ONTARIO

Superior Court of Justice
(Name of Court)

Court File Number
FS-20-16365

at **393 University Ave., 10th Floor, Toronto, Ontario, M5G 1E6**
(Court office address)

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Children's Aid Society of Toronto **30 Isabella Street** **Toronto, ON M4Y 1N1**	**Alex De Melo** **Children's Aid Society of Toronto** **30 Isabella Street** **Toronto, ON M4Y 1N1** **Tel: 416-924-4640 x2584** **Fax: 416-324-2550** **ademelo@torontocas.ca**

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
[redacted] **[redacted]**	**Mira Pilch** **Gottlieb Law Firm** **40 Sheppard Avenue West, Suite 200** **Toronto, ON M2N 6K9** **Tel: 416-227-1653** **Fax: 416-227-1678** **mpilch@gottlieblawfirm.com** **Tammy Law** **Tammy Law Professional Corporation** **151 Bloor Street West, Suite 604** **Toronto, ON M5S 1S4** **Tel: 416-410-4808** **Fax: 416-691-7368** **wingyun@tammylaw.ca**

FACTUM OF THE APPELLANT
[redacted]

I – OVERVIEW AND ISSUES

1. This is an appeal of the decision of Justice Zisman, dated April 9, 2020 which suspended face to face access between the parents and child during COVID-19. The Appellant father appeals from that decision. This appeal concerns the appropriate legal test for access during the COVID-19 pandemic in child protection cases; the evidentiary requirements for such motions; and the duty of the Society, as an arm of the state, to act fairly.

2. The Appellant father submits that the motion judge made the following errors, any one of which would justify an overturning of the decision:

    a. The motion judged failed to apply the correct legal test applicable to a variation in access.

    b. The motion judge erred by failing to consider the *Charter* rights at stake and the importance of pre-trial access in child protection cases

    c. The motion judge drew improper inferences from the evidence, relied on irrelevant evidence, and relied on speculation to reach her conclusions.

    d. The Appellant was denied the right to due process and substantive fairness, which is contrary to the principles of fundamental justice.

3. The Appellant father also relies on the Appellant mother's factum with respect to the other grounds of appeal raised in his notice of appeal, and in particular the motion judge's application of the incorrect legal test for the admission of medical opinion, and the motion judge's failure to consider the least intrusive access order possible.

II – FACTS

4. The Appellant father adopts the statement of facts as set out in the Appellant mother's factum.

5. In addition to the facts set out in the Appellant mother's factum, it is important to note the following:

    a. There was no evidence that the parents failed to follow any conditions imposed by the Society or the

court.

b. There was no evidence of the parents being uncooperative with any request made by the Society.

c. There was no evidence that the parents had ever acted inappropriately at any medical appointment for the child.

d. There was no evidence that *any* of the access visits which occurred, including access supervised by the Society via video one day before it suspended access, put the child at risk or were not in the child's best interests.

e. There was no evidence (specific or otherwise) of the parents failing to take COVID-19 precautions.

f. There was no evidence that the maternal grandparents had health conditions that made them more susceptible to COVID-19.

g. The Society produced no evidence of the criteria it would use to determine when face to face access could be reinstated.

6. In addition, the Society failed to produce evidence of any change that occurred between March 17, 2020 (the day of the all-party meeting) and the date of the motion, except the one paragraph opinion of Dr. Aref. The Appellant father has filed fresh evidence which disputes the accuracy of the Society's evidence with respect to Dr. Aref's statements and the reliability of his opinion.

7. The Appellant father has also filed fresh evidence to address the misleading information the Society included in its affidavit before the motion judge.

The Motion Judge's Decision

8. In her reasons for judgment, the motion judge acknowledged that:

a. There was no evidence that there were any concerns about the parents' access visits;
b. The Society had been prepared to allow the maternal grandmother to supervise access during the meeting of March 17, 2020;

c. There were no concerns with the March 18, 2020 access visit that was supervised by the Society remotely via Skype.;
d. The parents had taken "extreme caution" with respect to COVID-19 and had done everything possible to comply with COVID-19 precautions.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, paras. 22, 24-25, 30, 30, 35-38, 97

9. Despite the above findings, the motion judge suspended the parents' access. In coming to her decision, the motion judge relied heavily on the evidence provided by the Society.

10. In particular, the motion judge concluded that the parents and maternal grandmother had minimized the child's vulnerabilities and had attempted to "bolster the need for in person contact by the parents". Specifically, she adopted the following concerns raised by the Society in its affidavit:

a. The parents and maternal grandmother do not have a clear understanding of the child's complex medical and developmental needs. In particular, they minimized the "protection concerns" during their meeting on March 18, 2020.

b. The mother's affidavit is contradictory in that she states that the child is exclusively breastfed and her ability to breast feed will be impacted by a loss of face to face access, but also states that she struggles with latching and the child transitions between breast milk and formula; and

c. The mother made a video in February 2020, where she refers to the child as a "cross-eyed baby" and said that his fontanel dip is so large it could "hold a bowl of cereal". The grandmother did not express concerns about the video.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, paras. 46-52

11. The motion judge also concluded that the maternal grandmother failed to take the child's injuries seriously and had little insight into the child's medical and developmental needs.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, paras. 52, 88

12. The motion judge further relied on the opinion of Dr. Aref, who claimed that the Society's directive to suspend all access was the "best thing to do right now", and that the child is "definitely at risk of getting more sick compared to other children if he gets exposed to illnesses including COVID-19". She relied on this opinion despite Dr. Aref stating that he had not seen any increase in patients with COVID-19 in his practice, and therefore, had minimal first-hand knowledge or experience of the disease.

    Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, paras. 42-45

13. The motion judge also found that, "this is not a case where it is likely that the child will be returned to the parents in the immediate future. There is still no explanation of his serious injuries while in the care of his parents". She further noted that "there is of course no expert evidence that the child will not be able to attach to his parents if there is a suspension of face to face contact".

    Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, para. 53

14. The motion judge found that the mere fact of requesting access every day at the grandparents' home raises concerns about the parents' real understanding about the spread of COVID-19. She made this judgment despite counsel clarifying in submissions that the parents would be content with the prior access schedule or any other access arrangement ordered by the court.

    Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, para. 94

III – LAW AND ANALYSIS

A. The Motion Judge Failed to Apply the Correct Legal Test

15. In *Catholic Children's Aid Society of Toronto v. R.M.*, Justice Sherr set out the well-known legal test to vary an access order. Specifically:

    a. The party seeking the change in order has the onus of establishing that a sufficient change in circumstances has taken place since the making of the last court order.

    b. The court should conduct a contextual analysis when exercising its discretion as to whether it is in a

child's best interests to change the access order, and if so, what terms and conditions are appropriate. The purposes in section 1 of the Act should always be at the forefront of the analysis.

Catholic Children's Aid Society of Toronto v. R.M., 2017 ONCJ 784, at para. 85

16. In *R.M.*, Justice Sherr also provided a list of factors to be considered in its contextual analysis (step 2 of the test). These factors include considering the proportionality of the requested change; the degree to which the change reduces or increases risk of harm to the child; the extent to which the change meets the objectives in s.1 of the *CYFSA*; the best interests factors set out at s.74(3) of the *CYFSA*; the importance of gradually increasing access so that such access does not remain static; the stage of the proceeding.

Catholic Children's Aid Society of Toronto v. R.M., 2017 ONCJ 784, at para. 83

17. The motion judge did not consider the access test established by Justice Sherr in *R.M.* In particular, there was no consideration of whether the Society had discharged its onus of establishing that there was a sufficient change in circumstances. Nor did she consider the multiple contextual factors set out in *R.M.*

18. The motion judge provided no principled reason why the carefully formulated test for access in *R.M.* should be departed from during a pandemic. The Appellant father submits that in fact, the existence of exceptional circumstances such as this pandemic, makes it even more important that decisions which have significant impact on families and children are made grounded in long-established legal principle. As noted in *Multani v. Rana*, "fear of coronavirus, while understandable in the context of our natural desire to protect our children, cannot be the sole determinant of parenting arrangements." Where a sense of personal safety from the coronavirus may be far off, it is important that decisions about children's best interests not be made on the basis of presumptions and fear.

Multani v. Rana, 2020 ONSC 2433, at para. 66

19. The Appellant father submits that the proper legal test to apply in these exceptional circumstances is as follows:

a. First, the well-established legal test for ordering or changing access pursuant to caselaw developed under the *CYFSA* should be applied, without consideration of COVID-19.

b. Second, after the court has determined what access is in the best interest of the child, the party seeking to depart from the order due to COVID-19 considerations bears the onus of providing specific evidence that this should be the case. The least intrusive order should be considered. Only admissible evidence should be relied upon.

20. The separation of COVID-19 considerations from the traditional access test is important because it more clearly crystallizes the importance of the access order on a standalone basis. The legal rigour of a two-part test prevents the clouding of judgment that may occur as a result of fear about COVID-19. It also forces courts to recognize that pre-trial access between children and parents is a *Charter* right that should be preserved absent relevant and compelling evidence that the parent does not take COVID-19 seriously.

21. The proposed framework for analysis is similar to the approach adopted in domestic caselaw, with modifications to include the different access test in child welfare. In *Ribeiro v. Wright*, Justice Pazaratz alluded to this approach when he stressed that existing parenting arrangements and schedules should continue because they reflect a determination that was made based on the best interests of the child, subject to whatever modifications may be necessary to ensure that COVID-19 precautions are adhered to. In other words, Justice Pazaratz contemplated a two-step process: first, a consideration of what is in the child's best interests; second, a consideration of whether concerns about COVID-19 justify a modification.

Ribeiro v. Wright, 2020 ONSC 1829, at paras. 7, 11

22. Recent child protection cases also appear to apply this two-step approach.

See e.g. *Catholic Children's Aid Society of Toronto v. D.A.*, 2020 ONCJ 206
See e.g. *Children's Aid Society of the Region of Waterloo v. J.N.*, 2020 ONSC 2999

23. In this present case, the order that was in existence at the time this motion was brought was a temporary access order, providing for access at the discretion of the Society, and supervised by the Society. The Society had initially sought the access order, consented to the access, and ultimately supervised access for 3 months prior to suspending it. Multiple cases have established that access at the Society's discretion does *not* include the right to suspend access.

Children's Aid Society of Hamilton v. M.N., 2007 CanLII 13503 (ON SC) at paras. 41-42
Children's Aid Society of Toronto v. N.N., 2017 ONCJ 827 at para. 16

24. In this circumstance, the Society had the onus of establishing a sufficient change in circumstances. Despite this fact, the parents were forced to bring the motion to reinstate their access; the Society did not request a motion date despite knowing there was no consent to its proposed change. There is no principled reason why the Society should be allowed to depart from its obligation to bring motions to vary access, where there is no consent.

    14B Motion Form on behalf of [redacted], dated March 24, 2020, Appeal Record, Tab 7, dated March 24, 2020

25. The Society is clearly unable to meet its onus of establishing a sufficient change in circumstances in this case. There are no facts which would suggest that the access plan proposed by them on March 17, 2020 is not in the child's best interests. All of the facts relevant to access and protection concerns were known to the Society on March 17, 2020, when they agreed to an access trajectory that would expand access.

26. Even if the Society is able to establish that a sufficient change in circumstance has occurred, a review of the contextual factors set out in *R.M.*, without looking at COVID-19 considerations, would yield an access order as set out in the Society's proposed access trajectory. The undisputed evidence is as follows:

    a. There had been 3 months of positive supervised access between the parents and child, with no concerns.
    b. The Society had previously approved the grandmother as an access supervisor while the child was in the hospital.
    c. The Society was prepared to approve her again as an access supervisor at the March 17, 2020 meeting.
    d. The parents and grandmother had been compliant with all requests made by the Society.
    e. The parents and grandmother had attended at medical appointments, and had followed through with all medical recommendations.

    In these circumstances, and having regard to the principles of family-reunification and the importance of ensuring that access not remain static, an order for expanded access would be proportionate, reasonable, and consistent with the principles set out in *R.M.*

    Affidavit of [redacted], sworn March 29, 2020, Appeal Record, Tab 16, at paras. 3, 7, 8, 9, 12, 13-19, 22-23, 34

Affidavit of [redacted]r, sworn March 30, 2020, Appeal Record, Tab 17, at paras. 44, 45, 47, 50, 53a
Affidavit of [redacted], sworn March 27, 2020, Appeal Record, Tab 15, at paras. 5-6

27. Turning to COVID-19 considerations, the Society bears the onus of providing specific evidence that COVID-19 justifies departing from the access plan. It has not done so. Specifically:

a. The undisputed evidence is that the parents are complying with all COVID-19 precautions and had gone to great lengths to ensure that the recommendations were being followed.

b. The Society provided no evidence that the kin caregivers have any underlying condition that would put them at greater risk of severe illness due to COVID-19, and in fact the grandmother is not even 60 years old.

c. The undisputed evidence is that the parents and grandparents did not have any COVID-19 symptoms.

d. The one-paragraph opinion of Dr. Aref should not have been admitted as it is not proper opinion evidence (see the Appellant mother's factum). Furthermore, Dr. Aref's opinion, even if accepted, does not address the issue of the minimal risk posed to the child if everyone within his social bubble is taking extreme precautions to COVID-19.

e. The undisputed evidence is that the parents and grandparents have a plan for access. This included continuing with social distancing recommendations, remaining inside the home for access, changing clothes after arriving for access, driving a private car to visits, and frequent handwashing.

Affidavit of [redacted], sworn March 29, 2020, Appeal Record, Tab 16, at paras. 27-34
Affidavit of [redacted], sworn March 27, 2020, Appeal Record, Tab 15, at paras. 23-43
Affidavit of [redacted], sworn March 30, 2020, Appeal Record, Tab 17, at paras. 75-86

B. The motion judge erred by failing to consider the *Charter* rights at stake and the importance of pre-trial access in child protection cases.

28. The motion judge erred in law when she failed to follow and apply the principles developed by domestic courts in parenting cases related to COVID-19. The Appellant submits that the principles developed by

domestic courts, and specifically, the principles that court orders should be followed, parent-child relationships maintained, and that such relationships are not to be disrupted unless a child's health and safety are at risk, are of even greater relevance to child protection cases. The motion judge's failure to apply these principles contradicts well-established principles about the heightened importance of pre-trial access in child protection proceedings.

29. The motion judge's refusal to apply domestic caselaw was furthermore based on an incorrect understanding of the difference between domestic and child protection cases. Specifically, the motion judge's claim that children in child protection are "inherently vulnerable having been in problematic care situations" and that "their caregivers have been found not to be able to meet their needs even with terms of supervision" shows a fundamental misunderstanding of the difference between domestic and child protection proceedings at the pre-trial stage.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, paras. 78-79

30. The fundamental difference between child protection and domestic proceedings is not that caregivers have been found unable to meet the needs of their children. This is particularly the case at the pre-trial stage, where the protection concerns raised by the Society are *allegations* that have not been proven. Rather, the fundamental difference between child protection and domestic proceedings is that child protection proceedings involve the intrusion of the state into family life. The removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent, which is protected by s.7 of the *Charter*. This intrusion is significant, and the interests at stake has been described by the Supreme Court of Canada as being "unquestionably of the highest order", "an individual interest of fundamental importance in our society", and a "gross intrusion into a private and intimate sphere".

New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46, at paras. 61, 76

31. The Newfoundland Court of Appeal has recognized that s.7 of the *Charter* is engaged in decisions about access. In *J.T. v. Newfoundland and Labrador (Child, Youth and Family Services),* Justice Hoegg stated that s.7 of the *Charter* clearly protects the substantive right of access. Chief Justice Greene also recognized that the denial of access is the very thing that will bring about the serious interference with the psychological integrity that the Supreme Court has said s.7 protects. As a result, courts must ensure that any interference in access, particularly at the pre-trial stage strictly accords with the principles of fundamental

justice.

> *J.T. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55, at paras. 9, 143, 148

32. The principles of fundamental justice are both substantive and procedural. From a procedural perspective, courts must ensure that pre-trial motions are conducted in a fair manner. From a substantive perspective, courts must take special care to ensure that parental rights and relationships to children are maintained pending the merits of the child protection concerns being adjudicated at trial.

> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 70

33. In *Children's Aid Society of Toronto v. M.A.*, Justice Katarynych noted that a pre-trial access arrangement which sets up the withering of the child's relationship with his parents is contrary to the principles of fundamental justice. She stated as follows:

> It is fundamentally unfair at the earliest stages of a court case to provide a level of access that in its effect sets the child on the path to a loss of his family… possession of the child pending adjudication of a protection application is not licence to ignore the fact that the society's authority over this child is temporary, *that there has been no judicial finding that this child is in need of protection at all – much less to the degree alleged by the Society – and that the outcome of the protection application is unknown to any of the parties*. The society's apprehension of the child from his mother's care had already disrupted a process of parent-and-child attachment that had barely begun. The uncertainty of outcome makes it particularly important that the society arrange parent-and-child access in a manner that does not create an ever-widening chasm between the child and his family.

> *Children's Aid Society of Toronto v. M.A.*, 2002 CanLII 45665 (ON CJ), at para. 24(7)

34. Other courts have also noted that the application of *Charter* rights in child welfare proceedings means that every effort must be made to preserve parent-child relationships before a trial. Thus, in *R.M.*, Justice Sherr criticized the "material change in circumstances" test in domestic case law as being "**too high a bar**" for child welfare and inconsistent with *Charter* rights. It is also for this reason, and specifically as a result of a

recognition of the disruption caused by state intervention, that Justice Kukurin in *Children's Aid Society of Algoma v. S.P.* adopted the "maximum contact" principle in child protection cases.

Catholic Children's Aid Society of Toronto v. R.M., 2017 ONCJ 784, at paras. 71-72
Children's Aid Society of Algoma v. S.P., 2011 ONCJ 93, at paras. 19, 22, 26

35. In this case, the motion judge erred in law when she failed to recognize the importance of the pre-trial right to access and the *Charter* rights at stake. She did so by assuming that the Society's allegations had been proven, opining at para. 53, that "this is not a case where it is likely that the child will be returned to the parents in the immediate future". By doing so, the motion judge presumed the truth of the Society's unproven allegations which led her to devalue the importance of maintaining pre-trial access between the child and his parents. Contrary to the motion judge's statement, the indefinite suspension of pre-trial access is not trivial, and not akin to situations where children are unable to see their parents because of vacations or medical treatment.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, at paras. 53, 79, 90, 97

C. The motion judge drew improper inferences from the evidence, relied on irrelevant evidence, and relied on speculation to reach her conclusions.

36. An error that is palpable and overriding includes findings of fact that are unreasonable or not reasonably supported by the evidence. A non-exhaustive list of errors in the fact-finding process that could produce an unreasonable finding of fact includes the following:

a. The failure to consider relevant evidence;
b. The misapprehension of relevant evidence;
c. The consideration of irrelevant evidence;
d. A finding that has no basis on the evidence; or
e. An inference that is speculation.

Pena v. Pena, 2018 ONSC 2320, at para. 23

Failure to Consider Relevant Evidence or Misapprehension of the Evidence

37. The motion judge failed to consider relevant evidence or misapprehended the evidence in her decision. In particular, the motion judge ignored relevant undisputed evidence, which directly contradicted the conclusions she drew.

38. For example, with respect to the grandmother's ability to supervise, the motion judge ignored the undisputed evidence of the grandmother having been approved to supervise visits while the child was in the hospital. She ignored the undisputed evidence that the grandmother had been compliant with all of the Society's rules. She further ignored the undisputed evidence that the grandmother is able and willing to intervene during access visits where necessary. These undisputed facts directly contradict the motion judge's conclusion that the grandmother is an inappropriate supervisor.

    Affidavit of [redacted], sworn March 30, 2020, Appeal Record, Tab 17, at paras. 32, 44-45, 47, 50, 54
    Endorsement of Justice Zisman, dated January 10, 2020, Appeal Record, Tab 9

39. The motion judge's conclusion that the grandmother minimized the child's injuries and did not understand his developmental needs is also contradicted by the undisputed relevant evidence. The motion judge failed to consider the undisputed evidence that the grandmother was aware of the protection concerns, had demonstrated commitment to caring for the child, had cared appropriately for the child, had taken the child to all his medical appointments and followed through with all recommendations, had followed through with all of the medical referrals for the child, and had spent time researching about caring for brain injured children.

    Affidavit of [redacted], sworn March 29, 2020, Appeal Record, Tab 16, at paras. 8, 9
    Affidavit of [redacted], sworn March 30, 2020, Appeal Record, Tab 17, at paras. 32, 39-40, 63-66

40. With respect to the Society's allegations that the parents minimized the child's injuries and were unconcerned about his developmental needs, the motion judge also ignored the undisputed facts that contradicted this claim. The undisputed evidence was as follows:

    a. The parents had sought changes in the child's access to relieve him from the distress of long car rides to the office;

b. The parents had attended at medical appointments, asked appropriate questions during those appointments, took detailed notes during those appointments, and implemented medical recommendations during access without issue;
c. The parents took the Society's concerns seriously, with the father even acceding to the Society's request that there be no in person access between his family members (who are under investigation) and the child.
d. The parents, like the grandmother, had also been compliant with all rules and conditions set out by the Society.

Affidavit of [redacted], sworn March 29, 2020, Appeal Record, Tab 16, at paras. 11-12, 17, 34
Affidavit of [redacted], sworn March 27, 2020, Appeal Record, Tab 14, at paras. 5-6
Affidavit of [redacted], sworn March 30, 2020, Appeal Record, Tab 17, at para. 41

Consideration of Irrelevant Evidence

41. The narrow issue on this appeal is whether face to face access should be suspended in light of COVID-19. The only evidence relevant to the issue of whether access should be suspended is evidence about whether access had occurred, the quality of the access, the ability of the grandmother or worker to supervise, and whether COVID-19 precautions had been followed.

42. Most of the allegations raised by the Society, namely, allegations about the parents' statements in a video which they received in February 2020, allegations about the contradictions in the affidavits about breastfeeding, and allegations about the traumatic cause of the child's injuries are irrelevant to the narrow issue of whether access should be suspended. The motion judge erred when she considered such irrelevant evidence.

43. The court in *Children's Aid Society of the Region of Waterloo v. J.N., A.F., and M.S.* dealt with the issue of relevant evidence on access motions during COVID-19. In that case, the fathers, like the Society here, raised protection concerns to justify suspension of access between the mother and the children. These concerns included the mother failing to follow court orders, her consumption of alcohol, and her drug use. The court rejected these concerns as being irrelevant to the narrow issue of access during COVID-19. The court also noted that one of the fathers did not take any issue with the mother's access until the Society had instituted its blanket policy on March 23, 2020. The mother's access was reinstated.

Children's Aid Society of the Region of Waterloo v. J.N., 2020 ONSC 2999

Findings that have no Basis on the Evidence

44. The motion judge also made findings that were based on non-existent evidence. For example:

a. At paras. 81-92, the motion judge stated that if the grandmother is infected and her health becomes compromised, the child would be removed from the home and placed in foster care. There is no evidence to support the speculation that the maternal grandmother has any risk factors that would make her part of a high-risk group for COVID-19; the grandmother is 57 years old. In addition, even if the grandmother did get sick, there is no evidence that the child would be placed in the care of the Society; there is no evidence that the maternal step-grandfather is unable to parent the child and there is no evidence that other family members are unable to care for the child.

b. At para. 92, the court questioned the parents' ability to act in the child's best interests given that they had signed affidavits remotely with their lawyers and had participated in the all-party meeting remotely. The fact that the parents signed affidavits remotely with their lawyers or participated in an all-party meeting remotely is evidence that the parents are taking COVID-19 precautions and acting to reduce the spread of this disease. No negative inference should have been drawn from this decision.

c. At para. 94, the court questioned the parents' understanding about the spread of COVID-19 given their request for access according to the trajectory outlined by the Society. No evidence was provided to support the assumption that more frequent access would put the child at greater risk of the virus, particularly where all parties are complying with social distancing recommendations.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, at paras. 81-92, 94

An Inference that is Speculation

45. In *R. v. Munoz,* Justice Ducharme set out two common errors that are often made in the inference drawing process, making the inference drawn impermissible speculation:

a. The inference was made based on facts that were not established; every step in the inference drawing

process must be proven with evidence.

b. The inference cannot be reasonably and logically drawn from the established primary facts; any inferential gap between the evidence and the matter to be established must be bridged by evidence.

R. v. Munoz, 2006 CanLII 3269 at paras. 26-31

46. In this case, the Society invited the court to draw the inference that there were "heightened concerns" about the parents' compliance with COVID-19 precautions, and that there is a "nexus" between the protection concerns and the risks associated with COVID-19. The Society's position, adopted by the motion judge, was as follows:

> It is the position of the society that although the protection concerns were previously known, there are now heightened concerns. It is submitted that if the parents and grandmother have little insight into the impact of the child's injuries, there is a concern that they cannot be trusted to seriously consider the risk of contracting COVID-19.

The Appellant submits that this inference is both factually and logically speculative, falling into the two common errors described in *R. v. Munoz.*

Transcript of Hearing, dated April 7, 2020, Appeal Record, Tab 19, pg. 60, lines 11-14
Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, at para. 66

47. In order to draw the "nexus" as invited by the Society, the court needed to accept the following: that the parents and grandmother had little insight into the impact of the child's injuries; that as a result of that lack of insight they could not be trusted; and that as a result of not being able to be trusted, they cannot be trusted to consider the risk associated with COVID-19. None of this was factually proven. There was no evidence to suggest that the parents or grandmother were generally untrustworthy. There was no evidence to suggest that they could not be trusted to consider the risk of COVID-19, particularly since the court found, as a matter of fact, that they were complying with the stated precautions.

48. Furthermore, none of the assumptions are connected logically. Even if the Society proved that the parents had little insight into the impact of the child's injuries (which is disputed), that does not reasonably follow that they could not be trusted. It also does not reasonably follow that they would not be able to comply with

COVID-19 precautions. The nexus that the Society invited the court to adopt, which it did, was improper inference and speculation.

D. The Appellant was denied the right to due process and substantive fairness, which is contrary to the principles of fundamental justice.

49. The Appellant further submits that the parents were denied the right to due process and substantive fairness during the motion. Specifically:

a. The motion judge failed to set a fair process for the hearing of the motion;
b. The motion judge created a perception of unfairness when she privileged the Society's status as a special litigant

The unfairness was further exacerbated by the Society's failure to comply with its duty of fairness by submitting evidence that was inaccurate and incomplete, as well as Society counsel's use of prejudicial statements during the arguing of the motion.

50. As noted by both the Ontario Court of Appeal and the Supreme Court of Canada, the procedural and substantive protections afforded to a person are proportionate to the rights affected. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice. These requirements include ensuring that the person has the ability to fully and fairly present his case, and that the process is impartial and fair.

R. v. McDonald (2018), ONCA 369 at paras. 37-38

51. In this case, the rights impacted are significant. As noted by multiple courts, given the young age of the child, the suspension of access, for an indefinite period, could irreparably damage the bond between the parent and child and cause him emotional harm. This circumstance demands that the motion judge ensure that the maximum procedural and substantive rights available to the parents on a motion be complied with. This did not occur. The motion judge imposed significant restrictions on the ability of the parents to fully present their case. She did so by setting deadlines which allowed the Society to file their materials the day before the motion; by failing to provide the parents with a right to file reply affidavits; and by restricting the

parents' ability to provide a fulsome affidavit by setting a page limit of 10 pages.

52. The motion judge further created a perception of unfairness when she privileged the Society's status in the litigation. She did so when she adopted the Society's submissions that it is a special litigant with a statutory mandate to protect children, as distinct from private litigants. In fact, courts have been clear that while child protection agencies have a statutory mandate to protect children, they are on the same footing as any party in litigation before the court. The Society, despite its statutory mandate, is capable of making incorrect decisions, capable of tunnel vision, and capable of acting in bad faith. The Society's judgments are not entitled to deference or preference.

Children's Aid Society of Hamilton v. E.O., 2009 CanLII 72087 (ON SC), at para. 204

53. The Society exacerbated the unfairness of the proceedings when it failed to comply with its duty of fairness towards the parents. Multiple courts have noted that the Society, as an agent of the state, cannot pursue an aggressive litigation strategy. Courts have also noted that the Society must provide balanced and fair evidence to the court; exaggerated and misleading information should not form any part of the Society's evidence.

Children's Aid Society of Hamilton v. E.O., 2009 CanLII 72087 (ON SC), at paras. 164, 192
Hastings Children's Aid Society v. S.(A.), 2007 ONCJ 694, at paras. 119-120

54. In these circumstances, given the urgency of the motion and the lack of reply, the Society had a heightened duty of fairness towards the parents. Even more so than under normal circumstances, the Society should have taken care to ensure that only accurate and fulsome evidence was before the court. The Society is not entitled, particularly, during circumstances of urgency, to "cherry-pick" statements or evidence that do not provide the court with a full picture. Unfortunately, the Society did so in this motion. The Appellant father's fresh evidence demonstrates that the Society withheld positive, relevant, and important information to the court which would have been helpful to the parents. The Society also provided information which was both inaccurate and contradicted by the casenotes of its own workers.

55. Of particular concern is the Society's evidence of the February 2020 video. The Society left out material information about the video that would have undermined its description of the video, including, information about the length of the video, the loving and affectionate presentation of the parents, and the parents' ability to comfort the child. This failure to enter the entirety of the video into evidence, and the failure to provide

an accurate context to the video, skewed the meaning attached to it, and misled the court about its importance. Nothing in the video suggested that the comments made were "crude" or "insensitive", and in fact, contrary to the Society's claim, the caller who produced the video never used the words "crude" or "insensitive" to describe the contents of the video.

Affidavit of [redacted], sworn May 27, 2020, at paras. 14-17

56. The video featured significantly in the decision of the motion judge. The motion judge relied on the Society's description of the video to conclude that the parents had minimized the child's vulnerabilities. The motion judge referred to the video on 4 separate occasions during the hearing of the motion, including on one occasion, stating that the video "doesn't do them [the parents] any credit". This video was then subsequently referred to on multiple occasions by Society counsel in submissions, during which he described the video as "concerning", "inappropriate", demonstrating the parents' "their lack of appreciation", and suggesting a "nexus" between the video and the parents' failure to take COVID-19 precautions. None of this was based on the actual evidence.

Reasons for Judgment of Justice Zisman, dated April 9, 2020, Appeal Record, Tab 5, at paras. 50-52
Transcript of Hearing, dated April 7, 2020, Appeal Record, Tab 19, at pg. 21, line 25-28; pg. 23, line 10-14; pg. 23, line 21-25; pg. 43, line 24-Pg. 44, line 4; pg. 44, line 28-32; pg. 45, lines 22-32

57. Another example of the Society's failure to provide balanced and fair evidence to court is its failure to provide the complete statement of Dr. Aref. Dr. Aref was clear to the Society that he did not wish to take a position on access, that the precautions described by the parents were consistent with the recommendations, and that the parents were taking appropriate precautions with respect to the delivery and handling of breast milk. Dr. Aref's opinion was central to the motion judge's decision and his statements should have been fully and accurately provided to the court.

Affidavit of [redacted], sworn May 27, 2020, at paras. 30-31

58. The Society's failure to describe the parents and maternal grandparents' involvement in the child's developmental and medical care in an accurate and balanced manner was also unfair. The Society's records show that its workers believed that the parents and grandmother were invested in the child's developmental and medical care. That opinion was shared by the worker who remotely supervised the parents' access on March 18, 2020, immediately before access was suspended. Their failure to provide balanced evidence on

this point was extremely prejudicial to the parents.

Affidavit of [redacted], sworn May 27, 2020, at paras. 19-29

59. Finally, Society counsel's use of highly prejudicial statements during the motion also coloured the court's perception of the risk to the child. At various times in his submissions, Society counsel claimed that the child could suffer "fatal" consequences from the disease. He claimed that ordering access would create "a scenario where the baby would have to *fight for his life* for a second time". He further claimed that attachment and bonding "should not be at the expense of the child's life". None of these statements is based on evidence; the Society led no evidence to suggest that the child would die from COVID-19. By making these statements, the Society irreparably coloured the motion judge's perception of the risk. This was improper and prejudicial, and has no place in a child protection proceeding where serious rights are at stake.

Transcript of Hearing, dated April 7, 2020, Appeal Record, Tab 19, pg. 41, lines 13-20; pg. 48 lines 10-13, pg. 56 lines 25-27; pg 62 lines 10-11; pg. 63 lines 5-19; pg. 30 lines 30-33; pg. 64 lines 10-15

60. The Supreme Court in *R. v. Trochym* made the following statement about the duty of Crown counsel, which is equally applicable to Society counsel:

> Crown counsel are expected to present, fully and diligently, all the material facts that have evidentiary value, as well as all the proper inferences that may reasonably be drawn from those facts… Rhetorical techniques that distort the fact-finding process, and misleading and highly prejudicial statements, have no place in a criminal prosecution.

R. v. Trochym, 2007 SCC 6, at para. 79

IV – ORDER REQUESTED

61. As a result of the foregoing, the Appellant father requests the following relief:

1. An Order that the Appellants, [redacted], have face to face access with their child, [redacted] (d.o.b. [redacted]) in accordance with the plan proposed by the Society on March 17, 2020, and specifically:

a. Commencing immediately, 1 hour on Mondays, Wednesday, and Thursday, supervised by [redacted] or [redacted], in addition to the regularly scheduled access of 2 hours on Mondays, 3 hours on Wednesdays, and 3 hours on Fridays, supervised by the Society.

b. After one week, additional access time on Tuesdays and Fridays for three hours each, supervised by [redacted] or [redacted], with possible drop-in video visits by the Society.

c. If the child has additional in home services, the Appellants shall be permitted to attend for the duration of those appointments. The Society will be given advance notice of these appointments and may have the discretion to attend those appointments.

2. In the alternative, an Order that the Appellants, [redacted] and [redacted], have face to face access with their child, [redacted], (d.o.b. [redacted]), three times per week for 2 hours on Mondays, three hours on Wednesdays, and three hours on Thursdays, supervised by [redacted] or [redacted], or supervised by video through the Society.

V - TIME ESTIMATE

62. The Appellant estimates he will require 40 minutes for his oral argument

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF MAY 2020

Tammy Law
Counsel for the Appellant Father
[redacted]

Schedule "A"
List of Authorities

1. *Catholic Children's Aid Society of Toronto v. R.M.*, 2017 ONCJ 784
2. *Multani v. Rana*, 2020 ONSC 2433
3. *Ribeiro v. Wright*, 2020 ONSC 1829
4. *Catholic Children's Aid Society of Toronto v. D.A.*, 2020 ONCJ 206
5. *Children's Aid Society of the Region of Waterloo v. J.N.*, 2020 ONSC 2999
6. *Children's Aid Society of Hamilton v. M.N.*, 2007 CanLII 13503 (ON SC)
7. *Children's Aid Society of Toronto v. N.N.*, 2017 ONCJ 827
8. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
9. *J.T. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55
10. *Children's Aid Society of Toronto v. M.A.*, 2002 CanLII 45665 (ON CJ)
11. *Children's Aid Society of Algoma v. S.P.*, 2011 ONCJ 93
12. *Pena v. Pena*, 2018 ONSC 2320
13. *R. v. Munoz*, 2006 CanLII 3269 (ON SC)
14. *R. v. McDonald* (2018), ONCA 369
15. *Children's Aid Society of Hamilton v. E.O.*, 2009 CanLII 72087 (ON SC)
16. *Hastings Children's Aid Society v. S.(A.)*, 2007 ONCJ 694
17. *R. v. Trochym*, 2007 SCC 6