NOVA SCOTIA COURT OF APPEAL

Citation: *C.C. v. Nova Scotia (Community Services)*, 2015 NSCA 67

Date: 20150707
Docket: CA 436477
Registry: Halifax

Between:

C.C. and G.C.

Appellants

v.

Minister of Community Services

Respondent

Restriction on Publication: Pursuant to s.94(1) of the *Children and Family Services Act*

Judges:	Scanlan, Bourgeois, and Van den Eynden, JJ.A.
Appeal Heard:	June 19, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Scanlan and Van den Eynden, JJ.A. concurring
Counsel:	Cheryl Watson, representative for the appellants Peter C. McVey, Q.C., and Patricia A. McFadgen for the respondent

Restriction on publication: Pursuant to s. 94(1) **Children and Family Services Act**, S.N.S. 1990, c. 5.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT** APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

94(1) 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.

Reasons for judgment:

[1] This is an appeal from an order of the Honourable Judge Corrine Sparks, placing a 10 month old girl in the permanent care and custody of the Minister of Community Services (the "Minister") pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("the *Act*"). The order arose from a disposition hearing on January 13, 2015, and was issued February 9, 2015.

[2] The appellants are the biological parents of the child. They will be referred to collectively as the appellants, or individually as Mr. C. and Mrs. C.. Both appellants were represented by legal counsel at the disposition hearing. The resulting order cites that through their respective counsel the appellants consented to the permanent care and custody order. The appellants initially filed separate Notices of Appeal, which were later consolidated. From the outset, Cheryl Watson, a layperson, has been providing "assistance" to the appellants in this matter. At the hearing before this Court, the appellants were advised that they could, if they chose, speak on their own behalves. Although they were content to have Ms. Watson continue to advance their appeal, Mrs. C. did take the opportunity to provide supplementary comments.

[3] Both appellants ask this Court to set aside the permanent care order on the basis that Judge Sparks failed to abide by her statutory duty to ensure their consent to the order was informed and voluntary. Mrs. C. further argues that she did not instruct her legal counsel to indicate her consent to the order under appeal, and because of this and other reasons, she was ineffectively represented. She seeks the introduction of fresh evidence. The appellants raise several other concerns with the proceedings below, including alleging the Minister was unclear about the expectation that the couple terminate their relationship, and the drafting and issuance of the permanent care order.

BACKGROUND

[4] This appeal concerns the child D.F.C., born March *, 2014. Her parents, the appellants, are married and were involved throughout the court process leading to the order for permanent care and custody. Given the nature of the issues raised by the appellants, it is necessary to review in some detail the context in which the proceeding arose, including the history of an earlier child protection matter.

[5] The appellants were not inexperienced with child protection authorities and proceedings. Their older child, A.D.C., born in April, 2012 had been placed, with their consent, in the permanent care of the Minister in February of 2014.

[6] On March 17, 2014, the Minister filed a Protection Application and Notice of Hearing in relation to the appellants' second child, D.F.C., who had been apprehended at birth. In the Notice, the Minister alleged the child was in need of protective services pursuant to s. 22(2)(d) of the *Act*. That section provides:

> 22(2) A child is in need of protective services where
>
> (d) there is a substantial risk that the child will be sexually abused as described in clause (c);

Clause (c) provides:

> (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;

[7] In the Notice, the Minister also indicated that she would be seeking, amongst other things, the following:

> An Order pursuant to section 96(1) of the *Children and Family Services Act* admitting as evidence in this proceeding the evidence from the proceeding under the *Children and Family Services Act* between the Respondents, [C.C.] and [G.C.], in relation to the child, [A.D.C.], born April *, 2012;

[8] The Notice was supported by an affidavit sworn by social worker Michelle MacLean. Ms. MacLean's affidavit outlined the basis for the Minister's concerns prompting the protection application. It was heavily based upon information from both the recently concluded proceeding in relation to A.D.C., and the Minister's previous involvements with Mr. C.. Ms. MacLean's affidavit noted the following:

- The Minister had first become aware of Mr. C. in 2003 due to allegations reported by M.C., a nine year old girl. She reported that Mr. C., her step-father, had begun sexually abusing her in 1999; had forced her to perform oral sex on him; and had touched her vagina with his hands and penis;

- M.C. was concerned Mr. C. may be abusing his own daughter, C., who was then four years old, and who was acting out sexually;

- Agency staff interviewed C. in February of 2003, but did not proceed further due to the child's inability to communicate as well as her mother's agreement to prevent any further unsupervised access with Mr. C.;

- Mr. C. was criminally charged with sexually abusing M.C., and acquitted at trial. Notwithstanding the outcome at trial, agency staff found M.C.'s reporting to be credible;

- The Minister again became involved with the child C. in October 2005. Her mother reported the child to be engaging in sexual behaviour. Six years old at the time, she was observed attempting to perform oral sex on her younger brother. Interviewed by police and agency staff, C. disclosed that when she was five years old Mr. C. "put his peter in her mouth and her bum", explaining that "peter" meant his genital area;

- It was concluded that C.'s disclosures were credible. However, due to her age, and emotional development, it was determined she would be unable to testify at trial, and as such, criminal charges were not pursued by the police;

- As Mr. C. had permanently separated from C.'s mother, and had relinquished all rights of custody and access to her, the Minister closed the protection file in relation to this child;

- In July 2010, a referral was received in which it was alleged that Mr. C. had sexually assaulted a 5 year old girl, who was being babysat by Mrs. C., then his girlfriend. The child had disclosed to a family friend that Mr. C. had "touched her down there", "kissed her on the lips" and "told her not to tell". Due to the child's significant developmental delay, the police did not pursue criminal charges, as the child would be unable to testify;

- On June 12, 2012, the Minister became aware that Mr. C. and his then spouse, Mrs. C., had a baby in April, 2012. This was brought to their attention by the Truro Police Services, who advised Mr. C. was a suspect in several sexual abuse files involving young children. Given the ages of the children, and their inability to testify, no criminal charges had been laid;

- In response to this information, agency staff met with Mrs. C. to review the allegations and concerns relating to Mr. C.'s sexual abuse of children. Because of Mrs. C.'s refusal to acknowledge Mr. C. as a potential risk to A.D.C., he was taken into care, and protection proceedings commenced in July, 2012;

- Mrs. C. participated in a Parental Capacity Assessment, which was undertaken by psychologist, Meredith Burns. In her report dated October 12, 2012, Ms. Burns opined:

> The primary concern at this time involves safety more directly than basic care and has to do with [C.]'s reaction to the information provided to her regarding previous Agency involvement with her husband. This is a concern in several ways. When approached by the Agency regarding the allegations against [G.], she advised that [G.] had already told her about the "lies" made against him. She does not appear to have been open to really listening to or more importantly asking questions about the Agency information involving [G.]. While it is understandable that she would want to trust her husband, her responsibility to protect [A.] should have dictated to her that she must examine the situation completely before making a decision.
>
> Secondly, whether she saw it as a fair choice or not, when forced to make a decision, she chose to remain cohabitating with [G.] and to allow her child to go into foster care. [C.] could have chosen to "fight" the Agency position with [G.] while they lived apart thus allowing [A.] to remain with her and to take a position that clearly indicated to the Agency that she was not prepared to take any kind of chance with respect to [A.]'s safety. Her failure to do so suggests her emotional needs and not [A.]'s were given priority.
>
> Also, since [C.] does not believe [G.] is a threat in anyway, she does not recognize a need to be vigilant. Based on the fact the Agency substantiated sexual abuse of a child by [G.], [C.]'s judgment places her son at risk and her ability to keep him safe is thus significantly compromised.

- A.D.C. was found to be in need of protective services pursuant to s. 22(2)(d) of the *Act* (substantial risk of sexual abuse) in November, 2012;

- The Minister offered services to address the identified protection risks, including individual counselling for both parents; a program (STOP) which provides information to assist in recognizing the risks of sexual abuse and prevention; and family support services for Mrs. C.;

- Mr. C. underwent a "Sexual Offending Assessment" with Dr. Brad Kelln, whose report dated March 16, 2013, opined that Mr. C.'s risk for sexual re-offending fell, at a minimum, within the moderate range, and that the risk appeared most related to underage females. Dr. Kelln recommended Mr. C. undertake further assessment to determine what treatment options may be suitable;

- Dr. Angela Connors, Clinical and Forensic Psychologist and Program Manager of the Forensic Sexual Behaviour Program at the East Coast Forensic Hospital assessed Mr. C. to determine what programs, if any, may be of assistance to him. In a letter dated October 10, 2013 she reported Mr. C. had undergone a Penile Plethymography (PPG) assessment, the results of which suggested Mr. C. was sexually aroused by children and "that his sexualisation of underage persons extends to both males and females, both

of which were preferred to adult consenting sexual activity in the same trial". However, because Mr. C. denied having offended against children, or having any inclination to do so, he was not a suitable candidate for treatment;

- The Minister put forward a Plan of Care in relation to A.D.C. in November, 2013 in which she indicated an intention to seek an order of permanent care and custody;

- After the filing of the Plan of Care, both Mr. and Mrs. C. advised the Minister and the court, that they were separated, and Mrs. C. would seek to parent A.D.C. as a single parent;

- Notwithstanding the appellants' assertions they were separated, the Minister continued to receive information that the couple were sighted together and were maintaining a relationship. When asked about this, Mrs. C. denied she was having contact with Mr. C.;

- The child, A.D.C. was placed in the permanent care and custody of the Minister on February 11, 2014;

- The Minister believed the younger child, D.F.C. was at risk of sexual abuse, given what appeared to be Mrs. C.'s inability to recognize the risk posed by Mr. C., and her continuing relationship with him; and

- Given the services just recently provided, the level of risk and the inability of Mrs. C. to separate herself from Mr. C., the Minister determined it was in the best interest of D.F.C. that a permanent care order be sought immediately.

[9] An order pursuant to s. 96(1) of the *Act* was granted, with consent of the parties, thus serving to introduce evidence from the matter involving A.D.C., in the present proceeding. Before returning to the matter relating to D.F.C., there are certain aspects of the record relating to the previous protection proceeding which provide further important context. I note:

- The Protection hearing in relation to A.D.C. was held on November 8, 2012. He was found to be a child in need of protective services pursuant to s. 22(2)(d) of the *Act*. Mr. and Mrs. C. consented to that finding "reserving the right to cross-examine". Both were represented by legal counsel;

- An initial disposition order was rendered on January 31, 2013 which required Mr. C. be referred for a Sexual Offender Assessment. Mr. and Mrs. C. consented to this order. Both were represented by legal counsel;

- In her affidavit sworn April 25, 2013, Michelle MacLean noted Mrs. C.'s sister, M.M., had reported to her that she had recently been sexually assaulted by Mr. C.. She reported that on an occasion when Mr. and Mrs. C. were staying overnight at her home, she had awoke to his hand down her pants. She further reported that when she advised Mrs. C. of this conduct, "she [C.C.] passed it off";

- A number of disposition review hearings were held, with orders resulting therefrom. This included an order of August 8, 2013, in which Mr. C. was ordered to undertake a penile plethsmography. Mr. and Mrs. C. consented to this order. Both were represented by legal counsel;

- The Minister filed an Agency Plan of Care on November 25, 2013, in which she sought an order of permanent care and custody. The rationale for this decision is explained in the Plan as follows:

> The agency believed that Mrs. [C.] continues to show no insight into the child protection concerns. Although Mrs. [C.] has obtained a separate residence, she has not made any attempt to separate from her husband, [G.C.], and is in fact expecting her second child with Mr. [C.] which is due in March of 2014.

> Mr. [C.] has completed a Sexual Offender Assessment that has concluded that he is at moderate risk to reoffend. In addition, Mr. [C.] underwent a Penile Plethsymography assessment and the results suggest that "his sexualisation of underage persons extends to both males and females, both of which were preferred to adult consenting sexual activity in the same trial". The Forensic Sexual Behaviour Program has deemed he does not meet the intake criteria for their program because "he demonstrated little insight into his own functioning and appeared closed to the need for any intervention and potential benefit from such".
>
> Although Mrs. [C.] appears to have understood the materials in the STOP program and could apply them, she has made no attempt to separate herself from her husband, and the agency has grave concerns that they are only maintaining separate residences as a façade. Mrs. [C.] was rarely home for any unscheduled visits by the caseworker and any contact with her occurred at Mr. [C.]'s residence.
>
> Throughout agency involvement, we have had concerns that Mr. and Mrs. [C.] have continued to maintain their relationship and live together as a family unit. We have had numerous reports from [M.M.], [C.C.]'s sister that [G.] and [C.] live together and she only goes to her [W.] Street apartment for services.

- In preparation for the final disposition hearing scheduled for February 11, 2014, the Minister filed several affidavits, including that of Mary Evans, casework supervisor, sworn January 6, 2014, which provided the following insight as to the Minister's concerns:

> 11. On November 6, 2013, I attended a case conference with respect to this family. Also in attendance at this case conference were Mr.[C.], Ms. [C.], service providers and legal counsel. At the conclusion of this case conference Ms.[C.] advised that she would end her relationship with Mr. [C.], and Mr. [C.] advised that he would be voluntarily relinquishing his access with the child, [A.]. Mr. [C.] further advised that he would not be putting forward a plan of care for the child, [A.], and would instead be supporting Ms. [C.] having the child, [A.], returned to her care. These positions were confirmed before this Honourable Court during Review Hearings on November 21, 2013, and November 28, 2013.
>
> . . .

> 13. On November 26, 2013, I received information from Colleen Reddy, Agency Family Support Worker, who reported that on (*sic*) she observed Ms. [C.] and Mr. [C.] together at Tim Horton's on November 24th.
>
> 14. On December 23, 2013, I received further information from Colleen Reddy with respect to contact between Ms.[C.] and Mr. [C.]. Ms. Reddy reported that she observed Ms. [C.] and Mr. [C.] walking together on Willow Street in Truro and that they were carrying gift bags that appeared to be presents. Mr. [C.] was wearing a jacket and what appeared to be a sweater with a hood but Ms. Reddy was able to see his face and identify him.

- Additional affidavits were subsequently filed on behalf of the Minister, in which staff attested to multiple sightings of Mr. and Mrs. C. being together;

- The record shows the Amended Permanent Care and Custody Order in relation to A.D.C. arose from a finding made on February 11, 2014 (the order was amended due to a typographical error in the child's name). Mrs. C. was represented by legal counsel at the hearing, with the order indicating Mr. C.'s prior counsel had been permitted to withdraw. Mr. C. indicated consent to the order on his own behalf. The order contained the following recital:

> **AND UPON** the Respondents, [C.C.] and [G.C.], consenting to the Order for Permanent Care and Custody herein with respect to the child, [A.D.C.], born April *, 2012, and giving this consent freely understanding its nature and effect and, in particular understanding that, pursuant to s. 47(1) of the *Children and Family Services Act*, the Minister of Community Services is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the care and custody of the child, [A.D.C.], born April *, 2012;

[10] As was noted earlier, the Protection Application in relation to newborn D.F.C. was commenced just over a month from when her brother was placed into the permanent care of the Minister, with the consent of her parents.

[11] The Minister believed the child D.F.C. was in need of protective services, and given her mother's lack of insight regarding the risk Mr. C. posed to the child, she was at risk of sexual abuse in particular. Michelle MacLean's affidavit, sworn May 15, 2014 set out:

> 5. On March 13, 2014, I met with Mrs.[C.] at the Colchester Regional Hospital, where she was staying while recovering from the child, [D.]'s birth. . . During this meeting:
>
> a. I questioned Mrs. [C.] with respect to whether she understood why the Agency was taking the child, [D.], into care. Mrs.[C.] shrugged her shoulders, and did not respond except to cry.
>
> b. I advised Mrs.[C.] that the Agency would be making an application to have the child, [D.], placed in permanent care as soon as possible, and explained the reasons why the Agency made this decision;
>
> c. Mrs. [C.] denied that she was in a relationship with Mr.[C.] . . .
>
> . . .
>
> 6. Mrs. [C.] has continued to advise me that she does not have any contact with Mr. [C.]. Despite Mrs.[C.]'s statements, she has continued to be observed in Mr. [C.]'s company . . .
>
> 7. Tanya Broome, therapist, was providing therapy to Mrs. [C.]. Tanya Broome has reported that Mrs. [C.]'s attendance at therapy has been sporadic since January of 2014 and she is not currently attending appointments. Due to Mrs. [C.]'s failure to engage with this service the Agency no longer considers it to be reasonable and the service has been terminated.
>
> 8. Shirley Atkinson has been providing Mrs. [C.] with family support services. On April 15, 2014, Mrs. [C.] left me a voicemail advising that she was no longer prepared to work with Shirley Atkinson and would no longer allow her to enter her home.

> . . .
>
> 12. The Agency has concluded, in light of the extensive (and recent) history of this family and services previously offered to them, that this family has exhausted all available services, and there are, at present, no existing services that would assist this family in remedying the existing protection concerns. Further, the Agency has concluded that it is in the best interests of the child, [D.], that the Applicant, the Minister of Community Services, make an Application for permanent care and custody at the earliest opportunity.

[12] The above affidavit was filed in advance of the protection hearing scheduled for May 20, 2014. On that day, the record discloses Judge Sparks found D.F.C. to be in need of protective services pursuant to s.22(2)(d) of the *Act*. Mr. and Mrs. C. consented to that finding, reserving the right to subsequent cross-examination on the filed evidence.

[13] At the protection hearing, counsel for the Minister advised that a decision had been made to seek permanent care as soon as possible. Counsel said:

> From the Minister's perspective, the parties continue to be seen in one another's company. It's clear to the Minister that they remain in a relationship of sorts. Most recently they were seen together on two separate occasions this past weekend. The Minister at present has no services in place for Ms. [C.] due to her withdrawal from Family Support Services and her failure to attend with her counselling resulted in that service being terminated. The Minister has – as the Minister has been indicating all along, the Minister does intend to file for permanent care at the disposition hearing, so we are seeking an early return, if possible. The outside date for disposition is August 17th, but we're hoping to be back before then.

[14] In rendering the protection finding, Judge Sparks addressed the appellants as follows:

> Now, please understand that this is a serious matter, because the Minister's seeking to have the child placed in the permanent care and custody of the agency, which means that the Minister's seeking to sever your parental ties to the child, all right?

[15] The Minister filed a Plan of Care for D.F.C. on June 24, 2014. It was clear a permanent care order was still being sought. The Plan addressed the continuation of the marital relationship as follows:

> Although Mrs. [C.] appeared to have understood the materials in the STOP program and could apply them, she has made no attempt to separate herself from her husband, and the agency has grave concerns that they are only maintaining separate residences on paper only.
>
> . . .
>
> After the treatment and services Mrs. [C.] has received during both proceedings, the agency believes that Mrs. [C.] still doesn't understand the seriousness of Mr. [C.]'s sexualized behaviours against children. The agency believes that Mrs. [C.] does not have the ability to identify, address, and prevent risk for her [A.] (*sic*) and that will continue their relationship despite agency direction that they separate.
>
> . . .
>
> Throughout both proceedings the agency has grave concerns that Mr. and Mrs. [C.] have continued to maintain their relationship and live together as a family unit.

[16] The Minister filed an affidavit of Ms. MacLean, sworn July 4, 2014. She attested that "despite the Agency's direction that the relationship between Mr. [C.] and Mrs. [C.] poses a protection risk to the child", the couple had been observed repeatedly in each other's company. Details of the sightings, including dates and locations, were specified in the affidavit. Similarly, in an affidavit sworn August 26, 2014, Ms. MacLean set out more specified sightings of Mr. and Mrs. C.. She

deposed that she had met with Mrs. C. to review these reports. In her affidavit, Ms. MacLean noted:

> 10. On August 14, 2014, I met with Mrs. [C.] following her access visit. We had the following conversation:
>
> a. I questioned Mrs. [C.] regarding her contact with Mr. [C.] and advised that the Agency continued to receive reports that they have been observed together in the community. Mrs. [C.] denied that it was her with Mr. [C.] and advised that she spent most of her time out of town in Dartmouth helping her mother.
>
> b. I further advised her that staff and lawyers at the Department of Justice were reporting that they had observed her and Mr. [C.] together. Mrs. [C.] became agitated and yelled "your just calling me a liar like everyone else". She grabbed her bag and headed for the door.
>
> c. I then proceeded to speak with Mrs. [C.] of my sighting of her and Mr. [C.] together at Tim Horton's and my conversation with them together at Tim Horton's. Mrs. [C.] indicated that this was a mistake and that a lady from the Native Council had called her about working with them and she did not understand so she saw Mr. [C.] and sat down to talk with him about it. I advised that she had been observed thirty (30) minutes before walking down the street with Mr. [C.] near Tim Horton's. Mrs. [C.] explained that she was at the bank as she just got paid and she continued to deny that she was in a relationship with Mr. [C.].
>
> d. I asked Mrs. [C.] to be honest and explained that I understood that she married him and had children with him. Mrs. [C.] became tearful and said it was hard and that her last lawyer told her to "pretend that he (Mr. [C.]) didn't exist".
>
> e. I asked her why she continued to have contact with Mr. [C.] as Mr. [C.] was considered a risk to his daughter and that he had sexually offended against his older daughter. I explained that she needed to put [D.]'s needs and safety above her own needs and the needs of Mr. [C.]. Mrs. [C.] did not respond and continued to cry.

[17] An initial disposition order was rendered by Judge Sparks on July 8, 2014. A Review disposition hearing followed on September 9, 2014, at which time a contested hearing was scheduled. In advance of the anticipated hearing, both Mrs. C. and Mr. C. filed their own Plans of Care for D.F.C., in which they challenged

the appropriateness of the permanent care and custody order being sought by the Minister. They each filed affidavits in support of their Plans. Both plans were based on the premise the couple would permanently separate, and the child be returned to the care of Mrs. C..

[18] Because of the nature of the issues on appeal, it is useful to set out significant portions of the appellants' affidavits. In her affidavit sworn November 21, 2014, Mrs. C. stated:

> 4. I have just recently, through the help of my lawyer, come to understand and accept how foolish I have been in the conduct of my life and parenting.
>
> 5. I now see the sexual, physical and emotional risks that [G.] poses to [D.].
>
> 6. I have been blind to that fact for quite some time.
>
> 7. Even when we physically separated from one another, I have continued to have contact with him and allow him to be in my life.
>
> **8. I admit that we have had the contact described in the affidavits of the agency workers, and where I do not specifically remember certain times, I accept the accuracy of the statements concerning our contact found in the affidavits.**
>
> 9. I now see that [G.] had been lying to me and manipulating me. He is a sexual predator and is a risk to my kids.
>
> . . .
>
> 14. I see he could and would sexually abuse [D.]. I don't want him around her or me.
>
> 15. I love [D.] and want her in my life at some point.
>
> . . .
>
> 17. I did take the STOP program and they said I understood and could apply the materials in the program. I just didn't make a sufficient effort to cut [G.] out of my life.

> 18. [G.] is now out of my life. We have not had contact since the last court appearance. I just need time to show I can follow through with keeping him out of my life. (emphasis added)

[19] Mr. C.'s affidavit, sworn December 3, 2014, contained the following assertions:

> **5. I admit that I have had contact with [C.C.], and I undertake to refrain absolutely from same in the future.**
>
> 6. I acknowledge that I was convicted of sexual interference in 1991, and that I was accused of same in 2003 and 2005.
>
> 7. For the 2003 and 2005 allegations, I deny any wrongdoing, but I acknowledge that I have consistently put myself in a position where I am open to such allegations, and that I must make serious life changes to ensure that this is no longer the case. (emphasis added)

[20] One further affidavit was filed with the court prior to the commencement of the review disposition hearing. It alleged that despite their representations made to the court, the appellants were still in contact. That affidavit, sworn January 9, 2015 by Christine Mason, stated in part:

> 2. Through my employment as an Access Facilitator with the Agency I am familiar with [C.C.] and [G.C.]. Specifically, I was the access facilitator for a number of visits between Mr. [C.] and his son who was the subject of a previous proceeding.
>
> 3. On Saturday, January 3, 2015, at approximately 4:30 p.m. I observed [C.C.] and [G.C.] entering the Atlantic Superstore on Elm Street in Truro, Nova Scotia. [C.C.] and [G.C.] were entering the Atlantic Superstore together when I walked by them both.

[21] The parties appeared before Judge Sparks on January 13, 2015 to commence the contested hearing. What resulted was the order under appeal, placing D.F.C.

into the permanent care and custody of the Minister. At that appearance, Mrs. C. was represented by Mr. Sutherland, and Mr. C. was represented by Mr. Penny. The record discloses the hearing did not commence when originally anticipated, due to a request made by Mr. Sutherland. He advised the court:

> We think that we may be close to, ah, resolving this matter. I just need to have discussions with Ms. McFadgen and one of her witnesses and they'll sit down with our clients. . .

[22] Court re-convened in the afternoon. At that time, the following exchange took place:

> **MR. SUTHERLAND:** Yes, Your Honour, the stand-down was extremely productive as expected. We've arrived at a resolution while talking with some potential new witnesses and reviewing some new evidence from the Agency and I believe my colleague, Ms. McFadgen, can outline the details of the resolution.
>
> **THE COURT:** Thank you, Mr. Sutherland. Ms. McFadgen?
>
> **MS. MCFADGEN:** Yes, thank you, Your Honour. The . . .Ms. [C.], who was the individual putting forward the . . .parent putting forward the plan in this case, I have been advised from Ms. [C.]'s counsel that she is consenting to the Minister's application for permanent care and custody with no access. I've indicated in some of the material [D.] is of Mi'kmaw heritage. She will, once permanent care is granted, her file will be transferred to the Mi'kmaw Agency. She currently resides in a foster home with her brother [A.]. . .
>
> **THE COURT:** Mmm hmm.
>
> **MS. MCFADGEN:** . . . and the intention would be to seek permanency for them together, um, in a culture . . .
>
> **THE COURT:** In a native home?
>
> **MS. MCFADGEN:** In a culturally appropriate home. Mi'kmaw would be responsible for all future permanency planning.
>
> **THE COURT:** Mmm hmm.

MS. MCFADGEN: Um, the Minister would be seeking therefore that, based on the affidavit evidence and the expert evidence before the Court, that the Order for Permanent Care and Custody go forth.

MR. SUTHERLAND: Substantially put by my colleague. One qualification when we're talking about access, there will be one final access visit.

MS. MCFADGEN: Yes, absolutely. Like the Minister did with the older child, [A.], until the file is transferred to Mi'kmaw, the Minister is prepared to offer Ms. [C.] access. However, once it is transferred to Mi'kmaw, then Mi'kmaw will . . .those decisions will rest with Mi'kmaw.

THE COURT: Yes. All right. Thank you. Mr. Penny?

MR. PENNY: Yes, Your Honour, and that is correct on the part of Mr. [C.] as well. He is consenting to the permanent care order and I did advise him that to make sure that he understands that does mean there will be no provision for access to him.

[23] Both appellants were present when the above exchange took place in court.

Immediately following the above representations of counsel, Judge Sparks said:

. . . Yes. All right. Very good. Thank you, counsel.

It's always a difficult decision to commit a child to permanent care and custody, but nevertheless, having reviewed the file and being familiar with some of the evidence which would have been adduced on behalf of the Minister primarily, I'm satisfied this is an appropriate disposition under the *Children and Family Services Act*. [D.] is an infant and she is hereby committed to the permanent care and custody of the Agency, consistent with her overall best interest; and as the least intrusive alternative under the legislation.

It is noteworthy that she is of native heritage and the Minister will ensure that the file is transferred to the Mi'kmaw Child Welfare Agency in [D.]'s overall best interests. Currently, I understand she's in a placement with her brother and she eventually will be placed for adoption. Consequently, there will be no provision in the Order for access, although the Minister is instructed to permit the parents to have a final visit or two with the child on compassionate grounds.

The Order will go forward and the Court extends its gratitude to counsel for the resolution of this matter without court intervention.

. . .

I'm satisfied that this is the appropriate disposition in [D.]'s best interests.

. . .Ms. McFadgen, please draft an Order and send it along to the Court for signature . . .

> Obviously, I've also reviewed and accept the Plan of Care placed before the Court by the Minister of Community Services as well. Thank you.

ISSUES

[24] From the Notice of Appeal and submissions made on behalf of the appellants, the issues before the Court can be framed as follows:

1. Was Mrs. C. ineffectively represented by her counsel, resulting in a miscarriage of justice?
2. Did the Family Court judge fail to abide by the statutory duty contained within s. 41(4)(c) of the *Act*?
3. Do any of the host of other concerns raised by the appellants justify appellate intervention?

STANDARD OF REVIEW

[25] The appropriate standard of review for Issues 2 and 3 is as set out by this Court in **Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.**, 2013 NSCA 141. There, Saunders, J.A. for the Court wrote:

> [26] Questions of law are assessed on a standard of correctness. Questions of fact, or inferences drawn from fact, or questions of mixed law and fact are reviewed on a standard of palpable and overriding error. As Justice Bateman observed in *Hendrickson v. Hendrickson*, 2005 NSCA 67 at para.6:

> [6] ... Findings of fact and inferences from facts are immune from review save for palpable and overriding error. Questions of law are subject to a standard of correctness. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness. ...

[26] As we are considering the ineffective assistance of counsel in the first instance, there is no standard of review for that issue.

ANALYSIS

Was Mrs. C. ineffectively represented by her legal counsel, resulting in a miscarriage of justice?

[27] In her written submissions, Mrs. C. says that her counsel, Mr. Sutherland, failed her on a number of fronts. She says he did not adequately explain the consequences of consenting to the protection finding; he misinformed her as to the consequences of putting forward the "no-contact" plan in November, 2014; and he failed to follow her instructions to proceed to a contested disposition hearing, resulting in counsel for the Minister wrongly indicating her consent to the order for permanent care and custody on January 13, 2015. Despite Mr. C. advancing nearly identical positions in the court below, he does not challenge the adequacy of his own legal representation, nor the validity of any of the orders issued in the court

below, including the protection finding. He has not challenged on this appeal the validity of his consent to the permanent care order.

[28] Child protection matters are the rare type of civil matter where the ineffective assistance of legal counsel can be advanced as a ground of appeal (**M.W. v. Nova Scotia (Community Services)**, 2014 NSCA 103; **M.O. v. Nova Scotia (Community Services)**, 2015 NSCA 26). The law is well settled in relation to allegations of ineffective assistance of counsel in the criminal setting. I see no reason why the same principles should not apply in child protection matters. As this Court said in **R. v. West**, 2010 NSCA 16:

> [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, *B.(G.D.), supra*; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and *R. v. M.B.*, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in *B.(G.D.), supra*, at para. 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[29] As is the practice in the criminal context, Mrs. C. brought a motion for fresh evidence as it relates to this ground of appeal. Mrs. C. filed an affidavit sworn March 27, 2015 setting out the basis for her concerns with respect to Mr. Sutherland's representation. The Minister filed an affidavit in reply from Mr. Sutherland. Mrs. C. did not seek to cross-examine Mr. Sutherland. Mrs. C. was called for cross-examination. Both the affidavit and *viva voce* evidence go to the heart of the allegation of ineffective representation; are necessary to assess this ground of appeal, and therefore are admitted.

[30] Mrs. C.'s affidavit is a mix of submission and evidence. I have no hesitancy in concluding it was drafted by Ms. Watson and is more reflective of her view of the case, as opposed to Mrs. C.'s recollection of events. When presented with the original sworn affidavit for the purpose of her cross-examination, Mrs. C. testified she had "not seen this copy" and required time to review the document to familiarize herself with the contents. Her *viva voce* evidence was often inconsistent with both what she had sworn to in her affidavit, and the assertions put forward in the factum prepared by Ms. Watson.

[31] Sifting through the materials, there are three overarching complaints with respect to Mr. Sutherland's representation of Mrs. C.. Firstly, he did not adequately explain to Mrs. C. the significance and consequences of consenting to a

protection finding; his advice to put forward a plan in November 2014 that Mrs. C. would separate from Mr. C. was ill-advised; and he failed to protect her interests on January 13, 2015 when he not only failed to follow her instructions to contest the Minister's plan for permanent care, but stood by and permitted the Minister's counsel to erroneously advise the court she was consenting to a permanent care order.

[32] During her cross-examination, Mrs. C. was referred to Mr. Sutherland's affidavit, and in particular his responses to her various concerns respecting the nature and quality of his representation. She acknowledged the accuracy of many of Mr. Sutherland's assertions, including the nature of the advice he provided, described as follows:

> 6. During those meetings, we reviewed her file and I advised her of these five major problems with her current child protection care involving [D.C.] which required her immediate attention. In order to challenge the Agency's position, I advised her that she must:
>
> (a) acknowledge he (*sic*) sexual, physical and emotional risk [G.C.] posed to [D.] which was supported by the evidence,
>
> (b) severe (*sic*) all contact with [G.C.], and
>
> (c) engage with her therapist Tanya Broome and her family support worker Shelly Atkinson.

[33] With respect to the protection finding, Mrs. C. was presented with Mr. Sutherland's letter to the Family Court dated May 20, 2014. It read in part:

> I will represent [C.C.] in this matter. I cannot make the appearance May 20, 2014, 10:30 am . . .
>
> I have discussed the file with the client who is appearing. We are consenting to a protection finding on a reservation of rights. She is seeking a restoration of services and will consent to whatever the Agency is prepared to offer.

[34] In her cross-examination, Mrs. C. confirmed the accuracy of the statements made by Mr. Sutherland in his letter to the court, and confirmed they reflected the instructions she had given him.

[35] The comments of Judge Sparks at the protection hearing held May 20, 2014 in which she advised the appellants of the consequences of a permanent care and custody order as being sought by the Minister, were read to her. In her *viva voce* evidence, Mrs. C. confirmed she understood the consequences of a permanent care order.

[36] With respect to the Plan of Care and affidavit put forward in November, 2014, in cross-examination Mrs. C. acknowledged:

- Mr. Sutherland had, prior to her signing the documents spent "a good chunk of time" on the telephone discussing with her his advice;
- Mr. Sutherland told her that her only realistic chance of having D.F.C. returned to her care was to acknowledge Mr. C. was a risk to the child, and to separate permanently from him;

- She told Mr. Sutherland she would accept that advice, follow it, and acknowledged that her failure to follow through would be disastrous to her plan of seeking the child's return;

- She signed the affidavit and Plan of Care knowing it was intended to be filed with the court, and used as a statement of her position.

[37] In my view, the only factual disputes between the evidence of Mrs. C. and that of Mr. Sutherland which are relevant to the outcome of this appeal relate to the events of January 13, 2015. Mrs. C. remained adamant she did not consent to a permanent care order, and did not instruct Mr. Sutherland to do so. Further, she says she had specifically instructed him to proceed with the contested disposition hearing. She asserts not only did Mr. Sutherland fail to follow her express instructions, he stood by mutely as Ms. McFadgen improperly advised the court she was consenting to a permanent care order.

[38] Mr. Sutherland refutes the above assertions. His evidence is that he discussed with Mrs. C. the likely negative impact of the Minister's evidence that she had, once again, been sighted with Mr. C.. He asserts Mrs. C. said she understood this, and she instructed him to consent to a permanent care order. Mr. Sutherland says he followed that instruction, and indicated her consent to the court.

[39] Clearly there is an evidentiary impasse which this Court must resolve on the issue of consent. In doing so, it is helpful to look more broadly at the evidence with respect to the events of January 13, 2015. Mrs. C.'s affidavit evidence lends the impression that when she arrived at court for a contested disposition hearing, she was suddenly confronted by the Minister's counsel and staff, who bombarded her with a false allegation that she was again seen with Mr. C., and that the judge would never believe her. She submits; head spinning, she was then ushered into court where her consent to a permanent care order was entered by the Minister's counsel, not her own, while she was left "speechless" from the whirlwind of the verbal attack.

[40] That is not what happened. Firstly, the transcript earlier set out at para. [22] herein, is not supportive of Mrs. C.'s allegations Ms. McFadgen improperly spoke on her behalf. The transcript shows Mr. Sutherland advised the court that an agreement had been reached, and then invited Ms. McFadgen to advise of the details. She accepted that invitation, and when she omitted a detail regarding an agreed final visit between his client and the child, Mr. Sutherland interjected to assure that was added to the record. He was far from a passive observer. There is no validity to Mrs. C.'s claim that Ms. McFadgen acted improperly, nor to the

suggestion Mr. Sutherland did not convey her consent to the court. He did, as he was instructed.

[41] Secondly, Mrs. C.'s *viva voce* evidence confirms the events leading up to the court appearance on January 13th unfolded much differently than suggested in her affidavit. In effect, her evidence is, almost entirely consistent with that of Mr. Sutherland, who describes the events of that day as follows:

> 30. Just prior to the permanent care hearing commencing January 13, 2015, I was informed that the Agency had new information of her and [G.C.] having recent contact during the first week of January 2015 at the Atlantic Superstore, Truro.
>
> 31. I immediately contacted Mr.(sic) [C.] and informed her of this.
>
> 32. She maintained that she had had no contact with [G.C.] in compliance with her affidavit and her Plan of Care, and that these new allegations were not true.
>
> 33. We agreed that we would meet with the Agency lawyer and its witness to review the evidence they had regarding this alleged contact before the hearing commenced on the morning of January 13, 2015.
>
> 34. I advised the court the morning of the hearing that we would be seeking to adjourn the matter from 11:00 am to 1:30 pm to investigate some new evidence regarding contact between Ms.[C.] and [G.C.].
>
> 35. From approximately 10:30 am to 11:20 am, Ms.[C.] and I met with the Agency lawyer and its new witness in one of the interview rooms of the Truro Family Courthouse. I asked the witness all possible questions about the time, duration and nature of that contact, her knowledge of the parties and her certainty of her proposed testimony.
>
> 36. After the meeting ended, I met with Ms.[C.] from 11:20 am to approximately 11:45 am in another of the interview rooms at the Truro Family Courthouse and reviewed her the new evidence and is (*sic*) impact on the current merits of her case.
>
> 37. I advised her that, in my opinion, the new witness evidence was credible and reliable. She understood and agreed with my advice.

> 38. I further advised her that, in my opinion, if the hearing were to proceed at 1:30 pm, this new evidence would destroy her credibility and reliability on the key strategic points we were relying on and we would likely be unsuccessful at the hearing. I explained that she may undergo a rigourous cross-examination of the evidence regarding contact she had had with [G.C.].
>
> 39. I then informed her that I was seeking her instruction to consent to a finding of permanent care which would result in [D.] being put up for adoption and explained that if she agreed, there would be no trial or hearing of the matter.
>
> 40. However, I informed her that if she wished to proceed to a hearing, I was prepared to do it but I reiterated that I did not think it would be successful.
>
> 41. She instructed me to consent to a finding of permanent care such that the child [D.] would be put up for adoption and there would be no trial or hearing.
>
> 42. I suggested that she take the time to reflect on her decision during the lunch hour from 11:45 am to 1:15 pm to confirm where she with (*sic*) consenting to the permanent care order. She agreed and left for lunch.
>
> 43. At approximately 1:15 pm, I met with her in one of the interview rooms of the Truro Family Court. She indicated to me that she was comfortable with her decision to consent to a finding of permanent care and the child [D.] being put up for adoption. She indicated she knew there would be no trial or hearing of the matter. I advised her that we would need to appear briefly before the court to indicate that consent.

[42] It is only the assertions contained in paragraphs 41 and 43 of Mr. Sutherland's affidavit which Mrs. C. strongly contests. It is clear she was not rushed into a meeting room, bombarded by various information, and rushed into the courtroom. Mrs. C. acknowledged during her *viva voce* evidence that she met with Mr. Sutherland following the meeting with Ms. McFadgen and the new witness, Ms. Mason. She acknowledged he advised her of the negative impact Ms. Mason's evidence would have on her case, and this new witness would likely be found to be credible by the court. She acknowledged she was at the Superstore on the day she was seen by Ms. Mason, but she was not "with" her husband, rather

coincidentally arriving at the same time. She acknowledged Mr. Sutherland recommended she consent to a permanent care order, but he had indicated he was willing to proceed with a contested hearing if that was her instruction. She acknowledged after her meeting with Mr. Sutherland, she went for a walk over the lunch hour prior to returning to court. None of this was contained in her affidavit, and it paints a significantly different picture than the initial impression left by Mrs. C. in her affidavit, and in the factum filed on her behalf.

[43] With respect to the issue of consent, I accept the evidence of Mr. Sutherland over that of Mrs. C.. She simply is not credible. The inconsistencies in the content and tone of her affidavit evidence, as compared to her *viva voce* evidence is concerning. Further, Mrs. C. has a well-documented history of telling the court what she thinks will assist her case, not necessarily the truth. I point to her blunt evidence that despite swearing to the court in November 2014 that she viewed Mr. C. as a sexual predator, she never considered such to be true. That earlier representation, she explains, was only a "strategy" to regain custody of her daughter. Similarly, although she acknowledged in the same affidavit she had been having contact with Mr. C. as alleged by the Minister's multiple witnesses, she now tells this Court all of those sightings were not her and Mr. C., but rather

their identical twins. No evidence was adduced as to the existence or whereabouts of these alleged twins.

[44] Finally, there is one particular aspect of Mrs. C.'s *viva voce* evidence which I find particularly enlightening with respect to the reliability of her assertions. Although she adamantly denies instructing Mr. Sutherland to consent on her behalf to a permanent care order, she confirmed she did instruct him to seek a final visit with the child. She explained this was particularly important to her, as she had never received, as promised by the Minister, a final visit with her older child when she had consented to his permanent care order. Mrs. C. advised this Court that in instructing Mr. Sutherland, she wanted to make sure he asked for a final visit with her daughter. In my view, this evidence is incompatible with her assertion she did not consent to permanent care, and was expecting to proceed to a contested hearing. Her instruction to Mr. Sutherland to negotiate a final visit, which he did, is entirely consistent with his evidence that she had instructed him to consent to the child being placed in the permanent care of the Minister.

[45] I am satisfied based upon the record and evidence given before this Court, that Mrs. C. did instruct Mr. Sutherland to consent to a permanent care order in relation to D.F.C.. I am further satisfied she understood the consequences of a

permanent care order. She acknowledged such in her *viva voce* evidence. I am further satisfied she made that decision of her own volition.

[46] I turn to the other complaints in relation to Mr. Sutherland's representation. Based on Mrs. C.'s own *viva voce* evidence, I find no merit to her allegation she was misinformed about the nature and consequences of consenting to a finding that D.F.C. was a child in need of protective services. Mrs. C. had previously, with the benefit of different legal counsel, consented to the same finding in relation to her older child. She was well aware of the legal consequences of doing so.

[47] I turn now to consider the nature and quality of the advice Mr. Sutherland gave to his client. Two aspects of Mr. Sutherland's representation are particularly important. He recommended Mrs. C. consent to a finding that D.F.C. was in need of protective services, and he recommended Mrs. C. acknowledge the risk that Mr. C. posed to D.F.C. and to separate permanently from him.

[48] In my view, the advice offered by Mr. Sutherland was not only reasonable, but likely the only realistic means of Mrs. C. maintaining any chance of regaining custody of D.F.C.. It is difficult to imagine a more challenging scenario from Mr. Sutherland's perspective. His client had just had another child permanently removed from her care as a result of a consent order in which she acknowledged

her husband posed a substantial risk of harm to the child. The record from that earlier proceeding showed Mrs. C. had expressed a willingness to separate from her husband, but she was repeatedly seen with him. There was substantial evidence, including from experts, which strongly supported the Minister's view that Mr. C. posed a substantial risk of sexual abuse to younger children.

[49] It is also significant in my view that in providing advice to Mrs. C., Mr. Sutherland was faced with the reality that in both the previous proceeding, and in the current one, Mr. C., had consented to findings his children were in need of protective services pursuant to s. 22(2)(d) of the *Act*. It would be difficult in light of this, for Mr. Sutherland to challenge the Minister's allegation that Mr. C. posed a risk to D.F.C., when the alleged source of the risk, had in effect acknowledged it.

[50] Mr. Sutherland's advice that Mrs. C. should acknowledge the risk and separate from her husband in the context of the record before him, was far from ineffective. Mrs. C. testified she accepted this advice, told her counsel she would follow it, but that she had no intention of separating from Mr. C. in the long-term. The outcome in the court below which Mrs. C. now seeks to reverse, has nothing to do with the ineffective representation of her counsel. The result is a consequence of her failure to follow through with the prudent advice he gave her.

[51] I would dismiss this ground of appeal.

Did the family court judge fail to abide by the statutory duty contained within s. 41(4)(c) of the Act?

[52] The appellants submit Judge Sparks breached her statutory obligation to ensure their consent to the permanent care order was informed and voluntary. Relying on an earlier decision of this Court, **Family and Children's Services of Lunenburg County v. G.D.**, [1997] N.S.J. No. 272, they say the permanent care order should be set aside.

[53] Section 41(4) of the *Act* requires a judge to turn his or her mind to several considerations when faced with a consent to permanent care. It provides:

> (4) Where a parent or guardian consents to a disposition order being made pursuant to Section 42 that would remove the child from the parent or guardian's care and custody, the court shall
>
> (a) ask whether the agency has offered the parent or guardian services that would enable the child to remain with the parent or guardian;
>
> (b) ask whether the parent or guardian has consulted and, where the child is twelve years of age or more, whether the child has consulted independent legal counsel in connection with the consent; and
>
> (c) satisfy itself that the parent or guardian understands and, where the child is twelve years of age or older, that the child understands the nature and consequences of the consent and consents to the order being sought and every consent is voluntary.

[54] In this appeal, the appellants only raise concerns with respect to Judge Spark's obligation under s. 41(4)(c) of the *Act*. This Court has recently had the opportunity to consider **G.D.** in the context of an allegation that a lower court failed to meet the statutory obligation contained in that subsection. The Court in **M.W.**, **supra**, noted:

> [71] In *G.D.*, the appellant who had been represented by counsel, submitted that the consent she provided to an order for permanent care and custody in relation to her young child, was not fully informed. She asserted she understood that her child would, following such order, be placed for adoption within her extended family, and as such, she would have continued contact. That did not take place. There, the appellant was described as being of "borderline level of intelligence". It was argued that the trial judge breached the statutory duty in s. 41(4)(c) as he made no inquiry as to whether she was consenting or its voluntariness.
>
> [72] The Court ultimately agreed with the appellant. Writing for the Court, Pugsley, J.A. noted:
>
> > [39] The key question is whether the Court is required, in the course of satisfying itself, of the issues raised in s. 41(4)(c) to direct questions in Court (as well as obtain responses) to the parent or guardian, or where the child is 12 or more, to the child. (By expressing the question in this manner, I do not mean to imply that the Court, in the course of satisfying itself, should limit itself to inquiries of this nature.)
> >
> > [40] In my opinion, unless there are exceptional circumstances, which do not appear in this case, the Court should conduct such an in court inquiry.
> >
> > [41] I concede there may be exceptional circumstances, in a case where:
> >
> > 1. The parties are represented by counsel, and counsel specifically addresses the issues raised in s. 41(4)(c);
> > 2. The client is present in Court to hear the exchange between the judge and his, or her, counsel. (Although Ms. D. was present in Court, the issues raised in s. 41(4)(c) were not specifically addressed in Ms. D.'s presence.)
> > 3. There is nothing in the evidence previously heard by the Court to affect the issues.
> >
> > [42] Even in the exceptional circumstances postulated, I would suggest the better practice is for the Court to directly question the parties involved.

> [73] Justice Pugsley noted the assessor's observations regarding the appellant's level of intelligence, and that even at age 26 was still viewed "as a child in the home, even when of adult age". He indicated such was "cogent indicia" that a direct inquiry by the trial judge respecting the issues raised in s. 41(4)(c) was warranted.
>
> [74] From the transcript, it is clear the family court judge did not directly ask the appellant whether she was consenting, nor whether the consent was voluntary. The appellant asserts that the present case is on all fours with *G.D.* and the result -- remitting the matter back to the family court for a permanent care and custody hearing, should also be the same.
>
> [75] Although it would have been preferable for the family court judge to confirm directly with the appellant that her consent was being voluntarily given, his failure to do so in this case does not justify appellate intervention. Here, there is no suggestion the appellant was intellectually impaired. She had been present at every court proceeding and had the opportunity to hear the exchanges between counsel and the court, specifically on March 17th and 24th when the matter of consent had been raised. Further, she had received the Plan of Care which clearly set out the consequences of consenting to the permanent care and custody order. In my view, such falls within the "exceptional circumstances" as contemplated by this Court in *G.D.*

[55] Like in **M.W.**, it appears Judge Sparks did not directly confirm with the appellants that they were consenting to the permanent care order, nor confirm their consent was informed and voluntary. With respect, it seems undertaking that inquiry would not be onerous and, in light of the statutory directive, and the potential for a resulting order to be challenged on appeal, such should be done as a matter of course.

[56] The above being said, the failure of Judge Sparks to undertake that inquiry does not, in the circumstances of this case, constitute reversible error. Clearly Judge Sparks had satisfied herself as to the adequacy of the consent – her order explicitly says so. Here the appellants were represented, had previously consented

to a permanent care order, and had been earlier advised by the court of the consequences of such an order at the protection hearing. Judge Spark's conclusion that the appellants' consent was informed and voluntary was well-founded.

[57] I have previously concluded Mrs. C. had effective legal representation, understood the consequences of consenting to the order and had instructed her counsel accordingly. Mr. C. has not argued he did not understand the consequences of the consent offered by Mr. Penny on his behalf, nor that his counsel had lacked the authority to offer his consent to the permanent care order. None of the concerning factors that were present in **G.D.** are present in this case.

[58] Section 41(4)(c) of the *Act* is intended to protect the interests of parties who, through misunderstanding, coercion or otherwise may not be validly consenting to a permanent care order. This provision should not be used as a means for those who clearly gave valid consent, to later reconsider and rescind that decision. In my view, that is exactly what happened here, and as such, the circumstances fall within the type of exception contemplated in **G.D.**.

[59] I would dismiss this ground of appeal.

Do any of the other host of concerns raised by the appellants justify appellate intervention?

[60] The appellants raise a number of "concerns" and allege they individually or collectively, justify appellate intervention. I disagree. There is not a scintilla of merit in any of the arguments advanced.

[61] It was submitted the Minister failed to make clear to Mrs. C. the expectation that she separate from her husband. Mrs. C. argues that by virtue of the Minister offering services aimed at preserving the family unit, she was confused and did not understand she ought to be separating from her husband. Further, she says the Minister did not make clear that if she failed to separate from Mr. C., she was at risk of permanently losing her child.

[62] While the record does disclose that early in the proceeding relating to the older child A.D.C., the Minister offered couples counselling to the appellants, it was discontinued shortly thereafter. No such services were offered in the course of the proceeding relating to D.F.C.. The materials I have noted earlier show that it is preposterous for Mrs. C. to suggest the Minister did not make clear the expectation the appellants separate, and the consequences of not doing so.

[63] It is equally preposterous to suggest, given the appellants had asserted in both proceedings they had in fact separated, that they did not understand they were expected to do so. The fact they had consented to a permanent care order in

relation to A.D.C., makes the assertion that they did not understand the consequences of failing to separate, ludicrous. Mrs. C.'s *viva voce* evidence before this Court underscores she fully knew the Minister expected her to separate from her husband, given the risk he posed to their child.

[64] The appellants also raise concern with respect to the nature of the order for permanent care. They make a convoluted argument that the permanent care order, by virtue of being a consent order, is somehow inherently inadequate. In her written submissions, the appellants' agent opines:

> 2 The case being appealed is a consent order. This case was not judged on the merits or the balance of probabilities. The Minister, in this case, has not proved it's allegations as would have been required if a trial had commenced. The agents for the Minister and Department of Justice lawyers, it seems to me, had already decided that Mr. [C.] is a child molester, and therefore, a substantial risk to his children. The balance of probabilities, however, is for a Judge to decide so any references to the case being appealed having no merit, has not been decided in a court of law and are opinions of the various government agents and employees. There is extremely little rebuttal evidence before the family court from Mr. and Mrs. [C.].

[65] I have already concluded that in the present case, the appellants gave valid consent to the permanent care order. As such, there is no merit to the suggestion that a consent order for permanent care is somehow inferior to an order rendered following a hearing. The *Act* specifically contemplates such orders being made, with consent. That process is legislatively recognized as being a valid means to

concluding a disposition hearing. It is also worthy of note that it is ultimately the court which must issue the order, and must be satisfied of the appropriateness of the disposition given the directives contained in s.41(4) of the *Act*. In the present case, it is clear from her oral decision, Judge Sparks had reviewed the materials before the court, including the Minister's Plan of Care, and was satisfied that the disposition was in the best interests of the child. There is nothing inherently flawed with the order for permanent care.

[66] Related to the above, in her oral submissions Ms. Watson makes an equally convoluted assertion Judge Spark never rendered an order for permanent care. She says the order under appeal was a creation of Ms. McFadgen who drafted it, and must therefore be invalid. She said if such an order had ever been issued by Judge Sparks, she was unaware of it, as it was never provided to the appellants. Incredibly, as Ms. Watson was making this submission, she was holding in her hand the appeal book she compiled on behalf of the appellants. That appeal book contains the order under appeal, being a permanent care order clearly initialed by Judge Sparks and displaying the court's stamp.

[67] The appellants also complain that it was the Minister's staff and Department of Justice staff – not the trial judge, who reached the conclusion that D.F.C. was at risk, and that Mr. C. was a sexual offender. They further complain it was primarily

the same staff who provided the reports of their continuing contact. The appellants suggest the involvement of staff should be concerning to this Court, and somehow undermines the integrity of the order under appeal.

[68] This argument demonstrates the fundamental lack of understanding fueling the appellants' position. It is the legislative mandate of the Minister, through her employees and delegates to protect children from harm. This includes assessing whether the circumstances of a child place them at risk of harm. It is the day to day business of the Minister, her staff and delegates, to identify, assess and provide services to address the risk to children. This includes investigating allegations and identifying evidence that children may be in need of protective services.

[69] Sometimes the level of risk as assessed by the Minister, her staff or agents, results in a decision to take a child into care, as happened here, pursuant to s. 33(1) of the *Act*. That provision reads:

> 33(1) An agent may, at any time before or after an application to determine whether a child is in need of protective services has been commenced, without warrant or court order take a child into care **where the agent has reasonable and probable grounds to believe that the child is in need of protective services** and the child's health or safety cannot be protected adequately otherwise than by taking the child into care. (emphasis added)

[70] Clearly, to bring an application under the *Act*, the Minister must have reasonable grounds to believe a child is in need of protective services. That belief

is then subsequently tested before the court, as it was here. The point is however, that the initial belief a child is at risk, must be made by staff, and then advanced by the Minister by way of court application. The belief held by staff and the Minister that D.F.C. was in need of protective services was found to be valid by Judge Sparks at the protection hearing.

[71] With respect to the concern that the Minister's staff and Department of Justice staff were potential witnesses, I find nothing unusual or sinister about such a scenario. Staff regularly testify as to their observations regarding the parties before the court. Here, Department of Justice staff were aware of the concerns relating to Mr. C. and that the appellants were, supposedly, separated. When the couple was observed together, the same staff would be, unlike general members of the public, keenly aware of the relevance of this. There is nothing unusual about those types of observations being made, and reported in relation to a child protection proceeding, especially in a smaller community.

[72] Finally, the appellants take issue with the conduct of the Minister's trial counsel, Patricia McFadgen. In their factum, they assert:

> 26. Patricia McFadgen, Minster's counsel, is on the record, giving consent to the court on behalf of Mrs. [C.]. Ultra vires. Does this have the effect that Mrs. [C.]'s alleged consent does not legally exist?

And further:

> 33. The Order was drafted and drawn by Patricia McFadgen, counsel for the Minister. Ms. McFadgen was a witness against the [C.s] which causes mistrust of the justice system and must be a conflict of interest.
>
> 34. The recital: AND UPON the respondents, [C.C.] and [G.C.], consenting to the Order for Permanent Care and Custody . . . .and giving this consent freely . . . .this is only the opinion of Patricia McFadgen as there is no evidence in the transcript to support this. At least not for [C.].

[73] Ms. McFadgen was one of the potential witnesses who had observed the appellants together in the community. The record discloses Ms. Aleta Cromwell attended on behalf of the Minister at a pre-hearing conference on July 15, 2014. At that time, Ms. Cromwell advised the court and the parties she would be undertaking carriage of the file, given Ms. McFadgen's potential as a witness.

[74] Ms. Cromwell was unable, due to illness, to represent the Minster at the scheduled disposition hearing, and the first scheduled day was adjourned due to her unavailability. The record discloses Ms. McFadgen wrote to the court on December 30, 2014, copied to the appellants' counsel, in which she advised:

> I have been advised that Ms. Cromwell will not be returning to the office in time for the scheduled hearing dates. I am, however, available at the hearing. Although I voluntarily removed myself as counsel for this matter due to witnessing the Respondent parents together in the community, I understand from reviewing the Respondent parents respective plans that the contact I observed is no longer in dispute. In the circumstances I do not believe that I am in conflict any longer, and, with Your Honour's permission, it would be my intention to represent the Minister of Community Services during this proceeding.

[75] There was no concern raised by the court, nor the appellants, to Ms. McFadgen acting as trial counsel. In the circumstances, the appellants' criticism before this Court of Ms. McFadgen's involvement at the hearing below, is unfounded.

[76] I have already determined there is no validity to the appellants' assertion Ms. McFadgen consented to the permanent care order on behalf of Mrs. C.. That leaves the appellants' concern that Ms. McFadgen acted inappropriately in drafting the permanent care order. The appellants' concern in this regard is also completely unfounded.

[77] Ms. McFadgen undertook the drafting of the order, as is commonly done, at the request of the court. She then proceeded to circulate a draft order to the appellants' legal counsel for any input. Receiving none, she then forwarded the order to the court. It was ultimately Judge Sparks who received, reviewed and initialed the permanent care order. The order was reflective of her decision, and included a recital she was satisfied of the appellants' consent; that it was given freely, and that they understood its nature and consequences. Like the others, this complaint with respect to the conduct of Ms. McFadgen is entirely unwarranted.

[78] At this juncture, I feel compelled to make several observations regarding Ms. Watson's involvement in this matter as the appellants' "assistant". Although she may have been well-intentioned, Ms. Watson was of no apparent assistance to the appellants in this matter. After hearing Mrs. C. testify and speak on her own behalf, I am certain she could have represented herself and her husband as effectively, if not more so, than Ms. Watson.

[79] It would appear it was Ms. Watson who drafted the appeal documents, Mrs. C.'s affidavit and prepared the factum. I have already commented upon the inconsistencies between what was written in both documents, and Mrs. C.'s *viva voce* evidence. This is concerning. In a previous chambers decision issued in this matter, Justice Fichaud commented upon the frequently changing positions advanced by Ms. Watson on behalf of the appellants (2015 NSCA 28). This is concerning. In this matter, Ms. Watson has, on behalf of the appellants, advanced very serious allegations of professional misconduct and inadequacy against Mr. Sutherland and Ms. McFadgen, all completely without merit. This is concerning.

[80] What is of ultimate concern to the Court is the fact Ms. Watson has now appeared as "agent" (as she refers to herself) in two child protection appeals (see

also **M.O. v. Nova Scotia (Minister of Community Services)**, 2015 NSCA 26). She has advanced arguments which demonstrate a fundamental lack of understanding of legal issues and process. When decisions are being made regarding the permanent removal of a child from their family of origin, there can be no room for those who are dabbling in quasi-legal representation and clearly grasping at legal straws. The stakes are too high.

[81] I am fearful that should Ms. Watson continue to offer her "assistance" to parents in such circumstances, she may, by virtue of her incompetence, jeopardize an otherwise meritorious appeal. Although Ms. Watson may believe she is helping individuals access justice, that goal is hampered if she impairs their case.

[82] In the present matter, I have carefully reviewed the entirety of the record, and considered the fresh evidence before the Court. I am satisfied there was no merit to the appeal, either in terms of the stated grounds, or otherwise. Ms. Watson's "assistance" here, although ineffective, did not in any way give rise to a miscarriage of justice.

DISPOSITION

[83] I would dismiss the appeal, without costs.

Bourgeois, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.