egregious failure to disclose could be anything other than intentional and deliberate. The Agency determined the contents of its affidavits, the risk conference minutes and the Agency Plans. The Agency reviewed and signed these documents.

[e] Fifth, Ms. MacNeil's and Mr. Janega's evasiveness during cross examination was troubling. I do not find them credible.

[88] In summary I find that the Agency did indeed mislead the court and L.M.. It remained silent and provided affidavits and other documents which failed to disclose the true circumstances confronting the children. I find that the only plausible reason for so doing was to ensure that the court accepted the Agency's plan to have the children placed in T.B.'s care in [...]. The Agency knew that its plan would be in jeopardy if the court was made aware of B.R.W. child protection history and of the true circumstances facing the children. The Agency made a decision that the children should be with their father, and by their failure to disclose made it impossible for this court to properly assess the best interests of the children.

[89] What is the remedy? Civil remedies such as a dismissal of the action, or an order compelling the children to be returned to L.M. without addressing the statutory requirements are not appropriate orders. The court must be concerned with the best interests of the children in any decision. Therefore the only possible relief in the circumstances is one of costs . Before I consider a cost award, I require written submissions from both parties.

[90] What is the proper disposition order in respect of the children, C.B. and K.B.?

[91] In ***Children's Aid Society of Halifax v. C.V. and L.F.*** 2005 NSCA 87, the Nova Scotia Court of Appeal discussed the purpose of a review hearing at paras 8 and 9:

> ¶ 8 A review hearing is not an appeal or review of the original finding that the child was in need of protective services, which finding is assumed to have been properly made. On a review, the issue is whether there continues to be a need for a protection order, taking into account the changing needs of the child and the child's family. The court must consider whether the circumstances which prompted the original order still exist and whether the child continues to be in need of state protection. In so doing, the court may consider circumstances that have arisen since the time of the first order. These matters were canvassed in Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.), 1994 CanLii 83 (SCC), [1994] 2 S.C.R. 165, where L'Heureux-Dubé J wrote for the Court, at p. 200:
>
> The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time ...
>
> (Emphasis added)
>
> ¶ 9 The "status review" to which Justice L'Heureux-Dubé refers is the Ontario child welfare equivalent of our review hearing.

[92] The statutory requirements which I have reviewed include the preamble and ss. 3(2), 22 (2), 37, 45 (3), and 46 of the *Children and Family Services Act*.

C.B.

[93] T.B. is not seeking C.B.'s return. C.B. wishes to return to live with his mother and L.M. wishes to have C.B. live with her. The Agency advised in its summations that it now supports C.B.'s return to Nova Scotia, but seeks an order placing C.B. in its temporary care and control.

[94] I now must apply the two stage test articulated by the Court of Appeal to C.B.. The original protection finding was made pursuant to s. 22(2) (k) of the *Act* in respect of L.M.. Given the position of C.B. and L.M., arguably the s. 22 (2) (k) grounds for a protection finding no longer exists. While this may be true, I must look to C.B.'s changing circumstances and I must operate in his best interests given the factors which exist today to determine if C.B. remains a child in need of protective services as it relates to L.M..

[95] I find that C.B. in fact remains a child in need of protective services pursuant to s. 22 (2) (b) of the *Act* as it relates to L.M.. There is a substantial risk that C.B. will suffer physical harm caused by L.M.'s inability to supervise and protect C.B. adequately.

[96] I find that L.M. has many problems which have yet to be resolved and which create a substantial risk to C.B., especially given C.B.'s challenging behaviours and defiant personality. I find that L.M. is highly impulsive. L.M. frequently reacts in a negative and impulsive fashion when faced with stresses and crises. L.M. becomes emotional, agitated, and argumentative when the children present negatively. She is unable to control her anger and emotions. She is unable to control her actions and reactions. This inability leads to a substantial risk to C.B..

[97] To her credit L.M. took the one service suggested by the Agency which was counselling. I find however that given L.M.'s history and circumstances, more resources and services must be put into place so that L.M. can effectively and appropriately manage her anger, stress and emotions. L.M. requires professional intervention. Services to be offered shall include intensive psychotherapy with a psychologist or psychiatrist, anger management counselling and individual counselling. These services will be implemented immediately. In addition, L.M. will cooperate with the parental capacity assessment to be completed by Dr. Landry.

[98] I must now turn to the second stage of the review hearing test. I find that C.B.'s circumstances have changed since the last disposition order. C.B. was apprehended by the [...] Agency and placed in its temporary care in an approved foster placement. C.B. and his father were involved in an altercation and the police were called. C.B. no

longer resides with his father. T.B. is not able to care for C.B. and has no relationship with him. C.B. wants to return to live with his mother.

[99] The plan for C.B.'s care as stated in the supervision order dated August 3, 2006 is not being applied now and has not been applied for some time.

[100] The least intrusive alternative that meets C.B.'s best interests at the present time is to have C.B. returned to Nova Scotia and placed in the temporary care and control of the Agency with access to L.M. and to have services put in place for C.B. and L.M.. Services to be put into place for C.B. include educational services, counselling services, anger management services, and recreational programs. C.B. shall also participate in a psychological assessment so that the court receives a comprehensive picture of his needs.

[101] It is hoped that with intensive services, L.M. and C.B. will be reunified as a healthy family unit.

K.B.

[102] L.M. seeks K.B.'s return to Nova Scotia while the Agency seeks an order dismissing the protection application against K.B.. T.B. does not seek K.B.'s return.

[103] I now must apply the two stage test to the child K.B.. In respect of the first stage of the test, I find that K.B. remains a child in need of protective services pursuant to s. 22 (2) (b) and 22 (2) (k) of the *Act* . The factors which I identified in reaching my protection finding in respect of C.B. apply to K.B.'s circumstances as well. As K.B. refuses to return to the care of either parent, s. 22 (2) (k) of the *Act* applies. I reject the submission of the Agency that K.B. is not in need of protective services given the involvement of the [...] Agency.

[104] In examining the second stage of the test, I find that K.B.'s circumstances have changed since the issuance of the last disposition order. Further the plan which the court adopted for K.B.'s care in August 2006 is not being carried out and has not for some time. K.B. does not live with her father. She resides with C.R.B. in small accommodations with C.R.B.'s young children.

[105] C.R.B. has a prior child protection history with the [...] Agency. The [...] Agency did little to investigate C.R.B. and her circumstances. The two visits which Ms. Gillespie made were not investigative in nature. The [...] Agency went from a position of strong disapproval of the C.R.B. placement to a strong approval without an assessment confirming that C.R.B.'s circumstances had changed.

[106] The objective evidence confirms that the C.R.B. placement is not in K.B.'s best interests. K.B. does not attend school while in C.R.B.'s care. K.B. does not receive counselling while in C.R.B.'s care. K.B.'s behaviour has not improved since she has been in C.R.B.'s care as she continues to have extreme angry outbursts and continues to be defiant. K.B. has a web site on which she posted sexually inappropriate photos of herself and which photos also show her drinking in a bar while underage. C.R.B.'s web site is also racy and inappropriate.

[107] I am aware of K.B.'s wishes and her age. I am aware that K.B. has threatened to run if the court attempts to move her from C.R.B.'s care. I have carefully considered these factors. However, a threat to run is not an appropriate reason to justify the court making a placement decision. Section 3 (2) of the *Act* lists the factors which the court must consider when acting in the best interests of children. These are the factors which I have considered in conjunction with the other relevant statutory requirements. K.B.'s wishes are not the determinative factor, especially given K.B.'s lack of emotional maturity and her current inability to act in her own best interests. K.B. is a confused child who faces a multitude of problems.

[108] I find that the least intrusive alternative that is in K.B.'s best interests is for her to be returned to the jurisdiction of this court and to be placed in the temporary care and custody of the Agency with services and access to be provided. Services to be put into place for K.B.

include educational services, counselling services, anger management services, and recreational programs. K.B. shall also participate in a psychological assessment so that the court receives a comprehensive picture of her needs. I recognize that K.B. is more defiant than C.B., however such only increases the need for intense services.

VI. CONCLUSION

[109] In summary, I find that the Agency failed to disclose relevant information to the court and L.M. in an effort to ensure that the children would be permitted to live with their father in Alberta. As a result, the ability of the court to act in the children's best interests was severely compromised. Costs will therefore be considered by the court after counsel have had an opportunity to prepare submissions.

[110] The children continue to be in need of protective services. The plan adopted by the court in August 2006 was not applied. There have been significant changes in the circumstances of the children and of the respondents. It is in the best interests of the children to be returned to Nova Scotia and placed in the temporary care and control of the Agency with access, and with extensive services which will be paid by the Agency.

[111] Mr. Crosby will draft the order.

Justice Theresa M. Forgeron

VI. **ADDENDUM**

[112] L.M. has advised that she is not seeking costs for three reasons. First, she is represented by Nova Scotia Legal Aid and did not personally incur costs. Second, she prefers that the Agency's resources are spent on services for families and children in need. Third, she feels that the decision stands as a sufficient deterrent to the Agency's blameworthy conduct. As a result, no costs are awarded.

SUPREME COURT OF NOVA SCOTIA

Citation: *Children's Aid Society of Cape-Breton-Victoria v. M.,* 2007 NSSC 119 NSSC

Date: 20070420
Docket: 44071
Registry: Halifax

Between:

The Children's Aid Society of Cape Breton-Victoria

Applicant

v.

L.M. and T.B.

Respondents

Restriction on Publication: s. 94(1) *Children and Family Services Act*, SNS 1990, c. 5

ERRATUM

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	November 10, 2006, December 7, 8, 12 and 14, 2006 and February 2, 2007 in Sydney, Nova Scotia
Counsel:	Robert Crosby, Q.C., for the Applicant Ann Marie MacInnes, Counsel for the Respondent L.M. Lisa Fraser-Hill, Counsel for the children, K.B. and C.B.

Details: September 26, 2023
Para. 82 – reference to "*In Children's Aid Society of Kingston (City)* …." is now paragraph 83.
Para. 86 – contained a list of five items but only listed one under para. 86. The other remaining items were incorrectly listed under paragraphs 93, 94, 95 and 95(4). This has been corrected and all five items are now alphabetized under para. 87 (a) to (e).
General corrections have been made to paragraph numbers beginning with paragraph 82 until the end of the decision as required due to prior incorrect numbering. Case names have been italicized, minor grammar edits made and links removed.